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He moots, he scores in hockey arbitration

KIM ARNOTT

They saved the New York Rangers hockey club $100,000 in salary, and earned the right to hoist the Cup.

And while there was no victory lap around the ice or champagne-drenched dressing room, two University of Western Ontario law students earned medals and a year's worth of bragging rights as winners of the 2014 Hockey Arbitration Competition of Canada.

Organized by University of Toronto law students, the hockey-inspired competition has grown in popularity in each of the three years it has run. Thirty-two teams of students from law schools across Canada and the United States took part this year in a recent weekend of simulated National Hockey League (NHL) salary arbitration proceedings.

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In a close final, Western law students Sean DelGallio and Devon McIntyre convinced guest arbitrators that New York Rangers forward Derick Brassard should earn only $4.9 million, down from the $5 million he earned prior to salary arbitration. They faced off against a University of Toronto team charged with arguing Brassard should earn a higher salary.

Star guest arbitrators Brian Burke of the Calgary Flames and NHL player agent Don Meehan added to the pressure of the final for the competing teams. The pair then took part in a panel discussion addressing a variety of topical sports issues.

Organizers were thrilled to be able to attract the high-profile guests who joined lawyers working in a variety of hockey and employment-related fields as arbitrators, said student chair Amir Torabi.

Competition founder Nick Rossi attributes the popularity of the event to the deep-seated Canadian love of hockey.

"It's gotten bigger and better every year," said Rossi. "There are a lot of students in law school who love hockey. I think it's a pretty good sample of our population in general."

Rossi, a recent graduate who chairs the steering committee overseeing the competition, started the event as a student after witnessing a similar baseball-themed contest at Tulane University (New Orleans) in his first year of law school.

The competition requires students to represent either a player or a club during a salary arbitration proceeding. They must gather admissible evidence under the arbitration rules of the collective bargaining agreement between the NHL and the NHL Players' Association, find statistically comparable players to bolster their arguments, prepare a concise written brief, then present a convincing case to an arbitrator in only 18 minutes.

While on a smaller scale, the competition is a realistic mimic of the actual arbitration process, said André Nowakowski, a labour and employment lawyer who acts as counsel to NHL clubs in salary arbitration disputes.

Nowakowski, a partner with the sponsoring law firm Miller Thomson, has participated as an arbitrator during all three years of the competition. Although the vast majority of the students aren't likely to ever get to argue the salary fate of an NHL player, the preparation and practice

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outside the country of refuge prior to his admission to that country as a refugee."

Interveners including the Canadian Association of Refugee Lawyers (CARL), U.N. High Commissioner for Refugees, Amnesty International, Canadian Civil Liberties Association and Canadian Council of Refugees argued that the article 1F(b) exclusion should be narrowly construed to take into account the refugee claimant's expiation of the offence and his or her current circumstances. CARL argued that the "overbroad, unjustifiably severe" and "arbitrary approach" of the Federal Court and the Immigration and Refugee Board below fails to accord with the purpose of article 1F(b) and the convention.

But relying on the provision's ordinary meaning, context, and "the dominant tide" of international jurisprudence, Chief Justice McLachlin agreed with the federal Minister of Citizenship and Immigration that in excluding all claimants who have committed serious non-political crimes, article 1F(b) unequivocally "expresses the contracting states' agreement that such persons by definition would be undeserving of refugee protection by reason of their serious criminality.

"Nothing in the words used suggests that the parties to the Refugee Convention intended subsequent considerations, like rehabilitation, expiation and actual dangerousness, to be taken into account," the chief justice wrote.

"It's a really dark day in the history of refugee law in Canada," said Toronto's Jared Will, who with Peter Shams represented the unsuccessful appellant, Luis Febles, who now faces deportation to Cuba. "Unfortunately the Supreme Court is aligning itself with a number of [foreign] decisions that were themselves ill-founded."

Toronto's Aviva Basman, co-counsel with Alyssa Manning for CARL, said the "disappointing" ruling "largely upholds the status quo, which has unjustly excluded many refugees who are deserving of protection. We believe the court missed an opportunity to correct the overbroad and unjust application of the article 1F(b) exclusion."

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>
> **Chief Justice Beverley McLachlin**
> Supreme Court of Canada

Ottawa welcomed the ruling.

"The government's position is that Article 1F(b) of the Refugee Convention is clear and unequivocal: Once it has been determined that a refugee claimant 'has committed a serious non-political crime,' that person is excluded from the definition of 'refugee,' " Sonia Lesage, a spokesperson for Citizenship and Immigration Canada, said in an e-mail.

"The government is committed to the safety and security of Canadians, and protecting the integrity of Canada's immigration system," she added. "Mr. Febles should respect our laws and leave Canada."

According to records recently obtained by Will under the federal *Access to Information Act*, about 450 people were deemed ineligible by the IRB for refugee protection in Canada based on serious, non-political criminality in the three years from 2010 to 2012.

"There are definitely dozens and dozens of pending cases that this will impact," Will said, adding that the legal battleground has shifted to determining whether a given crime is "serious" enough to trigger the article 1F(b) exclusion.

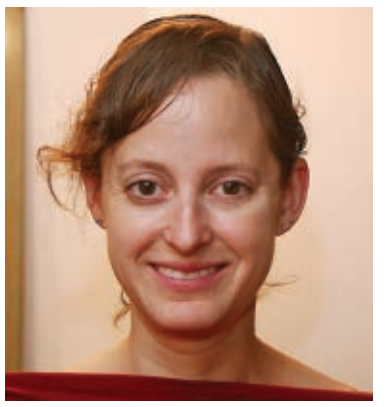
On that front, Chief Justice McLachlin stated in *obiter dicta* that where a maximum sentence of 10 years or more could have been imposed if the crime been committed in Canada, "the crime will generally be considered serious." However, she stressed also that "the 10-year rule" is a rebuttable presumption and "should not be applied in a mechanistic, decontextualized, or unjust manner."

Will said the court has "raised the bar" on what amounts to a "serious" crime.

"A lot of 1F(b) decisions that I've seen are based on crimes that I don't think would get past that threshold," he said. "Refugee decision-makers, in many cases, have refused to even consider what sentence the person would have gotten under Canadian law and the [Supreme Court's] decision is clear that that's a factor that they have to consider. And if [the sentence] is at the lower end of the range, then it may not be sufficiently serious."

Basman said the court accepted that only objectively serious crimes — such as murder, rape, child molesting, wounding, and arson — are presumptively serious.

"Where the act would attract a sentence [in Canada] at the high end — 10 years or more — the presumption applies," she said. "Where the act would attract a sentence at the lower end, the presumption does not apply. As an example, if a refugee claimant was convicted of trafficking in cocaine, which attracts a maximum possible sentence of 10 years, but this particular act involved $20 worth of cocaine, and would actually attract a sentence of three months, it is not presumptively serious."



> [The ruling] largely upholds the status quo, which has unjustly excluded many refugees who are deserving of protection. We believe the court missed an opportunity to correct the overbroad and unjust application of the article 1F(b) exclusion.
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> **Aviva Basman**
> CARL co-counsel

Basman added that "by confirming the relevance of sentencing ranges and actual likely sentences, the court affirmed a nuanced and contextual examination of whether a particular act is indeed serious."

She advised refugee lawyers to look at the specific facts, and the sentence that would likely be imposed in Canada, in order to argue whether the crime is presumptively serious. "This can involve a review of criminal law sentencing decisions with regard to similar facts, or an opinion from a criminal lawyer."

CARL'S Supreme Court factum contends that Canadian decision-makers in practice have deemed "an overly broad range of offences" to be "serious," consequently excluding from refugee protection those previously convicted of using a false passport, taking bribes, possessing 0.9 grams of cocaine, falsifying business records, and impaired driving.

In her dissent, which emphasized that interpreting the *Refugee Convention* must not be divorced "from its human rights purpose," Justice Abella said "it remains far from clear" that the signatories to the convention meant to exclude offenders without regard to whether they have been rehabilitated.

"In my view, this leaves it open to this court to reach its own conclusion as to how to interpret the scope of 1F(b)," Justice Abella wrote.

She and Justice Cromwell concluded that, except for "very serious crimes," an offender should not automatically be disqualified from refugee protection "and should be entitled to have any expiation or rehabilitation taken into account."

The majority dismissed the appeal of Febles, a 59-year-old Cuban, from decisions below that held he was ineligible for refugee protection because he had committed a serious non-political crime. At age 29 in 1984, while intoxicated, he hit his sleeping roommate on the head with a hammer and was later sentenced to two years in an American prison for assault with a deadly weapon. He said he has long since reformed.

"One of the issues going forward is going to be the scope of the protections available under s. 7 of the *Charter* for people who have been excluded from refugee protection under article 1F," Will said. "The court makes clear…that people have a statutory right to seek protection against death, torture or cruel and unusual punishment, but there's of course a whole range of serious abuses that fall short of death, torture and cruel and unusual punishment. And the issue will be to what extent can one seek protection against those risks, those kinds of abuses under s. 7 of the *Charter*. The law is not settled on that."

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offers them a chance to hone skills they'll need in almost any area of law, he notes.

"It's clear that the students take a lot of time and put a lot of effort into it, and that to me is always an impressive aspect," said Nowakowski.

While it might have been good practice for him, passionate hockey fan DelGallio admits the background research hardly felt like work. "It's pretty much how I spend my spare time anyway, looking at NHL.com," he laughed.

Still, participants needed to do more than simply quote statistics to impress guest arbitrator Eric Macramalla, who also teaches a course in sports law at the University of Ottawa.

"What I wanted to see was not only a good command of the facts and the situation and the scenario, but also an ability to express it effectively," said Macramalla, adding that the interactive format of the proceedings also allowed the arbitrators to ask questions and make comments as the students made their submissions.

"This is a really good opportunity for (students) to flex their legal muscles in connection with subject matter that they really enjoy."

For hockey fans like DelGallio, who shares his hometown of Brantford, Ont., with Wayne Gretzky, the appeal of the competition is evident. But beyond the topic, he believes students are keen to take part in novel contests that go beyond the usual law school moots focusing on criminal or constitutional law.

"It's different from a lot of other moots, and it's great to get a bit of variety in oral advocacy skills.

"And this was pretty amazing. They brought in some of the biggest names in the industry."