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"Not One Cookie Cutter Citizen": A Review of ABlawg Posts on Some of Justice Sheilah Martin's Decisions

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Matter Commented On: Justice Sheilah Martin's Nomination to the Supreme Court of Canada

The Faculty of Law at the University of Calgary is thrilled that one of our own – Justice Sheilah Martin – has been nominated to the Supreme Court of Canada. Many of us watched her question and answer session with Parliamentarians on 5 December 2017, and were pleased to see her fierce intelligence, compassion and humour shine through. In one of the most quoted lines from her remarks, she said that she hoped her legacy would be that she was a deep thinker, a good listener, and had really great hair. The title of this post, "Not One Cookie Cutter Citizen", is also taken from Justice Martin's remarks during the hearing, when she was making a point about the importance of thinking about the differential impact of the law on people with different identities and needs. A review of ABlawg posts on decisions written by Justice Martin during her tenure as a judge in Alberta reveals her concern for the impact of the law on individuals and the public. This post will highlight four of Justice Martin's decisions that we have blogged on over the years, in areas ranging from constitutional and health law, to civil litigation and vexatious litigants, to bankruptcy law and oil and gas assets, to homicide and sexual assault law. We also provide a list of other posts on her judgments for those who are interested in further reading on Justice Martin's legacy as a judge in Alberta.

Jennifer Koshan: *HS (Re)*, 2016 ABQB 121 (CanLII)

Sheilah Martin was appointed to the Alberta Court of Queen's Bench in 2005, and sat on that Court until her appointment to the Alberta Court of Appeal in June 2016. One of her most significant decisions while on the Court of Queen's Bench – and one she mentions in her Questionnaire for the Supreme Court of Canada Judicial Appointment Process – was the first judicial authorization of medically assisted dying (MAD) in Canada outside of Quebec, which I blogged on here. In *Re HS*, Justice Martin provided guidance to courts and to people seeking MAD following the Supreme Court's decision in *Carter v Canada (Attorney General)*, 2016 SCC 4 (CanLII) (*Carter II*). She clarified two key points: (1) that the role of lower courts was to decide whether individuals met the criteria for the constitutional exemption, which had already been granted in *Carter II*, and (2) that if so, the judicial authorization order for MAD would apply throughout Canada. These were important findings from access to justice and access to medical services perspectives, as those seeking MAD would otherwise have had to bring applications for individual constitutional exemptions and to do so in the province in which they sought MAD – a much more significant burden, especially in light of the fact that applicants are persons claiming to have grievous and irremediable medical conditions causing intolerable suffering. She also clarified the notice requirements for applications and the circumstances in which applicants would be entitled to closed courtrooms and publication bans, noting the need to

balance applicants' privacy, dignity and autonomy interests with the public interest in accessing information about MAD decisions. She established a broad and flexible approach to the evidentiary requirements for MAD applications, finding that "any form of admissible, authentic and reliable evidence" could satisfy the criteria (at para 88). In Justice Martin's own words, taken from her Questionnaire, "this decision… shows how judges are often required to confront the pressing issues of our time…. It was important to show respect for the full humanity of the individual claimant, as well as to grapple with the various important legal principles engaged by the question before the court." Justice Martin's keen ability to balance personal and public interests with compassion, clarity and vision will serve her well on the Supreme Court.

Jonnette Watson Hamilton: *Belway v Lalande-Weber*, 2017 ABCA 108 (CanLII)

I want to mention one of Justice Martin's more "everyday" decisions, a decision that certainly does not appear as one of her "five most significant cases" in her Questionnaire. I want to mention it because it too epitomizes many of the qualities that led to her appointment. *Belway v Lalande-Weber* is a decision that Justice Martin made in her role as a single Court of Appeal judge deciding whether to grant an applicant leave to appeal to the Court of Appeal; see Granting a Vexatious Litigant's Application for Leave to Appeal. In *Belway*, not only was Justice Martin deciding a relatively common request for permission to appeal, but she was deciding a request that came from a self-represented litigant who had been declared a vexatious litigant. Although a vexatious litigant order does not bar that person's access to the courts, someone with a vexatious litigant order filed against them must apply for and obtain leave from the court before starting or continuing a proceeding. In other words, access to the courts is regulated, not prohibited. But the distinction between regulated access and no access depends to a large extent on the hearing that the litigant receives from the judge when the litigant requests permission. The National Self-Represented Litigants Project (NSRLP) has documented a great deal of impatience, exasperation and intolerance towards self-represented litigants, and those labelled vexatious likely fare worse. The *Belway* decision by Justice Martin is a rare example of an application for leave being granted to a vexatious litigant. The decision is accompanied by a thoughtful and comprehensive legal analysis that evidenced that Justice Martin had carefully listened to and had heard the litigant and his arguments. Justice Martin, in her question-and-answer session with Parliamentarians, stated "I think judges need to show respect to get respect." She went on to say "…it has been my personal goal to be respectful in court, and to listen patiently and to let things unfold": Jim Bronskill, CBC News (5 December 2017), Laura Stone, The Globe and Mail (5 December 2017). She also stated that, in her written judgments, "I want to write that way, so that somebody would say, 'Oh, OK, I was in good hands.'" In *Belway*, we see a good example of her achieving her goals in an everyday, for everyone sort of way.

Fenner Stewart: *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 (CanLII) (leave granted)

When *Orphan Well Association v Grant Thornton Limited* came out earlier this year, many were dismayed about how it punched a hole in the Alberta Energy Regulator (AER)'s program for ensuring that licencees of oil and gas wells satisfied their reclamation and abandonment obligations. The judgment granted secured creditors the best chance possible to be compensated, but it came at the expense of Alberta's well reclamation and abandonment program. Justice

Martin's dissent provided a ray of hope, and channeled the spirit of the late Chief Justice Laycraft in *PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Limited*, 1991 ABCA 181 (CanLII), championing the position that a regulator, when merely protecting the public, ought not to be considered a creditor. And yet, when the decision came down, even those individuals who most sympathized with her conclusion – including my colleague Nigel Bankes – feared that her reasoning may have "reach[ed] too far". Justice Martin's dissent reflects her willingness to advocate for what she believes to be right and just… even when she faces difficult odds. For a more detailed discussion of the issues in this case, which will now be heard by the Supreme Court of Canada, see my post *Orphan Well Association v Grant Thornton Limited*: What's at Stake in *Redwater*.

Lisa Silver: *R v Barton*, 2017 ABCA 216 (CanLII)

This decision by Justice Martin is a joint effort with Chief Justice Fraser and Justice Watson, yet it has Justice Martin's indelible stamp. *Barton* – a homicide case with a possible element of sexual assault – is a provocative decision, cogently reasoned (see my post here). It offers a fresh perspective, a "re-set" of the proverbial go-button we lawyers love to press. The decision says something meaningful about the difficult intersection between the rule of law and human interaction. The *Barton* decision is a heavy read, providing insight into the layers of issues engaged in the case but it is an easy read as it offers clarity where obfuscation is the norm. It calls us out as lawyers and challenges us to be thoughtful and mindful when we approach a case, especially one involving a victim who was multiply disadvantaged. It reminds us of the fair balance needed in the justice system, but a balance which does not displace fundamental principles of justice but rather displaces and eradicates myths and stereotypes which must not be tolerated in a free and democratic society. Justice Martin often speaks on these issues of justice, fairness and balance in her decisions. Other judges do so as well but none with the tone-perfect sense of what needs to be said at that particular point in time. In the *Barton* decision, Justice Martin is part of a timely discourse we all need to hear. I look forward to hearing more from her as she steps into the supremely important role of giving a voice to our nation's justice system.

Other ABlawg posts on decisions written by Justice Sheilah Martin:

Nickie Nikolaou, Extending Limitation Periods for Environmental Actions, a comment on *Lakeview Village Professional Centre Corporation v Suncor Energy Inc*, 2016 ABQB 288 (CanLII)

Drew Yewchuk, Myths, Stereotypes, and Credibility in Sexual Offence Trials, a comment on *R v CMG*, 2016 ABQB 368 (CanLII)

Alastair Lucas, Doctors Affected by Hospital Unit Closure Have Minimal Procedural Fairness Rights: Public Program Discretion Tops Individual Procedural Rights, a comment on *MacDonald v Alberta Health Services*, 2013 ABQB 404 (CanLII)

Jonnette Watson Hamilton, It's Difficult to Disinherit Some Adult Children, a comment on *Soule v Johansen Estate*, 2011 ABQB 403 (CanLII)

Linda McKay-Panos, Costs Take Centre Stage in Human Rights Case, a comment on *Alberta (Human Rights and Citizenship Commission Panel) v Tequila Bar & Grill Ltd.*, 2009 ABQB 226 (CanLII)

Nigel Bankes, When does a "participant" earn under the terms of a farmout and participation agreement?, a comment on *Solara Exploration Ltd v Richmount Petroleum Ltd.*, 2008 ABQB 596 (CanLII)

Linda McKay Panos, Racial Profiling–Identification or Discrimination?, a comment on *Coward v Alberta (Human Rights and Citizenship Commission, Chief Commissioner)*, 2008 ABQB 455 (CanLII)

Linda McKay Panos, Court of Appeal Sends Court of Queen's Bench Decision to Rehab, a comment on *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company*, 2006 ABQB 302 (CanLII)

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