COMMONWEALTH LAW MOOT COURT COMPETITION: LONDON 2005

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The Commonwealth Law Mooting Competition was held in London from 12th-14th September 2005. An orientation was conducted in the afternoon of Sunday 11th September for all the mooting students, representing the twelve Commonwealth regions. The Convention Centre, where the orientation was held, was also the main venue for the 30th anniversary of the Commonwealth Law Conference, a biennial conference which incorporates the Commonwealth Law Mooting Competition. At the orientation, each team had to file their briefs and pleadings. This session served as the first opportunity to meet-up with other mooting students and to get a feel of who were your competitors for the next two days of round robin competition.

The moot competition itself was held at the Law Society offices. The Law Society building was not only immaculately maintained but the interior designs and the odour of old leather and ancient timber provided a solemn atmosphere, with portraits of jurists of very early times. It was a very noble setting.

The case that formed the basis for the competition involved two appellants and Her Majesty the Queen. The facts concerned two Canadian businessmen (the appellants) who were arrested in the Kingdom of Thainam (a fictitious country in Asia) and charged with attempting to smuggle 10kg of cocaine into that country. Thainam had huge oil reserves and Canada had recently entered into a multi-billion dollar contract with the government of Thainam for the supply of oil to Canada. Despite its reserves of oil, Thainam was an underdeveloped country with very poor infrastructure including primitive and over-crowded prisons and a criminal justice system which was not only staffed by under-paid officials but also centrally controlled by the royal family of the Kingdom. The appellants had been detained for three months in the Bangong prison where bad living conditions and cruel treatment made life for them unpleasant. The penalty for smuggling over 1kg of cocaine in Thainam was death by decapitation.

Officials of the Canadian Embassy had been allowed access to the appellants who were told that, having considered the matter, the Canadian government would not intervene in their case. The reason given by embassy staff was that it was not in the interests of the Canadian people as a whole to upset the delicate relationship which existed between Canada and the Kingdom of Thainam.

After two months in custody the appellants were able to consult a Thainamese lawyer who advised them that there was no prospect of them being granted bail or of their conditions of detention being improved. Lawyers acting for the appellants in Canada then launched an urgent application in the Supreme Court of Canada seeking an order requiring the Government of Canada to provide the appellants with diplomatic protection in the form of an official request to the government of Thainam that the conditions of their detention would conform to international standards; that they would be given a fair trial before an impartial court, and that should they be sentenced to death such sentence would not be carried out. The Supreme Court of Canada refused to order the Canadian Government to provide diplomatic protection in this form. The appellants then appealed to the Commonwealth Moot Court.

The nature of the case involved a great deal of international law. An observation made in respect of the authorities was that a number of the authorities were used for both the appellant's case and similarly for the respondent's case. An example of this is the decision in *United States v Burns* (2001) 1 SCR 283. For the appellants, the case suggested that the failure of the Canadian Government to extend diplomatic protection to the appellants was a breach of the *Canadian Charter of Rights and Freedoms.* It was argued that any failure by the Canadian Government to act, in circumstances where it maybe able to grant protection to its nationals, was a breach of the *Charter* by way of omission

Similarly, for the respondent, the same case was used to support the view that any Canadian national who left Canada of his or her own volition left behind them all the rights and privileges conferred by the laws of Canada and that such person was obliged to accept the criminal laws, procedures and punishments applicable in the territory of whichever foreign State he or she entered.

Apart from these two arguments the question arose as to whether the Commonwealth Moot Court (which has the same status as the Privy Council) upset a Ministerial decision to the effect that it was in the interests of the people of Canada not to provide the appellants with diplomatic protection?

International agreements and treaties were another source of reference. The *International Covenant on Civil and Political Rights* details basic civil and political rights and obligations of individuals and nations. Among the obligations on nations is the solemn undertaking to ensure that the rights recognized within the *Covenant* are given effect to all individuals within its territory without distinction. The *Universal Declaration of Human Rights* was the first international statement to use the term 'human rights'. The *Charter* universally declares that "everyone has the right to life, liberty and security of person". Both instruments have been ratified by Canada and it was argued that this imposed an international obligation upon the Government of Canada to act in the interests of the appellants as Canadian citizens and to intervene if their human rights were or were likely to be abused.

Finally, under the customary international law doctrine of State responsibility, it was argued that Canada was obliged to protect its citizens whose lives, human rights and fundamental freedoms were in jeopardy in a foreign State.

Ultimately the determination of the Moot problem was not based purely on the law but also on the manner and delivery of the argument, the organisation, clarity, analysis, thoroughness of content; poise, composure, and how each competitor answered the questions of the judges.

The first day of the competition resulted in three wins for the appellant teams and three wins for respondent teams. In this first round the team from the University of the South Pacific won a narrow victory over the team from New Zealand. On the second day of competition the University of the South Pacific team was narrowly defeated by the team from Malaysia. The finals were held on the third day with the grand final being between Canada and the United Kingdom. This final was won by Canada. Their counsel spoke very eloquently. They were deserving winners.

The scenario of the moot problem is not so far removed from the Pacific. We need only recall the recent Australian cases of Corby and the Bali nine in Indonesia and now the case of an Australian convicted in Singapore for smuggling drugs. Both Indonesia and Singapore employ the death penalty as the maximum penalty for such offences. The response by the Australian Government to these incidents, apart from providing some legal aid, has been largely confined to ensuring the welfare of their citizens.

How might other South Pacific nations respond in similar circumstances? Fiji has also ratified the *International Convention on Civil and Political Rights*. No doubt this would be the starting point to argue protection for the rights of its citizens, such as the right to legal resources, the right to life, the right to

equality before the law and the right to the presumption of innocence until proven guilty. Fiji of course also has a Human Rights Committee which could assist in diplomatic representations. However perhaps the most constructive option is to learn from the experience of Canada who formalized a treaty with the United States to the effect that if a Canadian national was found guilty of an offence which attracted the death penalty by a court in the United States, then that sentence would not be imposed, or if imposed, would not be carried out. That being said, the difficulty for Fiji would be in terms of its own death sentencing provisions under the Fiji *Penal Code* Cap 17, although this is restricted to the offence of treason. The Tongan situation may be even more precarious than Fiji because in Tonga the death penalty applies to the offences of treason as well as murder.

The Commonwealth Moot experience is a lifetime experience for a law student. No matter what the moot problem may be for the competition, those who represent their University's are not only winners in their own right but they also gain the experience of engaging in high level advocacy. To "go through the mill" of the competition is not only a learning curve but also has exponential benefits in terms of meeting and learning from some of the best mooting students in the Commonwealth. One also gets to meet real judges, some of whom sat on the cases you learn about in your studies. What was also rewarding was the level of respect competitors had each other and the friendships that were made. The organisers and sponsors of this event must be commended and thanked for giving law students throughout the Commonwealth such a worthwhile learning experience.

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