
EDITORIAL

THE COMMONWEALTH, CLIMATE CHANGE AND THE LAW

One of the defining issues—if not *the* defining issue—of our present age is climate change. We cannot open our newspapers, glance at our digital newsfeeds, turn on our televisions, tune in our radios or talk to our children (and *particularly* our grandchildren) without the subject arising. Perhaps more important, evidence of the degradation of the biosphere by the insidious upward creep of atmospheric temperatures is not just reaching us through the media or through conversations with others; increasingly we are experiencing it first-hand in a myriad of ways *wherever* we may live.

The term ‘heat dome’ was barely known a year or two ago. The one that afflicted British Columbia, Canada, this past summer was responsible in part for the most severe and protracted season of wildfires in the province’s history. The inland village of Lytton, B.C. was razed—erased really, from the face of the earth—by a wildfire on a day where temperatures reached 49 degrees Celsius. Vancouver—British Columbia’s largest city—is situated a little more than three hours to the southwest of Lytton, perched on Canada’s western coastal mainland. The heat dome proper was at its peak in that city on 29th June and on that day alone, 232 Vancouverites lost their lives to the heat—a death rate just short of 10 per hour. Some 595 deaths in total—most of them seniors—have been attributed by the provincial coroners’ service specifically to the extraordinary temperatures in British Columbia between 8 June and 12 August. To put these numbers in perspective, the heat-related death toll in the province for that two-month period alone claimed a third as many lives as has COVID-19 from the pandemic’s inception to 30 June 2021 (1,754).

There are, of course, many stories like this unfolding around the world, many of them much worse.

The wildfires in Australia in recent years have been unprecedented in their destructiveness, both in terms of lives and property. Other countries in the Commonwealth which are situated closer to the equator (in Africa

and the Caribbean, for example) have been experiencing deadly catastrophic effects at the hands of climate change for much longer.

Some small island nation states face truly existential threats owing to rising sea levels. In anticipation of the COP26 Summit in Glasgow this year, the Commonwealth Foundation had this to say in an article entitled ‘Small Island States and Climate Justice: Looking Ahead to COP26’:

The Commonwealth has an irreplaceable role to play. Small Island Developing States (SIDS) make up almost half of its total membership. Citizens of these vulnerable countries are literally on the frontlines of the fight against global warming. Nowhere else does the climate crisis feel more urgent or more real: rising sea levels and shifting weather patterns are already posing serious threats to the livelihoods of small island populations throughout the Commonwealth. The small island experience serves as a demonstration, and a warning, for what lies in store for the world—unless we act now.

As long ago as 1987, the then president of the Maldives, Maumoon Abdul Gayoom, famously delivered his ‘Death of a Nation’ speech to the CHOGM and the UN General Assembly, in which he stated (in part):

Today, the world is faced with risks of irreversible damage to the human environment that threaten the very life-support systems of the earth - the basis for man’s survival and progress. According to studies conducted by the UNEP, 35 percent of the earth’s land surface, an area larger than the African continent, and inhabited by more than 20 percent of the world’s population, is at risk from desertification. Up to a total of 20 million hectares of tropical forests, an area nearly the size of the United Kingdom, is estimated to be lost each year. And as much as from half a million to a million species of life on earth could be extinguished over the next two decades. These are all without precedent in human history. The words ‘environmental

trends' have now come to embody a host of appalling global predicaments such as desertification, mass deforestation, loss of genetic resources, water pollution, toxic air emissions, hazardous wastes, acidification of the environment and world sea level rise.

The first International Panel on Climate Change ('IPCC') report followed some three years later in 1980. Many of the report's dire predictions have come true in the intervening years and the most recent IPCC assessment, published earlier in 2021, is unstinting in its condemnation of where we now find ourselves. Quoting some highlights from the report's 'Summary for Policymakers':

The scale of recent changes across the climate system as a whole – and the present state of many aspects of the climate system – are unprecedented over many centuries to many thousands of years...

Global surface temperature will continue to increase until at least mid-century under all emissions scenarios considered. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO₂ and other greenhouse gas emissions occur in the coming decades...

Continued global warming is projected to further intensify the global water cycle, including its variability, global monsoon precipitation and the severity of wet and dry events...

Many changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level...

No one, wherever situated—in the Commonwealth and beyond—is immune from the effects of anthropogenic climate change. That so little progress has been achieved in respect of a crisis-in-the-making that has been so clearly in plain view for so long must cause deep worry for all thoughtful citizens across the world.

The CMJA has been active in promoting determined action to address global warming and other environmental threats for

many years. It has, for example, mounted educational programmes for judicial officers on environmental law topics since at least 2003 (when the CMJA cooperated with UNEP at the CMJA conference in Malawi). Similar training initiatives were undertaken in the Southern African Development Community region in 2007, in Jamaica in 2011, in St Lucia in 2012 and at the CMJA's conferences including the virtual conference held in September 2021

Encouragingly, if one visits the Commonwealth of Nations website and types the word 'climate' into the search box, hundreds of hits are returned. The challenges we face owing to the fragile global climate are plainly recognised by the Commonwealth and the organisation is confronting those challenges squarely and concretely.

One Commonwealth initiative which will be of special interest to members of the judiciary is The Law and Climate Change Toolkit—an online database which is being developed by a core partnership of the Commonwealth Secretariat, the United Nations Environment Programme and the United Nations Framework Convention on Climate Change Secretariat. The Toolkit's stated purpose is to provide a global resource to assist countries to establish the legal frameworks necessary for effectively implementing, nationally, the Paris Agreement and their nationally determined contributions. Quoting from the Climate Law Toolkit website:

The Toolkit is designed for use by national governments, international organizations in the field of climate law and governance, and experts engaged in assisting countries to implement national climate change laws, as well as academia and research institutions that are undertaking analysis of the growing body of climate change-related legislation throughout the world. The key features of the Toolkit include functionalities to search existing climate change-related legislation and undertake an assessment of a selected country's legislation to help users identify priority areas for climate law review and potential legislative or regulatory reform.

Space limitations permit only a few other Commonwealth climate-related initiatives to be mentioned here. They include:

- The Commonwealth Climate Finance Access Hub (the ‘CCFAH’) is a programme aimed at lesser developed and other Commonwealth nations whose experience of the deleterious effects of climate change is disproportionately severe. (Perversely—owing to their low greenhouse gas emissions, for example—those same nations have made a disproportionately *small* contribution to the climate crisis.) To quote the relevant website, through the CCFAH, ‘...small and vulnerable member states are assisted to bid for and gain increased access to climate finance. The process is achieved through supporting the development of grant proposals and project pipelines; building human and institutional capacity; providing technical advisory services; and facilitating cross-Commonwealth cooperation and sharing of experience and expertise by CCFAH advisers who are deployed and embedded in relevant government ministry departments’;
- The NDC Partnership–Climate Action Enhancement Package (the ‘CAEP’) is an initiative under which ‘...the Commonwealth Secretariat is supporting four member countries—Belize, Eswatini, Jamaica and Zambia—through in-country technical expertise, capacity building and targeted support, to fast-track the implementation of each country’s nationally determined contributions’;
- The Disaster Risk Finance Portal is a programme which ‘...helps member countries easily find the right type of financial support to prepare for, respond to and recover from natural disasters. Information on international funding earmarked for catastrophes is compiled, streamlined and made easy to navigate’;
- The Commonwealth Blue Charter is an agreement by all 54 Commonwealth countries to actively co-operate ‘...on a fair, inclusive and sustainable approach to ocean protection and economic development’. The objective is to facilitate the solution of ocean-related problems and the meeting of commitments for sustainable ocean development on the part of all Commonwealth countries;
- The Commonwealth Secretariat has, for 30 years, provided advice to Commonwealth countries with respect to responsible and sustainable energy and natural resource development and exploitation. That advice touches on subjects such as policy and strategy development; the development of legal, fiscal, environmental and institutional regulatory frameworks; and the provision of technical advice including assistance in the drafting of new laws, regulations and model agreements; and
- The Commonwealth Youth for Climate Action Blog Series features postings by youth from across the Commonwealth who are showing leadership potential on local climate action. These contributors are drawn from the Commonwealth Correspondents Network—young voices from the Caribbean to Africa, who recognise the need for swift action on the climate change agenda and who share the Commonwealth values of sustainable development, protection of the environment and promotion of peace and prosperity to improve the lives of all.

When a global problem has the disastrous potential that the current climate crisis has, then every state and every supranational body like the Commonwealth can, and always should, be expected to do more. With such disappointing progress having been made to date, there are no laurels that anyone can afford to rest on. But, that said, it is heartening to see the extent to which—using, *inter alia*, its onboard legal expertise—the Commonwealth is committing time, money and resources to fight global warming and the detrimental effects the climate crisis is inflicting on humankind across the world.

CMJA VIRTUAL CONFERENCE 2021: POST-PANDEMIC INNOVATIONS

The COVID-19 pandemic has taught us many things; it has even spawned its own vocabulary. While it was of course known to us before, the word ‘pivot’ has certainly acquired new significance in our parlance since early 2020. Very few bodies and institutions had the luxury of carrying on as usual under pandemic conditions; rather, they were called upon to reorient, always rapidly and sometimes quite radically, so as to be able to continue to function under constraints, limitations and pressures that few ever imagined—to ‘pivot’ in other words.

The CMJA executed a seamless, Nijinski-like pivot from first planning its 2021 Conference as an in-person event in Accra, Ghana, to offering it online. The Association's secretary general, Dr Karen Brewer—ably assisted—led the initiative into previously uncharted territory for the CMJA with splendid results. Thanks to that pivot, many presenters and registrants succeeded in convening virtually to exchange information and their accumulated learning about how court systems have themselves pivoted in various jurisdictions across the Commonwealth to accommodate pandemic-related disruptions. One is reminded of philosopher Marshall McLuhan's reference to the medium being the message. The agility displayed by Commonwealth jurisdictions in adjusting in real time to COVID-19's jealous demands—which was the conference's main focus—was, to all accounts, mirrored by the nimble way the CMJA reconfigured its September conference to an online format to allow a full canvassing of that agility from all corners of the Commonwealth. *CJJ* readers may now look forward to reading, in future issues, articles based upon some of the papers presented at the virtual conference which will bring the pandemic's legacy for court processes and justice system functioning into clearer focus.

WHAT AWAITS YOU IN THIS ISSUE

A rich variety of subject matter is addressed by *CJJ* contributors in the current issue. We have on offer continuations of two lengthy, two-part articles for which the first parts appeared in June 2020, and some new and interesting pieces as well.

- Mr Dennis W. Barr has contributed an article which explains recent steps that have been taken to enhance the quality of lay justice in Scotland through, *inter alia*, structured judicial training and development and more elaborate appraisal and accountability measures;
- Part II of the two-part article by Professor Joseph Weiler and Mr Mark Bakhet on Deferred Prosecution Agreements (sometimes referred to as Remediation Agreements) carries those authors' analysis forward by providing a close review of recent Canadian experience with such alternatives to conventional prosecution—an experience that, as it happens, was a fraught one which led, ultimately, to the resignation of Canada's

then Attorney General from Cabinet;

- Part II of Judge Jennifer Oulton's two-part reflection on the fragility of democracies in the present era concludes in this issue with a closer look at how, when charismatic populists exert their influence through social media at times of income inequality and other forms of inequality, democratic norms can be destabilised;
- Professor Luke Moffett offers an assessment of the somewhat disappointingly limited legal tools currently available to provide redress for those who have indirectly suffered losses and harms attributable to the historical slave trade. The notion that reparations for victims of historical wrongs of this kind might even be sought in the modern era is a controversial one and Professor Moffett's thinking in this area will likely provoke a spectrum of responses. We may, perhaps, even see a letter to the editor or two in response to the Moffett article, which would be a good thing. (Hope does indeed spring eternal.);
- Professor Paul Bowden provides a fascinating survey of the UN Guiding Principles on Business and Human Rights, it now being 10 years since their endorsement by the UN Human Rights Council. His article describes, *inter alia*, the incorporation of the Guiding Principles into, and their modifying influence upon, existing human rights programmes, initiatives and business practices across the world; and
- Lady Justice Jacqueline Kamau of the High Court of Kenya provides a timely overview of the problem of human trafficking in Kenya and offers recommendations as to how control of the problem might be enhanced.

Apart from the foregoing substantive content, the December issue also presents the usual array of case notes taken from the Law Reports of the Commonwealth and reviews of books likely to be of interest to the *CJJ*'s readers.

Plenty of holiday reading!

On behalf of the editorial board of the *CJJ*, and the CMJA and its officers, we extend warm holiday season greetings to all.