



Realizing Constitutional Rights through Advocacy, Education and Research

Report on the Centre's First Year

By Cheryl Milne, Executive Director

On September 5, 2008, the David Asper Centre for Constitutional Rights began its work with much fanfare at a Colloquium focusing on the Charter's first 25 years and looking forward to it's next. Prominent members of the constitutional bar leant us their support and offered their views. The message was clear: the Centre wants to, and can, make an impact on Charter litigation in the next era.

As the inaugural executive director I was pleased and somewhat overwhelmed by the interest and support that the Centre has been given — from its principal donor, David Asper, to the members of the constitutional bar. With an impressive Advisory Group of academics from the Faculty, there is no doubt that the Centre will make its mark in the coming years.

My first task was to consult with faculty and the constitutional bar to develop the plan for the Centre. My second task was to establish a clinical legal education course on constitutional advocacy. Both have been incredibly rewarding and successful.

Just as I was setting about organizing workshops for the second term and developing projects for the clinic, the House of Commons erupted with what was dubbed a constitutional crisis. I was able to see first-hand how the Faculty of Law comes together quickly in response to the pressing issues of the day.

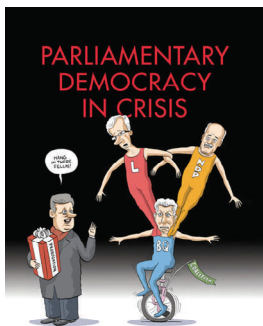
The Asper Centre's first workshop was held the day after the decision of the Governor General to prorogue Parliament. With standing-room only attendance, the workshop was a resounding suc-

cess. But it has been my mission to follow this with equally informative (although not quite as sensational) workshops. We have addressed the prorogation in more depth, but have also looked at the role of interveners and the issue of aboriginal representation on juries with a provocative presentation by lawyer Julian Falconer.

See the back page for information on more to come over the coming year.



Publication in the Spotlight



EDITED BY PETER H. RUSSELL AND LORNE SOSSIN
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Constitutional Crisis Workshop Series

On December 4, 2008, the Governor General, Michäelle Jean granted the Prime Minister's request to prorogue Parliament.

The Faculty of Law jumped into action and pulled together a panel discussion, including prominent academics and politicians such as Bob Rae, Ed Schreyer, Peter Russell, David

Cameron, Lorraine Weinrib, Lorne Sossin and Joe Comartin. The overflow crowd heard their take on what was being dubbed a constitutional crisis.

The Asper Centre followed this event with another panel on January 13 moderated by Mary Eberts and including Ned Franks, David Schneiderman

and Peter Russell, once again.

Our final event in the series on April 21st celebrates the launch of an "instant" book pulled together by Lorne Sossin and Peter Russell that provides in-depth analysis of these turbulent political times by many experts in the field.

Clinical Legal Education

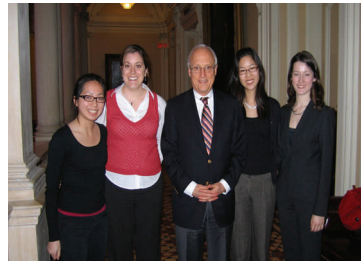
The Centre has completed its first Clinical Legal Education course. Students earned credits for working on cutting-edge constitutional advocacy projects involving litigation, public legal education and policy work.

The course, taught by Cheryl Milne, included a seminar in which the students discussed and learned from each others' projects and listened to leading members of the constitutional bar on topics relevant to constitutional law practice. This year the students met with Mary Eberts on the topic of the test case client; Sarah

Kraicer on the use of social science evidence in constitutional litigation; and on a trip to the Ontario Court of Appeal to watch argument in a human rights case, met with Justice

Stephen Goudge who talked about judging these types of cases.

Three students have been working on a housing rights case, providing research and drafting support for legal issues and expert evidence. This project has given them the opportunity to see the development of a test case



Justice Stephen Goudge (centre) & students, Tiffany Lau, Candice Telfer, Rosita Lee & Kathryn Esaw

and to participate in coalition meetings with housing rights advocates.

Another student will be flying to Thunder Bay to participate in a mock jury trial event with the Ontario Justice Education Network (OJEN). The student researched the law respecting the right to a trial by jury and developed the case scenario in consultation with OJEN and a judge from the Ontario Superior Court of Justice. Another student worked on a court case and an advocacy initiative related to the provision of services to First Nations children.

"It has been an invaluable experience seeing how a case is developed from the ground up."
- student

Best Interests of the Child: Meaning and Application in Canada

On February 27 and 28, the Centre hosted a two-day conference on the Best Interests of the Child in collaboration with leading child rights organizations in Canada, including the Canadian Coalition for the Rights of Children, UNICEF Canada, Justice for Children and Youth, and the International Bureau for Children's Rights.

With almost 200 attendees from many professional disciplines, the conference generated a tremendous buzz in the children's advocacy community. The conference's focus was on one of the basic principles of the United Nations Convention on the Rights of the Child, which as of 2009 is 20 years old.

Cheryl Milne, executive director says that the conference focused on such issues as where Canada is failing children, and where it's succeeding. "One critical example of failure is the status of Aboriginal children in the child welfare system and a lack of support for parents with disabled children," she says. "The discus-

"One of the goals of the conference was to put content into the best interests principle."
-Prof. Carol Rogerson

sions that we held really pointed towards the need to advocate for a national federal children's commissioner of some kind, and the need for intensive assessments to be done at every level of government regarding policies that affect children."

The Centre organized a panel on how the Canadian constitution both facilitates and hinders efforts to incorporate the best interests principle and children's rights more broadly into the Canadian legal system. Cheryl Milne reflected on the Supreme Court decisions that have, on the one hand held that the principle is not constitutionally vague, yet more recently have held that it is not a principle of fundamental justice.

Another panel focused on the many ways that the voice of the child is being brought into custody and access determinations, both within and outside the courtroom.

Professor Carol Rogerson, who helped organize the conference, said that the conference raised hard questions about the issues facing children. "We realize that the 'best interests' principle can be misapplied or even badly applied. It can be quite

[continued on back page]

Focus on Interveners

The role that interveners play in public interest litigation has been a consistent theme in the Centre's consultations with faculty and the constitutional

bar. The Centre aims to make this issue a priority in the upcoming year with a symposium on November 6, 2009 and new research by Professors Ben Alarie and Andrew Green.

On March 24, the Centre kicked off its examination of the issue with a workshop conducted by Nathalie Des Rosiers, the new General Counsel to the Canadian Civil Liberties Association and Kent Roach of the Faculty of Law.



Cheryl Milne and Prof. Nathalie Des Rosiers

Both addressed the important role that public interest groups play in litigation that might have a significant impact on social policy issues and rights in Canada.

Both speakers expressed their concern about the ability of individual litigants to carry the financial burden

of a test case. Des Rosiers said "If no one else is there but the immediate parties, the courts and others will be deprived of considering the long-term and widespread implications of their decision."

Des Rosiers spoke of the important democratic rationale for including interveners in the court process. She stated,

A lot of interveners are surrogates for the access to justice problem that the courts often don't recognize.
- Prof. Kent Roach

"Interveners encourage civil society to engage in civil participation.

Roach, in an address that rebutted the so-called "court party critique" of interveners, spoke of the many ways that interest groups attempt legal reforms, of which intervention in court is only one. He cited the roles that Aboriginal Legal Services

of Toronto have taken in this regard. However, he warned: "Interveners are important; they help the court, but they're a fragile thing, and we can't assume the court will always include them."

The symposium in November promises to further explore these important issues with faculty, practitioners and the bench.

Julian Falconer on Jury Representation

In Jan. 2006, Jamie Goodwin and Ricardo Wesley died in a fire in a jail in Kenora. Those outside watched two young men burn to death because they could not get them out of their cells. So set the context for the public inquest and public interest litigation that Julian Falconer and Jackie Esmonde came to the Faculty to describe in an Asper Centre workshop on April 1, 2009.

In representing Wesley's estate, Falconer tried to pick an inquest jury with First Nations representation on it, as Wesley was a member of the Nishnawbe Aski Nation. What was disclosed in the ensuing litigation suggested systemic exclusion of First Nations people from the jury rolls in a number of First Nations communities.

The inquest jury issue served as an excellent example of the type of constitutional advocacy that the Asper Centre clinic is teaching the law students at the Faculty. Litigation, policy advocacy and grassroots organizing all play a role in advocating for the constitutional rights of individuals and, in the case example presented by Julian Falconer, whole communities. Falconer says, "You must keep pressure up in a number of places all at once."

As Falconer points out, "Litigation isn't always the best way to engineer social change. Class actions and litigation are unwieldy tools. Courts and governments are reluctant to institute change in this way. From the AG's perspective, the litigation isn't about the particular case. It's about the validity of all

jury trials that have taken place in Ontario since the year 2000!"

Challenging the audience to critique his approach, Falconer acknowledges the various problems facing anyone who seeks to engage First Nations communities in the justice system. With their overrepresentation as accused persons and victims of crime, First Nations have not had many positive experiences with Canadian justice.

He acknowledges that the Attorney General has expressed a willingness to work with First Nations on the issue of jury representation moving forward, but in his view serious questions of trust and disclosure of past information remain to be addressed.

[Based upon notes taken by student Megan Vuksic]

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Webcasts Available on our Website

- › Litigating the Charter: Strategies for a Successful Charter Claim in the 21st Century
- › Leading Scholars Weigh in on Current Constitutional Quandary
- › Parliamentary Democracy and its Constitutional Foundations and Future: Beyond the Headlines
- › April 21st: Parliamentary Democracy in Crisis Book Launch

David Asper Centre Advisory Group

The Centre's Advisory Group draws from an impressive Faculty with expertise in constitutional law:



Prof. Michael Code



Prof. Kent Roach



Prof. Sujit Choudhry



Prof. Lorraine Weinrib



Prof. Lorne Sossin



Prof. Anita Anand

What to Watch For

- Asper Centre Website will be launched shortly — look for the announcement and go to www.aspercentre.ca
- Mark your calendars for November 6, 2009 for our Interventions Symposium — details and registration to follow on our website;
- Our clinic will resume in September 2009 with more students and more projects;
- Over the summer months we will be planning and scheduling workshops for the next year — watch for announcements on our website and through our listserv;
- The centre will be expanding its research offerings — look for resources, working papers and commentary on our website over the summer and into the fall.

Acknowledging David Asper

David Asper, in a speech to the Canadian Association of Journalists, May 12, 2006, stated, "There has to be a way that we can level the playing field with respect to fighting for our Charter rights [other] than the present system, where no one individual, except the most wealthy and foolhardy, could stand up and defend themselves."

Motivated by the elimination of funding for the federal Court Challenges Program, David Asper was determined that steps needed to be taken to enhance access to justice for people whose constitutional rights have been violated, and took that step with his donation to establish the Centre.



Dean Mayo Moran, David Asper and U of T President David Naylor

Best Interests of the Child (continued from page 2)

vague, but it can also be a useful tool for improving the lives of children." Rogerson added that "We also were delighted to hear from youth at the conference, and that solidified the message that we really do need children's and youth participation in the conversation about what is in their best inter-

ests." Rogerson says that one of the exciting aspects of the conference was that it focused on how to implement the 'best interests' principle on a more systemic level, as a tool to analyze all laws and government policies in terms of their impact on children.

Conference proceedings

and recommendations are currently being transcribed and will be available publicly by May 2009. You will find a link to the material on the new Asper Centre website at www.aspercentre.ca

[Adapted from an on-line article by Laura Rosen Cohen]