



## The Asper Centre's Clinic 2009 – A student's perspective

By: Lindsay Beck

Students in the Asper Centre's Clinical Legal Education Course hit the ground running last fall, scrambling to prepare to intervene in a case at the Supreme Court of Canada. *Conway v. Her Majesty the Queen et al* was the first case the Centre intervened in under its own name, in partnership with the Criminal Lawyers' Association.

With the factum due in late September, students turned out a stream of research memos to assist with the Centre's arguments in support of the appellant's position that the Ontario Review Board was a court of competent jurisdiction to grant remedies under s. 24(1) of the Charter. Students assigned to the project were rewarded for their hard work with a trip to Ottawa to watch the clinic's director Cheryl Milne argue before the Court. Those remaining in Toronto gathered to watch the live web-

cast, where they had the advantage of being able to heckle over muffins and coffee.

It would not be the Centre's only trip to Ottawa this year. Teaming up with the International Human Rights Program Clinic and Human Rights Watch, Asper Centre students provided research assistance to intervene in *The Prime Minister of Canada et al v. Omar Khadr*. Students also worked with the BC Civil Liberties Association on materials to intervene in the case of *City of Vancouver v. Ward*. Other student projects included research on comparator groups for a public interest organisation intervening in a s. 15 case, a study for a disability rights group on the equality rights of blind voters and potential remedies, and a law reform project looking at the rights of marginalised workers and how Canada's federal structure contributes to their marginalisation.

Intervenors and remedies were common themes of many of this year's projects. The former was the subject of a day-long symposium in November at which practitioners, judges and international experts spoke about the issues and ethics surrounding intervention. Our weekly seminars were also forums to discuss these themes, and the clinic had the benefit of a series of guest speakers who illuminated various aspects of Charter



litigation.

Among the highlights were Patricia Hughes, Executive Director of the Law Commission of Ontario, who spoke about policy advocacy, and Sarah Kraicer of the Constitutional Law Branch of the Attorney General of Ontario, who discussed how expert evidence is gathered and used in constitutional cases. Mary Eberts spoke about the solicitor client relationship in test case litigation.

Finally, clinic students were fortunate to have a group outing to the Ontario Court of Appeal to hear a s. 15 case being argued and even more fortunate that the case was heard by Justices Laskin, Sharpe and Armstrong, who took the time afterward to sit down with our group and discuss the issues. Overall, it was a very challenging and rewarding semester!

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# Criminalization of Polygamy: Constitutional or Not?

By: Kathryn McGoldrick

On February 16, 2010, the Asper Centre, jointly with the Canadian Coalition for the Rights of Children was granted interested person status in the upcoming reference at the British Columbia Supreme Court regarding the constitutionality of s. 293 of the Criminal Code, which prohibits polygamy. This case is expected to be widely followed, particularly given the notoriety of the Fundamentalist Latter Day Saints (FLDS) community in Bountiful, BC and the interesting questions it raises regarding the scope of religious freedom in Canada and how the concept of harm is relevant to limits on this freedom.

To examine these issues more fully, the Asper Centre presented a panel discussion on March 23, which included Professors Lorraine Weinrib and Mohammad Fadel, moderated by Asper Centre Director Cheryl Milne, counsel for the Centre on the reference. Professor Weinrib, who has published widely in the area of the Charter and teaches several courses in constitutional law at the University of Toronto, has done extensive research on polygamy and advised the Asper Centre on their reference application. Professor Fadel has published numerous articles in Islamic legal history, and teaches several courses at the Faculty of Law, including Religion and the Liberal State: The Case of Islam.

Professor Weinrib spoke about Charter rights generally, highlighting that it is individuals rather than religious communities who have rights against the state. She also emphasized the rights of each person to equality and human dignity, which are very important in the context of polygamy. After giving some brief background information regarding the polygamous practices of the Church of Fundamentalist Latter Day Saints both in the United States and in Bountiful, she noted that it is not clear precisely how their claim to religious freedom under the Charter would be framed as a challenge to the constitutionality of s. 293, or how this might be dealt with under section 1.

Polygamy in the FLDS Church is based on the belief that men who have three or more wives on Earth will inherit their own “celestial kingdoms” in heaven, and men are reportedly “awarded” wives

based on revelations from God to the Church’s leaders. This arithmetic imbalance based on gender has important implications for vulnerable persons within these polygamous communities. For example, Professor Weinrib noted that teenage girls are often required to marry much older men whom they may have never met, and who may have numerous wives already. They may also be forced to leave their families and communities in the process. These girls and young women often become pregnant before reaching the age of 18, and generally live together with their “sister wives” and their children. While the Church leaders often attempt to present a positive picture of life for women and children in polygamous relationships, the testimonials of those who have left these communities suggest that they have suffered psychological and even physical harm.

In addition, some media and biographical accounts of life in these polygamous communities have suggested that boys who are not “selected” to receive wives may be directly cast out of the community (in the United States) or kept as low wage workers for Church affiliated companies (in British Columbia and Alberta). Professor Weinrib noted that some accounts of this so-called “lost boys” phenomenon in the US have claimed that these boys are being dropped off on street corners in Salt Lake City or elsewhere in the US with nothing but the clothes on their backs, usually with very little education. Some reports have suggested that these boys suffer depression and are particularly vulnerable to substance abuse and prostitution. There have been accusations within the Canadian context that some of these boys are being conscripted to work for low wages in dangerous conditions for logging companies in Alberta. These boys, as well as the majority of other children in these communities, rarely obtain a postsecondary education, and reports have indicated that many do not complete high school even though there are two provincially-funded schools in the community. Professor Weinrib concluded that these reports reveal significant harms to vulnerable persons in these communities, and that something must be done to address them.

Professor Fadel spoke about polyg-

amy under Islamic Law, which has a very different basis than do polygamous practices in the FLDS Church. Polygamy is not encouraged in the Muslim faith, and is even frowned upon for men. Consequently, he noted that a Muslim man would likely not be able to claim religious freedom in defence of a prosecution under s. 293. However, given that in Islam it is undesirable for a woman to remain unmarried, he suggested that Muslim women may have such a claim should they be unable to find an unmarried man and wish to marry one who is already married. Interestingly, he noted that as s. 293 criminalizes not only the act of polygamy but also celebrating, assisting or being a party to a rite, ceremony, contract or consent that purports to sanction a polygamous relationship, celebrants or witnesses to an Islamic marriage in which one of the parties is already married could also advance a s. 2(a) claim if faced with prosecution. He also proposed that an argument could be made under s. 7 of the Charter, that state prohibition of a particular form of marriage could infringe one’s security of the person by restricting the autonomy to pursue intimate relationships as one chooses.

While Professor Fadel agreed that some of the consequences of polygamy in FLDS communities are clearly harmful and should be addressed by government, he expressed concern that s. 293 is overbroad, as it technically catches any marriage to more than one person, not just those that occur in circumstances thought to be harmful to vulnerable persons. He also suggested that it is unclear what falls under “conjugal union” as used in s. 293, and that the provision could also be considered under-inclusive in the sense that it does not seem to prohibit other forms of polygamy, which may also cause harm. While agreeing with Professor Weinrib that something must be done to address the harm associated with polygamy in communities such as Bountiful, he expressed concern that other polygamous relationships not be automatically considered in this negative light, when there may be no evidence of any harm to those involved in them.

Cheryl Milne spoke briefly about the child welfare and international child rights

# City of Vancouver v. Ward: The Availability of Damages under s. 24(1) of the Charter

By Kathryn McGoldrick

On January 18, 2010, Professor Kent Roach represented the Asper Centre as an Intervener at the Supreme Court of Canada in the case of *Ward v. City of Vancouver*, jointly with the British Columbia Civil Liberties Association (BCCLA). The case arose in rather strange circumstances. During Prime Minister Chrétien's 2002 opening of the Millennium Gate in Vancouver's Chinatown, police received a report that a man was overheard planning to throw a pie at him. Mr. Ward, a Vancouver lawyer, fit the suspect's description in some respects, and was picked up by police. He was handcuffed and taken by police van to jail, and his car was seized. While at the lockup, he was strip searched by corrections officers. He was released four and a half hours after his arrest and was never charged.

Ward brought an action against the City of Vancouver and the Province of British Columbia seeking declarations that his ss. 7, 8 and 9 rights under the *Charter* had been infringed, and seeking damages. The trial judge awarded him \$5,100 in damages against the City for wrongful imprisonment and the unreasonable seizure of his vehicle, and \$5,000 against the Province in respect of the strip search. Appeals were dismissed by the BC Court of Appeal. At the Supreme Court, the issue was whether damages could be awarded under s. 24(1) for the violation of a Charter right

even where there was no fault on the part of the state.

The Asper Centre supported the position of Mr. Ward. In its written submissions, the preparation of which were assisted by students in the Clinical Education Course, it noted that requiring bad faith, abuse of power or tortious conduct by the state in order to award damages would depart from the purpose of s. 24(1), which is to provide trial judges with broad remedial discretion to vindicate personal Charter rights through effective and meaningful remedies. The Centre was concerned that this would also blur fundamental distinctions between discretionary relief and personal remedies under s. 24(1) and more systemic relief under s. 52(1), and noted that damages can be particularly effective and meaningful in enforcing Charter rights and rule of law values in response to violations that have not been authorized by legislatures. Instead, the government had requested a restrictive approach that would not allow any compensation for aggrieved individuals and would allow the state to violate Charter rights with impunity except in cases where there is a high level of fault or an existing tort remedy.

In oral argument, Professor Roach noted that because of their concerns about

police conduct and access to justice, the Asper Centre and the BCCLA believe that it is in the public interest that meritorious Charter litigation such as this case be encouraged, and that individuals who are not charged with an offence but whose rights have been violated will be extremely unlikely to bring claims if the only remedy they can get is a declaration, since "a declaration is no remedy at all".

He also highlighted that the fault in this case, to the extent that there was any, was the unchallenged violation of the Charter. In doing so, he contested the argument advanced by the Intervener Attorney General of Quebec that because fault was required to award damages under s. 49 of the Quebec Charter of Human Rights and Freedoms, it should also be required under s. 24(1) of the Canadian Charter. He contrasted the language of the two sections, highlighting that s. 49 limits remedies to moral, material, or exemplary damages, while s. 24(1) explicitly states that *any* appropriate and just remedy may be granted. Furthermore, he expressed concern that the restoration of rights not be reduced to a choice between applying a general civil liability regime and rendering declaratory judgments that "recognize the right but give it no practical effect".

We await the Court's decision.

(continued from page 2)

implications of criminalization. She said that the UN *Convention on the Rights of the Child* specifically states that children should be free from exploitation (particularly girls) and that all children have the right to be free from religious and cultural practices that are harmful to them. She commented that provincial legislation and authority may be implicated in relation to the education and child protection concerns raised in regard to certain polygamous communities. Furthermore, consent to marriage is also within provincial jurisdiction where most legislation permits marriage at age 16 with parental consent.

The panel was very well attended by University of Toronto faculty and students, as well as practitioners from both government and private practice. It is clear that the reference and issues

related to polygamy generally have generated a significant interest within the legal community as well as among the public, and it will be exciting to follow the case as it begins in the fall of 2010. Particularly noteworthy is that it is the first time in Canada that a reference case will be heard by a trial court, given the government's desire that evidence be presented by interested persons on all sides of the issue. It will most likely eventually reach the Supreme Court of Canada, which will once again be required to weigh religious freedom against broader interests in our free and democratic society. The Asper Centre would like to thank our panellists for an enlightening discussion, and we look forward to providing you with more information on our work on the case in the future.



# Conway v. Her Majesty the Queen, et al.

By Brendan Morrison

Shortly before the start of the academic year, the Asper Centre was granted standing to appear before the Supreme Court of Canada for the very first time. As a result, September at the Asper Centre was not a time for gentle introductions and casual post-summer chit-chats. Instead, the Clinic students were instantly thrust into the pace, energy and excitement of litigation.

Partnered with the Criminal Lawyers Association (CLA), the Asper Centre acted as Intervener in the case of *Conway v. Her Majesty the Queen, et al.* The case involved the constitutional question of whether the Ontario Review Board (ORB) is a “court of competent jurisdiction” under s. 24(1) of the *Charter* to provide *Charter* remedies.

The appeal was brought by Paul Conway, a current inmate of the Centre for Addiction and Mental Health (CAMH) in downtown Toronto. Mr. Conway has been detained over the past 25 years in various psychiatric institutions after being found not criminally responsible by virtue of mental illness for sexual assault with a weapon in 1984, pursuant to Part XX.1 of the *Criminal Code*.

At his annual review hearing before the Ontario Review Board in 2006, Mr. Conway applied for an absolute discharge under s. 24(1) of the *Charter*, asserting numerous violations of his *Charter* rights due to his inhospitable living conditions at CAMH. The ORB dismissed his application on the basis that it was not a “court of competent jurisdiction” to provide *Charter* remedies. The Ontario Court of Appeal dismissed Mr. Conway’s appeal in a split decision that involved a force-

ful dissent by Justice Lang.

This was the historical and legal context into which four students at the Asper Centre Clinic were propelled on the very first day in September. Led by Executive Director of the Asper Centre, Cheryl Milne, and Professor Kent Roach, the team dedicated itself fully over the next month and a half to the varied and urgent tasks required in preparing a case.

The students canvassed the jurisprudence on s. 24(1), responding frequently to Milne and Roach’s urgent orders to prove negatives, review other provincial Review

Boards’ powers, summarize academic articles, edit footnotes, and generally prepare the factum.

In the appeal, the Asper Centre and CLA took the position that the ORB was indeed a “court of competent jurisdiction” under s. 24(1) of the *Charter*, and that moreover, there was no court or tribunal better suited to provide such flexible and tailored remedies for these persons. The remedial structure of the ORB, as well as its unique expertise in these complex cases, supports the idea that it has the power to apply the *Charter*.

Judges outside of the ORB may not have the mental health expertise necessary to provide adequate remedies. Furthermore, in accordance with their own legal expertise and institutional mandate, the Asper Centre and CLA highlighted for the Court the way in which greater access to *Charter* remedies is fundamental to an effective and accessible justice system. An affirmative answer to this constitutional question would strengthen the powers of the ORB to respond efficiently and effectively to those it is authorized to

oversee. This, in turn, would create a more accessible and efficient judicial system.

After a whirlwind month and a half of preparation, Cheryl Milne appeared before the Court on October 22, 2009. The four students who had worked on the case made their way to Ottawa to sit for the first time within the walls of the Supreme Court and watch some of the country’s finest litigators deliver oral argument.

In the brief ten minutes given to Interveners at the Court, Milne highlighted the circular argument put forth by the Respondents with regard to the relationship between statutory powers and *Charter* jurisdiction. She pointed out that their assertion was that *Charter* remedies are precluded because the Board’s governing statute does not permit the type of remedy sought, while also stating that if the statute permitted the remedies then there was no need for the *Charter* jurisdiction, thereby rendering it irrelevant.

The Court has yet to deliver its judgment on the issue, but the students involved gained a great deal from this exposure to the life and work of constitutional litigation.

*“Those who are detained under Part XX.1 should be able to obtain full one stop justice from Review Boards.”*

*-Factum of the Intervener, Asper Centre & CLA*



Exec. Dir. Cheryl Milne and students Kim Potter, Brendan Morrison and Ryan Liss at the Supreme Court of Canada

# Exclusion of Evidence under s. 24(2): The Supreme Court Decisions of the Summer of 2009

By: Kathryn McGoldrick

On September 30, 2009, the Asper Centre presented a workshop highlighting the exclusion of evidence cases released by the Supreme Court of Canada this past summer: *R. v. Grant*, *R. v. Harrison*, *R. v. Suberu*, and *R. v. Shepherd*. The panel included two University of Toronto professors, Martha Shaffer (who acted as moderator) and Hamish Stewart, and two practitioners, Jonathan Dawe, who served as counsel for the appellant in *Grant* and for the Canadian Civil Liberties Association in *Harrison*, and Rick Visca, counsel for the respondent in *Harrison*. The workshop was very well-attended by faculty, students, and practitioners alike.

The panellists discussed the changes to the law of the exclusion of evidence under s. 24(2) of the Charter, introduced by the Court in *Grant* and applied in the other three companion cases. Prior to *Grant*, the test for the exclusion of evidence was the three-pronged framework developed in *R. v. Collins* and *R. v. Stillman*. Under that analysis, courts considered the following factors: (1) whether admitting the evidence would undermine the fairness of the trial; (2) the seriousness of the Charter breach; and (3) the effect of excluding the evidence on the long-term repute of the administration of justice. In practice, the first factor was often determinative if the evidence was conscriptive, meaning that it was obtained where an accused, in violation of his Charter rights, was compelled by the state to incriminate himself. Derivative evidence, real evidence found as a result of an unlawfully conscripted statement, also fell into this category. Because conscriptive evidence violates the principle against self-incrimination, it was generally considered to undermine trial fairness. Consequently, the Court held that there was virtually an automatic exclusion of this type of evidence under the first factor, without having to consider the other two factors.

In *Grant*, the SCC engaged in what Jonathan Dawe referred to as a “fairly radical reworking of the Collins-Stillman test.” Now, under s. 24(2) a court must assess and balance the effect of admitting the evidence on society's confidence in

the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

Professor Stewart cautioned against reading *Grant* simply as the Court having redistributed the Collins factors into different boxes. More importantly, it represents a balancing of all three factors in the current test, rather than one often being determinative without consideration for the others. Under the new framework, the court considers the self-incriminatory aspect of evidence as an important factor, but that this must be balanced against seriousness of the offence and reliability of the evidence.

Dawe identified three main practical implications resulting from *Grant*. Firstly, and most significantly in his opinion, evidence that would previously have been excluded under the first branch of the Collins-Stillman test will now in many cases be admitted. Although the Court stated that self-incriminatory statements will still be excluded most of the time, derivative evidence will be admitted in some cases, even if it is found as a result of these statements. Professor Stewart expressed concern that the principle against self-incrimination, an “essential norm in any system where people are presumed innocent until proven guilty”, may now often be forgotten in this process. Effectively, according to Dawe, the principle against self-incrimination has been “downgraded” from the paramount consideration in the analysis under s. 24(2) to merely one of a number of factors to be considered. He noted that this may also have implications for the Court's Charter s. 7 jurisprudence regarding compelled statements, which was expressly developed in line with the Collins-Stillman framework.

Secondly, the *Grant* framework and the way it is applied in *Harrison* places new emphasis on examining the seriousness of police misconduct. Under the old test, this factor was merged in the second branch with the impact of breach and its

seriousness from the accused's perspective. These are now split, and the Court in both cases treats it as being very significant and potentially decisive (as it was in *Harrison*). Rick Visca noted that this was a clear statement by the Court that it is not prepared to condone serious, deliberate, flagrant misconduct by police, even though significant, reliable evidence that may assist in conviction on a serious offence may be lost as a result. The Court is careful, however, to note that although important, this factor is not to be treated as a trump card outweighing all other factors of the test.

Finally, although the old framework had been criticized for being too structured and often difficult to apply, it had the advantage of providing a measure of predictability for some types of cases (for example, as mentioned above, if the evidence was obtained in violation of the principle against self-incrimination, it would generally be automatically excluded under the first factor). Both Dawe and Visca noted that this assisted prosecutors in deciding whether to litigate particular cases. Consequently, following *Grant* we may see more Charter applications being argued and fewer concessions being made, as well as greater inconsistency in trial-level decisions based on similar facts.

The panellists all agreed that it is not clear how the three factors will be balanced under the new approach, although it seems that the first branch is most important. Only time will tell how courts will apply the framework, and, more importantly, how this approach will ultimately alter the admissibility of different types of evidence under s. 24(2).

More information, as well as the webcast of this event, can be found on the Asper Centre website, at

<http://www.aspercentre.ca/events/calendar>

# Justice Albie Sachs' Book Launch

By Esther Roche

On January 15, 2010, Justice Albie Sachs launched his latest book, "The Strange Alchemy of Life and Law" at the Faculty of Law. The book combines excerpts from key judgments authored by Justice Sachs while sitting on the Constitutional Court of South Africa with context and commentary on the writing process. From life as an active member of the anti-apartheid movement in South Africa and exile in Mozambique to an assassination attempt by South African Security Forces, Justice Sachs had many stories to tell and the Faculty of Law was privileged to be his audience for some of them.

Justice Sachs began by recounting his first waking moments in a Maputo hospital bed following an attempt on his life in 1988. He described the immense relief and elation he felt having survived a car bomb attack, saying, "I think everyone in the freedom struggle, wherever it might be wonders, 'When they come for me, will I be brave? Will I get through? How will I be?' And they had come for me and tried to kill me and I got through, I was surviving." He described the sense of hope and renewed resilience he felt while in that hospital bed, and spoke of his realization in that moment that South Africa, like him, was also resilient and would be able to recover.

Justice Sachs stressed the important role that humour has played in his life, explaining that just as humour had been an important aspect in his recovery and the freedom fight, so too would it be a powerful component of South African democracy. Justice Sachs quoted from a portion of his judgment in the "Laugh it Off" case, which involved the use of a trade-

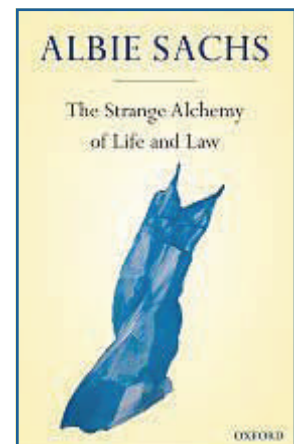


mark in a political parody, saying, "Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health."

Justice Sachs, who was a visiting professor at the Faculty of Law in 1999, graciously focused part of his lecture on the small role played by the Faculty in the development of some of the concepts in his book. He recalled the opening line he delivered in one of his classes: "Every judgment I write is a lie", explaining his frustration with his final judgments and their failure to convey the often wrenching decision-making and writing process. Justice Sachs credits conversation with fellow University of Toronto faculty members as pivotal in coming to terms with this frustration, and he thanked his University of Toronto colleagues for pointing out the difference between the "logic of discovery" and the "logic

of justification" in the writing process - a distinction Justice Sachs focuses on in his book.

When an audience member asked Justice Sachs how, as a young lawyer, he resisted getting caught up in the apartheid regime. Justice Sachs responded by saying that he never felt like there had been a moment where he had chosen to take a stance, rather he felt he had inherited the fight. Ultimately, he replied, he saw himself fighting for human rights and not just "black rights". In the end, he was fighting for himself, so that he could live in a free country.





# Prime Minister of Canada et al. v. Omar Khadr

By Esther Roche

On February 11, 2010, the Asper Centre for Constitutional Rights and the International Human Rights Program at the University of Toronto, Faculty of Law, hosted a panel discussion entitled “The Khadr Decision: A Just Result?” in light of the Supreme Court of Canada’s recent controversial judgment in *Canada (Prime Minister) v. Khadr*. The panel was moderated by Professor Hamish Stewart, who supplied the audience with a brief overview of the decision, and consisted of Professor Audrey Macklin, counsel for the interveners the Asper Centre, Human Rights Watch and the University of Toronto Faculty of Law – International Human Rights Program, Professors Kent Roach and David Schneiderman, and Asper Centre Executive Director Cheryl Milne.

This judgment concerned an appeal from a judgment of the Federal Court of Appeal (*Khadr 2*) ordering the government to request the repatriation of Omar Khadr, a Canadian citizen detained in a US prison in Guantanamo Bay, Cuba. The United States has held Khadr since 2002 when Khadr, then 15, was captured after an incident in Afghanistan involving the death of a United States soldier. In 2003 and 2004 Canadian officials from CSIS and DFAIT interrogated Khadr, under the conditions then prevailing at Guantanamo Bay prison, which included sleep deprivation. The judgment primarily focused on the question of whether these interrogations could be subjected to Charter scrutiny, and if so whether any of Khadr’s Charter rights had been violated by the actions of Canadian officials. Professor Stewart explained that while the Supreme Court had found that the Charter applied extr territorially to the actions of Canadian officials, and that Khadr’s rights were being violated, the court refused to go any further than issuing a declaratory remedy. The court’s issuance of a declaratory judgment was supported by the citing of “evidentiary uncertainties”, limitations of the court’s institutional competence, and deference to the executive prerogative power.

Many of the panelists noted the significance of this judgment with regard to the division of powers between the executive, legislative, and judicial branches of government. Professor Macklin emphasized that the case is political at many levels, and suggested that the Court’s particular concern for its own political legitimacy vis-à-vis other branches of government is ultimately what animated its decision with respect to the remedy in the appeal. Professor Macklin pointed out the unanimous nature of the judgment was indicative of this political concern, noting that the court was giving an institutional response, responding as a “unified body”. Professor Macklin also pointed to the Court’s unwillingness to go further than other national courts in finding an executive duty of diplomatic intervention, and its dependence on the US Supreme Court’s findings with respect to the violative nature of the detention regime that existed at Guantanamo Bay prison in 2003 and 2004 as indicative of the Court’s hesitancy and overarching concern for its proper role in relation to other branches of government. Professor David Schneiderman agreed with Professor Macklin’s statements regarding the Court’s concern over political legitimacy stating that the court “keeps its eye on the legitimacy ball all of the time”. He also noted that the legitimacy the Court is concerned with stems from both public opinion and political classes.

In addition to the legitimacy of judicial action in this case, the appropriateness of executive action with respect to its political and legal authority was also discussed. Professor Schneiderman’s comments focused on the executive’s use of the royal prerogative and the court’s response to this form of executive discretion. He explained that originally the royal prerogative stemmed from the “realm of unfettered discretion” that formed the royal governance of Britain, and that this prerogative had been incrementally reduced by parliamentary statutory enactments. He pointed out that prerogative authority exists only because (and to the extent

that) it has not been moderated by statute or fallen into disuse, and should not be viewed as existing to preserve power for its own sake or to preserve power for any particular Prime Minister.

Ms. Milne analyzed the Court’s decision and the application of the royal prerogative from a child rights perspective. She explained that at the time of his apprehension by the US military, Omar Khadr was 15 years old, meaning that he was a child at the time of his arrest. In addition, she noted that Khadr was actually 11 when he was conscripted, by his father, into armed conflict in Afghanistan. Ms. Milne argued that considering Khadr’s status as a child throughout the events in question, and Canada’s signing of the UN Convention on the Rights of the Child (including the Optional Protocol on Children in Armed Conflict) the royal prerogative could have been interpreted to compel the executive to act to protect Khadr in this case. Ms. Milne felt that the court’s deference to the executive power vis-à-vis the royal prerogative, was not consistent with their concurrent unwillingness to hold the executive to their international treaty obligations, which were created by the use of that same prerogative power. In addition to the executive’s responsibility to Khadr due to these prerogative created treaty obligations, Ms. Milne, also pointed out that the executive might have a responsibility to alleviate and vindicate Khadr’s Charter rights stemming from its *parens patriae* role with respect to Canadian children.

The Supreme Court’s choice of remedy in this case was a main focus. While Professor Macklin endorsed the court’s reinforcement of their Charter based authority to make remedial orders regarding the return of citizens (namely from *Burns v. Rafay*), she expressed disappointment in the basis that the Supreme Court used to limit their remedy in this case. The Supreme Court’s reliance on the inadequacy of the record to justify their refusal to go further than a declaratory remedy, was problematic for Professor Macklin, since as she pointed out the record was

inadequate due to the government's own refusal to disclose information to the court. Professor Roach theorized that the court's declaration, and its reference to prudence in the matter, was an appeal to Alexander Bickel, who recommended that the court stay out of certain political questions and allow them to mature. However, Professor Roach expressed disagreement that Bickel himself would agree with the decision in this case, pointing out that "Bickel recognized with respect to *Brown v Board of Education 2*, that the court had to provide some form of remedy, it might be difficult, governments may resist it, it may take a long time to get a remedy, but as Bickel said, 'The Supreme Court does not exist as a collective poet laureate; it is there to actually resolve cases and controversy through a remedy.'" Ultimately Professor Roach worried that if the Supreme Court does not give substantive remedies in areas of executive prerogative power, then where do Canadian citizens go to have their rights vindicated?

Even though, as Professor Roach noted, the court has not retained juris-

diction in this case, the panelists offered various steps forward with respect to Omar Khadr. Roach mentioned that the court's lack of retained jurisdiction did not stop parties in both *Finta* and *Marshall* from going back to the court and asking "did you really mean it?" Professor Roach also pointed out that it was clear from the judgment that it was a DFAIT person who went down in 2003, and unlike CSIS which is subject to CIRC oversight, DFAIT has no clear oversight regime. It may be best then for pressure to be brought in order to convince the government that DFAIT oversight is required in order to avoid further rights violations. Professor Schneiderman suggested that a possible political avenue of action would involve a move by Parliament to catalogue, regulate, or abolish the royal prerogative. He supported this proposition with reference to the UK House of Lords recent move to statutorily regulate the royal prerogative with regard to war and troop deployment. He went on to point out that the current composition of the House of Commons, with a majority held by opposition parties,

could allow the passage of a bill requiring cataloguing and caveating in the exercise of the prerogative.

Notwithstanding the panelists over-all disappointment with the judgment, some positive aspects to the decision were noted. Professor Macklin spoke highly of the court's willingness to find extraterritorial application of the Charter, at least when Canadian officials are not the primary perpetrators but rather complicit in the actions of foreign states. In addition, both Professors Macklin and Roach highlighted the extent to which the court was willing to find ongoing impact and continued rights violation from the 2003 and 2004 interrogations by Canadian officials, noting that this was a robust interpretation of the rights violation in this case. Milne also noted, from a child rights perspective, the Court's endorsement of the requirement that youth have an adult present to look out for their best interests in its analysis of the s.7 violation.

## Panel Discussion on *Bedford v. Canada (Attorney General)*

By: Renatta Austin

On November 30, 2009 the Metropolitan Action Committee on Violence Against Women (METRAC), in partnership with Women and the Law at the University of Toronto hosted a panel on the criminalization of sex trade workers, with a particular focus on the anti-prostitution challenge currently before the Ontario Superior Court. The provisions of the *Criminal Code* that prohibit keeping a common bawdy house, living off the avails of prostitution and communicating for the purpose of prostitution are being challenged by a trio of sex trade workers, represented by Osgoode Hall Professor Alan Young. He argued that these provisions prevent sex-trade workers from engaging in safe work indoor and amounts to a violation of their rights under Section 7 of the Charter. Ms. Zahra Dhanani, Legal Director of METRAC, agreed with Prof. Young's assessment, saying that the criminalization of sex-trade workers contributes to a vicious cycle of discrimination and gender-based violence, violation of women's rights, and institutionalization of uninformed

and inaccessible laws pertaining to the sex-trade profession.

Although Prof. Young and Ms. Dhanani were optimistic about the outcome of the case, the courts have been reluctant to strike down Canada's prostitution laws. In the *Prostitution Reference, 1990*, a majority of the Supreme Court of Canada held that the criminal prohibition against public communication for the purposes of prostitution and keeping a common bawdy house are not inconsistent with s. 7 of the Charter. Moreover, to the extent that the prohibition against communicating for the purposes of prostitution limits freedom of expression, it is justified under s. 1 of the Charter. The British Columbia Court of Appeal dismissed a similar challenge, where a sex worker argued that the disproportionate number of offences charged against women constituted discrimination on the basis of sex contrary to s. 15 of the Charter. The Court held that there was no conclusive evidence to support the claim that prostitution laws disproportionately affect

women, given that their male customers are often also charged with related offences. Because the current challenge is being argued under s. 7 rather than s. 15, it is not clear how much weight the court will give to arguments and supporting evidence that point to gender-based discrimination.

The position being advanced before the Superior Court was not without its critics. At an earlier Fireside Chat with Professors Lorraine Weinrib and Martha Schaffer, several students expressed their concern that striking down the current prostitution laws will expose more women and children to violence and exploitation. For example, the absence of a criminal prohibition against living off the avails of prostitution might create a market for pimps and sex traffickers. Professor Weinrib speculated that the court will be mindful of these concerns and craft its decision in such a way as to avoid this problem. A follow-up workshop will be held when the decision is released.



# Brief of the David Asper Centre for Constitutional Rights Regarding the Privacy Investigations of the Information and Privacy Commissioner of Ontario

## Executive Summary

Contributors: Professor Lisa Austin, Kerri Lui, and Cheryl Milne

Jurors are innocent members of the public in a criminal trial. They have not been charged with a crime. Nor did they consent to invasive background checks conducted by state agents, which disclosed private information about their mental illnesses and family problems to prosecutors. The widespread allegations of background checks conducted by police and utilized by Crown Attorneys to vet potential jurors threaten to undermine the fundamental tenets of our justice system if they are not properly addressed. Given its mandate, the submissions of the David Asper Centre for Constitutional Rights focus on the breaches of the jurors' *Charter* rights and their broader systemic implications, with a particular emphasis on access to justice principles.

### The *Charter* Rights of Jurors

S. 8 of the *Charter* provides that “[e]veryone has the right to be secure against unreasonable search and seizure”. Following the *Tessling* criteria, the jurors had an objectively reasonable expectation of privacy in the contents of their police files. The fact that the police, a third party, had possession of the information does not diminish this expectation. When the subject has a reasonable expectation of privacy, a warrantless search is *prima facie* unreasonable. The Court has made exceptions for searches authorized by a reasonable law and conducted in a reasonable manner. But the *Juries Act* does not expressly authorize the confirmation of juror eligibility through background checks. While sections 38(2) and 42(1)(d) of *FIPPA* may generally authorize obtaining further information about jurors, all reasonable searches must be consistent with *Charter* principles. The prosecutors' actions clearly went beyond what was necessary to determine eligibility. Moreover, the additional information was not legally relevant to the jury selection process. The searches were a

fishing expedition in which the Crown searched all potential jurors with no grounds for reasonable suspicion. The searches were not reasonably conducted and therefore infringed the jurors' s. 8 rights.

### The *Charter* Rights of the Accused

The Crown has a general legal obligation to disclose all relevant information to the accused. The decision of some prosecutors to withhold the information about prospective jurors, which was pertinent to the defence's case, is a serious breach of legal ethics and may infringe the accused's right to a fair hearing under s. 11(d). The purported widespread nature of the practice threatens the integrity of countless past jury trials. This aspect of the conduct of prosecutors is admittedly beyond the scope of the Privacy Commissioner's mandate and thus necessitates toward a broader independent investigation or public inquiry.

### Systemic Implications

Potentially, the rights of thousands of prospective jurors have been breached. This gives rise to a significant access to justice problem. Many jurors are unaware that their rights have been infringed. Even if they are aware, jurors have no standing in the criminal proceeding and no access to remedies. Furthermore, even where procedures are available for jurors to challenge privacy breaches, the U.S. experience indicates that extremely few jurors are willing or able to initiate separate litigation.

The avoidance of jury duty by citizens is pervasive and well documented. The prospect of intrusive background checks will only worsen negative public sentiment and may encourage more people to elude their civic obligations. This is likely to exacerbate existing concerns

about jury representativeness, with particular regard to the underrepresentation of racialized and Aboriginal people.

The Court has stated that fairness is the “guiding principle of justice and the hallmark of criminal trial”. There is no doubt that the prosecutors' actions were contrary to Crown policy and longstanding Supreme Court jurisprudence. These *Charter* breaches may bring the administration of justice into serious disrepute. On the basis of our analysis, we conclude that a full public inquiry or an independent investigation with a broader mandate is crucial to prevent the broader implications of these infringements from materializing.

### Summary of Conclusions and Recommendations

1. The interpretation of the legislation respecting the legality of the background searches must take into consideration the *Charter* rights of the individuals affected. Given the preceding analysis and assuming the facts as set out in the letter of request, we conclude that there have been *Charter* violations in respect of the privacy rights of prospective jurors.
2. We also conclude that there are serious implications for the public's perception of the administration of justice which could seriously impact the willingness of people to serve on jury duty which already imposes significant hardship on individuals.
3. Given the lack of standing of potential jurors in the system and the widespread nature of the violations, a public inquiry or independent investigation that fully explores the incidence of the violations and the appropriate protections for the public is necessary to restore public confidence in the system.

# Message from the Executive Director

## Cheryl Milne

In this our second year, we have seen an incredible burst of accomplishments flowing from the consultation and strategic planning conducted last year. It had been my modest goal to seek and hopefully obtain standing in a Supreme Court of Canada case in the 2009-2010 academic year. Not only did we accomplish this goal with *Conway v. Her Majesty the Queen* highlighted in this newsletter, but we went on to successfully intervene in three more cases - *Khadr*, *Ward* and most recently *Alberta v. Caron*. In three of the four cases we conducted we are grateful for the faith that our partners, Criminal Lawyers' Association, BC Civil Liberties Association, Human Rights Watch and our own IHRP, had in us. In the last case of the year, *Caron*, we managed to move from supported baby-steps to standing on our own.

We will continue to seek out partnerships as appropriate, but it also feels amazing to be recognized as a relevant organization in the leading constitutional cases in the country. Our next case finds us again working with a partner organization, the Canadian Coalition for the Rights of Children, in the BC Polygamy Reference where we have been granted status as interested persons. Brent Olthuis of Hunter Litigation Chambers in Vancouver is providing *pro bono* services and will be working with me as co-counsel to assist us in presenting the child rights perspective to an important constitutional case regarding the constitutionality of the *Criminal Code* provisions prohibiting polygamy. Students in next year's clinic will have an opportunity to become significantly involved in a case at the ground level.

This year has seen even more achievements than those in the courts. We launched a beautiful website during the summer and have managed to upload many facts from important Supreme Court of Canada constitutional cases. Students have been engaged through work study, practicum and volunteer opportunities in providing material for the site. We will continue to look for ways to improve it and make it the source for cutting edge writing and information on constitutional issues. Look for our future working paper se-

ries making use of the facts we have gathered.

During the summer we prepared our first policy submission which focused on the Charter rights of prospective jurors in criminal trials. The Ontario Privacy Commissioner conducted an investigation into the breaches of privacy caused by the conduct of background searches by police on potential jurors. The Commissioner's report acknowledges our contribution and references our submissions in key areas. The Executive Summary is found in this newsletter.

We also held an extremely successful one day symposium on the Role of Interveners in Public Interest Litigation. Leading lawyers from across the country, and internationally, came to discuss the impact that interveners can make in important litigation in the public interest. Members of the judiciary also shared their thoughts about effective interventions and the value they place on contributions made to the legal arguments by public interest groups. The Symposium is available, broken down by panel discussion, in the archived webcast available on our site. I particularly recommend viewing the international panel for a window on how it is done elsewhere.

Next year will bring additional partnerships in both litigation and in legal education. We will be joining the Canadian Civil Liberties Association in co-sponsoring an event focused on the discrimination faced by immigrants and non-citizens in Canada. We have also been working with LEAF to organize a 2 day event celebrating 25 years of LEAF and s.15 of the Charter. I will also be working over the summer to put together a half day event on the issue of costs and funding for Charter litigation. It will be a fall full of activity.

The clinical course will also resume in September with new projects to engage the students in constitutional advocacy. The most enjoyable work that I have done this year (besides getting back into Court), has been my work with the students. It is without a doubt that we have an extremely impressive group of students who bring a range of skills and interests to the table. I have



thoroughly enjoyed watching them become engaged in the practice of public interest advocacy through the clinic and working groups. Early in the clinic one student commented that his initial experience on our litigation project made him run through the highs and lows of legal practice, from "Is this what I really want to do?" to, "Can I handle the stress?" to "This is incredibly exciting!" That's litigation for you - I think he's hooked.

I would be remiss if I did not take the opportunity to also thank the lawyers who have given of their time and services to support the Centre. As noted by Lindsay Beck in her article about the clinical course, Patricia Hughes of the Law Commission of Ontario, Sarah Kraicer of the Office of the Attorney General, Constitutional Law Branch and Mary Eberts, took time to speak to the students in our weekly seminars. We have also been the beneficiaries of *pro bono* legal services in our litigation. John Norris and Brydie Bethel represented us, along with Prof. Audrey Macklin, in our intervention in the *Khadr* case. We are grateful for the *pro bono* agency work of Kelly Doctor and Joan Bell of Sack Goldblatt Mitchell LLP in Ottawa.

I am pleased to announce that Ogilvy Renault LLP has agreed to be our Ottawa agents on an ongoing and *pro bono* basis. Martha Healy has already assisted us in the *Caron* case and the firm even provided English translation for some of the French language materials filed in the case. I am looking forward to working with them again.

Finally, I wish to congratulate and bid fond farewell to Professor Lorne Sossin. I have greatly appreciated his consistent, thoughtful and sage advice on our Advisory Group. We all wish him the best as Dean of Osgoode Hall Law School.

## David Asper Centre Advisory Group

*The Centre's Advisory Group draws from a distinguished Faculty with expertise in constitutional law:*



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### Webcasts Available on our Website [www.aspercentre.ca](http://www.aspercentre.ca)

- ◆ The *Khadr* Decision: A Just Result? February 11, 2010
- ◆ Overdue Update or Big Brother? Lawful Access and Cyber Surveillance, February 25, 2010
- ◆ *Grant, Harrison, Shepherd & Suberu*: The Supreme Court Decisions of the Summer of 2009 , September 30, 2009
- ◆ Michael Fordham, QC: Human Rights at the UK Supreme Court, November 5, 2009
- ◆ Role of Interveners in Public Interest Litigation, November 6, 2009
- ◆ The Charter Rights of Canadian Citizens Abroad, November 24, 2009





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