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ASPER CENTRE OUTLOOK

SCC Releases Decision in *R v. Caron*

The Asper Centre was granted intervener standing on its own for the first time in R v. Caron, a case which addresses the availability of advance costs in test case Charter litigation. The case was heard on April 14, 2010, and the Supreme Court of Canada rendered its judgment on February 4, 2011.

Mr. Caron was prosecuted for a minor traffic offence. His defence was based on a constitutional languages challenge resting on the fact that the court documents were uniquely in English. He insisted on his right to use French "in proceedings before the courts" of Alberta. He claimed that Alberta could not abrogate French language rights and that the *Alberta Languages Act* was unconstitutional.

The central issue before the Supreme Court of Canada was not related to the actual traffic violation or the constitutional issue but concerned the jurisdictional legality of two interim costs orders that had been made by the Alberta Court of Queen's Bench. Although Mr. Caron had initially been able to find the necessary funds for his defence/constitutional challenge in the provincial court, as the litigation unexpectedly lengthened, his ability to fund the litigation was exhausted. Without funding, the defence/ constitutional challenge could not have been completed and would have resulted in months of effort, costs and judicial resources being "thrown away."

Mr. Caron first sought funding (by way of a costs order) from the provincial court. That court, satisfied that Mr. Caron could not fund the litigation himself, made an interim award of costs. The award was overturned by the Alberta Court of Queen's Bench on the basis that the provincial court lacked the necessary jurisdiction to render such an order. However, the Court of Queen's Bench then stepped in to make the interim costs order itself.

ISSUES

On appeal before the Supreme Court of Canada the only issues were related to the ability of the Court of Queen's Bench to make the interim costs orders in respect of proceedings before the provincial court. Two issues were considered on the appeal:

1. Whether the Court of Queen's Bench had inherent jurisdiction to grant an interim remedy (i.e. an interim costs order) in litigation taking place in the provincial court;
2. If yes, whether the criteria for an interim costs order had been met.

Significantly, the issue of whether the provincial court had the jurisdiction to issue such an award was not before the SCC. *Continued on pg.2*

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R v. Caron: A Step Forward for Public Interest Costs

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Holding

The Alberta Court of Queen's Bench has inherent jurisdiction to make the interim costs orders in respect of the proceedings in the provincial court. In the case of inferior tribunals (such as a provincial court) a superior court may render "assistance" in circumstances where the inferior tribunal is powerless to act and it is essential that action be taken in order to avoid an injustice. Such inherent jurisdiction must be exercised sparingly and with caution. As to the second issue, the Queen's Bench judge, in assessing the criteria relevant to the exercise of its discretion to make such an award, exercised that discretion reasonably.

The appeal from the decision of the Alberta Court of Queen's Bench was dismissed with costs to Mr. Caron on a party and party basis.

Reasons

As a general rule, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. A cost order in a constitutional challenge must be highly exceptional and made only where the absence of public funding would cause a serious injustice to the public interest.

The SCC confirmed that superior courts possess an inherent jurisdiction to render assistance to inferior courts to enable to them to administer justice fully and effectively. While this type of assistance is best known in the context of contempt proceedings, the inherent supervisory jurisdiction of a superior court is not limited to the contempt context and may be invoked in an "apparently inexhaustible variety of ways" including, in an appropriate context, by making interim costs orders in connection with proceedings before the inferior court where such an award is essential to the administration of justice and the maintenance of the rule of law.

When assessing whether or not to make an interim costs award, the SCC confirmed that the analysis in two decisions involving civil proceedings - *British Columbia (Minister of Forests) v. Okanagan Indian Band*, and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue) ("Little Sisters (No.2*)") should be applied to a quasi-criminal proceeding such as that found in *Caron.*

The *Okanagan/Little Sisters (No.2)* criteria are helpful to delineate when a court may exercise this inherent jurisdiction. The criteria are: 1) the litigation would be unable to proceed if the order were not made; 2) the claim to be adjudicated is *prima facie* meritorious; and 3) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. Even where these criteria are met there is no "right" to a funding order. The court must then decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. When the SCC applied the public funding criteria to the Caron case, it determined that the Alberta Court of Queen's Bench had made no legal error in the exercise of their jurisdiction to render the costs orders.

What was "sufficiently special" about the case was that it constituted an attack of *prima facie* merit on the validity of the entire corpus of Alberta's unilingual statute books. The injury created by continuing uncertainty about French language rights in Alberta transcended Mr. Caron's particular situation and risked injury to the broader Alberta public interest. The issue had not been fully dealt with in the previous litigation and it was in the public interest that it be dealt with in the context of the Caron litigation.

Concurring Reasons Raise a Cautionary Note

Concurring in the result, the separate reasons rendered by Abella J. raise a cautionary note. Starting with a reminder that the issues before the Court had not included an assessment of the scope of the powers of the provincial court to make an interim award of costs, Justice Abella cautions that the majority reasons must not be seen to encourage the "undue expansion of a superior court's inherent jurisdiction" into matters the SCC had increasingly come to see as part of a statutory court's implied authority to do what is necessary to administer justice fully and effectively. Justice Abella described the SCC as, in this case, being in the "problematic position" of having to decide the issue of the jurisdiction of a superior court to render a funding order "as if" no other jurisdictional course were available. Further, she cautions, an inability to order funding in the limited circumstances in which the *Okanagan* and *Little Sister (No 2)* criteria are met "could well frustrate the ability of provincial courts and tribunals to continue to hear potentially meritorious cases of public importance".

Commentary

Caron confirms that the inherent jurisdiction of a Superior Court to "assist" an inferior court is not limited to any existing categories and will include making public interest costs awards in proceedings before an inferior court in the limited context in which the criteria for such funding have been met. *Caron* also confirms the applicability of the *Okanagan/Little Sisters (No 2)* criteria to quasi-criminal (as well as civil) proceedings. The Court emphasized that the scope of an inferior court's power to order public interest funding was not before the Court and, potentially, has left this issue open to be considered in another case.

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Working Group Update

The Working Group on International Prisoner Transfers focused on issues concerning Bill C-5, which initially proposed an increase in discretionary power to the Public Safety Minister to refuse to accept the return of Canadian citizens to serve their sentences in Canada.

The Standing Committee on Public Safety and Security met February 3, 2011, and amended the Bill C-5 to remove the discretionary language: "in the Minister's opinion", "the minister may consider" etc. They also removed some of the more problematic criteria for consideration of the prisoner's return e.g. whether or not the prisoner had entered a guilty plea. Finally, they qualified the scope of the provisions -- which is to give the minister the ability to refuse repatriation to offenders who would endanger public safety ***while the offender is in prison***. An excerpt from the new text reads:

10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors:

...

(b) whether the offender's return to Canada, while they are serving their sentence, will endanger public safety, including

...

(c) whether the offender is likely to continue to engage in criminal activity, after the transfer, while they are serving their sentence;

The basic problem highlighted by working group faculty advisor Audrey Macklin is still present: the Act is irrational because a threat must be posed to the public by a person in prison for the act to protect public safety. This means Canada's prisons are not sufficient to keep the public secure, rather than that prisoners need to be kept from Canada. This irrational aspect means the act is susceptible to failing the *Oakes* test.

The amended Bill was reported to the house February 7, 2011.

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Wilson Moot Results

The Asper Centre has proudly provided support to the Wilson Moot team for the last two years. Advisory Group member, Professor Lorraine Weinrib and Executive Director, Cheryl Milne act as faculty coaches to the students who are chosen to represent the school in this competitive moot on s.15 of the Charter. This year's moot problem centred on a claim for legal recognition of polygamous marriages under the *Civil Marriage Act.* The final round saw the U of T student mooters, Emily Bala, Lwam Ghebrehariat, Adrian Johnston and Jessica Lithwick, victorious over Osgoode Hall Law School before a panel consisting of Justice Ian Binnie of the Supreme Court of Canada, Justice Gloria Epstein of the Ontario Court of Appeal and the Honourable Wally Opal, QC. Adrian Johnston took first place oralist and Emily Bala placed third.

This year the student coaches also had Asper Centre ties. Dan Rohde, last year's first place oralist, and Becca McConchie were clinic students this past year, while Lindsay Beck, last year's second place oralist, was a clinic student last year. The Wilson Moot was established in 1992 to honour the outstanding contribution to Canadian law made by Madam Justice Bertha Wilson. The spirit of the moot is to promote justice for those traditionally disempowered within the legal system, and, in particular, to explore legal issues concerning women and minorities.

Student mooters and coahes: Adrian Johnston, David Forsayeth, Jessica Lithwick, Dan Rohde, Emily Bala, Lwam Ghebrehariat, Becca McConchie and Lindsay Beck

The Draft *National Securities Act:*

On April 13 and 14, 2011, the Supreme Court of Canada heard arguments regarding the constitutionality of the Draft National Securities Act (DNSA). The SCC has generally ruled that the power to create securities legislation falls within section 92(13) of the Constitution – the catchall "Property and Civil Rights" provision – and therefore lies with the provinces. However, provincial securities laws are anomalous both within the context of Canadian corporate law (all other business law in Canada has a federal act) and on the international scene (the only other industrialized country without a national securities regulator is Bosnia). As capital markets have grown, provincial securities legislation and regulation has increasingly become an inefficient regime. Provincial regulation has left Canada without any consistent regulation of derivatives or any common rules for enforcement.

Background on Canadian securities law and the DNSA

Efforts have been made to harmonize provincial securities laws with the creation of the Canadian Securities Administration (CSA) and through them a series of national and multilateral instruments and policies which bind or commit the provinces who sign on to act within certain established rules agreed upon by all. Key among these is the "passport system" where an issuer can file a prospectus (the disclosure needed to issue shares) with their principal securities regulator. If it is approved by the principal regulator, then all other provinces who have signed on to the passport system are deemed to have approved the prospectus as well. The problem with the passport system is that the province where most financial business is done, Ontario, has not signed on to it. More generally, this network of policies and instruments often overlaps and conflicts with existing provincial legislation and there is no mechanism to resolve the discrepancies.

Despite a growing call for national securities legislation over the past 50 years, the many attempts on behalf of the federal government have failed. The current embodiment of this goal is the DNSA, which would establish a self-funded Canadian Securities Regulatory Authority (CSRA) with both a regulatory branch and a tribunal branch. The DNSA proposes an opt-in system for provinces. The legislation itself would be a platform system where the general provisions exist in the Act and the detailed requirements and exemptions are set out in regulations. The Act would have the authority to regulate a broad range of market participants and the CSRA would receive input on policy-making from different groups including an investor advisory panel.

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The Constitutional Reference to the SCC

In order to be deemed constitutional, the DNSA will have to fall within one of the federal government's heads of power according to the division of powers in sections 91 and 92. It is most likely to succeed under the general branch of the trade and commerce power, section 91(2). To determine this first point, the DNSA will be evaluated based on the five criteria outlined in *General Motors v City National Leasing*, [1989] 1 SCR 641, the leading case on the general trade and commerce provision:

Firstly, the legislation must contain a general regulatory scheme. Given its regulatory nature, the DNSA would easily qualify.

Secondly, the scheme

must be monitored by the continuing oversight of a regulatory agency. The proposed CSRA would fill this role.

Thirdly, the scheme must be concerned with trade as a whole, not a particular industry. This point will be argued based on the meaning of "particular industry". If the financial industry is one industry then the DNSA might fail on this point; however, if the SCC can be convinced that securities is not one industry but a broad array of market participants acting in a number of different economic activities encompassing all Canadian capital markets, it might pass.

The fourth criterion is that the legislation must be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting. This is problematic for the DNSA because the passport system has allowed the provinces to jointly enact a very similar scheme. The argument in favour of the DNSA on this point is that the provinces have been unable to do this in an efficient manner or that the provinces cannot compel such coordination on the scale proposed by the DNSA.

Lastly, if one or more provinces were excluded from the legislative scheme, it must be proven that the exclusion would jeopardize the successful operation of the scheme elsewhere in Canada. This will be the hardest hurdle for the DNSA to surmount due to the opt-in clause in the legislation. By allowing provinces to opt-in, there is a very strong argument that the federal government does not believe that the exclusion of a province will result in the failure of the scheme. The counter argument on this point is that the opt-in clause is only a temporary measure, a political necessity to achieve the ultimate goal of national compliance. The argument is that this eventual goal would fulfil the fifth step.

These criteria are not determinative but "merely represent a principled way to [distinguish] between matters relative to trade and commerce and matters of a more local nature". If the five criteria are met mechanically but the SCC finds that the nature of the DNSA infringes on provincial rights then it can still declare the law unconstitutional. Conversely, if the DNSA does not meet all five criteria but the SCC finds that the Act relates to trade and commerce in spirit, then it can declare it constitutional.

If the DNSA is deemed constitutional under a federal head of power in addition to its already-established constitutionality under the provincial power over property and civil rights, then the double aspect doctrine applies. This means that both provincial and federal legislation would therefore operate concurrently; except in cases where the national act conflicts directly with a provincial act such that compliance with one would result in defiance of the other, in which case the paramountcy doctrine applies and that part of the provincial law is declared ineffective.

Provincial opinion on the DNSA

Leading up to the SCC Reference, the governments of Alberta and Quebec both decided to challenge the constitutionality of the DNSA and referred the question to their respective courts of appeal. The Alberta Court of Appeal found that "just because the federal government believes it would be advantageous to concentrate economic power nationally does not alter the terms of the Constitution Act." They found that the DNSA did not meet the last three criteria of the GM test because it is concerned with one industry, the provinces can and have regulated the industry for the last hundred years, and the federal opt-in proves that not every province needs to be involved. Furthermore it would displace valid existing provincial legislation. Many other provinces have voiced support for the Quebec and Alberta position. Currently Ontario will be the only province advocating on behalf of the DNSA at the SCC hearing.

Conclusion

We need a national regulator for a number of reasons. It will help harmonize the Canadian system with the rest of the world. For example, the US nearly pulled out of the multi-jurisdictional disclosure system due to Canada's provincial securities scheme. Furthermore, the DNSA will standardize and expedite enforcement through increasing communications between provinces as well as with self-regulated organizations as well as the police. The DNSA will also help us keep our G20 commitment regarding derivatives, facilitate the integration of new financial instruments, help achieve the goal of a national financial system, and simplify securities market to help secure international investment.

However, the DNSA is not perfect. It does little to fix many of the substantive issues with the current system such as the redundancy of a quasi-criminal remedy. The opt-in aspect means that provincial securities legislation will continue to exist alongside the DNSA therefore significant duplication and variation in enforcement will remain. Perhaps the strongest argument against the system is that the passport system seems to be working efficiently enough, so why try to fix what isn't broken?

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The Supreme Court's Decision in *Sinclair* : The Accused's Right to Counsel

In *R. v. Sinclair*, 2010 SCC 35, the Supreme Court of Canada held that an accused person who has already spoken to a lawyer does not have the constitutional right to a further consultation during the subsequent interrogation, even if he asks for it. Standing alone, this holding is not particularly troubling. But taken together with other recent developments in the law, Sinclair is worrisome.

The accused Sinclair was charged with murder. Shortly after his arrest, he spoke with a lawyer for about three minutes; three hours later, he spoke with the same lawyer, again for about three minutes. We can only assume that the lawyer advised him that he had the right to remain silent in any subsequent interrogation. Later that day, the police interrogated Sinclair for about five hours. During the interrogation, Sinclair repeatedly expressed concerns about speaking to the police in the absence of his lawyer, stated that he intended to remain silent, and repeatedly indicated his desire to speak with his lawyer. On each occasion, the interrogating officer agreed that Sinclair did not have to say anything, but did not give him another opportunity to speak with the lawyer, and continued to place details of the investigation before him. Eventually, Sinclair admitted killing the victim. His statement was admitted in evidence at his trial, and he was convicted of manslaughter. A 5:4 majority of the Supreme Court of Canada held that Sinclair's right to counsel had not been violated.

Section 10(b) of the Canadian Charter of Rights and Freedoms guarantees the right of any person who is detained or arrested "the right to retain and instruction counsel without delay and to be informed of that right". The Supreme Court of Canada has given this right considerable content. The police are required to inform the arrested person of the right and of the availability of Legal Aid and duty counsel; they are required to give the accused an opportunity to speak with counsel; and, perhaps most important, they are required to refrain from questioning the arrested until he or she has consulted with counsel. Moreover, if the arrested individual's jeopardy changes significantly while he or she is detained, the police are required to re-advise him or her of the right to counsel. But Canadian law has never recognized a right to have a lawyer present, or even to consult with a lawyer, during an interrogation. It is assumed that the lawyer will advise the accused of his or her right to silence in the initial consultation, and that the accused will therefore be aware of and able to assert that right during any interrogation. Sinclair explicitly held that there was no constitutional right to consult counsel, or to have counsel present, during an interrogation. Given the legal background, the decision in Sinclair is unsurprising. But there are three features of the law governing police interrogations that should give us pause before accepting it as an adequate interpretation of the constitutional right to counsel.

First, as decided in R. v. Singh, 2007 SCC 48, once the accused has consulted with counsel, the police may continue the interrogation even after the accused has expressed unwillingness to say anything. In Singh, the accused stated 18 times that he did not want to answer any questions and repeatedly asked to be returned to his cell; the interrogating officers nonetheless continued to question him until he made an incriminating statement. A majority of the Supreme Court of Canada found that there was no violation of the accused's s. 7 right to silence and upheld the trial judge's decision to admit his incriminating statement at trial.

Second, the use of various forms of deceit and trickery in police interrogations neither violates the right to silence nor renders a statement involuntary at common law. In R. v. Oickle, 2000 SCC 38, even while expressing some concern about the use of deceit in interrogations, the Supreme Court of Canada found that a falsehood (or an "exaggeration" as the court described it) about the accuracy of a polygraph test did not make the accused's subsequent statement involuntary. In Sinclair itself, the police lied to the accused about forensic evidence linking him to the crime. In other legal contexts, such as commercial transactions or the law of assault, the use of deception to obtain an advantage is treated as fraud that vitiates consent; but in the context of interrogation of accused persons who are presumed to be innocent, it is considered acceptable.

Third, since 2000, the Supreme Court of Canada has weakened the protection offered by the common law confessions rule. At common law, a statement by the accused person to a person in authority is inadmissible unless the Crown can prove beyond a reasonable doubt that the statement was given voluntarily, in the sense that it was not induced by threats or promises, that it was the product of the accused's operating mind, and that it was not a response to oppressive questioning or conditions of detention. In several cases including Sinclair, the court has continued recognize the common law rule as an important protection for the accused's decision whether to speak to the police. But in Oickle and in R. v. Spencer, 2007 SCC 11, the court appeared to take the view that a statement is involuntary only if the accused's will is "overborne" by the police; and in Singh, the court invoked a similar standard for violations of the s. 7 right to silence. The meaning of the "overborne will" is not entirely clear, but the use of this standard for involuntariness appears to have lowered the threshold for finding a statement to be voluntary. For example, the presence of an inducement is no longer sufficient to make a statement involuntary; the trial judge must now assess the strength of the inducement for the individual accused to determine voluntariness, and must consider the inducement in light of factors affecting the accused's operating mind and the degree of oppression.

Without these three unfortunate developments, the holding in Sinclair would be much less objectionable. If the police had to cease questioning when the accused asserted the right to silence, or if the confessions rule remained robust, or if deceit and trickery were held to undermine voluntariness, then legal advice during interrogation might well be unnecessary. But where deceit and disregard for the right to silence are treated as legitimate interview techniques, a brief consultation on arrest may not be sufficient.

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Withler v. Canada

On March 4, the Supreme Court handed down its decision in *Withler v. Canada (Attorney General)* (2011 SCC 12), marking the Court's first detailed application of s. 15 of the Charter since Kapp in 2008. The Asper Centre has a particular interest in Withler. Clinic students assisted LEAF with research in support of its intervention at the Supreme Court after the claimants had lost at trial and at the British Columbia Court of Appeal. They ultimately lost again in a unanimous Supreme Court decision co-authored by the Chief Justice and Abella J. The ruling was welcomed for its elaboration on the obiter in Kapp regarding comparator groups and the need to avoid a "formalistic and arbitrary search for the 'proper' comparator group" (para 2). However, its application of the s.15(1) test to the facts of the case was disappointing, both in its failure to recognize the differential impact on elderly women, and in the wide deference the Court indicated should be the norm in challenges to government benefits schemes.

The appeal was a class action which challenged provisions of two federal benefits plans, the Public Service Superannuation Act and the Canadian Forces Superannuation Act, that reduce a supplementary death benefit paid out on the death of the plan member by 10 percent for each year by which the member exceeds the age of 65 or 60, respectively. The representative plaintiffs, both widows of plan members, argued that the Reduction Provisions discriminate on the basis of age, contrary to s. 15 (1). The Court found that when the provisions were viewed in the context of the benefits scheme as a whole, they did not impose or perpetuate discrimination.

Regarding comparator groups, the Court in *Withler* further backed away from the language of "mirroring" that was used in *Hodge*, endorsing the concern that the focus on a precisely corresponding comparator "becomes a search for sameness, rather than a search for disadvantage" (para 57). It also suggested, in contrast to Hodge, that it was inappropriate for the court to redefine the claimant's proposed comparator since the record would have been created in anticipation of comparison with a different group. Finally, the Court held that a rigid comparison may "fail to account for more nuanced experiences of discrimination" (para 58). Freed from the necessity to pinpoint a particular corresponding group, courts have the flexibility required to accommodate claims based on intersecting grounds of discrimination (para 63).

In its application, however, the Court neglected to address LEAF's submissions regarding the gendered dimensions of the claim. While the claim was made on the basis of age, LEAF argued that the Reduction Provisions had a disproportionate impact on women, in particular compounding the economic insecurity of elderly women. The provisions, it was argued, perpetuate the belief that their needs and circumstances matter less than those of younger beneficiaries, who are entitled to the full supplementary death benefit. However, the Court declined to address the economic vulnerabilities of elderly women. It found that for younger employees, the benefit insured against unexpected death, while for older employees it was intended to assist with the costs of last illness and death. It did not question the rationale for reducing the benefit for the eldest subset of older employees.

Instead, the Court focused on the multiplicity of interests a large government benefits scheme must attempt to balance, asserting that courts should ask whether the lines such schemes draw are generally appropriate. Allocation of resources and the legislature's policy goals must also be considered, the Court held, raising the perennial question of whether such considerations would not be better conceptualized at the s. 1 stage of the analysis. Following from a long line of failed s. 15 challenges to social benefits schemes (*Law, Gosselin, Hodge, Auton*), the holding in Withler raises the issue of whether this type of challenge will ever succeed.

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Entrance to the Supreme Court of Canada.

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Morris A. Gross Memorial Lecture 2011:

On April 1st, 2011, the David Asper Centre for Constitutional Rights hosted a symposium on 'Funding the Charter Challenge'. In the first panel, Joseph Arvay, Douglas Elliott and David McKillop spoke on 'Cost Strategies for Litigants'. The second panel features Professors Janet Mosher, Chris Tollefson and Jasminka Kalajdzic on 'Access to Justice, Professionalism and Ethics'. The final session of the symposium was this year's Morris A. Gross Memorial Lecture by Marlys Edwardh, C.M of Sack Goldblatt Mitchell LLP. The Morris A. Gross Memorial Lecture was established in memory of the late Morris A. Gross by the law firm, Minden Gross LLP and by members of his family, friends and professional associates. The following is an edited text of Ms. Edwardh's lecture.

For many of us, the Charter has redefined the legal landscape within which we work. It has provided a framework wherein the pressing issues of our time can be raised in search of what many of us would regard as justice. It inspires the view that without the rule of just laws, the rule of law may become an empty promise.

Preparing to deliver this lecture has caused me to reflect back upon my own personal experiences. As first and foremost a criminal defence lawyer, I would have to concede that in most of the important cases where I have appeared as counsel to one of the main parties to the litigation and important Charter issues have been raised and resolved, I have been publicly funded through Legal Aid. These cases arose in the criminal justice context and access to public funding was an essential prerequisite to adequately prepare and litigate the issues and to persevere over what was inevitably many years of litigation. Without this public funding, there can be no doubt that some of the important cases in which I have had the privilege to participate would never have been brought forward. This is particularly so when such litigation arose from issues raised by the treatment of indigent, incarcerated accused who would have literally no ability to bear the costs of litigation against usually well-funded adversaries.

When I pause to ask the question, 'Were these cases adequately funded?', the answer would have to be 'Yes'. No one would ever suggest that the counsel working on the certificate given in these cases was paid anything more than a modest rate – usually well below the going rate in any private case, or that such cases didn't involve a significant contribution by way of pro bono hours of legal work. Despite this, there can be no doubt that without Legal Aid supports, these issues would have been extremely difficult to raise.

Again, in reflecting on my own experience, it is not difficult to see how criminal law in particular has benefitted by Legal Aid's willingness to stand behind important constitutional cases.

Let me first turn to the case of *Regina v. Swain*, [1991] 1 S.C.R. 933. Owen Swain was a gentleman who was arrested in October 1983 on charges of assault and aggravated assault, and shortly thereafter transferred from jail to what was then known as the Mental Health Centre for the Criminally Insane at Penetanguishene. His case was ultimately resolved in the Supreme Court of Canada in 1991. Like many Charter cases, its history is lengthy and protracted. The case raised two important issues. The first related to what the constitutional limits ought to be imposed upon Crown counsel when they wish to raise the defence of insanity over the objection of a fit accused. The second related to whether the then-automatic commitment provisions of the Criminal Code which were applied to insanity acquittees without the necessity of a hearing or any kind of determination of present dangerousness, violated s. 7 and s. 9 of the Charter. Under the old provisions of the Code, a trial judge was required to order the insanity acquittee, or those persons found not guilty by reasons of insanity, to be held in strict custody until the pleasure of the Lieutenant Governor was known. The Court found the regime in place a violation of s. 7 and s. 9 and gave the Government of Canada a period of 6 months to revamp the structure. Today, a trial judge or the Board of Review has duties to determine whether any confinement or deprivation of liberty is justified in a hearing promptly held after the conclusion of the trial. Swain brought significant structural changes to the regime governing the treatment of mentally disordered offenders, and at the same time reaffirmed the autonomy and dignity of those who may be mentally disabled to control most aspects of their defence. They would no longer be subject to the indignity of having the Crown call evidence of mental illness as part of the Crown's case in chief over the objection of a fit accused, which inevitably had the effect of discrediting the accused, undermining any other defence that he or she might wish to raise.

Another case also funded through the Legal Aid system, but this time in British Columbia, was the case of *United States v. Burns and Rafay*,[2001] 1 S.C.R. 283. Two Canadian citizens were charged with three counts of aggravated first degree murder in Washington state. Both were 18 years of age at the time of the killings, and the victims were Atif Rafay's mother,

father and sister. At the time of the extradition request, Washington was a retentionist state and still imposed the death penalty. The case involved a challenge to the exercise of the Minister's discretion to surrender both the accused to the United States without seeking assurances that the death penalty would not be sought or imposed. Article 6 of the *U.S. -Canada Extradition Treaty* provided an opportunity for the Minister to seek such assurances. However, he declined to do so. The Minister's discretion must be exercised in accordance with the Charter. The Supreme Court, in approaching the question of whether the Minister's discretion was exercised in a manner which breached the Charter, concluded that the outcome turned on the nature of the death penalty itself, and in the absence of exceptional circumstances, assurances in death penalty cases would be constitutionally required. The Court, in effect, determined that within Canada the death penalty went beyond the appropriate limits of the criminal sanction, and its abolition was a principle of fundamental justice in Canadian criminal law. In reaching this conclusion the Court referred to various factors including:

the final and irreversible nature of the penalty; the growing concern about wrongful convictions in murder cases which if the death penalty existed would result in the state killing factually innocent persons; the trend in Canada to abolish the death penalty in all of its manifestations; Canada's promotion of an abolitionist agenda abroad; the evolving trend worldwide towards abolition; the frailties of the administration of criminal justice, which when recognized could never be fully eliminated in order that there be absolute confidence that the system would protect the innocent; and lastly the death row phenomenon where prolonged delay associated with death penalty litigation caused ongoing human rights concerns and psychological trauma.

The case of *Burns and Rafay* was publicly funded through B.C.'s Legal Aid Plan. Without the support of public funding, the depth of the research and the time devoted to the development of the arguments would have been impossible.

I should, however, pause to note the pro bono traditions of the criminal defence bar, because there can be no doubt when one looks at the list of interveners in *Burns and Rafay* that more likely than not, had the benefit of counsel acting pro bono for them. These interveners included Amnesty International, The International Centre for Criminal Law and Human Rights, the Criminal Lawyers' Association, the Washington Association of Criminal Defense Lawyers, and lastly and perhaps more remarkably, the Senate of the Republic of Italy. At best, interveners often can only afford to fund disbursements and count on counsel when issues of broad public importance arise to give their time freely on appeals of this kind. Their participation is invaluable.

Lastly, the case of *R. v. Conway*, [2010] 1 S.C.R. 765, raised the issue of whether the Ontario Review Board was a tribunal that could exercise Charter jurisdiction and grant Charter relief. In concluding that it could, the Supreme Court gave important guidance not only to the board that governs the daily lives of all those found not criminally responsible and who often live in closed or locked wards in hospitals, but also opened up important avenues for Charter litigation before other administrative tribunals across Canada. How far this precedent will reach to change the face of administrative tribunals is as yet unknown. However, it does offer opportunities to extend the reach of the Charter. Again, Conway was a publicly funded case. This litigation could never have been financially supported by Mr. Conway, who himself had spent the vast majority of his life confined to closed hospital wards.

While the history of this type of litigation can be the source of great pride to members of the Bar and community, there can be no doubt that the challenges facing Legal Aid today make it less able to support this type of litigation, even in the criminal law context. Many lawyers simply cannot afford to work on what is now Legal Aid's hourly rate. Experts decline to accept fees that are substantially below what they ordinarily charge, and the length and complexity of such cases only grow. The litany of problems associated with Legal Aid today could readily occupy all of our time this afternoon.

For the criminal accused, access to justice does not mean merely finding oneself before a court or a dispute resolution mechanism. The accused by necessity is present before a court. The question that must be posed is different than in the civil law context. The question to answer is whether, in the important cases that come before our courts in the criminal law context, public funding will continue for the legally aided in order that Charter issues that remain pressing and important can be raised and a fair trial assured. In the criminal law context, deficit reduction and the attendant pressures on the Legal Aid budget have not yet resulted in the loss of funding for Charter issues – however, everyone is concerned that this is a very real threat.

It must also be recognized that more and more criminal defendants come before the court unrepresented. The income threshold used by Legal Aid today to refuse a certificate in a criminal case is far too low, and no certificate will be issued when it is unlikely that the accused will be incarcerated if convicted. The consequences to the larger public interest are significant. Important legal and Charter issues that present themselves in these kinds of cases will rarely, if ever, be raised.

Even when Legal Aid is not available in the criminal law context because it has been denied to an applicant, it is noteworthy that there is still a safety net. Courts retain a power to appoint counsel who will receive public funding. This power is statutory in appellate courts hearing criminal appeals. As well, trial courts may appoint counsel where Legal Aid has been refused, the accused does not have enough money to hire counsel, and he or she would not have a fair trial without assistance of counsel.

All of the above is not to suggest that important Charter cases are not carried forward by private litigants. For example, the recent National Post litigation, triggered by a search warrant and assistance order served on the Post eventually resulted in

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a Supreme Court of Canada ruling. In the ruling the Court established the general contours and limits to a case by case privilege provided to a journalist and his or her confidential source. However, such litigation is extremely costly and can rarely be concluded without the expenditure of tens of thousands of dollars. Furthermore, such litigation must be undertaken without any expectation of a costs award against the Crown, even as a Charter remedy. In today's world, probably no single piece of litigation reaches the Supreme Court of Canada without having already cost either the public purse or the private litigant several hundred thousand dollars, if not more.

Two observations are warranted in conclusion. Criminal defence lawyers have protested, argued and criticized the Legal Aid Plan. All of the criticisms from the perspective of maintaining a vibrant Legal Aid Plan are legitimate and appropriate. However, it is also clear that the place where access to justice is most wanting is outside the administration of criminal justice – and in the civil system.

It is now a widely accepted proposition that access to justice in the civil system for low to middle income Canadians has become a burning issue. As Chief Justice McLachlin said in a speech delivered on February 11, 2011:
"Legal advice is a fundamentally vital social need that is not being provided to poor and middle income Canadians. The legal profession must work to provide access to justice for these people, as currently, only corporations and the very rich are getting such access. The middle class is caught between the two extremes of Legal Aid and paying for a lawyer – they don't qualify for Legal Aid and cannot afford lawyers. This lack of access to justice undermines confidence in the legal system."

Report after report documents this problem for ordinary Canadians, but such concerns fail to garner the attention of legislatures and parliament. It is a given in the civil system that persons who are in need of legal advice and simply cannot afford a lawyer, or who appear unrepresented before courts or administrative tribunals, simply founder. Many cannot take advantage of the protections and guarantees that may be located in the bewildering maze of legal rules that govern so much of civil society. While both levels of government have recognized the need for funding a civil legal aid plan by making some monies available, the funding is clearly inadequate.

To the extent that middle and low income Canadians have cases that involve state action, there are Charter issues that could be raised but are never brought forward. Their voices, the problems they confront, the unfairness that may exist, the discrimination that may be occasioned and suffered may well just continue for want of an ability to raise them.

Not only have governments at all levels not responded to the needs for publicly funded services, the programs once in place, even for important Charter cases have been terminated or become inadequate. The end of federal funding to the Court Challenges Program, whose mandate was to provide financial assistance to advance equality rights is just one example. Funding was stopped by the Harper government in 2006.

Another important publicly funded program is the Test Case Funding Program within Indian and Northern Affairs. In 1985 the program was designed to provide First Nations with greater access to the courts for the determination of issues uniquely affecting them. In 2005 while the Treasury Board recommended continuing funding the program at roughly $750,000 per annum, it recommended that assistance be confined to test cases at the appeal level. As others have quite correctly observed, success at the appellate level is almost always dependent of the development of a full evidentiary record at trial. This limit on program funding will have a serious and negative impact on adequately preparing cases for the trial court.

What is the answer?

I have a general proposition I would ask you to accept. This proposition is derived from my experience at the criminal bar and can be stated as follows: important Charter issues lie within many ordinary, seemingly banal civil cases that never see the light of day because ordinary Canadians can't afford the luxury of a lawyer let alone access to a court or other form for adjudication.

If I am correct, then it is clear that many of the solutions discussed by members of the Bar, the Judiciary and the Academy can only be seen as partial stop gap measures that will never fill the basic social need for legal services, let alone breathe life into cases that could raise important Charter issues.

Many things seem to stand in the way of filling this basic social need. The private bar's work is still organized around billable hours, which can be set at exorbitant rates. Law firms, large and mid-size seem only to get larger, reaching out to provide services to corporations and the wealthy on an international level. Rarely do they reach down to the community. Pro bono work must be largely understood as charity.

Large firms have not and will never undertake the kind of work that will meet broad social needs found at the ground level. For example, they are not in a position to provide legal services in a comprehensive program for women in abusive relationships or who face the Children's Aid Society in child protection proceedings. No doubt they are and will participate in pro bono work at appellate levels, particularly as interveners.

Roughly one third of the lawyers in Ontario are practising at a community based level and largely as sole practitioners. Rather than being in a position to offer meaningful pro bono assistance, they tend to operate on a shoestring budget and simply cannot undertake much if any significant pro bono work.

All of the above is not to suggest that in many circumstances pro bono work is significant and has been undertaken on important issues. If the current organization of the private bar or the provision of pro bono services is not the answer, one

Funding the Charter Challenge

looks to whether the Charter itself can help. Is there a constitutional right to legal aid in civil cases?

In the 1999 landmark decision of *New Brunswick (Minister of Health and Community Services and G.(J.))*,[1999] 3 S.C.R. 46, a case where the court was asked to grant a 6 month extension of temporary Crown wardship and the applicant, a recipient of social assistance, was not eligible for Legal Aid because the Plan did not cover such proceedings. The Supreme Court granted the extension. The Court held that the trial judge should have ordered the province to provide publicly funded counsel to the mother. Relying on section 7 of the Charter, the majority reasoned that both the mother's and the children's section 7 rights to security of the person were in jeopardy, and without the benefit of counsel, the mother would be unable to effectively participate in the hearing. This, the Court held, created an unacceptable risk of error determining the best interests of the children – affecting both their rights and hers.

Many people welcomed this decision believing it would result in publicly funded counsel in all civil cases when section 7 rights were engaged, legal representation was required for a fair hearing and government action had triggered the hearing. Now, fast forward over a decade, and the problems with access to justice in the civil system have not been remedied, and access to justice remains as elusive as ever.

I side with my colleague, Len Doust, who on March 8, 2011 issued a report on behalf of the B.C. Commission on Legal Aid. The Commission was funded by the Canadian Bar Association, B.C. branch, the Law Society of British Columbia, the Law Foundation of British Columbia, and the B.C. Crown Attorneys' Association, and the Vancouver and Victoria Bar Associations. Doust calls for a legal aid system on both the civil and criminal sides that treats legal services as an essential public service on a par with health care and education.

Doust concludes that the absence of such a service results in real human suffering and the consequent and related inevitable social and economic cost to the community. He documents the erosion of the provincial government commitment to Legal Aid, and the steady decline of the Legal Aid budget. He proposes major changes including, enhanced funding for those charged with criminal offences, the modernization and expansion of the eligibility criteria, clear access to publicly funded counsel in a host of civil law matters.

His conclusions echo those of Melina Buckley in her 2010 report to the Canadian Bar Association entitled, "Moving Forward on Legal Aid", as well as the CBA's five point platform. These also call upon governments to recognize Legal Aid as an essential service and to set national standards for civil and criminal Legal Aid coverage and eligibility requirements. Anyone envisaging such a fundamental change as is proposed can well imagine that important Charter issues will be funded through such a program.

Much has been said about other kinds of alternatives. Ancillary doctrines developed by the courts in respect to costs jurisprudence in public interest litigation where the plaintiff has no financial stake, or has been granted public interest standing, will also assist in raising important Charter challenges in the civil context. However, before any such doctrinal changes in the law of costs are meaningful, they must be predictable in application and be applied with significant consistency to allow litigants to reasonably predict the costs, and have confidence that in litigation that has a significant public interest component, costs will not be imposed on an indemnification rationale if they ultimately lose. Costs are very much an exercise of judicial discretion. Cost rules need considered explication by our courts before an applicant or plaintiff can predictably rely on the rules to ensure that launching litigation is not the equivalent of financial ruin. Cost rules have a long way to go to be seen as actively encouraging access to justice where issues of public interest are in play.

Nor does a case by case approach recently approved the Supreme Court of Canada in *R. v. Caron,* [2011] SCC 5, for interim funding orders - which the Supreme Court of Canada instructs are to be reserved for the most exceptional cases - go far enough.

Litigating a *Charter* Claim at Downtown Legal Services

Downtown Legal Services is the University of Toronto's legal clinic. Recently, Bri Bovell, a DLS volunteer in its criminal division, represented a client who alleged his Charter *rights had been violated while being detained by police. The names in this story have been modified. The facts of the arrest are based on the information provided by Mr. Smith to the author.*

Mr. Smith already felt he had no choice from the moment he heard "pull aside". He had to comply with the officer. Mr. Smith had left his friend's basement apartment with a small bag of crack cocaine in his backpack. While biking away, a police car suddenly cut him off. The officer told him to "pull aside."

The officer did not state why he needed to pull aside. He asked for his bag and if anything was in the bag that would incriminate him. Mr. Smith handed over his bag and said yes. The officer did not inform Mr. Smith of any of his legal rights. Instead, he looked inside, saw the drugs, and ordered him into the police car. Mr. Smith immediately obeyed. The officer started talking to Mr. Smith in the car. He asked numerous questions about the friend he was visiting, wanting to know where this woman obtained her drugs. He told him he knew Mr. Smith's friend was a user. But what he didn't tell Mr. Smith were any of his legal rights or reason for detention. According to Mr. Smith, he chatted in a friendly manner as if they were old friends. Mr. Smith even asked if he was being charged, and was told no, before being handed a ticket for cocaine possession and given permission to leave the car. He arrived at our meeting confused and concerned about the consequences of the ticket. He insisted that "the officer acted like we were friends," and that he was surprised to have been given the ticket at the end.

At issue was whether the police breached Mr Smith's s. 8 Charter protected right to be free from unreasonable search and seizure, his s.9 right to be free from arbitrary detainment and his s.10(a) and 10(b) rights to be informed of the reason for his arrest and his right to retain counsel. Our position was that without the arbitrary detention, the police would not have obtained the cocaine. In our view the evidence was gathered in breach of his s. 8, 9 and 10 rights. Given the seriousness of consecutive breaches, we would argue the admission of such evidence would bring the administration of justice into disrepute and it ought to be excluded.

The convergence of Charter violations sprang from his arbitrary detention. Because the officer detained Mr. Smith, Mr. Smith did not believe he had a choice to comply with the officer, nor a choice to remain silent. In fact, he explicitly told me that he "had to do everything the officer said." He confessed because he believed that he had no choice.

Section 9 of the Charter guards against unjustified state intrusions upon an individual's mental and physical liberty. The coercive pressures of detention and imprisonment can only be applied with adequate justification. In our view the officer did not have the required grounds of reasonable suspicion to detain Mr. Smith for investigation; he had not seen anything that connected Mr. Smith to the commission of a crime. The basement apartment had no windows; so, the officer could not have seen Mr. Smith place the crack cocaine in his bag. What the officer did see was Mr. Smith leave the basement apartment of a known drug user. This formed the basis of the officer's hunch.

Based on this limited hunch, the officer took Mr. Smith under the state's control. In this vulnerable position, Mr. Smith was in desperate need of legal advice; but, the officer failed in his duty to inform Mr. Smith of his rights and to address the imbalance between his power and the person under his control. Consistent with the officer's bombardment of questions to Mr. Smith about his friend, it was our view that the officer likely wanted to use Mr. Smith to gain information about drug dealing in the neighbourhood.

The officer cast aside Mr. Smith's s.9 Charter right on his pursuit of information. The police practice of using 'sources' to elicit information about drug rings is an important source of probative information. But, crime investigation cannot be an absolute goal. As the Supreme Court said in *Hunter v. Southam*, there is always a balance that must be assessed to determine whether the individual's privacy interests and desire to be left alone on the one hand, should give way to the state's interest in law enforcement in a particular circumstance. Once he had Mr. Smith inside his car, he attempted to elicit as much information about the drug trade in the neighbourhood as possible. Mr. Smith's legal rights did not factor into the picture.

On the day of the Charter voir dire, the police officer confirmed our position; he likely wanted Mr. Smith as a source of information. The trial was to consist essentially of a voir dire to determine the admissibility of the cocaine obtained from the search. Just prior to entering the courtroom, the officer approached Mr. Smith in a friendly manner, behaving more like an old friend than an arresting officer. This behaviour did not elude the Crown; he took the officer aside for twenty minutes or so before returning to speak to us. "We won't be proceeding with the charges today," he abruptly told me. He turned around before I had the opportunity to probe any further. Once inside the courtroom he quickly seized the opportunity to prevent any further discussion on the topic. "Your Honour," he said, "the Crown will be withdrawing the charges. We have no further discussion on this matter."

Legal rights cannot function effectively in informational vacuums; the legal system can be an intimidating and frightening place, particularly when an individual is not apprised of the information that he or she has the right to receive. The ordeal leading up to the ticket and the subsequent year and a half that it took to bring the matter to trial threw Mr. Smith into a legal labyrinth, treating him as source of information the police desired, but without the dignity he is entitled to under the Charter.

Bri Bovell is a JD Candidate at the University of Toronto Faculty of Law and a volunteer at Downtown Legal Services.

Observations on the Polygamy Reference Proceedings

The Asper Centre, jointly with the Canadian Coalition for the Rights of Children, was granted standing in the Reference re: s.293 of the Criminal Code. During the fall 2010 semester, a group of students in the Asper Centre Clinical Legal Education course was dedicated to working on the proceedings. In the winter term, an expanded group of students has continued this work as part of a practicum course. Throughout the term, several students in the group have had the opportunity to travel to Vancouver to attend the proceedings. I was among those students, attending three days of court at the end of January. During that time I, along with two other students, observed the testimony of three current members of the Bountiful Fundamentalist Church of Jesus Christ of Latter Day Saint (FLDS) community, all of whom testified anonymously.

Earlier in the proceedings, the FLDS applied for and was granted an order allowing the three witnesses to testify anonymously. The application was made on the basis that the witnesses feared future criminal prosecution and would be unlikely to testify without the guarantee of anonymity. To satisfy this guarantee, all of the witnesses gave their testimony in a separate courtroom where only Chief Justice Robert Bauman, the FLDS lawyer, the court clerk and the court reporter, could see them. Lawyers for the parties and other interested persons and members of the public remained in the main courtroom, where we watched the examinations through a closed circuit television. During cross-examination, lawyers for the parties and other interested persons addressed the witnesses through the closed circuit television.

The physical separation of the FLDS witnesses during their testimony mirrored the cultural separation that they described in their testimony. All three of the witnesses described their lives within the FLDS community as lived almost entirely apart from the broader community outside of the FLDS. It is this separateness and insularity that is in large part responsible for the relative difficulty in building a coherent empirical record on the lives of those within the Bountiful FLDS community.

All three of the anonymous witnesses were adult women. The first witness was in her mid- 40s, a mother of nine biological children and a wife in a plural marriage. She had married at age 15 while she was living in the United States and then moved to Bountiful where she currently lives with her family. The second witness was 24 years old and a mother of a 5 year-old child. After marrying into a plural marriage at 17, she pursued courses in accounting at a college in Cranbrook, B.C. The final anonymous witness was 22 years old and, while a resident of Bountiful, attends Southern Utah University in the summers where she is studying education. This witness is unmarried, but was raised in a polygamous family. Through recalling their past experiences from their youth, and describing their current roles as wives, mothers, educators and community members, the three witnesses gave some insight on the experiences of children and youth within the FLDS community.

Part of the witnesses' testimony described childhood within the FLDS community as characterized by familial support and attention, dedication to education and some autonomy from FLDS leaders in the community. On cross-examination, however, these narratives began to break down. The witnesses described underage marriages, trafficking of girls across the US-Canada border and adult unwillingness and inability to intervene or seek help for girls who were the married underage or the victims of sexual abuse. While the witnesses described the school in Bountiful as excellent, their testimony also described that same system as containing a substantial religious component, no sexual education and little to no history of sending its graduates on to secondary institutions in British Columbia, or on to become professionals within the Bountiful community.

For those of us who had the opportunity to observe the examination and cross-examination, the experience was both valuable and incredibly interesting. The witnesses' personal narratives encompassed many of the legal issues that we have worked on through our work at the Asper Centre. These witnesses lived in a community where they lived out their religious beliefs, including the practice of polygamy. It was clear from their testimony that placed immense value on their religion, their values and their community structure. However, it was also clear that the community had failed to provide children with protection from underage marriage, trafficking and other abuses. All of the students in the practicum look forward to seeing how these issues are reflected in the closing submission in April and, ultimately, the Court's holding.

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Counsel for the Asper Centre at the Polygamy Reference L-R: Cheryl Milne, Executive Director of the Asper Centre, Brent Olthuis and Stephanie McHugh of Hunter Litigation Chambers

Is Coalition Government Here to Stay in Britain?

In the latest of the Asper Centre's Constitutional Roundtable lectures, Professor Robert Hazell of the University College London's Department of Political Science provided an account of the trend towards hung parliaments in Britain and the prospect for constitutional reforms currently on the table. In the lecture, sponsored by the Asper Centre, the Faculty of Law and the Department of Political Science, Professor Hazell addressed four reforms put forward by the current government: electoral reform, fixed term parliaments, reducing seats the House of Commons, and House of Lords reform. He argued that while the Conservative - Liberal Democrat coalition appears to be a stable government, the constitutional reforms proposed will not easily be achieved.

Since the mid-twentieth century the major parties in Britain have tended to receive a declining share of the overall popular vote. If this trend continues, hung parliaments are likely to become more common. The stability of the Conservative - Liberal Democrat coalition is not particularly surprising, argued Hazell, as coalitions are the second most stable governments after single party majorities. Additionally, the coalition's approach of "good faith and no surprises" is holding up.

Of the four constitutional reforms advocated, electoral reform has been adopted with the most vigor. The government plans to hold a referendum in the coming months on whether to switch from the current First Past the Post electoral system to Alternative Vote. The AV system would likely yield results similar to the current system, and is not a proportional system. Prof. Hazell suggests that the prospect for success on this front is limited by the lack on formal consultation and limited time-line for voter education.

The proposal for fixed five-year terms in parliament has been slower to move through parliament. The bill proposes fixed five-year terms, long by international standards, but allows for early dissolution through parliamentary procedure. It abolishes the prerogative power of dissolution, an approach unlike that adopted in our own federal fixed term laws. Hazell argued this difference may stem from the adaptability of England's unwritten constitution. While this bill, if passed, would not bind future parliaments, it does create a new constitutional norm.

Reducing the size of the House of Commons by fifty seats to 600 presents an enormous administrative task, one that would require significant streamlining in order to go forward according to Hazell. Moreover, it has proven contentious, facing significant resistance in the form of Labour filibusters in the House of Lords.

The fourth and final reform discussed was the House of Lords. Though the proposals are yet to be released, Hazell suggested that they are likely to include a reduced number of members who would be limited to serving single 15 year terms, most or all of whom would be elected a third at a time every five years.

A number of audience questions went to the issue of reforming the House of Lords. Specifically, Hazell was asked about how an elected, and perhaps more legitimate, second chamber might affect the workings of parliament. His response pointed to a fundamental component of the struggle to define its purpose going forward. The House of Lords is by no means a weak chamber, and since major reforms in 1999 it has used its powers more willingly. Hazell argued that one of its great assets is the expertise possessed by its members, which allows for detailed analysis of the intricacies of legislation. It is unclear whether an elected chamber would be willing to devote the same effort to work that is, in general, less politically rewarding

Sean Tyler is a JD Candidate at the University of Toronto Faculty of Law.

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Message from the Executive Director

As I write this we are in the midst of a federal election. There is no better time for the release of the Asper Centre's report on unwritten constitutional conventions. On February 3-4, the Asper Centre with University Professor Emeritus Peter Russell, pulled together leading scholars and political experts for a closed workshop on the topic of the unwritten rules that govern our parliamentary democracy. Governed by Chatham House rules, the report of the discussions does not attribute comments to any particular participant. However, with their consent we have listed their names in the appendix to the report — and it is an impressive list.

While the topic of constitutional conventions may seem somewhat removed from the Centre's focus on constitutional rights, we are of the view that these conventions are essential to the realization of democratic rights in Canada. In the English language leaders' debate held on April 12th, Prime Minister Harper stated that the party that wins the most seats gets to form the government and dismissed the other leaders' assertions that the leader needs to obtain the confidence of the House of Commons in order to govern. The differences between the positions are at the core of how our form of Westminster democracy functions. There was broad support in our workshop discussions for the confidence convention: that the right to govern depends on maintaining the confidence of the House. As we noted, the London-based Institute for Government documents how Canada has been lagging behind in adjusting to the new era worldwide of minority and coalition governments in a chapter of their report entitled, "Canada's Dysfunctional Minority Parliament." As you read this we may again be into a period of fractious minority government with the governing party behaving as if it has a majority mandate.

Our report, *Adjusting to a New Era of Parliamentary Government*, calls for clear guidelines such as New Zealand and the United Kingdom now have in their Cabinet Manuals, establishing principles that better inform the public about how our system is supposed to work. It calls for a review of Standing Orders with respect to votes of non-confidence and informal measures to adjust the practices and norms of parliamentary life to make parliament more co-operative and functional in an era in which hung parliaments frequently occur. The Toronto Star, in comparing our discussions with the political rhetoric, likened us to the adult conversation at the holiday dinner gathering with the noise from the political campaign compared to the "kids' table, complete with the shrieking and the hurled objects." Our job now is to get the kids to listen to us once the election shrieking stops.

Copies of our report are available on the website in both official languages. Hard copies will be distributed in a forum sponsored by the Churchill Society for the Advancement of Parliamentary Democracy and a Canadian Bar Association Conference in Ottawa on June 10th. Costs of the translation and publication was provided by the Churchill Society .

I am proud that we are once again, with the litigation and policy work outlined in this newsletter, at the cutting edge of constitutional issues being debated in this country.

Thank You to Our Pro Bono Partners

Brent Olthuis & Stephanie McHugh, Hunter Litigation Chambers—our pro bono counsel in the *Polygamy Reference*

Martha Healey, Ogilvy Renault LLP—our pro bono Ottawa agent for *R. v. Caron*

New Resources Available on the Asper Centre Website

- *Adjusting to a New Era of Parliamentary Democracy*—Report of the workshop on Constitutional Conventions
- Webcast of Professor Robert Hazell, "is Coalition Government Here to Stay in Britain?"
- Webcast of April 1st Symposium: Funding the Charter Challenge
- Webcast of Morris A. Gross Memorial Lecture: Marlys Edwardh CM.

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