

# ASPER CENTRE OUTLOOK

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## *The Charter of Rights and Freedoms at Thirty*

April marks the thirtieth anniversary of the signing of the *Canadian Charter of Rights and Freedoms*. For those of us who practice constitutional law there have been many changes over the years, but just as fashion is often retrospective, we are seeing in some instances a return to earlier days. I refer particularly to the equality rights cases that seem to harken back to *Andrews v Law Society of British Columbia*. Much criticism was leveled at the decision in *Law v Canada*, lamenting the development of an onerous test for complainants that relied upon a strict test of comparison with an elusive human dignity element. *R v Kapp* has been heralded as a return to the basic principles animating the equality rights provision, but its impact is still unclear. A number of cases awaiting judgment or making their way up from the lower courts may give an indication of where we are heading. We may also look forward to the re-litigation of issues such as those facing the court in *Rodriguez v British Columbia (AG)*, as a case argued by constitutional lawyer Joseph Arvay makes its way from the British Columbia Supreme Court on the right to make and facilitate the decision to die.

Despite the possible repetition of the broader issues at stake, the cases heard today are much different than those heard in the early days of the *Charter*. As Joseph Arvay, the Asper Centre's inaugural Constitutional-Litigator-in-Residence comments in this issue of the Asper Centre Outlook, the constitutional cases coming before the courts have a much better factual foundation than the early cases. This indeed increases the costs and length of the litigation, but is a necessary development. It remains to be seen whether we have gone too far, with thousands of pages of materials being filed in cases such as *Bedford* and the *Polygamy Reference*. This will be one of the topics of the conference that the Asper Centre is hosting next fall reflecting on the thirty years of litigation under the *Charter* and the role that social science evidence has played.

The *Charter* is not without its detractors. Prime Minister Stephen Harper could not bring himself to comment favourably on the *Charter* let alone engage in a celebration of its anniversary. While a majority of Canadians feel pride in the *Charter*, not misplaced given its stature internationally, we are reminded of Quebec's alienation and the distain that some politicians feel for a document that appears to take power away from legislators and put it in the hands of judges. Legislation that is being passed at break-neck speed by the federal government may garner constitutional challenges in the coming year, including major changes to the immigration system and more mandatory minimum sentences. Is it fair to speculate whether it is a matter of "will" the notwithstanding clause be used or simply "when"?

*Cheryl Milne is the Executive Director of the David Asper Centre for Constitutional Rights*

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# Interview with the Asper Centre's Inaugural Constitutional-Litigator-in-Residence, Joseph Arvay

## ***Why did you want to come to the Asper Centre?***

I have a very high regard for the work that the Asper Centre has done in its short time on the planet. When I was thinking I would like to take a short sabbatical and wondered how I might want to spend it, I thought it would be fun and interesting to come to the Centre. This may sound like a bit of a busman's holiday to some but I just think it's a real opportunity to work with students and impart whatever knowledge or experience I have about constitutional litigation to them. I have taught in the past but it is difficult to teach and practice at the same time so I thought that by allowing myself a break from my practice, I would really enjoy reconnecting with students and the law faculty. And I suspect I will likely learn as much from both students and faculty than I teach.

## ***What kind cases or work do you expect to be involved with?***

That will really be Cheryl Milne's call. I assume I'll be working on whatever cases Cheryl decides the Centre is going to tackle in that term.

## ***How did you decide you wanted to practice constitutional litigation?***

I kind of fell into it. I had an interest in constitutional law right from my law school days. That was of course when constitutional law was just about "chickens and eggs" and who gets to regulate them – federalism issues. It wasn't about a Bills of Rights.. Nonetheless, I was always intrigued by the American Bill of Rights, having done my graduate work at Harvard. After graduating, I taught for 5 years at the University of Windsor and I taught constitutional law. Again, it was mostly federalism. It wasn't about the Charter, of course, because it hadn't come into being yet. I landed a job at the end of 1981, beginning of 1982, with the Ministry of the Attorney General. Totally coincidentally, the Charter was brought into force a few months later. I was really in the right time and in the right place to do Charter litigation and other constitutional litigation. I spent approximately 10 years doing that on the government side and was involved in many of the formative cases that were argued and decided back then.

## ***What has been the most memorable case you've worked on in your career?***

It is clearly the Little Sisters litigation: both its first iteration, which was all about whether or not customs could detain and prohibit the entry into Canada of what it considered obscene gay and lesbian books and magazines; and the second iteration, which was about whether or not the courts could order the government to pay Little Sisters advanced costs to fight the second round. I consider that litigation important both in so far as where we were successful and even where we were not. It was also the most fun I've ever had in a courtroom.



Joseph Arvay, Photo used under Creative Commons (Wikipedia)

## ***Today (April 17<sup>th</sup>, 2012) is the Charter's 30<sup>th</sup> birthday. In your opinion, how have the strategies for a successful charter challenge changed over the past 30 years?***

I think the one significant difference is that counsel now understand, much better than any of us did in the beginning, the importance of putting in a full factual and evidentiary record. These cases turn so much on the facts, as much, if not more than on the law. One of the reasons that I'm interested in coming to the Asper Centre is because I think I have something to impart to students in terms of how to create a constitutional record, how to create the case. Most law students, and even most lawyers, really only know about constitutional law from what they read in the Supreme Court of Canada or other courts' decisions. But by the time the case gets to the Supreme Court of Canada, the outcome is sometimes rather foregone because the outcome is so much a function of the underlying record. What law students usually don't learn and what I think is the most interesting about constitutional litigation is creating that record. If you compare some of the early cases, certainly some that I did, the record is pretty thin compared to what it is now. Maybe we're now erring on the side of too much of a record but that definitely has been the trend.

## ***What do you think the Insite decision, which was highly dependent on the specific circumstances of that case, will mean for other safe-injection sites that are not yet established, such as those being urged for in Ottawa and Toronto?***

The case clearly establishes a very important precedent that will make it more difficult for the federal government to refuse to allow supervised or safe-injection sites in other cities. The message seems to be that the federal government intends on resisting and fighting those applications. I suspect there's going to have to be more litigation before the issue is settled.

## ***You recently represented the BCCLA in its constitutional challenge of Canada's criminal prohibition on assisted suicide before the BC Supreme Court (Carter v Canada). What was your strategy in distinguishing this challenge from Rodriguez v. British Columbia, where the Supreme Court of Canada rejected the s. 7 and s. 15 claims?***

That's a really good question and it really calls for a fairly long answer. Essentially, I can say this: we believe that *Rodriguez* was distinguishable in a number of respects. First, we argued for additional section 7 rights than were argued in *Rodriguez*. *Rodriguez* turned solely on security of person whereas our case involves both the right to life and the right to liberty. Secondly, *Rodriguez* was limited to one principle of fundamental justice – the principle of arbitrariness.

*Continued on page 3*

Subsequently to *Rodriguez*, there have emerged at least three new principles of fundamental justice – overbreadth, gross disproportionality, and the principle of equality. We also believe that in light of cases like *Malmo-Levine* and especially *A.C.* (the case about whether a mature child can refuse a blood transfusion) and the *Insite* case itself, the SCC has approached the principle of arbitrariness differently than it did in *Rodriguez*. It will take too long for me to explain all of that I am afraid.

We also have taken the position that given that there was a sea change in the legislative facts from what existed in *Rodriguez* (our record consisted of 47 three inch binders compared to one binder in *Rodriguez* including extensive cross examination of expert witnesses) and especially when section 1 is at play, the doctrine of *stare decisis* properly construed will not prevent the trial court from coming to a different conclusion than the SCC. Unfortunately, the Ontario Court of Appeal in the *Bedford* case has just recently come to a contrary conclusion when they said that Justice Himel was wrong in not considering herself bound by the *Prostitution Reference* on one aspect of the case. We have just yesterday appeared back before our trial judge in the *Carter* case in response to her request for further submissions as to the implications of *Bedford*. We are awaiting her decision.

***Do you have any advice for students who want to practice constitutional litigation?***

Get your inheritance secured first. Get a real day job. More seriously, there are maybe three ways of practicing constitutional litigation for young lawyers. The most obvious way is to find

yourself in a clinic that does public interest law. You've got to be ready to accept the salary that comes with public interest law, which is not very high.

Another way is to practice labour law or criminal law. That seems to be the two areas where constitutional law more commonly crops up.

The third is to go to a big firm and to try and make it a condition of your employment that you get to do *pro bono* work on constitutional cases. It seems to me that that's where I see some of the best and brightest young lawyers doing constitutional law coming from.

Those are the three obvious ways. It is very difficult to do what I do. I have a practice that is not exclusively but is largely a public law litigation practice. The reason why it is very difficult is because funding of constitutional litigation is very difficult and very sparse. I've been fortunate and I make a good living but it is somewhat implausible, to just think you're going to hang up a shingle and practice constitutional law. Truth is most lawyers, even those who want to practice constitutional law, might only do one or two constitutional cases a year if that. I don't think too many lawyers have a steady diet of it. There are a few of us but there aren't too many. But I don't want to discourage anyone from trying. It's like anything else: if you put your mind to it, work hard and have some luck, anything is possible.

*Rebeka Lauks and Esther Oh are second year JD Candidates at the University of Toronto Faculty of Law.*

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## David Asper Clinic - A Student's Experience

For students who are looking for a little diversion away from the tried-and-true 'get lectured at/struggle to stay awake/panic for exams' courses, you may be considering one of the wonderful clinical courses at the law school. Good for you! It's the perfect course for the overachieving keener in all of us: getting up early for a 3 hour class, boatloads of readings, and more legal drafting and research than you can shake a stick at.

But in all seriousness, although the workload can be heavy, my experience with the David Asper Centre Clinical Education Course has been the most rewarding since I entered law school. It offers a chance to get intimately involved in high profile appellate level cases – a rare experience that cannot be captured by regular classroom courses or mooting, no matter how competitive. In fact, the clinical program is more closely analogous to work as an articling student at a small firm; from the high level of responsibility down to working the binding machines and calling Ottawa to get your head around convoluted Supreme Court rules and procedures.

From September to January, my partner and I provided litigation support for an Asper Centre intervention in the case of the *Attorney General of Canada v Downtown Eastside Sex Workers United Against Violence Society, et al.* The case was originally a constitutional challenge levied towards a variety of criminal provisions against prostitution (similar to the *Bedford* case in Ontario, although slightly different in substance and scope). However, the Attorney General successfully petitioned for the case to be dropped for lack of standing. The plaintiffs went all the way to the Supreme Court to

try and get standing, while offering the Court a chance to revisit the oft-criticized *Canadian Council of Churches* test for public interest standing.

The intervention itself was an amazing experience. We had the privilege of working closely with Cheryl Milne and Kent Roach in developing our core arguments. Everything from comparative research to factum and pleadings drafting was handled by my partner and me. We also suffered the indignity of having the Attorney General reject us, only to file a response and have the Supreme Court let us in!

The experience culminated in a trip to Ottawa, which unfortunately I was unable to attend. However, I felt a tremendous sense of fulfillment after seeing Professor Roach at the Supreme Court so passionately and persuasively deliver the arguments we had worked long and hard on. I could not have asked for a better ending to a long semester.

*Vince Wong is a second year JD Candidate at the University of Toronto Faculty of Law*

# Case Commentaries

## The Jury Vetting Cases

The Supreme Court heard the appeals in what has collectively been called the Jury Vetting Cases March 14-15, 2012. The Asper Centre was granted intervener status and was represented by Professor Lisa Austin and Executive Director Cheryl Milne who presented the oral argument.

The appeals were on four murder charges and one fraud charge in which the police performed background checks on prospective jurors for the benefit of Crown prosecutors. The Ontario Court of Appeal dismissed all the appeals stating that there was no miscarriage of justice, as the vetting did not affect the fairness of the trials.

The Asper Centre's position was that the actions of the State, as represented by the police and prosecutors, interfered with the juror's reasonable expectation of privacy and that this brought the administration of justice into disrepute. The Centre requested that the Court make a clear statement condemning these actions as incompatible with an effective justice system and contrary to the *Charter* rights enjoyed by all Canadians.

Section 8 of the *Charter* states: "Everyone has the right to be secure against unreasonable search or seizure." The Centre argued that the authorities breached jurors' privacy rights by conducting unauthorized searches. Government agencies hold personal information, but this did not mean that the information could be used and disseminated without oversight and permission. Although there is not an absolute right to privacy in the *Charter*, the Centre submitted that there is a duty on the state to balance the legitimate needs of investigation with the interests of private citizens. The people being investigated were potential jurors being called on to perform their civic duty. The only purpose of the police investigations was to pass information on to Crown prosecutors to aid in their jury selection.

This intelligence was not shared with the defence representatives. The Ontario Court of Appeal's finding that there was no miscarriage of justice did not consider the impact on a person's reasonable expectation of privacy as it was focussed on questions of fair trial. The State did not justify its actions in performing the search in regards to juror rights.

Canadian citizens may not serve on a jury if they have been convicted of an indictable offence. The *Juries Act* allows the sheriff to access the Canadian Police Information Centre database (CPIC) to determine a juror's eligibility and to coordinate with police. There is no authorization for this information to be shared with other agencies. Jurors can be subject to preemptory challenge but Canadian courts are careful to not allow the aggressive American style of choosing juries. If the State wishes to delve into the lives of jurors, any such search must be a reasonable one. The Centre argued that the vetting of jurors in these cases was a fishing expedition. The level of

reasonableness required was not one of post event justification but of legitimate suspicion based on evidence. This was a standard that the Crown could not demonstrate.

The Centre's final argument was that the State's breach of the Rule of Law brought the administration of justice into disrepute. Juries are an essential part of Canadian justice and have been recognized by the courts as vital in enabling a fairer, more impartial system. The systematic breach of juror privacy rights brings doubt upon the proper administration of justice. Jurors' personal information is private. This keeps them safe from possible tampering and reprisal. If unadulterated access to this information by government officials is permitted to continue, then confidence in anonymity will be removed. Jurors already have what is perceived as a thankless though necessary role. Public perception of the justice system will be damaged if it is assumed that their rights to privacy do not apply simply because they are performing their civic duty. This erosion of *Charter* rights would have a serious impact on perceptions of fairness and confidence in the unbiased administration of justice.

The Centre requested the Court to follow the recommendations of Ontario's Information and Privacy Commissioner in clarifying when it is appropriate to conduct background checks. It entreated the Court to censure State investigations that go beyond legal requirements. Jurors are third parties in disputes and, when their rights have been violated, have little recourse. The Asper Centre advocated that the Supreme Court of Canada define limits on juror investigation. The privacy rights of all citizens are at stake.

The Court reserved judgment. The Asper Centre's written arguments are available on the Centre's website.

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Cheryl Milne & Professor Lisa Austin, counsel for the Asper Centre at the Supreme Court of Canada

# ONCA: Bawdy-House and Living Off the Avails\Provisions Are Overbroad and Grossly Disproportionate

On March 26<sup>th</sup>, 2012, the Ontario Court of Appeal rendered its decision in *Bedford v Canada*, the constitutional challenge to the prostitution provisions in the *Criminal Code*. The five justice panel unanimously held that s.210 (the bawdy house provision) and s. 212(1)(j) (the living off the avails provision) breached s. 7 of the Charter by infringing the claimants' right to security of the person in a manner that was not in accordance with principles of fundamental justice, and were not justified under s. 1. As a remedy, the court issued a delayed declaration of invalidity for s. 210, and read in the words "in circumstances of exploitation" in s. 212(1)(j) in order to bring the text in line with the legislative objective and cure its unconstitutionality.

The court split three to two on the constitutionality of s. 213(1)(c) (the communication provision). Doherty, Rosenberg and Feldman JJA held that the provision did not breach s.7; MacPherson and Cronk JJA held that the communication provision breached s. 7 in a manner that was not justified under s. 1.

## The Security of the Person Claim

The court summarized the security of the person claim as follows:

Properly understood, the respondents' security of the person claim is about self-preservation. The preservation of one's physical safety and well-being is a fundamental component of personal autonomy. Personal autonomy lies at the heart of the right to security of the person.

The court agreed that a law that *prevents* a person from preserving their safety *does* infringe security of the person. The court analogized the present situation with a law that makes the "self-defence" provision inapplicable to persons engaged in prostitution, thus making a prostitute choose between self-preservation and criminal sanction.

## The Provisions Do Not Reflect a Broad Objective of "Eradicating" Prostitution

The court's analysis of the legislative objective of the provisions is essential for the principles of fundamental justice analysis. The Ontario Court of Appeal rejected the Attorney General of Ontario's argument that the provisions, as a whole, reflect a legislative objective of "eradicating" prostitution. The court, relying on the interpretations of the legislative objective apparent in the *Prostitution Reference*, held that it was "satisfied that the challenged provisions are not aimed at eradicating prostitution, but only some of the consequences associated with it, such as disruption of neighbourhoods and the exploitation of vulnerable women by pimps." By rejecting the argument that the provisions have a collective, overarching objective of "eradicating" prostitution, the court proceeded to analyse each of the three challenged provisions for arbitrariness, overbreadth and gross disproportionality in light of their three distinct (narrower) legislative objectives.



Courtroom at Ontario Court of Appeal, Photo used under Creative Commons (Wikipedia) /Photographer: Padraic Ryan

## The Bawdy House Provision (s 210)

The court held that the bawdy-house provision passes the arbitrariness analysis, but fails on the overbreadth and gross disproportionality tests. The legislative objective of s. 210 is "to combat neighbourhood disruption or disorder and to safeguard public health and safety". The provision is not arbitrary, because it targets the social harms it aims to prevent. However, the provision is overbroad because it captures conduct that is not likely to lead to those social harms (i.e. "a prostitute operating discreetly by herself, in her own premises"). The provision is also grossly disproportionate because the impact on prostitutes is "extreme"; the provision prevents prostitutes from taking "the basic safety precaution of moving indoors to locations under their control, which the application judge held is the safest way to sell sex." Finally, s. 1 cannot cure the "overbreadth" and "gross disproportionality" of s. 210, as such a provision would fail on the minimal impairment step of the s. 1 test. The court also emphasized that s. 7 breaches will only be justified under s. 1 in exceptional circumstances.

The court clarified that it is not holding bawdy-house prohibitions *per se* to be unconstitutional, and that it is open to Parliament to draft a Charter-compliant bawdy-house provision "that is consistent with the modern values of human dignity and equality and is directed at specific pressing social problems".

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## The Living Off the Avails Provision (s 212(1)(j))

The court held that the living off the avails provision is not arbitrary, but it is overbroad and grossly disproportionate. The legislative purpose of s 212(1)(j) is the prevention of exploitation of prostitutes by pimps. The section is not arbitrary, because it does target this objective. However, the section is overbroad because it captures relationships that are in no way exploitative (i.e. a bodyguards, drivers, receptionists). On this point, the court rejected the argument that only a blanket prohibition would achieve the legislative purpose. The provision is also grossly disproportionate; by not targeting strictly exploitative relationships, the provision prevents prostitutes from hiring people who *enhance* their safety, and may, in fact increase the likelihood of exploitation. The court also concluded that the s 7 Charter breach is not justified under s 1, for the same reasons as the bawdy-house provision.

The court concluded, however, that the unconstitutionality of s 212(1)(j) can be cured by reading in the words “in circumstances of exploitation”. In the view of the court, striking down the provision would have left prostitutes unprotected from exploitative pimps; the “reading in” remedy better targets the unconstitutionality of the provision, and narrows its scope.

## The Communication Provision (s 213(1)(c)): the Court's Disagreement

Doherty, Rosenberg and Feldman JJA held that s 213(1)(c) serves an important objective of reducing the social nuisance effects of street prostitution. Furthermore, the impact of the provision on the claimants' security of the person interest is not high enough to make the provision grossly disproportionate. In the view of the majority, the record did not support a finding that the initial screening of customers was an “essential tool” of safety.

It is apparent in the majority's reasons that the gross disproportionality analysis of the communication provision is conducted in the reformed context in which s 210 is struck down and s 212(1)(j) is narrowed. In this reformed context, prostitutes would be able to move indoors and hire protection staff.

MacPherson and Cronk JJA disagreed with the majority on the constitutionality of the communication provision for seven reasons. MacPherson JA's two most compelling concerns are the fifth and seventh.

On the fifth concern, the vulnerability of street workers, he pointed out that the majority has “turned the question of pre-existing disadvantage on its head. They reason that because prostitutes' marginalization contributes to their insecurity, the adverse effects of the law are diluted and should be given less weight.” He argued that on the contrary, “[a]ny measure that denies an already vulnerable person the opportunity to protect herself from serious physical violence, including assault, rape and murder, involves a grave infringement of that individual's security of the person.”

On the seventh point, MacPherson JA noted that the

communication provision, the most recent of the three, served to particularly endanger prostitutes in light of the bawdy-house and the living off the avails provisions. In his view, the majority's decision on the first two sections *will not cure* the harmful effects of the communication provision. He colourfully wrote, “[t]he world in which street prostitutes actually operate is the streets, on their own. It is not a world of hotels, homes or condos. It is not a world of receptionists, drivers and bodyguards.”

## Conclusion

A key point to understanding the decision and its effect is the interpretation of the provisions' legislative objective.

First, by rejecting the argument that the sections have an “overarching” objective of “eradicating prostitution”, the court is able to assess *each* provision in terms of *its* impact on the security of the person of the claimants, and assess whether *each* provision conforms to the principles of fundamental justice according to *its distinct* legislative objective. This “disaggregation” of the objectives is important to holding *any* provision unconstitutional. Otherwise, as the majority notes, “the fact that prostitution itself is not illegal is of little constitutional significance.”

Second, this disaggregation, and distinct treatment of the provisions poses a serious difficulty in terms of assessing the harms and benefits of the provision that is assessed last – here, the communication provision. It is apparent that the court's major disagreement on the communication provision is largely rooted in different assumptions about the effect of striking out the bawdy-house provision and narrowing the living off the avails provision. The majority assesses the impact of s 213(1)(c) on the assumption that “the ground has shifted”. The minority is skeptical about the extent to which the ground is really shifting for the most vulnerable of prostitutes.

Finally, the interpretation of the legislative objective will play a key role in shaping the legislative response that is to come (likely after the Supreme Court's word on it). In other words, because so much of the analysis hinges on the objective *not* being the eradication of prostitution, it is difficult to discern the exact constraints that this decision would place on a new legislative scheme that aims to “eradicate prostitution”. Perhaps a government that has just enacted the Omnibus Crime Bill would be more likely to respond with a scheme that seeks to “eradicate prostitution”, than with a scheme of regulation and oversight for bawdy houses. Only time will tell.

A longer version of this comment is available on the Asper Centre's website.

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# Objectivity and Freedom of Religion: *S.L. v. Commission scolaire des Chênes*

How can one demonstrate objectively that a right has been violated when the exercise of that right is subjective and invisible? This was the challenge faced by a group of Quebec parents when they tried to convince the Court that allowing their children to learn about different religions in school would stand in the way of their right to raise their children Catholic.

In *S.L. v. Commission scolaire des Chênes* (2012 SCC 7) [*Commission scolaire des Chênes*], a unanimous Supreme Court of Canada (SCC) ruled that the requirement to enroll school-aged children in an Ethics and Religious Culture program did not violate the parents' freedom of religion under s.2(a) of the *Canadian Charter of Rights and Freedoms*. While the decision theoretically left the door open to future challenges of the constitutionality of mandatory courses on religion, it demonstrated the difficulty of applying the test from *Syndicat Northcrest v. Amselem* (2004 SCC 47) [*Amselem*] to non-physical restrictions on religious freedom.

Basing its reasoning on *Amselem*, the SCC found that the appellants had failed to objectively demonstrate how the program interfered with their ability to pass on the Catholic religion to their children, in violation of their rights under s. 2(a) of the *Charter*. In *Amselem*, however, the contested restriction was very concrete – Orthodox Jews were being prevented from building *succas* (temporary structures) on their balconies. *Multani v. Commission*

*scolaire Marguerite-Bourgeoys* (2006 SCC 6), another major recent case in which the SCC found an infringement of religious freedom, also involved a ban on something physical – carrying the Sikh ceremonial dagger *kirpan* in the classroom. By contrast, the plaintiffs' claim in *Commission scolaire des Chênes* was in essence an argument for the right to indoctrinate their children into the Catholic religion, based on their subjective understanding of what this process required. Describing the process as indoctrination makes it easier to see why the parents would feel that exposure to other religious doctrines – regardless of the specific course content and teaching methods – would interfere with raising their children to believe that there is only one true religion, Catholicism.

In sum, the Court in *Commission scolaire des Chênes* focused on the evidentiary issue and staunchly required objectivity while stating that Canada's multicultural reality mandated that mere exposure to various systems of belief could not be a violation of the *Charter*. The decision thus eschewed the complexity of the tension between recognition of diversity, on one hand, and respect for religious dogmas, on the other, including for those that shun exposure to alternative beliefs.

*Radostina Pavlova is a first year JD Candidate at the University of Toronto Faculty of Law.*

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## 2012 Constitutional Cases at the Supreme Court

The following constitutional cases are scheduled to be heard in 2012.

***Mandeep Singh Chehil v Her Majesty the Queen*** (scheduled 2012-05-07, #34524)

No information posted yet and factum not available but keywords provided: "Canadian charter (Criminal) - Search and seizure (s. 8)."

***Her Majesty the Queen v Richard Cole*** (scheduled 2012-05-15, #34268)

The case considered whether the Court of Appeal erred in law in concluding that the accused possessed a reasonable expectation of privacy in his employer-issued work computer without due regard to the ownership of the computer, and the explicit employee use policies that established no such reasonable expectation of privacy. The case further considered whether a diminished expectation of privacy in an employer-issued work computer should impact upon the determination of whether there is a s. 8 Charter breach by law enforcement officials who are subsequently provided the computer by the employer.

***Brendan David Aucoin v Her Majesty the Queen*** (scheduled 2012-05-16, #34349)

The appellant appealed his criminal conviction and raised on appeal that the police officer breached his s. 8 Charter rights when he did a pat down search of the appellant prior to placing him in the back seat of the police car so that he could write him a ticket for a motor vehicle infraction while sitting in the front seat.

***Suresh Sriskandarajah v United States of America, et al.*** (scheduled 2012-06-11, #34009)

The U.S. seeks the applicant's extradition to stand trial on terrorism charges for alleged assistance of the Liberation Tigers of the Tamil Eelam. At the committal hearing, the applicant sought a declaration that the definition of "terrorist activity" in s. 83.01(1)(b), and its use in the terrorist provisions of the Criminal Code are unconstitutional under s.2(b) of the Charter. Before the Minister, he submitted that his surrender would breach s. 6(1) of the Charter. The applicant also argued that the definition of "terrorist activity" and its operation throughout the terrorism provisions of the Criminal Code, specifically section 83.18, is unconstitutionally overbroad and contravene s. 7 of the Charter.

***Piratheepan Nadarajah v. United States of America, et al.*** (scheduled 2012-06-11, #34013)

The U.S.A. seeks the applicant's extradition to stand trial on terrorism charges for alleged involvement with and assistance of the

Liberation Tigers of Tamil Eelam. At the committal hearing, the applicant sought a declaration that the definition of “terrorist activity” in s. 83.01(1)(b), and its use in the terrorist provisions of the Criminal Code are unconstitutional. Before the Minister, he submitted that his surrender would breach s. 6(1) of the Charter.

**Mohammad Momin Khawaja v. Her Majesty the Queen** (scheduled 2012-06-11, #34103)

The applicant was convicted of a number of criminal charges, including various terrorism charges. In pre trial proceedings, the trial judge held that s. 83.01(1)(b)(i)(A) of the Criminal Code is unconstitutional and he severed it from the balance of s. 83.01.

**Ivana Levkovic v. Her Majesty the Queen** (tentative 2012-10-10, #34229)

The applicant was charged under s. 243 with concealing the dead body of a child. At issue is whether the words "child died before ... birth" are vague and therefore whether s. 243 breaches s. 7 of the Canadian Charter of Rights and Freedoms.

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The following cases were heard in 2012 and are awaiting the judgment.

**Benjamin Cain MacKenzie v. Her Majesty the Queen** (heard 2012-01-09, #34397)

The case considers whether the use of a sniffer dog was unreasonable search and seizure (Charter, s.8). It is argued that the jurisprudence is inconsistent regarding “reasonable suspicion” and a clear test is needed.

**Tessier Ltée v. Commission de la santé et de la sécurité du travail** (heard 2012-01-17, #33935)

The applicant claimed to be a federal undertaking in providing transportation services. The respondents suggested that as the Company was carrying on single undertaking and normally and habitually providing crane and heavy equipment rental services in Quebec and, to lesser extent, longshoring services it should be seen to fall under provincial jurisdiction. Constitution Act, 1867, ss. 91(1) and 92(10).

**Attorney General of Quebec, et al. v. A, et al.** (heard 2012-01-88, #33990)

This case considered whether de facto spouses in Quebec are victims of discrimination within the meaning of s. 15 of Charter because the Civil Code of Québec does not give them the right to support, partition of family patrimony, protection of family residence, partnership of acquests and compensatory allowance, unlike married or civil union spouses.

**Attorney General of Canada v. Downtown Eastside Sex Workers United Against Violence Society, et al.** (heard 2012-01-19, #33981)

This case considered the relevance of the nature of the constitutional challenge to the assessment of whether there are other reasonable means by which a challenge may be brought. The Attorney General argued that the Court of Appeal has weakened the test for public interest standing by adopting a relaxed approach that will be an ineffective limit on when standing should be granted.

**James Peter Emms, Ibrahim Yumnu, Vinicio Cardoso, Troy Gilbert Davey an Tung Chi Duong** (heard 2102-03-14, # 34087, 340900, 34091, 34179, 34340)

The jury vetting cases. See p. 4 in this issue.

**Her Majesty the Queen v. Marius Nedelcu** (heard 2012-03-19, #34228)

After testifying in his civil trial that he had no memories of the events of the day of an accident, the defendant gave a detailed account of the accident and the events preceding it fourteen months later at his criminal trial. The case considered whether s. 13 of the Charter precludes the use of civil discovery evidence to impeach the credibility of an accused who chooses to testify at his criminal trial.

**Frederick Moore on behalf of Jeffrey P. Moore v. Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Education, et al.** (heard 2012-03-22, # 34041)

Although a human rights case, the issues in this appeal focus on the comparator group analysis under a claim for systemic discrimination with particular reference to the reasoning in *Auton v British Columbia*. in respect of special education services for a child with severe learning disabilities.

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And the following cases were heard in 2011, but judgments are expected in 2012.

**Saskatchewan Human Rights Commission v. William Whatcott, et al.** (heard 2011-10-12, # 33676): Constitutional challenge to the hate speech provisions of the Saskatchewan Human Rights Code.

**Her Majesty the Queen, et al. v. Anic St-Onge Lamoureux** (heard 2011-10-13, #33970) : Constitutional challenge to the breathalyzer provisions of the Criminal Code.

**Ewaryst Prokofiew v. Her Majesty the Queen** (heard 2011-11-08, #33754) : Jury address on the implications of the accused not testifying at trial on fraud charges.

**N.S. v. Her Majesty the Queen, et al.** (heard 2011-12-08, #33989) : The wearing of a niqab during testimony of a complainant in a sexual assault case.

# Lectures, Panels, and Conferences

## Panel Discussion Explored Niqab Ban and Canadian Citizenship

Last December, Canada's Minister of Citizenship, Immigration, and Multiculturalism, Jason Kenney, announced a ban on face veils at citizenship oath-taking ceremonies, citing openness and gender equality as fundamental Canadian values. Like Quebec's Bill 94 (which sought to prevent women wearing the niqab from receiving or providing public services) and the *R v NS* case (on whether a woman can testify in court while wearing the niqab), Minister Kenney's announcement provoked national debate about the place of the niqab in Canadian society.

The University of Toronto's Muslim Law Students Association (MLSA) organized a panel on Wednesday, February 29, to explore the various positions and interests represented in the discussion on the ban in particular, as well as in the broader Canadian discourse on the niqab. The panel featured Farzana Hassan (writer and commentator on issues pertaining to Islam and Muslims, in Canada and globally), who spoke in favour of the ban, and Brenda Cossman (professor at University of Toronto's Faculty of Law, specializing in family law, law and sexuality, and freedom of expression), who spoke against the ban.

Farzana Hassan began by acknowledging that section 2(a) (freedom of religion) of the Canadian *Charter of Rights and Freedoms* protects subjective, sincerely-held religious beliefs, including wearing of the niqab. However, Ms. Hassan argued that security concerns justify restrictions on the niqab in the public sphere, providing several examples of crimes committed by individuals masked with the niqab. She also stated that the niqab is inherently a symbol of gender inequality. Ms. Hassan supported the ban on the niqab at citizenship ceremonies as a promising first step towards a broader interdiction (of the type proposed by Bill 94).

Brenda Cossman started by situating the ban in the colonial tradition of "white men saving brown women from brown men" (employing Gayatri Spivak's oft-quoted aphorism): she drew a parallel between Minister Kenney's citation of gender equality to justify the ban, and the colonialist attempt to justify colonialism by referencing the imperative of "saving brown women" from the misogyny of "brown men." Professor Cossman noted that the ban is problematic from both administrative law and constitutional law perspectives. On the administrative law front, the ban is *ultra vires* Minister Kenney's powers. Constitutionally, the ban infringes on several *Charter* provisions, primarily sections 2(a) (freedom of religion) and 2(b) (freedom of expression). Professor Cossman argued that while the government's stated objectives for imposing the ban (the necessity of ascertaining the identity of oath-takers, and ensuring that the oath is audible) *are* legitimate, the ban fails the section 1 proportionality test since it does not minimally impair *Charter* rights.

A lively question-and-answer session followed the speakers' remarks. Several questions revolved around the issue of whether women truly choose to wear the niqab. While Farzana Hassan stated that wearing the niqab is not a genuine expression of choice (since it is perceived as religiously-mandated and often coercively imposed), Brenda Cossman observed that choice and agency are always constrained by culture, and it is problematic for the state to prevent women from expressing their agency by wearing the niqab. The discussion raised important questions about agency, equality, and difference in feminism and liberal democracy. Together, the two panellists provided a thorough canvassing of the legal and social issues implicated in discussions on the niqab in Canada.

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## Public Lecture by Professor Brudner

Can a liberal state criminalize polygamy? Last November, the B.C. Supreme Court (BCSC) found that it could: polygamy's criminalization in Canada is not unconstitutional. In a public lecture delivered at the University of Toronto's Faculty of Law on March 26, Professor Alan Brudner agreed with the result of the B.C. judgment, but he would have relied on different reasoning to get there.

Professor Brudner's polygamy discussion was an endnote to his lecture. The focus of his discussion was three principles of criminalization - ownership, harm and community - all of which justify outlawing conduct antithetical to human dignity. Given that Professor Brudner grounds the polygamy question in these principles, I will briefly describe them here.

Under the ownership principle, conduct that interferes with the freedom of persons over their bodies and possessions may be criminalized. Under the harm principle, the state may forbid behaviours that do harm to others. The community principle allows the use of criminal laws to guide citizens towards relationships that

validate their self-worth, such as families, civil associations and political communities. Worth validation can be understood as acknowledgement of the value of an individual's unique character. Laws based on the community principle are signpost laws: they direct us towards worth validating relationships. Treason is an example of conduct that is criminalized under the community principle.

Our original question now becomes more focused. Can a liberal state criminalize polygamy *under the logic of any of these three principles*? The ownership principle is not engaged by polygamy, since absent other criminal acts, parties voluntarily enter into polygamous marriages. The harm principle is more contentious. Professor Brudner and the BCSC see its application to polygamy differently. Justice Bauman for the BCSC found that, "[T]his case is essentially about harm; more specifically, Parliament's reasoned apprehension of harm arising out of the practice of polygamy." Professor Brudner does not see it this way. In his view, while it is true that harms may arise out of polygamous practices, that an activity *might* be harmful is not enough to justify its prohibition

*Continued on pg 8*

under the harm principle. As he put it, “Unless they’re insane, we let consenting adults make mistakes.” To the extent that polygamy might lead to behaviours that are unquestionably harmful, such as sexual exploitation and extortion, these acts are independently criminalized.

This leaves the community principle. For Professor Brudner, it is under this head that a liberal state may criminalize polygamy, or at least its public manifestations. The community principle promotes relationships that foster the worth validation of individuals. The state can prefer monogamous marriages because worth validation in a marriage requires reciprocal devotion between two partners. This reciprocity is lost where there are multiple wives and only a single husband (a polygynous arrangement, the most common form of polygamy). Plural wives do not receive the worth validation that they would in a monogamous marriage.

This justifies the criminalization of polygamy, but it cannot justify a blanket prohibition on polygamous practices. The state must also respect the individual’s freedom to pursue the good as she sees it. This apparent contradiction can be reconciled by distinguishing between public and private polygamy. Only public or formal polygamous unions may be criminalized, because only they challenge the public norm of monogamy that the state seeks to preserve. Privately, individuals are free to pursue their own conception of good, including one in which they have multiple partners. This conclusion is consistent with the BCSC ruling. Although s.293 of the *Criminal Code* appears to prohibit all forms of polygamy, Justice Bauman read it down to capture only formal polygamy.

Professor Brudner’s analysis raises two questions. A key premise of his argument is that a plural wife will receive less worth validation from her husband than would a wife in a monogamous marriage. He seems to treat the question mathematically, as if worth validation would be divided between wives. But worth validation cannot have a zero-sum quality. For example, it would seem that a parent could provide similar worth validation to multiple children as they could to a single child. Why couldn’t multiple wives, or multiple husbands, receive full worth validation from their partner?

A second question is if the criminalization of polygamy is a signpost law, is anyone reading the signpost? It seems that people choose monogamous marriages over polygamy, not because of criminal law, but because of social norms. Polygamy has long been a fringe practice, largely associated with religious communities. In Canadian society, it does not pose a threat to the institution of monogamous marriage. Why then should the state override the individual’s freedom to pursue the good as she sees it *publicly*, in order to protect a practice that needs no protection?

The BCSC held that polygamy can be criminalized because of its associated harms. Professor Brudner justifies it on different terms. He sees the prohibition on public polygamy as a permissible use of criminal law to guide citizens towards marriage relationships that will maximize their worth validation. While this answers some of the questions left open by the BCSC, it raises several of its own.

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## SPINLAW 2012 - Bill S-2: Family Homes on Reserves

In December 2011, Bill S-2 (Short title: Family Homes on Reserves and Matrimonial Interests or Rights Act) had its first reading in the House of Commons after being introduced in the Senate in August. Currently, there is no legislation dealing with marital real property (“MRP”) on Indian reserve lands. Provincial legislation is *ultra vires* MRP on reserve land, and the federal *Indian Act* does not provide for the division of MRP upon marital breakdown. Because of this jurisdictional gap, women are left without legal recourse. The drafters of Bill S-2 hope to resolve this problem by setting up a regime in which provincial judges are authorized to resolve disputes relating to the division of MRP.

At this year’s SPINLAW, two inspiring advocates for First Nations and womens’ rights discussed the implications of the Bill. Dr. Pamela Palmater is a Mi’kmaq lawyer and professor of Indigenous law, politics, and governance at Ryerson University. In 2010, she testified before the Senate as an expert witness in relation to an earlier draft of Bill S-2. Ellen Gabriel is an artist and activist who was chosen by the Kanehsatà:ke peoples to be their spokesperson during the 1990 Oka Crisis. She is active with the Kontinón:sta’ts (Mohawk Language Custodians and First Peoples Human Rights Coalition) and was president of the Quebec Native Women’s Association from 2004 until 2010.

Palmater and Gabriel pointed to two overarching problems with the bill. The first problem stems from jurisdictional concerns: Bill S-2 ignores s. 35 of the Constitution Act, 1982, which affirms First Nations’ jurisdiction over internal affairs on reserves. Moreover, the bill authorizes provincial adjudication on First Nations reserves, encroaching further on First Nations’ sovereignty.

The second flaw is that there has been inadequate consultation with First Nations women. All stages of the drafting process are characterized by a failure to meaningfully work with women who will be affected by the bill, and therefore, the bill does not reflect their needs, their concerns, and their lived experiences. Ellen Gabriel

rejected the notion that this bill will benefit women on reserves. Instead, it will render void the local remedies, both informal and traditional, with which different First Nations, such as the Anishanabek Nation, Six Nations, and Akwesasne, are resolving MRP disputes. Rather than substantially increase their access to justice, it will require that women in remote areas spend substantial amounts of money on lawyers’ fees and travel expenses. It will, in its narrow focus on MRP, lose sight of broader social challenges like the housing crisis that exists on many reserves.

While the legislative gap around MRP needs a remedy, the solution will depend upon working with and supporting First Nations women and their communities in order to devise local responses. Dr. Palmater and Ms. Gabriel both cited the legacies of the ‘Sixties Scoop’ and Residential Schools as examples of the socioeconomic, cultural, and communal injuries that stem from a legislative opposition to First Nations’ inherent rights. They urged the government to pay heed to the lessons of history and not instate legislative regimes that neither support First Nations laws and traditions, nor reflect a meaningful consultation with affected First Nations.

The theme of this year’s SPINLAW was “A Seat at the Table” in recognition of the 20th anniversary of *Canadian Council of Churches*. Towards the end of the discussion, Ellen Gabriel spoke about what this phrase means in light of Bill S-2 and the ongoing relationship between First Nations and the federal government: there is no seat at the table when the federal government has the final say over whether or not First Nations women want or need Bill S-2. A real seat at the table requires a recognition of, and commitment to, First Nations jurisdiction, which Bill S-2 fails to provide.

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# CARL Conference and BILL C-31

On March 9, 2012, the Canadian Association of Refugee Lawyers (CARL) held its first national conference since its inauguration last summer. Among the panellists were prominent refugee advocates, academics and other experts including Lorne Waldman, Prof. Audrey Macklin, Prof. David Galloway, and Lesley Stalker (former legal officer for the UN High Commissioner for Refugees). Bill C-31, put forward by the Government less than a month earlier, featured prominently in the discussions, with much criticism and concern directed at the constitutionality of newly-proposed refugee legislation. Bill C-31 amends, primarily although not exclusively, the *Immigration and Refugee Protection Act* and the *Balanced Refugee Reform Act (BRRA)* in advance of the full implementation of BRRA. One of the most troubling pieces of the bill is the inclusion of aspects stemming from previously-proposed Bills C-4 and C-49, the so-called "Preventing Human Smuggling Bill," many of which are arguably unconstitutional, potentially violating sections 7, 9, and 10 of the *Charter*.

Section 20.1(1) of the bill authorizes the Minister of Citizenship and Immigration to designate groups of claimants who arrive "irregularly" – that is, without a visa or other travel documents – as "designated foreign nationals" (DFNs) if one of two conditions exists. Groups may be so designated if first "examinations of the persons in the group ... cannot be conducted in a timely manner" or second, if there are reasonable grounds to suspect that the arrival was "for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group." While the first condition of designation seems fairly innocuous and the second condition seems highly reasonable, both are problematic from a constitutional perspective, particularly when combined with the provisions of the bill which require that DFNs over the age of 16 be detained for no fewer than 12 months without the ability to have their detention reviewed. If a claimant arrives with minor children under the age of 16, the children will either be detained with the parent or forcibly separated for at least a year.

As noted, detention is mandatory if it seems unlikely that examinations cannot be conducted in a "timely" manner. In other words, if there is administrative backlog on the part of the government that prevents an efficient consideration of an individual's claim, it may be used as a reason to detain the individual for a period of 12 months. Furthermore, even if the examination is conducted and completed before the year expires, and even if the individual is found to be a genuine Convention Refugee, there is no provision in the bill that requires that the DFN be released from detention. Put differently, even if the original reason for the detention is no longer a matter of concern, an individual may remain in detention without review. Section 7 of the *Charter* enshrines the right to liberty, except in accordance with the princi-

ples of fundamental justice. In *Rodriguez*, the Supreme Court found that when deprivation of the right to liberty does little or nothing to enhance the State's interest, the deprivation happens for no valid purpose and, consequently, cannot be said to be consistent with principles of fundamental justice. Moreover, s. 9 of the *Charter* guarantees that no person may be subjected to arbitrary detention. For these reasons, members of the CARL panel on Bill C-31 believe that the bill's mandatory detention provision, in relation to s. 20.1(1)(a), could potentially constitute a violation of ss. 7 and 9 of the *Charter*.

Another constitutional challenge suggested during the CARL conference revolves around the lack of administrative or judicial review for both clauses of s. 20.1(1). As the proposed legislation currently stands, DFNs may be held for at least a year without the ability to have the reasons for their detention assessed. This condition constitutes a violation of s. 10(c) of the *Charter*, which enshrines the right of every arrested or detained individual to have the validity of his or her detention assessed, and to be released if the detention is unlawful. This right extends to foreign nationals, as determined in *Charkoui* by Chief Justice McLachlin when she wrote that "whether through *habeas corpus* or other statutory mechanisms, foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law." The Chief Justice went on to state that a lack of review for 120 days under the security certificate process "violates the guarantee against arbitrary detention in s. 9 of the *Charter*, which encompasses the right to prompt review of detention under s. 10(c)." If 120 days is a violation of a claimant's rights under the *Charter*, surely a 365-day delay cannot be seen as anything but a violation of both ss. 9 and 10(c).

However well-intentioned the Government may have been in bringing forward Bill C-31, its provisions on mandatory detention for designated foreign nationals serves to punish refugee claimants who, facing persecution in their countries of origin, dare to claim their human right to life and security. There are already provisions within the current legislation and within the *Criminal Code* that target human traffickers and attempt to strike a balance between protecting national security and upholding Canada's international obligations. As noted by the Canadian Civil Liberties Association, "Bill C-31 represents a dramatic departure from the ethos and reputation of Canada as a compassionate, humanitarian voice on the world stage." This bill, with its arbitrary and draconian measures, separates families and strips people of their most basic legal rights at a time when they are particularly vulnerable.

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Mooters: Denise Cooney, Michael Sabet, Jeremy Nemers and Haley Peglar

Congratulations to this year's Wilson Moot competitors. The team placed first overall and for their factum. Michael Sabet took second place oralist.



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