

ASPER CENTRE OUTLOOK

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FIFTH ANNIVERSARY SPECIAL EDITION

The Promise and the Reality of Ward v. Vancouver By Kent Roach

Vancouver v. Ward [2010] 2 S.C.R. 28 is the type of case you go to law school for. The case involved a damage claim under s.24(1) of the Charter by lawyer Cameron Ward for being unconstitutionally stripped search. Although Mr. Ward always maintained that he would abandon the case for an apology, the case had precedent setting written all over it.

I was first asked to represent the British Columbia Civil Liberties Association in its intervention in Ward in the British Columbia Court of Appeal. I happily flew from a Toronto winter to a Vancouver spring for two days of argument in the Court of Appeal.

After 25 years of the Charter, the basic structure of Charter damages remained remarkably unclear: who was the proper plaintiff? Did you have to establish fault in addition to a Charter violation? Was there a minimum per se award for any Charter violation? Was there a maximum? I knew the case law was a mess as was the chapter on damages in my constitutional remedies text.

The case also involved an important policy issue. In 2001, the Supreme Court in *R. v. Golden* [2001] 3 S.C.R. 679 had established relatively tight limits on the use of strip searches, but the message seemed not to be getting out to the police. The case, like the Charter, bridged the divide between the civil and the criminal side.

Mr. Ward, represented pro bono by Vancouver lawyer Brian Samuels, had been awarded \$5000 at trial for the unconstitutional strip search and \$100 for the unconstitutional seizure of his car. The Court of Appeal upheld the damage awards but there was a strong dissent.

Leave was granted by the Supreme Court and the B.C. Civil Liberties Association graciously agreed to a joint intervention

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with the newly founded Asper Centre. This allowed a number of students to do research and help with the drafting of the factum. The array of issues was large and we all worked hard to produce a factum that would hopefully assist the Court.

An important issue was the possibility of over-detering government action by awarding damages. The governments stressed this argument, but we replied that over-deterrence was unlikely because, unlike in the United States, governments and not individual officials would be directly liable for constitutional torts. Cases from New Zealand, the Caribbean and South Africa all held governments directly liable for constitutional damages.

The argument at the Supreme Court was as impressive as usual. I struggled to fit myself into the barrister's robes that Robert Sharpe had left me when he was first appointed to the bench. Asper/BCCLA made its 15 minute argument along with a number of other interveners.

The Court's decision was elegant. The Chief Justice writing for an unanimous Court upheld the \$5000 award for the strip search but overturned the \$500 award for the seizure of the car. There would be no per se award for any violation. In every case, the applicant would have to justify damages as necessary to compensate, vindicate or deter Charter violations. The quantum of damages would also be driven by those functional considerations.

Governments would in a mini-section 1 exercise be able to show that damages were not appropriate and just because of an open-ended list of countervailing factors. I happily re-wrote the chapter on damages in my constitutional remedies text and enjoyed teaching *Ward* to my students. All who had helped us on the file could take pride that we had played some part in an important precedent. Indeed, I sometimes got ahead of myself and called it the *Roncarelli v. Duplessis* of this generation.

But the reality of *Ward* had not been as bright as its promise. Three years later, there have been few cases applying *Ward* to award damages. In large part this is because of access to justice issues that have been central to much of Asper Centre's work to date.

Although the quantum was not appealed, \$5000 has been used as a type of starting point in subsequent cases. The costs of litigation in the superior courts, however, ensures that only economically irrational plaintiffs will sue especially if they face the risk of cost-shifting if they lose.

Damages may prove to be more valuable if they are available before more accessible tribunals. In *Conway* [2010] 1 S.C.R. 765, the Asper Centre had

success in making the case for a broad interpretation of administrative tribunals jurisdiction to award Charter remedies. Sometimes advanced costs from governments may be necessary as the Asper Centre argued in *Caron* [2011] 1 S.C.R. 78. Finally, broad public interest standing is still necessary as the Centre argued in *Downtown Eastside Sex Workers* [2012] 2 S.C.R. 524.

Students need to have a sense of both the promise but also the reality of Charter litigation or indeed any litigation. They need to learn that the fight for justice is almost always up hill and never done. I am grateful to my former LLM student David Asper for providing the faculty with the resources that enables students (and professors!) to learn these important lessons.

Kent Roach is chair of the Asper Centre Advisory Committee and has represented the Centre in a number of cases. He published the 2nd edition of Constitutional Remedies in Canada in 2013 and was recently awarded a Trudeau Fellowship to examine constitutional remedies in a comparative fashion. The 2014 Asper Centre annual conference will examine constitutional remedies.

Cameron Ward was strip-searched because he was suspected of being a man wanted for planning to throw a pie at the Prime Minister at the time.



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The Polygamy Reference: A One-of-a-Kind Proceeding

By BJ Wray

After decades of questioning the constitutional validity of the *Criminal Code*'s prohibition on polygamy and after numerous investigations into the polygamous community located in Bountiful, British Columbia, the Attorney General of British Columbia decided in the fall of 2009 to ask the province's Supreme Court to give its opinion on whether the 120 year old criminal prohibition was constitutional. Two years later, Chief Justice Bauman held that while the polygamy prohibition infringed the freedom of religion of identifiable groups guaranteed by s. 2(a) of the *Charter* and the s. 7 liberty interests of children between 12 and 17 who were married into polygamy, the *Criminal Code* prohibition, except for its application to the latter group, was demonstrably justified in a free and democratic society.

The Chief Justice's book-length ruling is grounded in the massive evidentiary record of harm that was put before the Court by the Attorneys General of British Columbia and Canada and their allied interveners, including the David Asper Centre for Constitutional Rights. This evidence demonstrated that women in polygamous relationships experienced elevated levels of physical and psychological harm, including depression and other mental health issues, and that these women also faced higher rates of domestic violence, abuse, and sexual abuse. The evidence of harm to the children of polygamous relationships was equally compelling. They were subject to higher infant mortality rates and suffered more emotional, behavioural and physical problems. They also had lower educational achievement and were at higher risk of physical and psychological abuse and neglect. Finally, the evidence of polygamy's harm extended to democratic society in general as polygamy was found to engender higher rates of poverty and institutionalized gender inequality. The Chief Justice concluded that the state does have a place in the bedrooms of the nation when it is defending what he called a "critical institution", namely, the institution of monogamous marriage.

The significance of the *Polygamy Reference* is found not only in the Chief Justice's conclusion that this archaic prohibition is *Charter* compliant but, rather, it is the process itself that made this proceeding entirely unique in Canadian history. The *Polygamy Reference* was the first time that a provincial trial court was tasked with adjudicating a constitutional reference. British Columbia and Manitoba

are the only provinces with legislation permitting the government to refer legal questions to either the trial court or the Court of Appeal.

The initiation of the *Polygamy Reference* at the trial court level allowed all the parties, including the publically-funded Amicus and the eleven intervenor organizations, to put a comprehensive evidentiary record before the Court. This record included *viva voce* and written testimony from expert and lay witnesses, cross-examinations of these witnesses, video affidavits, academic studies and commentary, as well as popular culture materials on polygamy, including documentaries, news reports, talk shows, and wonderfully titled books such as, *The Ethical Slut: A Practical Guide to Polyamory, Open Relationships and Other Adventures*.

The parties and interveners created a diverse and wide-ranging evidentiary record that would have been impossible in a typical appellate reference. There were over 90 expert reports and affidavits from individuals in polygamous relationships, and 22 of these individuals were examined and cross-examined during the hearing phase of the proceeding. The experts were drawn from a wide range of academic disciplines including anthropology, psychology, sociology, law, economics, family demography, history and theology, and much of the research of their research was interdisciplinary and cross-cultural. The lay witnesses included current members of the Bountiful community who gave their written and *viva voce* evidence under cover of anonymity.

By the end of the evidentiary portion of the *Polygamy Reference*, the parties and interveners had



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

amassed, in the words of the Chief Justice, “the most comprehensive judicial record on [polygamy] ever produced.” While a reference is by nature abstract, the extensive evidentiary record made the *Polygamy Reference* more akin to a traditional trial and provided the parties and interveners with an opportunity to demonstrate, through live witnesses, the outcomes enumerated in the academic and expert reports. Undoubtedly, the extraordinarily moving testimony of ex-members of the Bountiful community – who graphically recounted the water torture of babies and the marriages of twelve year old girls – contributed to the Chief Justice’s unequivocal conclusion that the harms associated with polygamy justified any infringement of freedom of religion.

The *Polygamy Reference* was also unique in that the proceeding was characterized by a high level of public access. One of the interveners, the Canadian Polyamory Advocacy Association, provided public access, via its website, to the vast majority of the court file, including the affidavits, written submissions, and transcripts of the *viva voce* evidence. This material was physically accessible to the public in a resource library located adjacent to the courtroom. Public access was also facilitated through the CBC’s live webcast of the closing arguments.

The evidence and submissions of the Asper Centre were an integral part of the Court’s analysis of polygamy’s impact on the rights of children. The Asper Centre, together with the Canadian Coalition for the Rights of Children (“CCRC”), argued that polygamy is systemically harmful and violates children’s fundamental and constitutional rights. The Asper Centre and the CCRC focused on Canada’s obligations under the United Nations’ *Convention on the Right of the Child* (“CRC”) and other international instruments in order to highlight the principle that all children are entitled to full recognition of their rights and respect for their inherent dignity as maturing individuals. The Chief Justice accepted that Canada has positive obligations to prevent violations of the CRC and that these positive obligations are heightened because children are inherently less able to advocate on their own behalf. The Asper Centre’s advocacy on behalf of this vulnerable group ensured that these interests were given the full consideration they deserved in the *Polygamy Reference*.

BJ Wray is a graduate of the University of Toronto, Faculty of Law. BJ is counsel with the British Columbia Regional Office of the federal Department of Justice and was one of the litigators on the Polygamy Reference and is currently working on the Assisted Suicide litigation. The views expressed here are her own.

R v Conway: UnChartered Territory for Administrative Tribunals

By Christopher Bredt and Ewa Krajewska

*R v. Conway*¹ was the first Supreme Court hearing in which the David Asper Centre for Constitutional Rights intervened. The Supreme Court’s decision in *Conway* is important to administrative tribunals as the Court reformulated and simplified the test for when an administrative tribunal is considered a court of competent jurisdiction to consider constitutional questions and grant Charter remedies. In doing so, the Supreme Court simplified the law in this area by making the primary consideration whether the administrative tribunal can consider questions of law.

The specific issue in *Conway* was whether the Ontario Review Board, which is an administrative tribunal that monitors and adjudicates the detention of accused persons who were found not criminally responsible, has the jurisdiction to grant a remedy under section 24 of the Charter for the breach of an accused’s Charter rights. The wider issue, as framed by Abella J. for the Court, was the relationship between the Charter, its remedial provisions and administrative tribunals.

Prior to *Conway*, different tests were applied to

determine whether a tribunal had jurisdiction under section 52 of the Constitution Act and section 24(1) of the Charter. The two lines of jurisprudence under section 24(1) and section 52 were enunciated in the leading cases of *Mills v The Queen*² and *Nova Scotia (Workers’ Compensation Board) v. Martin*³ respectively.⁴ Thus, the analysis that was followed in determining whether a tribunal had jurisdiction to apply the Charter depended on the nature of the Charter question at issue:

- (i) If an applicant submitted that the tribunal should find a legislative provision constitutionally invalid or inapplicable, then the analysis under section 52 applied.
- (ii) If an applicant requested that the tribunal provide a personal remedy on the basis that his or her Charter rights had been infringed, then the analysis under section 24(1) applied.

After conducting a review of the evolution of the jurisprudence on the power of administrative tribunals to consider Charter issues, Abella J. set out the following test for whether an administrative tribunal

can order a remedy under s. 24(1) of the Charter:

(i) Does the administrative tribunal have jurisdiction, explicit or implicit, to decide questions of law? If it does, and unless it is clearly demonstrated that the legislature intended to exclude the Charter from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the Charter – and Charter remedies – when resolving the matters properly before it.⁵

(ii) If the answer to the first question is affirmative, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. At issue will be whether the remedy sought is the kind of remedy that the legislature intended to fit within the statutory framework of the tribunal. Relevant considerations will include the tribunal's statutory mandate, structure and function.⁶

There are a number of important implications of the *Conway* decision.

First, the overarching theme in *Conway* is the Court's acceptance that administrative tribunals should play a primary role in determining Charter issues falling within their jurisdiction. The decision thus falls within a general trend affirming the power of administrative tribunals and respecting their decision-making (as seen in *Dunsmuir*,⁷ *Khosa*,⁸ and *Bell Canada*⁹) and more recently in *Doré v Barreau du Québec*.¹⁰

Second, under the former *Mills* analysis, the inquiry into whether the tribunal has jurisdiction to issue a remedy was driven by the specific remedy that was sought. In freeing the analysis from the anchor of the remedy and re-situating it on the institutional structure and mandate of the tribunal, the Court is implicitly condoning a more contextual approach. The key inquiry is now whether the tribunal has the power to apply the law. The remedy sought will only be a secondary concern. At the second stage the inquiry will focus on whether this remedy is within the tribunal's jurisdiction and does not frustrate its legislative mandate or structure. As indicated by Abella J., section 24(1) does not bestow on a tribunal remedies that are outside its legislative jurisdiction.

Third, the Court made clear that a tribunal can provide an effective remedy against a Charter breach through the exercise of its discretion in accordance with Charter values. In a sense, the Court may have been indicating that a complainant or applicant is not required to demonstrate a Charter breach in order to receive an appropriate remedy. The statute that the applicant is relying upon, interpreted in accordance with Charter values, may be sufficient to remedy a harm. This issue provided a preview of the Supreme Court's more recent decision in *Doré v Barreau du Québec* where the Supreme Court held that an administrative decision must be consistent with Charter values.

Fourth, it is clear that the Charter cannot fundamentally alter the function and structure of an administrative tribunal. The powers of an administrative tribunal are determined by its enabling statute and the Charter will not enhance these powers. The remedy sought is one that must be available to the administrative tribunal itself.

Fifth, the implication of the decision has been that there are new courts of competent jurisdiction including the Ontario Review Board.

In summary, *Conway* has been a positive development in administrative law. The Supreme Court took disparate case law and developed a simpler and more coherent test for when an administrative tribunal is a court of competent jurisdiction. As important, the recognition of a broad jurisdiction to consider Charter issues within administrative tribunals can be seen as an affirmation of the important role that administrative decision making plays in the administration of justice. Since the decision a number of administrative tribunals have been found to be courts of competent jurisdiction to grant Charter remedies.¹¹

NOTES:

1 *R. v. Conway*, [2010] S.C.J. No. 22, 2010 SCC 22 (S.C.C.) [*Conway*].

2 *Mills v. The Queen*, [1986] S.C.J. No. 39, [1986] 1 SCR 863 (S.C.C.) [*Mills*].

3 [2003] S.C.J. No. 54, 2003 SCC 54 (S.C.C.) [*Martin*].

4 For a summary of each of these tests see C. Bredt and E. Krajewska, "R v Conway: Uncharted Territory for Administrative Tribunals" (2011) 54 S.C.L.R. 451.

5 *Conway*, supra note 1, at para. 81.

6 *Ibid.* at para. 82.

7 *Dunsmuir v New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 SCR 190 (S.C.C.).

8 *Canada (Citizenship and Immigration) v Khosa*, [2009] S.C.J. No. 12, [2009] 1 SCR 339 (S.C.C.).

9 *Bell Canada v Bell Aliant Regional Communications*, [2009] S.C.J. No. 40, [2009] 2 SCR 764 (S.C.C.).

10 *Doré v Barreau du Québec*, [2012] 1 SCR 395 [*Doré*].

11 For example, the College of Physicians and Surgeons, the Ontario Information and Privacy Commission, the Immigration Division Board, the Security and Intelligence Review Committee.

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To Much Water in the Garden? Vertical Stare Decisis in Canada v Bedford

By Peter Hurrich

Trial Decision

Bedford v Canada, 2010 ONSC 4264, was a constitutional challenge to several *Criminal Code* provisions prohibiting operation of brothels, criminalizing persons who live on the avails of prostitution, and prohibiting public communication for the purpose of engaging in prostitution [s. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code*, RSC 1985, c C-46]. Himel J. found that the impugned provisions, which prevent prostitutes from taking precautions that would decrease their risk of facing violence, deprived the applicants of security of person [2010 ONSC 4264 at para 362]. Possible imprisonment also impaired the applicants' liberty [2010 ONSC 4264 at para 281]. Finally, the impugned provisions were found to be arbitrary and grossly disproportionate to their objectives, and the bawdy-house and living off the avails provisions were found to be overbroad [2010 ONSC 4264 at para 385-388, 436, and 402].

Based on the applicants' constitutional right to be free from arbitrary, overbroad or grossly disproportionate deprivations of liberty or security of person and the finding that the deprivations could not be justified as a reasonable limit of a constitutionally guaranteed right, the provisions were ruled unconstitutional [2010 ONSC 4264 at para 440-441]. The judge also found that the communications prohibition to be a violation of free expression which failed to minimally impair the right in question and had disproportionately deleterious effects, rendering the communications provision unconstitutional [2010 ONSC 4264 at para 505].

Vertical *stare decisis* is a principle requiring judges to strictly adhere to precedent set by the decisions of higher courts. In the *Prostitution Reference*, [1990] 1 SCR 1123, the Supreme Court upheld the communications prohibition as a justified infringement of the right to free expression and also found that neither the communications provision nor the bawdy-house provisions were unconstitutional deprivations of liberty.

While Himel J. describes the *Prostitution Reference* as "*prima facie* binding" [2010 ONSC 4264 at para 66], she adds that in light of substantial amounts of new research, changing social, political and economic assumptions and reframing of the type of expression involved, it was open to reconsider the issue of whether the limitation was justified. Furthermore, the jurisprudence governing justified violations of the rights to life and security of per-

son had evolved to the extent that the challenges in *Bedford* were distinguishable from the *Prostitution Reference*, leaving them open for consideration [2010 ONSC 4264 at para 75].

The Appeal and Intervention at the Supreme Court

In 2012, the Ontario Court of Appeal agreed that the provisions prohibiting brothels and living off the avails of prostitution were unconstitutional [2012 ONCA 186 at para 5-6]. However, overturning the trial judge, the constitutionality of the prohibition on communication was upheld [2012 ONCA 186 at para 7]. The Court of Appeal agreed that the liberty and security arguments in *Bedford* concerned legal issues that were not before the court in the *Prostitution Reference*. Thus, Himel J. was not bound by a ruling of a higher court. In contrast, to the extent that the *Prostitution Reference* court upheld the communication provisions as justified infringement's of freedom of expression, the Court of Appeal ruled that the trial judge was fully bound by precedent [2012 ONCA 186 at para 75].

On June 13, 2013, submissions on the *Bedford* case were made to the Supreme Court. While the issue of vertical *stare decisis* is technically moot at the highest level of court, the David Asper Centre for Constitutional Rights intervened, seeking clarification for lower courts. The Centre argued that the role of the trial judge includes reconsidering whether a state limitation of a right is reasonable, submitting that the Court of Appeal erred by disregarding the significance of a change in legislative or social facts in the constitutional context [David Asper Centre Factum at para 11].

The factum argued that *stare decisis*, a common law doctrine, should operate differently in the constitutional context because constitutional supremacy subordinates the doctrine to the dictates of the constitution [David Asper Centre Factum at para 13-15]. Where the rationale for a decision is based on legislative or social facts, subsequent courts should only be bound to the extent of a common factual matrix [David Asper Centre Factum at para 20]. Allowing trial judges to be rendered constitutionally mute by a common law doctrine may be an unconstitutional exercise in itself [David Asper Centre Factum at para 25].

Annuals, Dead Branches or Root Rot?

According to the Court of Appeal, when a court of first instance is faced with the argument that a prior

decision of a higher court should be reconsidered on the basis of changed factual circumstances, its role is limited to establishing an evidentiary record. If the Supreme Court eventually hears the case, the record will provide the basis for submissions on the issue [2012 ONCA 186 at para 76].

The submissions of the Centre for Constitutional Rights sketch a more active role for the trial judge. The Centre proposes “significant and material change” as a standard for reconsideration of a constitutional challenge on the basis of changed factual circumstances and offers a non-exhaustive list of guiding criteria [David Asper Centre Factum at para 34].

In Canada, we have traded watertight compartments for an arborescent image of the constitution. The Court of Appeal describes the lower court’s approach as “yielding a garden of annuals to be regularly uprooted” [2012 ONCA 186 at para 84]. The Centre responds that trial judges are merely being asked to occasionally trim dead branches from the living tree [David Asper Centre Factum at para 29].

The vertical *stare decisis* question is about balancing the coherence of hierarchical structure with the malleability to adapt to changes in human circumstances. The fear is that adopting the “significant and material change test” will lead to more than occasional pruning. Too much change too quickly would be like over-watering the living tree. While the tree needs water to grow and thrive, too much water will eventually choke the roots and if the roots rot, the tree starves.

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The Centre’s argument has a compelling access to justice justification. To force constitutional litigants through two layers of court before their arguments may even be heard is a serious burden. The burden is intensified by the reality that the Supreme Court must limit the number of cases it agrees to hear. However, the Centre likely understates the degree to which *stare decisis* is ingrained in the roots of our constitution. “Significant and material change,” while somewhat nebulous, may be a workable standard. But do we have enough assurance that a more fluid approach to *stare decisis* will not destabilize the Canadian legal framework?

Ultimately, some laws are more unconstitutional than others. Canadian judges employ a wide range of remedies for constitutional viola-

tions. In *Bedford*, the appeal court read “in circumstances of exploitation” into the crime of living off the avails [2012 ONCA 186 at para 267].

Similarly, while the word prostitution was struck from the definition of bawdy-house, the bawdy-house provisions still apply to “acts of indecency” [2012 ONCA 186 at para 214]. Furthermore, the Court of Appeal’s partial invalidation of the bawdy-house provisions was suspended for 12 months [2012 ONCA 186 at para 218]. In practice, it is through remedy that courts temper the effect of their decisions and pursue constitutional dialogue with Parliament.

Conclusion

Bedford illustrates how the fluid approach to *stare decisis* is tempered by remedy. The effect seems to be a moderate shifting of burden from the litigant to the state. If the state intends to pursue the issue in a higher court or to redraft legislation, the courts are open to making suspended declarations of invalidity. This may be problematic for litigants seeking immediate relief. However, it increases pressure on the government to act. Furthermore, the Supreme Court retains its role as constitutional guardian without placing an undue burden on attempts to re-litigate issues on the basis of changing factual circumstances.

To conclude, I find the Centre’s position persuasive. A flexible approach to vertical *stare decisis* is unlikely to function much differently than contemporary practice. However, it may increase pressure on Parliament to participate in constitutional dialogue and moderately lessen the burden on litigants who raise constitutional challenges on the basis of changing factual circumstances.

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Scene in front of the Supreme Court of Canada during the *Bedford* hearing. Photographer: Cheryl Milne

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society

By Simon Stern

The judgment in *DESW* constitutes the most significant rewriting of the law of public interest standing since *Canadian Council of Churches* (1992), the last sequel to the *Borowski* trilogy (1975-81). Its practical effects, however, are likely to be minor. In 2008, DESW sought to challenge various criminal prohibitions involving prostitution, seeking a declaration that these provisions violated a panoply of constitutional rights (namely, those of free expression and association, to equality before the law, and to life, liberty and security of the person, in ss. 2(b), 2(d), 7 and 15 of the *Charter*). The British Columbia Supreme Court dismissed the action, ruling that DESW lacked public interest standing, as set out in *Canadian Council of Churches*. The Chambers judge concluded that the action raised serious constitutional issues and that DESW had a genuine interest in the prohibitions' validity, but that nevertheless, "there exist[ed] another reasonable and effective way to bring the issue before the court," because sex workers affected by the prohibitions might have "personal interest standing" and "could ... bring all of these issues before the court."

The BCCA reversed, in a split bench. The majority explained that DESW's case was not an individual challenge to a discrete issue but instead presented a "systemic" challenge (that is, a challenge to "an entire legislative scheme"), and that in such cases, the courts should take "a more relaxed view of standing." The majority did not explain how exactly any future court might reliably determine when to take such a "relaxed view," nor how much relaxation would be appropriate. The totality of the appellate court's guidance was encapsulated in the proposition that private interest standing should not be treated as a preferable alternative to public interest standing when the claims raise justiciable issues and when "the essence of the complaint is that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities, and exacerbates their vulnerability."

The Supreme Court affirmed the BCCA, on a theory that accounted not only for the case at hand, but also for several of the earlier standing cases. After rehearsing the rationales for limiting standing in the first place (i.e., excluding "busybodies," ensuring that adversarial arguments are based on concrete experience, and confining the courts to justiciable questions), the Court emphasized that the law of standing must not operate so as to immunize state action from liability. Where "the legality of state action" is open to question, parties must always have "practical and

effective ways to challenge" it. As the Court noted, in *McNeil* (1975), the first episode in the *Borowski* trilogy, standing was conferred on the plaintiff, a "member of the public" concerned about the restriction of speech rights, even though the owners of theatres had a more direct and personal interest in the provincial censorship law. Similarly, *Borowski* itself granted standing to a member of the public even though "many people ... were more directly affected by the legislation," because the latter "were unlikely in practical terms to bring the type of challenge brought by the plaintiff." In *Borowski*, the plaintiff opposed an exception that allowed abortions under certain circumstances; he believed that there should be no exceptions to the prohibition, whereas those who were more directly affected were the ones availing themselves of the exception. Neither *McNeil* nor *Borowski* might plausibly be characterized as featuring a law that "renders individuals vulnerable while they go about otherwise lawful activities, and exacerbates their vulnerability." If a general principle is discernible here, it is that "courts should take a practical and pragmatic approach," recognizing that where the individually affected parties lack the incentive, resources, social clout, or access to legal representation that would allow them to prepare and present an effective case, standing may be conferred on another party – whether an individual or a public interest organization – that can effectively ventilate the arguments.

The Court added that even where an individual party is litigating the issue, others might have standing to participate in the litigation if they "bring [] any particularly useful or distinctive perspective to the resolution of those issues." The importance of this statement is easily exaggerated. It might suggest that where would-be interveners were once relegated to the status of "friends of the court," if they lacked the concrete harm that an existing litigant had already demonstrated, they may now use their knowledge and expertise to justify their inclusion as parties. These considerations, however, are hardly novel ones for conferring standing on interveners: the Ontario courts, for example, have long allowed intervention to those who can bring an "important perspective distinct from the immediate parties" (*Incredible Electronics Inc. v. Canada*, (2003) 173 O.A.C. 29). *DESW* does not say that by offering a "distinctive perspective," an organization may, on that ground alone, qualify for standing despite the lack of any individually affected parties with concrete harms. The question of whether the

impugned action would otherwise be immunized from attack would still remain to be answered.

Courts have traditionally been reluctant to widen the ambit of the standing doctrine, and although *DESW*'s rationale could potentially create space for rafts of formerly excluded litigants, that result is unlikely. At the time of writing, sixteen judgments have mentioned *DESW* in connection with a decision on standing; in most of these cases, the court has drawn on *DESW* simply because it is the most recent source of well-established law about either the reasons for limiting standing or the grounds for conferring it. In two cases – *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2012 BCCA 422 – the courts devoted an extensive amount of prose to *DESW*'s “distinctive perspective” rationale, so as to confer standing on an organization when the dispute also included individ-

ual litigants with concrete harms. The results in both cases were easily achievable under the doctrine of *Incredible Electronics*. None of the sixteen cases uses *DESW* to justify the very feature that distinguishes it: the expansion of standing to an organization that seeks to start the litigation. This pattern suggests that *DESW*'s likeliest result will be to increase the courts' willingness to allow public-interest organizations to act as interveners-cum-plaintiffs in disputes where this was already permissible in any case. As for the public-interest organizations that seek to commence litigation, unaccompanied by an individual party with a concrete harm – they will probably have a few notable successes within a larger pattern that displays little change.

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R v. Caron: A Little Help from the Court Above

By Renatta Austin and Martha Healey

The Asper Centre was granted intervenor 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.

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 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.

Renatta Austin is a graduate the University of Toronto Faculty of Law and worked with the Asper Centre; Martha Healey is a lawyer with Norton Rose Fulbright and the Asper Centre’s pro bono Ottawa agent on this case and others. The

Jurors Have Rights Too

By Cheryl Milne

The important role of the jury in our justice system has been described as the “representative conscience of the community” (*R v Sherratt*, [1991] 1 SCR 509 at 523), “a final bulwark against oppressive laws or their enforcement” and a “public institution which benefits society in its educative and legitimizing roles” (*R v Turpin*, [1989] 1 SCR 1296). Despite the respect that the system purports to give to this essential element of our justice system, it is no secret that jury duty is seen by many as, at best, an inconvenience, and at worst, a major disruption to the juror’s daily life (*R v Tele-Mobile Company (Telus Mobility)*, [2006] ONCJ 229).

The Asper Centre has involved itself in two recent sets of cases that have looked at the rights and participation of citizens in juries, particularly in Ontario. The first was a series of appeals heard together by the Supreme Court in the spring of 2012 focusing on the practice of some police and Crown Attorneys of vetting the backgrounds of potential juries using police data bases (*R v Davy*, *R v Cardoso*, *R v Yumnu*, *R v Emms* and *R v Duong*). The information obtained was not shared with defence counsel and was, in most of the cases, used as a basis by the Crown for choosing jury members.

The Supreme Court dismissed the appeals in all of the cases, finding that the failure to disclose the jury vetting did not amount to a miscarriage of justice. The Court held in the cases that the Crown’s actions were improper, particularly in relation to the non-disclosure of relevant information to the accused. While Justice Moldaver for the Court in *R v Yumnu* allows for some limited intrusion into the privacy of prospective jurors he noted, “Jurors deserve to be treated with respect. Subject to a few narrow exceptions, they are entitled to know that their privacy interests will be preserved and protected.”

The second set of cases was at the Ontario Court of Appeal. In *R v Kokopenace* and *R v Spiers*, the accused alleged that the jury rolls for the districts in which their trials were held were not representative as First Nations persons living on reserves were left out due to systemic problems with the delivery of jury notices. The issue has come to light particularly in the Kenora region when the jury array for two inquests alerted participants to the problem. While *R v Spiers* was decided upon another ground (coincidentally the problem with jury vetting that had come to light in the previous cases), *Kokopenace* was ultimately sent back for a new trial based upon the ground that the original trial had not been fair due to the unrepresentativeness of the jury rolls (not

the chosen jury itself). The evidence suggested that there was a significant under-representation of on-reserve First Nations people on the jury rolls, a group that makes up approximately 40% of the district’s population.

So, why would the Asper Centre seek to intervene in these cases? In keeping with our access to constitutional justice mandate, we saw the cases are one where the Charter rights of participants in the justice system were ignored or breached. For the jurors in the Jury Vetting cases, no one represented the jurors whose records were searched without authorization. It was the Asper Centre’s position that the jury vetting conducted in those cases violated the section 8 rights of the prospective jurors to be secure from unreasonable searches. The prospective jurors would never be made aware of the use of their private information and in any event would have no standing in the criminal proceedings to raise any objections.

Similarly, in *Kokopenace*, those people who were left out of the jury notification process would not be in a position to know they had been ignored. The Asper Centre argued that there was a systemic exclusion of on-reserve First Nation residents that amounted to discrimination under s.15 of the Charter. We argued that the fairness of the trial should be viewed from the prospect of the jurors as well as the accused, both members of a group that has suffered historical disadvantage in our criminal justice system through exclusion from participation in juries and over-inclusion in terms of prosecution and incarceration.

While the Court of Appeal ordered a new trial in *Kokopenace* on the basis of his Charter claims under sections 11(d) and 11(f) - right to a fair trial and trial by jury, it refused to do so on the basis of any s.15 claim. However, Justice La Forme concluded that the “violation is the state’s failure to provide Aboriginal on-reserve residents with a fair opportunity to be included in the jury roll.” Justice Goudge also noted that the special relationship that the state has with Aboriginal people and the fundamental estrangement that they have with the justice system are factors that must be taken into account in ensuring a fair opportunity to participate in that justice system. The government has sought leave to appeal to the Supreme Court.

Cheryl Milne is the Executive Director of the David Asper Centre for Constitutional Rights. She represented the Centre in the Jury Vetting appeals alongside Professor Lisa Austin and in Kokopenace with Professor Kent Roach.

The Rule of Law, the Force of Law and the Rule of Force

By Audrey Macklin

I became involved in Omar Khadr's case in 2007. I spent three years assisting Khadr's then US military defense counsel, Lt. Cmr. William Kuebler and Rebecca Snyder, advocating Khadr's repatriation to Canada, and facilitating counsel's efforts to engage the Canadian government and the Canadian public to that end. I contributed to amicus curiae briefs submitted to the United States Supreme Court and the Military Commission in Guantanamo Bay. I represented Human Rights Watch and the University of Toronto International Human Rights Program and the Asper Centre for Constitutional Rights as co-counsel before the Supreme Court of Canada in

Khadr's two appeals to that Court. I twice attended the pre-trial hearings of Khadr before the Military Commission in Guantanamo Bay as an observer for Human Rights, in October 2008 and again in May 2010. I helped Canadian counsel John Norris and Brydie Bethell during the two years following the plea agreement, and culminating in his eventual repatriation to

Canada in 2012. As of late 2013, Omar Khadr is in a maximum security prison near Edmonton, where his current lawyer (Dennis Edney) and dedicated tutor (Prof. Arlette Zinck) reside. Omar Khadr will be eligible to apply for parole soon.

At various points in the evolution of Omar Khadr's case, the Asper Centre for Constitutional Rights and law students from the University of Toronto has engaged in important ways, most notably in the intervention in the 2010 Supreme Court of Canada case, and in providing research on constitutional issues related to Omar's return and treatment within Canada. While much of the world's attention rightly

focused on United States' violations of its own constitution and international legal obligations in prosecuting its War on Terror, the Asper Centre was uniquely well situated to elucidate the nature and extent of Canada's Charter obligations to Omar Khadr.

My experience with Khadr's case forced me to confront the fact that large swaths of the public (and their governments) seemed to regard the most basic human rights – the right to be free from torture, the right not to be detained indefinitely, the right to a fair trial – as privileges for the popular. Working with Khadr's US defense lawyers taught me the

invaluable lesson that the rule of law makes for strange bedfellows. Before meeting Lt. Cmr. Kuebler and Rebecca Snyder, I would have been unable to imagine what combination of circumstances would lead me to make common cause with United States Judge Advocate General (JAG) attorneys. But thanks to that rare

opportunity, I

retain boundless and unqualified admiration for Ms. Snyder and Lt. Cmr Kuebler's fidelity to their constitutional duties as soldiers and lawyers.

The regime to which Khadr was subject breached the most basic precepts of the rule of law. The invention of crimes, their retroactive application to detainees, the routine use of torture, solitary confinement and cruel, inhuman and degrading treatment, the lack of access to legal counsel, the indefinite detention without charge or trial, each and all extravagantly flouted international human rights law, international humanitarian law, the US Constitution and US military law. Khadr's



Omar Khadr Interrogation, used under Creative Commons from Howl Arts Collective

particular circumstances as a minor (he was fifteen when captured in July 2002), and the indifference to his age and his status as a child soldier, only exacerbated the brutality.

Guantánamo Bay represents a ‘state of exception’ existing outside of the application of the rule of law, but one which is formalized in an intricately codified legal structure. Detainees are written into the law as bodies outside of the reach of the law’s fundamental assurances of procedural fairness, and basic human rights like freedom from torture or cruel, inhuman and degrading treatment. However, as a function of the Military Commissions Act’s rigging of substantive rules of culpability and procedural rules of evidence to assure conviction, is all contained within the legal scope of the detention regime. I observed the rule of law decomposing at the granular level through the performance of ordinary courtroom rituals by legal actors schooled in the most intricate and rights-conscious legal system in the world. Khadr’s lawyers were caught by the paradox of legitimization, writ large. The more zealously they denounced the injustice of the process, the more they proved that the system was just because it provided Khadr with zealous defense counsel. Along with the media, we human rights observers performed a similar function: as long as our eyes were open in the courtroom, we proved that justice was seen to be done.

The charges against Khadr included “murder in violation of the laws of war,” and providing material support to the enemy. The most serious allegation against Khadr was that on July 27, 2002 in Afghanistan, he threw a grenade that killed US soldier Sergeant Christopher Speer. But the questions of what really happened on July 27, 2002, and what was done to Khadr in the intervening years, were nowhere on the agenda of the pre-trial hearings I attended.

During the hearings, the prosecution stated the intent to rely at trial solely on statements made by Khadr to law enforcement interrogators, not to military intelligence interrogators. Therefore, they argued, defense counsel did not need access to Khadr’s intelligence interrogators, whose evidence was irrelevant. The defense responded that before and after Khadr was interrogated by FBI and CIA law enforcement officials (who did not physically abuse him), Khadr was tortured by military intelligence interrogators. Thus, even if statements to the ‘clean team’ law enforcement interrogators were not extracted contemporaneously with torture, statements made in an environment so saturated by brutality were contaminated and cannot be construed as voluntary. Khadr’s military interrogators included the notorious Joshua Claus, who was subsequently implicated in torturing to

death two other Afghan detainees around the same time.

Discovery of these military intelligence interrogators was crucial to establishing a foundation for a motion to suppress statements Khadr made to law enforcement interrogators in which he confessed, among other things, to throwing the grenade that killed Christopher Speer and wounded another US soldier, Layne Morris. The prosecution asserted that defense counsel’s position regarding the use of coercive techniques by intelligence interrogators was mere speculation and assertion without factual support. So, the defense’s motion to obtain discovery of seven of Khadr’s intelligence interrogators was an overly broad request built on the unsubstantiated conjecture that military intelligence personnel employed coercive interrogation techniques.

The other issue argued before the judge was more complex, and exposed the incoherence produced by a legal order that stands outside criminal law and the laws of war, yet culls elements from both for normative support. The question was whether murder committed by an “alien unlawful enemy combatant” (later re-branded as ‘alien unprivileged enemy belligerent’ under the post-Obama 2009 Military Commissions Act) is automatically a war crime, or whether something more is required to turn a killing into a violation of the laws of war.

The laws of war bring within the domain of legal regulation that which is normally considered the ultimate criminal act—the willful killing of another human being. Under the Geneva Conventions, members of a state’s armed forces who kill enemy combatants on the battlefield are exempted by “combatant’s privilege” from being prosecuted for murder under the domestic laws of the enemy state. Individuals who take up arms but who are not part of a state’s armed forces, so-called unlawful (or, more properly, unprivileged) combatants, have no such immunity from domestic criminal prosecution. This means that the Geneva Conventions would have authorized the US government to charge Khadr with homicide under US criminal law and tried him in a US federal court. Instead, Congress has used the Military Commissions Act to retroactively create the war crime of murder by an unlawful alien enemy combatant. That virtually any iteration of the rule of law condemns retroactive (‘ex poste facto’) penal laws seemed not to faze the prosecutors, or the judge. Another war crime under the Military Commissions Act was “providing material support” to the enemy. The acts that constitute “providing material support” are meant to encompass anything that combatants might do, attempt to do, or assist others in doing, or fail to prevent others from doing in conflict situations. In effect, the

offenses created criminalize the status of being an enemy.

The laws of war are about regulating armed conflict between adversaries, not about making participation in armed conflict unlawful per se. Yet, once labeled an ‘alien unlawful enemy combatant’, the Military Commissions Act made it a war crime for Khadr to do anything other than surrender or die. Khadr is a combatant when it comes to detaining him indefinitely (even if acquitted of the charges against him), but not when it comes to providing him the privileges and immunities of prisoners of war. He is a criminal defendant when it comes to charging him with murder, but not when it comes to furnishing him with the most basic rights, protections and defenses available to persons charged with a crime.

One legally recognized status that actually did describe Khadr was conspicuously absent from the text of the Military Commissions Act, the cages at Bagram Air Force Base, the cells of Camp Delta, and the courtroom of Guantánamo Bay. In none of these places was fifteen-year-old Khadr a minor, much less a child soldier. The United States signed the Optional Protocol on Child Soldiers and committed itself internationally to the reintegration and rehabilitation of child soldiers. But under the US interpretation of the Optional Protocol, its provisions apply to child soldiers who kill foreigners in foreign countries, not to child soldiers who kill Americans.

Khadr was wedged between criminal accused and prisoner of war, bearing all the burdens and none of the protections of each status. His condition as a minor remained invisible to the law. But Khadr was indisputably an alien (non-citizen) to the United States. His designation as “enemy unlawful combatant” and subjection to the Military Commission process hinged on this status. Had Khadr been a US citizen, he would be in the territorial United States, facing a trial under US law in a US court.

But of course, one state’s foreigner is almost always another state’s citizen. Khadr is a citizen of Canada, born on Canadian territory to Canadian citizen parents. In law, no amount of vilification based on his family, his absence from Canada, his religion, ethnicity, alleged beliefs or conduct, can compromise the tensile strength of his legal citizenship. That some regard him or his family as ‘bad’ citizens does not alter the fact that Khadr was and remains a citizen in law.

States may intercede with other states through negotiation, advocacy, and even protest in order to protect their citizens from mistreatment. A violation of international law committed by a state against a

citizen of another state constitutes a wrong against that state, entitling it to intervene through negotiation, consular assistance, representations or litigation. This is how every industrialized state other than Canada secured the release and repatriation of its citizens from Guantánamo Bay.

Canada instead chose to condone US mistreatment of Khadr through its inaction. It seized the opportunity of Khadr’s detention in Guantánamo Bay to interrogate him repeatedly in 2003-2004. In so doing, Canada effectively renounced its relationship to Khadr as citizen. In functional terms, Canada exploited Khadr as Canadian in order to gain access to him in Guantánamo Bay, only to repudiate him as a citizen by availing itself of the opportunities presented by a regime that regarded Khadr as an alien. The United States perpetrated countless human rights violations upon Khadr. It would not subject him to a process in the continental United States that is governed by the rule of law because no such system could countenance or validate the abuses inflicted upon him. Although the war on terror is invoked as justification for Guantánamo Bay, the specific normative distinction upon which the legal regime pivots is the alien/citizen distinction, and Khadr was consigned to the abyss reserved to aliens. Canada did something different to Khadr: rendered him not merely an alien, but a stateless man. If, citizenship, as Hannah Arendt famously described it, is the right to have rights, then Khadr embodies a new and unheralded subject position: post-national statelessness.

*Audrey Macklin is a professor at the Faculty of Law. She holds law degrees from Yale and Toronto, and a bachelor of science degree from Alberta. She has been an active participant in the Asper Centre representing the Centre in the Khadr matter as well as recently in *Divito v The Minister of Public Safety and Emergency Preparedness*. This article is a condensed version of a chapter in *Oh Canada Oh Khadr*.*

A Note from Our Founding Donor

Approximately six years ago I got engaged in a general discussion with Mayo Moran, Lorraine Weinrib and Kent Roach about constitutional rights and what might be done to advance advocacy and research in this area of the law. Like other law students I assumed it was a typical kind of law school conversation that was circular, and would end with something ambiguous like 'it depends'. What I didn't appreciate was that I had actually lit a fuse and it didn't take too long before I was presented with the idea of creating a Centre-something like this Centre.



David Asper

Without fully appreciating the details of what it would mean to go down that path, I had a lot of confidence in Mayo and the Faculty to achieve excellence in whatever they recommended, because that's in the DNA of how the U of T operates.

In hiring Cheryl Milne as the Executive Director as the first move I think the Centre declared that it was going to be serious and completely dedicated to the mission.

It's not surprising therefore to reflect on the past five years and see the important contribution that's been made by the Centre in the cases, in research endeavours and in promoting education. I know it's taken a huge amount of work and salute all who have committed so heartily to their projects.

As the founding donor I can't say enough about the pride I take in seeing us be the leader in what we do. Constitutional rights seem like an obscure subject for most Canadians until theirs are adversely affected, and when they are, someone or something has to be there to analyze, evaluate, advocate and litigate when necessary. This precious asset is crucial to the achievement of a fully engaged rights-based society.

Congratulations to everyone connected with the Centre and I'm sincerely grateful for your efforts. So too are many Canadians, and please remember that at age 5 your work has only just begun!

David Asper



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