



# ASPER CENTRE OUTLOOK

Volume 8, Issue 1 (January 2016)

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## *Indigenous Jury Representation after Kokopenace: Ontario's Efforts at Jury Reform and the progress so far*

On May 21, 2015, the Supreme Court of Canada's ruling in *R v Kokopenace* was concerning to many rights advocates because of the narrow view it took of the accused's s. 11(d) and (f) *Charter* right to be tried by a representative jury. The four judge majority held that the underrepresentation of Indigenous people on the jury list in northern Ontario did not violate the representativeness of the jury selection process, and that hence there were no violations of the accused's *Charter* rights. Legal scholars and public interest organizations alike were critical of the majority judgment, which adopted a reasonable efforts "fair opportunity" test for representativeness even if the process still resulted in an unrepresentative jury.

The criticism of *Kokopenace* has distracted attention from the potential for policy-driven jury reform to increase Indigenous representation. Far from closing the door on reform, Supreme Court Justice Moldaver explicitly noted that nothing in the judgment prohibits Ontario from increasing its efforts to improve Indigenous representation. As former Supreme Court Justice Frank Iacobucci noted in his 2013 report on First Nations jury representation, Ontario's policies can go well beyond the minimum legal standards for jury representativeness.

Ontario is the first Province to seriously examine Aboriginal underrepresentation on juries since Manitoba's 1991 Aboriginal Justice Inquiry. The Inquiry found that the jury system perpetuated underrepresentation at every stage. However, neither the federal nor provincial government implemented its recommendations on jury reform. As the Iacobucci Report makes clear, the problems of Aboriginal underrepresentation have persisted and even intensified since the Manitoba Inquiry. However, attempts at rectifying this issue are underway.

Ontario is currently embarking on a serious attempt to remedy Aboriginal underrepresentation in the jury system. In 2013, the Province created the Debwewin Committee, a joint government-First Nations body that will oversee implementation of the Iacobucci Report. The next year, the government established an Aboriginal Justice Division to give Indigenous justice issues a strong institutional voice within the Ministry of the Attorney General. These two moves suggest that Ontario does not want to let the recommendations gather dust on a shelf like the Manitoba Inquiry's jury recommendations.

### **Learning from New York**

The Iacobucci Report suggests looking beyond the bounds of the province for means of increasing First Nation representation on juries. New York has served as a model by meeting, and exceeding, the standards recommended by the American Bar Association for maximizing jury representativeness.

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One such recommendation is to send additional jury summons or questionnaires to non-responders. According to the National Center for State Courts, this is the most effective approach for minimizing non-response rates. The approach, however, is not clearly effective in maximizing jury representativeness in New York, as racialized communities continue to be underrepresented on juries.

Another recommendation based on New York's experience is to allow on-reserve First Nations people to volunteer for juries. New York allows volunteers to be added to the jury source list, and some officials have encouraged volunteers from racialized communities. However, gender and socio-economic imbalances among volunteers have given rise to legal challenges. The recommendation also raises different issues than New York faces, since in New York any citizen can volunteer.

### **Ontario is the first Province to seriously examine Aboriginal underrepresentation on juries since Manitoba's 1991 Aboriginal Justice Inquiry.**

#### **Looking within Ontario**

The Iacobucci Report also recommends eliminating the threatening language on jury questionnaires. Presently, questionnaires contain a description of the penalties for non-response. According to the Iacobucci Report, the language is perceived as both coercive and inappropriate. A study by the American Judicature Society, however, suggests that a person's expectation of the consequences of non-response is the best predictor of that person's response.

Another recommendation calls for Ontario to consider requesting that Canada amend the Criminal Code to abolish peremptory challenges. Peremptory challenges allow prosecution and defense counsel to strike members from the jury pool without providing reasons. There is little data on their use in Ontario, but data from Manitoba, New Zealand, and Australia suggests that counsel frequently use it to discriminate against Indigenous jurors. In fact, the Aboriginal Justice Inquiry called for its elimination. There are also options short of elimination to restrict peremptory challenges. These range from guidelines for counsel to provisions in two Australian states that allow the judge to dismiss the jury if peremptory challenges have created the appearance of discrimination.

Finally, the Iacobucci Report recommends adopting measures to respond to the problem of automatic exclusion from jury duty for individuals with criminal records – recognizing the over-incarceration First Nations people in Ontario. The measures recommended include amending the Juries Act to exclude fewer convicted individuals; encouraging and providing support to apply for pardons; and to consider whether, after a certain period of time, a person convicted of an offence could regain eligibility. The feasibility of implementing these measures is yet to be determined.

#### **Conclusion**

In conclusion, Ontario is currently making an effort to increase Aboriginal participation on juries. This effort has the potential to achieve through policy the outcome that the Supreme Court in *Kokopenace* refused to constitutionalize. Rights advocates should closely monitor Ontario's efforts, since if successful they could serve as a model for other provinces. The work that remains to be done is challenging but the actions that are being undertaken are welcome attempts at reform for a very serious problem.

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# **Case Comment: *Frank v Canada***

## **Voting rights for Canadians are absolute (even for expatriates)**

The right of every citizen to vote in federal elections under s 3 of the Charter of Rights and Freedoms is a pillar of Canadian democracy. The recent decision in *Frank v Canada* (AG), 2015 ONCA 536 [*Frank*], is noteworthy because the Ontario Court of Appeal upheld legislation denying that right to citizens who had continuously lived outside of Canada for five or more years. This comment argues that case was decided incorrectly for it ignored the fundamental importance of equality in the electoral process, a consideration that will have ongoing significance in the relevant case law.

#### **Background**

The respondents were Canadian citizens who moved to the United States to attend school and remained there to pursue careers. Both had family in Canada, visited the country several times a year and wanted to return to the country if they could secure employment in their chosen fields. In 2011, they were denied the ability to vote in the federal election pursuant to provisions of the *Canada Elections Act*, SC 2000, c 9 [Act]. The provisions effectively disenfranchised Canadian citizens who had continuously lived outside of Canada for five or more years until they resumed residence in the country. The provisions applied to non-residents unless they belonged to an exempted group, such as the Canadian Forces. The respondents brought an application in the Ontario Superior Court for a declaration that those sections were unconstitutional.

The question at issue was whether Canadians who have lived continuously outside of Canada for five or more consecutive years could be denied the right to vote under the Charter. The applications judge struck down the relevant provisions, finding they placed an unreasonable limit on the right to vote, which could not be justified. Ontario Chief Justice Strathy, for the majority of the Ontario Court of Appeal, reversed that decision, holding that, while the impugned provision violated the right to vote, that limit was justified. An application for leave to appeal to the Supreme Court of Canada was filed on September 29, 2015.

#### **Law**

The leading case is *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [Sauvé], where Chief Justice McLachlin, for the majority, held that the right to vote “underpins the legitimacy of Canadian democracy and Parliament's claim to power”. In *Harper v Canada (AG)*, 2004 SCC 33 [Harper], Justice Bastarache, for the majority, added that, “[t]he advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system”. That confidence, in turn, “is essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy”. Given the centrality of the right to vote in Canadian democracy, the majority in *Sauvé* held, “that s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns”. The effect of that holding is that the denial of the right to vote of a certain class of citizens almost invariably violates s 3.

In order to withstand Charter scrutiny, such a denial must therefore amount to a “reasonable limit prescribed by law [that] can be demonstrably justified in a free and democratic society” under s 1. Per *R v Oakes*, [1986] 1 SCR 103, such a limit must have an objective that is “pressing and substantial” and means that: (1) promote the asserted

# Frank v Canada: let voter ballots be cast

objectives; (2) minimally impair the violated right; and, (3) produce greater overall benefits than negative effects.

Sauvé made clear that, in applying the Oakes test to cases involving the denial of the right to vote, judicial deference to Parliament is not warranted. As Chief Justice McLachlin explained, “[D]enying a citizen the right to vote denies the basis of democratic legitimacy”. Accordingly, it has proven very difficult for the government to justify a limit on the right to vote in federal elections.

Canadian courts have struck down portions of the Act denying the right to vote to mentally disabled people, federally appointed judges, and prison inmates: *Canadian Disability Rights Council v Canada*, [1988] 3 FC 622; *Muldoon v Canada*, [1988] 3 FC 628; and *Sauvé v Canada (Attorney General)* (1992), 7 OR (3d) 481 (CA), affirmed by [1993] 2 SCR 438. In *Sauvé*, the Supreme Court struck down a prohibition on voting by prisoners serving sentences of two years or more. Since those decisions, the only overt, controversial restriction remaining in the Act is the one denying the right to vote to citizens who have been absent for five or more consecutive years.

## Reasoning

In *Frank*, Ontario Chief Justice Strathy held, “that preserving the connection between citizens’ obligation to obey the law and their right to elect the lawmakers – strengthening the social contract – is a pressing and substantial objective”. The idea is “that non-residents are generally not subject to Canadian laws and do not share the same citizenship obligations”. He also found a rational connection between that objective and the chosen means: “Canadian citizens who have been non-resident for five or more years are largely not governed by the Canadian legal system; therefore, excluding them from the franchise helps to strengthen the social contract and enhance the legitimacy of the law”. Further, the five-year cut-off was found to minimally impair the right to vote because it accorded with the maximum life of a Parliament, the time required to complete a university degree and similar restrictions in other countries. Finally, the intended benefit of strengthening the social contract was found to outweigh the harm of the infringement given that non-residents regained their right to vote upon resuming residence in Canada. For these reasons, Ontario Chief Justice Strathy concluded that the violation of s 3 was saved by s 1.

While Appellate Justice Laskin, dissenting, would have dismissed the appeal on procedural grounds, he nevertheless considered the appeal on its merits. He argued that preserving the social contract was not a pressing and substantial objective because, inter alia, there was “no evidence of harm, real or potential.” Further, the social contract objective was not rationally connected to the chosen means as those living outside of the country continuously for five or more consecutive years “remain subject to and affected by the laws that do apply to them” and “maintain strong ties and affinity to Canada” [at para 240-2]. At the minimal impairment stage, the justice argued that there was no evidence that non-residents exempted from the five-year limit, such as Canadian Forces members, had a stronger connection to Canada. Lastly, Laskin found that the harmful effects of the legislation were too great: “Canadian citizens abroad for more than five years... will have no voice in the future direction of their country even though they have family here, intend to return here, and thus will be affected by laws enacted while they are abroad.” In all, Justice Laskin rejected the

majority’s contention that denying voting rights to non-resident citizens strengthens democratic legitimacy.

## Comments

There is another consideration that bolsters Laskin’s conclusion: the fundamental importance of equality in elections, as recognized in *Harper*. Equality, in the context of the right to vote, refers to the equality of citizens to participate in the electoral process. The Supreme Court has found that this factor is necessary to preserve public confidence in, and hence the integrity and legitimacy of the electoral system. This factor creates a very high hurdle at the proportionate effects stage of the Oakes test.

A limitation that denies voting rights to a group of citizens weakens the equality among citizens to participate in the electoral process and arguably as a consequence undermines the integrity and legitimacy of that process. In other words, the deleterious effect of a bar on the ability of a group of citizens to vote is the destabilization of the democratic system. One would be hard pressed to come up with a benefit that could outweigh that harm.

In the *Frank* case in particular, the benefit espoused by Ontario Chief Justice Strathy was “preserving the connection between citizens’ obligation to obey the law and their right to elect the lawmakers” [at para 93]. Even if that benefit had been substantiated, Chief Justice McLachlin made clear in *Sauvé* that “the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote” [at para 31]. It follows that without the right of every citizen to vote, the obligation to obey the law that Justice Strathy appealed to weakens that connection.

Beyond the immediate case at hand, this analysis also raises questions about less explicit restrictions on the right to vote of particular groups of Canadian citizens. The most pressing issue relates to voter registration laws, like the *Fair Elections Act*, SC 2014, c 12 [FEA], which are argued to obstruct the right to vote of Canadians who do not have driver’s licenses generally, and youth, Aboriginals, elderly people, and homeless people specifically: see *Council of Canadians v Canada (Attorney General)*, 2015 ONSC 4601, affirmed by 2015 ONSC 4272 (Div Ct). The precursors to the FEA voter registration rules were held to be justified by the *British Columbia Court of Appeal in Henry v Canada*, 2014 BCCA 30. However, in light of this analysis, the supposed benefit of preventing rare occurrences of electoral fraud and error [at para 97] do not outweigh the harm of obstructing the right to vote of vulnerable groups such as the homeless. The reason for that conclusion is that, as stated above, that type of harm undermines the integrity and legitimacy of democracy.

## Conclusions

The *Frank* decision is significant for several reasons. The case addressed the last controversial, explicit restriction on the right to vote under the Act. This comment asserts that the failure of the majority of the Court of Appeal to strike down that restriction highlighted the fundamental importance of equality in the voting process. In doing so, the decision raised questions about less obvious restrictions on voting, particularly voter identification laws. In all, the decision underscores the importance of guaranteeing equal access to the ballot box.

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# ***Asper Centre intervenes at SCC in R v KRJ***

## **Students reflect upon working with the Asper Centre intervention**

*The Asper Centre intervened in the case of R v KRJ at the Supreme Court of Canada on December 2, 2015. This appeal dealt with the applicability of certain amendments to s. 161(1) of the Criminal Code in sentencing. The accused was sentenced to a total of nine years' imprisonment for certain sexual offences committed against persons less than sixteen years of age from 2008-2011. The trial judge held that the accused would be prohibited from engaging in certain activities for a further seven years after his release. On August 9, 2012, s. 161 (1) was amended. The trial judge found that these new amendments were punitive under s. 11 (i) of the Charter and thus should not be retroactively applied to the accused. The Crown appealed the trial judge's decision and argued that the newly amended s.161 (1) terms should be applicable. The Court of Appeal allowed the Crown's appeal and the accused appealed to the Supreme Court. JD students Liz Kurz and Bilal Manji worked with the Asper Centre on this case and they reflect upon their experience here.*

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Last year, we attended an information session about the clinical opportunities available at the Faculty. A student from the Asper Centre discussed his work on an intervention at the Supreme Court of Canada. Our first thought: they let students do that?

From September to December, we provided litigation support for the Asper Centre's intervention in *R v KRJ* ("KRJ"). Section 161 of the Criminal Code provides for prohibition orders to attach to sentences for certain sexual offences. KRJ, the appellant, committed a sexual offence and the sentencing judge imposed a prohibition on internet access upon him, pursuant to section 161(1). However, the section had been amended after KRJ committed the offence, and prior to his sentencing. The issue in the case was whether the "benefit of lesser punishment" guaranteed by section 11(i) of the Charter prevents the imposition of an order under s. 161(1) as it read at the time of sentencing as opposed to how it read at the time of the offences. Our submissions dealt exclusively with the threshold issue of what constitutes "punishment" for the purposes of section 11 of the Charter.

Upon being given our project assignment, we had to very quickly delve into the research, as the Centre's leave to intervene materials were due within a couple of days. Moreover, due to the scheduled date of the appeal, we knew that if granted leave, we would only have approximately one month to prepare a factum. We met with counsels, Cheryl Milne, John Norris and Professor Hamish Stewart, to discuss various theories of punishment, tease out the nebulous case law in this area, and brainstorm possible arguments that the Centre could raise. Despite the expertise and vast experience of our counsel, we were expected to contribute to meetings as though we were full members of the team.

### **The Learning Experience**

The factum drafting process was a steep learning curve. We had to articulate a coherent analytical framework to identify punishment under section 11 of the Charter, which reconciled past jurisprudence of the Supreme Court of Canada, as well as anticipated future issues to be heard by the Court. Luckily, we had two lectures (one of which was with Madam Justice Kathryn Feldman) on factum writing. Once again, we were struck by how much counsel trusted us in the factum drafting process. In total, we had four drafts, with regular feedback provided by counsel. Moreover, we benefited from class input on how best to frame our proposed analytical framework.



*Cheryl Milne, Bilal Manji, Liz Kurz, and John Norris at the SCC*

### **A Day at the Supreme Court**

On December 2, we travelled to Ottawa to hear the oral arguments of the appeal at the Supreme Court. We have watched hours and hours of Supreme Court hearings on CPAC – but it was a particularly rewarding experience to watch submissions live. Due to the number of interveners, we were able to see a range of advocacy styles. It was very interesting for us to see the judges grappling with questions we had been asking ourselves throughout the term. Should the test for punishment be based on purpose or effects? What does it mean for a sentence to "further the purposes and principles of sentencing?" How are we to apply the framework articulated by Justice Charron in *R v Rodgers*? These were some of the many questions that counsel had to respond to in this appeal. It was an incredible feeling to be in the courtroom and we felt so grateful to have been given the opportunity to work on such an interesting project.

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### **Reflections**

KRJ provided us with an incredible introduction to constitutionally based rights advocacy. We learned about the different dimensions – legal, procedural, strategic, ethical and conceptual – of rights advocacy. From having to respond to a letter by the respondent to dismiss our leave to intervene application, to Justice Cromwell approving our leave application, to finally watching counsel John Norris provide oral submissions, it has been an invaluable opportunity to engage with appellate advocacy. We only hope it will not be our last.

*Elizabeth Kurz and Bilal Manji are third-year JD students at the University of Toronto Faculty of Law*

# Mandatory Payment Transparency for Canada's Extractive Industries

## The impact of Canadian federalism under new government policies create jurisdictional uncertainty for extractive industries

*Canada has always been a nation with an economic reliance upon its natural resources. The division of powers between the federal and provincial governments as respectively enumerated under sections 91 and 92 of the Constitution invariably create legal ambiguities between these two governments when dealing with natural resources and their subsequent trade. This article examines the international trade of Canada's natural resources and the federalism issues surrounding it.*

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Under the policy of 'Responsible Resource Investment', recent years have seen significant legal developments bearing on the extraterritorial conduct of firms in the extractive industries, including:

- the *Extractive Sector Transparency Measures Act* (ESTMA),
- amendments to the *Corruption of Foreign Public Officials Act* (CFPOA Amendments),
- several precedent-setting prosecutions under the CFPOA, and
- amendments to the "Corporate Social Responsibility Strategy for the Canadian International Extractive Sector" (Extractives CSR Strategy) of the erstwhile Department of Foreign Affairs, Trade, and Development (now called Global Affairs Canada).

This article identifies the relevance of Canadian constitutional law to the *Extractive Sector Transparency Measures Act*, in particular. The first section introduces the connection between payment transparency and federal securities regulation. The second section notes attempts to regulate payment transparency both by Ottawa and Quebec City in the absence of a federal securities regulator.

### Diplomatic Commitments and the Securities Act Reference

In some ways, the story in this first section is an old one: diplomatic pressure has led Ottawa to adopt a rule that was conceptualized with little to no consideration of Canada's institutional particularities. It starts in July of 2010 when the U.S. congress passed S 1504 of *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank), which tasks the Securities and Exchanges Commission (SEC) with regulating payment transparency amongst U.S.-listed companies. In August 2012, after extensive and at times controversial consultation, the SEC issued its Rule 13q-1 imposing payment transparency-related annual reporting obligations as a component of ongoing securities disclosure.

### significant uncertainty [remained] about how mandatory transparency would transition from diplomatic commitment to federal legislation.

While implementation of Rule 13q-1 has been delayed due to renewed lobbying and court challenges – a revised version was re-introduced in December 2015 – it has nevertheless had significant international influence. The next key moment was Ottawa's adoption of mandatory payment transparency within the G8. In 2011 the G8 Summit considered for the first time the need for rich countries to mandate payment transparency.



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By 2013 a consensus had been reached between Washington, London, Paris, and Brussels. The 2011 Lough Erne Declaration was categorical, stating, "extractive companies should report payments to all governments - and governments should publish income from such companies." It came as a *fait accompli* when, in a meeting with mining, oil, and gas executives on the edges of the 2013 summit, then-Prime Minister Stephen Harper announced that Canada would also mandate payment transparency.

Finally, we return to the beginning with the intuition that payment transparency is a variation of securities regulation. In January 2014, the Canadian mining industry partnered with civil society groups to issue a report titled "Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments" ("Joint Report"). The Joint Report recommended

[...] the implementation of a mandatory disclosure framework through securities regulation with a strong equivalency provision to align with other jurisdictions such as the U.S. and the EU. This recommendation aligns with the U.S. model ... where such disclosure is regulated by the U.S. Securities and Exchange Commission ("SEC") and recognizes the existing powers of Canadian securities administrators to regulate the disclosures of public entities in Canada.

Notably, the Joint Report therefore refers the federal government's jurisdiction under s 91.2 'Regulation of Trade and Commerce' of the Constitution. However, in light of, *inter alia*, the Supreme Court of Canada's findings in the *Reference Re Securities Act* 2011 SCC 66, there remained significant uncertainty about how mandatory transparency would transition from diplomatic commitment to federal legislation.

### Between Natural Resources Canada and the Autorité des marchés financiers

Following the Joint Report, the federal government did not implement payment transparency through securities regulation. Rather, the *Extractive*

# Canadian Federalism and the Extractive Sector

*Sector Transparency Measures Act* came into effect on 1 June 2015 and in August 2015 National Resources Canada issued a (continued on page 6) suite of administrative documents constituting the ESTMA Scheme. Shortly thereafter, i.e. on 11 June 2015, Quebec tabled *An Act respecting transparency measures in the mining, oil and gas industries* (Bill 55). Bill 55 has now become law in Quebec and will be administered by the Autorité des Marchés Financiers, the province's financial market regulator.

Under NRCAN's ESTMA Scheme, the first annual reports for covered entities will be in respect of financial years ending after 1 June 2016 and will be due 150 days thereafter. Companies with a 31 December year-end will therefore be required to submit their first annual report on 30 May 2017.

It could be inferred that the federal government and NRCAN would argue that the ESTMA Scheme falls under s.91(2) 'Regulation of Trade and Commerce' and thus is a federal jurisdiction. Quebec City, however, has indicated that it believes ESTMA to fall under s.92a 'Non-Renewable Natural Resources, Forestry Resources and Electrical Energy' and has therefore introduced Bill 55. Although Bill 55 will be administered by Quebec's securities regulator the province has not to-date claimed jurisdiction under s.92(13) 'Property and Civil Rights', which was invoked in the *Reference re Securities Act*.

Practically speaking, the short-term result is that firms reporting under the ESTMA Scheme also have to consider whether they are covered by Quebec City's Bill 55. This may be the case, for instance, if the firm's head office is in Quebec or even if the firm simply owns assets in that province. This exercise in avoiding the appearance of ceding any core competency to the federal government, adds an extra layer of compliance, which, even if there are practical solutions, investors avoid at their own risk. Therefore, the uncertainty arising from a division of power based on constitutional federalism remains unresolved.

## Conclusion

As noted in the introduction, ESTMA is one aspect of a larger trend whereby Canadian law is being used to discipline the extraterritorial conduct of Canadian firms in the extractive industries. In fact, as Canadian law applies a territory-based principle when determining whether it will extend criminal jurisdiction to offences that take place abroad, it was previously necessary to demonstrate a real and substantial link between Canada and the act of bribing a foreign public official abroad, which made prosecutions under the CFPOA, for example, notoriously difficult. It is possible that this 'problem' has effectively been overcome by recent amendments that write nationality-based jurisdiction in to the CFPOA.

It is not unlikely that this trend will intensify under the new Liberal Government which seems more sympathetic to global governance and sustainable development than its predecessor. However, issues of Canadian federalism appear set to complicate the equation.

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# Working Groups at the Asper Centre

## Environmental Law Working Group



Commencing in September 2015, the David Asper Centre for Constitutional Rights established the Environmental Law Working Group to research the possibility of climate change litigation in Canada. The Working Group was developed in concert with the University of Toronto's Environmental Action group (UTEA). UTEA's mandate is to ensure climate justice for young Canadians. UTEA

believes that failure of the current generation of Canadian leaders to take effective action on the issue, which means avoiding the associated cost and leaving a much higher cost to be paid by future generations, constitutes age discrimination and thus climate injustice for youth. UTEA began investigating the possibility of challenging the Federal Government's fossil fuel subsidies in court in 2013, as an instance of this injustice, and requested the assistance of the Asper Centre in 2015.

The Asper Centre working group consists of 14 first and second year law students, led by four group leaders (Alissa Saieva, Graham Henry, Holly Sherlock, and James Elcombe). Our goal is to lay the foundations for a section 7 and/or section 15 claim under the Charter. Our students are involved in researching sections 7 and 15, the government's response under section 1, and questions of standing, jurisdiction, etc. The academic benefits from such an undertaking are complimented by the practical impact the students' efforts will have.

The group of students prepared their first research memos on their assigned topics at the end of November 2015. These memos are currently in the process of being synthesized with a research memo prepared for UTEA by a law student at Osgoode Hall Law School in the summer of 2015. Upon completion of the synthesis, the group will present a report to Executive Director of the David Asper Centre for Constitutional Rights, Cheryl Milne, Professor Douglas Macdonald from the University of Toronto's School of the Environment, and Joseph Arvay, Q.C., a Partner with Farris Law.

In response to the feedback on the initial report, the working group students will distribute further research questions for the group's final deliverables to be submitted prior to the April exam period, as well as looking at the best way to move forward in light of the change in government at the federal level, and the Liberals' commitment to removal of fossil fuel subsidies. The students hope to keep working on this problem in the future, taking on the next challenge with a new batch of students in September 2016.

The Environmental Working Group is grateful for Cheryl Milne's continued guidance, Douglas Macdonald's strong commitment to the cause, Joseph Arvay's legal expertise, and the students' enthusiasm and legal research skills.

**Alissa Saieva** is a second-year JD student and **James Elcombe** is a third-year JD student. Both Alissa and James study at the University of Toronto Faculty of Law and are working with UTEA



# ***Reflections on the Asper Centre Summer Fellowship: Advancing Constitutional Rights with Ecojustice***

*Each summer, the Asper Centre selects 2-3 University of Toronto Faculty of Law students to work with organizations within Canada to advocate for human rights issues. The funding comes from the John and Mary A. Yaremko Programme in Multiculturalism and Human Rights. The endowed fund provides awards for students who demonstrate academic excellence and who are participating in a broad range of community organizations relating to human rights and multiculturalism.*

*Quinn Keenan was one of the students selected for a 2015 Summer Fellowship with the Asper Centre. She shares her experience working with Ecojustice in this article.*

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I was very fortunate to have received the opportunity to work as a summer student at Ecojustice. During my first year winter break, I nervously picked up the phone and called their Toronto office.

I was eventually offered supervision by one of Ecojustice's top lawyers. With this assurance, I was able to apply for the grant offered jointly by the David Asper Centre and International Human Rights Program (IHRP). This grant (and Ecojustice's equally generous offer to put up with a first year law student for the whole summer) led to my most important experience of law school thus far.

As a first-year law student, I loved the study of law but it was a difficult field of study. During my time with Ecojustice, the attentive supervision of their lawyers meant that even the most stupendous of my blunders had no larger repercussion than eliciting great learning experiences and a fierce shade of crimson from the tips of my ears!

Despite what may have seemed like my best efforts, I eventually improved. After about a month and a truly impressive amount of constructive criticism, something finally clicked. I started to understand what was required of me as a law student. Beyond the obvious gains in utility, a big part of this new sense of direction came from being around the practice of law done in a way that inspired me.

Ecojustice is the only environmental law charity in Canada whose operations run entirely on charitable donations. Through litigation, and some law reform, Ecojustice focuses on protecting wilderness and wildlife, safeguarding peoples' health against toxic pollutants, advocating for cleaner energy; and working to stave off disastrous consequences from climate change. Also, the cool thing is, I feel like I got to do a little bit of work in all of these aspects.

How I spent my days was equally varied. I began with an assignment from the senior scientist researching Canada's regulations of certain chemicals in relation to other Organisation for Economic Co-operation and Development (OECD) countries. I was given the experience of filing my first freedom of information request, and wow, never has posting a thing been more terrifying. I was next assigned a case law memo, which was the most disastrous and therefore the most informative experience of the summer.

As I got a bit faster, I also began taking some new case inquiries from the public. This was a fascinating, and at times both a frustrating and rewarding new challenge. It was a priceless opportunity to work with a member of the public under the close tutelage of a lawyer. As I was unable to give legal advice, it was great to see how much help I could

sometimes provide by pointing out information that is publicly available but hard or time-consuming to find.

A lot of Ecojustice's work, and a lot of what I learned there, involved administrative law. As I have now learned from the talented Professor Richard Stacey, the body of administrative law is essentially the most recognizable and practical application of the Constitution. While, I never made this clever observation during my summer, it now seems unmistakably clear.

Ecojustice lawyers' work in this area of law is particularly important due to the landscape of environment law in Canada. One reason is Canada's Constitutional divisions of power relating to the environment. The struggles between the federal and provincial governments, whether and how to introduce competition and private companies, Ministries, and planning authorities to name a few are Ecojustice's chief areas of focus: the only competition that is applicable to all these bodies is the competition to seemingly divest responsibility on environmental stewardship. In response to this, Ecojustice's lawyers have become experts at enforcing administrative honesty and high-quality Ministerial decisions.

Another reason why Ecojustice is indispensable is that several decisions by the Supreme Court have annihilated the "toxic tort". This type of class-action suit used to be an essential cause of action in environment law. For those who are unfamiliar, the overview is this: members of a community band together to accuse polluters of environmental violations, which have resulted in widespread health issues of a certain type. This type of suit was especially key because of the problems establishing factual causation endemic to this kind of case, e.g., proving the kidney cancer suffered by each 150 residents was caused by the defendant's facility. This model allowed the possibility of weighing the sheer volume of cases against a lack of proof of factual causation in every specific case. However, the Supreme Court has essentially removed tort as an avenue to remedy environmental violations.

There are now some cases with the absurdly unfortunate result where liability for an environmental violation is established through some other area of law, e.g., administrative law, but there is no tangible remedy available to the people affected by the consequential environmental destruction. There is also the additional difficulty for victims of environmental torts that private firms are now even less likely to take on these cases. In my opinion, Ecojustice lawyers do work that would simply not get done by anybody else under the circumstances.

Ultimately, thanks to the grant I received from the David Asper Centre and the IHRP, I was able to experience the real application of our Constitutional principles on a daily basis. It was an honour on many levels. Bad decisions about the environment can be catastrophic and good decisions require a champion. While there may not be a Charter right to a healthy environment, in the right hands, the Constitution provides the way to make it right.

**Quinn Keenan** is a second-year JD student at the University of Toronto Faculty of Law. She was also one of the 2015 Summer Fellows with the David Asper Centre for Constitutional Rights

# ***Constitutional Reform in the post-Arab Spring Middle East***

## ***An interview with Professor Zaid Al-Ali***



Prof Zaid al-Ali speaking at the Asper Centre constitutional roundtable

The 2011 “Arab Spring” uprising led to a critical moment in the Middle East’s recent history. During those events, protests from various countries sprang up from North Africa to Syria and Kuwait. Notably, popular street protests against what was perceived to be autocratic governments led to significant governmental changes in countries like Tunisia, Libya, and Egypt as well as reforms in nations such as Jordan and Kuwait. Such protests reflected a popular yearning for change in the status quo from a top-down, autocratic form of government towards one which better reflected the social desires, aspirations, and values of the people. In effect, it was a mass protest from an angered populace against a ruling elite that seemed too isolated from the problems of ordinary life.

In a recent Constitutional Roundtable event hosted by the University of Toronto - Faculty of Law and the David Asper Centre for Constitutional Rights, Professor Zaid Al-Ali discussed the ramifications of the 2011 protests and how its consequences have been reflected from the perspective of constitutional law and reform. Professor Zaid Al-Ali is a Law and Public Affairs Fellow at Princeton University and he is also a Senior Adviser on Constitution Building for International IDEA, an intergovernmental organization which supports worldwide sustainable democracy. He also had first-hand experience dealing with the nuances of constitution drafting with various governments in the region during the turbulent post-2011 protests as well as during the immediate aftermath of the American war in Iraq and the end of Saddam Hussein’s rule of the country.

During the Roundtable discussion, Al-Ali discussed what he perceived to be the “absence of social solidarity amongst Arab elites”. Essentially, despite the history of popular detachment from a small ruling elite in many forms of government, recent Middle Eastern countries featured an aloof and insulated social group of elites which governed according to their own views of society- at times, against the popular concerns and consent of the governed. This elite consisted of the executive branch; namely, the ruling party’s president and its inner circle of cabinet members, a

subservient judiciary, a powerful military and police force, as well as various business interests.

What distinguished this particular group is that many of these members of the elite were educated in Western nations such as France; however, their education focused on the challenges and virtues of the specific historical and social contexts of the era (i.e. France in the 1960s and 1970s). As such, an entrenched view of government and policy reflected the lessons of that particular elite education which revered the French form of constitutional power at the cost of ignoring the modern challenges facing ordinary citizens. Al-Ali argues that when this elite inability to meet up to the popular expectations of social justice, the ultimate impact led to the 2011 Arab Spring protests and its subsequently new governments throughout the Arab world.

In a variety of ways, the legacy of colonialism, the region’s political culture and emphasis on consolidating political power in the hands of a small group of elites, as well as the impact of regional conflict contributed to the problems of the post-2011 Middle East. In the process of forming new governmental structures, the old elite which was subject of great popular disdain became replaced by competing interests of various social groups which sought to create a new government. This process of governmental change and social upheaval led to varying results which depended on the particular problems of the country prior to the protests. Indeed, in a country such as Tunisia, the gradual transition to popular democracy was relatively peaceful and progressive versus the more turbulent governmental changes in countries such as Libya, Egypt, and Syria. However, what all countries had in common was that a new government based itself on the legitimacy of a constitution-based order.

I spoke with Professor Al-Ali about his upcoming paper on the issue of government and the Arab elite, the nature of constitutional reform in the post-2011 Middle East, and where the path towards reform may lead to.

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**Alvin Yau:** Your roundtable discussion dealt with a very important world event in the context of the 2011 Arab Spring protests. You mentioned that a lot of the causes leading to the protest was due to a desire for “social justice” and “social solidarity”. Can you elaborate for us what you mean by “social solidarity”?

**Zaid Al-Ali:** It means many things in different parts of the world; but in the Arab context, It is a state of society whereby the most vulnerable are looked after. That there should be sufficient healthcare, education, and opportunities to find work. It does not mean an entitlement to get an income as some people do believe it to be.

**There is a big generational gap in the Arab region, the older generation tend to be more conservative whereas the younger people are very different.**



# ***Constitutional Reform in the Middle East: The Asper Centre in conversation with Zaid Al-Ali***

**AY:** Is that similar to “social justice”?

**ZA:** the only difference is the use of the word “justice”. It implies something was wrong and needs to be rectified. It acknowledges that there needs to be transitional justice and to acknowledge that there were past crimes and injustices. Now, this might mean decades of mismanagement or corruption in these countries. This differs from social solidarity because it deals with the historical events which were perceived to be unjust.

**AY:** How do you envision that this form of social justice become administered or realized?

**ZA:** That is a tough one. There are all sorts of mechanisms. It is a challenge because the people who control the state are not really interested in ruling. It is not in their order of priority. Particular mechanisms involve decentralization, judicial reformations to improve on the rights of the people. It needs to come through a change in government or force them to respond adequately to the people’s needs. Now, that is not a problem that is particular to the Arab world; it happens in all countries, but these mechanisms would be one way of administering social justice [in light of the 2011 protests].

**“justice”...implies something was wrong and needs to be rectified. It ...acknowledges that there needs to be transitional justice and to acknowledge that there were past crimes and injustices.**

**AY:** There has been a lot that has changed since the 2011 protests and many aspects have been less than ideal. In your opinion, what were some positive effects of the protests?

**ZA:** Before 2011, discourse about Arab region was “why are Arabs so passive?” In post-2011, the people do not feel so helpless anymore. Indeed, many more networks between NGOs, activists, and citizens allow for connection between these groups. This was never the case [before 2011]. Before elite circles would say that people need to be educated before there can be reform; nowadays, that has been dropped. The discourse has changed and it focused on formulating mechanisms that will grant people rights. Those are very symbolic but also very important elements in change.

For example, in Egypt 1970s, we could not even speak about gender or poverty or discrimination against women. It was seen as treasonous. Now, it is completely gone. Freedom of speech in the Arab world is no

longer seen as being totally restricted by the regime; we just have not translated to the proper legal mechanisms just yet.

**AY:** You had a lot of first-hand experience regarding constitutional reform. Was there anything that surprised you when you had this experience?

**ZA:** Well, I was born in exile, my family was politically exiled. Therefore, I had met many other exiles in my youth who ultimately took part in the new constitutional framework. So, I was not so surprised that the negotiations for constitutional reform was where it was.

In Iraq in particular, after the American-led war, it was probably likely that all parties knew how difficult the process would be and how there were different interests which would conflict with each other. I was not so surprised about that. What I was surprised of was how the lack of progress was so severe in the post-war drafting process and how that has created room for chaos in the region leading up to the Islamic State’s takeover of parts of Iraq and Syria.

**AY:** What are you most hopeful for? What are some positive effects of the protests?

**ZA:** The younger generation has their ideas straight. There is a big generational gap in the Arab region, the older generation tend to be more conservative whereas the younger people are very different. Therefore, the younger would need to be co-opted into the new government to get them to share their ideas. Some of these younger people have really gone out of their way to do what is simply just right and they have a lot to say regarding state reform. We have to get them incorporated into the new government.

**AY:** How do you go about incorporating these new, younger, and more diverse voices into a new government? Should we?

**ZA:** We should! The question is not if, but “how?” The easiest way is through an election. But, in cases like Egypt, they may not turn out ideally. However, even in that process, there were a few really good people who were voted into power. Another way may be to become appointed by the ruling party. In Kenya, some very progressive voices were appointed to draft a new constitution and similarly with South Africa. So, while there was no direct democratic process to get these new voices into the government, it still served what was needed to get a diverse group of voices and representation in the drafting process.

In Egypt, fifty were appointed; seven were really progressive and they made a lot of noise. However, there was not enough of them to tip the balance; nevertheless, they were recognized as legitimate voices in a society. So, in some cases, there is a role for appointments and in others there are cases where democracy may work.

**AY:** Very interesting observations, professor. Thank you for your time!

**ZA:** Any time!

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**Alvin Yau** is a first-year JD student at the University of Toronto Faculty of Law. He is also the 2015-2016 Research and Communication Assistant at the David Asper Centre for Constitutional Rights

# ***Notable Constitutional Law Cases***

## ***New constitutional directions for 2016?***

*After the 2015 Canadian election and the resultant change in government, there have been a handful of cases that merit special attention. These cases seem to represent a new direction with regards to certain topics of constitutional significance. We have explore some of these cases below.*

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### **Citizenship Rules**

#### **Minister of Citizenship and Immigration v. Zunera Ishaq 2015 FCA 194**

The Respondent in the appeal, Ishaq, was a permanent resident with religious beliefs requiring her to wear a niqab, or face covering, at all times in the public. She applied for full Canadian citizenship and had passed all her tests; however, the penultimate step towards attaining citizenship included taking an oath of citizenship in a public venue. Under the most updated regulations overseeing the citizenship application process, citizenship judges could only administer the oath in swearing-in ceremonies where all participants could not have their face concealed. Ishaq refused to remove her niqab since it would violate her Islamic beliefs and subsequently sued the Ministry of Citizenship and Immigration for breaching her s.2 (a) and s.15 (1) Charter rights. At trial, Justice Boswell ruled that the Ministry's regulations were invalid since they were contrary to the overarching Citizenship Regulations which govern citizenship judge conduct. The court did not address the Charter arguments. The Ministry appealed the decision and controversially reaffirmed the then-Conservative government's public position that "citizenship is a privilege and not a right." The Federal Court of Appeals swiftly dismissed the appeal since it agreed with the Federal Court's result but under different interpretations of the Citizenship Regulations. The appellate court also did not deal with the Charter arguments presented. The Conservative government appealed to the Supreme Court but the appeal was withdrawn shortly after the Liberals won the 2015 Election and formed the new ruling government.

### **Assisted Suicide**

#### **Quebec (Procureure Général) c. D'Amico 2015 QCCA 2138**

After the Supreme Court Carter decision effectively struck down Canada's ban on euthanasia, it remains unclear how, if at all, provinces can provide assisted suicide services to patients who request it. Currently, the federal law banning euthanasia is still valid law since the Supreme Court gave Parliament one year to revisit the language (which it has yet to do); however, in effect, it is unlikely to be enforced until Parliament amends the law. Recently, the Quebec Court of Appeals helped clarify the issue by ruling that Quebec's post-Carter law allowing for assisted suicide is valid provincial law. The appellate court reasoned that since the Supreme Court Carter decision is itself legally valid even if it is not yet implemented, Quebec's legislature can enact new law to fill the void during the one-year Parliamentary review period on the current euthanasia law.

#### **Lee Carter, et al. v. Attorney General of Canada, et al. 2016 SCC 4**

Following the original Carter decision (2015 SCC 5) on euthanasia, the Supreme Court of Canada gave Parliament twelve months to establish new laws dealing with euthanasia. During the previous Conservative-led government, there was no final draft copy of the law that was debated in Parliament prior to the 2015 Federal Election. After the election of a new Liberal-led government, the new Government motioned for a six-month extension from the Supreme Court to properly create a new law on euthanasia. In February 2016, the Supreme Court agreed with the Government's position that a time extension was appropriate given the law's scope in the context of a new Government. However, instead of the full six-months, the Supreme Court decided 5-4

that a four month extension was more appropriate for the issue of a new law on euthanasia and further held that Quebec was exempt because it had established a regime for approval while individuals from other provinces could apply to a Superior Court for an individual exemption.

### **Criminal Law Reforms?**

In light of the Truth and Reconciliation Commission report released in June 2015, one of the many proposals for reforms called for repealing section 43 of the *Criminal Code of Canada*. This particular section of the *Criminal Code* offers protection for teachers, parents, or guardian who use force against children "if the force does not exceed what is reasonable under the circumstances." While this has been valid law for 123 years, the Supreme Court of Canada had already narrowed the scope of the law in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 where it restricted use of force via objects and limited where force could be applied. However, the current Government has proposed striking down the law in line with the findings of the Truth and Reconciliation Commission. While this particular proposal has not yet been brought up to Parliament at the time of writing, this is a particular area that the Asper Centre is paying attention to in 2016.

### **Voter Reforms?**

Another proposal from the new government was to enact electoral reform that would change our current system of first-past-the-post (FPTP) to one based on proportional representation. While this is merely a proposal from the current government at this stage, it raises some interesting questions as to whether there is a valid constitutional basis through which Parliament can enact such a change. On the one hand, electoral reforms do not require constitutional law change since there is no explicit constitutional requirement suggesting that FPTP or any other method of voting is entrenched in Canada. However, the mere process of reforming how Canadians vote would seem to engage the relevant sections of the Constitution that deal with regional representation, equality, and democratic rights. At the time of writing, the government has stated that it would not hold a referendum for the voting reform; rather, it would be decided upon by Parliament. While the idea may merely be a proposal, how the government ultimately chooses to engage in this reform process could lead to some constitutional law challenges.

### **Prostitution Law Reforms?**

In 2013, the Supreme Court of Canada struck down the *Criminal Code* provisions on prostitution in its *Attorney General of Canada et al. v. Terri Jean Bedford et al. (Bedford)* 2013 SCC 72 ruling. Afterwards, the former Conservative-led government passed a new law that reflected how prostitution was legalized; however, the new law criminalized the purchase of sex which critics say actually make it more dangerous for sex workers. After the 2015 Federal Election, the new government vowed to reform this law. While at the time of writing, Parliament has not yet began the reform process, the fact remains that any such changes to the existing law on prostitution would engage constitutional law issues

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While this is a selection of some of the many reforms that were proposed by the current government, they all raise potential constitutional law concerns. The Asper Centre will continue to report on these issues as they develop more fully in the coming year.

# Update on Asper Centre Cases

**Jessica Ernst v Alberta Energy Regulator :** The Asper Centre was granted intervener status in this appeal concerning the ability of the applicant, Jessica Ernst, to make a Charter claim against the Alberta Energy Regulator, the respondent, that it had infringed upon her s. 2(b) Charter rights. The applicant claimed that the respondent regulator had been negligent in dealing with her claims against EnCana Corporation in a dispute over hydraulic fracturing. The particular hydraulic fracturing project allegedly had adverse impacts to an aquifer near the applicant's property. Specifically, the legal action against the respondent regulator concerned how the applicant was restricted from communicating through channels of public communication and that her only recourse over the aquifer dispute would be through the Board's Compliance Branch. The applicant was allegedly barred from speaking about the dispute to the media or with other citizens. At trial court, the judgment ruled in favour of the respondent regulator finding that a statutory immunity clause barred the claim and ordered that the Charter claims would be struck out. The Court of Appeal dismissed Ernst's appeal and she now appeals to the Supreme Court. The Asper Centre is represented by Raj Anand of Weir Foulds LLP and Cheryl Milne.

**R v K.R.J:** The Asper Centre was granted intervener status in this appeal which deals with the applicability of certain amendments to s. 161(1) of the Criminal Code in sentencing. The accused was sentenced to a total of nine years' imprisonment for certain sexual offences committed against persons less than sixteen years of age from 2008-2011. The trial judge held that the accused would be prohibited from engaging in certain activities for a further seven years after his release. On August 9, 2012, s. 161 (1) was amended. The trial judge found that these new amendments were punitive under s. 11 (i) of the Charter and thus should not be retroactively applied to the accused. The Crown appealed the trial judge's decision and argued that the newly amended s.161 (1) terms should be applicable. The Court of Appeal allowed the Crown's appeal and the accused appealed to the Supreme Court. The Asper Centre is represented by John Norris of Simcoe Chambers, Executive Director Cheryl Milne and Professor Hamish Stewart, a professor at U of T's Faculty of Law.

**B010 v Canada:** The Supreme Court of Canada delivered its ruling on this case in November 2015. The Asper Centre is pleased with the Supreme Court's decision in B010 v Canada (Citizenship and Immigration) and is glad that the result may lead to better outcomes for the appellants pending the Immigration and Refugee Board's reconsiderations.

While this particular case was decided on issues of statutory interpretation, the Asper Centre still believes that there were Charter issues that could have been clarified by the Supreme Court. The Asper Centre would have preferred greater discussion of the s.7 Charter considerations in light of s.37(1) of the Immigration and Refugee Protection Act. Specifically, the ruling leads to an open-ended question about when do s.7 Charter rights become applicable for individuals seeking refuge in Canada but have not necessarily been granted refugee status.

More information about the cases, including the factums filed on behalf of the Centre,  
is available at [www.aspercentre.ca](http://www.aspercentre.ca)



## SAVE THE DATE! February 26-27 2016

The Asper Centre will be having its 2016 conference on the state of Canada's constitutional democracy at the University of Toronto Faculty of Law. This symposium is part of a broader analysis by the Asper Centre of the state of the rule of law and Canada's constitutional democracy comprising background papers and additional workshops that will result in a final report. The papers will be utilized as the central themes on various panels across the one day symposium and selected conference papers will be considered for publication as part of a special issue of the National Journal of Constitutional Law.

More updates will be available on our website: [www.aspercentre.ca](http://www.aspercentre.ca)



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The Asper Centre Outlook is the official newsletter of the  
David Asper Centre for Constitutional Rights. It is  
published two times per academic year.

*Editor: Alvin K Yau*