ASPER CENTRE OUTLOOK

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IN THIS ISSUE

Ernst v. Alberta Energy Regulator: Is judicial review an effective substitutive remedy for Charter damages?

On January 13, 2017, the Supreme Court of Canada delivered its ruling in Ernst v. Alberta Energy Regulator, a year and a day after the case was first heard before the court. In a split 4-4-1 decision, Ernst lost her case against the Regulator, the majority striking out her claim for Charter damages and dismissing the appeal with costs.

At issue was an alleged breach of Ernst's right to freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms. Ernst brought a claim for Charter damages as an "appropriate and just" remedy under s. 24(1) against the Alberta Energy Regulator (the "Board"), an independent quasi-judicial body responsible for regulating Alberta's energy resource and utility sectors.

Ernst had initially brought a claim against the Board, EnCana Corporation, and the Province of Alberta in 2007. EnCana had engaged in hydraulic fracturing and drilling near her property, which Ernst alleged contaminated water on her property. She voiced her concerns in 2004 and 2005 by contacting the Board's compliance, investigation and enforcement office, as well as publicly. She was then prohibited by the Board from using its public complaints and enforcement process until she stopped speaking to the media and public.

The Board argued that it was protected from the claim by s.43 of the *Energy Resources Conservation Act,* a statutory immunity clause, which reads:

> No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) [technical specialists or personnel] in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

Both the Alberta Court of Queen's Bench and the Court of Appeal found that s. 43 on its face barred Ernst's claim for *Charter* damages. On appeal to the Supreme Court, Ernst challenged the constitutional validity of s. 43, arguing that the clause was inoperable to the extent that it barred a claim against the Board for *Charter* damages.

The Asper Centre, represented by its former Constitutional Litigator-in-Residence Raj Anand, argued that governing bodies whose enabling legislation includes an immunity provision cannot use that immunity to avoid Charter liability. Absolute immunity from Charter liability is not available at common law, and allowing statutory provisions to bar Charter claims would undermine public accountability. Allowing the statutory provision to bar the claim would also displace the courts' jurisdiction under s.24(1) of the Charter to determine whether a damages award is an appropriate and just remedy in the circumstances. Regrettably, this argument was not addressed directly in the three decisions delivered by the Court.

Cromwell J., writing for the **majority** (with Karakatsanis, Wagner and Gascon JJ.), found that the record before the Court was inadequate to permit a decision on the constitutionality of the provision. Because the Court could not refuse to rule on the law's constitutionality and also refuse to apply the clause, the immunity clause was applied and the claim struck out. The majority further considered the challenge on its merits and held that *Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board. Since section 43 did not limit the availability of such a remedy under the *Charter*, the provision could not be unconstitutional.

In considering whether *Charter* damages would ever be an appropriate remedy, the Court applied the analysis in *Vancouver (City) v Ward* [*Ward*]. *Ward* held that *Charter* damages would not be an appropriate and just remedy where there is an effective alternative remedy or where damages would be contrary to the demands of good governance. The availability of judicial review as an alternative remedy was an important factor in this decision, as in the majority's view it would provide relief against the alleged *Charter* breaches and serve to vindicate Ernst's rights. The Court also considered negligence law and the common law immunities of judges in civil suits, introducing private law good governance concerns into the analysis.

Abella J., in **concurrence**, focused on the procedural aspects of the case, noting that Ernst never gave formal notice of a constitutional challenge to s. 43 as required under s. 24 of Alberta's *Judicature Act* and that she expressly denied she was challenging the constitutionality of the clause in prior proceedings. Notice requirements serve ensure that a full evidentiary record is present be

fore the court before a decision can be made about the validity of legislation. Without a full record to determine the constitutionality of the immunity clause, an assessment could not be made of its inapplicability or operability and the claim ought to be struck. Abella J. additionally agreed with the majority that it would be plain and obvious that s. 43 barred Ernst's claim and that Ernst could have sought timely judicial review of the Board's decision.

In **dissent**, McLachlin CJ., Moldaver, and Brown JJ., with Côté J. concurring, would have allowed the appeal and sent the matter back to the Alberta courts. The dissent declined to answer the constitutional question. They found that it was unnecessary to do so after determining that it was not plain and obvious that *Charter* damages could never be appropriate or just, or that s. 43 barred Ernst's claim. In their view, it was arguable that the Board's actions fell outside the scope of immunity offered by s. 43 because the Board was acting punitively.

Applying the *Ward* framework, the dissent considered whether Ernst could establish a breach of s. 2(b) of the *Charter* and found that a viable claim could be made out. The pleadings established that damages would fulfill the functions of vindication and deterrence. In considering countervailing considerations, the dissent disagreed with the majority that judicial review was an alternative and effective remedy, or that good governance concerns limit the availability of damages in this case.

Countervailing factors: alternative remedies and good governance concerns

The majority used the availability of judicial review to distinguish this case from *Nelles v Ontario* where the rationale for denying absolute immunity to prosecutors was that none of the alternative remedies to a civil suit for malicious prosecution could adequately

Photo: Wikimedia Commons

address that wrong. However, without looking beyond the wrongs in this case, it is not clear that judicial review would be an effective substitute remedy in all other cases. For the dissent, it was not plain and obvious that judicial review would meet the same objectives as an award of *Charter* damages, specifically vindication and deterrence of future breaches. They found that it would be premature to conclude based on pleadings alone that judicial review would be an effective alternative remedy in this case, let alone *all cases* against the Board.

The majority and dissent also differed in their decision on how private law should influence the question of awarding damages in the *Charter* context. The majority imported policy considerations ("practical wisdom") from private law which negated a prima facie duty of care into the analysis of whether *Charter* damages would be an appropriate remedy – in particular, concerns about excessive demands on resources, a potential "chilling effect" on behaviour of the state actor, and the protection of quasi-judicial decision-making. The dissent disagreed that these concerns in negligence law could support absolute immunity from *Charter* damages claims for the board.

For the dissent, there were two interrelated principles from *Ward* to keep in mind – that *Charter* compliance is itself a foundational principal of good governance and that courts must consider good governance concerns in a manner that remains protective of *Charter* rights. Good governance concerns should limit the availability of *Charter* damages only so far as necessary. In response to the concern that "parties would come to the litigation process dressed in their *Charter* clothes whenever possible" the dissent replies that parties must still plead all elements of a *Charter* breach and facts upon which *Charter* damages could be justified, such that any claims which would be in substance private law claims would be struck at one of the first two steps of the *Ward* analysis.

The common law rationales supporting immunity for judicial and quasi-judicial decision-maker's were also considered. For the dissent, however, the Board was not

acting in an adjudicative capacity, but sought to punish Ernst when it informed her that she could no longer write to the Board until she stopped publically criticizing it. The majority and concurrence rejected this "artificial" distinction made between the Board's various roles. Whether adjudicative or other administrative decisions, statutory immunity has been extended to administrative boards and tribunals to protect their independence and impartiality and to facilitate the proper and efficient administration of justice.

The majority states that "underlying whether *Charter* damages is an appropriate remedy is how to strike a balance between constitutional rights and effective government." In the majority decision it appears that concerns about effective governance ultimately weigh more heavily in the analysis, while the dissent seems to emphasize the protection of constitutional rights and focuses on the different context of *Charter* rights.

Charter damages

The majority asserts that case-by-case consideration of claims would undermine the very purpose of the immunity clause, and so concludes that *Charter* damages would *never* be appropriate or just against the Board. The majority does, however, consider the case within its factual context in reaching their conclusion. In the context of Ernst's specific complaint that the Board refused to interact with her, the majority notes that judicial review could have served as a more timely remedy (as Ernst started her action two years after the alleged breach and months after the Board rescinded their direction), would have reduced the extent of the impact, and would have vindicated her right to freedom of expression.

The majority states that because s. 43 does not limit the availability of *Charter* damages it could not be unconstitutional because damages would never be an appropriate remedy. This statement attempts to minimize the impact of the decision, yet in effect, the majority has limited the availability of *Charter* damages where it was not previously known to be limited.

Although Abella J quotes from *Ward* that "granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop in crementally", it is not clear how "incremental" this development in the availability *Charter* damages is.

Abella J. notes that *Charter* damages have never been awarded against independent judicial or quasi-judicial decision makers. It would seem that because *Charter* damages are new and as yet, rarely granted, it is an "incremental" development to rule to restrict their availability rather than permit them. Conversely, the dissent would emphasize that the court has never held, simply because a governmental decision-maker has an adjudicative role, that *Charter* damages can never be an appropriate and just remedy regardless of the circumstances. In the dissent's view, the majority's holding confers "broad, sweeping immunity" for the Board by saying that *Charter* damages could never be an appropriate and just remedy in any action or against any quasi-judicial decision-maker like the Board.

At the Supreme Court: from left to right Alex Wong (student) Cheryl Milne (Executive Director, Asper Centre), Raj Anand (2016 Constitutional Litigator in Residence, Asper Centre), Spencer Bass (student) and Brandon Pasternak (student)

Procedural fairness and broader implications

The entire court agreed that there was not an adequate record to determine the constitutionality of s. 43. Fairness to the parties was a factor that weighed heavily for Abella J., who emphasized that a proper record protects the public interest by ensuring that laws are not "casually or cavalierly set aside or upheld", just as immunity clauses protect the public interest by ensuring that adjudicative bodies are not "casually and cavalierly dragged into litigation."

In an exercise of statutory interpretation, however, the dissent avoids the question of constitutionality altogether by finding that it is not obvious that the provision on its face bars the claim. The dissent points in particular to the phrase "in respect of any act or thing done purportedly in pursuant of this Act". The Board's conduct was intended to punish Ernst, and thus the question becomes whether this punitive conduct was clearly caught by the phrase "done purportedly in pursuance" of the ERCA.

Abella J. takes issue with Ernst's argument that she sought to challenge the constitutional applicability rather than validity of the clause, as either way there would have to be a judicial determination of constitutional validity and therefore constitutional applicability of the provision. The claim was in effect a s. 52 claim, which requires notice to the government, Abella J. viewed Ernst as attempting to frame her grievance as a claim for *Charter* damages, an "end-run by litigants around the required process" which s. 43 exists to prevent. The majority also made note of unfairness to the Board, who "had no reason to think that there was any doubt that the provision purported to bar her claim." The dissent's position would have unfairly deprived the board of an opportunity to make submissions on the key point in the case.

It is not clear what impact this may have in terms of future constitutional litigation – does this alert litigants to the necessity of formulating a constitutional claim early on or risk having a *Charter* claim with merit struck out? If the constitutional challenge is novel and with merit, is it reasonable that considerations of procedural fairness would override the importance of considering the claim?

The dissent refers to "exceptional circumstances of the case" which compel the Court to consider an issue not raised by the parties. Ernst raises a novel and difficult legal problem, though the submissions do not comprehensively address the issues. The s. 2 (b) allegations are serious with consequences that extend beyond the facts of the case. Only the dissent considers the s. 2(b) guarantee more carefully. While it is an "admittedly novel" s. 2(b) claim, the Court must "err on the side of permitting a novel but arguable claim to proceed". What impact might this decision have on developments around freedom of expression? And other *Charter* claims?

Abella J. notes that Ernst's approach is a "dramatic jurisprudential development with profound implications" on judicial and quasi-judicial decision-makers, recognizing that many statutes across Canada containing immunity clauses are potentially affected. Because of the profound implications, a full evidentiary record would be required. However, despite this, there doesn't seem to be the opportunity to present a full evidentiary record following the decision of the Court. One wonders at what point the constitutionality of such immunity clauses could be considered again given that judicial review is offered as the appropriate means of addressing *Charter* breach concerns ("the time-tested and conventional challenge to an administrative tribunal's decision"). The court's effective grant of absolute immunity may risk harming public confidence and the public interest in the long run given the growing reliance on government bodies with administrative and quasi-judicial functions which serves the public.

***Alex Wong** is a third-year JD Candidate at the Faculty of Law, University of Toronto and worked on the Asper Centre's intervention in the appeal as part of the clinic.*

Revitalizing the Canadian Court Challenges Program and Charter Litigation in Canada

On November 23, 2016, the David Asper Center for Constitutional Rights hosted a fireside chat, which I attended. The topic of discussion was the liberal government's decision to reinstate and restore funding to the Canadian Court Challenges program (CCP). The discussants were Raj Anand - a prominent constitutional lawyer and former constitutional litigator-in-residence at the Asper Centre, who also happens to be a member of the CCP's equality rights panel – and David Asper, a successful criminal/ constitutional lawyer, businessman and founder of the Asper Centre. The discussion was moderated by the Asper Centre's director, Cheryl Milne.

The event immediately started as back and forth between both discussants on the central weakness of the CCP - its reliance on government - and a brief look into the history of the program that

Photo: Oliver Salathiel for University of Toronto Faculty of Law

shed light on why the Trudeau government created the Court Challenges program in 1978 as a means to aid language groups in challenging perceived government violations of the language guarantees in the *British North American Act*. By 1985, with the introduction of the *Charter* and the implementation of section 15 regarding equality rights, the CCP's mandate was expanded to fund other marginalized groups seeking recognition and protections that were now guaranteed through the equality and multiculturalism rights in the *Charter*. The program was cancelled by the Conservative government in 1992, then reinstated in 1994 by the new Liberal government, only to be later defunded yet again in 2006 by the Harper government.

This on-off nature of the CCP's existence was at the forefront of Asper's thought when he stated, "its inevitable that the government will defund you…because by definition you are doing battle with the government". Anand had also said as much when he laid out a litany of issues that the program had, most prominent of which was the CCP's proximity to government. "There's a certain vulnerability when you're sort of near government, but not part of government", said Anand as he summed up his thoughts on the issues.

Indeed, as long as the CCP remains tethered to government it will always have a tenuous existence, and it would not be bold to suggest that its current revival may only last the length of the current Liberal regime.

Part of the problem lies in the fact that the CCP is inherently progressive, and leans towards the side of marginalized and disadvantaged groups. However, what a progressive government may label as marginalized groups, a conservative government could just as easily persuade many to believe to be special interest groups - a tactic employed by CCP critics in the last Conservative government. This creates vulnerabilities that can be used against the program, i.e., when government funding and government officials are tied to a program that is painted as forwarding special interest groups through the Court system, it becomes quite easy to persuade a large number of Canadians that the CCP serves as a means of circumventing an elected parliament in favour of an unelected activist judiciary. This vulnerability buttressed Asper's insistence that the CCP's greatest strength should be its independence and severance from the government.

To the question posed of whether there are better ways to engage in Charter litigation, Asper responded by emphasising the need for an overhaul of the entire court system due to its continued failure to address the access to justice problem prevalent in Canada. Asper also drew attention to why there was a need for a Court Challenges Program at all, stating that the CCP was only throwing money at the problem of access to justice, rather than fixing the underlying issues. Anand was less radical in his response, calling the talk of "throwing money at it" illusory and insisting that the CCP will always work on a shoe string budget because it is a program designed to work for the minority. Anand nonetheless conceded that there are bigger issues concerning access to justice that need to be addressed; however he called it a distraction from the smaller, more imminent issues, as he stated "there's no doubt that the problem is multifaceted, but we have an opportunity here and we need to figure out a way to bring this back in a way that is more durable and more effective than the previous one". Asper suggest-

ed that housing the CCP within a University might be a reasonable solution since it would be backed by a community if faced by government interference or attacks. But as Anand had pointed out earlier, "the problem is that funding with assistance is associated with a loss of control by those community organizations and marginalized groups that the CCP was designed for and for whom a university setting may not be a natural home".

As the conversation shifted focus to how the CCP can be made more durable, I was drawn to a point that Asper raised earlier that begs further exploration. When asked about the effect of the CCP's last cancellation, Asper replied "It sent a signal to Canadians that we were somehow less willing to get into the risk of rights litigation. It was totally contrary to the spirit of the *Charter*", in other words, Asper suggested that the CCP worked in tandem with the *Charter*, hence implying that the CCP is necessary for the full effectiveness of the *Charter*.

Kim Stanton, Legal Director LEAF

Indeed, there is a legitimate question about the efficacy of a *Charter* that guarantees the equality of all before and under the law if the court system poses barriers created by socio-economic factors that restrict the *Charter's* application for the marginalized and minority groups it was designed to protect. The Supreme Court has acknowledged the importance of government provisions for access to justice in *R v. Brydges*, where it held that both the provincial and federal governments have a shared responsibility for the provision of legal aid. However, criminal legal aid (hinged on s.10b of the *Charter*) occupies the vast majority of the existing access to justice terrain, and relatively little progress has been made with regards to equality rights. The integrity of the *Charter* and the Canadian justice system may depend on the existence of an effective system for providing legal representation for marginalized and disadvantaged groups, and the CCP is the closest thing we have to such a system. Yet it has been shut down twice by the federal government and continues to face threats of future discontinuation.

A significant, and telling moment during the conversation occurred in the Q&A period. Kim Stanton, the legal director of the Women's Legal Education and Action Fund (LEAF), elicited agreeing nods from the discussants when she detailed the debilitating effects the CCP's defunding had to her organization. "We have managed to survive the last decade by our fingernails" said Stanton as she explained the dire state of the organization. With a legal staff of only one (Stanton by herself), for the national organization, and a two-room office, LEAF is hardly a special interest group seeking political favors. An organization designed to play an active role in ensuring that s.15 of the *Charter* would be well-interpreted by the Courts, it is kept going today only by the passion of a few staff members and volunteers. As Stanton pointed out, their ability to do the work has been significantly curtailed.

The situation with LEAF stresses an important point about the quintessential purpose of the CCP, that is, the program was created to aid groups that do not have the funds or cannot raise funding for themselves for various reasons. Many critics of the CCP argue that groups like LEAF should be able to raise funding on their own, and even Asper and a few members of the audience posed a similar query, i.e., why not seek out public donations. One member of the audience referenced the SCC decision in *Downtown Eastside Sex Workers*, where the Downtown Eastside Sex Workers United against Violence (SWUAV) were granted standing as an organization that can bring constitutional challenges before the court, as a potential argument for the redundancy of the CCP since the SCC effectively opened the door for groups like the SWUAV to bring constitutional cases on behalf of vulnerable groups. The argument the questioner was making is that these groups have more resources and better funding, and giving that a pathway has been set for these groups to get standing before the Courts, vulnerable people seeking *Charter* challenges should go through such groups instead. The problem with this line of argument is the assumption that all groups associated with causes that Canadians care about will easily generate funding through public outreach. This is just not the case, some causes at the forefront of the Canadian consciousness will generate enough interest to push the case forward through financial investments, but there are numerous groups that have difficulty raising funds either because the cause they represent lacks the headline grabbing factor or the population affected is numerically the minority of Canadians. In fact, as Cheryl Milne was quick to point out, the Downtown Eastside case was largely made possible through pro bono work and SWUAV itself was operating on a low budget. A good portion of the CCP funding was going to groups like SWUAV and LEAF simply because they are not in a position to generate enough funds for Charter litigation.

At the end of the event, Anand continued to focus on the imminent issue of how to improve the CCP, mentioning the need to expand its application beyond s.15 of the *Charter* and the improbability of including provincial challenges. Asper, in his final addition for the day, spoke positively about the CCP and its importance as a tool to re-engage Canadians in asserting Charter rights, however before handing over the microphone, Asper reiterated his point about the lax handling of the access to justice crisis and stuck to his earlier comment about the need for a re-vamp of the Court system, "I'm telling you folks in Ottawa that Canadians are losing faith in our justice system as we continue to talk about doing all these things to fix it and don't fix it. So please fix it."

David Mba *is a second-year combined JD/MBA candidate at the University of Toronto and is the Asper Centre's work-study student.*

Asper Centre: Notable Litigations and Events in 2016

The Asper Centre for Constitutional Rights had an eventful 2016. We have compiled some of our advocacy and litigation as well as event highlights below:

ADVOCACY AND LITIGATION

R v KRJ

The Asper Centre was granted leave to intervene in this case, which dealt with the retroactive applicability of amendments to s.161(1) of the Criminal Code in sentencing. The accused was sentenced to nine years' imprisonment for sexual offences against a minor that occurred between 2008 and 2011. s.161(1) was amended in August 2012 to expand the discretionary power of sentencing judges to impose prohibitions on contact with minors and Internet access against all offenders, whether or not the amendments were in force at the time of the offence. The Asper Centre, represented by John Norris, proposed a refinement to the framework for analyzing punishment under s.11 of the Charter. The proposed framework would have examined the impact of a consequence on the liberty or security of an offender, whether the consequence was imposed in furtherance of sentencing purposes and principles and, if not, whether the impact on the offender was proportionate to the non-sentencing purpose being served.

The Supreme Court released its decision on July 21, 2016. The Court introduced a refinement to the existing s.11(i) Charter test developed in R v Rodgers. Karakatsanis J, writing for the majority found that the second branch of the Rodgers test suffers from two key ambiguities: whether a law aimed at public protection furthers the purposes and principles of sentencing, and the role played by the impact of a sanction on an offender's liberty and security interests in a s.11(i) analysis.

The Court preserved the Rodgers test and added a third branch, so that the revised analysis now proceeds as follows: 1) Is the measure a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable with respect to a particular offence? 2) Is it imposed in furtherance of the purposes and principles of sentencing? 3) Does it have a significant impact on the offender's liberty or security interests? In adding the third element to the revised s.11(i) test, Karakatsanis J cited the David Asper Centre (and other interveners) for the proposition that "fairness and predictability are enhanced when there is a pragmatic consideration of the impact of an impugned sanction."

Frank v. Attorney General of Canada

The Asper Centre was granted intervener status in this case concerning voting rights of non-resident citizens. The applicants are Canadian citizens residing in the United States for employment reasons, who intend to return to Canada if circumstances permit. Both applicants were refused voting ballots for the 2011 Canadian general election since they had been resident outside Canada for five years or more. The applicants sought a declaration that certain provisions of the Canada Elections Act violated their Charter-protected right to vote. A judge of the Ontario Superior Court of Justice declared the impugned provisions of the Act unconstitutional by reason of violating the applicants' right to vote under s. 3 of the Charter, and the violation was not justifiable under s. 1.

A majority of the Court of Appeal allowed the Attorney General's appeal, finding that the denial of the vote to non-resident citizens who have been outside Canada for five years or more is saved by s. 1. The limitation is rationally connected to the government's pressing and substantial objective of preserving Canada's "social contract" (whereby resident citizens submit to the laws passed by elected representatives because they had a voice in making such laws); it minimally impairs the voting rights of non-resident citizens by ensuring they may still vote if they resume residence in Canada; and the limitation's deleterious effects do not outweigh the law's benefits. In dissent, Laskin J.A. would have dismissed the appeal, finding that the "social contract" was not an appropriate nor a pressing and substantial legislative objective, and should not have been considered by the court. Justice Laskin also found that the denial of the right to vote was not rationally connected to the stated objective and did not minimally impair the rights of non-resident citizens, and that its harmful effects outweighed the stated benefits of the limitation.

The Asper Centre is being represented in this intervention by Audrey Macklin and Louis Century of Goldblatt Partners LLP. During the 2016 Fall academic term, the Asper Centre clinic students conducted legal research and drafted materials in support of this case. Please see page 11 of this newsletter for two students' reflections on this clinic work.

PANELS AND EVENTS

Photo: Alvin K. Yau

Asper Centre Symposium: The State of Canada's Democracy

On February 26 and 27, 2016, the Asper Centre co-hosted a two-day symposium with the Centre for Constitutional Studies, University of Alberta, examining the state of Canada's constitutional democracy. The symposium looked at the dramatic changes that have taken place in recent years at the national level in respect to the day-to-day functioning of Canadian democracy, and how these changes affect the separation of powers, the rule of law, and constitutional supremacy.

In November 2016, a special issue of the Constitutional law e-journal *Forum* was released that featured publications of the conference's proceedings.

Constitutional Roundtables

In February and March 2016 the Asper Centre hosted a number of noteworthy Constitutional Roundtables, including a discussion led by Susan William, who was actively involved in constitutional advising for the Burmese democracy movement, about her book, Constitutional Equality: Comparative Constitutional Law and Gender Equality; a presentation by former Constitutional Litigator in Residence at the Asper Centre, Raj Anand on Subsection 15(2) of the Charter and its Disconnection with Substantive Equality; and a paper by Professor Richard Albert of Boston College Law School on the Conventions of Constitutional Amendment in Canada.

In November 2016, Claudia Geiringer of the Victoria University of Wellington Law School, New Zealand presented a Constitutional Roundtable on transnational migration of Constitutional ideas from the U.S. to New Zealand.

IJCLE/ACCLE Conference: The Risks and Rewards of Clinical Legal Education

On July 10-12 2016, the Asper Centre co-hosted the joint International Journal of Clinical Legal Education (IJCLE) and Association for Canadian Clinical Legal Education (ACCLE) conference on legal clinical education. It was the first international conference hosted at the new Jackman Law Building and one of the largest such events ever hosted by the Faculty, including guests and speakers representing 18 countries and over 40 universities worldwide.

Over three days in nearly 40 concurrent sessions the conference covered topics as wide-ranging as community engagement, clinical pedagogy, and specialized clinics such as family law, discrimination law and women's legal clinics, from both a Canadian and international perspective.

Asper Centre Fireside Chat on Reinstated Court Challenges Program

On November 23, 2016 the Asper Centre convened a fireside discussion focused on the government's plans to revitalize and re-fund the Court Challenges Program (CCP) featuring David Asper and Raj Anand. Created in 1978, the CCP funded legal challenges to laws offending equality and official language minority rights guaranteed under the Canadian constitution, including the Charter of Rights and Freedom. The program has funded more than 1,200 cases, but has also been cancelled, twice, by governments averse to funding challenges to their own laws. At the time of this event, the current Liberal government was planning to revive the CCP, and undertaking consultations to this end. The discussion centred on the best ways to reintroduce the CCP and ways to ensure its durability.

David Mba *is a second-year combined JD/MBA candidate at the University of Toronto and is the Asper Centre's work-study student.*

Asper Centre Student Clinic: Reflection

The Asper Centre for Constitutional Rights houses a unique legal clinic that brings together students, faculty and members of the legal profession to work on significant constitutional cases. Each year, the Asper Centre's Clinical Legal Education Course offers up to 10 students the opportunity to engage in Charter rights advocacy, including but not limited to litigation, under the supervision of experienced lawyers. The below article was prepared by two clinic students as a reflection of their work on the Frank v Attorney General of Canada case in the Fall 2016 term.

The Asper Centre clinic has been a formative educational experience in our law school career. We had the opportunity to work with professors and external counsel on the Centre's intervention in *Frank v Attorney General*, a case exploring the disenfranchisement of expatriate Canadians who have been outside of the country for over five years.

Prior to beginning our substantive work on the project, we developed a learning plan and considered all the stakeholders, including how our intervention would inform the s. 3 right to vote in future cases.

In the first week of the course, we got straight to work, as the deadline for the *Frank* intervention was approaching. From the first week, we had analyzed the jurisprudence and helped identify novel or undeveloped areas that the Asper Centre could expand upon in the intervention. We helped to draft the affidavit, notice of motion, motion record, and memorandum of argument, with consultation from the Asper Centre's faculty advisors and the co-counsel to the intervention. It was also illuminating to observe the collaboration that took place between counsel for the appellants and the friendly interveners to avoid duplications in the submission.

We received thorough training in factum and memo writing, legislative history research, and ethics that we incorporated into our work. For instance, one of our research memos involved exploring the legislative history of the impugned election provisions and their subsequent enforcement. We also conducted comparisons of electoral legislation across multiple jurisdictions.

Another interesting aspect to our work was observing how quickly an unplanned issue could arise, and addressing it in a timely manner. For instance, the Attorney General of Canada opposed the Asper Centre's intervention and we had to file a reply highlighting the distinctiveness of our approach from that of the other interveners. This submission, that we helped draft, succeeded, and the Asper Centre was granted permission to intervene.

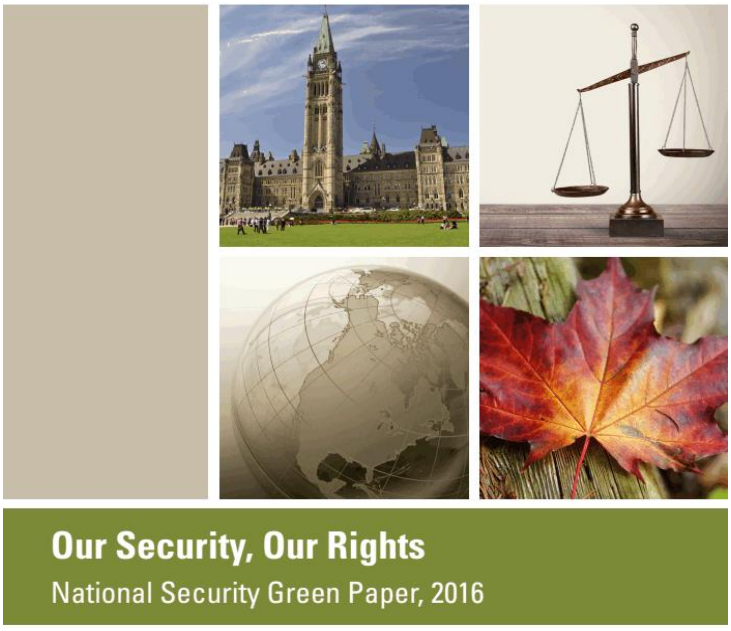
Finally, it was also fascinating to observe the amount of revision that went into the final factum. We had numerous meetings with faculty advisors and counsel, presented the results of our research, and proofread numerous drafts before Centre submitted the final version. It was rewarding to see that our work made a difference, and the amount of feedback we received will prove immensely helpful as we pursue our legal careers.

Geetha Phillipupillai *is a third-year JD Candidate* and ***Samuel Mosonyi*** is a *second-year JD candidate at the University of Toronto Faculty of Law.*

Student Working Groups at the Asper Centre

Privacy Working Group: Bill C-51 Consultations

Faculty of Law students become involved in the Asper Centre's work through volunteering with one of our Working Groups. This year, the Privacy working group prepared a policy submission in response to the government's "Our Security, Our Rights: National Security Green Paper, 2016," as part of the ongoing public consultation process on Canada's national security framework by Public Safety Canada. Furthermore, two students were able to attend the closed consultation meeting on Cyber Security and Digital Investigations with select experts and key stakeholders at the Munk School of Global Affairs at the University of Toronto. Patrick Enright, student working group member provided rapporteur minutes for the meeting and contributed the below article.



On Monday, October 24th, a gathering of techies, professors, lawyers, and senior members of Canada's national security apparatus assembled for a conference at U of T's Munk school of Global Affairs. This was not a scene out of a Hollywood spy thriller or a novel by John Le Carre. There were no high-level security checks, no clashes over government misdeeds, and no shady spy-types lingering in the corner of the room. Just a collection of professionals engaged in an informative, cordial, exchange on policy.

The topic for the day was the recently released "Green Paper" on the details and purpose of Bill C-51 (Canada's new anti-terrorism legislation). Two issues were foregrounded: the government's new interception capabilities, and the use of decryption as a tool for law enforcement and counter-terrorism. While the discussion was wonkish and technical, the conversation often returned to a single point: why can't the government be more transparent with respect to its *methods*? For example, the Green Paper was supposed to explain and justify the government's new enhanced security measures to the Canadian people. But the document is permeated with general language and "wiggle words" that, while seemingly conveying information, actually raise more questions than they answer. It is difficult, for example, to discern government activity when it litters the document with opaque words like "most," "many," or "some" - rendering the paper too vague to be meaningful, and too broad to be falsified.

Members on the national security side, for their part, denied any charges of obscurantism. The reason for the general language was not to obscure or bamboozle, but to avoid impenetrable jargon and falsehood. The purpose of the paper was, in other words, to explain Bill C-51 to the public in an accessible, easy-to-digest way.

While these important discussions were mostly cordial, the most heated exchanges continued to surround the government's failure to disclose its methods. The question was posed: *Why can't the public have information on , at a minimum, the number of taps the government conducts?*

Some of the participants voiced concerns that this lack of transparency not only frustrates the public's dialogue, but risks discrediting the agencies themselves. Government officials were presented with the following rationale: the secrecy you try to uphold rarely lasts forever, and when the public discovers malfeasance, the subsequent furor makes continued funding untenable. The result? Agencies are shuttered permanently. This makes transparency in the interests of everyone – both the government and the people.

The response to this point was, on the whole, muted and disappointing. It was mentioned – in an exercise in deferring responsibility - that the provinces can provide some of this information if they elect to do so. Unless the provinces choose to exercise this option, the majority of this information would likely remain classified.

But I should be fair. It was easier to be more sympathetic to concerns voiced by some about, the need to expedite the investigative process. Gaining a wiretap warrant, for example, can be an onerous task that, on occasion, takes up to six months to complete. During this time, telecommunications technology may have shifted, making the weeks-long effort a bootless errand.

Similar concerns were voiced on the issue of encryption. Encryption – the masking of telecommunications data in the form of indecipherable code – has a number of benefits to its credit. It is used to protect intellectual property, personal privacy, and sensitive financial information, while also safeguarding the security of our financial institutions. But encryption may also be used for less

than noble purposes. Bad actors are adept at encrypting their telecommunications, and have access to some of the most sophisticated forms of encryption. For this reason, it was argued that forcing companies to install "backdoors" (decryption capability built into telecommunications technology) weakens the security of ordinary citizens, while failing to uncover more sophisticated criminal activity.

In the end, the Canadian people will have to wait to see if consultations like this have an impact on reforms that the government intends to introduce in 2017 to Bill C-51 which has been law since 2015. While the meeting was hardly an exercise in futility, it is questionable whether the government will make major amendments to the Bill. There was an impression that the bad guys are well ahead in this game - and the good guys too hampered by red tape. In other words, the reality on the ground is too unworkable, and the alternatives too quixotic, to neglect expanding the government's power.

But there is, perhaps, a light amidst this bushel of disagreement. Those sympathetic to the government's new measures failed to provide adequate answers on the issue of transparency. If reformists continue to push the agenda on these matters - i.e. gaining access to intercept data, and more information on law enforcement methodology – small gains could conceivably be won.

Admittedly, these are small steps. But if they lead to a more transparent, more accountable, government - they may be steps in the right direction.

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Environment and Children's Rights Working Group

On February 1st, 2017 the University of Toronto Environmental Action group (UTEA) released their advocacy document titled "Canadian Children and Climate Change". Its subtitle describes the purpose of the document: "A detailed plan to help Prime Minister Trudeau achieve his goal of protecting Canadian children from future climate change impacts". The advocacy document was generated by UTEA with assistance from the Asper Centre student working group.

Photo: UTEA website

Last year, approximately fifteen law students researched possible *Charter* challenges and issues of civil procedure, standing, and jurisdiction relating to UTEA's main argument that the government of Canada is responsible for the current and future harms it is causing to children and youth as a result of its contributions to climate change. This year fifteen 1L law students, working under the supervision of three 2L leaders, focused their efforts on three areas of research. One group focused on the various international obligations Canada has to environmental protection, and specifically the intersection of that with the preservation of children's rights. A second group researched the various legal complications attendant to a *Charter* challenge, attempting to structure a constitutional argument that would impel the Canadian government to consider future generations in policy decisions. The final group investigated advocacy approaches to help UTEA organize the advocacy document and plan its release.

Findings and conclusions of the document

It had been suspected since the end of the 19th century that human activity contributed to the accumulation of GHGs in the earth's atmosphere.[1] Since then, the precise extent and deleterious effects of these gases has become only more clear. Contemporary scientific understanding clearly demonstrates that, any short-term variability notwithstanding, anthropogenic emissions are on track to create negative long-term climate change.[2]

Climate change as a political and moral problem is unique because of the delayed and incremental consequences it creates. That is,

we deal today with the choices of Canadians 50 years ago; and 50 years from now, future Canadians will have to deal with our choices. Thus, the actions and failures of our government to act today will certainly and profoundly affect the options and livelihoods of future generations.

Unfortunately, successive Canadian governments have failed to take concrete and comprehensive steps to address this problem. This delay will only make the impending issues all the more difficult and costly to resolve. Experts theorize that by 2050, Canada (and other nations) could face a 20% reduction in GDP as we deal with unpredictable weather patterns and abnormal temperatures. The increase in droughts, wildfires, threatened wildlife habitats, etc. may most directly affect tourism and insurance premiums. However, fishing, farming, and resource extraction are all vulnerable to an intemperate climate. Finally, there are the economic and quality of life costs of an increase in air pollution, allergens, and human pathogens.[3]

The UTEA document is anchored in the principle of intergenerational equity. That is, the axiomatic idea that those who possess or control the earth today, do so in trust for future generations. Youth today have no vote, and effectively no way to shape government policy, but they will be the ones bearing the brunt of the consequences for decisions made today.

Two *Charter* based arguments are made. The first is based on Section 15, which safeguards the right to "equal protection and benefit of the law", without discrimination based on age. Though Canadian courts have in the past been reluctant to protect children as a class, the unique endangerment caused by anthropogenic climate change may require a reassessment of this. The second argument relies on Section 7, which guarantees the right to "life, liberty, and security of persons and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Arguably, the government's decisions to compromise the present and future physical and psychological security of Canadians is an indefensible infringement of these rights.

Canada has other reasons to respect the rights of future generations: the numerous international treaties and conventions it has signed. Canada is a signatory to the UN *Convention on the Rights of the Child* and has a legal obligation to implement its provisions, which include the preservation of children's quality of life in the face of global climate change, and being required to consider the "best interests of the child" when enacting legislation.

In addition, Canada has ratified the *Paris Agreement*, wherein it agrees to reduce greenhouse gasses by 30% by 2030. It signed the *Rio Declaration on the Environment and Development*, which outlines principles meant to guide nations in sustainable development. Notably, it enshrines the precautionary principle - the idea that if something is suspected of causing risk to the public, the burden of proof is on those seeking to demonstrate that it is *not* harmful. Finally, Canada is one of the founding members of the World Health Organization, whose constitution includes the commitment to pursue the "highest attainable standard of health" for citizens.

Many areas of environmental degradation fall within the purview of provincial legislatures. However, the federal government retains significant direct and indirect ability to shape policy decisions, and consequent moral responsibility. By subsidizing industries such as oil and gas and aviation, and choice of Canadian Pension Plan (CPP) investments, the Canadian government actively contributes to climate problems that will face future generations of Canadians.

Domestically, such policies run afoul of the principle of intergenerational equity and arguably violate Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Internationally, their actions and inaction show a disregard for the general principles of protection and conservation that Canada helped develop, as well as the specific deadlines Canada has committed to reaching. As a country Canada has taken important and laudable steps to preserve the environment we all depend on, and these are worth celebrating. However, the magnitude of the ongoing crisis requires that as a nation we do more.

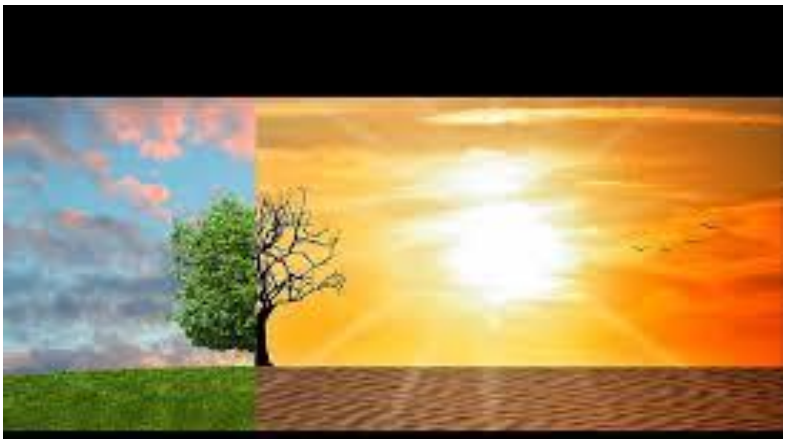

Photo: Creative Commons, Pixabay.com

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[1]Arrhenius, S. (1896). On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground, London, Edinburgh, and Dublin Philosophical Magazine and Journal of Science, 41, 237–275.

[2]For an overview of the history of climate science, see Weart, S.R (2008). *The Discovery of Global Warming*. Cambridge, MA: Harvard University Press, Intergovernmental Panel on Climate Change (IPCC). (2013). Op. Cit.

[3]Ford, L., B. (2009). Climate Change and Health in Canada. McGill Journal of Medicine, 12(1), 78-84

Indigenous Freedom of Religion: The SCC case of the *Ktunaxa Nation Council v. Minister of Forests, Lands, Natural Resource Operations*

Photo: Wikimedia Commons

2017 will usher in a new – and important – addition to the Supreme Court's jurisprudence on freedom of religion in Canada. Of particular interest is the case of the Ktunaxa – a First Nations group in the Pacific Northwest – who are challenging the construction of a ski resort on contested Crown land. The resort itself will be located in a valley between two large mountains in southeastern B.C. and is the subject of controversy because, according to the Ktunaxa, it is a sacred site known as "Qat'muk."

The valley itself is strikingly beautiful. It rests amidst a snowy mountain range with a landscape dotted by magnificent pines. The snow is clear. The sky is usually blue. There is admittedly something romantic about it.

But it's not as if the Crown hasn't made an effort to accommodate the Ktunaxa for the loss of this natural wonder. For 23 years the Crown made numerous efforts to compensate the Ktunaxa for approval of the construction project. Some of the measures included access to the land for ceremonial purposes, the creation of a Wild Life Management area, removal of the most intrusive structures, compensation packages, and preferential hiring policies for Ktunaxa members.

Nevertheless, the Ktunaxa objected to the site from the beginning, asserting their aboriginal rights, aboriginal title, and religious rights. And it is in this latter respect that the case is, perhaps, most unique. The case marks the first time that an Indigenous group has asserted its right to religious freedom as part of the consultation process with the Crown. While the Ktunaxa had emphasized the spiritual significance of the site throughout the consultation process, they had initially done so only through the lens of Section 35 of the Charter. (The reason for this was, likely, because redress under Section 35 confers greater remedies than does Section 2(a)).

This all changed, however, in 2009 when a Ktunaxa elder claimed to have had a religious vision: one that instructed him that there could be no development of any kind on Qat'muk. Any construction, it was claimed, would chase away the "Grizzly Bear Spirit" which, in turn, would deprive the Ktunaxa of the salubrious effects of its guidance. In other words, there could be no resort. No chair lifts. No hotels. No restaurants. Just the natural splendor of mountains amidst an azure sky.

But such an ambitious, and uncompromising, position raised another novel issue: whether religious freedom can be interpreted to cover so-called "sacred sites." That is, whether religious rights can bar the government from doing certain things, and engaging in certain development projects, on its *own* land. And while Canada has accepted that religious freedom may require the government to take positive steps in accommodating religious beliefs, it is less clear that it should allow the religiously inclined to dictate what the Crown may or may not do with its own property. To illustrate the difficulties with this position, take the following example:

Imagine that a devout Catholic, while strolling through Centre Island one day, sees an image of Mother Mary on the surface of some tree bark. Moved by the discovery, she takes a picture of the image and posts it online. Soon hundreds of devout Catholics arrive to hold vigils and sing Kumbaya in its presence.

In such a case, would the Crown have lost its ownership of the tree? Has it now forfeited the right to develop its own land?

Most, I should think, would say no – and it certainly seems as if the Supreme Court agrees with them. During oral argument, the lawyer for the Ktunaxa, Peter Grant, was hammered with questions related to the timing of the revelation (which was admittedly late in the process) and the unreasonableness of the request. Justice Moldaver was particularly troubled by the Ktunaxa's claim that there could be "no middle ground" with respect to Qat'muk after years of negotiating for settlement and accommodation. And Chief Justice McLachlin was, for her part, puzzled by the request that the issue be remanded to the Minister. Specifically, she didn't understand the point in re-weighing the matter if the Ktunaxa's all-or-nothing position vitiated any possibility of compromise. Indeed, the Chief Justice went so far as to imply that the Ktunaxa's position was antithetical to the *Charter* itself, noting that "…if you look at the larger structure of the Charter, Section One starts off by saying, we're going to give you all these rights...but don't get too excited."

In the end, it would probably be ill-advised for the court to grant the Ktunaxa all that they are requesting. As mentioned, it would be absurd to allow religious officials to demand accommodation as the result of sudden and unexpected religious revelations. Religious freedom is supposed to be a shield – not a sword. The consequence of acknowledging these rights may invite instability and a lack of predictability into Canada's *Charter* jurisprudence.

But there is a smaller, more important victory at stake for religious-rights claimants. While the Court is likely to find that a proper balance was struck between religious rights and the interests of the Crown (there were, after all, a number of concessions made during the 23-year process of consultation), the court may nevertheless find that the development of the ski resort *infringes* on the Ktunaxa's freedom of religion.

This is no small shakes. This would mark an important – if not monumental – victory for expanding religious freedom in Canada. It would mean that Canadian Muslims could rest assured that the desecration of Mecca by Canadian officials would amount to an infringement; that damage to the Vatican would likewise infringe; and – perhaps most importantly – indigenous religions that are intimately connected to land could be accommodated by our Charter. This would go a long way toward affecting reconciliation with Indigenous Canadians, as it extends religious protection beyond the scope of a Judeo-Christian religious framework. And all of this could be gained – even if the Ktunaxa are unsuccessful in their appeal.

It should also be mentioned, in passing, that the case of the Ktunaxa has exposed a general problem with the court's jurisprudence on religious freedom. The court has chosen to emphasize the highly subjective nature of religiosity that acknowledges the diversity of religious beliefs and the possibility of these beliefs changing over time. One person's religious trash may, according to the Court, be another's treasure. But this highly individualized approach to religious freedom neglects another important aspect of religiosity: the preservation of a *community*. Religious beliefs and practices are often important to people because they preserve a distinct culture, heritage, and spiritual tradition. They connect the past with the present.

But the court has never made a formal distinction between a *community* religious right and an *individual* who claims a similar right. Such conflation is untenable. It means that there is no difference between government action that threatens an entire religious community and action that threatens a single person. Take the example of the Ktunaxa. There appears to be little evidence that the belief in question – that the Grizzly Bear Spirit will leave Qat'muk if there is construction – is widely held throughout the community (it is only a single elder who holds the belief or, at most, a handful of others).

But facts such as these should - and must - make a difference when striking a balance between accommodating religious freedom and the interests of the Crown. Thousands of Canadian Muslims, for example, believe Mecca is a sacred site that informs their religious experience. Common sense says that this should weigh more heavily than the beliefs of a single person who believes Jesus resides in, say, Algonquin Park.

Should the Court decide to move in this direction – marking a distinction between religious *community* and religious *belief* – it may justify the accommodation of religious land claims, while not subjecting the Crown to the whims and fancies of minority religious views. On this model, longstanding religious land claims affecting hundreds (if not thousands) of Canadians may have to be accommodated in the name of religious pluralism, whereas individual claims could be more easily dismissed under Section One.

Such a result may not help the Ktunaxa in this case – but it could go a long way toward acknowledging, and accommodating Indigenous religion in the future.

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Photo: Wikimedia Commons

A new Criminal Law "Reasonable Delay" framework

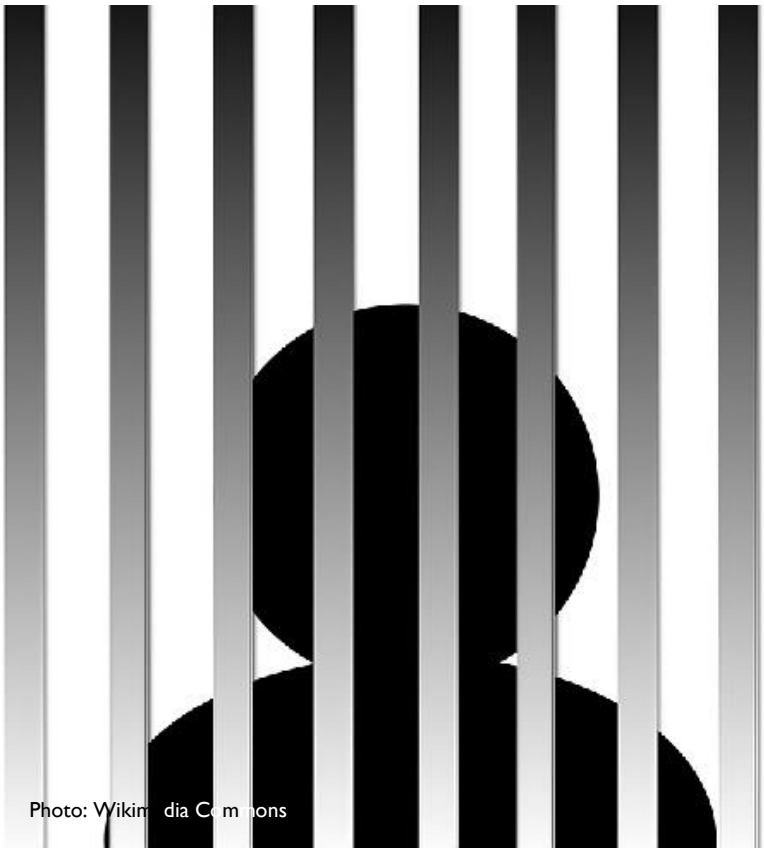
Photo: Wikimedia Commons

2016 will be remembered as a year characterized by general destabilization of liberal and establishment politics across international borders, bolstered by a furor of populist views. Here in Canada, we presented ourselves as the outlier, preserving hope in the ideals of social democracy supported by the ambitions of the current liberal government. It has been interesting to watch our Court system reflect the consciousness of the nation this past year and there have been a handful of cases in 2016 that merit special attention for their impact on the law moving forward, two of which are highlighted below in the Criminal law context.

R. v. Jordan, 2016 SCC 27

This case has its origins in the December 2008 arrest of the appellant following an investigation into a "dial-a-dope" drug operation. Various delays prevented the trial from taking place before September 2012. The appellant was either detained or under strict bail conditions during that time, and challenged the constitutionality of the delay under s.11(b) of the Charter. The delay was found to be reasonable at trial and on appeal. The Supreme Court of Canada reversed the courts below, declaring the 49.5 month delay unreasonable. Moldaver J, writing for the majority, further declared the entire R v Morin, [1992] 1 SCR 771 framework for the assessment of delays dysfunctional. In particular, the Court took issue with the retrospective nature of the Morin framework and its role in encouraging a "culture of complacency" with regard to delays within the justice system.

The new framework sets presumptive ceilings beyond which delay is unreasonable, unless the Crown proves exceptional circumstances were involved. The Court said such circumstances cannot be predicted in advance, but will generally fall into the categories of either discrete events (such as illness or unexpected events at trial) or particularly complex cases. Below the ceiling (18 months for cases before the provincial court and 30 months before the superior court) delays are presumed reasonable unless the defence proves they took meaningful steps to expedite the process and the case took "markedly" longer than it should have.

***R v Williamson,* 2016 SCC 28**

This case was heard alongside and applied the new 'reasonable delay' framework from R v Jordan, which replaced R v Morin, [1992] 1 SCR 771. The appellant was charged in 2009 with historical sexual offences against a minor. Trial did not begin until December 2011, with the appellant on strict bail conditions during that time. The trial judge found the delay to be reasonable under the Morin framework, and the Ontario Court of Appeal reversed. Applying the Jordan framework, the majority of the Supreme Court of Canada found that only 1.5 months of the 35.5 months' total delay were attributable to the defence, exceeding the presumptive ceiling by four months. As no exceptional circumstance had been proven, the delay was unreasonable. Applying the 'transitional exceptional circumstance' of whether the delay could be justified by the parties' reasonable reliance on the Morin framework, the majority found that the previous state of the law could not justify the nearly three years' worth of delay. The individual interest in a prompt trial therefore outweighed societal interest in having the case tried on the merits.

Chief Justice McLachlin, concurring in the result, found that the delay was unreasonable under the revised Morin framework proposed by Cromwell J in his concurring opinion from Jordan.

Under the revised framework he proposed in Jordan, Cromwell J found that the delay only exceeded the usual amount of time needed for such cases by a few months. He would have allowed the appeal, finding that in such a close case the trial judge had been correct to consider the gravity of the offence and consequent societal interests in trying the case on its merits.

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LOOKING AHEAD in 2017: The Asper Centre's Constitutional Roundtable Series in celebration of Canada's Sesquicentennial

Since its inception, the Asper Centre for Constitutional Rights has been convening Constitutional Roundtables as part of its mandate to promote scholarship and to make a meaningful contribution to intellectual discourse about Canadian constitutional law. The lunch-time Constitutional Roundtables start off with a presentation by invited guests and develop into wide-ranging discussions.

This year, in celebration of Canada's Sesquicentennial, the Asper Centre has put together a special Constitutional Roundtable series, focused on the development of Canada's constitutional and human rights from the British North America Act to the Canadian Charter of Rights and Freedoms. The series includes papers that provide an analysis of constitutional litigation throughout Canada's history with a focus on seminal cases that have made an impact on the Canadian constitutional rights landscape over the last 150 years.

Additionally, this year the Constitutional Roundtable series papers will be considered for publication as part of a dedicated journal issue or a separate e-book commemorating the Sesquicentennial, which will serve as a valuable resource for Constitutional litigators, students and academics.

On January 19, 2017 the Constitutional Roundtable series kicked off with the University of Toronto Faculty Of Law's Morris A. Gross memorial lecture, presented by the Honorable George S. Strathy, the Chief Justice of Ontario.

Strathy's thoughtful lecture was aptly titled *Judicial Courage and Restraint in Canadian Constitutional History*. In it, Strathy cited several landmark decisions handed down by the Supreme Court of Canada and stated that the judiciary has always been challenged with balancing the virtues of courage with restraint, as an "excess of courage can lead to arrogance in thinking that we judges know better than the legislature in matters of policy, whereas excess of restraint can lead to timidity in the face of abuses of state power." In response to a question from the audience, Strathy acknowledged that the changing times require judges to be more amenable to change. "Society changes, law changes, institutions change. The law has to evolve, and the Constitution, and our interpretation of the Constitution, has to evolve," Strathy concluded.

Constitutional Roundtables 2017 Schedule

The Constitutional Roundtables (lunchtime seminars) scheduled for the Winter 2017 academic term include: Feb 9th - Hugo Cyr, Dean and Professor of Public Law and Legal Theory of Université du Québec à Montréal on *Normalizing the Exception in Canada;* Mar 1st - Professor Richard Haigh of Osgoode Hall Law School on *The Alberta Press Case*, and Mar 22nd - Professor Jamie Cameron of Osgoode Hall Law School on *Section 7 and the Idea of the Charter.*

The remainder of the Roundtables in this series, which will be scheduled during the 2017 Fall academic term and also at a full day Constitutional Law Symposium dedicated to the Sesquicentennial will be presented by prominent Constitutional thinkers from across Canada, including Eric Adams, Audrey Macklin, Margot Young, Martha Jackman, Richard Moon, and Richard Albert.

Asper Centre Director Cheryl Milne thanking Justice Strathy following his lecture

More information
About our Constitutional Roundtable series is available on the Asper Centre website.
www.aspercentre.ca

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