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ASPER CENTRE OUTLOOK

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Asper Centre At the *Polygamy Reference*

On November 23, 2010, the hearing of ***Reference re: s. 293 of the Criminal Code*** (which prohibits polygamy) commenced in the Supreme Court of British Columbia. Its mandate is to answer two questions: 1) whether s. 293 is consistent with the *Charter*; and 2) what are the necessary elements of the offence (for example, must it involve a minor or occur in the context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?). The Attorneys General of British Columbia and Canada are parties to the proceeding, as well as an Amicus Curiae who has been appointed to argue that the law is unconstitutional.

There are also 12 "interested persons", who have been permitted to adduce evidence in written form, call and/or cross-examine witnesses, and make written and oral submissions. This group includes a wide range of organizations such as the British Columbia Civil Liberties Association, West Coast LEAF, the Fundamentalist Latter Day Saints community of Bountiful, BC, the Polyamory Advocacy Association, and the Asper Centre, jointly with the Canadian Coalition for the Rights of Children (CCRC).

During the fall term, five students in the Asper Centre Clinical Legal Education course worked on the proceeding. Much of our time was spent pouring over thousands of pages of affidavit evidence, including both expert reports as well as testimonials of current and former members of polygamous communities, and 'Brandeis brief' materials, which included social science evidence filed in the form of academic research, news articles, and books. We also conducted legal research with respect to issues such as legislation governing marriage, education, and child labour in British Columbia, children's freedom of religion and equality rights jurisprudence, and children's rights in international law.

This work helped form the basis for the position taken by the Asper Centre and the CCRC in the reference, that the prohibition is constitutional as it applies to situations where there is harm to children. This includes primarily the assignment of teenage girls to marriages to much older men, as well as the exploitation of boys' labour (and discouragement of educational attainment) on the effective promise that if they obey church leaders, they will one day receive one or more wives.

Other harms to children occasioned by polygamy include the constraining of their sexual identities and knowledge, inadequate child protection mechanisms and an unreasonable risk of child abuse, and the failure to prioritize children's best interests. The Asper Centre and CCRC wished to emphasize not only the harms to children, but also the need to recognize children's rights, including rights to freedom of thought and self-expression, to be heard, and to be cared for by their families. In the view of the Asper Centre

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and the CCRC, the practice of polygamy impairs these rights.

As one of the students working on the case, I was able to attend the proceeding for the examination of one of the Amicus' key expert witnesses: McGill law professor Angela Campbell. Due to scheduling, I attended court only on one day, while the rest of my time in Vancouver was spent preparing for the cross-examination of Prof. Campbell on both her qualifications as well as her substantive testimony. During my time there I was fortunate to participate in conference calls with the Attorneys General and several of the interested persons in which strategies for cross-examination were discussed, as well as to review transcripts from Professor Campbell's interviews with approximately 20 Bountiful women, the only academic research done in this community to date.

Although the proceeding is being held in British Columbia's largest courtroom, it is still at pains to accommodate the many counsel involved in the case (who Chief Justice Bauman asked, for his own sanity, not to change seats for the duration of the trial). Nonetheless, two of the lawyers for the Attorney General of BC took to sitting in the jury box on the day I attended. The case has also garnered considerable attention from the public, as was evident by the rows of journalists, clerks, members of interested organizations and women believed to be either current or former members of the Bountiful community.

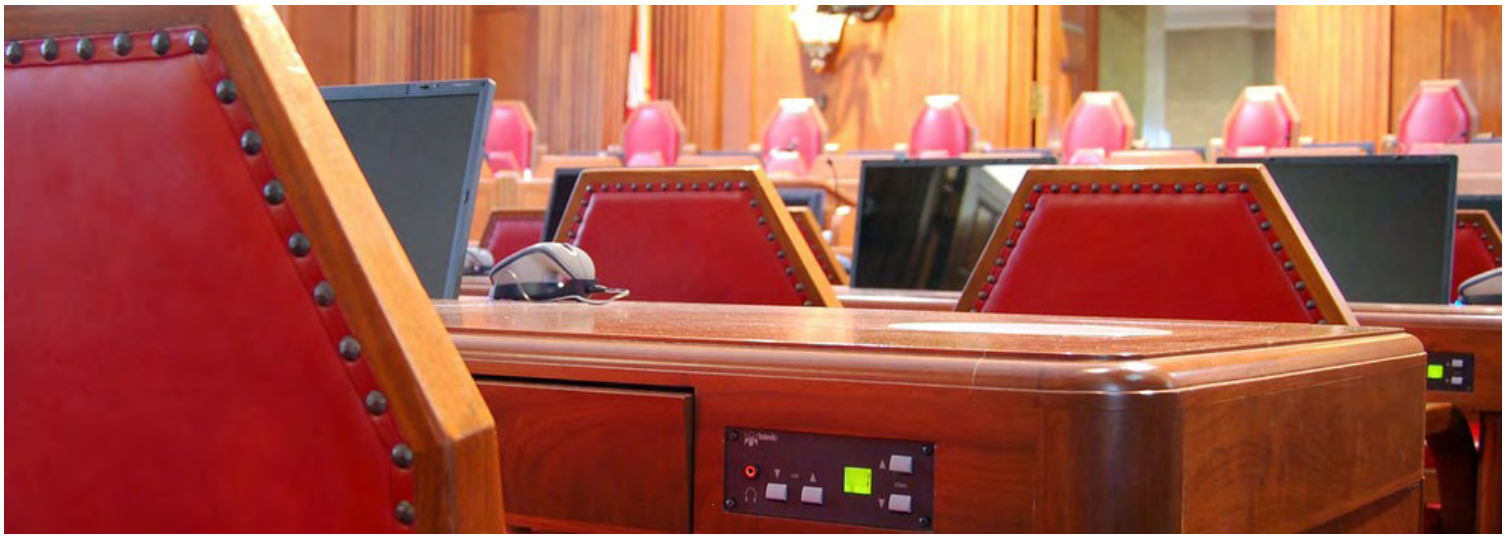
After a very lengthy examination-in-chief and cross-examination regarding her qualifications as a social science researcher, Chief Justice Bauman qualified Prof. Campbell to testify as an expert witness. She then testified the following day with respect to her research findings. In her view, these demonstrate that women in Bountiful have greater autonomy, particularly with respect to marriage, sexuality and reproduction, than has been traditionally believed, and that the practice of "child brides" is no longer pursued. She was cross-examined by several parties, including the Asper Centre's Director, Cheryl Milne, who focused on Prof. Campbell's lack of expertise involving children, as well as the fact that her research findings were limited to the specific women she interviewed and thus could not be generalized to the experiences of children in polygamous families.

Over the past month, the Court has heard the testimony of numerous other witnesses, including both expert witnesses from Canada and the United States, as well as current and former members of FLDS communities. In an unconventional procedure, several FLDS witnesses requested and were granted the ability to testify anonymously from behind a screen, on the basis that they were fearful of potential future prosecutions against them for polygamy. It remains to be seen how this will play out.

What is clear is that by the time the closing submissions conclude in April, the Court will have an unprecedented volume of evidence, and a multitude of extraordinarily difficult issues to consider. How should polygamy under the law be defined, and, specifically, what types of relationships should it cover? Does the prohibition violate the right to freedom of religion? Is it problematic under section 7, because of either vagueness, overbreadth, or a limitation on fundamental personal choices? Is there sufficient evidence of harm resulting from polygamy to justify its prohibition under s. 1? If so, is polygamy inherently harmful, or must it occur within a particular context of abuse or exploitation to be justifiably prohibited? Given these crucial questions, as well as the broader issue of how far the Charter permits the extension of individual liberties in light of important societal objectives, this case will undoubtedly prove to be one of the most interesting and significant Charter proceedings to date.

Kathryn McGoldrick is a third year student at the University of Toronto Faculty of Law.

The Asper Centre is jointly represented by Brent Olthuis and Stephanie McHugh of the Vancouver firm, Hunter Litigation Chambers, on a pro bono basis, along with Executive Director Cheryl Milne.



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The Supreme Court's Decision in *Ward* :

A Fresh Start for Charter Damages

The Supreme Court's landmark decision in *Vancouver v. Ward* 2010 SCC 27 adds much needed structure to a remarkably underdeveloped area of *Charter* jurisprudence and should encourage *Charter* damage claims against governments.

Ward affirms the availability of s. 24(1) *Charter* damages against governments as a means to compensate, vindicate and deter *Charter* violations. At the same time however, it also allows the state to demonstrate that damages are inappropriate because of other available remedies, or concerns about effective governance.

On the facts, the Court found a declaration to be insufficient remedy for an unconstitutional strip search of Vancouver lawyer, Cameron Ward. It rejected the government's argument that the $5000 trial court award would over-deter officials and open the floodgates to too many damage claims. The Court did, however, overturn a $100 award for unconstitutional seizure of a car on the basis that there was no need for compensation, the violation was not serious, and a declaration of the violation would be an adequate remedy.

Before *Ward,* there was significant uncertainty in the law surrounding *Charter* damages. Some courts required proof of fault in addition to a *Charter* violation, and basic issues such as the appropriate defendant and the existence of immunity remained uncertain despite 28 years of *Charter* rule.

The unanimous decision, as written by Chief Justice McLachlin, has brought some much needed structure to *Charter* damage claims. *Ward* affirmed that *Charter* damages are a distinct public law remedy under s. 24 (1); it stressed that such a public law remedy lies against the state and not against private actors.

The Court articulated a four-part approach to damage claims. First, the plaintiff must establish a *Charter* violation. Second, the plaintiff must establish a functional justification for damages in relation to the remedial purposes of compensation, meaningful vindication of the right, or deterrence of future *Charter* breaches. The recognition of both vindication and deterrence as legitimate remedial purposes should end any misconceptions that *Charter* damages are limited to providing compensation for pecuniary harms. The Court's recognition of deterrence as a legitimate remedial purpose is particularly important in this case, since the search of Cameron Ward ignored limits placed by the Supreme Court on the invasive procedure.

Once a functional need for damages is established, the burden shifts to the state to establish countervailing factors which should preclude a damage award. These factors are not closed, but include the existence of another adequate alternative remedy, as well as concerns that damages may interfere with good governance.

Finally, the court must consider the appropriate quantum for the *Charter* damage award. The primary consideration in most cases will be the need for compensation, including full compensation that restores "the claimant to the position she would have been in had the breach not been committed" (at para 48). Compensation includes non pecuniary damages, such as pain and suffering. Concerns regarding fairness to all parties, seriousness of the violation, and proportionality will also govern the appropriate quantum of damages that are necessary to vindicate the *Charter* violation or deter future violations.

The Court in *Ward* recognized that damages may serve broad interests in compensation, vindication and deterrence, that the damage award would not harm good governance, and that a declaration of the violation is not an adequate alternative remedy; this decision should inspire more *Charter* damage claims.

At the same time, governmental defendants will be able to argue that the Court's reversal of the damage award for unconstitutional seizure of a car affirms that there is no *per se* rule requiring damage awards for every *Charter* violation. It is still possible to argue that other remedies, such as declarations, would be more appropriate, and that certain damage awards may harm good governance and chill the exercise of governmental functions.

In the end, the decision stresses that, "the watchword of s. 24(1) is that the remedy must be "appropriate and just"' (ibid at para 46) in relation to the broad remedial principles of compensation, vindication, and deterrence, in addition to concerns about good governance. This principled approach is much better than that of the lower court, which initially ruled that proof of fault was required in addition to the *Charter* violation.

Kent Roach represented the British Columbia Civil Liberties Association in the BC Court of Appeal and both the BCCLA and the David Asper Centre in the Supreme Court of Canada. He is also a Professor of Law at University of Toronto where he holds the Prichard Wilson Chair in Law and Public Policy

Working Group Updates

Project G20

Project G20 is a new Asper Centre working group, coordinated by five upper-year students. Our goal is to promote and facilitate an ongoing dialogue within the Faculty of Law, addressing the interaction between *Charter* rights and political demonstration within the context of the G20 arrests. We are thrilled to be working directly with our partnership organization, the Canadian Civil Liberties Association (CCLA), and our faculty advisor, Professor Sujit Choudhry.

Our first panel discussion was on October 6, 2010. It featured Faculty of Law Professor Kent Roach, Cara Zwibel of the Canadian Civil Liberties Association, and Irina Ceric from the Law Union's Movement Defence Committee. Faculty of Law Professor David Schneiderman moderated the panel. The panellists discussed a broad range of issues, including *Charter* infringements, public apathy and the possible role of inquiries.

On January 17, we held a screening of selections from Adam Letalik's documentary *Toronto G20: Exposed*. It was followed by a panel discussion on *Charter* rights, with a particular focus on the impact on freedom of expression. The panel featured criminal lawyer John Norris on G20-related bail conditions, Professor David Schneiderman on Charter issues pertaining to the summit weekend (including the *Public Works Protection Act*), and Adam Letalik on his film and G20 experience.

Our research groups have completed a number of memoranda for the Canadian Civil Liberties Association. Research topics included *The Public Works Protection Act*, the international regulation of non-lethal crowd control weapons, the 'Breach of Peace' provision in the *Criminal Code* and the regulation of the use of 'kettling" by police.

Finally, a select group of our students have been working with Professor Sujit Choudhry on an academic discussion of the constitutional issues raised by the G20 arrests. The students expect to complete an original paper by the end of the 2010-2011 academic term.

This term, we hope to coordinate at least one more panel discussion, possibly for SPINLAW 2011 (Student Public Interest Network Legal Action Workshop). We also look forward to continuing our relationship with the CCLA. Future memoranda will address reforms to Criminal Code Riot Provisions, International Protection for freedom of peaceful assembly, and a history of the right to peaceful assembly in Canada.

Finally, the student coordinators would like to thank all of the members of the working group for their hard work helping to coordinate panels, and in providing us with fantastic research. We would also like to thank Cara Zwibel of the CCLA, Cheryl Milne and Professor Sujit Choudry for their ongoing patience and support. We are extremely proud of everything the group has accomplished and look forward to an equally successful second semester.

Claire Webster is a second year student at the University of Toronto Faculty of Law and one of the co-leaders of the Project G20 Working Group.

Image credit: David Shultz

Submissions on Bill C-5

Bill C-5*, An Act to Amend the International Transfer of Offenders Act*, proposes an increase in the discretionary power granted to the Federal Minister of Public Safety under the present *International Transfer of Offenders Act (*the *Act)*. Section 6 of the Charter protects the ability of all Canadians to enter and remain in Canada. The David Asper Centre for Constitutional Rights' Working Group on International Prisoner Transfers advocates for, and defends, the mobility rights of Canadian offenders abroad.

This past fall, our group submitted to the Standing Committee on Public Safety and National Security (SECU) a brief of constitutional issues pertaining to the *Act*. The brief addresses issues with the proposed changes; our primary focus is on international offender transfers to Canadian prisons, and whether these can be justified as furthering public safety. The brief raises questions about the public's safety from offenders within Canadian prisons, and the effects of criminal records on victims. The group's research also discusses the *Act*'s prima facie breaches of sections 6 and 7 of the Canadian *Charter* –the right to enter Canada, and the liberty protection, respectively-, and Canada's compliance with international obligations under multilateral conventions and bilateral treaties. The submission is available on the David Asper Centre website.

SECU's November 15 meeting saw discussion of Bill C-5. The committee heard oral presentations from the Canadian Civil Liberties Association, the Canadian Bar Association, and individual witnesses. These parties emphasized the points addressed by our working group: the bill would not fulfill its stated purpose; the bill would lead to an unwarranted increase in ministerial discretion; and, the bill would set the stage for breaches of ss. 6 and 7. CCLA's Nathalie Des Rosiers made the further point that the proposed changes create a sinister incentive for prisoners to plead guilty for a return to Canada. The fate of Bill C-5 is still unknown as SECU has yet to issue their report.

The government presented concerns about victim well-being, and the grievous nature of some offenses. However, forgoing state control over these prisoners does not serve victims, nor will it reduce recurrence of crimes. The bill faces criticism from the committee that, "[the bill is] the government trying to get around having to follow the law and trying to get around judges who have told them that they are doing the wrong thing", and –truly- that seems to be the best explanation.

Many thanks to the members of the Bill C-5 working group:

Stoney Baker, Kate Dalgleish, Anu Koshal, Esther Oh, Kate Robertson, Sean Tyler, Ryan Lax for assisting in recalling administrative law, and Audrey Macklin and Cheryl Milne for their guidance in planning the brief. Let's hope that *this* bill stops here.

Tatiana Lazdins is a second year student at the University of Toronto Faculty of Law.

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Working at the Constitutional Law Branch

I had the pleasure of spending the summer of 2010 at the Constitutional Law Branch -the office of Ontario's Ministry of the Attorney General responsible for defending Ontario statutes against constitutional and Human Rights Code challenges. With twenty-two counsel and only a handful of students, the Branch offered me a close-knit work environment and exposure to a tremendous amount of institutional knowledge of constitutional law, for both of which I am very grateful.

Going into the summer, I was under the impression that the CLB's title told me everything I needed to know. In this piece, I would like to highlight several elements of "in the trenches" constitutional law that surprised me.

Policy knowledge. For many people, Canadian constitutional law is a theoretical or philosophical undertaking, as seen in both law school essays ("what is section 7 really about?") and Supreme Court judgments ("the rule of law is a textured concept…"). However, I learned that mounting a strong defense of a statute or programme requires a high degree of policy savvy. It is always in the government's interest to present a clear and compelling rationale for the basis of a given policy, even in response to the most baseless constitutional challenges. Presenting defenses in areas completely unknown to me – drivers' licensing, workers' compensation, the mental health system, private colleges– was a challenge which required more research and conceptual understanding than I had anticipated.

Expert witnesses. Consistent with the philosophical conception of constitutional law described, I thought that constitutional argument was largely a matter of first principles. Like many students entering real-world litigation, I learned how severely I had underestimated the role of evidence. The complexity of regulation in the modern administrative state means that expert witnesses are a trademark of constitutional litigation, and selecting, managing and cross-examining experts is a vital skill for constitutional lawyers.

Administrative tribunals. I knew from my administrative law class that tribunals with the power to decide questions of law could hear Charter challenges, but I was still shocked by the number and variety of Ontario tribunals hearing constitutional questions (I worked on cases before the Workplace Safety and Insurance Appeal Tribunal, the Ontario Energy Board, and the Social Benefits Tribunal). These specialist tribunals present several challenges for constitutional lawyers, including a lack of familiarity with constitutional law, significant procedural differences, and distinct institutional character.

The breadth of constitutional law. At a Constitutional Roundtable in December 2009, Peter Hogg quipped something along the lines of "it's only a very small amount of the universe of government activity that the constitution affects". While this may be true from a high-level perspective, working on the ground and seeing the amount of legal advice generated by the constitutional law branch gives the impression that it touches almost every element of government life. I was exposed to a multitude of constitutional concerns which I had never anticipated as a student, but also to numerous sections of the Constitution Acts which I had never before seen assigned to a file (and I learned that even experienced litigators turn to Hogg's loose-leaf when confronted with this same problem). The standard survey class on constitutional law certainly teaches the most salient parts of our constitution, but it falls short of capturing just how broad a range of constitutional concerns play a role in daily government decision-making.

Padraic Ryan is a third year student at the University of Toronto Faculty of Law.

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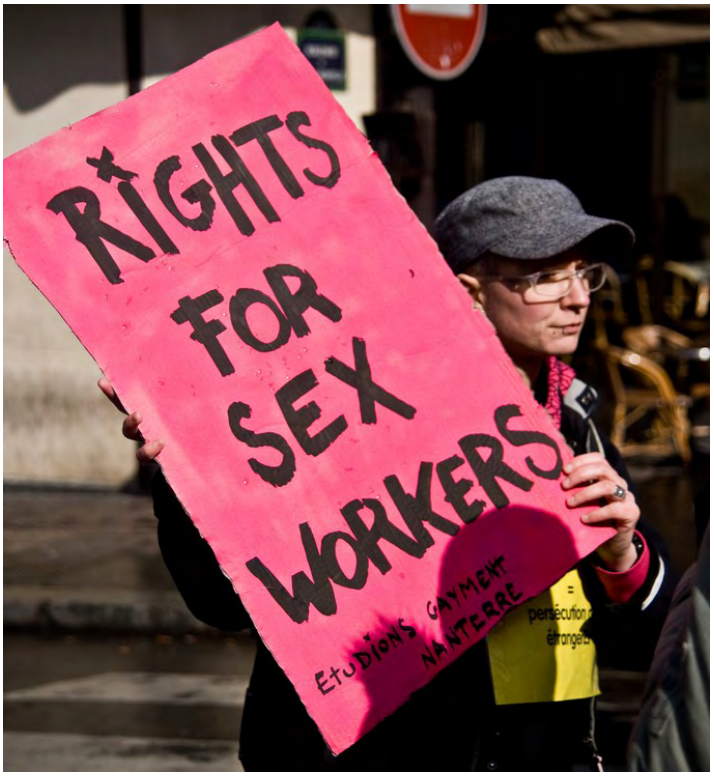
Perspectives on *R v. Bedford*

The decision of the Ontario Superior Court in *R. v. Bedford*, 2010 ONSC 4264, released September 28, 2010, sent shockwaves around the country and ignited passionate debate in the media as well as in our law school. In a 131-page judgment, Justice Susan Himel found that three central prostitution-related provisions of the *Criminal Code* – living on the avails of prostitution, keeping a common bawdy house and communicating in a public place for the purpose of engaging in prostitution – infringe the core values protected by section 7 of the *Charter*, and that this infringement is not saved by section 1 as a reasonable limit demonstrably justified in a free and democratic society.

On October 25, 2010, the Asper Centre hosted a panel discussion, organized by Renatta Austin and moderated by Cheryl Milne, to canvass the impact of this decision and the future of prostitution laws in Canada. The panel consisted of Professor Alan Young of Osgoode Hall Law School, who was counsel for the applicants in the case, as well as Professors Hamish Stewart and Brenda Cossman, both of the University of Toronto Faculty of Law. Professor Young expressed his satisfaction with the "lucid" and "well-organized" decision, noting that if anyone was curious as to how he structured his arguments, they need only read Justice Himel's judgment. He spoke about the need to translate social scientific evidence and argument into recognizable constitutional doctrine, and the advantages of challenging the means chosen in and the rationality of the legal regime as opposed to the objective it pursued. Professor Young also explained how he utilized the standard of "gross disproportionality", developed by the Supreme Court of Canada in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, to his advantage in this case.



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Professor Young also spoke at length about the kinds of evidence that he opted to adduce, noting that the very public coverage of the Pickton case in British Columbia around 2002 provided a useful context for proceeding in the case, by demonstrating the gravity of the situation. He contrasted the sources of evidence that the applicants adduced, and the issues that they focused on, with those of the respondent government. Ultimately, Professor Young predicted that this important case will move up through the appellate courts, and he expressed his hope that it be heard by the Supreme Court of Canada as soon as possible.

Professor Stewart, who spoke about how the court dealt with evidentiary matters in the case, began by praising Justice Himel's judgment for being well-written and coherent. Calling the decision a model of how to handle evidentiary matters in constitutional litigation, he stated that Justice Himel carefully considered the social scientific evidence and provided cogent reasons for favouring some evidence over others. Professor Stewart predicted that it would be difficult for an appellate court to find an error of law or any palpable and overriding error of fact in the judgment.

Professor Stewart also noted two critical moves made by Justice Himel in her decision. The first was a normative move rejecting the government's claim that prohibition can be justified on the basis of morality or because of an inherent harm to women. Secondly, Professor Stewart explained Justice Himel's decision to admit all the expert evidence that the parties adduced and to treat deficiencies in any piece of evidence which might have been relevant to the issue of admissibility instead at the latter stage of determining the appropriate weight to be given to it. Professor Cossman began by addressing the equality issues at stake in the case, commenting that a challenge to the provisions under s. 15 of the *Charter* would not be "compelling" because of the nature of the harms at issue. She then elaborated on the relationship between the evidence put before the court and the language of argumentation used by each side to characterize that evidence according to its standpoint. Professor Cossman concluded by discussing both the political context surrounding the court decision and the potential alternative regimes that could be developed to decriminalize or regulate prostitution in the absence of these three impugned provisions.

During the opportunity for questions and discussion, the panellists canvassed existing international models for controlling prostitution, addressed the extent to which the prostitution provisions which were not challenged remain effective, and considered the kinds of arguments (such as personal autonomy or the merits of the sex trade) that the applicants opted against raising in this case.

Will Morrison and Sabrina Bandali are third year students at the University of Toronto Faculty of Law.

UN Security Council Resolution 1267

Resolution 1267 is more than a no-fly list. It constitutes a complex regime that limits mobility and financial means, and imposes arms embargos on targeted individuals placed on consolidated lists. The resolution was passed by the UN Security Council (UNSC) in 1999 in response to the bombings of U.S. embassies in Nairobi and Dar es Salaam. The regime originally targeted the Taliban but in 2000 was expanded to include individuals associated with Al Qaeda. In recent years, the regime has come under increasing scrutiny by human rights scholars and activists who raise issues of due process and rule of law.

Paul Champ, a litigation lawyer who focuses on human rights in the context of national security, acts as counsel for Abousfian Abdelrazik. In his case challenging the implementation of the regime in Canada, Champ sets forth three main legal arguments. First, he maintains that the UN Al-Qaeda and Taliban Regulations are ultra vires the UN Act. As was expatiated in the parliamentary debates of 1947, the objective of the UN Act was to enable the Canadian government to implement decisions passed by the UNSC, and it was not envisioned that those resolutions would limit the liberties of individuals. Champ goes on to say that the regime constitutes a violation of ss. 2(d) and 7 of the Canadian *Charter*. Because of the mechanism that operates an asset freeze, the individual subject to the regime is unable to perform any transactions. In the case of Abdelrazik, any person who chooses to associate with him, such as activists, politicians, and professors who wish to donate to the legal fund, are not able to, because doing so would constitute an offence. Lastly, Champ highlights that the UNSC has contravened international principles since individuals are often placed on the list as a result of information derived from torture, an action proscribed by international customary law.

Ben Wizner, the litigation director for the ACLU's National Security Project, is involved in challenging the FBI's terrorist watch system. In the U.S., it is not uncommon for the government to vehemently rebuff legal challenges. In the past, cases have been declared moot because the government surreptitiously "de-lists" the plaintiff bringing the action. Having overcome this obstacle, Wizner is now representing 17 clients who have found themselves on the U.S. no-fly list. He has decided to centre his lawsuit primarily on the issue of due process. The U.S. policy doesn't allow for notification or reason to be given to individuals on the list, nor does it provide an appropriate recourse for those subject to its erratic effects. Wizner focuses his argument on the violation of right to citizenship, explaining that there is no practical or affordable way for people to return to the U.S. As for permanent residents who end up stranded outside the country, the sudden imposition of a no-fly restriction effectively constitutes a removal without due process. Given the political climate in the U.S. and the government's recent attempt to have the case dismissed, it seems Wizner faces yet an even more fundamental challenge: keeping the case alive.

Jeremy McBride, chair of Interights, is litigating a case on behalf of Yousef Nada at the European Court of Human Rights. Nada has since been de-listed, but McBride points out that such an occurrence is indicative of a greater strategy implemented by governments intending to destroy such cases. Nada, an Italian citizen, is confined to living in a small area because his town occupies an enclave within the Swiss canton of Ticino. McBride argues that Nada, having no access to health or religious services, is deprived of his right to liberty, to private life, to freedom of religion and is subject to degrading treatment as there is no effective way of challenging the regime.

By examining this range of litigation, it becomes clear that lawyers around the world are accepting an unprecedented challenge. And although implementing a diversity of tactics, litigators will inevitably point to the same fundamental flaws of the no-fly list—lack of due process, independent decision making and appropriate redress.

Daniel Simonian has been called to the Quebec Bar and is now completing his common law studies at the University of Toronto Faculty of Law.

Immigration Status & Discrimination in Canada

On September 24 and 25, 2010, the Asper Centre, in conjunction with the Canadian Civil Liberties Association (CCLA), hosted a conference on immigration status and discrimination in Canadian society: "Who Belongs? Rights, Benefits, Obligations and Immigration Status." Over two days, a series of expert panels and workshops explored issues ranging from conceptions of citizenship in Canadian law to extending municipal voting to non-citizens. Participants enjoyed engaging dialogue and creative insights from many of North America's leading scholars and practitioners in the immigration field.

In a lively panel on citizenship and statelessness, Professor William Conklin of the University of Windsor Faculty of Law began by identifying tensions in international legal discourses regarding statelessness. Although states enjoy discretion in determining nationality, and therefore citizenship is not reducible to national origin alone, there is increasing jurisprudence grounding nationality in social relationships and residence rather than legal rules, he said. Professor Don Galloway followed with a historical account of the conflict between what he sees as competing conceptions of political membership: residence and citizenship.

University of Toronto Professor Audrey Macklin then framed the issues in a decidedly practical light. According to Macklin, there are two assumptions shared by many of the conference presenters. For people who are excluded from citizenship, we should endeavour to make citizenship matter less. To the extent that lack of citizenship is the problem, we should make citizenship easier to acquire. Taking the example of the attempted repatriation of Omar Khadr from Guantanamo Bay, Macklin asked, what are the implications of affirming Canada's duties to Khadr based on his citizenship? What does this say about the rights of non-citizens at Guantanamo? Should citizenship matter or shouldn't it?

Photo from CCLA

One panel tackled the issue of race in immigration policy and discourse, while another explored new litigation avenues under the *Charter* and provincial human rights acts. A panel on enforcement included two American scholars commenting on trends south of the border. After Professor Doris Marie Provine of Arizona State University discussed the possibility of applying legal principles of proportionality and forgiveness to immigration law, Professor Juliet Stumpf of Lewis and Clark Law School introduced problems relating to the significance of time in what she called "crimmigration law."

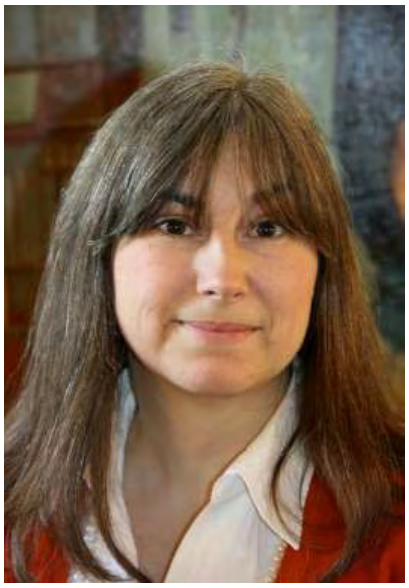
While membership in immigration law is decided in large part by measurements of time, Stumpf argued, criminal law focuses on a single moment in time – the criminal event. When criminal law intersects with immigration law – for instance, when a criminal conviction results in deportation or exclusion – the single moment of the crime is invested with the power of determining the entire immigration relationship, rendering time irrelevant. The so-called criminalization of immigration law was later challenged by João Velloso, who argued that the problem in the Canadian administrative law context is not the criminalization but rather the "punitive non-criminalization" of immigration law. Despite the wide range punishments in immigration law (including detention, deportation and exclusion), immigration law lacks the rules of evidence and procedural guarantees of criminal law.

This same spirit of dialogue animated the workshop on municipal franchise, another highlight of the conference, which saw Ryerson University Professor Myer Siemiatycki argue for extending municipal voting to non-citizens and University of Toronto Professor Phil Triadafilopoulos argue against it. Siemiatycki's arguments for extending the vote included the cost of excluding tax-paying noncitizens, the distinctness of municipal voting from provincial and federal, the importance of cities as sites of political membership, and precedent in other countries. He was followed by Triadafilopoulos, whose practical stance held that energy would be better spent on safeguarding liberal citizenship criteria and speedy naturalization. Triadafilopoulos did admit that if naturalization became difficult and drawn-out, he would reconsider his position. Finally, Cara Zwibel of CCLA walked through potential Charter arguments for extending the vote.

Later that evening at Hart House, the same topic was debated by the York Debating Society, with introductory remarks from then-Toronto mayoral candidate Sarah Thompson. Video feeds for select panels and workshops are viewable at http://ccla.org/our-work/focus-areas/who-belongs/, as is the full list of panelists and their papers, including many not mentioned in this brief overview.

Louis Century is a second year student at the University of Toronto Faculty of Law and is completing a joint graduate degree in Global Affairs.

Message from the Executive Director



Every year with the Asper Centre brings new and interesting challenges. We seem to have a different theme of constitutional advocacy to focus our clinic each term. Partly, this is due to the nature of test case litigation (every case is unique). Last year we focused on the role of interveners, particularly at the Supreme Court. This year the main focus of the clinical course was the Polygamy Reference Case. It was fortuitous that the release of the Bedford decision, striking down a number of prostitution related provisions in the Criminal Code, took place in the middle of the fall clinic, as the issues pertaining to the qualification of experts and the use of social science evidence applied equally to the work that the students conducted in our case.

The polygamy case is continuing into the spring with final arguments scheduled for the end of March and beginning of April. While last year students were able to travel to Ottawa to observe the Supreme Court in action, this year they have flown to Vancouver to watch a case being heard at the trial level. It has been a wonderful opportunity for the students to be at the ground level of a case that is sure to reach the Supreme Court eventually. I have to admit that I truly enjoyed the chance to be back in a trial court conducting cross-examinations in a subject area I know well—children's rights.

The Asper Centre has also been able to host a number of workshops on the emerging constitutional issues of the day. Students came back from the summer holidays animated by the fall-out from the police action during the G20 Summit in Toronto. A dedicated working group was formed and organized two workshops addressing the constitutional issues arising in the unprecedented number of arrests that took place during the event. Students have been working diligently on research memos for the Canadian Civil Liberties Association which has been at the centre of the advocacy on behalf of protesters and bystanders caught up in the fray. I was invited to make a presentation at the hearings organized by the CCLA to talk about the general constitutional issues that arose. I focused on the assault on freedom of expression and the various due process protections that we take for granted. The importance of peaceful public protest could not be better illustrated than by the events unfolding this week in Egypt. We hope to draw analogies between these two events when the student working group conducts a session in March for the L.A.W.S. program's Global Citizenship conference for high school students.

Workshops were also quickly organized to discuss and respond to decisions released in the fall including the Bedford case and *R. v. Sinclair*, the Supreme Court decision that looked at the right to counsel during police interrogation. We have also continued our efforts to partner with organizations to deliver a range of opportunities to students and our network of followers. In late September we co-hosted a forum in Immigration status with our good friends at the Canadian Civil Liberties Association (described in this issue); while in November we again partnered with them and the International Human Rights Program to deliver and excellent program on UN Security Council Resolution 1267. Our keynote speaker for the event was Kimberly Prost, the Canadian appointed as the first Ombudsperson in regard to the no-fly list.

One event that was not well-publicized, but which I hope will lead to significant public debate in the coming months, was an invitation-only workshop that we held on February 4th on the unwritten constitutional conventions that have such a significant impact on the functioning of our democracy. Leading scholars and political experts converged in the Solarium to discuss, debate and try to reach consensus on whether and how we should make these rules more accessible and coherent. Co-chaired by me, University Professor Peter Russell and our own Lorraine Wienrib, the event will result in a report to be made public over the coming months. We are grateful to the many participants who covered their own expenses to attend from across the country. Students in both law and political science assisted by playing the role of rapporteur for our working dinner and day-long workshop.

There is more to come from the Asper Centre in the second term and I have not acknowledged all of the great work being done by our volunteer student working groups, although this newsletter touches on much of it. Although I cannot say with any certainty what cases the students might be working on next fall, I have no doubt given our past experience that they will be challenged, as will I, by the opportunities we will present.

An Inside Look at Clinical Legal Education, Fall 2010

I was honoured to be selected as one of ten participants in the Asper Centre's Clinical Legal Education course in fall 2010. I was one of three 2L students selected for the course. Six 3L students and an LLM student were also selected. As a 2L student, I felt a bit behind the curve for the first month of the course. The 3Ls had a whole extra year of legal training as well as their summer experiences to learn the finer points of legal advocacy. After a few weeks of catch-up, however, I felt confident in my ability to participate in the interesting discussions held each week.

Most weeks, we spent the first half of class discussing assigned readings on issues from effective factum writing to the selection of clients for test case litigation. Discussion of the use of social science evidence and social science experts was a particularly popular topic of discussion this year.

The second half of class was devoted either to progress reports on our cases or guest speakers. I was one of five students selected to work on the Asper Centre's intervention in Reference re: s. 293 of the Criminal Code, colloquially referred to as the "polygamy reference". An overview of this work begins on pg. 1 of the newsletter.

I fear that we may have monopolized some progress report sessions, but learned a great deal from my colleagues working on other files. Work on a file for LEAF nicely mirrored the issues in the polygamy reference. On the other end of the spectrum, we had a federalism issue this year, which always provided a refreshingly different perspective on the expanse of constitutional advocacy, reform and litigation.

Guest speakers this year included Mary Eberts (noted Constitutional scholar and litigator), Patricia Hughes (Executive Director of the Law Commission of Ontario), and Sarah Kraicer, (Counsel, Constitutional Law Branch, Ministry of the Attorney General for Ontario). Each provided unique insights into legal practice and/or rights-based advocacy. Eberts was nice enough to come in early on Remembrance Day to give an excellent discussion on client selection and test cases. Hughes spoke about law reform in an engaging manner, contrasting the different law reform organs in different nations as well as detailing how law reform is institutionalized in Ontario. Kraicer's presentation provided us with the balance needed to see how the government views constitutional litigation.

At semester's end, my only regret was that the school schedule resulted in a few of our classes being cancelled or shortened due to on-campus interviews, reading week and Remembrance Day.

Several of my colleagues continue to work on these files as part of a for-credit practicum.

Michael Da Silva is a second year student at the University of Toronto Faculty of Law.

New Resources Available on the Asper Centre Website

www.aspercentre.ca

Webcast of the lecture by Professor Robert Hazell: Is Coalition Government in Britain Here to Stay?

2011 Events

February 3, 2011
Is Coalition Government in Britain here to stay?
Professor Robert Hazell University College London
Bennett Lecture Hall, Flavelle House, Faculty of Law

April 1, 2011
Symposium: Funding the Charter Challenge
Save the Date!

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