

ASPER CENTRE OUTLOOK

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Looking for Solutions: *Assisted Human Reproduction Act*

In the *Reference re Assisted Human Reproduction Act* (2010 SCC 61), the Supreme Court of Canada issued a divided 4-4-1 opinion that declared several provisions of the federal *Assisted Human Reproduction Act* ("AHRA") *ultra vires*. The sections that were found to be unconstitutional were, in general, provisions deemed to be related to healthcare, i.e. a provincial power.

On November 4th and 5th, the Health Law Group, the Faculty of Law and the David Asper Center for Constitutional Rights hosted a conference on the implications of this recent decision. The Equality Rights and Assisted Human Reproduction Working Group assisted with the conference and reviewed the sessions.

The sessions included discussions on federalism and the regulation of health care, family law and reproductive rights, empirical evidence and ethics, and international trends in the regulation of assisted human reproductive technologies. Examples of specific technologies include gamete donation, in vitro fertilization (IVF), preimplantation genetic diagnosis (PGD), and third-party reproduction or surrogacy. Speakers included University of Toronto professors Colleen Flood, Trudo Lemmens, Carol Rogerson, and Ian Lee, as well as many distinguished scholars visiting from other Canadian and international institutions.

Keynote Discussion

The highlight of the conference was the keynote dialogue between Preston Manning, leader of the previous opposition reform party of Canada; Carolyn Bennett, Liberal MP for St. Paul's; Peter Hogg, resident scholar at Blake, Cassels & Graydon LLP; and Alison Motluk, a freelance journalist who has published extensively on fertility laws and assisted reproduction. TVO's Steve Paiken guided the discussion and asked challenging questions of the expert panels.

The primary focus of the keynote session was how to proceed with a regulatory scheme around assisted human reproduction. Mr. Preston Manning emphasized the long-standing need for a regulatory scheme on assisted human reproduction in Canada. Peter Hogg clarified that in the wake of the reference decision, the onus for this regulatory scheme is on the provinces. Dr. Carolyn Bennett, MP, emphasized the need for a Canada-wide strategy in order to avoid "reproductive tourism", and Alison Motluk advocated for transparency and increased discussion regarding the impact that the legislative vacuum is having on individuals and families who rely on the health care scheme.

From a constitutional perspective, it was suggested that for some provinces, any federal regulation is unacceptable. Quebec brought the reference forward despite

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a provincial regulatory gap with respect to human reproduction and prior to their enactment of any legislation related to AHR. Professor Colleen Flood, in the session on the prospects for future regulation, highlighted the harm that can arise in private clinics because of this and similar provincial regulatory gaps.

The rights of a donor-conceived child

One issue that was discussed during the keynote session is the issue of a donor-conceived child's rights to access the medical history of his or her donors. Interestingly, during the discussion, the donor-child's right to information was not considered as being relative to or limited by the donor's rights to privacy.

As pointed out during the Identity and Family Law session, there is no system in place for allowing donor-conceived children to locate their donor or their donor's medical history. Balancing the donor's interest in privacy with the child's interest in accessing information effectively would necessitate a consideration of the scientific community's stance on the positive impact access to a donor's medical history can have on a donor-child's future health. A more open donor-information policy would begin to address these issues. Such a policy may also help donor-conceived children who are struggling with issues of self-identity to resolve questions about their genetic lineage.

The keynote panellists also approached the issue from the perspective of a new family-paradigm; Alison Motluk commented that Ontario birth certificates in many instances are misrepresentations insofar as they may only list parents who fulfill none of the biological requirements of parenthood, or preclude those who may contribute genetic materials. Some provinces address this issue by permitting as many as four parents on the birth certificate. Thus, as the family has evolved to include more than the traditional two parents, it is important that this can be legally recognized and the donor-

conceived child's interests are considered.

The rights of a surrogate mother

Another group, in addition to donor-children, that was identified as having their rights implicated by the AHRA is women who act as surrogates. One observer noted how the family law panel challenged the prevailing view of surrogates as poor women subject to abuse. They noted that the reality in Canada is that surrogates tend to be middle-class women who have already had children, and do not intend to continue expanding their own families.

The session on Legal Treatment of AHRA and the Contributions to Empirical Evidence and Ethics was followed by a debate on the meaning and relevance of "human dignity" as a foundational principle for the AHRA. Post *Kapp*, (2008 SCC 41) the SCC has moved away from using this notoriously tricky concept as part of its s.15 analysis under the *Charter*. Given that empirical evidence suggests that many women who act as surrogates describe their experiences in very positive ways, and feel that they have made a valid and worthwhile contribution, the relevance of "human dignity" as a reason for prohibiting payment for surrogacy (beyond compensation for reasonable expenditures - a separate issue entirely) was called into question.

Lawmaking in a Hype-Fuelled Environment

Timothy Caulfield, (University of Alberta, Faculty of Law), participated in the session on the regulation of new technologies. Rather than focusing on the implications of the recent Supreme Court decision striking certain provisions, Caulfield pointed his critique at how the AHRA was drafted. His contention is that the content of the AHRA was influenced by its social context. Throughout the AHRA's lengthy consultation and debate period, genetic science occupied an increasingly exciting place in the social imagination and popular culture. Dolly the sheep was cloned in 1997. In 1998, human embryonic stem cells were first successfully derived, and the treatment potential seemed limitless. In 2002, The Raelians claimed to have successfully cloned a human baby, Eve. Genetic science was much-hyped and poorly understood. In a hype-fuelled regulatory environment, there was pressure to regulate in an anticipatory fashion to avoid the hypothesized evils (manifest for example, in the AHRA's prohibition of human cloning). As a result, Caulfield argued, we ended up with a situation where the law tried to leap ahead of the technology.

The results were less than ideal. The bans imposed by the AHRA potentially rule out promising avenues for research developed since 2004 that have little in common with the evils legislators sought to prohibit.

While the future of assisted reproduction regulation is uncertain, Caulfield's point is compelling: In a society increasingly characterized by complex and fast-moving scientific phenomena, how do legislators best make laws? Should the law leap ahead of science, or is regulation better done *ad hoc*? Can the law leap ahead without building laws



Panel Speakers: Peter Hogg, Carolyn Bennett, Steve Paiken, Preston Manning & Alison Motluk

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based on hype? The risk of ill-suited regulatory schemes is matched by the difficulties and dangers of having no scheme at all. Caulfield's take on the AHRA provides an interesting insight into a problem with no easy solution.

Moving Forward

In sum, the conference introduced many of the broad implications that reproductive regulation (or lack thereof) has had on Canadians and their health and other rights as well as their prospective ability to form their own family or contribute to the families of others. Moving forward, there are no clear answers regarding how to balance the competing interests at play in reproductive regulation. Perhaps the only thing that is clear is that we must indeed move forward.

In addition to their work the Assisted Human Reproduction Conference, the Equality Rights and Assisted Human Reproduction Working group is providing research support to our partner organization, the Women's Legal Education and Action Fund (LEAF), on family law issues dealing with donor-assisted conception. Tatiana Lazdins is a second year student at the University of Toronto Faculty of Law and the leader of the Assisted Human Reproduction Act Working Group.

Working Group Updates

Bill C-4 Amendments to the Immigration and Refugee Protection Act

On August 13, 2010, almost 500 Tamil migrants arrived on Canada's shores aboard the MV *Sun Sea*. A previous ship, the *Ocean Lady*, had arrived with 76 migrants in October 2009. Concerned about the use of the MV *Sun Sea* as a "test boat" to assess Canada's response to such refugee claims as part of a growing trend in human smuggling by criminal elements, Public Safety Minister Vic Toews promised to act to strengthen Canada's border security. The result was Bill C-49, *An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, and the Marine Transportation Security Act*. Bill C-49 failed to pass during the 40th Parliamentary Session. Bill C-4, bearing the same title, is its identical reincarnation.

To date, the Canadian Bar Association, Canadian Council for Refugees, Canadian Civil Liberties Association, Amnesty International Canada and over 80 other organizations have released briefs or otherwise registered opposition to Bill C-4. Bill C-4 is allegedly targeted at deterring human smugglers from facilitating mass arrivals. However, observing groups have expressed concern that instead Bill C-4 punishes the refugee claimants themselves with harsh provisions that violate Canada's Charter of Rights and Freedoms and its obligations under international human rights treaties. For example, "irregular arrivals" for the purposes of the proposed Act would be designated by the Minister based on vague, broad criteria. Upon being declared "designated foreign nationals," claimants would be subject to mandatory detention without review for at least 12 months, pending a positive final determination. Designated foreign nationals are denied the right to apply for travel documents, temporary resident permits, permanent resident status, or relief under humanitarian and compassionate grounds until five years after a positive final determination. They are also denied the right to appeal unfavourable refugee claims to the Refugee Appeal Board.

The Asper Centre Working Group on Bill C-4 is investigating the Charter implications of the Bill. In particular, it

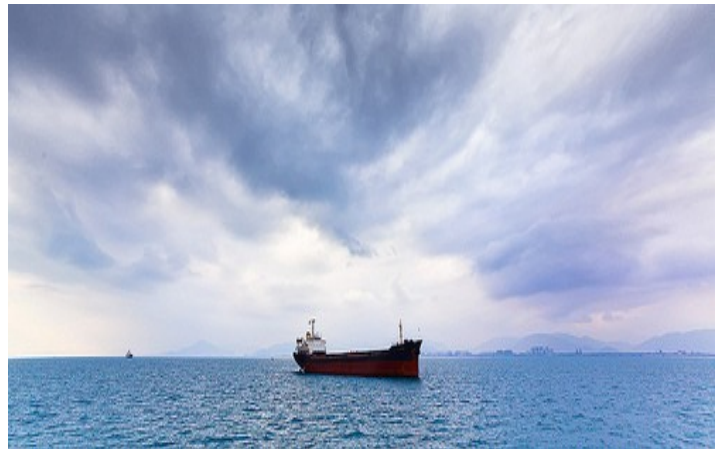


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is concerned that the provision for mandatory unreviewable detention violates the s. 10 right to *habeas corpus*, and the s. 7 liberty guarantee by mandating detention that is arbitrary and disproportionate. It is also investigating whether the Bill discriminates on the basis of national origin, contrary to the s. 15 equality guarantee.

Bill C-4 is nearing completion of its second reading, and is expected to go before a Standing Committee for review. The Asper Centre Working Group on Bill C-4 is collaborating with Professor Audrey Macklin and Executive Director Cheryl Milne to prepare a brief for submission to the Committee. The preliminary brief is currently being reviewed and additional revisions are expected.

The brief highlights these constitutional issues, drawing on immigration and refugee law, administrative law and international law as well as Charter jurisprudence..

At this time, the student coordinators would like to thank the members of the working group for their hard work in producing excellent research and in drafting the preliminary brief. Thanks to Cara Zacks of Downtown Legal Services for providing training. We would also like to thank Cheryl Milne and Professor Audrey Macklin for their ongoing support.

Cate Simpson, Webnesh Haile and Rebecca Sutton are second year students at the University of Toronto Faculty of Law and the co-leaders of the Bill C-4 Working Group.

Response to the Proposed “Omnibus Crime Bill”

On September 20th, the government introduced Bill C-10: The Safe Streets and Communities Act, otherwise known as the “Omnibus Crime Bill”. Forty-five sitting days later, on December 5th, the bill passed in the House of Commons. It had its second reading and was referred to the Senate Committee on January 16th. The bill introduces new mandatory minimum sentences for a range of sex and drug offences, and it reduces the availability of conditional sentences. On the youth criminal justice front, the bill also calls for the increased availability of adult sentences for youth convicted of serious offences.

The Crime Bill group was formed in an effort to raise awareness about the constitutional issues posed by this “tough on crime” agenda. Below are some of the past and upcoming activities of the group.

1. Research Assistance to Canadian Civil Liberties

Association for their policy brief : The students looked up cases of past convictions under the sections reformed by the crime bill. They compiled a list of “sympathetic” or “borderline” scenarios, in an effort to showcase the need for judicial discretion at the sentencing stage. The CCLA appeared before the House of Commons Committee on Justice and Human Rights, the Committee tasked with reviewing the bill.

Two significant concerns of the CCLA are the “unconstitutional use of mandatory minimum sentences”, and the “disparate effects of the legislation on Aboriginal people and persons requiring mental health care”. Among other concrete amendments, the CCLA advocates for the elimination of mandatory minimum sentences, and increased flexibility in conditional sentencing exclusions, to ensure that already marginalized communities are not burdened with unnecessary jail time. The CCLA also calls for a “five-year, independent report to Parliament that will evaluate the impact of any changes that are enacted”. More details on the CCLA’s position can be found at <http://ccla.org/omnibus-crime-bill-c-10/>.

2. Bill C-10 Speaker Panel – January 23rd, 12:30 PM: The Asper Centre hosted a discussion panel on the issues posed by Bill C-10. Criminology professor Anthony Doob, prominent Toronto lawyer and sentencing expert, Clayton Ruby, and prominent children’s rights lawyer and Executive Director, Cheryl Milne spoke. Criminal law Professor Vincent Chiao moderated the panel.

Professor Doob argued that the new policies are empirically unsupported; they are dishonest to the extent that they target “public safety”, and they contradict long-standing Canadian criminal justice values. Clayton Ruby particularly criticized the reduced unavailability of conditional sentences, which are inexpensive and ineffective sentencing methods. He also highlighted some of the practical difficulties in drafting sensible and proportionate mandatory minimum sentencing, and the absurdities of the “thresholds” for drug offences (i.e. that 201 marijuana plants would trigger a sentence double that of 200 marijuana plants). Cheryl Milne focused her discussion on the youth justice issues in the bill. She stated that the government has been very careful in the wording of the amendments so as

to not overstep recent Supreme Court decisions. The values behind these new amendments, however, seem to contradict the basic principle of reduced culpability of minors.

3. Ongoing Research: In the second term, the group continues to research the policy and constitutional questions posed by Bill C-10 and the potential social science evidence needed for future Charter challenges. The students put their efforts together to submit a policy brief to the Senate. A copy of the brief is available on the Asper Centre website.

Constitutional challenges of the legislation could arise under s. 12, s. 7, and s. 15 of the Charter. The discussion under s. 12 so far has been relatively limited, but the case law indicates that the “cruel and unusual punishment” threshold is a high one. The facts of the case leading to a successful challenge under this section would have to be rather sympathetic in order to bring the new mandatory minimums over this threshold.

On the other hand, s. 7 can provide for a rich discussion in light of the conflicting definitions of “arbitrariness” as a principle of fundamental justice. In the *Insite* decision, the Supreme Court has acknowledged that the definition of “arbitrariness” is unsettled. The Court has not pronounced itself as to whether an “arbitrary measure” that infringes a person’s s. 7 rights means a measure that is “inconsistent with” or “unnecessary for” the achievement of the state’s objective. Given that the objective of Bill C-10 is “safe streets and communities”, a successful Charter challenge under s. 7 will need to establish, with social science evidence, that such measures are either “unnecessary” or “inconsistent” with increased public safety.

Finally, on the same note as CCLA’s concerns about the disproportionate effect on marginalized communities (such as Aboriginal people, and people requiring mental health care), the legislation could also be vulnerable to a s. 15 challenge in the appropriate case.

Arina Joannis is a second year student at the University of Toronto Faculty of Law and the leader of the Bill C-10 Working Group.



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Summer Internships

First Nations/Tribal Water Rights in the Yukon River Watershed - Megan Strachan

I spent this summer in Alaska, working for the Yukon River Inter-Tribal Watershed Council. This internship allowed me to focus on First Nations rights in the Yukon Territory, specifically looking at how these rights can be interpreted in the context of water allocation, usage, quality and governance.

YRITWC is a unique international, inter-tribal treaty organization, consisting of 70 First Nation tribes throughout the Yukon River Watershed, including tribes in Alaska, Yukon Territory and British Columbia. YRITWC aims to preserve and protect the Yukon River, and provides training and education on a range of issues, from water quality testing to alternative energy to back-hauling hazardous materials out of these communities. Every two years, Tribal/First Nations leadership gathers in a community in the watershed to share information, give feedback to YRITWC and participate in presentations. This year's Summit was in Ruby, Alaska (called the "Gem of the Yukon").

A day of the Summit was dedicated to First Nation/Tribal water rights: what do "water rights" mean legally, practically and potentially on both sides of the border? I worked closely with a team of lawyers based in the lower 48 and Canada, with my research focussing on water rights in the Yukon Territory. I researched the content of the Yukon First Nation Final Agreements, as well as the accompanying Self-Government Agreements. I investigated the relationship between the territorial government, First Nation governments and federal government, trying to discern what these relationships and different spheres of jurisdiction mean for water management and governance in the Yukon. I did extensive research into the environmental assessment and permitting processes that grew out of the First Nations treaty negotiations, namely, the Yukon Environment and Socio-Economic Assessment Board (YESAB) and the Yukon Water Board. Both of these bodies give unique opportunities for First Nations participation and representation (such as the inclusion of traditional knowledge in the YESAB assessment process), and overlap with the constitutional duty to consult, though that duty has been found to largely be fulfilled through these general processes.

Water rights are unique in Canada as they are not typically recognized as constitutionally protected in the way that other aboriginal rights can be. In fact, Canada has historically denied that any Indigenous right to water exists. Aboriginal peoples in the provinces have turned to the courts to try and protect their water sources with mixed results. Treaty and aboriginal rights that involve hunting and fishing rights have been recognized to contain implicit accompanying rights to the quantity and quality of water necessary to sustain those rights. Yukon First Nations (YFN) are the only Aboriginal Peoples in Canada that have their rights to water explicitly recognized in their Settlement Agreements (which are constitutionally protected modern treaties). For example, Section 14.8.1 recognizes that "a YFN has the right to have water which is on or flowing through or adjacent to its Settlement Land remain substantially unaltered as to quantity, quality and rate of flow, including seasonal rate of flow." The UFA grants these expansive rights but also, in another section,



Photo of Megan Strachan

allows users to substantially interfere with these rights if there is no reasonable alternative. Thus, what on its face is a powerful right is not transferring into protection for water in practice. Involvement in the assessment and permitting processes discussed above has been more successful in protecting water sources than the language in this modern treaty to date.

The Summit in Ruby, a small village only accessible by boat or plane in the interior of Alaska, was an incredible experience. I spent the 4 days camping by the River, driving elders around in a school bus, learning and experiencing village life. There is nothing more validating - but also overwhelming - than seeing what is at stake if the Yukon River is not protected.

My experience and appreciation for the Yukon River and the people who depend on it began before the Summit, on an 8 day canoe trip called the Healing Journey. We began our trip only 60 miles below the Arctic Circle and travelled downriver 140 miles to the Native village of Tanana. We stopped in several fish camps on the way and talked with Alaskan Natives about the changes in the River, what they hope to see in the future for the River, and how the salmon were running that year. We also dragged a scientific probe behind one of the canoes and took water quality samples every 30 miles. The Healing Journey is an initiative that has gained international attention and has been duplicated on other continents as a method of collecting scientific data, reconnecting with the environment, and also gathering and sharing traditional knowledge alongside the scientific.

I had a remarkable experience this summer - I sharpened my legal research skills, I gained a deep knowledge of First Nations' right in the Yukon Territory and Canada as a whole, and I also achieved some comparative insight into the differences between Aboriginal rights in the Yukon and Alaska. Beyond all of this substantive knowledge, I had the opportunity to go into several villages, to spend a week canoeing on the Yukon River, and to watch the leadership's traditional decision making model in action.

Megan Strachan is a second year JD/MGA Candidate at the University of Toronto.

The Northern Gateway Pipeline Project - Chris Evans

Thanks to a grant from the Asper Centre, I spent my summer at West Coast Environmental Law (WCEL), a NGO based in Vancouver that works primarily in Aboriginal and Environmental law. My work this summer was wonderfully diverse, so I will focus on one of my projects: WCEL's work on the proposed "Northern Gateway" pipeline.

Northern Gateway would run from the Alberta oil sands across Northern BC to the Pacific coast. It would permit oil tankers to export crude oil from the oil sands to Asian markets at a profit of several dollars more per barrel. The pipeline poses several environmental risks, such as large-scale tanker traffic in turbulent waters, and the expansion of oil sands production to supply new markets. The pipeline would also run through many First Nations' traditional territories. Many of these Nations have decided, pursuant to their own laws, that the project is impermissible due to the risk of an oil spill. But because their jurisdiction has not yet been recognized, they must navigate Canadian law through the project's environmental assessment process.

The most important legal tool available to First Nations is the government's "duty to consult and accommodate", established by the Supreme Court of Canada in two 2004 cases, *Haida Nation v British Columbia* and *Taku River Tlingit First Nation v British Columbia*. The Court held that when the Crown considers an action that would adversely impact claimed Aboriginal rights or title, it must consult with the affected First Nations and accommodate their

concerns. Needless to say, what constitutes adequate consultation and accommodation is a difficult question, especially if the affected First Nations are adamantly opposed to the proposed undertaking. (The Court has been clear it does not amount to a First Nations' veto power). This will no doubt prove to be a thorny issue for the environmental assessment.

One of my tasks was to help figure out what the duty to consult and accommodate might entail. I researched the case law on a number of questions related to the duty to consult, and other factors that may play into the assessment process such as the cumulative impacts of other proposed projects, and the implications of various environmental statutes. This work also allowed me to learn more broadly about important trends in Aboriginal law. I briefed important cases that had recently been decided, as well as developments in law and politics in British Columbia and nationally.

My internship at WCEL allowed me to learn a great deal of substantive law, and what life is like at a public interest organization working on First Nations' and environmental issues. I was also very fortunate to work with a fantastic group of people, both the staff at WCEL and the other interns. I hope that my experience at WCEL will help me build a career in this field, and I am deeply thankful to the Asper Centre for providing the funds to make this internship possible.

Chris Evans is a second year JD Candidate at the University of Toronto Faculty of Law.

Callwood Summer Fellowship: The Duty to Consult - Promise Holmes Skinner

As a Callwood Fellow this past summer, I conducted research on the duty to consult. The purpose of my research project was to learn more about the effects of consultations on Indigenous communities and explore alternatives to the current consultation process. In this article, I will provide some background information on the duty to consult. I will also broadly discuss some negative effects of consultations on Indigenous people.

The Honour of the Crown: The honour of the Crown relates to the unique relationship between the Crown and Aboriginal peoples. The historical interactions between the Crown and Aboriginals created a special relationship that reconciled the Crown's right to sovereignty with the pre-existence of Indigenous peoples on Canadian land. The honour of the Crown has evolved rapidly through the common law over the past several years, providing for the recognition of unique Aboriginal rights and imposing a responsibility upon the Crown to enable Indigenous people to exercise their rights.

Recognition of Aboriginal and treaty rights were constitutionalized in s. 35(1) of the *Constitution Act, 1982*, creating an obligation upon the Crown to recognize unique Aboriginal rights and to act honourably with respect to those rights.

The duty to consult entails the Crown discharging one of two possible duties. . The Crown must initiate consultation with Indigenous people who have a right, or who have

made a claim to a right, that may be adversely impacted by a proposed development or proposed legislation. The Crown may delegate the "procedural" elements of the duty to consult to the proponent seeking to develop.

The Duty: When the duty to consult is triggered, the question of the scope of the duty is raised. The scope of the duty lays on a spectrum, measured by the strength of the Aboriginal right claim and the seriousness of the impact on that right. As established in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73., the strength of the right or the claim of a right and the seriousness of the adverse impact determine the intensity of the consultation and accommodation.

The duty to consult ranges from minimal to substantial requirements, but to uphold the honour of the Crown, all requirements must be done in good faith and substantially address Indigenous people's concerns. Minimal requirements include the Crown, or the delegated proponent providing notice of an issue or discussing important decisions with Indigenous people. More substantial consultations may require the proponent to receive consent from, or significantly accommodate, the Indigenous community.

The Underdevelopment of the Duty to Consult : While federal and provincial policies are in place to guide consultations between Indigenous communities and the Crown or proponents, there are still enormous discrepancies between parties' views of what is required by consultation and

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accommodation. Indigenous interests are often not protected, and a significant contributing factor is the fact that the number of consultation requests from the Crown and its delegated proponents taxes the resources of an Indigenous community. Consultation is expensive; Indigenous communities may require scientific, archaeological, legal and other “expert” advice to be able to assess impacts on their rights. This is very often not expertise that Indigenous communities have “in house”, and therefore have to rely on outside advice. In order to participate in the consultation and accommodation process, and to protect their rights and interests, Indigenous communities have to spend money, and often money they don’t really have or have to divert away from other programs or concerns.

Proponents commonly disagree with Indigenous communities about what interests deserve protection, often due to a lack of understanding of Indigenous perspective. When the Crown or delegated proponents refuse to protect Indigenous interests, community members become vulnerable. Many communities, unlike proponents initiating large projects, often do not have the resources to protect their interests. As a result, in addition to economic losses, these communities frequently suffer social and spiritual losses when they are unable to fully articulate the

effects of developments on their rights and the rights then go unprotected.

My project focused on the core issue that the constitutional right to be consulted is often a right that Indigenous communities are unable to exercise. Because Indigenous interests are often culturally unique to a community, those interests may simply be disregarded by delegated proponents and the Crown.

My Callwood research project included in-depth research of the causes and effects of the issues related to consultations as well as various relevant provincial and federal legislation and policies. I also consulted case law and commentary, and conducted two empirical studies of my own. In response to the core issue of the inability of Indigenous communities to exercise their constitutional right to be consulted, I propose a potential policy solution.

At this time I am unable to publically disclose further details of my project, but should you have any questions please feel free to contact me directly at promise.holmesskinner@utoronto.ca.

Promise Holmes Skinner is a second year JD Candidate at the University of Toronto Faculty of Law.

Case Commentaries

Fraser v Ontario

On April 29th, 2011, the Supreme Court of Canada released four opinions in the *Fraser* case: a five member majority judgment, two concurrences and a dissent. Despite this diversity of opinion, the result was clear: there is no constitutional right to traditional unionization for agricultural workers. While they have a right to organization and collective bargaining (that requires employers to bargain in good faith), agricultural workers are not guaranteed any particular type of organization and collective bargaining, such as the unionization regime available under Ontario’s *Labour Relations Act* [LRA]. The status of s. 2(d) is less clear. What ‘good faith’ entails and whether it is the relevant threshold for constitutional protection remains contentious. Four different judgments provided three possible holdings for the prior major s. 2(d) case, *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*.

Background: Historically, agricultural workers were barred from unionization and collective bargaining regimes. They have always been excluded from the LRA. In *Dunmore v Ontario (Attorney General)*, a 2001 decision, the Supreme Court held that “the exclusion of agricultural workers from the LRA substantially interferes with their fundamental freedom to organize.” They accordingly found the LRA exclusion unconstitutional.

In 2002, Ontario’s provincial government passed the *Agricul-*



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tural Employees Protection Act, 2002 in response to *Dunmore*. It continued agricultural workers’ LRA exclusion, but created a new agriculture-based labour relations regime. *Fraser* was a constitutional challenge to the AEPA on both s. 2(d) and s. 15 grounds. The s. 15 argument failed at every level. Despite explicit recognition that agricultural workers are disadvantaged workers in labour law literature and L’Heureux-Dube J’s recognition of occupational status as an analogous ground in her concurring judgment in *Dunmore*, occupational status is neither an enumerated nor analogous ground. The s. 2(d) challenge in *Fraser* was grounded partially in *Health Services*, which was decided between *Dunmore* and *Fraser*.

Innovations in Health Services and the s. 2(d) Argument in *Fraser*: *Health Services* further broadened the scope

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s. 2(d) to include a right to collectively bargain. It rejected past jurisprudence denying the inclusion of collective bargaining in the s. 2(d) right since “the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the Charter’s protection of freedom of association do not withstand principled scrutiny.” While there is no right to any particular collective bargaining regime, *Health Services* established a procedural right to collective bargaining. A substantial interference with this right would amount to a violation. In *Health Services*, the government’s failure to consult with the sectoral bargaining unit before adopting the *Health and Social Services Delivery Improvement Act*, which introduced changes to existing collective agreements, was seen as a substantial interference.

While the *Fraser* challenge to the *AEPA* initially failed in the Ontario Superior Court, a post-*Health Services* decision of the Ontario Court of Appeal invalidated the Act on s. 2(d) grounds, as the *AEPA* did not provide statutory protections for collective bargaining, such as a duty to bargain in good faith. A lack of good faith was viewed as a substantial interference with the workers’ collective bargaining. It appeared that agricultural workers had the right to organize as an exclusive bargaining agent with whom employers must bargain in good faith.

Its Post-Fraser Holding: The Supreme Court of Canada’s overruling of the lower court’s decision is somewhat surprising; it is difficult to see how the *AEPA* fits the *Health Services* criteria. A slight shift in the understanding of the ratio in *Health Services* may account for this change. While the majority decision explicitly stated that *Dunmore* and *Health Services* remain good law, it narrowed the scope of the latter. The threshold for good faith negotiations was lessened from a more traditional understanding (exemplified in Abella J’s dissent) to a unilateral presentation model. Despite acknowledging that the decision in *Health Services* rested on a “more general discussion” of s. 2(d) and noting that a meaningful collective action requires employers to consider the bargaining unit’s representations in good faith, the majority was not willing to find that a new regime that did not explicitly necessitate the latter violated the requirements of the former. While requiring “meaningful discussion” between parties, the majority held that this was met by employers reading or listening to representations and not responding.

The majority also stressed that no particular form of association was guaranteed. It eschewed claims that the ‘*Wagner Act Model*’ of unionization, a model dating back to the 1930s whose distinctive features are majority rule and exclusivity of bargaining, is constitutionally required and thus did not discuss the Court of Appeal’s comments on alternative models like minority unionism. Given the poor fit between modern work and the ‘*Wagner Act Model*’, this is perhaps a good route for the court to take, but providing a less fulsome alternative is unlikely to appease workers.

The dissenting Abella J accepted the majority treatment of *Health Services*, but did not accept that the good faith threshold had been met. For Abella J, good faith bargaining is crucial following *Health Services*. While the creation of the *AEPA* was a good faith response to *Dunmore*, it did not create good faith bargaining requirements necessitated by

Health Services. Its lack of an explicit requirement of good faith negotiation exemplifies that the Act neither fulfills *Health Services*’s requirements nor was intended to. While the majority claims that the duty to bargain in good faith is implied from certain provisions requiring the employer to “read” or “listen to” the representations and this must require good faith because otherwise the provisions would be meaningless, the Act does not require a response, let alone full negotiations.

There were varying views of the majority’s treatment of *Health Services* within concurring judgments. For Deschamps J, *Health Services* stands for the proposition that “freedom of association includes the freedom to engage in associational activities and the ability of employees to act in common to reach shared goals related to workplace issues and terms of employment.” She severely restricts the precedential value of the case by stating that there was no need to impose a duty to bargain in *Health Services* given the context of that case.

While concurring in the final determination, Rothstein J provided the strongest critique of the majority’s reasoning, denying that s. 2(d) included a right to *any* collective bargaining regime, let alone the *Wagner Act Model*. He called *Health Services* “an express break with precedent” that is “unworkable.” The majority accused him of thereby interpreting the Act as establishing directly or indirectly *Wagner*-ian labour relations.” For Rothstein J, “s. 2(d) protects the freedom of workers to form self-directed employee associations in an attempt to improve wages and working conditions. What s. 2(d) does not do, however, is impose duties on others, such as the duty to bargain in good faith on employers.” Section 2(d) is a freedom-protecting provision, not a rights-protecting provision and thus does not create a corresponding duty on employers.

For Rothstein J, legal precedent should only be overturned in limited circumstances. *Health Services* was not such a case. There, rather than overturning legal precedent, the court established new labour relations policy outside of its expertise or jurisdiction. In so doing, they created a model that cannot work in practice, guaranteeing fulsome collective bargaining rights.

With three interpretations in four judgments and a split in application of the majority interpretation, the status of *Health Services* post-*Fraser* is difficult to parse. In this politically charged area of law, even the judiciary provides us with a wide spectrum of possibilities.

Conclusion: Despite the intriguing (and perhaps primarily academic) debate concerning the holding in *Health Services*, the holding in *Fraser* is clear. Parliament retains the power to create a more fulsome collective bargaining scheme for agricultural workers, but is not constitutionally required to do so. In the absence of new labour laws, those interested in improving the lives of agricultural workers may require other resources, legal or otherwise, from employment standards laws to political and media campaigns in favour of workers’ rights.

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The Safe-Injection Exemption—a Lonely Victory?

In *Canada (Attorney General) v. PHS Community Services*, a unanimous Supreme Court of Canada (SCC) deemed unconstitutional the federal government's refusal to grant an exemption from the Controlled Drugs and Substances Act (CDSA) to Insite - a safe-injection site in Vancouver's Downtown Eastside. This decision could have implications not only for the potential opening of other such facilities, but for the adjudication of legal claims to the right of life, liberty and security of the person under s. 7 of the *Charter*.

Insite is a regulated facility where clients suffering from drug addiction self-administer injections under the supervision of health professionals. Clients receive sterile syringes, emergency medical care and referrals. To operate, the clinic requires the federal government's exemption from ss. 4(1) and 5(1) of the CDSA, which prohibit the possession and trafficking of controlled substances. Such exemptions, authorized under s.55 of the CDSA, had been granted several times prior to the federal Minister of Health's negative decision in 2008, which was challenged by two Insite clients. The trial judge declared the impugned provisions constitutionally invalid. The Court of Appeal for British Columbia dismissed the federal government's appeal, ruling that the province had immunity from federal legislation over health matters.

In the SCC decision, McLachlin C.J. first disposed of the jurisdictional invalidity claims, ruling that the provisions of the CDSA were not ultra vires the federal government and asserting that the narrow doctrine of interjurisdictional immunity had to give way to notions of cooperative federalism.

She upheld the constitutionality of the impugned CDSA provisions, arguing that, read in its entirety, the Act was not arbitrary, disproportionate or overbroad, because the exemption clause prevented "unconstitutional or unjust applications." She found, however, that since discretionary decisions, as in *Suresh v. Canada (Minister of Citizenship and Immigration)*, must conform to the *Charter*, the Minister's refusal, which gave preponderance to policy considerations, was unconstitutional. The SCC then ordered the uncommon remedy of an order of mandamus, requiring the government to grant an exemption to Insite.

Did the Court cross the line, as critics of judicial activism might say, getting involved in what Parliament intended to be a prerogative of the executive? McLachlin C.J. purposefully limited the scope of judicial influence in *Insite*, refraining from granting a permanent exemption while underscoring that the Minister retained discretion regarding future applications from Insite or other facilities, and stating that it was not for the court to interfere in policy matters.

Read narrowly, the *Insite* decision can be viewed as highly dependent on the specific circumstances, which would limit the likelihood for success of future *Charter* claims challenging governmental refusals of exemptions under the Act. A broader view would see as significant McLachlin C.J.'s assertion that morality had no role to play in assessing whether



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Charter rights had been infringed. This position could impact future s. 7 of the *Charter* rulings – notably, the *R. v. Bedford* appeal, challenging the Criminal Code provisions curbing activities around prostitution – which embody tension between individual rights and collective disapproval of the proscribed activities. Finally, an even broader interpretation of *Insite* might involve extending the ruling that the Minister's decision was grossly disproportionate and thus unconstitutional to other cases where legislation or governmental action aimed at achieving a relatively minor public benefit results in significant, perhaps life-threatening, individual harm.

While not enough time has passed since the *Insite* decision to discern its impact on subsequent jurisprudence, it appears unlikely that it will open the doors for a proliferation of safe-injection sites in Canada. Gathering enough factual evidence to demonstrate that a particular facility would help avoid life-threatening harm without a negative impact on the community – the basis for the SCC ruling in *Insite* – would be challenging for sites that are yet to be established. In addition, as indicated by the example of a proposed site in Ottawa, which has so far failed to launch due to pronounced opposition on the part of local authorities, the *Insite* ruling may curb federal discretion somewhat while in effect augmenting the decision-making power of provincial and municipal authorities and the communities involved. While at least one other province, Quebec, has announced that it would work with the City of Montreal and its hospitals to provide safe-injection services, Insite currently remains the only facility in Canada legally sanctioned to do so.

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The 10th Annual Ontario Bar Association Charter Conference

On October 14, 2011 the Canadian Bar Association hosted the 10th Annual Charter Conference. The conference offered an up-to-date overview of the substantive and practice *Canadian Charter of Rights and Freedoms* issues that were prominent throughout 2011. Presenters commented on the significant recent trends and offered a look ahead at the issues that will be before the Supreme Court in the coming year.

Two of the Program Chairs, Cheryl L. Milne, the Executive Director of the David Asper Centre for Constitutional Rights, and Joseph Cheng, from the Ontario Regional Office of the Department of Justice Canada, along with Professor Bruce B. Ryder of Osgoode Hall Law School, started the conference with a 2010-2011 Constitutional Overview that considered the most important *Charter* cases before the Supreme Court of Canada in the previous year. This was followed by a panel discussion of the evidentiary issues in *Charter* Challenges that specifically considered *Bedford*, the *Polygamy Reference*, and the *Goudge Inquiry*. All panelists (Andrew K Lokan from Paliare Roland Rosenberg Rothstein LLP, Cheryl L. Milne from the Asper Centre and Gail Sinclair from the Department of Justice Canada) noticed a significant shift in the type of evidence being used in *Charter* litigation and commented that this would continue to be of importance in the coming years, especially as the Supreme Court of Canada began to confront social science evidence in *Charter* litigation.

The conference then broke up into concurrent panels where participants could either hear an Update on s. 2(b) and (d) or learn about *Charter* issues in the Criminal Law context (more below). The conference ended with a Keynote address from Professor Emeritus Peter W. Hogg.

Is a Bill of Rights Enough to Protect Freedom?

Professor Peter Hogg, a notable figure of authority in Canadian Constitutional law and to whom legions of law students and scholars owe much gratitude, served as the honorary keynote speaker at the Ontario Bar Association's 10th Annual Charter Conference. Instead of simply commenting on this year's development of Charter jurisprudence, Professor Hogg "shook things up," showering upon the audience a riveting speech that compared the relative emergence of bills of rights across various jurisdictions around the world. In doing so, he inevitably touched upon the interplay ultimately required between a bill of rights and a flourishing democracy for the enforcement of human rights. On this note, he stated that when it comes to the recognition and enforcement of human rights, it is not their codification or the rule of law that is of utmost importance, but rather a healthy democracy consisting of a receptive government.

Furiously taking notes in the audience, I could not help but think about what implications this statement had on the millions standing behind the strong revolutionary wave of demonstrations and protests that swept across the Arab world this past year. In response to a strong demonstration of dissent by a Tunisian vegetable peddler, who burned himself to

death in December 2010, millions courageously stood up against oppression and shattered the illusion of peace in the region.

In light of heinous violations of human rights carried out systematically for decades in the region, it is clear why a constitutionally entrenched bill of rights ranks very high on the agenda of many countries such as Egypt and Libya. With the abolition of the appalling rule of both Hosni Mubarak and Muammar Gaddafi, many are energetically trying to fill the institutional vacuum with a list of fundamental rights, to then be used as a shield against future infringements. After all, with the 1948 UN Declaration of Human Rights, the constitutions of almost all democracies began with a list of the most important rights of a nation's citizens. Despite this, Professor Hogg suggests that while the constitutional inclusion of a bill will effectively serve to remind both Egyptians and Libyans of their inherent rights, it will not solely bring about the recognition and enforcement they are hoping for.

Now taking a step back, it must be noted that in no way am I implying that the Arab revolutionaries are asking *only* for a constitutionally entrenched bill of rights. They are not. However, it is important to emphasize that, along with all others courageously standing up against oppression, the Egyptians and Libyans must keep reminding themselves that they must *first and foremost* ensure the creation of a democratic government. Without a system of rule that allows for public participation and respects the personhood of each citizen, a bill of rights will do no more than pay mere lip service to the noble idea of human rights. It will be but a meaningless piece of paper, outlining only what was publicly promised, but never delivered.

This is evident in Zimbabwe, which is far from being considered a democracy, let alone a "flourishing" one. Ironically, despite the national constitution demanding extensive protection of human rights, Zimbabwe is notorious for being a systematic violator of even the most basic human liberties. Brazil, considered to be an emerging democracy, also has a constitutionally entrenched bill of rights; yet, it is home to cases of torture, police violence and extreme oppression. On the other hand, there are democratic nations like Australia, that *do not* have their own national bill, and yet are not worryingly drawing the attention of the international community.

As such, the bottom line is ultimately the following: the Arab nations that have so passionately stood up for their freedoms *need* to first ensure that another Hosni Mubarak or Muammar Gaddafi does not assume political power. It is imperative, as Professor Hogg discussed, that they fully appreciate the role a democracy plays in the recognition of human rights. Think about it—can a list of rights alone, deeply entrenched within a nation's constitution, really prevent a tyrannical regime from getting its way?

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R v Gomboc

At the 10th Annual Charter Conference on October 14, 2011, a panel on Charter issues in the criminal law context focused on *R. v. Gomboc* and the implications of this decision, dealing with s. 8 of Canada's Charter of Human Rights and Freedoms. The panel speakers were Professor Hamish Campbell Stewart from the University of Toronto, John S. McInnes,

(Continued on page 11)

Counsel for the Crown Criminal Law Office of the Ministry of the Attorney General, and David S. Rose from Neuberger Rose LLP.

Gomboc revolves around the installation of a digital recording ammeter to measure power usage in a suspected marijuana grow-op and the implications for privacy. The main issue was whether Mr Gomboc has a reasonable expectation of privacy regarding the information retrieved by the device, and thus whether this information can form the basis for a constitutional search under s. 8. The Supreme Court has been criticized for not establishing a consistent framework for the reasonable expectation of privacy and McInnes stressed that this decision does not get us any closer.

McInnes and Stewart offered different explanations for the approaches taken by the Court in the dozen cases that have made it to the Supreme Court since the middle of the 1980s that have considered the reasonable expectation of privacy. They both agreed that there has not yet been a dominant theory of privacy demonstrated through these

cases. While the legal test appears to be settled, the Court has written very different results even when there is no disagreement between judges about the facts.

Alberta has a regulation that governs the terms of the relationship between the utility company and its subscribers, and this regulation figured prominently in the Court's decision. Stewart indicated that the existence of a regulatory regime was extremely relevant for questions of reasonable expectations of privacy; as long as it was constitutionally valid, (the constitutional validity of the Alberta regulation was not challenged in this case). This regulation balances state interest and individual's expectations of privacy. He further stressed that the judiciary needs to consider what is meant by a regulated event as this could lead to significant problems in the future. All three panellists expressed frustration with the *Gomboc* decision which does not appear to have brought the law any closer to a consistent framework for the reasonable expectation of privacy under s. 8.

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Harney Program Policy Panel

Canadian Refugee Policy in a Global Context

On October 20, 2011 the Harney Program Policy Panel: Canadian Refugee Policy in Global Context was held at the Vivian and David Campbell conference facility. The panel consisted of three speakers: Audrey Macklin (Professor of Law, University of Toronto), Jeff Crisp (Head of Policy Development and Evaluation Service, United Nations High Commission on Refugees) and Zachary Lomo (PhD Candidate, University of Cambridge). Michael Ignatieff (Professor of Law, University of Toronto) acted as the moderator.

The panel dealt with the emerging trends around the world regarding refugee policies. The objective of the discussion was to analyze the position that Canada holds in the global scenario of refugee policies.

Michael Ignatieff opened by announcing that it was the 60th anniversary of the Refugee Convention. He emphasized the importance of Canadian Refugee Policy in a global context; namely, the life and death implications a country's policies can have on the individual refugee.

Jeff Crisp began by displaying the 2010 UNHCR Global Trends Report. He elaborated on how recent conflicts in Libya and other countries have caused a global increase in asylum applications. Another important issue raised was the growing negative response to spontaneous arrivals, particularly when those asylum seekers arrive by boat. Crisp believed that such an escalation in response might be due to an increase in mobility and migration, which has led to the ancillary effect of an increase in 'bogus' applications and substantial back-logs.

Zachary Lomo spoke to concerns regarding trends prevailing in the south, particularly in Africa. He claimed that there exists a strong correlation between the origin country of the asylum seeker and a low GDP level in that country. He also emphasized the tendency to misunderstand immigration and refugee laws. While the former has only geo-

graphic implications, the latter is supplemented with life, liberty and security implications for the individual. He concluded by saying that signatory countries to the refugee convention must not shy away from assuming responsibility for refugee claimants.

The final speaker, Audrey Macklin, stressed the negative impacts of Bill C-4, which seems to be a reaction to the two Tamil boats that landed between 2009 and 2010 in British Columbia. She was perplexed by the disproportionate response to spontaneous arrival of people on boats, explaining that these refugees were only 5 % of the total claimants who came to Canada seeking refugee status. Professor Macklin also stressed the policy paradox that Canada and other western countries face, which is that every successful refugee claim status leads to two things – on the one hand, the fulfillment of a country's international legal obligation, and on the other hand, a failure of border control. She concluded with the reminder that "it's not a crime to be a refugee."

The panel discussion was concluded by Michael Ignatieff after taking questions from the audience. The conference brought about stimulating ideas from recent global trends in refugee policy, which would prove useful for appreciating and examining these developments domestically. To conclude, while Canada appeared to be a champion defender of human rights in the past, with the new possible enactment of Bill C-4 there seems to be a decline in the international image of Canada as an upholder of refugee protection laws.

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Book Review: The 9/11 Effect



Photo of Kent Roach, courtesy of the Faculty of Law

"The 9/11 effect constitutes a fundamental shift in the respective importance given to liberty and security." This is one of the major conclusions drawn by Kent Roach in his new book, *The 9/11 Effect: Comparative Counter-Terrorism*. Published ten years after the 9/11 attacks, this book provides an in-depth assessment of the changing face of comparative counter-terrorism over the last ten years.

Roach argues that, when confronted with the growing threat of international terrorism and the enhanced role this would mean for the United Nations (UN) and its Security Council, the Security Council failed in one significant respect. Though successful in its call to all states to ensure that terrorism and its support are treated as serious crimes (through Resolution 1373), the Security Council provided no guidance as to how terrorism should be defined and gave little consideration to the significance of human rights protection in counter-terrorism activities. This omission opened the door for countries with poor human rights

records to defend repressive legislation as a means of counter-terrorism. However, such countries were not alone in using this oversight to their advantage. As Roach stated, "the difference between the responses of democracies and countries with poor human rights records to terrorism diminished in the wake of 9/11."

The fact that Canada, among others, used questionable tactics violating constitutionally protected rights is well known. The Charter-violating Canadian interrogation of Omar Khadr at Guantanamo and the role that Canada played in the detention and torture of Maher Arar in Syria are both evidence of this. Still, Roach's book offers a fresh, comparative perspective on counter-terrorism commentary.

The book is compelling not only in its analysis of the changing balance between security and liberty but also in its emphasis on the need for increased use of criminal prosecutions (and therefore, increased sharing of secret information), as well as adequate review mechanisms, such as review by independent bodies. "The lack of effective review," Roach said, "can threaten both security and human rights." Therefore, it is important to ensure that this review is not an after-the-fact process, but rather an ongoing supervision. Underlying Roach's analysis is the important question of whether it is possible to hold the UN and national governments accountable for the workability and efficacy of their counter-terrorism activities.

Rebeka Lauks is a second year JD Candidate at the University of Toronto Faculty of Law.

Constitutional Roundtable: Counter-Terrorism and the Constitution

On October 19, 2011, the University of Toronto's Constitutional Roundtable presented *Counter-Terrorism and the Constitution: Perspectives from Australia, New Zealand and Canada*. The roundtable brought together Kent Roach (University of Toronto), John Ip (University of Auckland), and Nicola McGarrrity (University of New South Wales), all experts in constitutional issues that arise from counter-terrorism. The topics included sunset clauses, Australia's reaction following 9/11, and the need for effective and rigorous review of Canada's anti-terrorism legislation.

Ip provided insightful commentary on the role of sunset clauses in anti-terrorism legislation in Canada, the US, the UK and Australia. Ip argued that sunset clauses have not been substantively successful in post 9/11 legislation, the exception being the expiry of preventive arrests and investigative hearings in Canada. Nevertheless, he still believes sunset clauses can prove valuable if more substantial action is required from the legislature. He recommended, for instance, the enactment of new primary legislation. By avoiding the actual expiration of the legislation, the likelihood of a purely formulaic renewal is reduced. Roach concurred with Ip, stating that although sunset clauses are not a guarantee, they can, if accompanied by meaningful review, lead to a more informed discussion. The key here is to ensure that Parliament is neither under-resourced nor under-informed.

McGarrrity spoke about the legislative response that occurred

in Australia following 9/11. Between March 2002 and November 2007, there was one piece of anti-terrorism legislation enacted approximately every seven weeks. According to McGarrrity, in enacting so many pieces of legislation, the Australian government has ignored the actual proportionality and workability of these laws. This, when combined with the fact that Australia does not have a national bill of rights, has resulted in some of the most damaging anti-terrorism laws in terms of human rights in the western world. An example of this is the use of control orders over terrorist suspects for up to 12 months. While this is done in many other regimes, it does not necessarily make sense in Australia, where the threat level is significantly less than that of the UK or US.

Roach too touched upon the concern of ignoring the workability of legislation. His worry was that we have arrived at the point where only constitutional challenges are heard. While the *Charter of Rights and Freedoms* has restrained counter-terrorism activities in Canada, constitutionality should not be the only consideration – the feasibility and effectiveness of these policies should also matter. This was a common theme at the roundtable and all experts agreed that, in order to guarantee the functional application of these policies while also respecting human rights, comprehensive review must occur.

Rebeka Lauks is a second year JD Candidate at the University of Toronto Faculty of Law.

Asper Centre in the Courts

The Asper Centre has been granted intervener standing in two cases before the Supreme Court of Canada and one before the Ontario Court of Appeal during this academic year. Students in the clinic course have worked on all of the appeals, including drafting court documents, reviewing evidence and researching points of law for the final legal arguments.

AG Canada v Downtown Eastside Sex Workers United Against Violence et al.

This appeal before the Supreme Court of Canada was heard on January 19, 2012. The case involves a challenge to a number of the sections of the *Criminal Code* pertaining to prostitution, but the appeal from the British Columbia Court of Appeal focused on the standing of the organization and individuals as public interest litigants. Of the ten interveners who filed legal arguments in the case, the Asper Centre was one of only four who were permitted to make oral argument. Professor Kent Roach presented the Centre's argument for a revised test for public interest standing in *Charter* litigation.

Jury Vetting Cases

The Centre sought intervener status to present written argument in a group of five cases scheduled to be heard by the Supreme Court in March, 2012 on the issue of the vetting of proposed jury members by police and Crown Attorneys. The Centre's interest in the cases stems from its brief to the Ontario Privacy Commissioner on the issue of the privacy rights of jurors in the context of the investigation into the practice. Professor Lisa Austin is working with Executive Director Cheryl Milne on these appeals.

R v Kokopenace & R v Spiers

In its first case at the Ontario Court of Appeal, the Asper Centre was granted intervener standing with the consent of the Attorney General for Ontario. At issue is the representativeness of juries, particularly in relation to First Nations people living on reserves. The appeals are set to be heard the last week of April, 2012.

Polygamy Reference Ruling Emphasizes the Rights of Children

The decision of the British Columbia Supreme Court in the Polygamy Reference case makes a strong statement respecting the rights of children and the state obligation to protect them from harm. In a lengthy judgment, Chief Justice Bauman catalogues the volumes of evidence demonstrating the harms to women and children associated with the practice of polygamy around the world and in our own backyard, in Bountiful, British Columbia.

Chief Justice Bauman concluded that the case was essentially about harm and Parliament's reasoned apprehension of harm. His factual findings on the harms to children include, higher infant mortality, more emotional, behavioural and physical problems, lower educational achievement, higher risk of psychological and physical abuse, early marriage for girls, early pregnancy resulting in negative health implications, as well as significant harm caused by exposure to, and potential internalization of, harmful gender stereotypes.

The David Asper Centre for Constitutional Rights and the Canadian Coalition for the Rights of Children joint submission to the Court urged it to consider the rights of children, particularly in isolated communities such as Bountiful. In addition to giving high priority to the children's right to protection from harm, the ruling reinforces the state's positive obligations to prevent violations of the rights of children, and makes strong links between rights under the *Charter* and under the *Convention on the Rights of the Child* (CRC). Chief Justice Bauman specifically notes Canada's positive obligations to prevent violations of the CRC, stating, "These positive obligations are heightened with regard to the CRC as children are, of

course, inherently less able to advocate on their own behalf."

In the analysis of the claim that the provision breaches the *Charter*, the judgment specifically refers to the rights of women and children to be free from physical, psychological, economic, social and legal harms that are also enshrined in sections 7, 15 and 28 of the *Charter*. While ultimately finding that the provision breaches ss.2(a) and 7 of the *Charter*, the evidence of the potential harm of the practice of polygamy and the state's legitimate objective to prevent such harms justify the prohibition against polygamy except where it applies to children aged 12 to 17 years, who might also be charged. The conclusion is that the provision should be read down to exclude from prosecution those young people who may be parties to a polygamous marriage.

This ruling rightly recognizes the duty to protect the rights of children directly affected, and it is hoped that the authorities take action accordingly, particularly where the evidence has suggested sexual exploitation and trafficking of children. The ruling also advances the recognition of children's rights in Canadian jurisprudence. It appears from the ruling that the arguments and analysis of the evidence put forward by the CCRC/David Asper were given very serious consideration by the judge and were influential in shaping the final ruling.

Counsel for the David Asper Centre for Constitutional Rights and the Canadian Coalition for the Rights of Children were Brent Olthuis and Stephanie McHugh of Hunter Litigation Chambers, Vancouver, and Cheryl Milne of the Asper Centre.

Message from the Executive Director - Cheryl Milne

Our newsletter is coming out a little later than we hoped this term, but thanks to the hard work of our student editors it is full of interesting content. This has been another very productive year for the Asper Centre with interventions in 3 cases and participation with the Health Law Group at the Faculty of Law in a 2 day conference on the *Reference re. Assisted Human Reproduction Act* case. We are now busily working on publication of the terrific papers that came out of that conference.

There has also been many opportunities for students to participate in policy advocacy on behalf of the Centre with the introduction of legislation at both the federal and provincial levels of government that impact on the constitutional rights of people in Canada. The Bill C-10 Working Group put together a well written and researched response to the Omnibus Crime Bill, while the Bill C-4 Working Group has worked hard to pull together material only to have to cool their heels as the progress of the Bill slowed down. However, the Group has been put to work developing a session for the LAWS high school Global Citizenship Conference and a Newcomer Conference both coming up in March. A small group of volunteers is also working on a response to the proposed Lawful Access Legislation that will require internet providers to hand over personal information to law enforcement. We are working with other organizations to develop a joint position on this Bill with the help of Professor Lisa Austin. The next task is to recruit a group of student volunteers to review the Ontario government's new legislation to replace the infamous *Public Works Protection Act* that was so strongly criticized for its use during the G20 demonstrations. It is a mark of the

success of the Asper Centre that we were consulted by the Ministry of Community Safety and Correctional Services during their early drafting of the Bill.

I would be remiss in not mentioning the changes to the Asper Centre's Advisory Group this year. Professor Sujit Choudhry has moved on to take a position at New York University School of Law. His energy and enthusiasm for the Asper Centre will be greatly missed. Fortunately, Professor Kent Roach has stepped into the Chair role providing leadership and litigation support to the work of the Centre. The Supreme Court heard his arguments on our behalf in the *AG Canada v Downtown Eastside Sex Workers* case in January. He has also assisted the Crime Bill Working Group. Our newest member on the Advisory is Professor Yasmin Dawood. I am looking forward to working with her in particular in regard to our conference next Fall (see Call for Papers on pg. 15).

As I write this I am also in the middle of preparing our factum in the Jury Vetting cases to be heard by the Supreme Court in March. Professor Lisa Austin is lending her privacy law expertise to our submissions. The Asper Centre engages faculty members in the work that we do including consultation on policy briefs, as Professor Audrey Macklin has done in regard to Bill C-4, litigation support as described above, as well as co-coaching the Wilson Moot with Professor Lorraine Weinrib. These opportunities allow students to see practical applications of the legal expertise of our Faculty.



Stephanie McHugh, of Hunter Litigation Chambers, Cheryl Milne & student Esther Roche at the awards ceremony for Lexpert 2011 Zenith Pro Bono Awards. Stephanie McHugh, Brent Othuis and Cheryl Milne won an award as a legal team for the work done on the Polygamy Reference case. Esther Roche worked on the case as a JD/MSW student during her practicum placement with the Asper Centre.

Call for Conference Papers

Charter Litigation and the Use of Social Science Evidence:

After thirty years what have we learned? What could we do better?

University of Toronto, St. George Campus – November 9 & 10, 2012

The David Asper Centre for Constitutional Rights invites papers for its upcoming conference. This multi-disciplinary event will create opportunities for dialogue between social scientists, academics, students, and litigators on the use of social science evidence in *Charter* litigation.

The Centre invites papers that stimulate and develop an ongoing dialogue on the approaches to the use of social science evidence. The goal is to foster inter-disciplinary understanding and collaboration in addressing social science evidence in *Charter* litigation. Key themes include:

Analysis and evaluation of the categories of social science evidence in *Charter* litigation

The processes of gathering and presenting social science evidence in *Charter* litigation

Historical and comparative law perspectives

The tensions between the disciplines of social science and law as arise in the context of litigation

The persuasive value of social science evidence, its limits, and its admissibility

Other conference themes may include such issues as the ethics of building the social science case; choosing and preparing expert witnesses; social science evidence as a vehicle for legal change; and judicial approaches to hearing and analyzing social science evidence. In particular, the conference is designed to stimulate a dialogue that highlights the approaches of various disciplines to the use of social science evidence in order to develop an inter-disciplinary understanding and collaboration.

The papers will be utilized as the central theme on various inter-disciplinary panels across the two-day conference and selected conference papers will be considered for publication as part of a special journal issue or as chapters in a book to be published with a reputable academic publisher.

The David Asper Centre for Constitutional Rights is a centre within the University of Toronto, Faculty of Law devoted to advocacy, research and education in the areas of constitutional rights in Canada. For more information about the Centre go to www.aspercentre.ca.

For those interested in participating, please send an abstract (max: 250 words) of your intended paper to: Cheryl Milne at cheryl.milne@utoronto.ca

Deadline for Submissions: March 30, 2012



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