



ASPER CENTRE OUTLOOK

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Recent Challenges to Mandatory Minimums

Six appeals heard together by the Ontario Court of Appeal during the week of February 19, 2013, have considered the constitutionality of mandatory minimum sentences for firearm offences. In two of them, *R v Smickle* and *R v Lewis*, two separate *Criminal Code* provisions requiring mandatory minimum sentences were found unconstitutional by the trial courts. *Smickle* saw s. 95(2) of the *Code* challenged and declared unconstitutional under ss. 7 and 12 of the *Charter*. *Lewis* was a s. 12 challenge of s.99(2) of the *Code*. Given the number of mandatory minimums in the Federal *Safe Streets and Communities Act*, these two decisions have been the subject of much discussion. A close look at the cases (i) suggests that it might be premature to assume of the new set of provisions will be found unconstitutional and (ii) provides tools for assessing which provisions might be vulnerable to challenge.

The Cases

Smickle involved tremendously sympathetic facts. The defendant was found guilty of possessing a loaded, prohibited firearm and faced sentencing under s. 95(2). The weapon belonged to one of Smickle's cousins. The relative went to a club, while Smickle opted to stay home because he had to work in the morning. Smickle found a loaded handgun in his cousin's apartment and was preparing to pose for a Facebook photo with the gun — while clad in sunglasses, an undershirt and boxers. At that moment, police burst into the apartment to execute a warrant for the relative and caught Smickle red-handed. He faced a mandatory minimum sentence under indictment of three years in prison.

Smickle argued in his s.12 challenge that the sentence amounted to cruel and unusual punishment. Analyzing this, the court held that under the first step of the s.12 test, requiring an appropriate sentence, Smickle should have faced one year's incarceration. Step two requires evaluating whether the difference between the 'ideal' sentence and the mandatory minimum sentences is so large as to be grossly disproportionate and amounts to cruel and unusual punishment. The court held that it was.

The court also considered a s.7 argument that the provision was arbitrary. This challenge centered on the gap in possible sentences under the provision, which makes the maximum penalty on summary conviction one year and the mandatory minimum penalty on indictment three years. The court draws heavily on *R v Nur*, which considered the same provision. *Nur* upheld the provision on a summary conviction, but primarily because, unlike in *Smickle*, the defendant in *Nur* had no standing to challenge the indictment penalty. In *obiter*, the court in

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Nur saw problems with two-year gap between the maximum one-year sentence for summary convictions and the minimum three-year sentence for indictment convictions. The court held the gap was arbitrary, inconsistent with the legislative purposes and would inevitably lead to unfit sentences in the low and mid-range. *Smickle* adopts this reasoning, and concludes that the arbitrary sentencing scheme is not justified under s. 1.

The defendant in *Lewis* also faced a mandatory minimum of three years, under s. 99(2) of the *Code*, for offering to transfer a firearm and ammunition without authorization to do so under the *Firearms Act*. Lewis had been selling drugs to an undercover police officer. The officer asked Lewis about procuring a firearm. Lewis agreed, but never procured it. There was evidence that he did not intend to and could not have procured it, but did not want his drug-dealing colleague (the officer) to think he was unable to do so. 99(2) covers all transfers and offers to transfer firearms.

In its s. 12 analysis, the court in *Lewis* did not hold that the mandatory minimum was so far from the 'ideal' one year sentence so as to violate the *Charter*. Under the second part of the s. 12 test, the court considered any hypothetical cases where the sentence mandated by the scheme *would* be grossly disproportionate. The court finds that a situation like Lewis's, where there is merely an offer to transfer, no actual transfer and no intention of transferring by a young offender with no record (Lewis's record included theft and assault charges) would make the three year sentence grossly disproportionate and a violation of s.12. Lewis received a one-year sentence for the firearm charge, to be served consecutively with sentences received for trafficking charges he also faced.

What to Expect Going Forward?

Quite likely, the s. 12 test will be clarified. There is some divergence in the cases in the way the test is discussed and applied. *Smickle*, especially, lingers on the uncertainty of whether s. 12 requires a subjective or objective test, working through past jurisprudence to find an answer. An appellate court will, we should expect, eventually answer this question

The cases themselves suggest that any challenges to new mandatory minimum provisions will be both fact- and provision-specific. The court in *Lewis* reminds us mandatory minimums are not *per se* unconstitutional. Provisions drafted similarly to s. 99(2), which stipulate one minimum for an offence that can be committed in a wide variety of ways, each arguably involving a different level of moral



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blameworthiness, are likely to be the most vulnerable. In contrast, tightly crafted provisions, where the offence can be committed in a highly limited number of ways, are perhaps more secure.

Smickle also suggests another angle by which we may see these provisions challenged: the relationship between the available summary and indictable penalties. When *Nur* considered s. 95(2), the provision also considered in *Smickle*, there was suggestion in the judgment that Crown discretion might effectively eliminate constitutional issues. The Crown presented this argument again in *Smickle* in cases where the indictable penalty would be grossly disproportionate to the offence and offender, the Crown would opt for summary conviction and a lesser penalty. Cases where the mandatory minimum on indictment would be cruel and unusual would be avoided in this way. *Smickle* rejects that possibility, namely because the facts of *Smickle* make clear it was an inadequate safety valve; if it functioned, *Smickle* would not have been indicted. Based on *Smickle* and *Nur*, challenges for arbitrariness will require a gap. They may require a gap on the low end of possible sentences, where the least culpable offenders, when pursued by indictment, face a mandatory minimum penalty higher than what would otherwise have been imposed. We can likely expect the Crown to argue again in the future that a remedy might be available in procedure, eliminating the need for a provision to be struck down. Whether courts will be satisfied in the future with perhaps a more robust version of a procedural remedy will remain to be seen.

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Feminism Lives on at LEAF's Persons Day Breakfast

"Feminism lives." These words, spoken by the Right Honourable Michaëlle Jean, former Governor General of Canada, truly captured the spirit of this year's Persons Day Breakfast hosted by LEAF, the Women's Legal Education and Action Fund. This gala, held annually at the Royal York Hotel, honours the historic efforts of Henrietta Muir Edwards, Nellie McClung, Louise McKinney, Emily Murphy and Irene Parlby, who fought for years until finally earning the recognition of women as "persons" under the law on October 18, 1929.

The Persons Day Breakfast not only commemorates that landmark case, but also recognizes the recent successes of LEAF and invites honest discussion about the challenges that continue to hinder female equality in Canada.

Eight women from both the Feminist Law Society and Women and the Law represented the University of Toronto Faculty of Law at this year's event, which was entitled "Equal. Right?" The morning included an update from U of T Adjunct Professor and Indigenous Rights lawyer Katherine Hensel on the many cases LEAF's litigation team has intervened in over the past year. Most notable was *R v Ryan*, a case currently before the Supreme Court regarding the availability of the defense of duress in the domestic violence setting, and *R v. D.A.I.*, in which the Supreme Court confirmed the importance of access to justice for disabled and intellectually handicapped victims of sexual assault.

LEAF's 700 guests were then captivated by the impassioned words of keynote speaker Michaëlle Jean, who continues to fight for humanitarian rights in her role as the

UN's Special Envoy to Haiti, and as Co-President of the Michaëlle Jean Foundation. The mission of Jean's legacy foundation is to champion creative initiatives that promote youth and the arts for social change. Madam Jean fervently believes that it is the responsibility of the next generation of Canadians to continue on the journey towards equality. She asserts that in order to do so, young people need the benefit of guidance, receptiveness and mentorship from the pioneers who have walked before them, even if those pioneers' methods and approaches are different from their own.

She demonstrated this very brand of support when a number of high school girls from across the province had the opportunity to meet and speak with the former representative of our Head of State after breakfast. At the forefront of the conversation was the recent suicide of Amanda Todd, the BC teen who was a victim of sexual assault and online bullying. When asked what could be done about these issues Madam Jean turned the question back to the girls, encouraging them to have the confidence to vocalize their own solutions in their schools and individual communities.

Upon the conclusion of the morning's events there was appreciation among the crowd for how far women's rights have come, and a strong sense that much is yet to be done. Organizations like LEAF and the men and women who support its vision must remain vigilant and never forget the efforts of the Famous Five. It's our turn to take on the struggle for the equality of all Canadians.

Leah Sherriff is a first-year JD candidate at the University of Toronto Faculty of Law.

Donner Fellow Spends Summer at LEAF

This summer, as a Donner fellow, I had the opportunity to work with the Women's Legal Education and Action Fund (LEAF), one of Canada's pre-eminent women's rights organizations. Under LEAF's supervision, I completed an annotated bibliography on discrimination in Canadian sexual assault trials.

Despite numerous legislative reforms and constitutional challenges over the last 25 years, equality concerns remain prevalent in the law of sexual assault. By way of example, the presence of broad restrictions on the admissibility of sexual history evidence and complainants' personal records (e.g. medical records) has not prevented such evidence from being commonplace in sexual assault trials. Feminists and academics also continue to study the misapplication of the substantive law of sexual assault. The law of consent, which is defined affirmatively under Canadian law, is still misunderstood by many judges as requiring some level of resistance from the complainant. In addition, what constitutes "reasonable steps" to ascertain consent

can vary greatly depending on judicial attitudes towards women's sexual autonomy.

Much academic literature also addressed the idea of "ideal" victims, a pervasive one in the discourse surrounding sexual assault. Sexual assault trials most often turn on credibility, thus putting the complainant in the spotlight. Women that do not fit the mold of the archetypal rape victim often include racialized and Aboriginal women, women of low socio-economic status, women who consumed alcohol prior to being assaulted, and woman who do not display a "normal" emotional response during the trial. Unsurprisingly, the women who are most often denied justice for not displaying the characteristics of a "real" victim are also those who are most often victimized.

Sylvie McCallum-Rougerie is a third-year JD candidate at the University of Toronto Faculty of Law.

June Callwood Fellowship at the John Howard Society

This past summer I was given the opportunity to work at the John Howard Society's Toronto office with their Native Inmate Liaison Officer (NILO) Program. The John Howard Society provides a number of different services to men who have been in conflict with the law. These include PAR (Partner Assault Response), assistance finding housing and jobs, assistance applying for a record suspension, harm reduction drug programs, and counseling within the Toronto prisons. The services the John Howard society provides are incredibly valuable and consistently underrated. Quite simply, if the John Howard Society was not providing their services, many of these programs would not exist. The NILO program works with Aboriginal inmates serving time or in remand at the three Toronto detention centers. One of my responsibilities while working at John Howard was assisting the NILOs at the West Detention center once a week. While at the West Detention center I would assist the NILOs in conducting smudge ceremonies and healing circles with the inmates. In addition, I would help them provide counseling and information to our clients. This information ranged from housing and ODSP information to providing information about aboriginal spirituality.

Working at John Howard was amazing. It is an incredibly supportive work environment and I was immediately welcomed into the community. I found people were always willing to answer any questions I had about their jobs and experiences. In addition to my project responsibilities, I had numerous opportunities to shadow other departments. I was able to learn about the record suspension process and spent time at Toronto's Drug Treatment Court, assisting our clients. I was also able to sit in on a harm reduction drug treatment group and assist the housing placement team. At the end of the summer I went to John Howard Canada's "Symposium on Prison Crowding and its Implications on Human Rights." This was an amazing opportunity to hear speakers from all over the country discuss a pressing human rights issue. After meeting with many different members of the criminal justice community this summer, I really value the optimism and positive attitudes of the John Howard employees. They show their clients respect, no matter what they have done, and this is not something I have observed consistently in other areas of the criminal justice community.

My two project deliverables for the summer were to create a pamphlet for Aboriginal inmates currently incarcerated that gives basic information on the justice system, the services available in jail and services available when they are released. I also completed a comprehensive paper for the NILO officers analyzing Bill C-10 and how it will affect aboriginal sentencing laws. While writing my paper I observed numerous Gladue court

sessions and talked to many defense lawyers. Aboriginal Legal Services of Toronto was particularly helpful. Unfortunately, the majority of Crown Prosecutors and Judges I requested to talk to either declined or did not reply to emails or phone calls. I was able to speak to two members of the judicial community off the record. However, on the whole I wish I had been able to get more opinions from the government side of the justice system.

My research project involved a large amount of case law and article research on aboriginal sentencing, Bill C-10, the interactions between the judiciary and Canadian Aboriginal people. The resulting final product is a paper that outlines the precedent-setting case law involved in Aboriginal sentencing, Bill C-10, and how the sentencing process will change. I also suggest a number of ways the accused can work within the new system to ensure their right to Gladue principles is applied. This paper will help the NILOs counsel their clients effectively about their rights within the current Canadian judicial landscape.

There are so many social issues connected to our justice system I had never considered until this summer. I now have a much better idea of the situations our clients deal with and consequently I am not as quick to judge. There is no question many of our clients have done morally reprehensible things. However, I understand that no story is black and white and they deserve a good defense and humane treatment. I also now have a better understanding of what it means to have a criminal record. Once you are convicted of a crime, your debt to society does not end with the completion of your sentence. It is very difficult for former convicts to find work. The social stigmas against those with criminal records are incredibly damaging and merely perpetuate a cycle of reoffending. Most of our clients had come into conflict with the law because of a drug or alcohol addiction. There is not enough support for those struggling with addictions who cannot afford to pay for private rehabilitative programs. These addictions also contributed to a cycle of reoffending.

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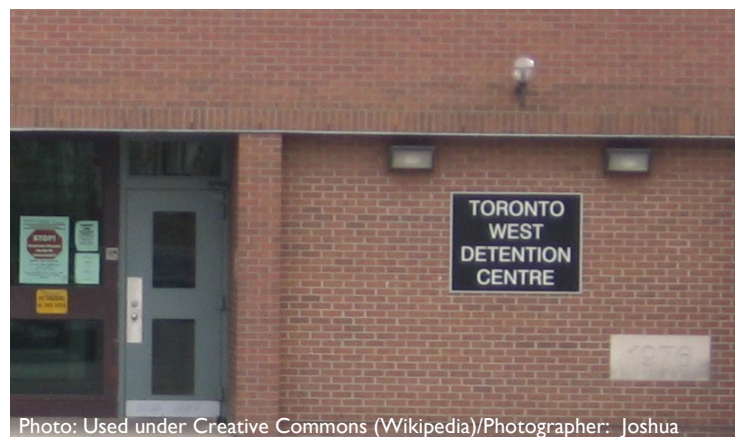


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Asper/IHRP Summer Internship at LEAF

This summer, I was fortunate to receive the Asper Centre Internship, which allowed me to spend 12 weeks working with the Women's Legal Education and Action Fund (LEAF). LEAF is a not-for-profit organization that was founded in 1985, with the mandate to advance women's rights through litigation and education. In the past 27 years, LEAF has intervened in over 150 cases at all levels of court, to make equality arguments and point out potential implications of court decisions on women's rights. It was inspiring to work with an organization that has been involved in cases I have studied in school, and to help advocate for such important causes.

I spent my summer working on three major projects: one which dealt with legal parentage in the context of assisted reproduction; another which looked at whether differences arising from federalism could constitute discrimination in the context of child support; and a third project updating LEAF's catalogue of recent *Charter* cases.



Outside the Ontario Court of Appeal

Parentage and Assisted Reproduction

The first project developed out of work I had been doing with LEAF on a volunteer basis since January. LEAF had recently learned about a case that was scheduled for trial, *deBlois v Lavigne*, which involved questions about legal parentage arising from assisted reproduction. In that case, a woman conceived a child using sperm from a known donor, with whom she had a very clear written agreement stipulating she was to be the sole parent of any resulting child. After the child's birth, the donor reneged on this agreement, and sought recognition of his legal parentage along with extensive custody and access rights.

On this project, I helped LEAF prepare for a possible intervention at the trial level. It was exciting to work on such an important project with a tight timeline. I drafted a case proposal to present to LEAF's Board of Directors, which outlined legal arguments we would want to make at trial. These arguments focused on the importance of intentionality over biology in determining legal parentage in the context of assisted reproduction. In particular, we pointed out recent changes to legislation in other provinces that protects the users of assisted reproduction from unwanted parentage claims by donors. We also argued that people who use assisted reproduction necessarily locate parenthood outside of biology, because they must rely on the biological contributions of others to procreate. Therefore, privileging biology in this context places the users of assisted reproduction in precarious parentage situations that unfairly disadvantage them.

While LEAF ultimately decided not to intervene in *deBlois v Lavigne*, LEAF recognizes that these cases will continue to arise, and I believe the work I did this summer will be of

assistance in any future intervention.

Federalism and Child Support

I also researched a second case, *Droit de la famille – 111526*. This case involves a s.15 challenge to the constitutionality of the Quebec child support guidelines. While the federal government has guidelines that apply in all other provinces, it chose as an exercise of cooperative federalism to give provinces the option to create their own guidelines. Currently, Quebec is the only province that exercises this option. The claimants in this case claim that the Quebec guidelines are discriminatory because in many cases they give custodial parents much lower payments than they would receive under the federal guidelines.

This case raises interesting questions about whether differences arising from federalism can constitute discrimination. It highlights the tension between two parts of the constitution – the right to equality under the *Charter*, and the protection of inter-provincial differences as a cornerstone of federalism. In particular, it is unclear whether and when differences arising from federalism can constitute discrimination for the purpose of s.15.

Charter Cases Catalogue

In my final project, I helped LEAF update their catalogue of *Charter* cases. I reviewed all the recent equality and rights-focused cases from the Ontario Court of Appeal, Alberta Court of Appeal, and Supreme Court of Canada. I also provided information about cases that were scheduled to be heard or awaiting decision. This gave me a great overview of the current state of equality rights case law, and I believe it will help LEAF stay up-to-date in their field.

Other Exciting Parts of the Summer

In addition to my projects, I got to sit in on cases at the Ontario Court of Appeal and the Supreme Court of Canada. At the Ontario Court of Appeal case, in which LEAF was interested but not intervening, I was able to speak with the litigator before and after the hearing. We talked about the various legal arguments and our impressions of the judges' reactions. This experience sparked an interest in litigation that will stick with me for the future. At the Supreme Court of Canada, I sat in on the closed hearing of *R v Ryan*. This was a case in which LEAF was intervening, and it was exciting to see LEAF's arguments presented to the panel. I am awaiting the Court's release of their decision with great interest.

I also got to meet and work with incredible people. During my internship, LEAF's long-time legal assistant Marian Ali was awarded the Diamond Jubilee Medal in recognition of her outstanding contributions to Canada. Marian is an

inspiration, and someone I am fortunate to have worked with. I am also enjoying ongoing working relationships with my supervisors and colleagues from this summer. From these lasting connections, I am continuing to learn about the field of equality rights in Canada.

I am very grateful to Cheryl Milne and the Asper Centre for making this experience possible. I got to develop my legal research and writing skills by working on projects that mean a great deal to me, and make connections that I hope will last for years to come. This is truly a rare opportunity that I am confident will be a highlight of my law school experience, and a significant influence on my career.

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Roundtables and Conferences

Finality and Oversight in Resolving Disputed Elections

On October 23, 2012, the Asper Centre's Constitutional Roundtable presented *Of Irregular Votes and Robocalls: Resolving Disputed Elections in Canada and New Zealand*. In this lecture, Andrew Geddis, a professor from the Faculty of Law, University of Otago in New Zealand, examined the differences between the approaches taken by Canada and New Zealand in resolving election disputes.

Underpinning his analysis is the fact that a foundational preset of the constitutional order of both countries (both Western, liberal democracies coming from the Westminster tradition) is that people choose who will represent them. When there is a flaw in the process, Andrew Geddis says, the very basis for conferring authority to these people is threatened. This is why it is necessary to have an oversight mechanism that looks into and responds to claims that the election process is invalid.

In addition to oversight, there is value in giving some measure of finality to election outcomes. If we want lawmakers to be able to do their jobs effectively, they need to know their position is reasonably secure. Furthermore, annulling an election in a riding can have the effect of disenfranchising not only those whose votes were disqualified but every person who voted in that riding.

It is the tension between these principles of oversight and finality, and the weight that each country chooses to give them, that forms the election dispute resolution process. Andrew Geddis argues that even minor choices in policy based upon these tensions can lead to significant differences in practice.



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In comparing the two countries' approaches, Geddis asked five questions: (1) Who gets to oversee disputes about an election? (2) How do you get that institution into the process (standing, time limits)? (3) What does the institution look at? (4) When and how should the institution intervene? and (5) Is the overseeing institution's decision final? Among the more significant differences in the answers to these questions is that New Zealand implements much

tighter timelines and allows for no right of appeal, indicating a greater emphasis on the principle of finality than in Canada. This preference is further evidenced by the fact that in New Zealand, even if the High Court is wrong as a matter of law—and this has happened, according to Geddis—it does not matter: once the High Court rules, that is legally the end of the matter.

This increased emphasis on finality in New Zealand comes with a corresponding decreased emphasis on oversight. For instance, in New Zealand's proportional representative system, where one vote is cast for local candidates and one vote is a party vote, counted nationally, the court's jurisdiction to review the party vote, the one that really matters for governing the country, is very narrow. The courts have a wide jurisdiction to review the local candidate votes, but this is irrelevant to the overall party representation.

The fourth question (when and how should the overseer intervene?) is the real crux of the Canadian disputes that provided the inspiration for the background paper leading to this lecture: two challenges to the May 2011 election, in the Etobicoke Centre and the Robocall ridings. These two cases demonstrate that Canada's response to resolving disputed elections is two-track.

The first track is the court's response if there is a claim of irregularity (a voter that does not meet the requirements to vote), as is the case in Etobicoke Centre. Following the May 2011 federal election, the Liberal candidate brought an application under the *Canada Elections Act* contesting the election. The Conservative candidate had won by just 26 votes. The Ontario Superior Court found, however, that 79 ballots were invalid due to irregularities. Andrew Geddis argues that the case law shows that a claimant must show that the irregularity affected a sufficient number of votes to

call the result into question. He labels this the “magic numbers test” – in this case, the magic number that the invalidated votes (79) need to exceed was the margin of victory (26 votes).

The second is the court's response to an allegation of fraud, corruption or illegal practice. Geddis refers to a Supreme Court of Canada case, *Sideleau v Davidson*, in which a Quebec election outcome was disputed because supporters of the winning candidate had been handing out whisky and money in return for votes. In this type of situation, Andrew Geddis claims there is no magic numbers test, as it would be too difficult to show a number of votes that were affected. Instead, the court just looks at whether it is tainted enough – Geddis labels this the “does it stink” test.

In answering the questions that formed his analysis, it is clear that New Zealand puts a greater emphasis on the finality principle than does Canada. However, one day after Andrew Geddis' lecture, the Supreme Court of Canada released its decision in the Etobicoke Centre case, *Opitz v. Wrzesnewskyj*. The Court held that there is a strong presumption that everyone who voted had the right to vote in that riding, and that the irregularities complained of were not sufficient to invalidate the election outcome. Perhaps the margin of victory in this case was not the magic number after all, or perhaps this case signals a conscious shift in the balance away from greater oversight towards the New Zealand approach – more prompt, final resolution of election outcomes.

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Expert Ethics Witnesses in Carter

“A lawyer, a philosopher and a judge walk into a bar...” Such was Joseph Arvay's introduction to the *Carter* case, a landmark British Columbia Supreme Court decision finding that the Criminal Code prohibition on assisted suicide violated section 7 of the *Charter*. Arvay, counsel for the plaintiff, appeared at the Asper Centre's Constitutional Roundtable to discuss the case with Wayne Sumner, a philosophy professor who served as an expert witness on the ethics of assisted suicide. Why have an expert witness on ethics? Arvay remarked that it is rare to lead evidence on the morality of a practice or law. But the *Carter* case brought the lawyer and philosopher together in the courtroom with great success.

Arvay was compelled to discuss morality because the Supreme Court of Canada had “put it on the table” in the 1993 *Rodriguez* decision. In that case, the Court partly upheld the assisted suicide prohibition on decidedly moral grounds: that preserving “the sanctity of life” justified the infringement of the interests protected by section 7. In order for a moral argument to fly, Arvay noted, one must prove that there is a broad consensus supporting it. He therefore set out to show that there was no such consensus.



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Sumner has worked on the issue of assisted death for some time, sensing that it was “heating up” in Canadian society. Arvay enlisted him to determine whether there were good reasons for distinguishing physician-assisted suicide from legal activities such as “passive measures” (e.g. the withdrawal of life-support), euthanasia or suicide itself. Sumner was told to assume that the patients were at the end of their lives, and that the decision to commit suicide was fully voluntary. He concluded that no valid distinction could be drawn: as far as the patient’s interest and autonomy are concerned, assisted suicide is no different from the others.

Arvay’s morality argument did not end there. To prevent Sumner’s evidence from being cast as mere armchair academia, he sought out the opinions of a medical ethicist and practicing doctors. He even conducted public opinion polls, finding that there was no consensus on the morality of assisted suicide. But when the decision came down, it was clear that Sumner’s evidence had powerfully influenced the trial judge.

For Sumner, this was a pleasant surprise. A self-acknowledged resident of the ivory tower, he was gratified to see his work play such a direct role in public policy. The decision also revealed the strategic value of Sumner’s evidence. The Crown did not lack for ethicists who could support its position. But it declined to call any, preferring to focus on experts from the medical community.

Carter reveals the value of ethics in clarifying moral issues when they arise before the courts. It also demonstrates a top *Charter* litigator’s skill in building an evidentiary record, and in taking on a directly adverse Supreme Court precedent. As the case works its way through the appeal courts, we look forward to seeing how this groundwork bolsters Arvay’s position.

Chris Evans is a third-year JD candidate at the University of Toronto Faculty of Law.

Asper Centre Holds Conference on Social Science Evidence in Charter Litigation

On November 9, practitioners, academics, students and other interested parties took part in an exciting conference hosted by the Asper Centre entitled *Social Science Evidence in Charter Litigation: 30 Years of Fact Finding*.

After introductory remarks from Professor Lorraine Weinrib, the conference began with a panel discussion featuring Justice Robert Sharpe of the Ontario Court of Appeal, Justice Susan Himel of the Ontario Superior Court of Justice—who wrote the *Bedford* judgment in which Canada’s prostitution laws were found to violate the Charter—and Justice Lynn Smith of the Supreme Court of British Columbia, who concluded, in the recent case *Carter v Canada*, that the *Criminal Code* provisions prohibiting physician-assisted suicide violate s.7.

Each panelist offered excellent insight into the role that social science evidence plays in *Charter* litigation. Justice Sharpe traced the historical development of the use of expert evidence in Canada, noting that there has been a shift toward requiring more evidence even with respect to “garden-variety” legal matters. He highlighted some of the issues facing the courts as they continue to emphasize the importance of expert evidence, including the uncertain line between evidence and argument as well as the at-times unprincipled manner in which courts distinguish between matters requiring evidence and those of which the court can take judicial notice.

Justice Himel outlined the various ways in which *Charter* litigation can be initiated—by application, through criminal proceedings, and by reference—and went over the application that led to the litigation in *Bedford*. She noted that the volume of social science evidence presented to the court in *Bedford* and other *Charter* cases is often staggering.

Justice Smith then emphasized the important distinction between social fact evidence and expert evidence. In the *Carter* case, she explained, the court heard first-hand evidence from non-experts suffering from disability and terminal illness to help determine the impact the removal of the prohibition on assisted suicide would have on such individuals.

assisted suicide would have on such individuals. Justice Smith also discussed the court’s use of expert evidence in *Carter*. As in *Bedford*, there was an immense amount of expert evidence to take into account.

Following a question-and-answer period with the three panelists, conference attendees were invited to take part in one of two breakout sessions. In one session, Yasmin Dawood and Michael Pal from the University of Toronto Faculty of Law, along with Professor Robert MacDermid of York University, discussed the role of social science evidence in election law, particularly as demonstrated in high-profile SCC cases such as *Harper v Canada* and *R v Bryan*. Professor MacDermid brought to the discussion the perspective gained from having actually acted as an expert witness in *Bryan*. In the other breakout session, Charles-Maxime Panaccio from the University of Ottawa, Roslyn Mousley from the Department of Justice, and Vanessa MacDonnell and Julia Hughes, from the University of Ottawa and the University of New Brunswick, respectively, presented on the various methodologies employed by courts when they rely on social science evidence in constitutional cases.

At the lunchtime plenary, Professor William Wicken, from York University’s Department of History, discussed the role of the historian in the litigation of aboriginal claims. Professor Wicken explained that it remains somewhat unclear precisely what role historians should play in such litigation, especially in light of the SCC’s statement in *Delgamuukw* that evidence from historians is unnecessary for the assessment of aboriginal rights claims. He then discussed how historians are sometimes used strategically by counsel in aboriginal litigation in a way that can undermine both the historian’s independence and her desire to extrapolate on the ideas at issue. Professor Wicken also stressed that all of the jurisprudence on s.35 forms a historical record of government-aboriginal relations that will no doubt be analyzed and used in the future. This, he argued, is something of which courts ought to be very mindful.

Following lunch, there was a second set of breakout sessions. The speakers here were 3L student Rebecca Sutton, Department of Justice lawyer BJ Wray, and health law expert Lydia Stewart Ferreira. A second panel with Linda Rothstein, Hart Schwartz and Karen Eltis focused on practice and ethical issues.

Next came a "Reflections" session led by Professor Carl Baar of Brock University and York University, Professor David Wiseman from the University of Ottawa, and Professor Ian Greene from York University. Among other topics, Professor Baar discussed the need to ensure that experts serve the court rather than advocating for a particular party. Professor Greene, who has served as an expert witness in four cases, discussed his experience in those cases as well as his perceptions of how judges perceive social science evidence. He also argued that the more social science experts know about *how* judges decide cases, the better prepared they will be to serve as an expert. Following this, Professor Wiseman discussed how concerns

with respect to competence that arise when social science evidence comes into play have had a detrimental affect on anti-poverty claims. After this session, Cheryl Milne closed out the conference with a brief presentation on *Canadian Foundation for Children, Youth and the Law v Canada*, in which a key finding of the lower court was the perceived common ground shared by experts who in many respects were diametrically opposed.

All in all, the conference offered participants a diverse range of perspectives on many different issues pertaining to the use of social science evidence in *Charter* litigation. The *Charter* has come a long way in the thirty years since its adoption, but, at least with respect to when and how expert evidence should affect its interpretation and application, it is clear that plenty remains to be worked out in the years ahead.

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Tsinghua-Toronto Joint Conference

The University of Toronto Faculty of Law, in collaboration with the Tsinghua University Law School, held a conference on the "Frontiers of Constitutional Jurisprudence in China and Canada" on October 12-13, 2012 in Toronto. The conference featured pioneering constitutional law scholars from China and Canada who presented on their studies engaging various topics of constitutional law. Students, scholars and practitioners from both countries attended the conference. Professor Ian Lee delivered the welcoming remarks.

Kent Roach and Professor Na Jiang from Beijing Normal University presented on "A Comparative Examination of Wrongful Conviction." Professor Roach structured his study on wrongful conviction as a unique piece in constitutional law scholarship.

"If a country thinks it does not have a wrongful conviction problem, it is not looking hard enough."--Kent Roach
He suggested that criminal law is constitutional law that matters, in the sense that it can lead to people going to jail and being executed. Professor Roach further discussed the Innocence Projects in the U.S., and also compared the approach of inquisitorial and adversarial systems to the issue of wrongful conviction.

From the Chinese perspective, Professor Na Jiang presented on three waves of criminal law reforms in China in 2006, 2010, and 2012. These reforms were largely motivated by wrongful conviction cases, *She* and *Zhao*. Professor Jiang argued that these reforms, however inspiring, are more symbolic than effective.

Professor Yasmin Dawood and Professor Ian Lee from the University of Toronto added two distinct perspectives to the conference. Professor Dawood discussed "Democratic Rights as Structural Rights" through a political science lens. Professor Lee presented on "Reasonable Accommodation in an Economic Perspective," focusing on recent Supreme Court of Canada decisions on freedom of religion. Professor Lee suggested that the commonality of these two studies lies in their interdisciplinary focus: both bring social science into constitutional law analysis.

Professor Jinyan Li from Osgoode Hall Law School chaired a



panel on International Law and Constitutional Law. Professor Zhaojie Li from Tsinghua University and Professor Patrick Macklem from the University of Toronto presented on the complex relationship between constitutional law and international law in China and Canada. Professor Li began with a eulogy to Professor [Betty Ho](#), who had a strong connection with both Tsinghua and the University of Toronto. Professor Li then discussed how international law affected the Chinese Constitution. Professor Patrick Macklem addressed the issue of "how dualist Canada is" by analyzing the Quebec Secession Reference and the "labour trilogy" cases.

David Mulroney, Senior Fellow at the Munk School of Global Affairs, University of Toronto, and former Canadian ambassador to China, chaired the closing address. Dean Zhenmin Wang from Tsinghua University School of Law delivered the closing remarks on "Constitutionalism and Democracy: A Comparative Observation." Dean Wang applauded the scholars for their success so far and suggested that the two schools should continue this kind of scholarly exchange in the future.

Liting Lin Cong is a second-year JD candidate at the University of Toronto Faculty of Law.

Working Groups at the Asper Centre

Refugee and Immigration Law Working Group

The *Protecting Canada's Immigration System Act*, formerly known as Bill C-31, received Royal Assent in June 2012. The new legislation makes sweeping changes to Canada's refugee system, which has serious, negative implications for foreign nationals in Canada. Many immigration and refugee lawyers believe that the changes may undermine the constitutional rights of both refugee claimants and other new arrivals in Canada.

Although there are several draconian measures that have been - or will be - put in place by the new legislation, one of the most egregious changes is the creation of Designated Country of Origin (DCO) and Designated Foreign National (DFN) classifications. Newcomers who are classified as DFNs or from a DCO are penalized in the refugee determination system - they are subject to shorter timelines, lengthy bars to particular applications, and, in some cases, unreviewable detention upon arrival. The new legislation also introduces a one-year bar that prevents a foreign national who has received a negative decision at the Immigration and Refugee Board from making a pre-removal risk assessment (PRRA) application or a humanitarian and compassionate application for one year after the date of the negative refugee decision. Moreover, PRRA applications that were submitted less than one year prior to Royal Assent were terminated at the end of June 2012.

It is imperative that the refugee bar starts to raise *Charter* challenges to the new legislation. Although students generally cannot directly support individual claimants, students have the power both to provide research support to lawyers on the impacts of the laws, to support lawyers in bringing test case litigation, and to work in the affected communities to raise awareness.

The Asper Centre's Refugee and Immigration Law Working Group was started to target these new laws, to address constitu-

tional law issues in Canadian immigration law in general, and to harness the potential of students to advocate for legal change. The Group has three arms, with three different focuses. First, there is a Bill C-31 research arm, which works with the Canadian Association of Refugee Lawyers (CARL) on research questions arising out of Bill C-31. The second arm focuses on cuts to the Interim Federal Health Program (IFH), and has an action agenda to disseminate information in communities affected by the cuts, and to support test case litigation. The third arm conducts research focused on the constitutionality of the face-covering veil ban during citizenship ceremonies, introduced by the government last year.

All three arms of the Working Group have realized significant achievements this fall.

First, the Bill C-31 research group researched and produced a memo for CARL on the current state of the law regarding public interest standing, following the Supreme Court decision in *Downtown Eastside Sex Workers*. In addition to researching and analyzing the jurisprudence, the group responded to three queries from three different public interest groups on the implications of the decision on their likelihood of attaining standing. The memo is currently being used by CARL to feed into its litigation strategy.

Second, the IFH arm of the group met with challenges earlier in the year while trying to work with community organizations to identify potential test litigants in determining how to securely and legally collect data. After some useful lessons on the intricacies of data collection and insight into the less glamorous battles routinely faced by constitutional lawyers, the group is now focused on developing public legal education seminars for refugee claimants and others affected by the cuts, which are planned to be delivered across Toronto in the spring.

Finally, the working group on the ban on face coverings at citizenship ceremonies conducted research on possible *Charter* challenges as well as on similar bans in France, Belgium, and the Netherlands. Next semester, the working group will produce a research memo that can potentially be used in a court challenge to the ban.

Next semester, all the arms of our group will be actively conducting research and taking action in the community. In light of increasing xenophobia and opaque government decisions, the challenges to Canadian refugee and immigration constitutional protection are immense. After an active first semester, the Refugee and Immigration Law Working Group is dedicated to advocating for the meaningful constitutional protection of newcomers' basic freedoms, as guaranteed by our *Charter*.

Aria Laskin and Jesse Elders are second-year JD candidates at the University of Toronto Faculty of Law.



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Privacy Working Group

Either you're with the privacy commissioners or you're with the child pornographers, Public Safety Minister Vic Toews informed Canadians in Spring 2011, as the Conservatives introduced Bill C-30, the bill that would grant the federal government and law enforcement agencies the power to obtain information about individuals who are online without having to first apply for a warrant. Bill C-30 represented a radical departure from traditional laws protecting Canadians' privacy, which typically require the state to obtain prior authorization from a court in the form of a warrant.

The government recently announced that it was abandoning Bill C-30. But this legislation—and the rhetoric surrounding it—speaks to an increasingly significant issue in contemporary Canadian law and public policy: how do we determine the right balance between ensuring that law enforcement personnel have the tools they need to investigate crimes and protecting the strong individual interest in keeping our private lives, interests, and activities private, beyond the reach of the state?

This year, the Asper Centre has put together a working group that will investigate the ways in which Section 8 of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to be free from unreasonable search and seizure, protects individuals' privacy interests associated with new and changing technologies. The group will think through the ways that the section 8 jurisprudence is imagining and accommodating new technologies, and make recommendations for how judges can conceptualize the meaning of technology more effectively.

What will this work look like? One threshold issue in the section 8 jurisprudence is whether the individual had a "reasonable expectation of privacy" in the device or information that is the subject of the search. For instance,

in cases where the police have used infrared surveillance to track the heat coming off a private residence as part of a grow-op investigation, do the inhabitants have a reasonable expectation of privacy in the patterns of heat emissions? Or, in cases where you have clicked "I agree" at the end of a long user agreement that has a small provision authorizing disclosure of your personal information by a service provider to the police, do you lose a reasonable expectation of privacy in that information?

Arguments can be made on both sides. Law and order advocates might point out that criminals are becoming more sophisticated, and that the expanding use of technology for surveillance purposes enables the more effective policing of drug traffickers. Privacy advocates, by contrast, worry that this opens up a wide range of extremely personal information to police, without the protection and judicial oversight that accompanies a warrant. Judges, meanwhile, have struggled to conceptualize what exactly the new technologies mean to users, and as a result, where reasonable expectations of privacy might lie.

The team working on this project, comprised largely of first year students, is uniquely well positioned to add to this debate. The median age of judges in Canada is 58. The median age of University of Toronto's entering class of 1Ls is over 30 years younger, and our students are much more familiar with changing technologies. These students can help the judiciary and government alike to understand the role of new technologies in the lives of Canadians.

Maya Ollek and Krista Nerland are second-year JD candidates at the University of Toronto Faculty of Law.

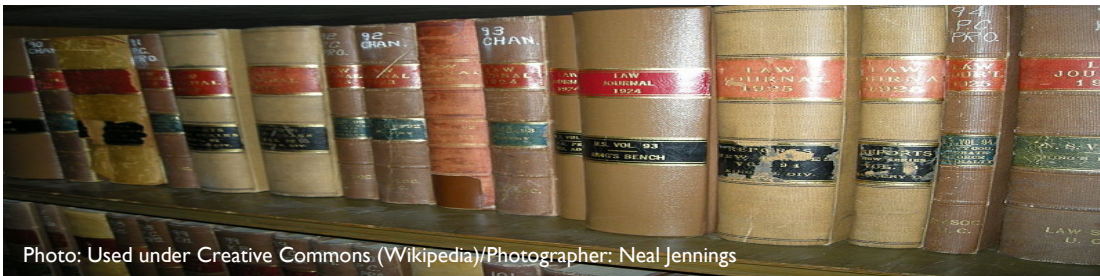


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In the Next Issue

- Focus on Bill C-31: Commentaries by four IHRP students on the *Protecting Canada's Immigration System Act*.
- Interview with Kim Potter, a former clerk at the Ontario Court of Appeal.
- Feature on Jeff King, visiting scholar and expert on constitutionalization of social rights.
- Updates on Asper Centre working groups and events.



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