

ASPER CENTRE OUTLOOK

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"Inauguration and Tradition: Twenty Years of Constitutional Democracy in South Africa"

The 2014 Goodman Lecture commemorated the 20th Anniversary of constitutional democracy in South Africa. The South African Constitution was born out the negotiations that ended apartheid. On April 27, 1994, the country adopted an interim constitution, which, among other things, established the Constitutional Court as the ultimate arbiter of constitutional questions. The lecture, entitled "South Africa's Constitution at Twenty: An Assessment," focused on the Court's role in instituting and developing the final Constitution over the last twenty years. The lecture was delivered by Catherine O'Regan, one of the founding justices of the Court, who focused heavily on themes of inauguration and tradition. Specifically, she explored the tensions inherent in the desire to keep the memory of the past alive while starting anew.

O'Regan explained how the institution of the Court itself reflects that tension. With the collapse of the apartheid regime and the creation of a constitutional democracy a new court, with new judges, robes, chambers and the like was created. But at the same time, the Court remained connected to common law tradition, as well as South African history. For example, the new Court building was constructed on the historic site of the Johannesburg Fort, a prison that housed both Nelson Mandela and Mahatma Gandhi.

The tensions between the South Africa of apartheid and that of constitutional democracy are even reflected in the democratic composition of the Court itself, a major concern of O'Regan's. The Constitution requires that the Court "reflect broadly the racial and gender" makeup of the country. As O'Regan explained, the provision is meant to confront the fact that white men had a monopoly on power under the apartheid regime, despite the fact that the overwhelming majority of the country was black. Since the fall of apartheid, the Court has gone from seven white and four black justices to seven black and four white justices, which much better represents the country's demographics. Yet she acknowledged the need for the Court to do a better job of representing women, who currently only occupy two of the eleven judicial appointments.

O'Regan also discussed the constitutional text itself. She placed great weight on the document's preamble, which serves as an important interpretive tool in South African constitutional jurisprudence. Notably, the preamble points to the need to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." Hence, the text embodies the tension between remembering the past and starting something new by directly linking memories of colonialism and apartheid to aspirations of democratic constitutionalism.

O'Regan illustrated how this tension particularly plays out in the *Bill of Rights*. This section is firmly rooted in the tradition of democratic constitutionalism insofar as it protects generally recognized fundamental rights, such as freedom of expression, life and security of the person. Yet

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the Constitution is also responsive to the distinctive history of South Africa in its recognition of positive social and economic rights, such as a right to adequate housing. O'Regan explained how these rights are designed to address the areas of deepest contestation in South African history.

As a result of the legacy of colonialism and apartheid, the country remains deeply divided and unequal. Large numbers of people are still excluded from economic and political opportunity, notwithstanding the significant constitutional changes that have occurred over the last 20 years. In light of such marginalization, the Court has held that the State must take reasonable steps to secure popular welfare through the right to adequate housing and like guarantees. In response, the State has constructed approximately three million houses since 1994. These gains are particularly significant because the Court has entrenched the idea of progressive realization, which prevents the government from eroding social and economic gains after they have been made. Nevertheless, O'Regan insisted that the promise of this particular constitutional ideal has yet to be fully realized, as approximately two million more homes are needed.

The former justice was generally optimistic about the future of constitutional democracy in South Africa. She expressed confidence that new legal traditions established through the country's short history as a constitutional democracy would be maintained. Moreover, she remained hopeful that the promise of the Constitution would ultimately be realized. In all, O'Regan believed that the Court would be able to manage the tension between responding to the past and moving toward the future in a way that preserved South African traditions of justice and constitutional democracy while still leaving room for it to grow.

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Basic Health Rights: *Canadian Doctors for Refugee Care v. Canada (Attorney General)*

On July 4th, 2014, Justice MacTavish at the Federal Court issued her judgment in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*. In it, a group of public interest organizations and two affected individuals (Hanif Ayubi and Daniel Garcia Rodrigues) challenged the government's decision to reduce the health care coverage available to refugees through the Interim Federal Health Program (IFHP).

The IFHP has existed since 1957, but in 2012, the government decided to reduce, and in some cases, eliminate the coverage available to refugees and others seeking Canada's protection. The government's primary reasons for changing the IFHP were to control the cost of the program, and ensure that it corresponded more closely to the Order In Council which authorized the program. Cost containment was of particular concern, as the number of people eligible for the program, health care costs, and length of time individuals spent in the program had all increased significantly in the last decade, raising the total cost of the program from \$50.6 million in 2002/2003 to \$91 million in 2009/2010.

Federal Court

The claimants alleged that the changes to the IFHP were *ultra vires* the prerogative powers of the Governor in Council, in breach of the duty of procedural fairness, a violation of Canada's international obligations, and contrary to sections 7, 12, and 15 of the *Charter*. They were successful on two grounds: MacTavish J. declared the changes invalid because they violated sections 12 and 15 of the *Charter*.

The section 12 ruling is of particular interest, because the vast majority of section 12 cases involve cruel or unusual "punishment," and

are concerned with the boundaries of legitimate criminal sanctions. It is very unusual to succeed on a section 12 claim outside of a penal or quasi-penal context. Thus, this case has the potential to widen the scope of section 12 jurisprudence by providing a functional definition of "treatment" rather than "punishment" under section 12: action, inaction or prohibition by the state in the course of state exercise of control over an individual. In this case, MacTavish J. found that those seeking the protection of Canada are subject to the administrative control of the state while they are under immigration jurisdiction, and government decisions with respect to those individuals can qualify as treatment for the purpose of section 12.

The 2012 changes to the IFHP were found to violate s.15 because they based eligibility for health insurance partly on whether the individual was from a Designated Country of Origin (DCO), with individuals from DCOs receiving a lesser level of health insurance. Justice MacTavish emphasized that this distinction sends the message that individuals from DCOs are undesirable and that their well-being is worth less than the well-being of those from non-DCO countries.

Justice MacTavish declared the 2012 changes invalid, but suspended the declaration of invalidity for four months (expiring November 4, 2014). She also ordered that the health insurance coverage of one of the individual claimants be restored after those four months had passed. The declaration of invalidity returns health care coverage to people who were excluded under the new regime, and requires the government to take an alternative approach to containing the cost of the program if they wish to do so.

Federal Court of Appeal

The July 4, 2014 decision from the Federal Court is currently being appealed, but prior to the appeal being heard, the government sought an order staying the Federal Court judgment for one year or until the appeal was decided. The Federal Court of Appeal released its decision with respect to the stay on October 31, 2014. The stay was not granted and the court emphasized the very real possibility that an individual in need of health care would not qualify under the 2012 changes, but would have under the pre-2012 program.

Thus, on November 4, 2014, the Federal Court's declaration of invalidity came into effect and the government was required to provide health services based on the pre-2012 IFHP. Although the government has since restored some health services for refugees, there is controversy about whether the services have been restored to the level required by the court order. Going forward, there may be the additional issue of government failure to comply with a court order as well as the government's appeal.

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U of T Lecture Series

Notes on Khiara Bridges' "The Poverty of Privacy Rights"

Professor Khiara Bridges fascinating lunch talk "The Poverty of Privacy Rights," sponsored by the Critical Analysis of Law Workshop, centered on the provocative argument that wealth is a precondition for women's assertion of privacy rights in the United States.

Bridges began by noting that despite the general presumption that all rights are unconditional for U.S. citizens, a number of rights in the U.S. do, in fact, come with preconditions. The most obvious example of a conditional right is that Puerto Ricans have not been granted federal voting rights. Being a resident of one of the 50 states (or the district of Columbia) is a precondition for the right to vote for Congress or for President. Similarly, the generally accepted interpretation of the U.S. *Constitution* is that one must be an American citizen at birth in order to become president.

Having established that some rights are conditional, Bridges proceeded to argue that we have good reason to believe poor women do not have privacy rights. Her main support comes from the jurisprudential history of poor women attempting to assert their right to privacy. Bridges argues that in every single case judges find infringements of poor women's privacy justified. This extends to such egregious infringements that Bridges argues the rational analysis of these cases is not to conclude that poor women have weak privacy rights, but rather that they have no privacy rights at all.

Bridges then explored why this might be the case, arguing that in the United States, norms of privacy only apply to those of good moral character, and that because the dominant American understanding of poverty is that it results from personal moral failing, poor women are presumed to have poor moral character. This presumption can be rebutted, but usually not without violating the very privacy rights a presumption of good character would protect. Bridges argues that women in particular are required to demonstrate good moral character as a precondition to the right to privacy because the law invariably justifies disregard for women's privacy by reference to the protection of children.

Bridges argues that this justification is not borne out in reality, since both poor mothers and rich mothers abuse their children, but the law uncritically imposes surveillance only on poor women. She notes that we know alcohol consumption is much more damaging during pregnancy than methamphetamine use, yet the latter is much more heavily policed by the state (and used as a justification for denying poor women's privacy rights).

During a lively Q & A, Bridges noted that poor mothers have no way of opting into privacy rights. She started by pointing out that poor people as a group are forced to live much more of their life in public than wealthier people. She pointed out that when someone's home is too small to host guests, the majority of their socializing will, by necessity, take place in a public space where anything overhead by strangers can be reported to the state.

Turning to poor mothers in particular, she noted they are in a catch-22 scenario. A poor mother may either choose to go on Medicaid, requiring her to answer a number of invasive questions, or, if she opts out, the state will charge her with endangering the health of her child for failing to seek out prenatal care. Similarly, if a poor mother applies for food stamps or welfare to help feed her children, she must submit to highly intrusive interrogations. If she opts out, she may end up being

unable to feed her children, and social assistance will likely intervene by removing them from her custody. Bridges argues that the United States has created a system in which poor women are entirely unable to assert any meaningful right to privacy.

Bridges argues that, given these realities, it is most accurate to say that poor women simply do not have privacy rights in the United States today. In addition to the rhetorical power of such a move, Bridges suggests that acknowledging this analytical framing may allow us to look for historical parallels of groups similarly deprived of legal rights (most obviously blacks in the antebellum south). This would allow us to identify strategies employed successfully in analogous situations.

While there are key differences between privacy rights as they exist in the Canadian and American legal context, Canada should take a hard look at the effects of its laws on poor women. It is very likely that they face similar problems to those of women in poverty in the United States.

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Supreme Court v Cyr: Quebec v Canada and Cyr's Cooperative Federalism

On January 13th, Hugo Cyr, a professor at Université du Québec à Montréal, presented his paper entitled "Autonomy, Subsidiarity and Solidarity: The Foundations of Cooperative Federalism" at an Asper Centre Constitutional Roundtable. Two months later, on March 27th, the Supreme Court released its decision in the Gun Registry case (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14), which specifically addressed the principles outlined in Cyr's paper. The case was about the constitutionality of section 29 of the *Ending the Long-gun Registry Act*, S.C. 2012, c. 6, which ordered that the data collected in the operation of the long gun registry be destroyed immediately and not provided to the provinces. The motive for this was to prevent the provinces from establishing their own long gun registries.

According to Cyr, cooperative federalism is the modern logic of federalism, which aims to maximize the freedom and ability of both provinces and the central government to enact legislation to further the interests of Canadian citizens. It is grounded in and justified by three underlying principles, of which two are relevant to the gun registry case: autonomy and federal solidarity.

Autonomy is straightforward. Negative autonomy means the ability to prevent the other level of government from intruding into your sphere of unique legislative competence, while positive autonomy essentially means freedom to legislate. Federal solidarity is more controversial. Cyr argues that federal entities have a duty to facilitate one another in the achievement of their goals, and not to impose negative externalities, such as unnecessary costs, on one another because although the federal and provincial governments are different entities, they share a common body politic and so imposing negative externalities on one another means imposing them on their own constituency. In the context of the long-gun registry, Cyr argues that eliminating the data without providing it to the provinces is a deliberate attempt to impose a negative externality (additional cost) on anyone seeking to legitimately exercise their legislative powers to create a similar register.

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The majority in the gun registry case held that the federal government was entitled to destroy the data, dismissing the idea of federal solidarity to preserve the legislative autonomy of the federal government. They indicated that cooperative federalism is grounded in mutual assistance and that the logic of cooperative federalism ends where the governments' goals diverge, because to hold otherwise would be to put limits on the valid exercise of legislative competence. The fact that the federal government acted deliberately to make it much more expensive for Quebec to achieve its goals is less important for them than a strong notion of autonomy in which the Federal government is not impeded in dealing with its own statutory creations.



Hugo Cyr, photo courtesy of Hugo Cyr

Admittedly, the majority grounded their judgment in a finding that the registry was not a collaborative enterprise between the Federal Government and the provincial governments, but that finding is questionable. The trial judge found that it was a cooperative enterprise, and the dissent agrees, pointing out that Quebec spent money on establishing the registry, that a Quebec official was significantly involved in the execution of the legislation, and that Quebec relied on the register for a number of functions under provincial legislation as well. It seems that the majority's focus on the piece of legislation being repealed ignores the broader picture in which an interconnected federal/provincial arrangement was in place. The question that the majority leaves unanswered is exactly what would qualify as a collaborative effort if this does not.

The dissent would have upheld the trial judgment. They found that the gun registry was not just a piece of federal legislation, but an integrated scheme requiring the exercise of both provincial and federal legislative powers. As a result, they held that destroying the data without providing it to the Quebec was an interference with Quebec's jurisdiction. They also found that the destruction of the data does not fall under the criminal head of power, since it would be possible to decriminalize unregistered possession of long guns without eliminating registry data, and that the destruction of the data is not necessarily incidental to the legislative scheme for the same reason. This represents a conventional approach to federalism, and does not closely resemble the ideas that Cyr espouses in his paper.

However, the dissent did say something that looks like an endorsement of Cyr's notion of federal solidarity. They went beyond arguing that since Quebec was involved in the scheme it is unconstitutional for the government to destroy the data. They argued that the deliberate attempt to impede the legislative goals of a province by the federal government was irrational, and interfered with Quebec's legislative powers. In order to arrive at that conclusion, they must have agreed with Cyr's idea that for one government in a federation to impose negative externalities on another is contrary to the principles of federalism.

This was a close case. The Court divided five-four between these two notions of federalism, and the majority suggested that the difference was actually grounded in a difference on the facts about whether the gun registry was a collaborative enterprise. Cyr's understanding of federal solidarity was more-or-less explicitly rejected by the majority, but it was a narrow majority. It may be an idea that gains traction with the Supreme Court yet, at least within the as-yet-undefined scope of collaborative inter-governmental exercises.

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Wishful Thinking: The Supreme Court of Canada Looks at Canadian Democracy in the Charter Era

On November 18, 2014, Mary Eberts presented her current project to the University of Toronto Constitutional Roundtable. The project was born out of a cognitive dissonance she recognized between what the Supreme Court says about the value of democracy and the role that it assumes in securing this value. This dissonance is particularly acute in social benefit cases where the complainants are vulnerable minorities who do not have representation in the legislature.

The project begins with a historical analysis of section 1 of the *Charter of Rights and Freedoms*, which reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (emphasis added).

Eberts explained that the language that was ultimately adopted in section 1 was subject to a series of revisions. The initial wording included the phrase "Parliamentary system of government". This was abandoned and the phrase "free and democratic society" was used in its place. She suggested that the decision to remove "Parliamentary system of government" from section 1 signals that the *Charter* intended a low level of deference to the government.

Next, Eberts highlighted a pair of significant statements made by the Supreme Court on the value of democracy. The first is by Justice Dixon in *R v Oakes* and the second is from the *Reference re Succession of Quebec*. Justice Dixon in *Oakes* argued that valuing the inherent dignity of the human person, and commitment to social justice and equality are essential to a free and democratic society. The Succession case adopts this statement and adds the Supreme Court's view that democracy expresses the sovereign will of the people. These statements represent a crucial assumption made by the Supreme Court, and one that Eberts argues is wishful thinking: namely that Parliament offers a chance for all minorities to have their voices heard.

Eberts identified a second "article of faith" that she argues the Supreme Court holds with respect to the legislative sphere: that it has a special institutional competency with respect to social benefit cases. She demonstrated this by arguing that the Supreme Court has effectively elaborated a separation of powers doctrine in social benefits cases. When balancing the rights at issue, the Supreme Court accords great deference to Parliament, as it would to a tribunal which had special expertise in the area. Eberts also described a trend in which the Supreme Court tends to characterize a social benefit as a policy rather than a legal matter, thereby fitting it into the sphere of presumed legislative competence.

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She acknowledged that this has not always been the approach taken by the Supreme Court. For example, in *Miron v Trudel* the Supreme Court took a different approach: giving the section 15 rights a broad interpretation, and limiting its application under a section 1 analysis. But reviewing more recent Supreme Court cases in this area, Eberts argued that the court has abandoned this strong understanding of section 15 rights.

Eberts suggests that the Supreme Court should abandon both of these articles of faith, and should presume neither that the legislature is particularly well suited to make decisions regarding social benefits nor that we have an effectively representative legislature. The goal is for the Court to see the legislature in practical rather than idealized terms. The legislature does not, in fact, include representatives from vulnerable minorities whose rights are at issue in social benefits cases. For this reason, the Supreme Court should take the *Miron v Trudel* approach, and engage in a full section 15 analysis, incorporating the importance of democratic decision making into the limiting 1 analysis and addressing issues of legislative competence at the remedy stage.

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Photo of Mary Eberts. Photo credit Alexandra Wong

Consensual Harm: The Ambiguous Status of BDSM in Canadian Law

In November, at the height of the controversy surrounding Jian Ghomeshi, the University of Toronto hosted a panel discussion on BDSM, consent and the law. BDSM, which is an acronym for Bondage and Discipline, Dominance and Submission, and Sadism and Masochism, refers to a range of sexual practices involving the infliction of harm. These range from blindfolding to slapping, choking or whipping. Legal scholars Brenda Cossman, Hamish Stewart and Kyle Kirkup, and BDSM writer and educator, Andrea Zanin, discussed the murky status of BDSM in Canadian law. The discussion also touched on the broader implications of BDSM's ambiguous legal status both in relation to the safety of practitioners and in relation to the role of the criminal law in policing sexuality.

Generally speaking, Canadian law does not recognize consent to the infliction of serious bodily harm where broader social considerations outweigh individual autonomy. This approach to consent was first explicitly stated in *R v Jobidon* (1991), where the Supreme Court held that an individual's consent to a violent fist-fight is legally irrelevant. However, an exception for activities deemed to be socially valuable is also suggested in *Jobidon*. As several panelists noted, the legal status of BDSM in relation to the Canadian law on consent remains unclear since a satisfactory definition of what counts as serious bodily harm in the BDSM context is lacking. It is quite possible that anything that leaves a mark is prohibited. Whether or not BDSM has social value has received little attention from courts.

Panelists also noted that the ambiguous legal status of BDSM carries dangers for participants. Andrea Zanin, explained that uncertainty about the

legal status of their kink may lead BDSM practitioners to be underserved by mental health and general health services for fear of seeking out those services. Since there is no clear legal framework for dealing with BDSM, the community is left to self-regulate, which leaves room for potentially abusive norms to develop in the community, or a subset of it. Additionally, the fact that current criminal law neither explicitly prohibits nor condones BDSM practices means that how the criminal law will deal with these dangers to participants is still an open question.

Incorporation of the concept of social value into the definition of criminal offences raises its own concerns. Many panelists noted that consideration of what is socially valuable provides an entry point for social norms that we might think ought to play no role in legal decision-making. Presumably, we hope to avoid criminalization of the socially taboo for its own sake. However, as Kyle Kirkup noted, the criminal law has been continually used to police the border between intelligible and unintelligible sex. Moreover, there is a significant risk that legal boundaries might be drawn based on misinformed views about minority practices. The panel discussion provided a telling illustration of this when Zanin stepped in to correct another panelist's suggestion that bondage is a comparatively less risky BDSM activity.

As this discussion illustrates, serious difficulties may arise when courts take on the task of determining what activities can and cannot be the subject of legally effective consent. Whether the law relating to BDSM and consent can be clarified in a way that is sensitive to these difficulties remains to be seen.

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The Victim Fine Surcharge: Mandatory Injustice

On October 24, 2013, Bill C-37 — the *Increasing Offenders' Accountability for Victims Act* — made Victim Fine Surcharges (VFS) mandatory in criminal sentencing, regardless of offenders' ability to pay. Many Ontario justices have cited a recent Ontario Court of Justice case, *R v Michael* (OCJ 2014), to declare a mandatory "tax on broken souls" unconstitutional. However, after April's SCJ decision in *R v Tinker*, which held that imposing VFS on the impoverished is not cruel and unusual punishment, this will be largely impossible.

VFS are levied to "provid[e] such assistance to victims of offences as the lieutenant governor [...] of a given province "may direct from time to time" [*Criminal Code* s. 737(7)]. Bill C-37 doubled the VFS imposed on those convicted of criminal offences: the new surcharges amount to 30% of any fine levied [737(2)(a)] or, if there is no fine, \$100 per summary offence [(2)(b)(i)] and \$200 per indictable offence [(2)(b)(ii)].

More significantly, it excised s. 737(5) which allowed justices to exempt offenders who could demonstrate that a surcharge would be an undue hardship. Judicial discretion now covers only time limits for payment [s 737(8) (d)], which is of little avail to those who cannot pay.

Minor crimes can now cost hundreds in VFS if they result in multiple convictions. Offenders with no income and/or large liabilities — even those who are currently incarcerated — must still pay. If they cannot, the surcharges are often referred to collection agencies, doing further damage to offenders' financial status, and often costing the State as much as the VFS it levies.

There are also severe penalties for default, which include blocked renewal of licenses and permits [734.5], civil suits [734.6] or even imprisonment via warrant of committal [734.7]. If that last provision is enforced, Canada has *de facto* reinstated the debtor's prison, and for very limited gain; it is not obvious what small payouts to crime victims will accomplish besides reinforcing government claims to be "tough on crime."

***R v Michael* – Victim Fine Surcharges are 'Punishment, not Treatment'**

The most influential rejection of mandatory VFS, *R v Michael* 2014 ONCJ 360, declared that they were cruel and unusual punishment contrary to section 12 of the *Charter*. In that case, a homeless, penniless addict was hit with a total of \$900 in VFS for three petty thefts and resisting arrest. Paccioco J. refused to collect.

The justice dismissed Crown arguments that VFS are a 'treatment' beyond *Charter* control. He held that fines are paradigmatic punishments (per *Whaling*, SCC 2014), and that the *Criminal Code* s. 737(1) itself indicates that VFS are punishment by referring to "any other *punishment*" imposed besides the surcharges. He also held that the a mandatory surcharge met the definition of 'cruel and unusual' in *R v. Nur* (Court of Appeal judgment), since the hardship the surcharges create is not proportional to the offence actually committed in the case before him, nor to other reasonable hypotheticals suggested by the facts.

Paccioco J. also rejected a Crown suggestion that applying a nominal \$1 fine (reducing the VFS on each count to thirty cents) would avoid injustice. Judges do not have discretion to impose fines in cases involving discharges or probation terms, and those are the cases (low-impact offences by low-income offenders) where VFS are most unjust.

Finally, Paccioco J. held that no grossly disproportionate law passes the *Oakes* test and therefore the law could not be saved under s. 1.

***R v Tinker* – Victim Fine Surcharges as 'Requirements, not Sanctions'**

Michael's widely adopted rejection of mandatory VFS, however, was overruled by Glass J. in *R v Tinker* 2015 ONSC 2284. *Tinker* overturned a trial judgment which had held that VFS violated s.7 of the *Charter*, and waived \$300 in VFS for Mr. Tinker (who lives on ~\$170/month) and the surcharges imposed on his equally impoverished codefendants.

Glass J. avoids one *Charter* argument by defining VFS as a 'requirement', not a fine. Like giving DNA to a registry, it is a consequence of conviction, not a sanction. However, he does not clarify how a "sum of money established to be a consequence of breaking the law" meaningfully differs from a fine. He notes that offenders typically have two years to pay, and can apply for extensions or adjust the quantum on appeal — assuming, again without providing reasoning, that impoverished offenders have the money or legal support to apply or appeal.

Glass J. concludes by dismissing an argument under s. 7 of the *Charter*. He holds that even if VFS are fines, they do not impose grossly disproportionate consequences. He asserts that those who do not save up to pay within the time limit are "author[s] of their own misfortune" — ignoring the fact that even \$2 per week can be difficult for those in deep poverty.

Victim Fine Surcharges are Here to Stay

Tinker doesn't address section 12 of the *Charter* directly, but Paccioco J. acknowledged that a Superior Court judgment holding that mandatory Victim Fine Surcharges are fair and proportional overrules *Michael*. Still, some scholars argue that only further appellate review of *Michael* and *Tinker* can settle the discrepancy between them.

But higher courts, at least since *Hutterian Brethren* (SCC 2009), greatly defer to legislative intent in assessing laws' proportionality. That is not a promising position from which to challenge VFS, as no obvious alternative victims' fund exists. Moreover, cases in which VFS is most clearly unjust involve poor offenders committing statutory offences, the precise offenders who lack the resources to appeal.

Mandatory VFS disproportionately harms the poorest and most vulnerable, prevents judges from applying *Charter* values of proportionality in sentencing, and often costs more in enforcement than it earns in fines. It is, however, legal. Ontario defence lawyers can expect dispiriting *pro forma* protests of VFS to become part of their practice — at least until compassion for the accused is given more weight than political posturing.



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Plenary Session: U of T Professors discuss Carter v AG



On February 27th, the David Asper Centre organized a lunchtime plenary session on the recent SCC case *Carter v AG* as part of its symposium “Life, Liberty and Equality — Canadian Style: The Interplay Between Sections 7 and 15 of the *Charter*”. The *Carter* case concerned the constitutionality of sections 14 and 241(b) of the *Criminal Code*, which indicate that someone cannot consent to being killed, and make aiding or abetting suicide an offense. Together they ban assisted suicide in Canada. The applicants raised section 7 and 15 arguments against the provisions, and in the end the Court found that the provisions were an unjustifiable infringement on the s. 7 rights of the claimants. Six professors spoke on the case: Trudo Lemmens, Hamish Stewart, Carol Rogerson, David Schneiderman, Sophia Moreau, and Denise Reaume.

Professor Lemmens led off the session, and his talk focused on potential dangers of relaxing the norms around physician assisted death. He argued that putting legal value on people’s choice to die contributes to a cultural context in which assisted suicide becomes the expected response to some conditions, and expressed concerns about the way that norm would evolve. To illustrate his concern, he cited a study in Belgium, where assisted suicide is legal, showing that one third of physicians would be willing in some cases to help someone end their life because they are beginning to suffer dementia or are mentally ill. Lemmens’ other concern is that this law will place new and inappropriate burdens on doctors, including asking them to decide when someone is competent to consent to assisted suicide. Doctors may not be equipped to make these decisions effectively, which creates a real risk that vulnerable individuals will die without genuine, competent, consent.

Professor Stewart’s discussion was also somewhat cautionary. He focused on the way that recent cases might alter the relationship between sections 7 and 1 of the *Charter*. Traditionally, it has been very difficult to justify breaches of s. 7 under s. 1, but Stewart suggested that it might be easier after *Bedford* and *Carter*. He noted that it has become easier to show s. 7 violations, and that public interest is not weighed against the impact of the charter violation in finding a s. 7 violation. Both of these make room for a substantial s. 1 analysis. Indeed, in *Carter* the Court devoted 20 paragraphs to deciding whether overbreadth was necessary to achieve the government’s aims. By contrast, in an earlier case the court might simply have said that an overbroad law is not minimally impairing under s. 1 and cannot be saved. He accepts that an enlarged s. 1 analysis may make sense in the context of norms against overbreadth or arbitrariness, but is concerned about other s. 7 claims. Section 7 includes procedural fairness requirements for trials, and prohibitions on criminal sanctions for involuntary actions. Stewart suggests that an emerging norm allowing s. 1 justification of s. 7 violations could undermine these important rules that delineate the boundaries of criminal law.

The third presenter was Professor Rogerson, who focused on *Carter*’s remedy. She noted that the remedy was somewhat unusual. Ordinarily the court makes a choice between two remedies. The first is a complete declaration of invalidity, suspended in order to give the govern-

ment time to fix the problem. The second is an immediate fix in which the court changes the legislation to make it constitutional. Here the two were combined: the court declared the law invalid to the extent that it inhibited physician assisted dying by people who clearly consent and are suffering from terminal illnesses, and also suspended the declaration of invalidity for a year. Rogerson pointed out that this remedy fails to meet the court’s standards for *Charter* remedies: the Court

tries to avoid case-by-case *Charter* remedies, but in this case anyone seeking to take advantage of this protection would likely need to apply to the court for a declaration that they fall under the exemption. She argues that the court should have better explained its unusual choice of remedy, and that failure to do so weakened the jurisprudence around constitutional remedies.

Professor Schneiderman’s remarks used *Carter* as an illustration of a particular tendency he has observed in the McLachlin court. He argues that it has moved in a libertarian direction, taking aim at restrictions on individual liberty even where there are arguably valid reasons for the state to restrict it. He pointed to a number of relatively recent cases in which the court has privileged individual liberty over the proposed societal interest protected by a law. In particular he cited *RJR MacDonald* which proposed that businesses should be free to advertise their products even if they are harmful to the public, and *Chaoulli* which decided that citizens had to be free to seek private medical care to preserve their security of person. He argued that both *Bedford* and *Carter* are examples of this tendency: the protection of individual freedom of choice over government efforts to shape society.

The last two presenters focused on the absence of section 15 analysis in the case. Professor Moreau asked why the court decided not to discuss section 15, while Professor Reaume examined the structural similarities between the logic of section 7 in *Carter* and section 15 in other cases. Moreau’s assessment is that there are two possible reasons s.15 might not have been addressed. First, it is not necessary to evaluate all *Charter* rights where the Court finds that one right is violated and analysis of the other rights would be duplicative. She notes that in *Carter* the s.7 analysis focused on the comparative rights of those with severe terminal illnesses, and it is plausible that section 15 would have focused on these same considerations. The other possibility is that the court’s decision was pragmatic. Here she suggests that the court does not wish to take a substantive approach to the s. 15 equality right, and so by avoiding the discussion entirely they did not have to grapple with it.

This tied into Reaume’s argument, since she contended that *Carter* actually diverts a section 15 argument to section 7. She suggested that this is because there are two kinds of s. 7 argument: the successful kind in which the law creates a distinction that inherently mistreats a particular group and the unsuccessful kind in which individuals “fall through the cracks.” In her analysis this case is of the first kind, in which the law presumes that an identifiable group is less worthy than others. It therefore falls neatly into the successful kind of s. 15 case. By contrast, in cases that fail the claimant usually argues that a law intended to solve a problem fails to do so for some subset of the population. Her conclusion is that the court in *Carter* saw a chance to address the kind of section 15 claim that they are receptive to under section 7, and therefore avoided any consideration of the kind of s. 15 claim they dislike.

If you’re interested in learning more, you can see a full webcast of the session on our website at www.aspercentre.ca/resources/webcasts.htm

James Elcombe is a second year JD Candidate at University of Toronto Faculty of Law, and the Asper Centre’s 2015 research assistant.

Education and Experience: The Asper Centre and Clinical Education

A Nourishing Legal Education

On October 24 and 25, students, staff and faculty from the University of Toronto Faculty of Law attended the annual conference hosted by the Association for Canadian Clinical Legal Education at the University of Windsor Faculty of Law. They joined legal educators and students from across Canada to discuss best practices and pedagogies in clinical legal education.

Clinical legal education can be “nourishing,” allowing students to become deeply embedded in their communities and correcting deficiencies such as a lack of social consciousness in our legal education system, suggested keynote speaker Sameer Ashar, Clinical Professor at the School of Law at the University of California, Irvine.

Professor Ashar pointed out that many law students are in the process of identity formation and figuring out their politics, values and career goals. For some students, volunteering in a clinic is one step in a legal career focused on building alliances with community activists and working to achieve social justice. For others, clinical education is a chance to become practice ready and develop skills like oral advocacy, memo writing and professionalism by working directly with clients.

Michelle Christopher, Executive Director of the student legal clinic at the University of Calgary pointed out: “You don’t send students to medical school and say don’t touch the body. Why wouldn’t we offer practical experience to law students?”

You don’t send students to medical school and say don’t touch the body. Why wouldn’t we offer practical experience to law students?

The conference included sessions about legal clinics ranging from poverty law clinics like Downtown Legal Services and Osgoode’s Parkdale Community Legal Services, to specialized clinics such as ARCH Disability Law, and international clinical legal education, including discussion of a criminal defense clinic in Afghanistan and clinical legal education in Nigeria.

Staff lawyers and legal academics were united in their desire to increase student involvement in legal clinics and encourage law students to become more politically conscious. Some practitioners and teachers raised concerns about the lack of student buy-in to clinical legal education and discussed how to align the interests of donors and law school administration with the goals of clinical legal education.

Petra Molnar, a second-year law student working full-time at Downtown Legal Services summed up the conference, saying she felt re-energized by attending, and that “Attending the ACCLE conference reminded me how important it is to have critical discussions on the role and scope of clinical legal education in shaping future lawyers and advocates for social justice.”

Leanna Katz is a second-year JD candidate at the University of Toronto, Faculty of Law

The Bedford Working Group — An Update

This year, a group of 25 hardworking law students volunteered their time and effort to conduct research, writing, and advocacy work on issues

surrounding prostitution laws in Canada. The group was created to engage critically with the recent changes to Canada’s prostitution laws arising from the *Bedford* decision. Before the beginning of the year, the federal government had proposed a new set of laws in response to the Supreme Court’s decision in *Bedford v. Canada*, and by the end of first term they had been implemented.

In late September, we had a small panel for the working group students with Professor Brenda Cossman and Executive Director of Maggie’s, Jean McDonald, who shared their thoughts and concerns around the criminalization of sex work.

The students were divided into four groups, each of which would pursue a distinct, but related, project. All of the projects dealt with the overarching issue of how prostitution is regulated in Canada, though the focus of each was different. Much of the work centered on the potential impact of the new legislation, Bill C-36, the Protection of Communities and Exploited Persons Act, which took effect on December 6, 2014, when our subgroups had just completed the first stages of their research.

Of our four research groups, one took an international and comparative approach, while another focused on the details of the legislation. The third group looked at a portion of the Parliamentary debates that took place over the summer, taking a critical analysis approach to the process by which the bill was passed. Finally, a number of students worked with local advocacy group, Maggie’s: The Toronto Sex Worker’s Action Project, to gather information for projects to be conducted in future.

There is continued uncertainty around how these new laws will be implemented and how they will impact the lives of those who are involved in sex work. Premier Wynne expressed concerns about the constitutionality of the new legislation and that they might not adequately address the Supreme Court’s decision regarding the security rights of sex workers. So in second semester we began developing public legal education materials so that people working on this issue have more resources available. Our work will be continuing through the summer, since there is still plenty to be done.

We want to thank our faculty advisors Professors Brenda Cossman, Kent Roach, and Simon Stern, as well as Jean McDonald of Maggie’s. They have all provided valuable advice and direction on how to focus our research, as has Professor Alan Young of Osgoode Hall, who argued *Bedford* at the Superior Court. We also thank Cheryl Milne of the Asper Centre for allowing us to form this working group.



Alexandra Wong is a second-year JD candidate at the University of Toronto, Faculty of Law. She was the Asper Centre’s 2014 Research Assistant



Front: Francis Mahon and Marlys Edwardh who represented the Asper Centre in *Henry*.
Back: Neil Abraham and Winston Gee, Asper clinic students who worked on the case.

The Asper Clinic — A Retrospective

When my friends and family ask how law school is going, I try to avoid boring them with details. But when I returned home for the holidays last December, everyone was eager to hear more about my work with the Asper Centre. And rightfully so: it has been the most exciting and rewarding aspect of my legal education to date.

From September to November, my partner and I provided litigation support for the Asper Centre's joint intervention with the BC Civil Liberties Association in *Henry v. British Columbia (Attorney General)*. The appellant, Ivan Henry, was wrongfully convicted of 10 sexual assaults and imprisoned for 27 years following the Crown's failure to disclose certain relevant information to the defence. This information included DNA evidence that was ultimately used to identify the true culprit. The appeal

concerned whether Mr. Henry could seek money damages under the *Charter* if the Crown's failure to disclose information was not malicious.

I initially thought our work would begin and end with research memoranda drafted to provide material for the intervener's factum. This would have been a sufficiently large task in itself given the complexity of the issues, the deep tensions in the case law, and the tight deadlines for our factum. But in fact we met regularly with our *pro bono* litigation team to discuss our research and brainstorm arguments, often emerging from meetings with new ideas and new research questions. Even though our litigation team included one of Canada's top criminal defence lawyers, my partner and I were expected to contribute to meetings as though we were full members of the firm. This allowed me to experience first-hand what it might be like to work in a leading appellate litigation practice.

Once our background research had been finalized, the time came to start drafting the factum. I was again impressed by the team's willingness to integrate us into the process. We were not only invited to help brainstorm the structure of our argument, we were given the opportunity to draft a section of the factum ourselves. This was a great exercise in writing collaboratively. It was also a chance to apply the lessons in written advocacy that our Litigator-in-Residence Mary Eberts and our guest speaker Justice Kathryn Feldman had recently shared with the class. Once a complete draft of the factum was assembled, we were invited to review it and make suggestions. I was honoured enough to see that one of my (minor) suggestions had been accepted. I was even more honoured to see that the section my partner and I drafted had been preserved almost *verbatim* in the final version.

Attending the hearing at the Supreme Court was as rewarding as I hoped it would be. Mr. Henry himself sat next to me in the courtroom, and I had the chance to speak with him, if only briefly. It was also great to be attending a hearing with so many interveners, as this allowed me to compare the strengths and weaknesses of different styles of advocacy. Because of my background research for the intervention, I was able to critique oral submissions on the fly and debrief with Cheryl Milne and my partner about how the hearing was going.

By the end of the day, I had developed a clearer understanding of what it means to be an effective advocate, but I had also unwittingly witnessed a piece of history: this had been Justice LeBel's last-ever hearing before retirement. Chief Justice McLachlin ended the proceedings with a warm tribute to him, which was met by a lengthy standing ovation. It was a memorable way to end a memorable experience.

Winston Gee is a second-year JD candidate at the University of Toronto, Faculty of Law

This Year at the Asper Centre: Some other events you might have enjoyed

Constitutional Roundtable: Foreign Relations Law. Last September Professor Campbell McLachlan, a professor of international law at Victoria University of Wellington presented his newly published paper on Foreign Relations Law at one of the Asper Center's annual constitutional roundtables. He focused on the relationship between national and international law, and the distribution of foreign relations powers between different organs of the state.

Kokopenace: The Panel. Last October, the Asper Centre and the Aboriginal Law Program co-hosted a panel comprised of speakers who made submissions to the SCC in *R v Kokopenace*. *R v Kokopenace*, a case about the representativeness of jury panels in Ontario and in particular about jury representation for First Nations people living on-reserve, was released late last month.

Special Screening: The Case Against 8. That same week, the Centre hosted a screening of *The Case Against 8*, a behind-the-scenes look at the attorneys and gay couples who worked to overturn California's same-sex marriage ban.

Constitutional Roundtable: Constitutional Law in the Absence of Constitution. This past February, new faculty member Professor Richard Stacey presented a paper which asks what the source of legal authority is when a country's constitution is suspended. The paper's specific emphasis is on the suspension of Egypt's constitution by its armed forces in 2011 and again in 2013.

Case Comments

Minimum Sentencing in Light of *R v Nur*

The recent Supreme Court decision in *R v Nur*, 2015 SCC 15, struck down the mandatory minimum sentencing requirements in s. 95(2)(a)(i) and (ii) of the *Criminal Code*. McLachlin C.J., writing for the majority, held that these sentences violate the s. 12 *Charter* protection against cruel and unusual punishment and are not saved by s. 1. Moldaver J., writing for the minority, would have upheld the impugned provisions because s. 95 involves hybrid offences, where less serious offences could be prosecuted summarily and bear no minimum sentence. More interestingly, Moldaver J. also put forward an alternative analytical framework for hybrid offences under s. 12.

S 95(1) makes it an offence to possess a prohibited firearm or a restricted firearm, whether loaded or unloaded, without the proper registration certificate and licence. It is a hybrid offence, which means offenders can be prosecuted through summary conviction or indictment. There is a maximum sentence of one year for summary convictions. Pursued by indictment, the offence carries a minimum sentence of three years for the first offence and five years for subsequent offences. The defendants in this case argued that mandatory minimum sentences for an indictment violated s. 7 and s. 12 of the *Charter* and were unconstitutional.

The two-part s. 12 analysis requires the court to first determine whether the mandatory minimum sentence would result in a grossly disproportionate sentence for the accused. If not, the court must then determine whether it could impose grossly disproportionate sentences in reasonably foreseeable hypotheticals, which must be based on judicial experience and common sense and should not be far-fetched (*R v Goltz*, [1993] 3 SCR 485).

Using this analysis, the majority held that s. 95(2)(a)(i) had the potential to impose a disproportionate sentence in the context of licensing offences, which are essentially regulatory offences and not the type of criminal activity that would warrant a three year minimum sentence. Consequently, they found that s. 95(2)(a)(i) violated s. 12 of the *Charter*. s. 95(2)(a)(ii) also violated s. 12 because a five year minimum sentence could be grossly disproportionate for a repeat offender if the subsequent offence was a minor licensing offence. The impugned provisions could not be justified under s. 1 because they were not minimally impairing.

In his dissenting opinion, Moldaver J. held that licensing offences were not reasonably foreseeable hypotheticals. He pointed out that s. 95 dealt with hybrid offences, and argued that Parliament intended for less serious offences, such as licensing offences, to be prosecuted summarily. Since summary proceedings carry no minimum sentence, this would not result in disproportionate punishment.

In response to the majority's suggestion that Parliament redraft the provision to limit it to criminal activities or conduct that endangers public safety, Moldaver J. asserts that such a requirement would be contrary to the legislative intent of criminalizing simple possession of prohibited firearms; it would also impose too high a burden on prosecutors and thus undermine Parliament's goal of getting dangerous weapons off the streets.

Moldaver J. also proposed a novel analytical framework for s. 12 analysis of minimum sentencing rules for hybrid offences. He asserted that previous jurisprudence on minimum sentencing has been limited solely to indictable offences and that hybrid offences warrant special consideration. The proposed framework would separate the analysis into two stages: first, a general analysis of the law's constitutionality and second, an analysis of the constitutionality of prosecutorial discretion. Under the first stage, the court should compare the mandatory minimum sentence with the lower range of



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sentences given out prior to the enactment of that mandatory minimum. If the mandatory minimum is grossly disproportionate, then the provision violates s. 12. If the law is generally proportionate, then it is a matter of the constitutionality of prosecutorial action. At the second stage, if the prosecution proceeds by indictment and causes the accused to face a disproportionate sentence, then the prosecution has committed an abuse of process. A sentencing judge may thus reduce the sentence to below the mandatory minimum.

In response to Moldaver J.'s proposed framework, the majority held that allowing prosecutors to determine sentencing by choosing whether to proceed summarily or by indictment would displace the role of the sentencing judge. They found this unacceptable because the prosecution stands in an adversarial position to the accused, and were also concerned that the mandatory minimum sentence might provide prosecutors with a trump card in plea bargaining; prosecutors may use the threat of a minimum sentence to incentivize guilty pleas to lesser offences. The majority appears apprehensive of prosecutorial abuse of discretion, especially since proving abuse of process is a high standard for the accused to meet.

Moldaver J. disagreed with the majority that proving abuse of process would be too high a bar for the accused. He asserted that the final sentencing decision still lay with the judge and not the prosecution because in situations where a minimum sentence would be grossly disproportionate, it is open to the sentencing judge to reduce the sentence to below the minimum sentence.

Going forward, it will be interesting to see how the federal government amends the impugned provisions. Since there are not many hybrid offences involving minimum sentences in the *Criminal Code*, it will also be interesting to see if Moldaver J.'s analytical approach for hybrid offences gains any traction.

Cindy Zhou is a second year JD student at University of Toronto, Faculty of Law.

Case Comments



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From school halls to City Hall: the SCC weighs the role of religion

Earlier this year, two highly anticipated judgments on freedom of religion originating from Quebec were rendered by the Supreme Court of Canada. In *Mouvement laïque québécois v. Saguenay (City)* and *Loyola High School v. Quebec (Attorney General)*, the Court grappled with the delicate balance between the *Charter* right of freedom of conscience and religion and the importance of State neutrality as we strive for a free and democratic society.

First, we turn to Montreal, home to Loyola High School, a private English-speaking Catholic high school. Since 2008, the Minister of Education, Recreation and Sports has required a Program on Ethics and Religious Culture (ERC) as a part of the provincial high school curriculum. The three-pronged program touches on world religions and religious culture, ethics, and dialogue with the goal of teaching the beliefs and ethics of a range of world religions from a neutral and objective perspective. The Minister can grant a school an exception from the ERC program if a proposed alternative is deemed “equivalent.” The Minister rejected an alternative course that placed greater emphasis on Catholic beliefs as well as a follow-up request where other world religions would be discussed from a Catholic viewpoint on the basis that they were not equivalent because they took a faith-based, rather than cultural, approach. The school administration was of the view that this decision restrained their religious freedom in violation of s. 2(a) of the *Charter*.

Then, moving northeast, we reach the City of Saguenay, home to Mr. Simoneau, a politically active citizen who regularly attended the public meetings of the city’s municipal council. As an atheist, he felt uncomfortable and excluded by the mayor and councillors’ recital of a Catholic prayer and the statues and crucifixes displayed on the premises. After a formal request to the mayor to cease this practice was refused, Mr. Simoneau was joined by the Mouvement laïque québécois (MLQ), a non-profit whose goal is to defend and promote freedom of conscience, separation of church and state and secularisation of public institutions in Quebec, for a complaint to the Commission. The plaintiffs argued that his freedom of conscience and religion were infringed contrary to ss. 3 and 10 of the *Quebec Charter*. In response, the City enacted a by-law to regulate the prayer, changed its wording, and allowed for a two-minute pause between the end of the prayer and the official opening of meetings to allow non-believers to exit the room during the prayer.

While both plaintiffs received favourable judgements from the respective application judges, the Quebec Court of Appeal reversed both decisions. The Court of Appeal held in both cases that the infringements were merely trivial. In *Saguenay*, the appellate court expressed that the State can remain neutral while participating in preserving its cultural heritage, which includes religious traditions. Finally, the Supreme Court reinstated most of the trial level rulings.

The Supreme Court’s judgments in both cases dealt with the question of how to review discretionary decision-making affecting *Charter* rights. In *Loyola*, the *Doré v. Barreau du Québec* (2012) framework was applied to determine whether the Minister had exercised her statutory discretion in accordance with the relevant *Charter* protections. In conducting this exercise of proportionality, the Court found that the Minister had restricted Loyola’s freedom of religion more than was necessary in the circumstances given the statutory objectives of the ERC program. The Court held that while the ethics and dialogue competencies must be taught neutrally, the school is permitted to teach the portion of the curriculum on Catholicism from their own Catholic perspective. In *Saguenay*, the Court held that the evolution of Canadian society has given rise to a State duty of neutrality that flows from the freedom of conscience and religion. The prayer is in breach of that neutrality as it gives preferential treatment to one religious view over others.

Readers will appreciate that the Court grounded the application to the facts at bar in a very clear way focused on the reality of both situations. Referencing modern, multicultural Canadian society, the Court held in *Saguenay* that one faith cannot be elevated to the exclusion of others by the State. The Court also took a practical approach in *Loyola*, explaining that the Catholic faith is central to the teachers and students at the school, and that it is unworkable to restrain these honestly held beliefs in a discussion about their own religion.

The *Saguenay* judgement has started a Canada-wide dialogue about prayers at municipal meetings and has caused many municipalities to cease the practice or suspend it while they review their policies. A practical alternative that is likely to be well-received by citizens would be a moment of silence where individuals are free to reflect on the topic of their choice. The presence of religious symbols in the municipal context, such as the crucifixes displayed in the City Hall in Saguenay as well as the prayer that opens parliamentary sessions in Ottawa were not at issue in *Saguenay*. Given these recent developments, it is only a matter of time before these issues reach the courts and the scope of freedom of religion is further defined in Canadian law.

Sophie Giguère is a second-year JD candidate at the University of Toronto, Faculty of Law

Asper Case Comment: Henry v British Columbia

The Supreme Court of Canada rendered its decision in *Henry v. British Columbia (Attorney General)* on May 1, 2015, a case in which the David Asper Centre for Constitutional Rights and the British Columbia Civil Liberties Association jointly intervened. Among the issues the Court considered was whether an individual who was wrongfully convicted following the Crown's unconstitutional failure to disclose relevant information can seek money damages under the *Canadian Charter of Rights and Freedoms*.

Mr. Henry was imprisoned from 1983 to 2009 following convictions for several sexual assaults. During his trial, the prosecution failed to disclose a number of key facts, including the discovery of DNA evidence, and the existence of another suspect. In 2002 the police re-investigated, and obtained DNA matches for the alternative suspect, who then pleaded guilty to several of the assaults. In 2010, the British Columbia Court of Appeal overturned Mr. Henry's convictions and entered acquittals on all counts. Mr. Henry sought damages against the crown for its failures to disclose relevant information. The Crown argued that his claim should not proceed as Mr. Henry was unable to show that Crown prosecutors acted maliciously.

Justice Moldaver for the majority of the Court held that the malice requirement was not applicable and established a new threshold for such claims against the Crown. The decision reinterprets the test for *Charter* damages in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, by limiting Crown liability for failing to disclose relevant information in a criminal prosecution to situations where the claimant can prove that the Crown intentionally withheld information when it knows, or would be reasonably expected to know, that the information is material to the defence. This new threshold for a claim for *Charter* damages, although limited to cases of non-disclosure, is an approach to s.24(1) damages that looks much more like a constitutional tort than the previous test in *Ward* did. While it removes the malice requirement from lawsuits for wrongful prosecution, it still sets the bar quite high.

Ward established the following framework for *Charter* damages,

The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages. [para. 4]

The majority's reasons focus on what has been termed the "good governance" factors in the third step of the test, and create a new onus on the claimant to show intentionality as a way to prevent "the floodgates of civil liability"[para.40] from opening. While the decision rightly disposes of the malice, the new threshold is arguably not much lower. Justice Moldaver, in rejecting the applicability of malice, quotes Charron who noted in *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, that conduct merely reflecting "incompetence, inexperience, poor judgment... or even gross negligence" will necessarily fall short (para. 81; emphasis added)" [para.51]. In rejecting gross negligence as too low a bar, Moldaver has made it clear that this new threshold is very difficult to meet. Why should a defendant who is wrongfully convicted due to lazy or reckless behaviour of a Crown that breaches the *Charter* not be

able to claim damages under s.24(1)? The reasoning of the majority appears to impose a *Mackin* type *per se* qualification that must be pleaded, unravelling *Ward's* unanimous rejection of *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, for *Charter* damages claims except in the circumstances of the good faith enforcement of laws later deemed invalid.

While Moldaver ostensibly limits the new threshold to wrongful non-disclosure cases, his majority decision hints that this standard may be applicable to other claims against the Crown, saying that:

The threshold established in this case may well offer guidance in setting the applicable threshold for other types of misconduct, but the prudent course of action is to address new situations in future cases as they arise, with the benefit of a factual record and submissions. [para. 33]

The Asper Centre and BCCLA argued that an individual prosecutor's state of mind is irrelevant to the availability of damages under section 24(1) of the *Charter* as *Charter* violations occur absent fault on the part of the state. Our submissions focused on the application of the *Ward* principles as the appropriate approach to the claimed damages and to the importance of compensation, vindication and deterrence in a monetary award. Much of our argument is reflected in the concurring minority opinion of Chief Justice McLachlin and Justice Karakatsanis.

McLachlin C.J. and Karakatsanis J. simply apply the *Ward* factors and clearly state that there should be no required fault element in the establishment of the *Charter* breach giving rise to the damages claim:

Imposing a fault requirement for *Charter* damages, where the Crown has breached its duty to disclose, is inconsistent with the purpose of s. 24(1) and with the principled framework established in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28. [para. 104]

They take issue with the arguments of the Attorney General that Mr. Henry's claim will interfere with prosecutorial discretion, inappropriately lower the standard for prosecutorial liability, and divert prosecutors from their work [para. 125], noting that the claim is "an action for the breach of a legal duty imposed by the *Charter*" [para. 129]. In particular they state that the focus is not on the fault of any individual but on the failure to disclose that results in a *Charter* breach of fair disclosure.

What does the *Henry* judgment mean for future *Charter* damages claims? For Mr. Henry, he must now prove that the non-disclosure was intentional – a possibly difficult task given that the prosecutor is now dead. As his case represents one of the most egregious examples of non-disclosure leading to a wrongful conviction, his claim remains quite strong. For others, the test may prove too difficult to meet. A broader concern is the possibility that the thresholds established in this case will apply to other contexts, creating further barriers to *Charter* damages claims and shielding the state from responsibility for the harm caused by *Charter* breaches.

Cheryl Milne is the Executive Director of the Asper Centre.

Asper Case Comment: R v Kokopenace

On May 21st 2015, the Supreme Court rendered its decision in *R v Kokopenace*. It overturned the Court of Appeal's holding that the provincial government breached Mr. Kokopenace's s.11(d) and (f) *Charter* rights because it had failed to meet its obligation to address the under-representation of First Nations on-reserve residents on Ontario juries. The four judge majority held that jury representativeness was not violated, and correspondingly that there were no violations of the accused's *Charter* rights. The dissent differed primarily on the question of what it means for a jury to be "representative," taking a broader view than the narrow majority position.

Clifford Kokopenace is an aboriginal man from the Grassy Narrows First Nation reserve in Kenora, Ontario. He was convicted of manslaughter for stabbing and killing another man during a fight. However, he appealed his conviction after discovering that the creation of the jury roll for the District of Kenora may have inadequately included the district's on-reserve residents. On appeal Mr. Kokopenace argued that his rights under s.11(d), 11(f) and 15 of the *Charter* were violated, and sought public interest standing under s.15 of the *Charter* to challenge the composition of the jury roll on behalf of potential jurors who had been excluded.

In Ontario, the Jury roll is assembled by randomly selecting names from the most recent municipal enumeration. This does not capture on-reserve residents, who do not belong to a municipality, so there is a supplemental process which selects additional jurors from lists of on-reserve residents. However, there were a number of issues with the supplemental process, including lists that had not been updated since 2000, and a very low response rate from on-reserve residents.

The Representativeness Requirement

Writing for a majority of four judges, Moldaver J. grounded his judgment in an extremely narrow definition of representativeness. He indicated that a jury roll will be representative if the state makes reasonable efforts to ensure that i) it is compiled using lists which draw from a broad cross section of society, ii) it is randomly selected, and iii) notices are effectively delivered to those who have been selected, providing them with a "fair opportunity" to participate in jury selection.

Cromwell J.'s dissent held that there are two requirements for a jury roll to be representative. 1) the lists used to randomly select potential jurors must be representative of the community and 2) the group of people who return questionnaires must substantially resemble a random sample of the lists. There are important differences between this definition of representativeness and Moldaver's. Most importantly, this definition captures the rate of response of potential jurors under its second point. This means that Cromwell agreed with the Court of Appeal's argument that Ontario had a responsibility to address declining response rates of on-reserve residents in order to ensure that the composition of the jury roll was representative.

The judges were sharply critical of one another's approaches. Moldaver J. argued that Cromwell's approach to representativeness would result in "an inquisition into prospective jurors' backgrounds and a requirement that the state target particular groups for inclusion", because if the jury roll had to be representative of the population with respect to the proportion of on-reserve residents, there was no justifiable reason that it should not need to be proportional with respect to gender, race, age, employment status and so on. Furthermore, he stated that failure to address these additional dimensions of representativeness by Cromwell creates a right without a meaningful remedy. His conclusion was that Cromwell's definition would either be incoherent, or would result in a "procedural quagmire" at the beginning of trials as defense attorneys searched the jury roll for problems with representativeness. Lastly, he responded strongly to Cromwell's criti-

cism of his use of a slippery slope argument, calling it "unfair and unwarranted".

Cromwell J. argued that Moldaver's "fair opportunity to participate" test mistakenly focused on the opportunity provided to the prospective jurors, rather than on the *Charter* protected interests of the accused. The accused's right is to be tried before a representative jury, and whether people had a "fair opportunity" to participate in that jury are irrelevant. He also concludes that the effect on jury impartiality is greater than Moldaver believes, since a representative jury helps minimize the danger of unconscious prejudice on the part of jurors. Lastly, Cromwell challenged Moldaver's slippery slope argument, noting that similar arguments were rejected in the context of racial bias in jury selection in *R v Williams* ([1998] 1 SCR 1128), and "the sky has not fallen."

The Role of the "Jury Representativeness" Right

These disagreements were informed by an underlying disagreement about the function of the s.11(d) and (f) rights in the case. Moldaver J.'s majority argued that the fair trial rights of an accused are not the correct place to address deeper underlying issues involving the alienation of First Nations peoples by the justice system. He expressed concern that attempts to address wrongs to Aboriginal peoples through the jury representativeness right would actually undermine the procedures for random selection of jurors, and the protection of juror privacy. By contrast, Cromwell argued that representativeness under s.11(d) and (f) is about the legitimacy of the justice system, and that therefore it should extend to addressing underlying problems, where resolving those issues will encourage the participation of marginalized groups, and enhance the legitimacy of the jury system as a result.

Section 15

None of the judges seriously addressed the section 15 arguments raised by the Asper Centre. Moldaver J. upheld the Court of Appeal's decision that Mr. Kokopenace did not demonstrate that he was disadvantaged. Cromwell J. found it unnecessary to address s.15 as the issues had been fully canvassed under the s.11(d) and (f) analysis.

Comments

The majority in this case construes the right to jury representativeness so narrowly that it seems to have little meaning. Short of the deliberate exclusion of a significant part of the population, I can see few things that would trigger Moldaver J.'s representativeness right, since it cannot address anything that happens after the jury questionnaires are sent out. This reflects a very formalistic approach to the problem the court was asked to consider, and Moldaver's bare assertion that section 15 was not engaged because the accused failed to demonstrate that he was disadvantaged by the process paid little heed to the evidence before the court regarding the relationship between First Nations peoples and the justice system. First Nations peoples are alienated from the justice system by disproportionate incarceration, by their historical exclusion from serving on juries, and by prejudice that exists against aboriginal peoples, among many other things. Simply put, the idea that these things do not become personal for an accused in the face of a jury trial where on-reserve residents are significantly under-represented does not make sense. Moreover, if the right of an accused to be tried by an impartial and representative jury is not the place to address these concerns, I struggle to find a place in the justice system that will be.

James Elcombe is a second year JD Candidate at University of Toronto Faculty of Law, and the Asper Centre's 2015 research assistant.

Introducing Raj Anand, Our New Litigator-In-Residence



BIOGRAPHY

Raj Anand is a partner and an arbitrator and mediator with Weir-Foulds LLP. His practice includes the areas of administrative, human rights, constitutional and employment law, civil litigation, professional negligence and regulation.

In his third term as an elected Benchler of the Law Society, he is currently the Vice-Chair of the Law Society Tribunal's Hearing Division. He was a member of task forces or working groups on admission requirements, articling, good character, Law Society governance and Tribunal reform. He

was Vice Chair of the Equity and Aboriginal Issues Committee for five years, and is currently Co-Chair of the Working Group on Challenges faced by Racialized Lawyers and Paralegals in Ontario and Chair of the Three Year Review of the Tribunal reforms.

Raj graduated from the University of Toronto Faculty of Law with the Dean's Key in 1978. He has served as President of the U of T Law Alumni Council, the Minority Advocacy and Rights Council, the International Commission of Jurists Canada, and Pro Bono Law Ontario; Co-Chair of the U of T Tribunal; and board member of the Advocates' Society, Legal Aid Ontario, the Law Commission of Ontario, the Centre for Addiction and Mental Health, Justice for Children and Youth, and the Income Security Advocacy Centre. Raj was Chief Commissioner of the Human Rights Commission in 1988-89, Board of Inquiry from 1989-94, and founding Chair of the Human Rights Legal Support Centre in 2008-10.

Raj has taught "The New Administrative Law" at the masters level, and "Legal Ethics: Legal Values" and "Diversity and the Legal Profession" at the JD level. He was the first recipient of the Advocates' Society Award of Justice in 1997, and has since received the Law Society Medal, the Professional Man of the Year award of the Indo-Canada Chamber of Commerce, and the South Asian Bar Association's Distinguished Career Award. In 2013, he was an inaugural Roy McMurtry Visiting Clinical Fellow at Osgoode Hall Law School.

Excerpts from our Interview with Raj Anand

Why did you decide to become the next constitutional litigator in residence at the Asper Centre?

There are a number of things that drew me to the position. First, I look forward to working with Cheryl Milne again. Second, University of Toronto is my Alma Mater and I've always had a certain connection with the Faculty of Law. I was the president of the alumni for a time, as well as an adjudicator at the University. More generally, I think the main benefit of teaching is what I learn from the students, and I think there's a lot to learn in constitutional law so I'm looking forward to it. Finally, my firm WeirFoulds LLP has a strong relationship with the Faculty of Law, and is very active in public interest litigation. Many of my partners teach at law schools.

Tell me a little bit about your human rights work.

I've done a lot of work in the area of creating enforceable human rights, a lot of policy work in addition to substantive legal work at the Human Rights Tribunal and the Commission.

About 15 years ago I gave advice to Justice LaForest, who had just retired from the Supreme Court, when he headed a blue ribbon committee to look at the substance and procedure of the *Canadian Human Rights Act*. They consulted widely across Canada, meeting with federally regulated employers and unions, individuals, and advocacy groups. Their conclusion was that the system was broken, but they couldn't agree on how to fix it. They asked me for a prescription and I drafted a direct access model, and attached a legal assistance arm to it to avoid privatizing the human rights process. The LaForest task force adopted it, but the Government didn't acknowledge the report for several years and the present Federal Government has done nothing about it. Some years later, Michael Bryant took up the same kinds of principles when he was Attorney General of Ontario. I got quite involved with that, and I was asked to set up the Human Rights Legal Support Centre, which is essentially that access arm for Ontario.

What was the most memorable moment in your career?

It was when I received the first Advocates' Society Award of Justice. That award recognizes two things: the highest quality of advocacy, and making an impact for those who are powerless in society. It was a very special moment for me, because those have been my two goals since I went to law school.

But more than that, it was because I was nominated by the lead plaintiff of the spouse-in-the-house case [*Falkiner v Ontario*], Sandy Falkiner, who was superwoman. She was a woman who had never been on social assistance in her life who was forced onto social assistance because she and her partner broke up. They had been sharing care responsibilities for a child with special needs, who needed to be constantly accompanied and cared for, and had managed it by taking complementary shifts, day and night. As a result of the breakup she couldn't take either shift, so she was on social assistance. While she was in this position she got together with a boyfriend, and she was declared a spouse and lost her independent welfare benefits. Ten thousand women in Ontario lost their welfare benefits as individuals under the Mike Harris government in 1995. The clinic system had lots of clients in that position, so they asked me to work with them in bringing forward a constitutional challenge. It took 8 years in all, and it was a cooperative effort between the clinics who knew their clients and welfare law far better than I do, and my experience in constitutional work and court advocacy.

Any advice for students who want to pursue the kind of work that you do?

My advice would be in line with my two goals in this area. First is to be able to devote at least a portion of one's practice to socially progressive work, whether it is pro-bono or legal aid or policy work, that assists those who are disadvantaged in society. The second is, at the same time, to attain the highest standards of advocacy in whatever field you're in. I find that these are complementary, because the beneficiaries of your socially progressive work need your ability to draw analogies, and explain specialized areas of law to generalist judges. The quality of advocacy that you bring to the work you value is very important. It's fine to devote oneself to valuable work, but it's also important to do it very well.

Read the complete interview at www.aspercentre.ca/who-we-are/constitutional-litigator.htm

Join the Asper Centre



Our Clinic Program

The Experience: The Clinical Legal Education Program with the David Asper Centre for Constitutional Rights gives students a chance to contribute to high level constitutional advocacy. Students will work with the Centre on one of our advocacy projects or constitutional cases. In previous years students conducted research, planned arguments, and drafted pleadings in *AG v Henry*, *AG v Downton Eastside Sex Workers*, *Divito v Canada*, and *AG v Ward*, along with many more cases and projects. Students involved got the chance to go to Ottawa and see the case litigated at the Supreme Court.

The Endorsement: Take a look at Winston Gee's article on page 7 of this newsletter to see what he got out of his work with the Asper Centre. Students from past years have also described their work with the Centre as "the most rewarding [experience] since I entered law school" (Vince Wong, 2011-2012 Asper Student), and a "real-world experience of Supreme Court litigation" (Maya Ollek and Louis Century, 2012-2013 Asper Students).

The Application: Applications this year are due on July 10th. In order to register, email a 1-2 page statement of interest to Cheryl Milne at cheryl.milne@utoronto.ca indicating any upper year courses in human rights or constitutional law that you have taken or equivalent experience, indicators of academic, analytical and research and writing ability, experience with advocacy work, and an explanation of why you want to enroll. You can get more details on our website at www.aspercentre.ca/clinic/courses.htm

Our Working Groups

Are you interested in leading a group of students, and researching a problem in constitutional law? Then you should apply to lead a Working Group with the Asper Centre. Previous working groups have been focused on the designated country system and reduced healthcare benefits in refugee and immigration law, on privacy law under section 8 of the *Charter*, and on Bill C-36, the new laws implemented by the federal government to replace the laws struck down in *AG v Bedford*. You can see a description of students' work in *Bedford* on page 6 of our newsletter.

If you want to lead a group but need some ideas, contact Cheryl Milne by email at cheryl.milne@utoronto.ca. If you already have an idea, then develop a proposal and send it by email no later than August 14th. To learn more about the proposal requirements, go to www.aspercentre.ca/clinic/working-groups.htm



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