

ASPER CENTRE OUTLOOK

Volume 5, Issue 2 (June 2013)

Photo: Used under Creative Commons (Wikipedia)/Photographer R Sones

Reviewing Bill C-425: Rhetorical Construction and Charter Implications of Citizenship Revocation

On February 27, 2013, *Bill C-425, An Act to Amend the Citizenship Act: Honouring the Canadian Armed Forces* passed its second reading and was referred to the committee. Bill C-425 proposes changes to the *Citizenship Act* that would enable the government to strip dual nationals of their Canadian citizenship if they engage in war against Canadian troops, a definition that may be expanded to include acts of terror more generally. The Bill, and the dialogue surrounding it, highlights the tension between notions of citizenship, identity and punitive denationalization and the atmosphere of rights and freedoms which characterizes Canada's legal regime. Framed in the language of contract – the Bill deems a dual national “to have made an application for renunciation of their Canadian citizenship” upon commission of certain acts – but designed for unilateral exercise, Bill C-425 is both rhetorically problematic and incompatible with the rights and freedoms enumerated in the Charter. Before exploring the Charter dimensions, however, it is important to both contextualize Bill C-425 in its history, and to deconstruct its rhetorical presentation.

A Brief History of Banishment

Citizenship revocation, or denationalization, is not a new concept – rather, the tool of banishment, to be deployed “both as a punishment and a mechanism of social control,” has existed for millennia [Matthew Gibney, *Should Citizenship be Conditional? Denationalization and Liberal Principles* (August 2, 2011) available at SSRN]. Ancient Greeks and Romans banished citizens for a host of reasons, ranging from cowardice to unpaid public debts. Fundamental early modern thinkers such as Kant and Hobbes endorsed banishment of citizens. Even as modern legal developments rendered the expulsion of citizens more problematic, states continued to pass laws for the denationalization of citizens, especially during wartime. For example, during the Cold War, fears over Communism led the United States to pass the Expatriation Act of 1954, which mandated automatic loss of American citizenship for crimes including “rebellion and insurrection.” Concerns over national allegiance during periods of insecurity continue to fuel citizenship revocation legislation. In the United Kingdom, the Home Secretary can strip British nationals of citizenship if it is “conducive to the public good,” per s.56(1) of the *Immigration, Asylum and Nationality Act, 2006*. Even in Canada, the concept of punitive denationalization is not new, as previous proposed bills have proposed citizenship revocation for acts of war. However, such provisions were strongly criticized; for example, in a 2005 report, the Standing Committee on Citizenship and Immigration recommended that “If citizenship is legitimately awarded and there is no question as to fraud in the application process, a person who later commits a crime is “our criminal.” [Citizenship Revocation: A Question of Due Process and Respecting Charter Rights: Report of the Standing Committee on Citizenship and Immigration, 2005]. Nonetheless, denationalization is not a novel mechanism employed by governments to punish and deter certain behavior by its citizens.

At the same time, the Canadian legislative and legal climate is increasingly framed within a rights-

IN THIS ISSUE

Reviewing Bill C-425	1
Challenges to Bill C-31	3
Striking down IRPA's unconstitutional human	4
Asper Centre intervenes at SCC in	5
Judging Social Rights: An Interview with Dr.	6
Internship with Canadian Association	7
Internship with the South Asian Legal	7
Internship at the Canadian Centre for	8
Working Groups at the	9
Interview with John Norris, the Asper Centre's new Constitutional-Litigator-in-Residence	10
Asper Centre Update	11

based context, exemplified by the Charter. The rights and freedoms enshrined in the Charter are inalienable, and continue to protect people – perhaps most crucially – when they have committed crimes. An inalienable right to Canadian citizenship is debatable, but the engagement of inalienable rights surrounding citizenship, punishment and due process is not – which is perhaps why Bill C-425 avoids the language of rights, and rests instead in the notion of contract.

Bill C-425: Casting Citizenship as a Social Contract

Rather than framing citizenship revocation as unilateral government action, Bill C-425 is purportedly designed to legally recognize what has already functionally occurred: renunciation of citizenship, through the commission of an act incompatible with continued membership in Canadian society. In a Parliamentary debate on 15 February 2013, Parliamentary Secretary to the Minister of Citizenship and Immigration Rick Dykstra stated that “if a Canadian passport holder maintains another nationality while waging war against Canada, this should be construed for what is so obviously clear; it is a deliberate renunciation of one's citizenship.” The familiarity of this rhetoric, embedded in the notion of social contract, makes it compelling. A rights-based legal environment renders it, to some degree, normatively troubling to unilaterally strip people of their citizenship. Thus, it is rhetorically attractive to frame any law that does so as the recognition of an individual's choice to break her contract with the state. For many people, citizenship is premised on notions of social contract, community and shared identity, and citizens are expected to share the same values and allegiances. Repudiation of these values can be equated with repudiation of membership in the community, which in turn can be interpreted as repudiation of citizenship. For example, even in expressing concerns about Bill C-425's legality, Liberal MP Irwin Cotler claimed that “an act of war against Canadian armed forces represents a repudiation of the values that we associate with the concept of citizenship, namely democracy, security, freedom, and equality.” Thus, the rhetoric of contractual repudiation reflects both familiar legal terrain, and embedded social notions of citizenship.

Potential Charter Arguments against Denationalisation

In theory, Bill C-425 is premised on bilateral changes to a social contract. In reality, Bill C-425 would empower the government to unilaterally strip dual nationals of their Canadian citizenship, which poses serious potential Charter issues, especially under s.7 and s.15.

Although claims based on s.7 violations have had limited success in the immigration context, the Bill's potential scale of infringement of an individual's s.7 rights bears close scrutiny. s.7 has already been recognized as an important consideration in the context of citizenship revocation. For example, Justice Reilly of the Ontario Superior Court stated in *Oberlander*, 2004 CanLii 15504, “There can be no question that the revocation of citizenship...triggers s.7 of the *Charter*. A revocation of citizenship engages both liberty interests and security of the person.”

The substantive s.7 rights potentially engaged by the Bill can be framed in both formal and functional terms. From a formal perspective, the provisions in the Bill arguably implicate the “security of the person,” as they enable the government to abolish an individual's relationship with her country, otherwise considered an inviolable relationship (except in the case of fraudulently obtained citizenship). It is also worth noting that the Bill in its current incarnation is worryingly devoid of procedural safeguards and guarantees of due process, and may violate procedural rights under s.7; however, without more information about the proposed procedure, such analysis is limited.

Alongside the rights engaged by the formal citizenship relationship, if the Bill were to come into force there may be powerful arguments to be made

on a case-by-case basis, premised on contextual factors. First, there is a potential s.7 argument based on the expulsion of a Canadian from her home. The functional notion of one's “own country,” beyond legal citizenship, invokes an individual's ties to her community and home. Further, if an individual faced potential rights violations — such as torture or death—upon return to another nation, cases such as *Suresh* suggest that a court may decide that s.7 has been violated (depending on how the “procedural safeguards” are perceived to align with the principles of fundamental justice). The downside of a more contextual approach under s.7 is that it relates to individual cases, rather than to the constitutionality of the Bill's provisions more generally.

As the Bill targets dual nationals, there may be a more effective argument under s.15. Since *Andrews*, citizenship has been recognized as an analogous ground. An argument could be made that the provisions in the Bill fall afoul of s.15, as they create a distinction based on an analogous ground (types of citizenship), and are arguably connected both to prejudice and stereotypes about the reduced loyalty of dual nationals, and to stereotypes about Canadians who are also citizens of countries associated with terrorism. One limitation of this argument is that as statelessness is prohibited under international law, the dual national qualification enables Canada to comply with its international law obligations. Nonetheless, a powerful s.15 argument can be made. Further, the symbolic nature of the Bill renders it less likely to survive s.1 analysis. In *Suave*, 2002 SCC 68 at para 23, the court expressed concerns over highly symbolic government objectives, stating that:

“If Parliament can infringe a crucial right...simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of “our symbols are better than your symbols.” Neither outcome is compatible with the vigorous justification analysis required by the *Charter*.”

Minister Kenney has stated that the provisions contained within the Bill are largely symbolic, and they may therefore fail under similar scrutiny.

Although further details about the proposed changes are needed to assess the nature of the Charter rights infringed and the likelihood of a successful challenge, continued scrutiny is merited as the dialogue over the Bill continues.

The Bill may also lead to violations of Canada's international obligations. In its current incarnation, the Bill may lead to rendering individuals stateless, either due to confusion over citizenship laws (such as in the UK case *Al-Jedda*) or due to leaving someone a “legal resident” of another country, as the Bill stipulates, but not a national, contrary to Canada's obligations under the Convention on the Reduction of Statelessness.

Conclusion

The language of Bill C-425 suggests it merely formalizes a functional revocation of one's citizenship – but in practice, it is designed to strip individuals of a basic tenet of their identity, based on their non-compliance with Canadian loyalty and values. Such a legislative development is incompatible with the Charter, which provides protections to individuals regardless of circumstance. In *Abdelrazik* [2010] 1 FCR 267, at para 12, the court stated that “Charter rights are not dependent on the wisdom of the choices Canadians make, nor their moral character or political beliefs.” Strong condemnation of terrorism and continued membership in our populace are not mutually incompatible. The intended force of Bill C-425 may be the symbolic reinforcement of Canadian loyalty and revocation of dissidence, but the legal impact is both invalid and irreconcilable with a modern, multinational Canadian society.

Aria Laskin is a second-year JD candidate at the University of Toronto Faculty of Law.

Special Focus: Bill C-31 and the Immigration and Refugee Protection Act

Challenges to Bill C-31

Bill C-31, “An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act, and the Department of Citizenship and Immigration Act”, was given royal assent in June 2012. Bill C-31 represents a drastic shift in Canada’s refugee policy, exerting a stringent series of harsh changes to the refugee determination process. The Bill truncates timelines for refugee claims, hearings, and removals, and introduces a one-year bar for Humanitarian and Compassionate applications and Pre-Removal Risk Assessments. It also creates two new discretionary status categories: “Designated Foreign Nationals” (DFN) and “Designated Countries of Origin” (DCO). The effects of DFN classification include the imposition of mandatory periods of detention on claimants classified as “irregular arrivals” at ministerial discretion, as well as termination of their access to the appeal process while facing deportation. The DCO classification introduces truncated timelines for refugee claimants from countries whose refugee claims are typically unsuccessful. Additionally, cuts to the Interim Federal Health Program (IFHP), upon which refugee claimants depend while their claims are being determined, selectively deny critical forms of non-emergency coverage based on the status of claims and whether the claimant is from a designated country of origin.

The refugee law working groups at the Asper Centre have been contributing to the groundwork for *Charter* challenges to these aspects of Bill C-31 that the Canadian Association of Refugee Lawyers (CARL) is considering, researching, and initiating. In the fall, student researchers analyzed CARL’s claim for public interest standing in mounting a *Charter* challenge against Bill C-31, and for the standing of Canadian Doctors for Refugee Care to challenge the changes to the IFHP, to determine its likelihood of success following the Supreme Court’s decision in *Canada v Downtown Eastside Sex Workers United Against Violence*.

At present, CARL, in conjunction with Canadian Doctors for Refugee Care (CDRC) is arguing in the Federal Court of Canada on behalf of three patients who have had critical healthcare denied under the changes to the IFHP regime. CARL and CDRC argue that the federal government’s cuts to the IFHP are unconstitutional and in breach of Canada’s obligations to refugees under international law. The *Charter* challenge is proceeding under sections 7, 12, and 15. The s.7 precedent established in *Chaouilli v Quebec* holds that the denial of critical medical care that increases the risk of medical complications and death and causes severe psychological stress threatens life and the security of the person. The s.12 challenge will argue that the suffering caused by the denial of basic health-sustaining coverage constitutes cruel and unusual treatment. The s.15 challenge argues that discrimination against refugees from certain countries, and of designated status, is in clear violation of the equality provision. Additionally, Canada’s commitments to the *Convention on the Rights of the Child* and the *Convention Relating to the Status of Refugees* obligate healthcare provision for refugees and children. The IFHP cuts place Canada in blatant noncompliance with these international legal commitments.

Concomitantly, another student working group researched the impact on the Act’s DFN provision and *R v Appulonappa*, the decision of the Brit-



Photo: Used under Creative Commons (Wikimedia): Photographer Sam

ish Columbia Supreme Court to strike down s.117 of the *Immigration and Refugee Protection Act*, which defines human smuggling as organizing, inducing, aiding or abetting entry into Canada for anyone not in possession of required documentation, while establishing mandatory minimum penalties for those charged. The court held under s.7 of the *Charter* that s.117 of the Act was of no force or effect. Because it captured categories of persons such as humanitarian workers and close family members, and conduct which the Crown agreed was not meant to be captured under the section, it was vague, overbroad, and inconsistent with the principles of fundamental justice, and could not be upheld under s.1. However, in disregard of the Canadian Council for Refugees’ call to respect the B.C. Supreme Court’s decision and to redraft the legislation, the Crown is appealing the decision. The working group concluded that if an appellate court upholds the verdict of s.117’s unconstitutionality, the most likely remedy would be a delayed declaration of invalidity. While this would require the legislature to amend the impugned provisions of the Act into constitutionality, they would nonetheless remain in force pending individual applications for interlocutory injunctions that met the test of “serious irreparable harm”. While being unconstitutionally detained would likely meet this test, the position of the five groups of asylum seekers currently subject to the DFN classification who are in detention and facing deportation under shortened timelines, without access to an appeals process, remains problematic. Under such an outcome, it would be essential for the refugee law bar to commit to ensuring access to justice for the groups whose constitutionally protected human rights the government sees as expendable in the pursuit of tenuously justified legislative objectives.

To the extent that the legitimacy of legislative action in a parliamentary democracy is constitutionally derived, the challenges to Bill C-31 are of immense importance to those of us privileged with the status or the citizenship by virtue of which our consent has been presumed, because Parliament speaks in our name, and should be challenged if it does so like this.

Aron Katz Zaltz is a first-year JD candidate at the University of Toronto Faculty of Law.

Striking down IRPA's unconstitutional human smuggling law

On January 11th, 2013, Justice Arne Silverman in the BC Supreme Court handed down his ruling in *R v Appulonappa* that struck down s.117 of the *Immigration and Refugee Protection Act* ("IRPA"). He found that s.117 was overly broad and vague, violating s.7 of the *Charter of Rights and Freedoms*.

s.117 is the "human smuggling" section of IRPA and reads:

s.117(1): No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

The accused argued that s.117(1) "casts too wide a net" as it could foreseeably include the acts of refugee humanitarian workers or close family members. The Crown agreed that it was not the intention of Parliament to prosecute such individuals, but that those hypotheticals would never occur for that reason. Furthermore, the Crown argued that s.117(4) required the permission of the Attorney General before prosecution under s.117 and that the Attorney General would never permit such prosecutions. Justice Silverman disagreed with the Crown's arguments, noting that such prosecutions had in fact happened in the past. Furthermore, Justice Silverman found that this apparent intention of Parliament not to prosecute "legitimate" family members and humanitarian workers was not expressed explicitly anywhere in s.117 nor in any international instrument to which Canada was a signatory and thus, s.117, by allowing for possible prosecutions outside its goal, was too broad and too vague. In addition, Justice Silverman found that the prosecutorial discretion allowed under s.117 (4) could not save s.117(1) because the stated intention of the Attorney General was not expressed explicitly in any statute. Justice Silverman acknowledged that Parliament has control over the means they choose to meet an objective of an international instrument to which they are signatory, but that those means must still remain constitutional.

This decision has been seen as a great victory for refugee law. Large opposition to s.117 of IRPA was voiced in 2007 when Janet Hinshaw-Thomas, the director of PRIME – Ecumenical Commitment to Refugees, a US refugee-serving organization, was arrested at the border in Quebec accompanying 12 Haitian refugee-asylum seekers. There was a huge public outcry in response and the Canadian Council for Refugees launched the "Proud to Aid and Abet" Campaign aimed at changing s.117 and bringing light to its apparent overbreadth. The charges against Hinshaw-Thomas were subsequently dropped but the Canadian government went on to charge another humanitarian refugee worker later in 2007, Margaret de Rivera, an American Quaker volunteer accompanying two Haitian refugee claimants to the New Brunswick border. Many refugee assistance organizations have released statements in support of the invalidation of s. 117 of IRPA in *Appulonappa*.

The Crown has said they will appeal the BC Supreme Court decision despite calls from organizations such as the Canadian Council for Refugees to respect the Court's decision and redraft the legislation.

An interesting point of law that follows from a striking down of s.117 of IRPA is the possible impact it could have on other provisions in IRPA, particularly the "Designation of Irregular Arrivals". Recently, I led a group of students at the University of Toronto Faculty of Law to research the possible impacts of *Appulonappa* on individuals designated as "irregular arrivals" under s.20.1(1)(b) of IRPA for the Canadian Association of Refugee Lawyers. s.20.1(1)(b) reads as follows:

s.20(1) The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group

of persons if he or she

(b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

The only application of s.20.1(1)(b) thus far has been the designation of five groups of asylum-seekers on December 5, 2012 by the Minister of Public Safety. This designation classifies them as "Designated Foreign Nationals" ("DFNs") for all purposes of the refugee claim process. This designation restricts their access to appeals processes and increases wait times for permanent residence applications, but most significantly, it allows authorities to detain them for up to a year with a detention review required only at 2 weeks and 6 months. There is much opposition to s.20.1 of IRPA within the refugee worker community, and it is possible that an independent *Charter* challenge will soon be filed against the section. The students' research however looked specifically at whether it would be possible for the individuals already designated, to have that designation removed as an effect of the s. 117 IRPA ruling.

We examined potential remedies for the DFNs both in the case of a delayed declaration of invalidity of s.117 and an immediate declaration of invalidity. It is likely if the decision was appealed up to the Supreme Court of Canada that a delayed declaration would be granted as that has been an increasingly frequent remedy offered by the Court.

It was found that in the case of a delayed declaration of invalidity, the DFNs could possibly succeed in an application for an interlocutory injunction, and that the courts alternatively could be open to the possibility of a prospective remedy. In the case of the interlocutory injunction, the DFNs would have to prove that there would be "serious irreparable harm" if the injunction was not granted. This would be dependent on the particular facts of the five groups of DFNs, but it is likely they would be able to meet the test, particularly because their refugee claim process would be ongoing during the delayed period, and maintaining the designation would "irreparably" harm their possibility for a claim in that they would not be able to appeal a negative decision. Furthermore, for any individuals still in detention, the "serious irreparable harm" would clearly be that they would continue to be detained on an unconstitutional basis. A prospective remedy is less likely to be granted, but would require proof of an ongoing *Charter* violation which could be satisfied by many of the same factors described above.

In the event that the Court chooses to issue an immediate declaration of invalidity of s.117, a natural consequence would be the success of an indirect challenge to s. 20.1(1)(b). Of importance is whether the decision could be applied retroactively to remove the designation from December 5, 2012, and restart the refugee claim process. It was found that because the status would likely be considered an "ongoing status" as opposed to an "event", it is likely that the courts would not allow for retroactive application of a decision to strike down s. 20.1 (1)(b).

Appulonappa serves as the first of many cases that are likely to arise challenging the constitutional validity of provisions in IRPA. While s.117 of IRPA is not a provision that arose out of the recently controversial Bill C-31, its invalidity will clearly play a role in cases concerning Bill C-31, specifically those related to designations of "irregular arrivals" under s.20.1 of IRPA. It is an important milestone both in its firm entrenchment in the application of the *Charter*, and in its reinforcement of the stance that the government, even in pursuit of publicly-lauded goals, must put forward constitutionally valid legislation.

Dharsha Jegatheeswaran is a first-year JD candidate at the University of Toronto, Faculty of Law.

Asper Centre intervenes at SCC in *Divito v Canada*

In February, Professor Audrey Macklin and Cheryl Milne, Executive Director of the Asper Centre, appeared on behalf of the Asper Centre at the Supreme Court of Canada (SCC) in *Divito v Canada* (*Public Safety and Emergency Preparedness*). The case was a judicial review of the Minister's refusal under the *International Transfer of Offenders Act* to accept a transfer request by a Canadian citizen, Pierino Divito, convicted and imprisoned in the United States. It proceeded as a constitutional challenge to the governing provisions granting the Minister the power to approve or refuse a transfer. The Asper Centre intervened on the relationship between constitutional and administrative law principles in refusing the Minister's decision under this Act.

Preparing to intervene in any case at the SCC is a major undertaking. For participating clinic students, Louis Century, Jennifer Luong, and Maya Ollek, the experience leading up to *Divito* offered lessons – both expected and unexpected – in the trials and tribulations faced by interveners.

Students learned important lessons about litigation and the realities of being an intervener. A would-be intervener may wait patiently for cases in which to seek intervener status, looking for the right set of facts, lower court judgments, and arguments. But finding the “right” case issue-wise is only part of the endeavour. Interveners operate in a world where much is beyond their control – the issues to be raised, the timelines of the case, the strategies of other parties and interveners.

Delays in the process leading up to the *Divito* hearing at the SCC created some unexpected excitement and questions for the Asper Centre: about the issues to be raised by the parties; about the timelines for intervention; about whether the hearing would go ahead. The Appellant was significantly late in filing his factum (which triggers the timelines for intervention applications) and then the government filed a motion to have the appeal declared moot because the Appellant had been released and deported back to Canada.

These circumstances forced the Asper Centre to think hard and pursue every option open to us to move ahead. We had the SCC on speed dial, calling them weekly for updates (who knew you could do this?). We scrutinized lower court submissions and judgments for clues about what to expect from the parties. We prepared research memos and strategized arguments without having a clear sense of whether these would be on point, or even if the case would proceed. We revised our timelines – the famous “project management cycle” – again and again. And again.

The legal issue was whether s.8 of the *Act*, granting the Minister discretion to refuse prisoner transfer requests, violates the s.6 *Charter* right to enter Canada. The Asper Centre took the position that the *Act* was unconstitutional. When the Minister makes his decision on a given prisoner transfer request, the foreign state will have already granted their consent, rendering the Minister's decision the only remaining obstacle to realizing s.6 mobility rights. And since refusing the request only delays the prisoner's return until after their prison term expires, at which time they may return outside the supervision of Correctional Services Canada, we were persuaded that refusal necessarily undermines the *Act*'s goals of rehabilitation, reintegration and public safety – each of which would be better achieved by granting the transfer. On this reasoning, the government would fail to justify its s. 6 breach at the rational connection stage of the s. 1 test.

However, in developing its strategy, the Asper Centre considered the possibility that the SCC may uphold the *Act* under s.1 on the reasoning that refusals may, in some exceptional situations, be justifiable. Believing that the Appellant and co-interveners would focus their submissions on the



Maya Ollek, Cheryl Milne, Audrey Macklin, and Jennifer Luong at the SCC

constitutional challenge to the *Act*, we decided to make our arguments in the alternative: if the *Act* is upheld, we argued, the constitutional question is not exhausted. In every decision, the Minister must give adequate attention and weight to the s.6 *Charter* rights of the prisoner in question and justify his refusal accordingly. To this end, under the sage administrative law guidance of Professor Macklin, the Asper Centre proposed an administrative law proportionality framework that would incorporate the justificatory essence of *Charter* review into the flexibility of administrative law judicial review. This builds on recent SCC decisions on the relationship between constitutional and administrative law, notably *Doré v Barreau du Québec*.

Before writing our factum, we needed to convince the SCC that our submissions would be distinct from those of the other parties and useful to the Court – and this included rebutting the Attorney General's argument that our proposed arguments were outside the scope of the appeal. Because of the delays we'd come to expect, receiving leave to intervene came as somewhat of a surprise – and a call to action. In the span of a week, we scrambled to consolidate the arguments that had been percolating for months into a concise, 10-page factum.

After half a year of preparatory work, never sure if the case would actually proceed, we found ourselves en route to Ottawa where Professor Macklin would face the Honourable Judges' questioning. The hearing itself was illuminating, offering glimpses of insight into how each judge stood on the issues. Now, we are left to speculate about how the judgment will unfold – were the justices playing devil's advocate when they asked their questions, or did the questions accurately represent their views of the case? What is the significance of the note passed from Justice Abella to Justice LeBel during the Appellant's arguments?

With judgment reserved, we are left with another undefined period of delay – but at least now, we know that our work is done.

The students thank Professor Audrey Macklin and Cheryl Milne for their patient guidance through this very real-world experience of Supreme Court litigation.

Maya Ollek is a second year JD candidate, and **Louis Century** is a third-year JD candidate, at the University of Toronto, Faculty of Law.

Judging Social Rights: An Interview with Dr. Jeff King

Human rights discourse commonly identifies three generations of rights: “first generation” civil and political rights, “second generation” social and economic rights, and “third generation” collective rights (tripartite scheme originally proposed by Karel Vasek). Social and economic rights include rights to such basic necessities as housing, education, health, and an adequate standard of living. While they are enshrined in such international treaties as the *International Convention on Economic, Social, and Cultural Rights*, the Canadian Constitution has not been interpreted by domestic courts as containing guarantees to such social rights – see, for example, the Supreme Court’s decision in *Gosselin v Quebec*, in which the Court declined to read the *Charter* right to “life, liberty, and security of the person” as including a social rights dimension.

In his recently published book, *Judging Social Rights*, Dr. Jeff King (Senior Lecturer, University College London Faculty of Laws; Distinguished Visiting Professor, University of Toronto Faculty of Law) argues that social rights merit constitutional protection, given the importance of provision of a social minimum in promoting such fundamental values as human dignity, personal autonomy, well-being, and civic participation.

King also lays out a theory of adjudication with respect to social and economic rights. Importantly, King specifies that his theory only applies to countries with similar background political conditions to his main referent, the United Kingdom. These conditions include: a good-faith commitment to the welfare state, independent courts, a well-functioning civil service, and an attitude of respect and cooperation among branches of government. And so he states that while his theory of social rights adjudication applies to Canada, New Zealand, Australia, and a variety of northern European countries, it does not extend to the United States.

In his theory, King advises that judges approach such rights with a posture of judicial restraint – informed by principles of democratic legitimacy, polycentricity, expertise, and the need to preserve administrative flexibility – and commends incrementalism as a general mode for this type of adjudication. According to King, such an approach is capable of realizing the benefits of judicial involvement in rights protection, while mitigating the risks of judicial interference in the complexities of the welfare state.

I interviewed Professor King about the theory and practicalities of his position on social and economic rights adjudication.

Azeezah Kanji: What is the value of judicial involvement in the sphere of social and economic rights?

Jeff King: The key contribution of judicial involvement is to ensure transparency, consistency, fairness, and reasonableness (in procedure as well as in substance). This is a general feature of judicial accountability. Why are judges good at this? Because they have constitutional authority, which is respected by people and the government, to examine information in a focused way. The process of adjudication forces a Minister to disaggregate a particular individual from the political process. Judges are good at principled reasoning, and also offer a modicum of independence from party ideology. Further, the process can offer avenues of participation for groups marginalized in the political process.

AK: What are the benefits of constitutionalization of these rights, as opposed to mere legislative protection?

JK: The benefits of constitutionalization include the resulting durability of commitments enshrined in the constitution; the public will be more concerned if the State tries to roll back constitutional commitments. Constitutionalization helps the public to see welfare rights as equal to other [civil and political] rights.



AK: Should adjudication of social and economic rights differ from adjudication of civil and political rights (with which Canadian courts are more familiar)? If so, how?

JK: The similarities are greater than the differences. In both cases [social and economic rights on the one hand, and civil and political rights on the other] the default should be judicial incrementalism. Indeed, in most civil and political rights cases judges already do act incrementally; while some decisions may have been controversial (such as the Supreme Court of Canada’s decisions on same-sex marriage and non-deportation to torture), this does not mean they were not incremental. In terms of limitations on rights, scarcity would be a justification for

limiting social and economic rights – but scarcity has also been acknowledged as a reason for limiting civil and political rights in certain cases [in the Supreme Court decision in *Newfoundland (Treasury Board) v NAPE*, for instance].

AK: Should States have obligations to guarantee non-citizens within their territory certain social and economic rights?

JK: Permanent residents *should* be entitled to social and economic rights, but the State’s duties to non-nationals may vary in ways that the State’s obligations to citizens do not. With respect to non-citizens, States would have strong obligations in the areas of education, housing, and some social benefits. However, when it comes to more complex forms of social benefits such as pensions, some restrictions may be permissible (particularly because of the reciprocal nature of pensions).

AK: Octavio Ferraz’s work on Brazil indicates that constitutional protection of social and economic rights has not improved the situation of the poor; rather, the main beneficiaries of social and economic rights protection there have been middle class individuals. If the rationale for constitutionalizing social and economic rights is to augment the protection of rights of marginalized groups who may not be represented in the democratic process, does the value of constitutionalization depend on ameliorating existing problems with access to justice (so that the poor actually have the opportunity to have their rights claims heard and adjudicated)?

JK: To a certain extent. My theory works on the assumption that people with few resources *do* have access to justice, and that a number of groups can intervene on behalf of marginalized groups to take cases before the courts. Even if perfect access to justice does not exist, this is no reason not to constitutionalize social and economic rights. Decisions provoking concern, such as the SCC’s judgement in *Chaoulli v Quebec*, can be regarded as aberrations: *Chaoulli* was inconsistent with the Court’s history of not using the *Charter* to roll back programs meant to protect marginalized groups [such as public healthcare in *Chaoulli*].

AK: Can you suggest what lessons Canada (or other States looking to constitutionalize social and economic rights) might learn from other jurisdictions that have experience with social and economic rights adjudication, such as South Africa?

JK: We can learn from South Africa how social and economic rights adjudication has been used to humanize the administration of these rights, without forcing judges to take on tasks that they can’t handle, or violating the separation of powers. And we can learn from jurisdictions that have made social and economic rights non-justiciable that without justiciability, these rights are ineffective.

Azeezah Kanji is a third-year JD candidate at the University of Toronto, Faculty of Law.

Asper Centre introduces its Summer Interns for 2013

Internship with the Canadian Association of Refugee Lawyers (CARL)

2012 was a year of ferment for immigration and refugee law in Canada. Bill C-31 ("Protecting Canada's Immigration System Act") received Royal Assent on June 28, 2012. A number of its key provisions on refugee determination came into force on December 15, 2012. Several of the changes in the new law have caused consternation in the refugee advocacy community. Indeed, in its 2012 Year in Review, the Canadian Council for Refugees stated that Canada is "slipping in its respect for basic rights of refugees" in international law and becoming a less welcoming country.

My internship with the Canadian Association of Refugee Lawyers (CARL) will involve conducting international law research under the supervision of Professor Audrey Macklin, Co-Chair of CARL's Legal Research Committee. As a professional network linking some 150 lawyers and academics, CARL seeks to provide a national voice on human rights and refugee law. In light of this mission, CARL has undertaken challenges to the constitutionality of various provisions in Bill C-31, as well as to other aspects of the government's refugee policy.

As an intern, I will assist CARL with research to support the following litigation projects, focusing on issues of compliance with Canada's international legal obligations, for instance under the *1951 UN Convention on Refugees*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Political Rights*, and the *UN Convention on the Rights of the Child*:

Accelerated Refugee Determination System that imposes a 15-day

timeline for refugee claimants to present their written claim and only 60 days to compile documentary evidence for their hearing. The timelines constitute a hardship for the most vulnerable refugees, for instance those fleeing persecution because of gender or sexual orientation.

Designated Countries of Origin (DCO) Scheme that empowers the Minister to declare certain countries "safe" for refugees. CARL contends refugee claimants from DCOs will be rushed through the claim process without important procedural protections.

Cuts to the Interim Federal Health Program that will leave many refugee claimants with no health care coverage in violation of Canada's commitment to an acceptable level of healthcare for all who reside here. These cuts affect both medications and psychological services that are critical for refugees who are survivors of torture, or violence.

While I carry out this research for CARL, I will be based at the Refugee Law Office of Legal Aid Ontario where I will also assist lawyers in their day-to-day work. Through my work for both of these organizations, I am looking forward to gaining first hand experience of the challenges involved in serving legally aided refugee claimants, and of the refugee claim process more generally.

Katherine Macdonald is a second-year JD candidate at the University of Toronto, Faculty of Law

Internship with the South Asian Legal Clinic of Ontario (SALCO)

I have been able to secure an internship with South Asian Legal Clinic of Ontario (SALCO) for the period commencing from 1 May to 15 August 2013. As part of the internship, I will be required to assist the clinic staff in conducting research on existing cases and projects being handled by the clinic. During my internship, I will primarily be involved in two projects. The first project will include research and drafting recommendations on the issue of forced marriages amongst South Asian families in Greater Toronto Area. I would research the existing legislation, case law, and policy recommendations. My role will also include interviewing families and victims of forced marriage and documenting my findings along with recommendations.

The second project I will work on in the clinic focuses on domestic violence in South Asian families in Toronto. The scope of this project includes interviews with domestic violence survivors, complainants, as well as the accused family members. I will research the existing Canadian legislation and cases dealing with the issue of domestic violence and draw my conclusions based on the findings.

Both these projects form part of the core area of practice of SALCO. Working on these projects would involve organizing and attending workshops, creating legal awareness, interacting and advising the aggrieved, compiling a database and legal research.

SALCO was started by a group of volunteers who noticed a real need

for culturally and linguistically appropriate legal services for low-income South Asians. SALCO was run as a volunteer clinic from 1999 to 2001 by South Asian lawyers and activists. From 2001 onwards, it began receiving periodic project funding from Legal Aid Ontario to provide services through a lawyer and community legal worker. It also received funding from the Law Foundation of Ontario, which supported the vision of a permanent legal clinic.

With tremendous community support as well as the hard work and dedication of volunteer lawyers, activists, and SALCO's limited staff, the organization was successful in receiving permanent funding as a legal clinic in 2007 from Legal Aid Ontario. In 2007, SALCO became the newest legal clinic to be funded in the province of Ontario. The demand for SALCO services continues to grow.

I am hopeful that the internship would give me a tremendous insight into various international human rights issues as well and will also get me acquainted with various challenges one can face while dealing with such issues, from an activist's point of view.

Shweta Chaudhary is an LLM candidate at the University of Toronto, Faculty of Law.

Internship at the Canadian Centre for Victims of Torture

This summer I will be working as a legal intern at the Canadian Centre for Victims of Torture (CCVT) under Dr. Ezat Mossallanajed, their head law and policy analyst. In liason with the CCVT's legal committee, I will be helping to provide legal support to survivors of torture, war, genocide, and crimes against humanity who are seeking the protection of refugee status in Canada.

The CCVT's comprehensive view of rehabilitation emphasizes the resolution of refugee claims as being essential to the stability and security that survivors need as a foundation upon which to begin rebuilding their lives. Torture survivors are especially vulnerable to retraumatization, but obtaining the protection of legal status and the guarantee of non-refoulement is a critical aspect of their recovery process. The primary contribution I will make will be in helping torture survivors obtain refugee status by providing legal support in some critical capacities that are not being addressed by legal aid. My responsibilities will include assisting the center's clients with their basis of claim forms, and in filing humanitarian and compassionate refugee claims under the stringent new criteria imposed by Bill C-31. Additionally, I will travel to consult with claimants being held at various detention centers pursuant to the disciplinary stipulations of Bill C-31.

My second major responsibility to the CCVT's mandate for the exposure, prevention, and eradication of torture will be monitoring international

decisions that have precedence for survivors in Canada and around the world, in order to help the center develop more comprehensive legal strategies for the protection of their clients, and the advancement of their claims. Over the course of the summer, I will conduct continuous research on all available legal instruments against torture and on all developments in international law and policy pertinent to the rehabilitation of its survivors and their struggles for justice. I will have the opportunity to present some of this research as part of the CCVT delegation at a conference on refugee law that will be held by the Canadian Council for Refugees in Vancouver.

Additionally, my supervisor expects that I will contribute legal perspectives to the CCVT's publications and the research it shares with the public. I will also have the opportunity to contribute to the CCVT's submissions to the UN as well as regional organizations (i.e. the InterAmerican Commission on Human Rights) on Canada's compliance with its international legal obligations against torture, and affecting its survivors.

I am very much looking forward to developing my legal knowledge and skills by participating in the advancement of this immensely important international humanitarian priority.

Aron Katz Zaltz is a first-year JD candidate at the University of Toronto, Faculty of Law.

Annual SPINLAW Conference reflects on 30 Years under the Charter

On March 16, students and community members from across the province gathered at Osgoode Hall Law School for the annual SPINLAW (Student Public Interest Network Legal Action Workshop) conference. Lawyers, academics, and community activists shared their perspectives through panels organized around the theme *30 Years Under the Living Tree – Reflections on the Canadian Charter of Rights and Freedoms*.

In his opening plenary, keynote speaker Raj Anand (former Chief Commissioner of the Ontario Human Rights Commission) identified three main failings of equality jurisprudence to date: ineffectiveness of race-based litigation, access to justice, and lack of recognition of socioeconomic rights. These topics were examined in three of the six panels held throughout the day. Other panel topics included gender expression and trans rights in Ontario, the blending of the *Charter* equality test with the test for discrimination under Ontario's *Human Rights Code*, and Aboriginal peoples' constitutional rights.

Speaking about the future of *Charter* litigation, keynote speakers Joe Arvay and Fay Faraday reiterated the importance of immersing oneself in the reality of the person or group whose rights you are defending. While the speakers disagreed on whether being an advocate is the same as being an activist, they agreed on the necessity of establishing a robust evidentiary record in order to help the judge connect with the human aspect of your client's story. Fay Faraday, who has been involved in litigation relating to migrant rights, discrimination, and income security, outlined the difficulty of introducing evidence of unspoken power and privilege in court.

Alluding to the theme of the keynote address, "Romanticizing the *Charter*", the speakers characterized the *Charter* as a moment in law that allowed



University of Toronto law students help with registration

people to place their hope in something that could be an instrument of good. Fay Faraday encouraged the audience to revisit key decisions of the Dickson and Lamer courts, where the court enunciated a social contract in which everyone has a lived experience infused with the enjoyment of their rights.

While both speakers helped advance this social contract for disadvantaged groups in Canada through *Charter* litigation, Joe Arvay reminded the audience that the *Charter* is only one instrument for advancing rights. Other speakers spoke of the importance of pursuing political advocacy alongside legal challenges. This approach recognizes that a good advocate should be primarily concerned with the outcome for their client, not abstract legal argument.

One panellist sought inspiration from former Supreme Court justice Louise Arbour, who once queried if judges were too timid, particularly in the defence of human rights. It is exciting to imagine how students and activists in the audience will affect the next generation of the legal profession as it grapples with salient social issues.

SPINLAW is co-organized by students at the University of Toronto Faculty of Law and Osgoode Hall Law School. At the conference, Acting Dean Duggan spoke of the importance of collaborative student initiatives. SPINLAW was also joined by U of T Professor Kent Roach, who spoke about constitutional remedies in the context of socioeconomic rights, and Aboriginal Law Program Coordinator Lisa Del Col, who moderated the panel on Aboriginal peoples' constitutional rights.

Lisa Wilder 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

In an increasingly hostile atmosphere to the rights of immigrants and refugees in Canada, the Asper Centre Refugee and Immigration Law Working Group had a busy Winter semester. The work of the group was focused on four separate projects: a memo on *jus soli* citizenship, an Interim Federal Health Program (IFHP) cuts research project, an IFHP advocacy project, and continuation of the niqab ban work.

First, in partnership with the Canadian Association for Refugee Lawyers (CARL), students worked to produce a memo on *jus soli* citizenship, and the potential for revocation of this citizenship regime in Canada. Although everyone born on Canadian soil is currently entitled to citizenship, the government has indicated that this system may be reformed, and avenues for citizenship narrowed. To prepare CARL for potential reforms, the group drafted a memo outlining the current system, the potential for change, and possible constitutional and policy challenges which could be launched in the event of government reforms to *jus soli* citizenship in Canada.

Second, a group of students filed an Access to Information Request to obtain information from the government regarding the IFH cuts. Research emanating from this request will be used to support CARL's work in this area.

Third, a group of students attempted to connect with local health care providers and refugee advocacy organizations in the hopes of creating public legal education materials to support refugees seeking access to health care. While the group was unable to launch the live project this semester - and learned a valuable lesson about the barriers and challenges of undertaking community-based advocacy work - the project will be continued next year.

Finally, the working group on the Ban on Face Coverings at Citizenship Ceremonies finalized research memos on *Charter* and comparative law issues, working under the supervision of Professor Audrey Macklin. Specifically, the group drafted memos on potential breaches of s. 2(a) and s. 15 of the Charter, as well as the treatment of similar bans in France, Belgium, and the Netherlands by domestic and international courts. The memos will be used in assessing the potential for a legal challenge to the ban.

In addition to these formal projects, as part of the Law in Action Within Schools Program's (LAWS) Global Citizenship Conference, students from the working group presented at Harbord Collegiate Institute and Central Technical School on Canada's refugee policy and current reforms to the system. Drawing on their research towards CARL's challenge to Bill C-31, they led LAWS students in approaching the concepts of global citizenship and refugee rights through the principles of constitutionality and the rule of law. The LAWS students were able to bring Charter arguments to bear in analyzing and challenging the legislative scheme, and to connect their social and political ideas to their implications in this legal context.

In a year when immigrants and refugees saw their constitutional rights further eroded, the Working Group was honored to work with CARL and to contribute to the protection and assertion of the constitutional rights of all individuals, regardless of origin.

Aria Laskin and Sofia Ijaz are second-year JD candidates, **Azeezah Kanji** is a third-year JD candidate, and **Aron Katz Zaltz** is a first-year JD candidate at the University of Toronto, Faculty of Law.

Privacy Law Working Group

This February, a group of 1L students spent a day of their reading week wandering Toronto like scouts. The students wandered around campus and nearby locations frequented by law students—the Eaton centre, Bloor Street, Grad House, local grocery stores and Museum Station, for instance—taking photographs of security cameras and making notes on associated signage (or complete lack thereof).

As part of their work with the Asper Centre Working Group on Section 8 of the Charter and New Technologies, this group was creating a map of how members of the law school community are subject to surveillance in their day-to-day lives, and analyzing whether this surveillance was in line with relevant statutory authorities, including the *Personal Information Protection and Electronic Documents Act (PIPEDA)*.

To use video surveillance in way that complies with privacy statutes generally requires signage that indicates that video surveillance is being conducted. These signs should include information such as: whether cameras are being monitored live or recorded; the purpose of the surveillance; the name of the organizations responsible for surveillance scheme; and contact information for the people in the organization who are responsible for privacy protection, as well as for the Office of the Privacy Commissioner [see Andrew Clement, "Minimal Privacy Compliance Standard for Canadian Video Surveillance Installations," *SurveillanceRights.org*]. The evidence suggests that signs are rarely present at all, and where they are, they do not meet the minimal statutory requirements.

This surveillance map is the public legal education arm of the students' work on Section 8. While compliance with *PIPEDA* is distinct from the analysis undertaken under section 8, in *R v Gomboc* the Supreme Court has found statutory standards to be relevant to whether an individual has a reasonable

expectation of privacy, the threshold question that triggers the protection of section 8 of the Charter.

Video surveillance also has significant implications for privacy. There is potential for law enforcement to access these video records as part of criminal investigations. More generally, however, as surveillance increases and compliance with privacy statutes remains poor, we confront an uncomfortable reality that an increasing proportion of our movements are being recorded in an effectively unregulated way.

The results of the students mapping project will be released this summer on the Asper Centre website, alongside the second major component of the students' work: a report that examines how judges are conceptualizing new technologies in the jurisprudence on section 8 of the Charter. Judges frequently rely on analogies to understand how new technologies operate and how they are used. Are computers like filing cabinets (*R v Vu*)? Are they like diaries (*R v Cross*)? Or safes (*R v Cole*)? The analogies that judges choose play a role in whether they find that individuals using these technologies have a reasonable expectation of privacy that can trigger the protection of section 8 of the *Charter*. As a result, helping judges get the analogies right is essential.

These two pieces together respond to an important issue: the ability of our law (and our jurists) to keep pace with changing technologies. The Asper Centre is proud of the students' work on these projects, and looks forward to releasing the final products later this summer.

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

Interview with John Norris, the Asper Centre's new Constitutional-Litigator-in-Residence

What attracted you to the position of Constitutional-Litigator-in-Residence at the Asper Centre?

I have a longstanding affiliation with the U of T law school. I'm a graduate of the school, and I've been teaching there for over 15 years. I've also acted for the Asper Centre on some of their SCC interventions. One thing I've found personally rewarding about my work at the law school is that it allows me to bring my practice into the academic environment. This opportunity seemed like another great chance to do that.

Do you know what kind of work you will be involved with at the Centre? What do you hope to gain from the experience?

I don't know too many specifics yet. Some of my firm's files—some of the pro bono work I do—would fit the Centre's mandate quite nicely, but of course I'm also open to taking on new projects. Whatever works best for the Centre and the students.

Do you expect to work with students while you're at the Centre?

I'll be involved in the Asper Centre Clinic that students can take for credit. This will allow me to work directly with students. I will also present a paper at the law school, which I'm really looking forward to. I certainly hope to work with students as much as possible.

How did you get involved in constitutional litigation?

I have always been a criminal defence lawyer. I articulated with the law firm of Ruby & Edwardh and continued there as a lawyer for many years. Constitutional issues were always at the forefront of the firm's work. I learned a tremendous amount about the importance of constitutional litigation in the criminal context and how to put this into effect in the courtroom. I still work as a criminal defence lawyer but my practice has also broadened to include immigration law and national security. My work in these areas has exposed me to many other important constitutional issues.

You've been in the news recently after agreeing to represent Raed Jaser, who is accused of plotting to derail a VIA Rail train. You've also been involved with other high-profile terrorism cases in the past. What are some of the special challenges that these kinds of cases have presented for you?

A lot of challenges come up in these kinds of cases, but two in particular stand out. The first is the extent to which these cases operate in the media spotlight. This can make them quite challenging from the lawyer's perspective. The media demands information, and it's their job to disseminate information, but this often stands in tension with my work as a lawyer. As a lawyer, one must do everything one can to protect the accused's right to a fair trial, and sometimes this means controlling or even preventing the release of information before the trial. Protecting the right to a fair trial is vastly more difficult than usual in these kinds of high-profile cases.

The second challenge is dealing with the public's rush to judgment in these cases. The public tendency to assume the guilt of those charged with a criminal offence is even more pronounced in terrorism cases than in most others. This, together with the high stakes in these cases, certainly increases the pressure on defence counsel.



Are there any novel constitutional issues to which your involvement in terrorism cases has exposed you?

Two particularly interesting issues I've been involved with come to mind. First, there was a trio of cases that eventually reached the Supreme Court of Canada: *Nadarajah*, *Sriskandarajah*, and *Khawaja*. These cases involved a challenge to the constitutionality of the *Anti-Terrorism Act* itself. This is a good example of an important issue that is unique to this context.

The other case that comes to mind is the Toronto 18 case. In that case I was involved in a constitutional challenge to the scheme set out s.38 of the *Canada*

Evidence Act, which gives the Federal Court jurisdiction over the disclosure of information pertaining to international relations, national defence, or national security. We successfully challenged the scheme at trial, but the SCC later reversed the decision (in *R v Ahmad*, 2011 SCC 6).

What are some other memorable cases you've worked on?

I can give you the high point and the low point. The high point was *Charakaoui* (2007 SCC 9). In that case the Supreme Court held that the process used to review security certificates for non-citizens living in Canada was unconstitutional. This ultimately led to important legislative changes including the adoption of the special advocate model. The case was a true triumph of justice, and I was honoured to be a part of it. It has also directly affected the course of my own career, since I am now working as a special advocate.

The low point was *Hall* (2002 SCC 64). In that case we challenged the constitutionality of section 515(10)(c) of the *Criminal Code*, which allows bail to be denied to maintain confidence in the administration of justice. The Supreme Court of Canada split 5-4, with the majority upholding the provision. With great respect to the majority, I still believe Iacobucci J.'s dissent got it exactly right.

What do you find most rewarding about constitutional litigation generally?

It's hard work, no doubt, but it's also really fantastic work—so it's hard work that's easy to do.

I think what I find most rewarding about constitutional litigation is that it gives us as lawyers a chance to try to shape the values that the law expresses and represents. Sometimes Parliament doesn't get it right, sometimes the police mess things up. To have the opportunity to demonstrate this is tremendously rewarding and important work. It is always gratifying to help uphold the fundamental values enshrined in the *Charter*, especially when they are under attack from so many quarters today.

What would you say to students who wish to become involved in constitutional law and constitutional litigation? Is there anything they can do to help make that a reality?

Unless you work in the government, it is impossible to be *only* a constitutional litigator. What you need to do is find a niche within which constitutional issues are likely to arise. Criminal law is an obvious one, but there are others; family law, for instance, involves some very important constitutional issues. Certainly, though, you will need to have a day job that isn't focused solely on constitutional matters if you want to survive.

Craig Mullins is a second-year JD candidate at the University of Toronto, Faculty of Law.

Update on Asper Centre Cases

R v Kokopenace: Prof. Kent Roach and Cheryl Milne represented the Asper Centre in this appeal in the Ontario Court of Appeal which focused on the under-representation of First Nations on reserve people on the jury rolls for the Kenora area. The appeal was heard in May, 2012 and we still await the Court's decision. In the meantime, the Hon. Frank Iacobucci released his report on the issue which outlines the complexity of the problem and the need for solutions.

Divito v Canada (Minister of Public Safety and Emergency Preparedness): As reported elsewhere in this newsletter, Prof. Audrey Macklin and Cheryl Milne appeared at the Supreme Court of Canada on February 18, 2013 for the hearing of this appeal. The Asper Centre's submissions focused on the intersection of the Charter and administrative law in respect of the review of the Minister's decision. The decision is on reserve.

Canada v Zajicek: The Asper Centre had been granted intervener standing in this appeal of an extradition case before the Supreme Court of Canada. The Centre was represented by John Norris. In May, 2013, the Court quashed the appeal for mootness.

Tanudjaja et al v AG Ontario and AG Canada: Prof. Kent Roach and Cheryl Milne appeared on behalf of the Asper Centre in its intervention on the governments' motion to strike the pleadings in this case, which focuses on housing rights under the Charter. The governments argued that the claims under s.7 and s.15 have no reasonable prospect of success, being a claim for positive economic rights not protected under the Charter. The Asper Centre focused its submissions on countering the claim that the remedy sought was not justiciable. The Court has reserved its decision.

Canada v Bedford: The Asper Centre was granted intervener standing and given 10 minutes of oral argument on this appeal of the challenge to several prostitution related provisions of the Criminal Code set for June 13, 2013. The Centre's submissions focus on the role of *stare decisis* in Charter litigation. The Centre will be represented by Joseph Arvay, Q.C. and Cheryl Milne.

More information about the cases, including the factums filed on behalf of the Centre,
is available on the Asper Centre website.
www.aspercentre.ca



SAVE THE DATE! NOVEMBER 8, 2013

In the Fall 2013, the David Asper Centre marks its 5th Anniversary. During this short period of time, it has successfully intervened in 11 Charter rights cases, including 8 appeals at the Supreme Court of Canada. It has hosted numerous workshops and symposia on constitutional law and provided research and policy briefs on many current issues involving Charter rights and government actions or proposed legislation.

Mark your calendars and plan to join us for a symposium on the impact of the ground-breaking Charter litigation to which we have been privileged to contribute.



David Asper Centre for Constitutional Rights UNIVERSITY OF TORONTO

Faculty of Law, University of Toronto
39 Queen's Park Cres. East, Rm 301
Toronto, ON M5S 2C3
Phone: 416-978-0092
Fax: 416-978-8894
www.aspercentre.ca

The Asper Centre Outlook is the official newsletter of the
David Asper Centre for Constitutional Rights. It is
published two times per academic year.

Co-Editors: Janet Lunau and Craig Mullins.