20 October 2017

The Asper Centre Constitutional Roundtable Series'

Constitutional Law Symposium for Canada's Sesquicentennial

LIST of ABSTRACTS

PANEL I: Section 7 of the Charter of Rights and Freedoms

Hamish Stewart, Professor, University of Toronto, Faculty of Law

"**Criminal Procedure: How Did the *Charter* Matter?"**

There is no question that the legal rights guaranteed in ss. 7 through 14 of the *Charter*, together with the remedies available under s. 24, have transformed Canadian criminal procedure. Yet many of the most significant transformations in criminal procedure law could have been achieved before the *Charter*, through rigorous applications of the *Canadian Bill of Rights*, S.C. 1960, c. 44, rights-oriented exercises in statutory interpretation, or development of the common law. Conversely, some of the most significant *Charter* cases could have been decided in a way that was much less favourable to the protection of the right at issue; indeed, with respect to certain aspects of criminal procedure, it is arguable that the rights of suspects and accused persons are less well-protected now than before the *Charter* came into force. I will demonstrate these points by comparing pre-*Charter* and post-*Charter* cases on topics such as Crown disclosure (*Duke v. The Queen*, [1972] S.C.R. 917; *R. v. Stinchcombe*, [1993]); the exclusion of improperly obtained evidence (*Hogan v. The Queen*, [1975] 2 S.C.R. 574; *R. v. Collins*, [1987] 1 S.C.R. 265); reverse onus provisions (*R. v. Appleby*, [1972] S.C.R. 303; *R. v. Oakes*, [1986] 1 S.C.R. 103); the right to silence (*Rothman v. The Queen*, [1981] 1 S.C.R. 640; *R. v. Hebert*, [1990] 2 S.C.R. 151); and the balancing of probative value and prejudicial effect (*R. v. Wray*, [1971] S.C.R. 272; *R. v. Seaboyer*, [1991] 2 S.C.R. 577). My claim will not be that the *Charter* did not matter to these issues; of course it did. But the comparison of cases will show that it was not the specific wording of the Charter or even its legal authority as part of the Constitution that made the difference. I suspect that, as others have suggested, the entrenchment of the *Charter* made it easier for judges to see themselves as part of the "culture of justification" that is essential for a rights-oriented legal order to flourish regardless of the precise wording of its statutory and constitutional provisions.

Martha Jackman, Professor, University of Ottawa, Faculty of Law

"One Step Forward and Two Steps Back: The Legacy of Gosselin"

In his 1989 judgment in Irwin Toy v Quebec, Chief Justice Dickson affirmed that, while "corporate-commercial economic rights" were excluded from the Charter, "economic rights fundamental to human life or survival" might nevertheless fall within the ambit of section 7. Shortly thereafter, Louise Gosselin brought such a claim, challenging a provincial welfare regime that effectively forced her to choose between hunger and homelessness. In 2002, the Supreme Court rejected Ms. Gosselin's argument that her Charter rights had been infringed. Writing for the majority in Gosselin v Quebec, Chief Justice McLachlin asserted that: "The question … is not whether s. 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not." Looking back, the paper will examine the basis for the majority and dissenting justices' competing understandings of the scope and application of section 7 as well as the longer-term impact of the Gosselin ruling, particularly for people living in poverty. The paper will argue that Gosselin's legacy is a Charter out of touch both with Canada's international human rights obligations and the reality of those whose claims are being read out. Looking forward, the paper will consider what is required for this situation to change, so that everyone is finally accorded the equal benefit and protection of this most basic constitutional guarantee.

Audrey Macklin, Director of the Centre for Criminology & Sociolegal Studies, Professor & Chair in Human Rights Law, University of Toronto, Faculty of Law

"The Inside Out Constitution"

Section 52 of the Constitution declares the Charter to be the supreme law of Canada. The effect of *Chiarelli* and its progeny has been to subordinate s. 7 of the Charter to a common law principle or, more precisely, a Crown prerogative. The axiom that, according to the common law, 'non-citizens do not have an unqualified right to enter or remain' was used first to pre-empt access to fundamental justice, and then to deny that deportation 'as such' engaged life, liberty and security of the person under s.7. I explore the jurisprudential logic that has produced this effect, and query its doctrinal coherence and normative basis.

Panel II - Seminal Cases for Past Reflection and Future Consideration

Ben Berger, Associate Dean and Associate Professor, Osgoode Hall Law School

"Assessing Adler: The Weight of Constitutional History and the Future of Religious Freedom"

The Supreme Court of Canada's decision in Adler v Ontario, sits at a provocative conceptual pivot point between the history and the future of law and religion in Canada. Looking backwards, in Adler the Supreme Court of Canada provides an account of constitutional history that positions the interaction of law and religion at the heart of the origins of the country. Speaking of the

protection for denominational schools included in s. 93 of the BNA Act, Justice Iacobucci, for the majority of the Court, explained that "[w]ithout this 'solemn pact', this 'cardinal term' of Union, there would have been no Confederation." Asked to assess this historical pact against the equality and religious guarantees found in the Charter of Rights and Freedoms, the Court found that the new rights instrument would have to do its work within the local, historical, and political logic of the older parts of our constitutional tradition. Adler thus stands for much about the role of religion in our constitutional history: the absence of a non-establishment principle, the confluence of religion and the political, and even the outcomes of the Quiet Revolution in Quebec.

Looking ahead, the Adler decisions points to the key role that education would play in the politics and law of religious freedom in Canada over the subsequent 20 years. The decision itself remained contentious and politically volatile, of course, shaping elections in Ontario. But we would also come to see that the interaction of religion and education, and the interests that both the state and religious communities have in the education of children, would be not just a matter of constitutional history in Canada, but "genetic" to the jurisprudence on religious freedom in Canada. From Trinity Western and Chamberlain, to SL and Loyola, education would be the terrain on which the future of religious freedom doctrine would work itself out. In recent years we have seen the ascendancy of the idea of state neutrality (Saguenay) and the possible renaissance of group interests and rights in religious freedom (Loyola). In this paper I would propose to use Adler as an entry point into examining the history and exploring the future of religious freedom in Canada, and the particular role that litigation over education plays in that history and future; and, ultimately, I would raise the question, "given recent developments, is the holding in Adler secure?"

Richard Moon: Professor, University of Windsor, Faculty of Law

"Dolphin Delivery and the Court's Loss of Confidence"

In the post-WWII period rights that had previously been understood as practical and social in character, were reframed by the courts as fundamental individual claims against the state (eg. Saumur v. Quebec). I will argue that many of the complaints about Dolphin Delivery – and other early Charter cases -- stem from the SCC's attempt to maintain this abstract conception of rights and to suppress the social and material character of protected practices such as expression and worship. When the Court in Dolphin Delivery defines the scope of freedom of expression, it regards the individual as free and rational, as an autonomous agent capable of giving direction to her life. However, when the Court assesses the freedom's limits, it shifts to a behavioural or causal discourse. The Court seems to rely on a different image of the individual -- as irrational, manipulable, directed by unchosen preferences and desires. Expression is seen as a form of action that impacts on the individual, sometimes causing harm or sometimes causing him/her to do harm. When expression takes place in a form and context in which individual judgment seems constrained, the Court finds it easier to treat the expression as a form of action that 'impacts' the individual, than to isolate the exceptional character or circumstances of the expression. The Court's decision in Dolphin Delivery that the Charter applies (only) to government action, but not

to court orders, stems also from the Court's wish to elide the social/material character of protected practices.

Margot Young, Professor, University of British Columbia, Allard School of Law

"Equality at Large: Section 15 and the Rest of the Charter"

This paper takes up the task of examining "conflict" between the equality rights /values of the Canadian Charter of Rights and Freedoms and other freedoms protected elsewhere in the Charter. A growing reach for constitutionalized equality rights threatens traditional belief systems. Indeed, the critical bite of equality rights demands that this be the case. But such challenge is also problematic when the values under threat represent key choices made by private individuals. This is, from one perspective, illustrative of liberal rights' unavoidable tension: rights enforcement against the state is liberatory for individual rights holders, yet the collective reordering of social relations rights can bring about also threatens that same individual freedom. In some sense, this is simply to say that liberal rights application always drags into view the murky division between public and private spheres. But, it is also to observe that the challenge equality aspirations present to more traditional beliefs will require for our courts, on occasion, some form of doctrinal resolution of rights in tension. This paper looks at this issue from the perspectives raised by the Trinity Western University issue: the tension in that case between equality rights for LGBTQ groups and the religious freedom of the TWU community. The larger frame for the paper is more theoretical and doctrinal, looking at key equality and religious rights cases and commentary, but the TWU case is effective illustration of this more abstract examination.

Panel III- Outside the Four Corners of the Charter

Eric Adams, Associate Professor, University of Alberta, Faculty of Law

"**Writing Rights: the Canadian Bill of Rights in Canadian Constitutional History"**

The 1960 Canadian Bill of Rights and its case law generally appear as a footnote in Canadian constitutional history. Seen as a disappointing half-measure, courts and scholars alike generally agree that the Bill of Rights cases have little jurisprudential value given the ascendancy of the Canadian Charter of Rights and Freedoms. Among the cases still partially remembered, cited, and celebrated is R v Drybones (1970), the only instance in which the Supreme Court of Canada rendered legislation inoperative under the Bill of Rights. Far from straightforward, however, Drybones is a story of astonishing judicial anxiety, confusion, and reversal. Placed alongside the forgotten jurisprudence of the Bill of Rights, especially Robertson and Rosetanni (1963), and situated within scholarly and popular receptions of the case, Drybones appears not as a dot along a pre-determined trajectory, but as a window into the role of judicial agency, constitutional culture, and constitutional thought in a moment of dramatic constitutional change. I argue that the Canadian Charter of Rights and Freedoms arrived not because the Bill of Rights failed as has so often been argued, but rather because the Bill of Rights succeeded in altering irretrievably, for better and for worse, Canada's constitutional imagination.

Richard Stacey, Assistant Professor, University of Toronto, Faculty of Law

"Honour and Sovereignty: How democratic accountability shapes the duty to consult Indigenous peoples"

In Haida Nation v British Columbia [2004] 3 SCR 511, the Supreme Court held that the extent of the Crown's duty to consult Aboriginal peoples before taking action that may affect their rights or title is proportional to the extent to which rights or title are likely to be affected and the strength of the claim to as-yet unproven rights or title. Considering the related question of who bears this duty to consult, the Court held that the 'procedural aspects of consultation' may be delegated to industry proponents of specific projects. While it seems clear that Crown corporations, tribunals and review boards can fulfil the Crown's duty to consult, questions remain as to whether consultations carried out by a project proponent with the Aboriginal groups likely to be affected by the proposed project, where the Crown acts in no more than a supervisory or oversight capacity, can discharge the Crown's duty to consult. There is a great deal of jurisprudence about the consultation activities of tribunals and review boards, but much less about the consultation activities of industry. Considering the jurisprudence on the first matter, however, helps to generate answers to difficult questions about industry-led consultation with Aboriginal peoples. This paper considers the proposition that the 'delegability' of consultation depends on the nature of the consultation required, rather than on the identity of the delegee: whether consultation can be delegated depends on a Haida analysis of the depth of consultation required.

David Schneiderman, Professor, University of Toronto, Faculty of Law

"**Unwritten Constitutional Principles in Canada: Genuine or Strategic?"**

Culminating with the Quebec Secession Reference (1998), the Supreme Court of Canada identified a number of unwritten principles that it described as the 'lifeblood' of the Constitution – they 'infuse our Constitution,' they wrote, and 'breathe life into it.' Having a 'powerful normative force,' they even could give rise to 'substantive legal obligations.' Since then, the Supreme Court has curiously retreated from this stance, preferring to rely on the written constitution and declining to consider unwritten constitutional principles as altering those substantive commitments. This trend line was most clearly on display in Quebec v. Canada (2015), where the Court resisted having the unwritten constitutional principle of cooperative federalism constrain exercises of unilateral federal authority. Significantly, the three civil law justices from Quebec jointly issued dissenting reasons, having the support of a number of scholars from within Quebec. The Court's behaviour indicates that the justices were not serious about the role of unwritten constitutional principles going forward. The paper argues that the unwritten constitution was developed in the Secession Reference as a response to legitimacy concerns then facing the Court, which are no longer present. Judges and scholars from Quebec mistook these signals as genuinely novel legal developments rather than strategic responses designed to get the Court out of a jam. It is hypothesized that recourse to unwritten constitutional principles indicates that the Court likely is engaging in strategic behavior.