

ASPER CENTRE OUTLOOK

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The #NotwithstandingClause: Section 33 Trends in 2018

By: Jasmit De Saffel

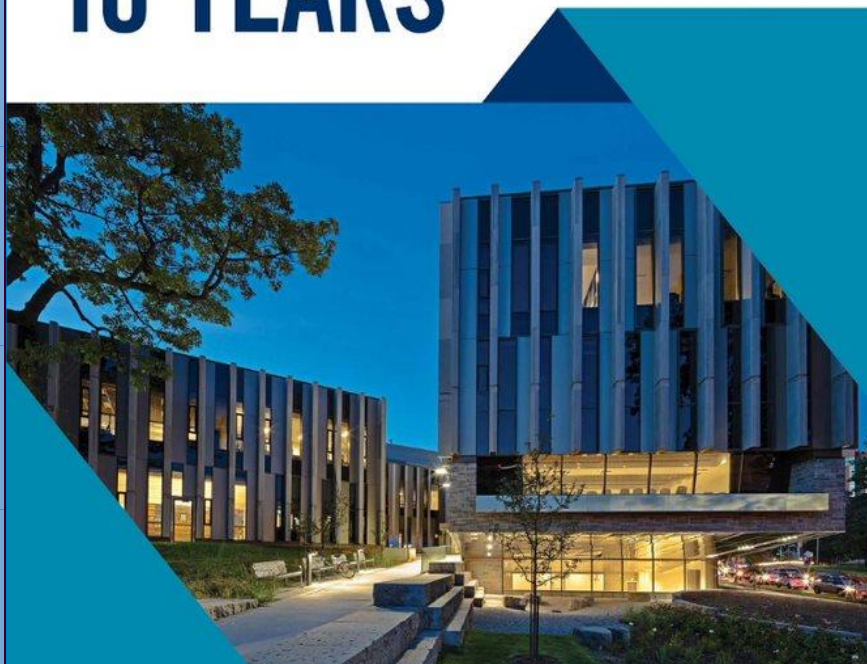
While section 33 (i.e. the notwithstanding clause) of the *Canadian Charter of Rights and Freedoms* has been the subject of extensive academic and legal debate, it was never really a part of mainstream discourse. At least not in the way it was last October, when #NotwithstandingClause trended on Twitter. The not-so-pithy hashtag was a testament to the astonishing nature of the Ford government's threatened use of the clause in attempts to alter the number of municipal wards in Toronto. This was closely followed by Quebec's Premier Pascal Legault's statement about being unafraid to use section 33 to fulfill electoral promises. The leaders of Canada's two most populous provinces using the notwithstanding clause so openly in their rhetoric put section 33 on the public radar in a way it has not been in a long time. It has caused both academic and general discussion about how the clause fits in with our *Charter*-based constitutional democracy.

In a recent survey, Canadians ranked the *Charter* as the number one symbol reflecting their identity as Canadians, above both hockey and the maple leaf. Considering this widespread importance of the *Charter* to Canadians today, it is no surprise that the thought of its guaranteed rights being undermined by the notwithstanding clause caused such an uproar. (*continued on page 3*)

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CELEBRATING 10 YEARS



Message from the Executive Director

It was with great pleasure and the support of the faculty that we held our tenth anniversary celebration in October 2018. It is hard to believe that ten years have passed since I took on the task of helping to create a one-of-a-kind Centre as part of the University of Toronto Law Faculty. But when I look at what we have accomplished, it is hard to believe that we have done so much in only ten years. Over this time, there have been many changes to Canada's constitutional landscape, including changes in government and new appointments to the Supreme Court of Canada. The role of interveners in constitutional litigation has also changed with more intervening groups achieving standing but with tighter controls on how they can contribute. Within that context, I have tried to be strategic in the cases that the Centre has chosen in order to make the biggest impact. We have also had the privilege of working with some of the best lawyers in the country, including our Constitutional Litigators in Residence, faculty members at this law school and other top litigators.

The work of these experts were highlighted in two recent decisions from the Supreme Court of Canada. In *Frank v Canada*, a challenge to the disenfranchisement of non-resident citizens, the majority judgment positively referenced the arguments we made through our legal team of Professor Audrey Macklin and alumnus Louis Century. Louis appeared on our behalf before the Court almost a year ago, ably presenting our argument on the interpretation of s.3 of the Charter. In another decision, *R v Bird*, that did not necessarily go as we had hoped, the majority also acknowledged the submissions drafted by our team of clinic students and presented at court by our then constitutional litigator in residence, Breese Davies, that judicial review at the federal court was not an accessible way for a long term offender to challenge the conditions of his community release. More detailed descriptions of these decisions can be found in blog posts created by Asper Centre students Sahil Kesar and Jasmit De Saffel.

As I mentioned in our most recent annual report, the next 10 years will challenge us to innovate and grow. We are no longer the “new kid on the block” and will be expected to continue our substantive contributions to constitutional law in Canada based upon the high expectations we have generated from our past work. This challenge has been made easier by the generous donation by David Asper to further strengthen the endowment that funds our activities. His donation of \$2.5 million over the next 5 years will both ensure the long-term viability of the Centre and, with the university's matching funds, establish David Asper bursaries for future law students. We continue to be grateful for the generous support of David Asper to the faculty and the Centre.



Cheryl Milne welcoming guests at 10th anniversary event
(Photo: D.Chang)

Section 33 of the *Charter* reads as follows:

33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter;

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration

Section 33 allows Parliament or legislatures to override some of the rights and freedoms guaranteed in the *Charter* by including an express declaration of its use in the statute or provision. The rights included are the fundamental rights under section 2, the legal rights in sections 7 to 14 and the equality rights under section 15. Other *Charter* rights, including democratic and mobility rights, cannot be overridden by section 33. Section 1's notable exception gives credence to the interpretation that section 33 cannot be invoked in a manner inconsistent with the values of a "free and democratic society."

History

The notwithstanding clause was included as a compromise to convince the Western provinces to sign on to the *Charter*. It was meant to appease concerns that the *Charter* would act as a centralizing force and allow the courts to overrule political will. Chretien, who was Justice Minister at the time of patriation, explained section 33 as "a safety valve, which is unlikely ever to be used except in non-controversial circumstances."

The clause has been most notably used by Quebec. Between 1982 and 1985 it was included as boilerplate language in every statute passed by the National Assembly, in political protest to the *Charter's* patriation. The National Assembly also adopted an *Act Respecting the Constitution Act 1982*, which retroactively applied section 33 to every law already existing in Quebec. This strategy was largely upheld by the Supreme Court in *Ford v Quebec*, which held among other things, that tribunals have no jurisdiction to evaluate a legislature's use of the notwithstanding clause. Since 1985, Quebec has used section 33 more sparingly, most notably to allow the government to limit the use of English signage.

Outside of Quebec, section 33 has only been used effectively by Saskatchewan, once to enact back-to-work legislation and once to pass the *School Choice Protection Act*, allowing the government to fund non-Catholic students going to Catholic Schools. Alberta used section 33 once in 2000, when amending their *Marriage Act* to define marriage only as the union between a man and a woman. After the 2004 SCC ruling that gave the federal government sole jurisdiction to determine marriage eligibility, Alberta did not use section 33 again in 2005 to maintain their definition of marriage. Yukon introduced legislation in 1982 stating that provisions of a statute relating to nominating members of the Land Planning Board operated notwithstanding the *Charter's* equality provisions. This legislation was never enacted. Outside of these uses, section 33 has not been invoked since the *Charter's* patriation in 1982. Premiers Ford and Legault's statements indicate a potentially radical change in the scarce use of the notwithstanding clause made thus far.

"a safety valve, which is unlikely ever to be used except in non-controversial circumstances."

A Tool in the Provincial "Toolbox": Ford's Use

The beginning of the Ford government's section 33 saga was the announcement in late July 2018 that Toronto's City Council would be slashed from 47 to 25 members. At this point the election period for the upcoming October 22 municipal election was well underway, having started on May 1. The *Better Local Government Act (Act)*, implementing this reduction and drastically redrawing Toronto's electoral wards, was passed August 14th, 2018.



On September 10 Superior Court Justice Edward Belobaba struck down the *Act* as unconstitutional in a scathing judgement ([City of Toronto et al v. Ontario \(Attorney General\)](#)). Justice Belobaba held that the legislation “substantially interfered” with the freedom of expression of both the municipal candidates and voters by changing the electoral map mid-election. He found that no rationale had been provided for the urgency expressed by the government’s actions, describing the government’s explanations on this matter as “Crickets.”

Mere hours later, Premier Ford decried Justice Belobaba’s decision and announced that he would be recalling the legislature to reintroduce the *Better Local Government Act*, with the notwithstanding clause included. This would have been the first use of the notwithstanding clause in Ontario. It’s important to note that Premier Ford was only able to make this threat because the election in question was municipal. The notwithstanding clause could not have been used to abrogate a decision finding a statute interfering with provincial or federal elections unconstitutional, as those rights are protected by section 3 of the Charter, to which the clause does not apply. Premier Ford’s threat to override Justice Belobaba’s decision led to an outpouring of concern from academics, legal professionals and the general public. It was what led to #NotwithstandingClause trending.

This visceral reaction came from the fundamental questions Premier Ford’s comments raised about the protection of *Charter* rights from legislative decisions. This sentiment was expressed in the “Fight Back against Ford: Rally to Save our Democracy and Rights” rally outside Toronto City Hall two days later.



The decision was also admonished in an open letter to Premier Ford and Attorney General Mulroney from 80 Canadian law professors. The letter said that the “government’s unprecedented move to invoke the notwithstanding clause ... is a dangerous precedent that strikes at the heart of our constitutional democracy.” Notably a statement was also made by former prime minister Jean Chretien, former Saskatchewan premier Roy Romanow and former Ontario attorney general Roy McMurtry, three of the original architects of the *Charter*. They condemned the Premier’s actions, called on his caucus to stand up to him, going so far as to say that “history will judge them by their silence.” There was some commendation for Premier Ford’s announcement, largely from those that have criticized the “judicial activism” the *Charter* has allowed.

**“a thinly thought-out outburst
with no legitimate backing or
defense”**

A week later the Ontario Court of Appeal stayed Justice Belobaba’s decision, holding that the *Better Local Government Act* is constitutional. The three judges on the panel were Justice Alexandra Hoy, associate chief justice of the Court of Appeal for Ontario, and justices Robert Sharpe and Gary Trotter. They held that “it is not in the public interest to permit the impending election to proceed on the basis of a dubious ruling that invalidates legislation duly passed by the Legislature.” The Court of Appeal found that it was not up to the courts to strike down legislation simply for being “unfair”. In his determination of the legislation’s constitutionality, the application judge was held to have erred in law. The doctrines pertaining to section 3 rights could not “be imported to expand the reach of s. 2(b).” At a panel organized by the Asper Centre a few days after the ONCA decision, U of T Law Professor Yasmin Dawood concluded that, “Interrupting an election midstream is inappropriate and completely inconsistent with notions of democratic and electoral fairness, even if it is the case that the provincial government has the power to do so.”

The Ford government, therefore, did not have to make good on their threat to invoke section 33. They were able to withdraw Bill 31, which was going to proceed to second reading later that week and would enforce the 25-ward election by using the notwithstanding clause. Premier Ford was quite open in his willingness to use section 33 in the future, referring to it as a tool in the provincial “toolbox.” “We are prepared to use s. 33 again in the future,” he said. “It is the people who will decide what is in their best interests for this great province.”

Francois Legault: Democracy Decoupled from Rights?

Later in the fall the Coalition Avenir Québec (CAQ) won a majority in Quebec's provincial election. Francois Legault's right-of-centre party campaigned on an opposition to the wearing religious symbols, including the hijab, by police officers, and others with state coercive authority. This religious symbol ban is part of a policy platform aimed at safeguarding Quebec's francophone identity. The day after his election, Premier Legault was very candid about his willingness to use the notwithstanding clause to achieve this legislative objective, stating that if they have to "use the notwithstanding clause to apply what [they] want, the vast majority will agree."



In a CBC Radio interview constitutional law scholar Benjamin Berger expressed deeper concern with Legault's proposed use of section 33 than with Premier Ford's. While he sees Premier Ford's threatened use of section 33 as a thinly thought-out outburst with no legitimate backing or defense, he understands Legault's potential use as much better formulated. He characterizes Legault's proposed use of section 33 to override the freedom of religion guarantee as a targeted use vis-à-vis a vulnerable group, backed by in-depth public discourse. It's a "thoughtful intervention in a substantial issue." What is worrisome about this, according to Professor Berger, is that it reflects a view of democracy decoupled from rights. This is a thin concept of democracy mainly concerned with majoritarian will. He differentiates this from the perspective that democracy is a collectivity of practices resulting from an understanding of everyone as free, equal and dignified. It is critical to keep in mind that Quebec has a unique cultural heritage that it aims to protect within our federal system. However, the maintenance of this collective identity and heritage should not come at the cost of undermining the individual rights guaranteed to all Canadians by the *Charter*.

Looking ahead

Section 33 has received more attention in the last six months than it has in a long time and what that means precisely is still unclear. What we do know is that two provincial leaders have made it clear that they are willing and able to use section 33 to push through their legislative agenda. While this is unprecedented, I do not believe the apocalyptic laments about our rights being in peril are giving the *Charter* enough credit. The Charter may only be a few decades old, but it has widespread, pan-Canadian support. In its short lifespan, it has become an integral

part of Canadian identity and this is not likely to be undone by threats or even actual uses of the notwithstanding clause.

"The apocalyptic laments about our rights being in peril are not giving the *Charter* enough credit."

Section 33 is not an inherently problematic part of our constitution. When used correctly, with the support of evidence and legitimate arguments, it is an important part of our constitutional democracy. The judiciary is not infallible and if the legislative branch genuinely believes it has a better understanding of our rights and freedoms, the notwithstanding clause provides a instrument to allow this dialogue. The emphasis here is on the fact that this should be an open and candid discourse about what is best for the citizenry, not an adversarial attack on the legitimacy of the judiciary. This delicate balancing mechanism is in line with the fact that Canada is multinational federal system, with varying concerns and needs.

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Celebrating the Asper Centre's 10 Year Anniversary

By: Josh Foster

On October 17th, 2018 the University of Toronto Faculty of Law opened its doors in celebration of the David Asper Centre for Constitutional Rights' 10th Anniversary. To borrow from the submissions of Joseph Arvay in [*Carter v Canada \(Attorney General\)*](#), the Asper Centre's 10th Anniversary was a "momentous occasion".

Founded through the generous donation of U of T Law alumnus David Asper (LLM '07), the Asper Centre has marshalled students, faculty and members of the bar toward advancing Canadian constitutional law, and access to constitutional rights since September 2008. This effort has afforded the Asper Centre the opportunity to intervene on multiple constitutional appeals, twenty of which have been before the Supreme Court. These appeals have included such noteworthy cases as: [*Conway v Her Majesty the Queen, et al.*](#), [*Prime Minister of Canada et al. v Omar Khadr*](#), [*Attorney General of Canada v Downtown Eastside Sex Workers United Against Violence Society*](#) and [*Sheryl Kiselback*](#), and [*Canada v Bedford*](#). In addi-

tion to its role as an intervenor, the Asper Centre has prepared policy briefs for numerous Senate Standing Committees, hosted panel discussions on topical constitutional issues, and contributed to legal scholarship.

In recognition of the Asper Centre's dedication to legal advocacy, education, and research, the Faculty of Law hosted a discussion between Mary Eberts and Joseph Arvay. Eberts, a former Asper Centre Constitutional Litigator-in-Residence, has acted as counsel to parties and intervenors at all levels of court and before administrative tribunals and inquests. Further, she advocated for the present language of section 15 of the *Charter*, and was one of the founders of the Women's Legal Education and Action Fund (LEAF). Since 1991, Eberts has been litigation counsel to the Native Women's Association of Canada (NWAC). Arvay, the first Constitutional Litigator-in-Residence for the Asper Centre, is recognized as one of Canada's foremost constitutional litigators. In 1990, he co-founded the firm of Arvay Finlay Barristers and has been awarded honorary doctorates of law from both York University and the University of Victoria. Together, Arvay and



From L to R, Dean Ed Iacobucci, Cheryl Milne, Joseph Arvay (sitting), David Asper, Mary Eberts, and Thomas Cromwell

(photo by D. Chang)



Constitutional panel with former SCC Justice Thomas Cromwell moderating, with Joseph Arvay and Mary Eberts as panelists. (photo by D. Chang)

“interveners play an integral role to constitutional litigation... ensuring that all interests/perspectives relevant to an issue are fairly represented.”

Eberts have appeared before the Supreme Court in more than fifty constitutional appeals. Both were made Officers of the Order of Canada in 2018 for their work.

The discussion between Eberts and Arvay, moderated by former Supreme Court of Canada Justice Thomas Cromwell, focused on wide-ranging topics relevant to public interest litigation, five of which are highlighted here.

First, Eberts and Arvay shared their views on early *Charter* jurisprudence as well as the development of the s. 15(1) equality guarantee. By now it is clear that the Supreme Court’s interpretation of s. 15(1) has been inconsistent. However, both Eberts and Arvay agreed that it has now stabilized. Importantly, Eberts would welcome greater judicial consideration for the meaning of “equal protection and equal benefit of the law” within the equality guarantee.

Second, Eberts and Arvay were asked to express their views on the development of Aboriginal law and Indigenous rights. Notwithstanding the progress made through cases like [*Delgamuukw v British Columbia*](#) and [*Tsilhqot’in Nation v British Columbia*](#), the Asper Centre’s distinguished speakers agreed that there is more to be done. For instance, Eberts suggested that s. 35 of the *Constitution Act, 1982* has been thus far, interpreted too narrowly. Moreover, greater regard must be had for the role of “the emerging Indigenous nations in Canadian federalism”. From the perspective of counsel for Indigenous litigants, Arvay articulated the difficult task of seeking relief from Canadian courts while limiting the room for those same courts to make pronouncements on Indigenous law.

Third, Cromwell asked Eberts and Arvay to share their opinions on the role of interveners in constitutional litigation. Having acted as counsel for numer-

ous interveners, each were well-positioned to answer. For both Eberts and Arvay, interveners play an integral role to constitutional litigation, namely, ensuring that all interests/perspectives relevant to an issue are fairly represented. Unfortunately, the Supreme Court’s continued shift toward minimizing the time given for interveners to make oral submissions tempers their efficacy and utility. The Asper Centre, as a frequent intervener in the Supreme Court has equally been impacted by these temporal limitations.

Fourth, and perhaps most surprisingly, Eberts and Arvay expressed their views on large law firm environments and whether they are conducive to public interest litigation. The fact that most public interest litigation is done on a pro bono basis presents an obvious challenge to any private practice, including large firms. Drawing on their respective experiences in large firms, both Eberts and Arvay suggested that they can serve as excellent environments to facilitate public interest and constitutional litigation. With that said, young lawyers in these settings must be careful not to over commit to pro bono litigation and thereby become unable to meet competing demands.

Lastly, Eberts and Arvay explored their experiences in seeking advanced or special costs orders. For Eberts and Arvay, the law on advanced costs is in an unsatisfactory state. A failure to receive advanced costs for litigants is at the least disheartening and at the worst, prohibitive of meritorious claims. Presently, the bar for granting an advanced costs order is simply too high while revealing the financial vulnerability of the moving party.

In summary, the Asper Centre’s 10th Anniversary celebration was an engaging and informative event. Mirroring the Asper Centre’s mandate, the questions posed to its esteemed guests were oriented around topi-

cal issues in constitutional law and access to constitutional rights. At the Direction of Cheryl Milne, and with the support of its Program Coordinator, Tal Schreier, as well as UTLaw's faculty and students, the Asper Centre has made significant strides in advancing constitutional rights, research and public policy in Canada. Further, the Asper Centre's involvement in constitutional advocacy initiatives and litigation has provided students with the opportunity to gain practi-

cal experience under the tutelage of experienced advocates such as Mary Eberts and Joseph Arvay.

Note: Select papers from this conference will be published in an upcoming dedicated issue of the *Supreme Court Law Review*

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Selected Themes from 2018 Public Interest Litigation Conference

By: Amanda Nash

On March 2nd, 2018 the David Asper Centre for Constitutional Rights convened a conference on Public Interest Litigation. I was able to attend several of the panels, and what follows is an overview of prominent themes that threaded through the assorted talks on recent achievements, challenges, and best practices in public interest litigation. The range of speakers offered a unique lens through which to examine the state of Canadian public interest litigation and the proper role of those seeking to advance the public interest.

Diverse Voices and Lived Experiences

The conference's first panel discussed recent cases in British Columbia and Ontario that brought challenges to the constitutionality of correctional uses of solitary confinement in Canada. Sitting on the panel, Lisa Kerr, Assistant Professor at Queen's Law, argued for the importance of hearing from the, often marginalized, groups that are actually affected by the litigation. She noted that in the case litigated in BC by the BC Civil Liberties Association and the John Howard Society, the experiences of those subjected to prolonged segregation were highlighted. In contrast, she remarked that such voices were notably absent in the

Ontario case. Kerr and the other panelists, Alison Latimer and Kelly Hannah-Moffat, discussed the importance of including indigenous, women's, and mental health perspectives in the discourse and litigation. The cases provide an opportunity to rectify the shocking use of administrative segregation and the adverse impacts it has on already marginalized groups.

Sensitivity to the experiences of marginalized and vulnerable groups and individuals was an active topic throughout the conference. Reinforcing this point, Helgi Maki and Tess Sheldon spoke to the significance of practicing trauma-informed law. They argued that lawyers have a professional responsibility to meet their clients' needs and interests, and where trauma might cause impairments in memory, communication, and trust, lawyers ought to build a professional relationship that is attentive to these considerations. Understanding the effects and experiences of trauma, they explained, can facilitate more fruitful and sensitive lawyering.

Many of the speakers referenced the fact that public interest litigation does not occur in a vacuum, since the wrongs we seek to redress affect real individuals. Reflecting upon the case of [*PS v Ontario*](#), where PS, a deaf man, had been involuntarily detained for 19 years under the *Mental Health Act*, Karen Spector discussed

the considerations public interest work must always bear in mind when advocating for the interests of persons with mental health disabilities. She reviewed her experience acting for the Mental Health Legal Committee in their intervention in the PS case before the Consent and Capacity Board. She noted that it is the role of interveners to ensure that adjudicators are aware of the consequences of their decisions on the wider communities. Whether they are party to the litigation or have experienced the disproportionate impacts of the law, public interest work nearly always involves vulnerable groups. As several speakers argued, it is incumbent upon the legal profession to always be mindful of how intersecting factors can shape the experiences of the clients and groups we serve.

Multimodal Advocacy

The value of engaging with affected communities is not confined only to test cases or intervention, but extends outside of the courtroom. Josh Paterson, Executive Director of the BCCLA, noted his organization's ongoing efforts to work with affected individuals. In the case of [Carter v Canada](#), the BCCLA employed this strategy to hear from affected individuals, and then convey their stories to spread awareness and understanding, whilst also garnering public support.

Not only does engaging affected communities involve hearing from specific individuals, but it can also demand that public interest work involve media work to foster support from the broader public. Anne Levesque shared the meaningfulness of public support in the [First Nations Child and Family Caring Society v Canada](#) case, which concerned the government's gross underfunding of services for First Nations children. The case spurred the "I am a Witness" campaign, which first started as a public education initiative, but evolved into its own social movement. The campaign cultivated public support, lead the hearings to be televised, and allowed First Nations children to attend the hearings, enabling them to engage in the litigation that would



directly affect them. Levesque stressed the significance of this public engagement in the success of the litigation.

Engaging a public audience can also provide financial support for public interest organizations to forcefully pursue litigation efforts. Given the constraints of public interest organizations' limited budgets, utilizing crowd-funding is a strategy used by the BCCLA. Paterson noted that leveraging social media to encourage donations helps the BCCLA to employ staff litigators, pay for expert evidence, and the numerous other expenses that come with advocacy. Discussions of the solitary confinement cases that opened the conference underscored the reality that substantive change will likely require legislative and policy reform, including the establishment of independent legal oversight for decisions relating to administrative segregation. In addition to litigation work, public interest advocacy often also requires public education, fundraising, and law reform efforts.

"It is incumbent upon the legal profession to always be mindful of how intersecting factors shape the experiences of the clients and groups we serve."

The Role of Intervenors

In the solitary confinement cases, public interest organizations acted as plaintiff/applicant. Nevertheless, the default of Canadian public interest litigation has generally been to intervene in compelling cases; however there are many barriers facing organizations who attempt to do so. As counsel for the Canadian Council of Christian Charities (CCCC), Barry Bussey had first-hand experience of the controversy that arose in the summer of 2017 in the [TWU v LSUC](#) case, when the Supreme Court initially denied intervener status to 17 applicants, including the CCCC and all LGBTQ groups. While all of the parties were eventually granted status, the incident prompted many conversations about the role that interveners ought to be playing.

Bussey noted that interveners are generally intended to assist the court and allow the public some access to justice, but an emphasis on "balance" and efficiency places demands on interveners that may undermine their effectiveness. For instance, the Supreme Court restricts each intervener to a 10-page factum and five minutes of oral argument. Intervenors are also prevented from introducing new arguments or facts on appeal, and yet are required to present a unique perspective that is different from the parties and the other interveners. Despite challenges, interveners are common in Charter litigation, especially at the appellate level. Kathryn Chan and Howard Kislowicz's research

revealed the significant extent to which various interveners are involved in cases of religious freedom. The prevalence and degree of intervener involvement raises questions of how interveners can best engage in litigation.

Tensions arise between our desire to hear from a diverse and robust set of interested parties, and a need to prevent redundancies with overlapping constituencies and interests of intervening parties. Dan Sheppard examined the many nuances of intervening in cases raising constitutional issues, concluding that the Supreme Court's attitude towards interveners has been broad but not deep. While interveners have historically been embraced, Sheppard suggests that the Supreme Court welcomes interveners only to lend their decisions the appearance of legitimacy, rather than engaging with interveners in a more substantive way. Since intervention remains a more economical way for public interest groups to be involved in litigation, it falls to us to consider whether our current approach can be improved.

Despite various hurdles, interveners currently remain an essential part of advancing social change in the justice system. As Joëlle Pastora Sala & Allison Fenske noted, a tenet of "public interest law is that it is unreasonable for 'individual members of already vulnerable social groups [to] bear the burden of privately litigating broad-based systemic challenges.'" As lawyers at the Public Interest Law Centre of Legal Aid Manitoba (PILC), Sala and Fenske discussed their success in [*Stadler v St Boniface*](#). PILC intervened in the case, in which the Manitoba Court of Appeal ruled that the province's social benefits tribunal has the jurisdiction to hear *Charter* issues. While interventions are a common means of effecting change by informing the judiciary of the nature and scope of the interests at stake, speakers discussed the need to streamline the involvement of interveners without losing the meaningfulness of their contributions.

Looking Ahead

Although public interest litigation can be a demanding endeavour and there are numerous battles still to be won, overall the conference struck an optimistic tone. Positive achievements, such as in the solitary confinement cases, demonstrate the value of public interest litigation. But, rather than idling in our successes, most speakers deliberated on how public interest litigation might be developed to better achieve its goals. Basil Alexander presented his work, which surveyed the practical realities of cause lawyering, finding that they employ a multi-faceted approach to effecting change, but noted that various advocacy strategies have their own advantages and drawbacks. Alexander's presentation tied in with the conference's final panel on funding. Gabriel Latner spoke about how Canadian public interest groups may be able to learn from American ap-

proaches to advocacy. Many conference participants felt that public interest litigation in Canada functions differently in part due to Canada's small size as compared to the United States; however, funding and coordination amongst stakeholders remains a concern. Wayne van der Meide presented on Legal Aid Ontario's Test Case Program, which can help fund public interest litigation in Ontario although other funding strategies must be engaged.

In the pursuit of dynamic and potent public interest litigation, research on what works in public interest litigation can complement experiments in alternative advocacy models. Reflections on Canadian public interest litigation suggest that the never-ending work admits of many challenges, but all are committed to informed and effective advocacy.

Amanda Nash is a 2018 JD Graduate from the Faculty of Law

Advocating for the Elimination of Administrative Segregation

By: Josh Foster

Since 2017, the Asper Centre has been advocating for the elimination of administrative segregation in Canada. Administrative segregation refers to the non-disciplinary separation of inmates from the general prison population. Ostensibly at least, such inmates are separated for their own safety or that of the prison. The growing body of social science evidence indicating the negative health effects and limited rehabilitative merits of administrative segregation have brought the practice into question. Moreover, its disproportionate use on minority groups has brought to light broader institutional issues related to the Correctional Service of Canada's ("CSC") employ of administrative segregation. Perhaps unsurprisingly, Canada's use of administrative segregation has become constitutionally suspect. Considering the available social science evidence and international standards, it is particularly vulnerable to ss. 7, 12, and 15(1) *Charter* challenges.

Recognizing these constitutional issues, the British Columbia Civil Liberties Association and the Canadian Civil Liberties Association challenged the CSC's continued use of administrative segregation. In two landmark decisions, [*Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*](#) ("CCLA") and [*British Columbia Civil Liberties Association v Canada \(Attorney General\)*](#) ("BCCLA") the Ontario Superior Court and the British Columbia Supreme Court respectively, held that the *Corrections and Conditional Release Act's* ("CCRA") administrative segregation regime is in part, unconstitutional. In CCLA, the Ontario Superior Court determined that ss. 31-37 of the CCRA are

unconstitutional based on s. 7 infringements to the rights to liberty and security of the person. In *BCCLA*, the British Columbia Supreme Court held that ss. 31-33 and 37 of the *CCRA* are unconstitutional owing to ss. 7 and 15(1) *Charter* infringements. On appeal in each province, the government has argued, among other things, that the case is simply one of maladministration of an otherwise constitutionally compliant statutory regime.

“Canada’s use of administrative segregation has become constitutionally suspect”

While the Department of Justice defended the *CCRA* in each of the previously mentioned cases, Parliament sought to amend the *CCRA* to ensure its constitutionality. It is on this front that the Asper Centre has been an active advocate. Bill C-56-*An Act to Amend the Corrections and Conditional Release Act* and the *Abolition of Early Parole Act* marked Parliament’s first recent attempt to refine Canada’s administrative segregation regime. The Bill proposed to: move to a 20-day presumptive release for offenders in administrative segregation, implement independent external reviews with respect to offenders in administrative segregation exceeding 21 days, and authorize the head of CSC, after review, to order than an inmate’s segregation be continued or ended. For the Asper Centre, these proposed amendments did not go far enough to safeguard the constitutional rights of inmates. Specifically, the presumptive release time-line did not accord with international standards or the prevailing social science evidence, the amendments did not guarantee inmates access to legal counsel, and the decision to continue an inmate’s segregation remained subject to a non-binding recommendation. These deficiencies were highlighted in a Policy Brief prepared by the Asper Centre to be submitted to the Senate in 2017. Ultimately, the Asper Centre’s efforts in preparing recommendations for Bill C-56 proved fruitless as the Bill did not move beyond its first reading in the House of Commons.

More recently, Parliament has introduced Bill C-83-*An Act to Amend the Corrections and Conditional Release Act and another Act*. Broadly, Bill C-83 purports to “implement a new correctional interventions model to eliminate segregation.” Notwithstanding its touted objective, Bill C-83 shares many of its predecessor’s shortcomings and is unlikely to withstand *Charter* scrutiny. Five of these shortcomings merit review here. First, Bill C-83 continues to grant the institutional head of a correctional facility the ultimate discretion to continue an inmate’s confinement in a structured intervention unit subject to the decision of the Commissioner after 30 days. Second, not only has Bill C-83 eliminated the notion of an individu-

al external review but, it continues to preclude a health care professional from making a binding recommendation. Third, Bill C-83 does not guarantee that an inmate within a structured intervention unit has the opportunity to leave their cell or have meaningful human interaction outside of a single visit from a designated health care professional. Fourth, Bill C-83 does not impose hard caps on the length of time that an individual may be segregated within a structured intervention unit. Fifth, Bill C-83 does little to prevent the placement of vulnerable persons (including Indigenous offenders and those with mental illness) within a structured intervention unit.

In a [Policy Brief submitted to the Standing Committee on Public Safety and National Security](#) in November 2018, the Asper Centre has highlighted the constitutional issues with Bill C-83 and made recommendations for their resolution. The Asper Centre’s recommendations, among other things, include: that Canada take immediate action to eliminate the use of administrative segregation in all but the most extreme circumstances; that the *CCRA* be amended to ensure that CSC must justify the use of administrative segregation before an impartial decision-maker with binding authority within 48 hours; and that the *CCRA* be amended to prohibit the use of administrative segregation beyond 72 hours. If Bill C-83 passes its Third Reading in the House of Commons, the Asper Centre will likely have an opportunity to broaden its submissions in an extended brief to the designated Senate Committee.

While the Asper Centre’s advocacy initiatives have been peripheral to the ongoing legal challenges to the *CCRA*’s administrative segregation regime, it has positioned itself to possibly intervene at the Supreme Court of Canada in the future. The Asper Centre regularly seeks leave to intervene in constitutionally significant cases heard at the Supreme Court of Canada (“SCC”) and may do so in the case of *CCLA* or *BCCLA*. Surely, the Asper Centre’s persistence in monitoring the proposed amendments to the *CCRA* and submissions on their refinement will support the argument that it may



assist the Court if granted leave. With stringent restrictions on the length of an intervener's factum and time allotted for oral submissions, which point of law the Asper Centre may focus its potential submissions on remains an open question. One point that may be of interest to the Asper Centre is the s. 12 Charter argument.

The seminal case interpreting the scope of the protection afforded by s. 12 of the *Charter* is [*R v Smith \(Edward Dewey\)*](#) ("*Smith*"). For the Court in *Smith*, s. 12 "governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed." The phrase cruel and unusual is a normative expression, violated when the punishment or treatment is, "so excessive so as to outrage standards of decency." The Court suggested that the following non-exhaustive considerations will be informative in determining whether a punishment is grossly disproportionate and thus, cruel and unusual: whether reasonable alternatives exists; whether the punishment is required to fulfill a valid penal purpose; and whether it is rooted in valid sentencing principles.

Following *Smith*, s. 12 jurisprudence has predominantly involved punishment arising in the context of sentencing. For a punishment or sentence to be contrary to s. 12, it must rise to the level of grossly disproportionate or be offensive to standards of human decency. In [*R v Lloyd*](#), the SCC offered that the impugned punishment will only constitute cruel and unusual where it is "so excessive as to outrage standards of decency" and would be considered "abhorrent or intolerable' by society." This high threshold has resulted in few successful s. 12 claims to the punishment or treatment received by inmates.

Recent decisions addressing the treatment of accused persons within administrative segregation evince a reluctance of courts to depart from the standard in

Smith. In [*R v Anderson*](#), the Supreme Court of British Columbia concluded that the continued detention of a mentally ill accused offender in administrative segregation was not contrary to s. 12 of the *Charter*. Similarly, the Ontario Court of Appeal in [*Ogiamien v Ontario \(Community Safety and Correctional Services\)*](#), overturned a finding of s. 12 violations for two inmates who were repeatedly placed in lockdown. In doing so, Laskin J.A. relied on *Smith*, separating the analysis into two stages. First, the court must determine what constituted appropriate treatment for the claimants in the ordinary conditions of their incarceration. Second, the court must look to the extent of the difference between the impugned conditions and the ordinary ones. If the departure can be characterized as grossly disproportionate, a s. 12 violation may be established.

The SCC's recent holding in [*R v Boudreault*](#) ("*Boudreault*") provides the perfect foundation to break free from the traditional approach to s. 12 in the context of segregation. In *Boudreault* the SCC declared the mandatory victim surcharge imposed under s. 737 of the *Criminal Code of Canada* to be contrary to s. 12 of the *Charter*. According to Martin J., in the case of indigent offenders, the mandatory victim surcharge imposes an indeterminate punishment divorced from sentencing principles that "results in a grossly disproportionate public shaming". It can hardly be the case that a pecuniary penalty imposed on some of society's most disadvantaged individuals constitutes cruel and unusual punishment while the severe risks of isolating those same individuals within a prison, absent a rehabilitate function and attendant safeguards, does not. A decision of the Asper Centre to intervene on this point may both assist in ending the use of administrative segregation and expand the scope of s. 12's narrow interpretation.

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SCC 2018 Year in Review

By: Catherine Ma

2018 saw the Supreme Court of Canada release some significant decisions that concerned Aboriginal law, the *Charter of Rights and Freedoms*, and even federalism. This article outlines a few of the developments in these areas.

[Williams Lake Indian Band v Canada](#)

At issue before the Court in this case was the validity of a claim to compensation under the *Specific Claims Tribunal Act* for losses arising from the failure of the Crown to prevent the land of the Williams Lake Indian Band from being taken up by settlers. The Supreme Court effectively recognized that the Crown wrongfully displaced Williams Lake Indian Band from its tradition-

al territories. The Imperial Crown did not fulfill its legal obligation to designate the Williams Lake's village and surrounding lands as a reserve; following Confederation, the Crown did not redress this omission.

The Specific Claims Tribunal adjudicates claims made by a First Nation against the Crown regarding the administration of land and other First Nation assets. The Supreme Court unanimously held that for the Specific Claims Tribunal, the appropriate standard of review was reasonableness. This statement affirms that the Tribunal has the mandate and expertise to resolve historic grievances, and respect should be given to its decisions. It is a strong endorsement of the Tribunal as an independent body that can resolve such grievances.



For the majority, Justice Wagner recalled that the Crown owes a fiduciary duty whenever Indigenous peoples have a cognizable interest over which the Crown assumed discretionary control. Indigenous peoples need not have a reserve or Aboriginal title to have a cognizable interest in certain lands. It is sufficient if Indigenous peoples have a tangible, practical, and cultural connection to the lands. Justice Wagner further refused to distinguish the Imperial Crown and the Crown. This distinction would be inconsistent with Indigenous perspectives on their fiduciary relationship with the Crown, as well as the Crown's acceptance of its responsibility for rectifying historic injustices. The Tribunal can treat the Crown as a single entity when addressing colonial grievances that arose prior to Confederation.

Mikisew Cree First Nation v Canada

This case addressed whether the federal government was required to consult with the Mikisew Cree First Nation prior to passing environmental legislation that could impact the exercise of treaty and/or their Aboriginal rights. The Supreme Court unanimously declared that legislative decisions are not subject to judicial review. This conclusion would have resolved the challenge, rendering it unnecessary for the Court to consider the underlying question: Does Parliament owe a duty to consult when developing legislation that might affect Aboriginal or treaty rights? The Court still deliberated this underlying issue, without reaching a clear consensus.

Justice Karakatsanis held that the legislative process does not trigger a duty to consult. She explained that the courts should not intervene in legislative process-

es due to the separation of powers between the executive, legislature, and judiciary. Recognizing a duty to consult would invite "significant judicial incursion" into the legislative process since the relevant remedies allow for quashing the decision, granting injunctive relief or damages, and mandating additional consultation. Justice Karakatsanis further warned that recognizing a duty to consult could prevent Parliament from effectively representing the electorate and engaging in meaningful accommodation. In their separate concurrences, Justices Brown and Rowe adopt this position.

Justice Abella dissented on the basis that the duty to consult arises from the honour of the Crown: "The right of Aboriginal groups to be consulted on decisions that may adversely affect their interests is not merely political, but a legal right with constitutional force ... The duty to consult is not a suggestion to consult, it is a duty, just as the honour of the Crown is not a mere 'incantation' or aspirational goal." If legislative processes do not trigger a duty to consult, then there would be a "void" and "gap" in the §35 framework.

Justice Karakatsanis addressed this gap by assuring that declaratory relief is available even without a cause of action and appealing to other unnamed legal doctrines. Justice Rowe noted that Indigenous peoples can challenge enacted legislation through the *Sparrow* framework. Justice Brown denied the existence of a gap altogether, claiming that the Crown and Parliament are distinct entities. His response fails to clarify where the Crown ends and Parliament begins, and also fails to explain how this distinction facilitates reconciliation.

R v Vice Media Canada Inc.

In this case, the Supreme Court upheld an order that a journalist provide to police copies of conversations with a person who said he belonged to a terrorist group. This case refined the framework for adjudicating applications for search warrants and production orders that affect the media. For the unanimous majority, Justice Moldaver considered and ultimately rejected countless proposed reforms to this framework. Proposed reforms included removing the distinction between confidential and non-confidential sources, establishing a presumption that a production order would have a “chilling effect” on journalism, and even restricting production orders to only circumstances where the requested materials would lead to a conviction.

Justice Moldaver did eliminate the presumption that prior partial publication always supports granting a production order. He acknowledged that once the media publishes an article, it may have a diminished interest in the unpublished materials; however, this logic does not always hold true. The media might have deliberately chosen not to publish certain materials that are especially sensitive. Permitting state access to the unpublished materials still interferes with the media’s right to privacy and results in potential chilling effects as well. Justice Moldaver further re-organized the framework in order to facilitate its application in practice.

More noteworthy is the concurrence by Justice Abella,

who would have recognized that the media has a §2 (b) right under the *Charter*. This §2(b) right would protect the media’s right to gather and transmit information without undue government interference, protecting any journalistic work product and their confidential sources. Recognizing such a right would then require a new framework to adjudicate applications for search warrants and production orders.

R v Boudreault

This case debated whether mandatory victim fine surcharges infringe §7 and/or §12 of the *Charter*. For the majority, Justice Martin held that for the reasonable hypothetical offender, mandatory victim fine surcharges constitute “cruel and unusual punishment” in violation of §12 of the *Charter*. She explained that the surcharge is punishment since it automatically results from a conviction, and it operates like a fine. The surcharge is cruel and unusual, as it creates a “grossly disproportionate” sentence and outrages standards of decency. The surcharge can cause offenders to suffer disproportionate financial consequences, expose offenders to continuous collections efforts, threaten incarceration if the offender cannot pay the surcharge, and even create a *de facto* indefinite sentence if the offender cannot pay the surcharge. Justice Martin acknowledged that for individuals with adequate financial capacity, mandatory victim fine surcharges likely would not be grossly disproportionate. The financial consequences are not disproportionate, and the individual would not experience the other negative repercussions that occur when an individual cannot pay the



surcharge.

The infringement was not justified under §1 as the government did not advance any argument to justify the surcharge if found in violation of the Charter. Justice Martin did not consider the §7 arguments in light of this conclusion.

In dissent, Justices Côte and Rowe would have upheld the constitutionality of mandatory victim fine surcharges. The dissent felt that while the surcharge was a disproportionate punishment, it did not constitute a grossly disproportionate punishment as required by §12. The surcharge further did not engage offenders' §7 right to security since there was no evidence that the surcharge caused sufficiently serious stress as to affect offenders' psychological integrity.

R v Comeau

This case, referred by some as the Free the beer case, concerned the scope of free trade between Canadian provinces based on the interpretation of the section 121 of the *Constitution Act*, 1867, which reads: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

The Supreme Court rejected the argument that this provision is a free trade provision that prohibits any barriers to the passage of goods across provincial borders. The provision prohibits governments from imposing tariffs or similar measures, but it does not stop governments from enacting laws and regulations that incidentally affect interprovincial trade. Environmental, health, and social regulations can apply to goods that cross provincial borders.

The Court explained that the Constitution must be interpreted within its "proper linguistic, philosophic and historical context." The text itself is relatively ambiguous, so it does not support any particular interpretation of the provision. The historical context supports the view that provincial governments only relinquished their power to impose tariffs. Relinquishing this power was required to support economic integration, reducing their dependency on less accessible markets. The historical context does not suggest that provincial governments gave up their power to regulate simply because those regulations might impact interprovincial trade. The Court added that the provision was part of a broad legislative scheme that shifts provincial authority over customs and levies to the federal government.

The Court added that the federalism principle applies whenever the courts interpret the Constitution. This

principle recognizes that provincial governments have autonomy to develop their societies within their respective spheres of jurisdiction. The courts thus must consider how different interpretations impact the jurisdictional balance between federal interests and provincial interests; in this case, provincial governments must have leeway to manage the passage of goods and address specific priorities within their borders.

Reference re: Pan-Canadian Securities Regulation

The federal government and some provincial governments proposed a national cooperative regulatory scheme for capital markets. Its main components include a federal statute that would manage systemic risk and establish financial crimes, a model provincial and territorial statute that would deal with the regular aspects of the securities trade, and a national securities regulator.

This case presented the following reference questions:

1. Does the Constitution authorize the proposed national cooperative regulatory scheme?
2. Does the draft federal statute exceed the authority of the Parliament of Canada over trade and commerce under [subsection 91\(2\)](#) of the [Constitution Act, 1867](#)?

The Supreme Court held that the Constitution authorizes pan-Canadian securities regulation under the authority of a single regulator. The proposed regulatory scheme does not fetter the legislative power of participating provinces; according to the principle of Parliamentary sovereignty, the proposed agreement does not legally bind the provincial legislatures. The provincial legislatures retain legal authority to enact, amend, and repeal their own laws as they desire.

The Court further held that the draft federal statute does not overstep federal government's authority over trade and commerce. Its pith and substance is to "control systemic risks having the potential to create material adverse effects on the Canadian economy" as a whole. The statute does not displace provincial and territorial securities legislation, which addresses risks that do not affect the *national economy*.

Catherine Ma is a 3L JD Candidate at the Faculty of Law and was a student leader of the Asper Centre's Indigenous Rights student working group in 2017-2018.



Asper Centre Clinic Reflection: Free Speech on University Campus Project

By: Sahil Kesar

I was an Asper Centre Clinic student in the fall term 2018 and I was fortunate to be able to work on the Free Speech on Campus project, which involved researching and drafting a report on the possible *Charter* implications of the Ontario government's recent free speech on campus directive. This project was interesting to say the least. First, I will discuss how the project came about and what drew me to it. Second, I will review what our main conclusions were. Third, and lastly, what the outlook has been thus far.

In August of 2018, the Ontario government announced, via a news release, that it was going to require universities to develop, publically post and enforce free speech policies on their campuses. This directive required the policies to be in place by January 1, 2019. Among other things, an adequate university free speech policy needed to define freedom of speech, include principles based on the University of Chicago Statement on Principles of Free Expression and apply current disciplinary methods to students in violation of the free speech policy.

In addition, the Higher Education Quality Council of Ontario ("HEQCO") is to be responsible for monitoring the development of these free speech policies. Universities will be required to submit annual reports on implemen-

tation progress and a summary of compliance.

In what I can only describe as an attempt to coerce compliance, the news release threatened potential reductions in operating grant funding for universities that failed to either introduce a free speech policy or report to the HEQCO on their progress. Funding could also be affected if universities failed to enforce their free speech policy once implemented.

This directive raised many questions. First, as eluded to above in my reference to coercion, can the government really enforce such a directive without passing legislation? Second, what impact does the Charter's Section 2 (b) Freedom of Expression right have on this directive and universities in general? Third, does reference to the University of Chicago Principles have any implications on Ontario universities, given that our free speech protections vary from that of the United States? Lastly, does this directive impede on a university's independence and ability to regulate itself?

Free Speech and Section 2(b)'s Freedom of Expression have always piqued my interests. The idea that a university is not a governmental entity which garners Charter scrutiny has always been an interesting topic for me. This idea rests on a decision made almost thirty years ago in [*McKinney v University of Guelph*](#). The Supreme Court of Canada determined that universities are not

government for the purposes of Section 32 of the *Charter of Rights and Freedoms* because universities function as autonomous bodies which the government has no direct ability to control, despite the fact that they might be created by statute, serve a public function, be governed by government regulations or that they may receive government funding. As such, if they are not government for Section 32 purposes, the *Charter* cannot apply to them. I would argue, that this cannot hold true today given the role of education and the influence that the government has in its delivery in Ontario. For these reasons, I jumped at the idea of working on this project.

Ultimately, after much research and consultation, my fellow clinic students and I came to some definitive conclusions on most of the issues that we were presented with. Firstly, there is no basis in law for the provincial government to require universities to adopt free speech policies. If such law existed, it would be a blatant disregard for the independence of universities to regulate their internal affairs. There is only a news release directing universities to undertake action. As such, there is nothing legally forcing universities to develop and implement free speech policies. However, as a practical matter, the threat of withdrawal of funding is very real and one entirely within the power of the provincial government. For that reason, while not legally required to comply, it is likely beneficial for universities to comply.

Second, while some other provinces have recognized some level of *Charter* applicability to university conduct in certain contexts, the law in Ontario still stands as it did thirty years ago with *McKinney*. The *Charter* does not apply to universities and the conduct or decisions of their administrators or faculty. Therefore, there is no Section 2(b) protection of free speech on university campuses. However, there are other ways that entities can protect and value free speech outside of the *Charter*. Most notably, universities generally have enacted student codes of conduct which reflect their reluctance to infringe on a person's freedom of expression, and that none of their policies should be construed as such. Further, the existence of human rights legislation also places limits on how a university can act towards its students and student groups looking to convey certain messages. In addition to these considerations, the *Charter* can provide a definition of freedom of expression for universities. Decades of cases have looked at and analyzed what freedom of expression means, what it protects and how to invoke its protections.

Third, it is quite odd that the news release references the University of Chicago's Principles. These principles are prefaced on the American concept of free speech, which is embedded in their constitution as the first amendment. The American Constitution does not contain a reasonable limit provision such as Section 1 in our *Charter*. For this reason, the American approach to

free speech is far less restrictive and generally finds most speech to be protected. There are certain specific categories of speech which have been recognized and not protected, but aside from those, the approach is that people should be tolerant of other people's views, even if they are highly offensive. Canada, on the other hand, takes the approach that there are certain limitations of freedom of expression which are justifiable, such as hate speech and obscenity. For this reason, reference to the University of Chicago Principles is odd given that those principles, while amenable to the American approach to free speech, do not necessarily transcend into Ontario as easily.

Does requiring a free speech policy where one did not already exist unreasonably intrude on a university's academic freedom?

Arguably yes.

Lastly, one of the core tenets of a university is its academic freedom. The ability of a university, its faculty and its students to explore and research the limits of human knowledge, should be unimpeded by political or other considerations. This means that ideas may be presented which offend current thinking and culture. Copernicus was foolish to suggest that the sun was the centre of the solar system. However, we all accept that as accurate today. Does requiring a free speech policy where one did not already exist unreasonably intrude on a university's academic freedom? Does it unreasonably intrude on a university's freedom to regulate itself? Arguably yes.

Following the release of the directive, many universities engaged in consultation processes in order to develop free speech policies. Most sought input from academics, administrators and some from their students. By January 1st, 2019, most Ontario universities had free speech policies in place. This signals that universities are taking the threat of reduction of funding as serious, given that there is no legal obligation to abide by the directive.

How these policies pan out remains to be seen given their relative newness. Students should review the free speech policies put in place by their respective institutions in order to ensure they are aware of their obligations and rights. Once our report is finalized and released to the public, I hope it gives readers an insight into freedom of expression, their rights and their obligations as well as the legal structures in place around them.

Sahil Kesar is the current Asper Centre half-time clinic student and a 3L JD candidate at the Faculty of Law

Challenging the Safe Third Country Agreement

By: Tabir Malik

As a first-year law student with a strong interest in the area, it was by a fortunate pick of draw that at the start of fall 2018, I was selected to be member to the Asper Centre's Immigration and Refugee Law student working group. The group has had the exciting task of contributing research in support of litigation, the outcome of which may transform how many refugees are able to access Canada's asylum system. The litigation challenges Canada's *Safe Third Country Agreement* (STCA) with the U.S., which currently allows border officers to turn away many people who want to claim asylum in Canada back to the U.S.

Enacted in 2004, the *STCA* requires that refugee claimants arriving in Canada at land ports of entry seek asylum in the first safe country that they arrive in. Under our *Immigration and Refugee Protection Act*, the U.S. is the only country to have been designated safe by Canada. The designation assumes that refugees entering from the U.S. and seeking asylum in Canada will have access to an equivalent asylum system, with equal protections, in the U.S.

"This raises the question of whether Canada, in turning back asylum-seekers entering from the U.S., is complicit in the U.S.'s morally questionable policies."

While public interest groups unsuccessfully challenged the *STCA* previously in 2007, the current challenge involves recent changes to U.S. refugee policy following the 2016 election of President Donald Trump. What began as campaign rhetoric has crystallized in the form of policy changes to U.S.'s refugee system that *STCA* challengers argue increases the risk of claimants being deported to their country of origin. This raises the question of whether Canada, in turning back asylum-seekers entering from the U.S., is complicit in the U.S.'s morally questionable policies. In addition, many of the asylum-seekers who are turned



back to the U.S. are immediately detained.

In 2015, a Salvadoran woman (ABC), along with her children, attempted to cross the U.S.-Canada border and claim asylum but was denied due to the *STCA*. Fearing deportation from the U.S. to El Salvador where her family faces gang violence, ABC mounted a challenge against the U.S.'s designation as a safe country. In 2017, the Canadian Council for Refugees, Canadian Council of Churches, and Amnesty International joined the case as public interest litigants.

Part of the argument in the current challenge is that the designation violates International law and the Charter because the U.S. does not comply with all of its refugee obligations and is unsafe. An example would be the change that now precludes gang violence and domestic violence as a ground to claim asylum. The organizations hope to leverage the previous Federal Court ruling in their favour and raise s.7 and s.15 Charter arguments.

The Asper Centre working group has been providing pro-bono assistance to the organizations in this challenge. My working group members and I met with Erin Simpson, counsel for the three public interest organizations, and participated in locating and reviewing reports for use in cross-examination. The case is scheduled to be heard in May 2019.

Tabir Malik is a 1L JD Candidate at the Faculty of Law

Cruel and Unusual Poverty

R v Boudreault and the unconstitutionality of the victim surcharge

By: Teodora Pasca

What does it cost to commit a crime?

For Alex Boudreault, \$1400. After pleading guilty to a number of summary conviction and indictable offences, the court ordered Boudreault to pay a total of \$1400 into a government fund for victim's aid.

Boudreault, who quit high school as a teenager, had never benefited from steady income. He committed his most serious crimes during a period when he was homeless, unemployed, and struggling with substance abuse. The \$1400 surcharge represented a significant obstacle to Boudreault's rehabilitation, and given his financial situation, it was unlikely he could pay within a reasonable time, if at all.

Until recently, under s 737 of the *Criminal Code*, all people discharged, pleading guilty to, or found guilty of criminal offences were required to pay a "victim surcharge" on top of any other sentences they received. In the December 2018 decision of [*R v Boudreault*](#), a 7-2 majority of the Supreme Court of Canada (SCC) struck down the surcharge regime.

The *Boudreault* decision is an encouraging acknowledgment of the countless people in Canada who find themselves caught within a cycle of poverty, crime, and marginalization. It is also a reminder of the limitations of judicial action in addressing what is fundamentally a socioeconomic crisis.

The Decision

The victim surcharge was first introduced into the *Code* in 1988. Offenders were usually required to pay 15 per cent of any fine they received into a government fund that provided assistance to victims of crime. While there was a presumption that the surcharge would apply, sentencing judges had discretion to waive it if offenders could demonstrate undue hardship to themselves or their dependants.

In 2013, by way of the *Increasing Offenders' Accountability for Victims Act*, the Harper government doubled

the amount of the original surcharge to 30% of any fine imposed. Where no fine was imposed, offenders would be charged a mandatory \$100 for each summary conviction and \$200 for each indictable offence.

Most significantly, the amendments removed judicial discretion to waive or reduce the surcharge in cases of demonstrated undue hardship. Judges could only increase the surcharge above the mandatory minimum, and the surcharge itself could not otherwise be appealed.

In the lower courts, Alex Boudreault challenged the victim surcharge provisions under s 12 of the *Charter*. By the time his case reached the SCC, six other claimants had joined him. All of them came from precarious financial backgrounds, and several struggled with addiction or mental or physical health issues. For some, the total amount of the surcharge far exceeded the monthly income or allowance that they used to pay for rent, food, and other expenses.

"The majority found the effects of the surcharge on impoverished and marginalized offenders to be grossly disproportionate."

Led by Martin J, a majority of the SCC held that the surcharge was cruel and unusual punishment under s 12 of the *Charter*. Given that the surcharge cannot be waived or reduced, the court applied the two-step test established in [*R v Nur*](#) for evaluating the constitutionality of mandatory minimum sentences.

The *Nur* test asks the court to first determine what a proportionate sentence would be for the offence in question, and then to ask whether the mandatory punishment is grossly disproportionate in comparison, either for the claimant before the court or for a "reasonable hypothetical" offender.

In this case, the majority considered it unnecessary to rely on hypotheticals given the evident hardship the

surcharge had on the claimants. The majority conceded that the surcharge serves an important purpose given that it funds victims' services, and also acknowledged that many Canadians have sufficient financial capacity to pay it. However, the majority found the effects of the surcharge on impoverished and marginalized offenders to be grossly disproportionate.

Potentially comprising months of an offender's income, the surcharge imposes severe financial consequences on people who are already struggling to make ends meet. Offenders subject to the surcharge live under the constant threat of imprisonment or detention for inability to pay, and fine options and extensions are unrealistic solutions to this problem.

In many cases, offenders who have no chance of paying the surcharge in the foreseeable future will be effectively tied to the court system indefinitely — requiring them to report before the court regularly, intensifying psychological stress, and effectively subjecting them to a “de facto” criminal sanction.

The dissent, led by Côté J, was of the opinion that the surcharge did not rise to the level of being grossly disproportionate. The obligation to pay the surcharge is not exorbitant in and of itself, given that many people in Canada can afford to pay \$100 or \$200 per conviction without debilitating their living conditions. The dissent acknowledged that the surcharge was disproportionate for the claimants before the court. However, in their opinion, the ability to obtain repeated payment extensions, and the fact that imprisonment is not a legal solution for inability to pay, was sufficient to mitigate these consequences.

Legal and social significance

To strike down a law under s 12, punishment must be more than disproportionate or excessive — as per the SCC's decision in [R v Morrissey](#), the punishment must be “so excessive as to outrage standards of decency,” and “abhorrent or intolerable to society.” To date, only three decisions of the SCC have struck down mandatory minimum sentences under s 12; one of them was *Nur*, in which one- and two-year mandatory prison terms for improper storage of firearms were held to be unconstitutional.

It follows that s 12 infringements will only be found in the rarest of cases, and it is encouraging that most of the court saw extreme poverty as one of them. The *Boudreault* decision is remarkable in its attention to the real-world circumstances of countless people within the Canadian criminal justice system, especially in a constitutional climate where economic rights continue to lack *Charter* protection.

Meaningful in this regard is the court's attention to the life experiences of the claimants themselves. Whereas the “reasonable hypothetical” test has been criticized for relying on potentially far-fetched outcomes, the majority acknowledged that “reasonable hypothetical” was somewhat of a misnomer.

The “hypothetical offender” suggested by one claimant in the lower courts was in fact based on the defendant in [R v Michael](#), an Inuit man struggling with homelessness and alcoholism who faced a \$900 surcharge despite living off a monthly allowance of \$250.

The claimants in *Boudreault* are disturbingly illustrative of reality for many people in Canada. For example, Daniel Laroque lives in extreme poverty and suffers from serious mental health problems. He pays for food and housing with disability benefits, leaving \$136 per month for other expenses. Kelly Judge is legally blind, suffers from depression and bipolar disorder, and is recovering from alcoholism. Though her monthly income is \$831, her \$800 rent leaves her with just \$31



per month for other expenses.

The surcharges that Laroque and Judge faced amounted to five or six times their monthly income.

While the dissenting opinion in *Boudreault* fixates predominantly on the legislative scheme of the surcharge provisions, Martin J's reasoning for the majority is clearly driven by the way criminal justice dynamics operate on the ground.

"The Boudreault decision is remarkable in its attention to the real-world circumstances of countless people within the Canadian criminal justice system"

For instance, it is true that the court may not imprison people for true inability to pay the surcharge. But many people who are impoverished or homeless do not have counsel to fight for them in committal hearings — government-funded legal aid does not cover it.

Furthermore, while fine options may help some offenders work off the surcharge, they are not available in all jurisdictions, and available options may be impractical in light of barriers to access caused by mental illness, disability, or age.

Most strikingly, the dissent's suggestion that offenders can evade the surcharge by obtaining repeated extensions of time wrenches people into an indeterminate bureaucratic nightmare. Offenders with pending surcharge payments repeatedly have to file paperwork and make court appearances, often unsupported by counsel. With each appearance, marginalized offenders must convince judges that their turbulent life circumstances justify yet another extension.

As Martin J puts it at para 77, "This ritual, which will continue indefinitely, operates less like debt collection and more like public shaming."

What next?

When the SCC struck down s 737 of the *Code*, it refused to suspend its declaration of invalidity, instead declaring the section to be immediately of no force and effect. The victim surcharge has therefore been absent

from the *Code* since the court struck it down in late 2018.

At the time the federal government had already tabled a Bill seeking to reintroduce judicial discretion into the victim surcharge regime. The future of those changes remains up in the air in light of the court's ruling.

While the *Boudreault* decision makes a laudable contribution to criminal law *Charter* jurisprudence, it is also important to recognize that it represents just one piece of a criminal law system that is disproportionately punitive towards people whose socioeconomic circumstances represent barriers to justice.

People living in poverty, people with addiction and mental health problems, and Indigenous people are overrepresented across all stages of the criminal justice system. Importantly, many people who commit crimes are also likely to be victimized by them — and as of yet it is unclear how Parliament will make up the shortfall in funding to victim's aid services now that the surcharge is gone.

Accordingly, in a way, *Boudreault* also serves as reminder of the limitations that constitutional law can face when achieving proactive justice. The challenge with declarations of invalidity, as the SCC itself points out, is that they offer little solace to the individuals who continue to live with the consequences of the old regime.

Though the claimants immediately before the SCC are now relieved of their surcharges, there are people across the country currently dealing with surcharges from convictions prior to December 2018. Parliament's intention to return with a new version of the law consequently implies a responsibility to all the offenders who continue to struggle with its impact. For the sake of people like Boudreault, Laroche, and Judge, let's hope the government takes that to heart.

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