

# ASPER CENTRE OUTLOOK

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David Asper Centre for Constitutional Rights  
**UNIVERSITY OF TORONTO**

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# MESSAGE FROM THE EXECUTIVE DIRECTOR

Reading through the impressive articles written by our law students, I am struck by the level of engagement and interest that the students have with the leading constitutional issues in Canada. I am also pleased that the Asper Centre is able to offer the opportunities for these students to study and debate such important issues as climate change, voting rights, media freedom and aboriginal rights, through the lens of our constitution.

I am very grateful for the work that the students have done, both on behalf of the Asper Centre and for the outside organizations who have partnered with us. Their work is central to work of the Centre and enables us to comment on and influence contemporary constitutional issues throughout Canada.

We frequently hold a panel discussion for

students with practising lawyers who have managed to incorporate constitutional law into their legal practices. While constitutional law is taught in 1L and is a foundational course there are few who get to practise in this area the way that I do. However, the group of alumni we draw upon from government, labour law, aboriginal law and legal clinics, among a number of other areas of practice, give the students who are drawn to constitutional law for the same reasons that I was, inspiration for how they could incorporate this area of great interest into their futures as lawyers.



Cheryl Milne  
Executive Director



# Too young to vote?

## *Challenging Canada's Voting Age*

By Kylie de Chastelain



**M**any young Canadians eagerly anticipate the privileges that arrive with adulthood: independence, driver's licenses, and paying jobs chief among them. But even as you might be able to drive a car, earn a wage and pay income tax by the time you turn fourteen, fifteen, or sixteen, in Canada, you will still be too young to vote. The *Canada Elections Act*, [SC 2000, c 9](#), stipulates that only those older than 18 are eligible to vote in federal elections.

This reality has become particularly relevant in an era of burgeoning environmental and social justice activism. For young people focused on long-term issues like climate change, voting age restrictions have come to be seen as antiquated and out of step with the demands of present-day life. Greta Thunberg and the youth behind the now-famous Fridays for Future climate strike initiative have expressed frustration that their abilities to effect political change are undercut by the fact that they are

too young to vote. Young people have voices and the desire to use them, as the upswing in climate demonstrations will attest. In this vein, restricting voting rights to those above the age of 18 is increasingly viewed as an arbitrary requirement in need of reconsideration.

This is why the David Asper Centre for Constitutional Rights and [Justice for Children and Youth](#) (JFCY), in partnership with several child rights organizations, have initiated efforts to challenge and lower the voting age in Canada.

### **The History of Voting Restrictions in Canada**

Voting restrictions have evolved substantially over the course of Canada's history. At the time of Confederation, the federal vote was [restricted to white men](#) over the age of 21 who met property ownership requirements. Women, First Nations people, and those with disabilities were all denied the vote.



Gradually, Canadian citizens were enfranchised. By 1916, women over the age of 21 had earned the right to vote in Manitoba, Saskatchewan and Alberta, followed by Ontario and British Columbia in 1917. Despite this, it took until 1940 for women to get the right to vote in every province. Perhaps even more striking is the fact that First Nations people only gained the right to vote in 1960.

With respect to voting age restrictions, in Canada, the federal voting age was 21 years until 1970, when it was [reduced to 18](#). Citing the “rising tide of unrest” among young people, Prime Minister Pierre Trudeau acknowledged that youth had expressed a valid desire to [assume greater responsibility](#) for the “destiny” of society. “If the rights and interests of individuals and groups are to be safeguarded, they must be accurately reflected in the political structure of this country,” he noted. Twin aims of peace and justice motivated the government to empower the young people who had clearly demonstrated that they had much to say.

In short, voting restrictions are always evolving; reflecting the needs and values of society at particular points in time. In Canada, as elsewhere, it is becoming increasingly clear that these needs and values are changing once again. As Mary Birdsell, Executive Director of JCFY, explains: “we have seen a continued rise in young people’s efforts to be heard – millions marching on issues that have a direct impact on their lives and the world in which they live...yet they still can’t vote.” Ms. Birdsell’s words echo those of Pierre Trudeau on the eve of voting age reform. Then, as now, youth fought to make themselves heard, and won.

### Voting Age Across the Globe

It is this kind of growing youth engagement that has prompted several countries – including Scotland, Wales, Austria, Greece, Norway, Argentina, and Brazil – to lower the voting age. In Scotland, the voting age was temporarily lowered to 16 during the 2014 independence referendum, with the view that youth should have a say in such a fundamental decision about Scotland’s future. This “temporary” initiative was subsequently made permanent following excellent youth voting turnout

and political engagement. During [public consultations](#), the Scottish government found that support for lowering the voting age largely came from the idea that there were lower minimum ages for many other adult privileges, including military service, marriage, driving, and employment. The importance of “no taxation without representation” was also frequently cited.

In Wales, similar changes have been made, in part due to Scotland’s success. The voting age was lowered to 16 for National Assembly elections in November 2019. Stated reasons for the change included [increasing political awareness](#) and participation among youth and enhancing democratic accountability by expanding the electorate.

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- Mary Birdsell, Executive Director, JCFY

This approach is consistent with Austria’s approach to voting age (16 years), where a rapidly aging population created concerns over democratic stability and engagement. By lowering the voting age, Austria hoped to build “buy-in” from an earlier stage; helping young people to become politically engaged during stable periods in their lives before the demands of University education and independent living were taking shape. In both Austria and Wales, this theory has been borne out, and voter turnout rates among youth have been shown to at least equivalent to – and in many cases greater than – voter turnout rates in the general population.

### The Myth of Immaturity

What these results show is that youth are sufficiently engaged to make the most of voting rights. But are youth cognitively capable of undertaking

the kind of careful decision-making processes that voters utilize? Social science research says yes. Although some might believe that young people are hotheaded and impulsive, psychology research shows that adolescents reach levels of [cognitive capability](#) on par with adults much earlier than they reach emotional or social maturity. Specifically, young people are capable of making informed choices in the same way that adults do; particularly when given opportunities to evaluate and compare competing criteria, as in a voting context.

Canada's political parties have already recognized that immaturity among young people is – in many cases – nothing but a myth. Indeed, the four federal political parties each allow youth under 18 to vote in party leadership decisions. The New Democratic Party even allows those as young as 13 and 14 to help determine who will lead. It seems grossly inconsistent to give young people the right to help choose political party leaders and then deny them the ability to elect those same people into positions of power. If youth are capable of weighing the merits of different candidates in a leadership race, what prevents them from doing so in a broader electoral context? Canada's [Chief Electoral Officer](#), Stéphane Perrault, agrees, and has pointed to this precise issue as a good example of why the voting age should be reconsidered.

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### Constitutional Issues

There are strong constitutional arguments to be made in favour of lowering the voting age. Notably, [Section 3](#) of the *Canadian Charter of Rights and Freedoms* stipulates that all Canadian citizens are entitled to vote. The voting age restriction is a function of legislation; not constitutional mandate, as was demonstrated repeatedly in *Frank v Canada (AG)*, [2019 SCC 1](#), decided on January 10th 2019. At issue in *Frank* were the voting rights of citizens who had lived outside the country for five consecutive years or more. The appellants, both resident in the United States, challenged a series of provisions in the [Canada Elections Act](#) which, when combined, had precluded them from voting in the 2011 Canadian Federal Election.

The Court sided with the appellants, emphasizing that voting rights are only tied to citizenship; not residency. Writing for the majority, Chief Justice Wagner stated: “in clear language, the *Charter* tethers voting rights to citizenship, and citizenship alone. Section 3 does not mention residence. Citizenship is the defining requirement of the right to vote.” Wagner CJ also emphasized that Canada had changed since the residence requirement was implemented. Where travel and mobility were previously rare, Canadian citizens now exist in a “globalized society” and can maintain strong connections to Canada while they live abroad. To restrict the voting franchise on this basis was at best outdated and at worst disempowering to citizens constitutionally entitled to vote.

The decision has been widely received as a valuable precursor to a potential voting age challenge. Wagner CJ's language repeatedly emphasized that citizenship is what “underpins the right to vote” full stop. Residency could not undermine that fundamental right. It stands to reason, then, that age cannot be used to limit voting access either unless there are substantial and valid reasons for doing so. However, such justifications are

hard to come by. If anything, lowering the voting age would arguably bring Canada in line with its own constitutional mandate to ensure that all citizens can exercise their right to vote.

This is particularly true if we consider [Section 15\(1\)](#) of the *Charter*, which expressly stipulates that “every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination.” The provision goes on to outline that no discrimination may occur on the basis of several protected characteristics; including age. This language begs the question as to whether youth disenfranchisement can be justified moving forward, particularly as section 15(1) analyses aim to ensure that pre-existing disadvantages are not enhanced by a given piece of legislation. There are many ways that we can point to the youth disadvantage in terms of their relative vulnerability, but the political disenfranchisement of youth is especially limiting. The old “no taxation without representation” argument rings true: how can those expected to abide by the law, earn a wage, and pay taxes, be deprived of an opportunity to elect those that will lead them? Moreover, when the constitutional imperatives for lowering the voting age are so significant, shouldn’t Canada respond?

### The Merits of Voting Young

There are other social and political effects to be realized, too. First, lowering the voting age would enfranchise youth and give them a place to voice their opinions and influence Canada’s future. This kind of platform and influence would help to channel the momentum and activism we have recently witnessed from youth across the globe. Secondly, lowering the voting age would better reflect existing responsibilities and privileges that are available to Canadian youth, including driving, working paying jobs, and paying taxes. Allowing young people to vote could also enhance political engagement and voter turnout, as it has in Austria.



The downsides to allowing young people to vote are few, but the potential for positive change is great, particularly when we consider that Canada has an aging population. If we acknowledge the “social contract” that exists in a democratic system, wherein people elect representatives to act in their interests, lowering the voting age becomes particularly important. Expanding the voting age would enhance accountability and the extent to which the electorate reflects the people it represents; pushing the electorate to consider and advocate on behalf of youth and their best interests.

### Looking Forward

With such a great task ahead, the Asper Centre has been hard at work preparing this constitutional challenge. The Asper Centre’s Clinic students have been particularly helpful in this endeavour, assisting with initial legal and social science research and with the funding applications. The Clinic students’ efforts allowed the Asper Centre and JFCY to secure development funding from the Court Challenges Program this past November. This funding will be used to help finance a consultation for children and youth on the subject of voting and voting age restrictions. Consultations such as these are very important to constitutional challenges, as

it is essential that the legal efforts undertaken reflect the perspectives and interests of those who will be affected by them.

Asper Centre Clinic student Karen Chen has provided an insightful reflection about the Clinic's work this past term, and what it looks like to launch a constitutional legal challenge from the ground up. Read Karen's reflection below.

*Kylie de Chastelain is a 1L JD student and the Asper Centre work-study student in 2019.*

### Laying the Groundwork for a Constitutional Challenge

*Reflections on the Asper Clinic Experience*

By Karen Chen

In law school, we often focus on the end result of a case: the decision the court made. This year's Asper Centre Clinic provided us with an opportunity to learn about how Constitutional challenges begin. As students in the Asper Clinic this past fall, we helped lay the groundwork for a *Charter* challenge to lower Canada's voting age.

Given the youth energy around organizing climate strikes and the Federal Election that took place during the term, it felt timely to challenge the *Canada Elections Act* to decrease Canada's voting age from 18. After all, section 3 of the *Charter* makes no mention of age as a requirement to participate in the franchise. It simply states that "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

Under the guidance of Asper Centre Director Cheryl Milne, we worked on a number of projects that go into preparing a *Charter* challenge. It was

illuminating to learn about all the different aspects that need to be in place before any documents are filed in court. For instance, one of the core aspects of advocating for youth rights is to make sure that the young people are leading the way and truly want the voting age to be lowered.

In order to make sure we heard from a diverse range of youth across the country, my Clinic partner and I developed a consultation curriculum that could be implemented by our partner organizations across the country to gather opinions on what youth thought about lowering the voting age, their thoughts on participating in democracy, and how they would respond to various reasons people may offer to prevent them from voting. In doing so, we not only learned about all of the organizational work that goes into making sure young people are heard, we also reflected about our own assumptions about youth and worked to make sure our consultations would be inclusive, informative, and youth-driven.

Other students worked on the media strategy by monitoring stories surrounding young people and voting and drafting a [press release](#) announcing our intentions to launch this challenge. One student handled the financial aspect by coordinating how the case development funding we had received from the [Court Challenges Program](#) would be managed and distributed to partner organizations to implement consultations and gather evidence.

Given the youth energy around organizing climate strikes and the Federal Election that took place during the term, it felt timely to challenge the *Canada Elections Act* to decrease Canada's voting age from 18.



The other half of the Clinic students provided research memoranda on a range of topics from the cognitive capacity that youth have to make decisions like selecting which candidate to vote for, what other countries which have already lowered the voting age have learned from their experience, what international law may support lowering the voting age, how political theory supports extending the franchise to young people, and how lowering the voting age may impact youth.

Working on all these aspects revealed just how much work, legal and non-legal, goes into preparing for a major constitutional challenge. It also taught us how important pro bono clinics like the Asper Centre are in the constitutional landscape because we are able to provide research, consultation, advocacy and financial management support working in collaboration with non-profit organizations and clients who may not be able to afford bringing the challenge on their own.

Another major lesson came from the legislative history memoranda we wrote tracing the history of who was allowed to vote in Canada and the different provinces and territories. While some students were skeptical at first about whether the voting age needed to be lowered, after looking to the groups who had previously been excluded from participating in elections, it seemed time to further expand the franchise. Women are a well-known example, but other huge demographic groups were also formerly excluded from voting, including First Nations people, Asian-Canadians, various religious groups, and even judges. We also researched how different

First Nations, Métis, and Inuit nations conducted their elections and learned about why, because of their specific history, some Indigenous youth may view elections and the voting age challenge differently than their non-Indigenous counterparts.

Finally, we were enriched by the many guest speakers in the Clinic who spoke about various aspects of constitutional challenges, including Justice Feldman of the Court of Appeal for Ontario who spoke to us about effective factum-writing, constitutional litigator Mary Eberts who gave advice about how to launch test cases and how to work with clients over a long period of time, and litigator Nader Hasan who spoke about the constitutional cases he is currently working on.

In all, we gained an appreciation for the entire process leading up to the constitutional law decisions read about after they are published, and feel better equipped to pursue this work after we graduate.

***Karen Chen*** is a 3L student and was an Asper Centre Clinic student in 2019.



# The “Carbon Tax” Conundrum

*Understanding provincial legal perspectives on Canada's “carbon tax”*

By Ainslie Pierrynowski

“Such a proposition is fundamentally at odds with the very nature of our federation,” Saskatchewan’s Office of the Attorney-General [wrote](#) of the federal government’s greenhouse gas (GHG) pricing scheme. “It represents the federal government taking a big brother or an ‘Ottawa [knows best](#)’ role which was never envisioned by the framers.”

The environment has long served as a fertile ground for Constitutional law debates. Since the environment is not a distinct head of power outlined in the *Constitution Act, 1867*, each level of government can enact environmental legislation as long as it falls within their constitutionally prescribed powers. Consequently, this legal area has seen key questions regarding the balance of power play out. Today, a new phase in these jurisdictional tensions is unfolding. At the centre of this dispute is the *Greenhouse Gas Pollution Pricing Act*, or GGPPA.

## From the legislature to the courtroom

On June 21, 2018, the GGPPA entered into force. This statute introduced a federal pricing scheme for GHG emissions, consisting of a fuel charge and an output-based pricing system for large industrial emitters. It requires all provinces and territories to enact their own pricing schemes. These systems must meet the minimum standards pre-

scribed in the legislation. However, a contested provision of the GGPPA is the Federal Backstop. This provision established that if a province does not implement a GHG pricing scheme in accordance with federal standards, then a federally-managed pricing system will be applied to the province.

[Saskatchewan](#) and [Ontario](#) unsuccessfully challenged the constitutionality of the federal pricing scheme before their respective provincial Courts of Appeal. Now, the [Supreme Court of Canada](#) is scheduled to hear their appeals later this month. In contrast, [Alberta](#) successfully challenged the Federal Backstop before its provincial Court of Appeal. The February 24, 2020 decision of the Alberta Supreme Court, ruling against the federal tax in a 4-1 majority decision, marks the first time a provincial Court of Appeal has deemed the GGPPA unconstitutional.

These cases have emerged in the wake of a federal election where the “carbon tax” became a [salient issue](#). Accordingly, examining these provinces’ legal arguments is vital to understanding the competing visions of federalism at stake.

## Saskatchewan

In arguments before the Court of Appeal, Saskatchewan [claimed](#) that the GGPPA is unconstitutional because it would apply a federal law unequally, only subjecting provinces without a GHG pricing scheme that meets GGPPA standards to the federal GHG pricing system. Saskatchewan cited the “unwritten constitutional principle” that federal laws can be adjusted to account for local concerns. The federal government cannot, however, apply its laws in a manner that effectively rewards or punishes the legislative decisions which provinces make in their own jurisdictions. To do so, Saskatchewan contended, would fail “to respect the autonomy that Provinces are guaranteed by the Constitution.”

Saskatchewan further argued that the federal

pricing scheme constituted a tax, rather than a regulatory charge, as the Attorney-General of Canada contended. Saskatchewan argues that by enabling the Governor in Council, rather than Parliament, to determine where the tax applies contradicts section 53 of the *Constitution Act, 1867*, which prohibits taxation without representation.

### Ontario

For its part, Ontario [focused](#) much of its factum on a specific jurisdictional question: the use of the national concern doctrine. Specifically, the GGPPA evokes this legal doctrine to justify its GHG pricing system. The national concern doctrine, a branch of the federal government's residual power to "make laws for the peace, order, and good government of Canada" enables the federal government to legislate on matters that would normally fall under provincial jurisdiction, under certain circumstances. In particular, the issue in question must have "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" as well as "a scale of impact" justifying a redistribution of federal and provincial powers. The Attorney-General of Canada [argued](#) that cu-

mulative GHG emissions are a sufficiently narrow and pressing challenge to justify the use of the national concern doctrine in this case, bringing the matter firmly under federal jurisdiction.

Ontario argued that cumulative GHG emissions are not a distinct subject matter rising to the level of national concern. Rather, cumulative GHG emissions are merely the sum of local GHG emissions. As a result, Ontario claims, the federal GHG pricing scheme would allow the federal government to legislate on "a virtually limitless range of human activities...It would also still radically shift the balance of the federation towards greater centralization." Moreover, Ontario reiterated Saskatchewan's contention that the federal GHG pricing scheme was a tax. This tax, Ontario said, is unconstitutional, as the GGPPA did not explicitly state that Parliament intended to impose a tax, contrary to section 53 of the *Constitution Act, 1867*.

### Alberta

In its submissions before the Court of Appeal, Alberta [challenged](#) the federal government's use of the national concern doctrine to justify the Federal





Backstop. Like Ontario, Alberta argued that since GHG emissions were an overly broad subject, the GGPPA's use of the national concern branch would enable the federal government to erode the province's legislative domain.

Whereas Ontario and Saskatchewan unsuccessfully argued that the federal GHG pricing scheme was a covert tax (and thus unconstitutional), Alberta emphasized a more narrow jurisdictional issue. Namely, the province [argued](#) that the GGPPA is contrary to section 92(A) of the *Constitution Act, 1867*, which gives provinces jurisdiction over the development, conservation, and management of natural resources and electricity generation within their territory. Additionally, In Alberta's [factum](#), the province's Attorney General wrote that the federal scheme overlooks the Alberta's unique social and economic circumstances, particularly its reliance on the energy and natural resource sectors.

In turn, the Attorney General of Canada [countered](#) that the drafters of section 92(A) intended for this provision to be consistent with the federal power to "make laws for the peace, order, and good government of Canada"—the very basis on which the federal government's authority to enact the GGPPA rests. As a result, the Attorney General of Canada contended, the GGPPA does not contradict section 92(A).

The 4:1 majority [decision](#) held that the GGPPA was unconstitutional, concluding that, "...what is

**These constitutional challenges speak to an underlying conflict of perspectives as to the implications of the GGPPA.**

authorized under the Act indefinitely into the future and in the sole unfettered discretion of the executive is endlessly expansive...Nor is there anything in the act limiting what the federal government can choose to levy in the future both on people and industry. The minimums of today are not the maximums of tomorrow." The decision echoed Alberta's treatment of Section 92(A), noting that "for decades following their entering into Confederation, the prairie provinces were denied ownership of the natural resources in their provinces" until this provision was enacted. The decision likewise emphasized that local authorities can deal with GHG emissions effectively. Overall, the decision stated, upholding the [GGPPA] would constitute undue federal interference in the province's domain.

### Manitoba

After Ontario and Saskatchewan filed their court challenges to the GGPPA, Manitoba [filed](#) a similar challenge at the Federal Court, on the ground that the Federal Backstop falls outside of the federal government's jurisdiction. At the time of writing, a date has not been set for the hearing. In the interim, Manitoba has positioned itself as an [intermediary](#) between the federal government and the other Prairie Provinces on the issue.

### New Brunswick

New Brunswick has announced [plans](#) to implement a provincial GHG pricing system in line with federal standards. This new pricing scheme will take effect on April 1, 2020. Nonetheless, New Brunswick intervened in Alberta's challenge to the GGPPA before the Alberta Court of Appeal. In its [factum](#), the province agreed that the GGPPA was unconstitutional.

New Brunswick's arguments focused primarily on the national concern doctrine. Similar to Ontario's submissions before the Ontario Court of Appeal, New Brunswick argued that the GGPPA unjustifiability invokes the national concern doctrine, as local GHG emissions can be more effectively managed at the provincial level.



As in Saskatchewan's, Ontario's, and Alberta's Constitutional challenges to the GGPPA, an emphasis on "local solutions" and provincial autonomy runs throughout New Brunswick's argument. Indeed, the preamble of the GGPPA, concluded the province's factum, "foreshadows a singular carbon reduction scheme of questionable constitutional merit that should have been left to the provinces to orchestrate."

### Other provincial perspectives

These legal proceedings have been met with varied responses from other provincial governments. British Columbia supports the Federal Backstop. After [intervening](#) in the Saskatchewan and Ontario cases, the province [intervened](#) in the Alberta Court of Appeal case and plans to [intervene](#) in Saskatchewan's upcoming challenge before the Supreme Court. The province has emphasized that a national regime with a uniform minimum standard is necessary to combat GHG emissions. For instance, in the factum which it submitted to the Ontario Court of Appeal, British Columbia [argued](#) that "because greenhouse gases do not respect borders -- while provincial legislation must -- British Columbia's actions will only counteract the negative effects of climate change on the property and civil rights of its residents if other jurisdictions follow suit." Therefore, it contended, the Federal Backstop is a necessary measure with only "the mildest of effects on provincial jurisdiction."

Quebec has been granted intervener status in the forthcoming Supreme Court appeals. In contrast to British Columbia, Quebec supports Saskatchewan's challenge to the GGPPA. Unlike Saskatchewan and the other provinces challenging the Federal Backstop, however, Quebec already has a GHG pricing system which meets federal standards. According to Premier François Legault, the government of Quebec's opposition to the GGPPA stems from the [view](#) that "it should be up to the provinces to decide" how to manage GHG emissions. Quebec Jus-

tice Minister Sonia LeBel [echoed](#) this viewpoint, stating that Quebec is not intervening to "line up for or against [the government of] Saskatchewan. Our motivations are not the same. Our arguments are different." PEI was also granted intervener status in the case, but has since [withdrawn](#).

### A conflict of perspectives

Overall, these constitutional challenges speak to an underlying conflict of perspectives as to the implications of the GGPPA, particularly the Federal Backstop. The Attorney-General of Canada consistently grounds their arguments in the idea that the Federal Backstop is a much-needed measure targeting a nationwide challenge. In their submissions to the courts, none of the provinces challenging the GGPPA seem to contest the importance of regulating GHG emissions. Rather, the language and framing of their arguments suggest that what is at stake is not merely the particulars of regulating GHG emissions, but a shift in the framework of Confederation toward a troubling erosion of provincial autonomy.

Indeed, the majority decision from the Alberta Court of Appeal states, "a substantial disconnect exists between meeting environmental objectives by reducing GHG emissions, on the one hand, and preserving provincial economies and the ability to fund new technologies and clean energy, on the other...All of this raises an overarching issue – how to resolve social, economic and environmental issues in this country in a way that maintains public trust and confidence in our democratic federal state and the Rule of Law."

As of January 1, 2020, the Federal Backstop [applies](#) to Alberta, Manitoba, New Brunswick, Nunavut, Ontario, and Saskatchewan. Saskatchewan and Ontario's cases are expected to be heard by the Supreme Court on March 24 and 25, 2020.

*Ainslie Pierrynowski is a 1L JD student at the Faculty of Law.*

## Building on *Bedford*

By Ryan Deshpande and Mackenzie Claggett

A common misconception of the groundbreaking case, [\*Canada \(Attorney General\) v. Bedford\*](#), is that, in it, the Supreme Court of Canada mandated the decriminalization of sex work. But in paragraph two of the decision, McLachlin CJ wrote: “These appeals and the cross-appeal are not about whether prostitution should be legal or not.” Rather, the issue was whether the manner in which the *Criminal Code* regulated sex work was compliant with the *Charter*. The unanimous Court ultimately ruled it was not.

While the Court did not explicitly mandate decriminalization in *Bedford*, the decision articulated how criminalization creates harms for sex workers. McLachlin CJ wrote that the criminal “prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution”. This finding helped to legitimize the advocacy of sex workers who, for decades, have argued that the prohibitions on street solicitation, bawdy-houses, and living on the avails of prostitution undermine their ability to conduct their work safely.

Given the Court’s emphasis on the harms of criminalization, advocates had hoped that Parliament would respond to the decision with non-criminal regulations. This approach would have served the interests of both sex workers and the broader public. Instead, the Canadian government responded with the [\*Protection of Communities and Exploited Persons Act\* \(PCEPA\)](#) in 2014. This act amended the *Criminal Code* and made it illegal to: (1) purchase sexual services, (2) advertise sexual services, (3) obtain a material benefit from sexual services (with exceptions), (4) procure a person to



provide sexual services, and (5) sell sexual services in certain areas. Such an approach was in direct contradiction with the spirit of the *Bedford* decision; so much so that every opposition member opposed the bill.

The unanimous legislative opposition to the *PCEPA* gave advocates the impression that these provisions would be repealed if the 2015 federal election resulted in a new party gaining power. A new party did form government in 2015, and advocates’ hopes were further heightened when the newly-appointed [\*Minister of Justice\*](#) told The Tyee, “I definitely am committed to reviewing the prostitution laws, and sitting down with my officials to assess the best options, and with those they affect directly.” Unfortunately, *PCEPA* was not amended and no party has raised it as a priority since. The act remains in full effect today.

In response to Parliament’s inaction, the Sex Workers’ Rights Working Group at the David Asper Centre hopes to build on the legacy of *Bedford* and continue to bring attention to how criminalization is a dangerous approach to regulating the sex trade. In our capacity as law students, we are in the process of developing resources on existing case law and academic literature that could assist with future legal challenges to the *PCEPA*’s provisions. While we remain hopeful that legislative changes to the *Criminal Code* will materialize, litigation may, again, be the only feasible avenue for creating safe and empowering work condi-

tions for sex workers.

This work is not done in isolation. Sex worker organizations and advocates have expressed their opposition to the *PCEPA* through legislative advocacy, and individuals are beginning to mount *Charter* challenges when charged under the new provisions enacted by the *PCEPA*.

For example, in a case called *R v Anwar*, individuals operating a professional sex work service were recently charged with procuring, advertising, and materially benefiting from sexual services. In response, the defence challenged the constitutionality of the *PCEPA*, arguing that the new *Criminal Code* provisions unjustifiably violates section 7 of the *Charter*.

Unfortunately, *PCEPA* was not amended and no party has raised it as a priority since. The act remains in full effect today.

Fortunately, the judge agreed with the defence, finding the procurement, advertisement, and material benefit provisions unconstitutional.

As we wait to see whether the Crown appeals this provincial court decision, we continue our advocacy and research efforts to assist advocates who may inevitably have to mount another *Bedford*-type challenge to these laws.

**Ryan Deshpande** is a 2L JD student at the Faculty of Law. **Mackenzie Claggett** is a 1L JD student in the combined JD/MPP program at the University of Toronto. They are the co-leaders of the Asper Centre sex workers' rights student working group.

## Tackling Immigration Street Checks

By Jeffrey Wang, Michelle Huang and  
Tabir Malik

In recent years, the media has reported about many [instances of illegal 'carding' practices](#) conducted by Canada Border Services Agency (CBSA) officials in Toronto's racialized neighbourhoods. These practices have sometimes been undertaken in collaboration with local police officers and have been seen to be targeted towards racial minorities as well as other vulnerable groups such as migrant workers.

Clearly, this relatively new phenomenon is highly problematic. Not only is this type of carding, which is also known as street checking, illegal and often rooted in racial profiling, but those who may likely end up detained as a result of such a discriminatory practice are frequently subjected to abuses of procedure in immigration detention centres and cannot rely on fair treatment or just hearings going forward. Carding has the potential to affect the *Charter* rights of many persons and disproportionately affects the most vulnerable.

Given this context, it is important to equip individuals with information about their rights, as well as CBSA officials' powers, and empower people who may be impacted to make informed decisions for themselves in the event that they are carded.

We are leading the Asper Centre's Immigration and Refugee student working group this year. The project for this year's working group is to create a brochure that compiles all of the legal information relevant to an individual who may be approached by a CBSA officer and find themselves being

## Asper Centre Working Group Reflection

'carded'; we are compiling information on both the individual's rights and obligations as well as those of the CBSA officer. All of the information will be presented in plain language to remain accessible for most populations.

Our project has been undertaken in collaboration with the HIV and Aids Legal Clinic of Ontario (HALCO), a full service legal aid clinic in downtown Toronto, and HALCO will be responsible for distributing the information drafted and creating the final brochures for their clients as well as sharing the information with other community legal aid clinics within the broader Ontario legal aid clinic system. We were guided and supervised throughout this year by *former* staff immigration lawyer at HALCO, David Coté, who met with us and the working group on several occasions to help us with the research and development of the brochure.

support workers with providing the correct information to their clients.

Through this project, we hope to expose first-year law students to legal research skills as well as expose them to the task of translating 'legalese' to plain language writing. We also hope to expose them to an area of law that they may be unfamiliar with but could find interesting. Finally, at this early stage in their law careers, our goal is to inspire them with the idea that they can make a tangible difference in the lives of others in our community through the law.

**Jeffrey Wang, Michelle Huang and Tabir Malik** are all 2L JD students at the Faculty of Law and the co-leaders of the Refugee and Immigration Law student working group.



**David Coté, staff lawyer at HALCO, speaking to the Refugee and Immigration Law student working group**

Our project will hopefully have a beneficial impact on the clinics' client populations, especially since they largely come from the marginalized groups for whom this information will be particularly relevant. We hope that the brochure will also support clinic lawyers and other community



## In Support of the Global Campaign for Media Freedom

By Sonia Patel

This year, the University of Toronto joined forces with universities and experts across the world as part of the Global Campaign for Media Freedom. The project reviews laws and practices in the area of media freedom both in Canada and internationally. As a research assistant for the Asper Centre, I have been looking into Canada's record on hate speech, blasphemy, sedition, and defamation. Students working with the International Human Rights Program (IHRP) are also researching espionage, disinformation, anti-terrorism laws, and more. Together, the Asper Centre and IHRP are contributing to a series of reports that highlight model laws to guide the formulation of international human rights standards for media freedom. The reports will also outline the existing laws and practices that are used to target journalists and stifle press freedom.

The Global Campaign for Media Freedom comes at a pivotal moment in time. Internationally, there has been an increasing number of threats to media freedom and freedom of the press. These trends are exacerbated by coercive and punitive laws and practices. In addition to the harm caused to the members of the press, the erosion of media freedom has a broader impact on our society at large. Democracy depends on the free and independent dissemination of information. The *Charter* recognizes this through the wording of section 2(b), which explicitly extends “freedom of thought, belief, opinion and expression” to include “freedom of the press and other media communication.”

Historically, the Canadian *Criminal Code* has criminalized three forms of criminal libel: seditious libel, blasphemous libel, and defamatory libel. In addi-



tion to criminal defamation, there is also a tort of civil defamation at common law. Of the three forms of criminal libel, only two remain on the books in Canada. The third, blasphemous libel, was repealed by Bill C-51 in December of 2018. Bill C-51 was an omnibus legislation that repealed provisions of the *Criminal Code* that were found to be unconstitutional, likely unconstitutional, obsolete, or redundant. Blasphemous libel in particular was criticized by free speech advocates and Members of Parliament as outdated, redundant, and likely unconstitutional.

During the consultations that preceded the passing of Bill C-51, groups such as the Centre for Free Expression and Canadian Civil Liberties Association advocated for the concurrent repeal of seditious and defamatory libel. These charges have not yet been taken up by Parliament. While prosecution for sedition has not happened in Canada since the 1950s, criminal defamation is a different story.

Members of the legal community often assume that criminal defamation is rarely prosecuted. However, this is not the case. The Canadian Centre for Justice Statistics produced statistics that at least 408 criminal libel cases were decided between April 2000 and March 2015. While few prosecutions involve charges against journalists, the trend of increased use of these provisions is nonetheless worrying for freedom of expression. The Law Commission of Ontario is currently undergoing a comprehensive analysis of the current defamation law framework in the civil context. The project highlights the increasingly blurred boundaries between professional or traditional journalism and online media. In this context, the defendant of a defamation action is just as likely to be an independent blogger or social media user as they are an established media outlet. Any consideration of the ongoing place of criminal defamation provisions must keep this in mind.

On the civil side, the 2009 Supreme Court of Canada case of [Grant v Torstar](#) has greatly diminished the restrictions that the media experience in the face of defamation allegations. In *Grant*, the Supreme Court accepted the arguments of the Toronto Star that the law of defamation in Canada needed to be updated in order to protect free expression and reporting on matters of public interest. Otherwise, there was a risk of a “chilling effect on what is published. Information that is reliable and in the public’s interest to know may never see the light of day.” With this in mind, the court recognized a new defence of responsible communication on matters of public importance. This defence to defamation applies to publications on matters of public importance if the publisher has made diligent efforts to verify whether the information they are reporting was true prior to publication, having regard to various factors such as the seriousness of the allegation, urgency, and whether the claimant’s side of the story was sought and accurately reported.

Similarly, criminal hate speech provisions general-

ly do not pose a danger to the press in Canada. While convictions for hate speech carry serious penalties when imposed, there is a high bar to conviction. For both sections 318 and 319 of the *Criminal Code*, consent of the Attorney General is required to proceed with a prosecution in order to safeguard freedom of expression. The Supreme Court of Canada has cautioned that “hatred” is restricted to the most severe forms of expression that “belie[] reason.” Given this high bar, publications by traditional Canadian media have generally not been captured.

At the same time, Canadian law recognizes that genuine hate speech only tenuously furthers the values of free expression. In the 2019 case of *R v Sears*, for example, the editor and publisher of Your Ward News, a community newspaper, were convicted for wilful promotion of hatred. In reaching their decision, the trial judge pointed to numerous specific examples of hate in Your Ward News, including glorification of Adolf Hitler and arguments that sexual assault laws were “evolutionarily backward laws.” The extreme nature of the speech allowed the court to find both the factual promotion of hatred and subjective intent to do so that is required under the *Criminal Code*. In the vast majority of cases involving the media in Canada, the fulfilment of these requirements has been thankfully lacking.

On March 6, 2020, the Asper Centre and IHRP co-hosted a symposium on Canadian media freedom. This symposium brought together a small group of academics, civil society organizations, media experts, and leading practitioners to examine the state of media freedom and the law in Canada. The goal of the symposium is to critically examine the various legal and non-legal challenges that threaten freedom of the press in Canada, with a view to shaping future advocacy efforts.

**Sonia Patel** is a 3L JD student at the Faculty of Law and was a 2019 Asper Centre Clinic student and Research Assistant.

## The Supreme Court: Year in Review

By Kylie de Chastelain



This year saw a number of interesting and significant Constitutional law decisions handed down from our Supreme Court. Here is a recap of some of those key decisions. The Asper Centre is proud to have intervened in three of the below cases reported.

### [Canada \(Public Safety and Emergency Preparedness\) v Chhina 2019 SCC 29](#)

In this case, the Supreme Court considered a claim brought by Mr. Chhina; an immigrant who received refugee status in Canada in 2008. At issue was whether an immigration detainee can challenge immigration detention using a habeas corpus claim. In 2012, Mr. Chhina was ordered to leave Canada for making false representations on his refugee application and was placed in detention pending his removal. Claiming his s. 10(c) *Charter* rights had been infringed, Mr. Chhina initiated a *habeas corpus* claim. *Habeas corpus* claims cannot be heard when there exists a “complete, comprehensive and expert statutory scheme” which provides for a thorough and equally advantageous review process. Because Mr. Chhina was

an immigrant, the *Immigration and Refugee Protection Act, SC 2001, c. 27 (IRPA)* and its detention review processes were applicable to his case. It was thus unclear whether Mr. Chhina’s access to *IRPA* review precluded his *habeas corpus* claim.

Justice Karakatsanis, for the majority, held that it did not. *Habeas corpus* was found to be more advantageous than *IRPA* regulations because it places the onus on the state to show why the detention of lawful, is timelier, and is broader in scope.

### [Frank v Canada \(Attorney General\) 2019 SCC 1](#)

This case debated whether or not Canadian citizens who have lived abroad for five or more years should retain the right to vote. The *Canada Elections Act SC 2000, c 9 [the Act]* excluded such Canadians from voting, with some exceptions for government employees and military personnel posted overseas. In 2011, plaintiffs, Dr. Frank and Mr. Duong were not allowed to vote in the Canadian federal election because they had been living outside of Canada for more than five consecutive years. The plaintiffs brought a claim arguing that the law breached their s. 3 *Charter* rights to vote.

The Attorney General argued that although the law clearly breached citizens’ s. 3 *Charter* rights, the breach was a reasonable limit that could be justified in a free and democratic society per s. 1 of the *Charter*. The Supreme Court did not agree. Writing for the majority, Chief Justice Wagner held that the impugned provision was not proportionate to valid objectives around ensuring fairness in elections. Instead, the law denied citizens their constitutional right to vote. As such, the appeal was allowed, and the impugned provisions of the Act were declared to be no longer in force. The Asper Centre [intervened in this appeal](#) to provide analysis as to the “social contract” argument and the meaning of s.3.

### [R v Barton 2019 SCC 33](#)

This case involved the death of an Indigenous woman, Cindy Gladue, who was found deceased after what was described as “rough but consensual

sex.” The defendant was initially acquitted by a jury on first-degree murder and manslaughter charges. However, on appeal, it was determined that the trial judge had erred by failing to hear a section 276 application to determine whether or not Ms. Gladue’s sexual history should have been admitted. At the Supreme Court, Justice Moldaver and the majority agreed that the trial judge had erred by allowing Ms. Gladue’s sexual history to be admitted. The Court ordered a new trial.

Of particular interest to the Asper Centre was the Supreme Court’s consideration of the role of interveners in criminal justice proceedings. There was some contention by Mr. Barton over the role and influence of interveners at the appeal, and as a result, the subject was considered at the Supreme Court level. The Asper Centre itself intervened to comment on the role of interveners in public interest litigation. The [Asper Centre’s factum](#) focused on the distinct perspectives that interveners can provide, particularly in criminal cases where marginalized people are vulnerable. In his decision, Justice Moldaver emphasized that interveners do play an important role in criminal appeals, and that their participation should continue in line with existing statutory requirements.

### [R v Bird 2019 SCC 7](#)

In this appeal, the Supreme Court considered whether an individual may challenge a Long Term Supervision Order (“LTSO”) through what is known as a “collateral attack.” A collateral attack occurs when an individual challenges an order or decision through a new or separate case rather than appealing the order through established channels (in this case, by appeal to the Parole Board).

Mr. Bird was convicted on a weapons charge in 2013 and sentenced to a year in prison. He served his time, but because he was a “long-term offender” with over 60 criminal convictions, he was placed on a 6-month LTSO at a “community correctional centre.” Mr. Bird initially remained there, but subsequently left the centre and did

not return. When he was found, he was arrested and charged with violating the LTSO.

Mr. Bird challenged the validity of the LTSO, arguing that it violated his rights to liberty under section 7 of the *Charter*. The majority of the Supreme Court held that such an attack was not permitted. Using the Maybrun framework, the Court concluded that, due to the availability of other avenues for appeal, the specific statutory language adopted by Parliament, and the danger of letting offenders “breach first” and “challenge later,” Parliament had clearly never intended to permit collateral attacks of this type. [The Asper Centre intervened in this appeal](#) and made a series of submissions relating to the suitability of the *Maybrun* framework as applied to constitutional cases, and the importance of considering access to justice in decisions of this type.

### [R v Jarvis 2019 SCC 10](#)

This appeal explored the limits of reasonable expectations of privacy and in relation to voyeurism in public spaces. Mr. Jarvis, a high school teacher, surreptitiously recorded female students in common spaces throughout the school using a camera hidden inside a pen. The videos focused on the girls’ upper bodies, chests and faces. None of the girls knew they were being recorded. Mr. Jarvis was charged with voyeurism under s. 162(1)(c) of the *Criminal Code*. He admitted to recording students but disputed that he had made the recordings for a sexual purpose and that he had made recordings of people in circumstances giving rise to a reasonable expectation of privacy.

Considering a variety of factors, including the location of the students when they were filmed, the subject matter of the recordings, and whether there was consent to record, the Supreme Court concluded that Mr. Jarvis should be found guilty. Students maintain a reasonable expectation of privacy in schools. In reaching this decision, the Supreme Court drew from section 8 *Charter* jurisprudence, which informs how we conceive of “reasonable expectations of privacy.” Although



applying *Charter* analysis to the interpretation of a *Criminal Code* provision is unusual, and potentially stands to broaden the scope of criminal liability, the case has been widely hailed as a victory for women and girls.

### [R v Stillman 2019 SCC 40](#)

In this appeal, several members of the Armed Forces were charged with serious civil and criminal offences under the National Defence Act and were set to be tried in a military proceeding before a judge or panel composed of five military personnel. The plaintiffs argued that this arrangement breached their section 11 *Charter* rights, and that the stipulated exception for military tribunals applied only to “true” military crimes such as mutiny. At the Supreme Court, the exception for military justice proceedings under s. 11(f) was upheld. The Court agreed that the designation of a distinct military justice system was a valid exercise of Parliament’s legislative authority over the military. Moreover, the Court determined that civilian crimes could be tried in this system, noting that the objectives that justify a separate military system – discipline, efficiency, and morale – are still relevant to criminal and civil actions that do not possess an inherent “military” quality.

### [R v Le 2019 SCC 34](#)

The central question in this appeal was how courts should interpret a subjective understanding of police interactions, and specifically, how such an understanding should influence analyses relating to s. 9 *Charter* claims about arbitrary detention. In 2012, Mr. Le was in a backyard with friends. The location was known to be connected to drug activity, and police officers, who were standing nearby to “observe” the yard, entered it and began asking questions of the men. This prompted Mr. Le to flee the scene. He was apprehended, arrested, found with a gun and drugs, and charged.

Mr. Le claimed that he was arbitrarily detained in violation of his s. 9 *Charter* rights and asked the Supreme Court to exclude the evidence obtained

by officers under section 24 of the *Charter*. The Supreme Court held that Mr. Le’s detention began from the moment the police officers entered the backyard, because Mr. Le believed he had to comply with the officers’ demands from that point onward, especially because he was a member of a racialized, low-income community who had had negative interactions with police before. Because the police entered the yard without reasonable suspicion of a crime, their questioning of Mr. Le was in violation of his rights under the *Charter*. The appeal was allowed, and the Court entered not-guilty verdicts on all charges.

### [Canada \(Minister of Citizenship and Immigration\) v Vavilov 2019 SCC 65](#)

This case asked whether a person born in Canada to foreign spies could receive citizenship. In a landmark decision, the Supreme Court has determined that they can. Mr. Vavilov was born in Canada to Russian parents who were employed by the Russian foreign intelligence service. When Mr. Vavilov attempted to renew his Canadian passport but was denied. The *Citizenship Act* stipulates that the children of diplomats on assignment in Canada are exempted from the rule that those who are born in Canada automatically acquire citizenship. Mr. Vavilov’s application was rejected on this basis. At the Supreme Court, the majority held that the exception for the children of diplomats applies only to those with diplomatic privileges and immunities. Because Mr. Vavilov’s parents had no such privileges, the exception could not apply to him, and he was entitled to citizenship.

From a constitutional perspective, *Vavilov* is important because it clarified the standard of review to be applied against administrative decisions. Specifically, the *Vavilov* decision stipulated that with respect to constitutional questions, a correctness standard must be applied.

*Kylie de Chastelain is a 1L JD student and the Asper Centre’s work-study student in 2019.*

## UNDRIP Implementation and the Wet'suwet'en

By Leslie Anne St. Amour

The development of the Coastal Gas Link (CGL) pipeline in BC has become a flash-point demonstrating the difficulties in resource development and achieving First Nations self-determination in Canada. It has highlighted not only the concern of lack of Indigenous consent to resource development that we have seen regularly across Canada, but also the question of who it is that can give that consent on behalf of an Indigenous community. The Indian Act band councils of the Wet'suwet'en First Nation, which are recognized by the provincial and federal governments as representing the community members involved in the dispute had given consent for the project, while the Hereditary Chiefs, that within Wet'suwet'en legal traditions would have authority over the territory over the which the dispute has arisen, have not given consent and believe that under Wet'suwet'en law, the project cannot go forward.

In January of 2019, the RCMP raided camps in Wet'suwet'en and arrested community members and supporters who were limiting access by Coastal Gas Link contractors and employees to their territory. This was based upon a temporary injunction granted by the BC Superior Court in favour of CGL. In November of 2019, the BC legislature passed legislation to implement the UN Declaration on the Rights of Indigenous People (UNDRIP) called the Declaration on the Rights of Indigenous Peoples Act (the Act). In January of 2020 the RCMP set up a checkpoint monitoring

and regulating access to Wet'suwet'en territory, following which a BC Superior Court justice granted a permanent injunction to CGL. Feeling déjà vu? You aren't the only one. How, after the province of British Columbia passed the aforementioned Act, could we again be seeing a checkpoint on Wet'suwet'en territory so similar to what we saw in 2019? What does UNDRIP mean for Indigenous people in this context?

In describing the implementation of UNDRIP on its website, the province of BC made it clear that it does not view UNDRIP as creating new rights. Rather, the Act requires that the province of BC prepare and implement an action plan to achieve the objectives of UNDRIP; it requires the Minister responsible to prepare a report each year on the progress made towards implementing UNDRIP; and, it allows for the entering into agreements with Indigenous governing bodies relating to the exercise of a statutory power of decision jointly between an Indigenous governing body and the government or the consent of an Indigenous governing body before the exercise of a statutory decision making power.

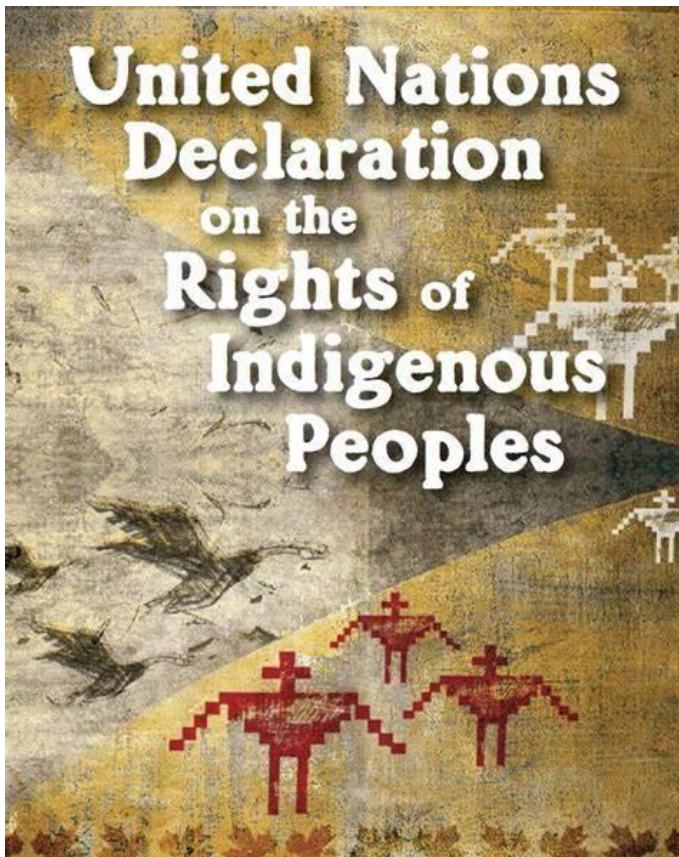
In the Act, "Indigenous governing body" is defined as "an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*;" This definition has the potential to recognize traditional Indigenous governance structures outside of the *Indian Act* as the rights holders in a territory. The Act allows the province to make agreements with these other governing bodies in relation to decision making powers, which will likely include the decision to approve or not approve a resource development project. However, the ability to enter into agreements with Indigenous governing bodies does not answer the question of which Indigenous bodies have the authority to enter into different types of agreements, rather it just gives the province more flexibility in who it chooses to enter into an agreement with. Businesses, the public and Indigenous

communities alike will have to wait and see how this flexibility plays out in reality and if it does provide additional certainty or rather shifts the questions causing further uncertainty.

For many Indigenous people one important aspect of UNDRIP is the principle of Free, Prior and Informed Consent (FPIC) in the context of the approval of projects impacting Indigenous lands. This phrase is found in Articles 10, 11(2), 19, 28(1), 29(2) and 32(2) of UNDRIP. The implementation of UNDRIP legislation in BC has not answered the question of what FPIC will mean in BC. For some, there is an expectation that due to the way FPIC has been referenced in other legislation, including the new Environmental Assessment Act, in BC it does not constitute a veto, but rather refers to methods of working towards consent and agreement, rather than an outcome that can be achieved. The impact of the legislation implementing UNDRIP in BC will depend greatly on the interpretation of FPIC and the way the province uses the flexibility it has in entering into agree-

ments, particularly if it is expected to solve the problems that occur in cases such as the Wet'suwet'en.

Currently, Canadian Constitutional law considers consultation with Indigenous people in relation to s. 35 Aboriginal rights. This duty to consult was established by the Supreme Court of Canada in [\*Haida Nation v. British Columbia \(Minister of Forests\)\*, \[2004\] 3 S.C.R. 511, 2004 SCC 73](#). In this case the court stated that governments cannot "run roughshod" over Aboriginal rights simply because they are yet to be proven in court. Since the Haida Nation case, the jurisprudence surrounding the duty to consult is continuing to evolve but some things are certain. The duty is owed to the [Indigenous group collectively](#), and is owed by the government, but it can be delegated to private actors. The issue of who can represent the Indigenous group when rights are at stake is not yet settled law, however. It is possible that the Supreme Court of Canada will find that it is the traditional governments of an Indigenous community where those forms of governance continue to operate and are empowered by the members of the community, that can represent the Indigenous group. This is because Aboriginal rights and title are tied to the [pre-existing societies and sovereignty of Indigenous people](#) in which these traditional forms of government would operate, unlike band councils which were formed by the Indian Act. It is yet to be seen how the incorporation of UNDRIP into Canadian Constitutional law may clarify these issues or raise further questions in the years ahead.



**Leslie Anne St. Amour** is a 3L JD Candidate at the Faculty of Law and was an Asper Centre Clinic student in 2018.





## The Constitutionality of Medically Assisted Death: Canada's Changing Landscape

By Kylie de Chastelain

Medical assistance in dying (“MAID”) was legalized in Canada in June 2016, following the Supreme Court of Canada’s ruling in [\*Carter v Canada, 2015 SCC 5\*](#) which declared s. 241(b) and s. 14 of the *Criminal Code* unconstitutional. Together, the provisions stipulated that no person could consent to death being inflicted upon them and that it was a crime to help someone end their own life. Unanimously, the Supreme Court held that these provisions deprived adults of their section 7 *Charter* rights to life, liberty and security of the person. An individual’s ability to assess their wellbeing and preferences in the context of a “grievous and irremediable” medical condition was deemed central to individual dignity and autonomy; a reality which clearly engaged s. 7 rights to liberty. Further, because individuals were denied access to medically assisted death, many were prompted to take their own lives prematurely and in a manner inconsistent with s.

7. The Supreme Court recognized the provisions’ combined objective: namely to protect vulnerable people from being induced to commit suicide against their true wishes. However, the Court determined that this valid and important aim was practically overbroad in its effects: the limit on rights protected vulnerable people, but it also prevented non-vulnerable people from accessing safe MAID services.

Following *Carter*, MAID became accessible in Canada with strict provisos that those seeking an assisted death be rigorously evaluated by a series of independent medical practitioners. Currently, to access MAID, citizens must be of legal age, eligible for public health care, able to make decisions about their health, able to make a voluntary request for MAID, and, importantly, be capable of providing free and informed consent. MAID is only available to those suffering from serious and irremediable medical conditions that cause per-



sistent and intolerable physical or psychological suffering. Perhaps most important: MAID is only available to those whose natural deaths are “reasonably foreseeable.” This excludes people with long-term but non-life-threatening disabilities and illnesses from accessing MAID services.

In September 2019, two Quebec citizens challenged the limits of MAID access at the Superior Court of Quebec (see: [Truchon c Procureur general du Canada, 2019 QCCS 3792](#)). Mr. Jean Truchon and Ms. Nicole Gladu are both severely disabled as a result of cerebral palsy and post-polio syndrome, respectively. Mr. Truchon is fully paralyzed and suffers from severe pain and spasms that no medical intervention seems to remedy, whereas Ms. Gladu lives with constant, chronic physical and psychological pain and the knowledge that her body will continue to physically deteriorate to the point that she will require full-time care. Despite this, neither Mr. Truchon or Ms. Gladu can currently access MAID because their deaths are not “reasonably foreseeable.” If both plaintiffs keep eating, they could live decades more.

**Mr. Jean Truchon and Ms. Nicole Gladu are both severely disabled as a result of cerebral palsy and post-polio syndrome, respectively.**

In submissions to the court, both Mr. Truchon and Ms. Gladu described their shared desire to end their lives in a peaceful and medically supervised manner. The current federal and provincial laws, they argued, violated their s. 7 and s. 15 *Charter* rights because they excluded people without reasonable foreseeability of a natural death from accessing MAID. The Superior Court of Quebec ulti-

mately agreed, stating that the existing law deprived people of their autonomy and rights to self-determination and induced them to end their own lives in violent and drastic ways that violated s. 7 *Charter* rights. This construction was overbroad, the court concluded, as existing screening requirements were deemed more than adequate to protect vulnerable people. Thus, the provision could not be saved under a s. 1 analysis.

With respect to s.15, the Court explored whether the existing legislation established a distinction based on an enumerated or analogous ground and, if so, whether the law imposed a burden or denied a benefit in a manner that would reinforce, perpetuate, or increase pre-existing disadvantage. Although the Attorney General argued that the impugned provision did not discriminate on the basis of disability, but rather on the basis of foreseeable death, it could not be said to engage s. 15 rights. The Court disagreed and concluded that the plaintiffs and comparable applicants were deprived of the ability to seek MAID based on their disability status and that this paradigm exacerbated existing disadvantage. Justice Christine Baudouin ruled that the existing MAID laws were too restrictive, and ordered them updated by March 11, 2020. Without an update, the “reasonably foreseeable” provision will be suspended in Quebec.

The decision from the Superior Court sparked much discussion in the legal community, as the federal government chose not to appeal the decision and instead moved towards amending the legislation. Attorney General David Lametti [has acknowledged](#) that the federal government is using this opportunity to update MAID legislation. A brief two-week national consultation was initiated in early January, and on February 24<sup>th</sup>, 2020, the federal government announced a [series of proposed changes](#) to *Criminal Code* provisions on MAID. These changes include removing the requirement for reasonably foreseeable natural

death, affirming and enhancing independent multi-physical review mechanisms and research into MAID practices, and allowing a waiver of final consent for people who may lose the capacity to consent before MAID can be provided. Despite this flexibility, the government specified that individuals who suffer solely from mental illness will remain ineligible.

**“Legalizing MAID outside the end-of-life context explicitly confirms the ableist presumption that people with chronic disabilities may be better off dead. It opens up MAID for a host of developmental and mental health conditions, characterized by often vague diagnostic criteria and challenging predictions of treatment success.**

*- Prof. Trudo Lemmens*

While many experts have heralded this decision as a progressive step towards greater equality and access to important healthcare services, there are others who fear for the future. Professor [Trudo Lemmens](#), a professor of health law and policy at the University of Toronto Faculty of Law (and co-editor of [Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction](#) alongside Asper Centre Executive Director Cheryl Milne) has offered strong criticism over the proposed changes. In a piece written for the Montre-

al Gazette, Prof. Lemmens wrote: “Legalizing MAID outside the end-of-life context explicitly confirms the ableist presumption that people with chronic disabilities may be better off dead. It opens up MAID for a host of developmental and mental health conditions, characterized by often vague diagnostic criteria and challenging predictions of treatment success.”

These concerns are shared by [disability activists](#), and Prof. Lemmens has emphasized that in places like Belgium and the Netherlands – the only other jurisdictions where people with chronic disability are entitled to access MAID – there are legal claims afoot. In Belgium, a criminal proceeding has been initiated against three physicians over the death of Tine Nys; a man with Asperger’s who was able to access MAID and end his life. As Prof. Lemmens notes, the intolerability of disability is directly related to the level of social and health care supports available. If provincial and federal governments chose to enhance these services, perhaps there would be no need to seek MAID in the first place. In the absence of such support, it strikes Prof. Lemmens and others that widening MAID access sends the wrong message about what it means to live well with disability and other chronic conditions.

The coming weeks and months will be hugely important as the proposed changes are debated in Parliament and across Canada. While the laws in Canada surrounding medically assisted dying will certainly be changing, whether legal experts and MAID proponents will regard these as positive developments remains to be seen.

*Kylie de Chastelain is a 1L JD student and the Asper Centre work-study student in 2019-20.*



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