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ASPER CENTRE OUTLOOK



David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO



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MESSAGE FROM THE EXECUTIVE DIRECTOR

It has been a really tough year for everyone. I did not imagine that we would be facing another province-wide pandemic lock-down in April 2021, but I suppose if we had listened to the experts, we should not be surprised. Through all of this, I am amazed at the dedication that the students have again demonstrated to learning, to contributing to the work of the Asper Centre, and to doing work that makes a difference. I am grateful and impressed.

The Faculty of Law has also gone through some turbulence that is yet to be resolved. I miss working closely with the International Human Rights Program and look forward to a revitalized program with a permanent director some time soon. The report of Hon. Thomas Cromwell did acknowledge the precarious position that our programs are in without clear commitments to protecting the freedom of programs such as the Asper Centre to challenge authority and advocate vigorously for the rights of marginalized communities and for access to justice. It was a disappointing blow to be denied intervener standing at the Federal Court of

Appeal in the challenge to the Safe Third Country Agreement which leads to refugee claimants being turned back at the United States border. However, it was an even greater disappointment for the Court to allow the appeal and dismiss the application. We will be keeping our eye on the inevitable application for leave to appeal at the Supreme Court of Canada. I will also be looking at ways to address the treatment of interveners at the Federal Court (all interveners were refused leave to participate in this important appeal). As we seek to be critical of institutions which make advocacy on behalf of marginalized communities and individuals, I trust the Faculty will continue to be supportive.



Cheryl Milne,
Executive Director



Reconciliation and Recognition of Treaty Rights:

The Mi'kmaq Fisheries Dispute

by Lavalee Forbes and Julia Nowicki

The launch of a self-regulated commercial lobster fishery in Saulnierville, Nova Scotia by Sipekne'katik First Nation brought to the fore issues such as Canada's failure to uphold treaties, the RCMP's failure to protect Indigenous peoples from acts of violence, and racism against Indigenous peoples. Most striking was perhaps the confusion and misinformation that abounded with regards to the fishing rights Mi'kmaq possess by virtue of the peace and friendship treaties they entered into with the British Crown in the 18th century. The constitutionally protected right to fish for a moderate livelihood was confirmed and recognized by the Supreme Court of Canada in the 1999 [*R v Marshall*](#) decision; however, the crisis that unfolded in response to the launch of the Sipekne'katik fishery demonstrates both how little the government has done to protect this right and how little this right is understood by the general population.

Summary of Present Day Dispute

The Sipekne'katik First Nation commercial lobster fishery was launched on September 17, 2020 — 21 years after the decision in *Marshall*. The fishery operated from September until December, with members choosing to fish earlier than the federally-mandated season because the community's boats were poorly equipped for winter conditions. Licences and lobster trap tags were issued to a number of Mi'kmaq fishers by the Sipekne'katik First Nation. However, non-Indigenous fishers quickly responded to the fishery by declaring that it was illegal and in violation of the federal government's required fishing seasons, which prohibited lobster fishing until

November. Declarations of illegality soon escalated into acts of violence directed towards Sipekne'katik fishers and their property. Flares were shot at Mi'kmaq fishing boats, fishing lines were cut, traps were seized, fishers were harassed, and a lobster pound was burned down.

Many non-Indigenous fishers have argued that Sipekne'katik's failure to comply with fishing seasons would jeopardize the health of the lobster populations off the coast of Nova Scotia. Although Aboriginal rights can be limited for conservation reasons, this position ignores the conservation measures taken by the Sipekne'katik fishery itself, including their fisheries management plan. It also ignores persuasive expert evidence which indicates that the Sipekne'katik lobster fishery is too small to endanger the lobster stocks, which are currently healthy and capable of supporting a Mi'kmaq commercial fishery.

Instead of protecting the Sipekne'katik's constitutionally-entrenched right to fish, the government threatened to prosecute individuals for purchasing fish from the Sipekne'katik commercial fishery. While everything caught as a part of the Sipekne'katik commercial fishery was eventually sold, these sales had to be done in secret because no buyer would openly do business with the First Nation's fishers. By the close of the Sipekne'katik's fishing season in December, all fishers had lost money.

Back in October 2020, Prime Minister Justin Trudeau pledged to work with both Mi'kmaq and non-Mi'kmaq fishers to find a solution to the conflict and to increase funding for police in the region. While Mi'kmaq leaders held conversations with



Fisheries and Oceans Canada (the “DFO”) through the fall months, Sipekne’katik chief, Mike Sack, ended these talks around December. He cited a lack of desire and ability on the part of the DFO to protect the Mi’kmaq Nation’s constitutionally entrenched right to fish commercially. Chief Sack did indicate, however, that he would continue speaking with Crown-Indigenous Relations Minister Carolyn Bennett about Indigenous self-governance.

R v Marshall SCC 1999

In 1999, the treaty right to fish and trade for sustenance was affirmed by the Supreme Court of Canada in *Marshall*. Donald John Marshall Jr. was a Mi’kmaw man who was arrested and charged under the Maritime Provinces Fishery Regulations for selling eels without a licence, fishing without a licence, and fishing during the close season with illegal nets off the coast of Pomquet Harbour, Antigonish County, Nova Scotia. Marshall Jr. appealed his conviction on grounds he had a treaty right to catch and sell fish under a treaty agreed to by the British Crown in 1760, and it was the terms therein which were under dispute in this case.

Today’s Aboriginal law jurisprudence continues to be based on treaties signed between Indig-

nous nations and the British Crown. After centuries of the Crown’s failure to uphold treaty obligations, coupled with a refusal on the part of the courts to treat treaties as constitutional documents, treaties were constitutionalized by section 35 of the Constitution Act, 1982, which reads as follows: “(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” The Aboriginal rights and treaty jurisprudence which has followed the enactment of s. 35 has dealt primarily with interpreting the meaning of the provision and has both limited and clarified the definition and application of aboriginal and treaty rights.

In 1990, the landmark case of [R v Sparrow](#) set out the test for prima facie interference with an existing Aboriginal right and for the justification of such an interference. The test states that, in determining whether prima facie interference exists, the courts should ask (1) whether the limitation is unreasonable, (2) whether the regulation that limits the right imposes undue hardship, and (3) whether the regulation denies the holders of the right their preferred means of exercising that right. If a prima facie infringement is found, the question of what “constitutes legitimate regulation of a constitution-

al aboriginal right” arises. In answering this question, the court must consider whether there is a valid legislative objective and whether the legislative objective upholds the honour of the Crown. The court must also ensure (1) that any allocation of priorities after measures that secure the law’s objective must give top priority to Aboriginal interests, (2) that such laws infringe as little as possible, and (3) that the right bearers are fairly compensated. As will be further explained below, one legislative objective that is considered a valid reason to infringe Aboriginal rights is the goal of conservation and resource management.

Six years after Sparrow, the test for identifying Aboriginal rights was set out in [R v Van der Peet](#). The Court in this case required that for an activity to constitute an Aboriginal right it “must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” The Court then set out a list of factors courts should take into account when applying the test, a significant one of which was to take into account both Aboriginal and common law perspectives.

The Aboriginal right to hunt, fish and gather in pursuit of a ‘moderate livelihood’ was affirmed through the Peace and Friendship Treaties of 1760 and 1761

The 1999 Marshall case drew upon the Aboriginal rights framework set out in Sparrow and concerned the interpretation of an 18th century treaty signed between the British Crown and the Mi'kmaq nation. Following a period of war and conflict between the British and Mi'kmaq people, a Treaty of Peace and Friendship was signed on

March 10, 1760. It was part of a series of treaties signed with individual Mi'kmaq communities in 1760 and 1761 intended to be combined into a larger, single treaty which never came into existence. The 1760 treaty document included a number of provisions ensuring peace between the Crown and the Mi'kmaq people, as well as a negative covenant, referred to after as the “Trade Clause”, through which the Mi'kmaq people promised to “not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor.” This promise at the time limited the ability of the Mi'kmaq people to trade with non-government individuals and the Crown was to establish and run “truck houses” or trading posts to facilitate this trading. Over time, the truck houses disappeared from Nova Scotia as they had fallen into disuse during the American Revolution.

In court, Marshall Jr. argued that this trade clause and truck house provision included within it the right to trade, and by extension, the right to hunt, fish, and gather in support of this trade. At the trial level, the judge found that although the clause contained a positive right to bring the products of hunting, gathering and fishing to truck houses, this right was extinguished upon the disappearance of the truck houses.

However, the Supreme Court of Canada held differently. Justice Binnie for the majority wrote that when determining the scope of the treaty obligations, the court may need to look beyond the obligations set out in the written document to extrinsic evidence, including (1) when it is available to show the document does not include all terms, (2) when there is ambiguity in the face of the treaty, and (3) where the treaty was concluded verbally and afterwards written up by representatives.

Bearing in mind these relevant evidentiary sources, including documentary records of negotiations with First Nations communities, the Court held that the written document of the treaty was

incomplete and was to be interpreted based on the historical record, stated objectives of the British and Mi'kmaq in 1760, and the political and economic context. In this case, the treaty was written on the assumption that Mi'kmaq people have the right to hunt and fish in order to facilitate this trade at the truck houses. Further, the promises of truck houses were not literal promises, rather they represented a right for the Mi'kmaq people to continue to obtain the necessities of life through hunting and fishing by trade. The origin of this clause stemmed from earlier negotiations with the Maliseet and Passamaquoddy First Nations, where the restriction on trading with non-government entities was a response to an original request for the provision of truck houses for trading made by the First Nations communities.

As such, the regulations that prohibit fishing or selling eels without a licence prima facie violated the appellants' treaty rights and were deemed of no force and effect. The regulation regarding the use of improper nets was likewise an infringement, as the SCC said there can be no limitation on the "method, timing, and extent" of Indigenous hunting under a treaty. Justice Binnie therefore held that, absent any justification for the regulatory prohibitions, these regulations under the Maritime Provinces Fishery Regulations were of no force and effect by virtue of ss.35(1) and 52 of the Constitution. Marshall Jr. was acquitted on all charges. As such, the right to hunt, fish and gather in pursuit of a 'moderate livelihood' was affirmed through the Peace and Friendship Treaties of 1760 and 1761, affecting 34 First Nations in New Brunswick, Prince Edward Island, Nova Scotia, and the Gaspé region of Quebec.

The Court defined moderate livelihood as including "such basics as 'food, clothing and housing, supplemented by a few amenities', but not the accumulation of wealth". The catch limits that could be reasonably expected to produce a moderate livelihood could be regulated and enforced without infringing the treaty right. However, al-

most 22 years after the decision, the Government of Canada has yet to elaborate and set these limits. Now, Mi'kmaq people and non-Indigenous fishers alike are calling for more clarity.

Post-Marshall

Immediately following the decision in 1999, there remained a number of unanswered questions regarding both the implementation and scope of the treaty rights of the Mi'kmaq, Maliseet, and Passamaquoddy people. Confrontations arose soon after amongst non-Indigenous fishers and First Nations members seeking to exercise their treaty rights.

Partial clarification came in November of that year, when the Court denied The West Nova Fishermen's Coalition's application for a rehearing of Marshall No.1. The decision was seen by Indigenous peoples as a partial backtrack, the Court writing that the treaty rights of Indigenous people were not unlimited, and could be regulated bearing in mind certain policy considerations such as conservation and economic fairness.

In the years that followed, the Canadian government, through the DFO, implemented a number of initiatives aimed at both regulating and providing access to commercial fishing opportunities for First Nations communities in New Brunswick, Prince Edward Island, Nova Scotia and the Gaspé region of Quebec. Around \$545 million was allocated to providing communities licences, gear, boats and training through the Marshall Response Initiative in exchange for promises to abide by the same regulations governing non-Indigenous fisheries.

The program was replaced in part by the Atlantic Integrated Commercial Fisheries Initiative (AICFI), which likewise provides financial resources to support the Marshall communities in commercial fishing enterprises and diversify their economic bases. Thirty-three of the thirty-four eligible communities participate in the AICFI, with a vast majority of licences being held communally and fishing done through community-owned vessels.

Although these various programs increased employment and business opportunities, communal commercial fisheries do not encapsulate rights to [moderate livelihood fishing](#).

According to an explanatory [article](#) written by APTN National News, “[m]ost Mi’kmaq, and Wolastoq bands in the Atlantic region signed commercial fishing deals after the Marshall decision – but Moderate Livelihood has never been defined. A Moderate Livelihood is supposed to allow a Mi’kmaw individual to make a living off resources. As a sovereign nation on unceded territory, the Mi’kmaq have jurisdiction and that is the basis to make their own rules for their fishery and that is what they’re asserting right now”.

Pending UNDRIP Implementation

The United Nations’ 2007 adoption of the [United Nations Declaration on the Rights of Indigenous Peoples](#) (“UNDRIP”) was the culmination of work that began back in 1982. In 2007, only four countries voted against its adoption: Canada, the United States, Australia, and New Zealand. It was not until 2010 that these four countries endorsed the declaration with reservations and not until 2016 that Canada fully adopted the declaration without reservation. UNDRIP “establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.” The various individual and collective rights enumerated therein include the right to self-determination, autonomy or self-government, and the recognition, observance and enforcement of treaties, agreements and other constructive arrangements.

In December 2020, [Bill C-15](#), United Nations Declaration on the Rights of Indigenous Peoples Act was introduced in the House of Commons, which, if passed, will affirm UNDRIP as “a universal, international, human rights instrument with

application in Canadian law and provide a framework for the Government of Canada’s implementation of the Declaration.” [S. 5](#) of Bill C-15 requires that Canada cooperate and consult with Indigenous peoples in taking “all measures necessary to ensure that the laws of Canada are consistent with the Declaration.” [S. 6\(1\)](#) then goes on to require that the Minister of Justice “in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration.”

While the potential impact of Bill C-15 on the protection of Aboriginal rights, such as the Mi’kmaq right to fish commercially, is as yet unclear, it is possible that the direct implementation of UNDRIP into Canadian law may put additional pressure on the federal government to ensure that Aboriginal rights are upheld. This said, Bill C-15 does not alter the licencing conditions, the Fisheries Act or any laws related to the DFO. However, it is possible that the action plan Bill C-15 aims to create could be used as a tool for Indigenous communities to ensure the protection of their Aboriginal and treaty rights and potentially help to stimulate government action in resolving the current issues facing Indigenous fishers and First Nations members in Nova Scotia. Until such a time, the dispute will remain ongoing, and a continuing lack of clarity from the Canadian government will only serve to deter efforts for meaningful reconciliation.

Lavalee Forbes is a 2L JD student at the Faculty of Law and the Asper Centre’s Indigenous Rights working group leader this year and **Julia Nowicki** is a 2L JD student at the Faculty of Law and was the Asper Centre’s work-study student this year.

Bill C-7 and MAID:

Life, Death, Liberty and Equality

by Ainslie Pierrynowski



“This case raises many legal, ethical and moral issues that touch on the very foundations of our society, on death and on our relationship with it.” With these words, the Superior Court of Quebec captured the underlying issues at stake in its recent decision regarding medically assisted dying (MAID). In [Truchon c Procureur général du Canada](#), the Superior Court of Quebec held that certain aspects of the Criminal Code provisions legalizing medically assisted dying were unconstitutional. In turn, this decision prompted the federal government to introduce Bill C-7, which would make significant amendments to the law surrounding MAID. What effect will Bill C-7 have? What prompted this change to the law? To answer these questions, we must turn to the landmark Supreme Court of Canada decision that marked a turning point in the debate on MAID in Canada: the 2015 case of [Carter v Canada \(Attorney General\)](#).

Carter and Bill C-14

In Carter, the Supreme Court of Canada held that sections 241(b) and 14 of the Criminal Code, which

prohibit assistance in ending one’s life, were unconstitutional. Specifically, these provisions unjustifiably infringed section 7 of the Charter. The Court determined that the legal prohibition on assisted death deprived “competent adults” who seek MAID as a result of a “grievous and irremediable medical condition that causes enduring and intolerable suffering” of their rights to liberty, life, and security of the person.

Accordingly, in 2016, a [bill legalizing medical assistance in dying](#) received Royal Assent. Under the new law, an individual can only consent to MAID if she has “a have a grievous and irremediable medical condition” and her natural death is “reasonably foreseeable.”

Reasonably Foreseeable Natural Death

Less than three years later, however, the statute was at the centre of a consequential legal case. The applicants, Jean Truchon and Nicole Gladu, challenged the constitutionality of the requirement that one’s natural death must be reasonably foreseeable to receive MAID. Both Mr. Truchon and Ms.

Gladu had sought MAID, but their requests were denied. Despite meeting the other statutory criteria, their natural deaths were not reasonably foreseeable.

Mr. Truchon and Ms. Gladu argued before the Superior Court of Quebec that this requirement violated their right to life, liberty, and security of the person and their right to equality, pursuant to section 7 and 15 of the Charter, respectively. In September 2019, the Superior Court of Quebec determined that the reasonably foreseeable natural death requirement did, indeed, unjustifiably infringe the applicants' rights under sections 7 and 15 of the Charter.

Justice Christine Baudouin held that the Carter decision, which determined that a legal prohibition on MAID was contrary to section 7 of the Charter, was general in nature and not specific to those in the terminal stages of an illness or at the end of their life. Moreover, this infringement on the applicants' section 7 rights was contrary to the principles of fundamental justice and could not be justified under section 1 of the Charter.

“The reasonably foreseeable natural death requirement discriminated against those with physical disabilities, contrary to section 15 of the Charter.”

The Court also found that the reasonably foreseeable natural death requirement discriminated against those with physical disabilities, contrary to section 15 of the Charter. In particular, Justice Baudouin noted that there exists “a distinction between Mr. Truchon, deprived of the choice to commit suicide due to his physical condition, and other persons...due to his physical disability and the fact that his natural death is not near, Mr. Truchon must receive assistance from

another person in order to end his life. That is a crime in this country.” This distinction, Justice Baudouin continued, has a discriminatory effect in that “the connection established by Parliament between the reasonably foreseeable natural death requirement and the vulnerability of every disabled person betrays a paternalistic view of people like the applicants. As with section 7, the Court found that this infringement could not be justified under section 1 of the Charter.

Responding to Truchon: Bill C-7

In the wake of Truchon, Bill C-7 was introduced in the House of Commons on February 24th, 2020. The [bill was reintroduced on November 5th, 2020](#). Bill C-7 seeks to repeal the reasonably foreseeable death requirement. Removing this requirement carries a number of other legal implications. For example, while Truchon did not involve individuals with a mental illness as their sole reason for requesting MAID, removing the reasonably foreseeable death requirement could potentially allow people to receive MAID where mental illness is their only underlying condition. However, Bill C-7 clarifies that a mental illness alone is not enough to qualify for MAID.

Additionally, Bill C-7 provides for several safeguards where one's death is not reasonably foreseeable. For instance, the medical practitioner or nurse practitioner providing MAID must ensure that the person requesting MAID was “informed of the means available to relieve their suffering, including, where appropriate, counselling services, mental health and disability support services, community services and palliative care...”

Lastly, if an individual's death is reasonably foreseeable, Bill C-7 would allow her to give advance consent to MAID. The law currently requires MAID recipients to have the capacity to consent immediately before MAID is provided. Justice Minister David Lametti was reportedly motivated to add this element to Bill C-7 following



the death of Audrey Parker in 2018. Ms. Parker had cancer which had spread to her brain. She wanted to receive MAID after Christmas. Ms. Parker, however, was worried that she would lose capacity before this point in time. As a result, she chose to undergo MAID in November 2018.

Into the House of Commons

Thus, Bill C-7 made its way into the House of Commons. After Bill C-7 passed its first reading, the Second Reading saw the Chamber engaged in a passionate and consequential debate. [Lametti introduced the bill](#), noting that with respect to Truchon, “[the government] agreed that medical assistance in dying should be available as a means to address intolerable suffering outside of the end-of-life context.” The Minister also noted that many in the disability community expressed concern at widening the scope of MAID eligibility, adding that the government “supports the equality of all Canadians without exception and categorically rejects the notion that a life with a disability is one that is not worth living or worse than death itself.”

In response, Michael Cooper (Conservative) contended that the Attorney General of Canada should have appealed the Truchon decision. Noting that MAID constituted a complex and divisive issue, Cooper stated that Bill C-7 made MAID

eligibility overly broad and lacked sufficient safeguards.

Conversely, Luc Thériault (Bloc Québécois) supported Bill C-7 in principle but argued that the bill should allow people with degenerative cognitive diseases to give advance consent to MAID. Randall Garrison (New Democratic Party) likewise contended that Bill C-7 overlooked several issues that were meant to figure into a wider review of prior MAID legislation, namely, cases involving “mature minors and requests where mental illness is the sole underlying condition, but it was not to be limited to those topics.” While he was supportive of Bill C-7, Garrison urged the Chamber “to consider undertaking the broader review of issues around medical assistance in dying without delay.” Despite these concerns, Bill C-7 passed without the addition of a provision allowing for advance consent.

On to the Senate

The concerns expressed in the House of Commons were echoed in the Senate’s discussion of Bill C-7. For instance, the Senate Committee on Legal and Constitutional Affairs released a [pre-study report regarding Bill C-7](#) on December 10th, 2020. While conducting the pre-study, the Committee received eighty-six written submissions and heard from eighty-one witnesses, including “the Ministers of Justice, Health, and Employment, Workforce Development and Disability Inclusion; regulatory authorities; professional organizations; advocacy groups; people living with disabilities; academics, legal and medical practitioners, and experts; Indigenous representatives; faith groups; caregivers; and other stakeholders.”

The preliminary report noted that, in contrast to the Superior Court of Quebec’s section 15 analysis in Truchon, several disability advocates emphasized that removing the reasonably foreseeable natural death requirement “would single out disability in a manner that would be inconsistent with the equality rights guaranteed by the Charter,

and that they anticipated a constitutional challenge on this basis if any such amendment is passed.” Conversely, other witnesses claimed that the new procedures for receiving MAID where an individual is not facing a reasonably foreseeable natural death were overly burdensome and marked a step backwards from the rights recognized in Truchon.

Nonetheless, many witnesses expressed concern that “individuals may choose MAID if there are not sufficient alternatives in palliative care or mental and physical health supports available to them.” In particular, several witnesses noted that many Canadians lack sufficient healthcare services, especially people with disabilities, Indigenous peoples, those living in remote areas, and racialized people. Other witnesses were concerned that repealing the reasonably foreseeable natural death requirement could encourage “stigma and prejudice against persons with disabilities and suggest that some lives are not worth living.”

Accordingly, several witnesses have suggested alternatives to Bill C-7. These suggestions range from taking more time to review current MAID legislation, to referring the MAID regime to the Supreme Court of Canada for a decision on its validity.

Overall, the Committee’s report revealed a divided response to Bill C-7. With the fundamental values of life, liberty, and equality hanging in the balance, this debate was poised to come to a head in the Senate chamber.

Passed, with Amendments

Ultimately, Bill C-7 was approved by the Senate with several amendments. One amendment would enable advance requests for MAID where individuals feared losing their mental capacity. Another amendment would place an 18-month time limit on the provision prohibiting MAID based on mental illness alone. A further amendment indicated that this ban would not apply to

people with degenerative cognitive conditions like Alzheimer’s. The remaining amendments required the government to collect race-based data on who requested MAID and to establish a committee to review Canada’s MAID regime.

The revised Bill C-7 will return to the House of Commons, where Members of Parliament will decide whether to accept or reject the amendments. While the future of Bill C-7 may be uncertain, it is clear that the legal and ethical issues underlying Bill C-7 will not dissipate. As the Supreme Court of Canada observed in *Carter*:

“The debate in the public arena reflects the ongoing debate in the legislative sphere. Some medical practitioners see legal change as a natural extension of the principle of patient autonomy, while others fear derogation from the principles of medical ethics. Some people with disabilities oppose the legalization of assisted dying, arguing that it implicitly devalues their lives and renders them vulnerable to unwanted assistance in dying...Other people with disabilities take the opposite view, arguing that a regime which permits control over the manner of one’s death respects, rather than threatens, their autonomy and dignity, and that the legalization of physician-assisted suicide will protect them by establishing stronger safeguards and oversight for end-of-life medical care.”

Indeed, regardless of the outcome in the Chamber, it seems that MAID will continue to animate significant debate for a long time to come.

Ainslie Pierrynowski is a 2L JD student at the Faculty of Law.

Voting Age Challenge Update

By Sarah Nematallah

In November of 2019, the David Asper Centre for Constitutional Rights and Justice for Children and Youth, in partnership with other child rights organizations, initiated efforts to challenge the minimum voting age for federal elections set by the Canada Elections Act, SC 2000, c 9. This legislation, which allows only Canadian citizens over the age of 18 to vote, places a restriction on democratic participation that is discordant with the Supreme Court's statement in *Frank v Canada (AG)*, 2019 SCC 1 that "the Charter tethers voting rights to citizenship, and citizenship alone".

Since fall 2019, a significant amount of work on the voting age challenge has been done. With

thoughtful and supportive oversight from Cheryl Milne, Asper Centre Clinic students completed applications for funding to support the challenge. Students also compiled research on topics such as voting and cognitive capacity, voting ages in other countries, and voting and political theory. Finally, students prepared a curriculum on voting in Canada that was implemented by partner organizations in consultations that invited youths to share their thoughts on whether the voting age should be lowered.

When I joined the Asper Centre Clinic in the fall of 2020, I had the opportunity to collaborate with other Clinic students to build on this work from the previous year in two important ways – identifying non-legal experts who have written on ideas that support legal arguments for lowering the voting age; and preparing the initial drafts of pleadings.

First, my Clinic colleague and I took a closer look at experts who have conducted non-legal research on voting ages and youth decision making. We developed a short list of experts from around the



world who might support the challenge, experts from the fields of political theory, international law, cognitive sciences, and social sciences. The theoretical writings, sociological studies, and scientific studies produced by these experts dispel many of the misconceptions around youth voting – most notably the myth that youths under the age of 18 do not have the cognitive capacity to vote, and the myth that allowing young people to vote harms democracy by enabling uninformed and uninterested youths to participate in the democratic process. In fact, the work of these experts suggests that neither of these myths could be further from the truth – psychological and cognitive social science studies from the last decade demonstrate that youths as young as 14 develop adult-level complex reasoning skills that enable them to make voting decisions of the same quality as adults, and international jurisdictions where voting ages have been lowered below 18 have reported that youths are an engaged and informed voting group and that their inclusion has produced no negative effects on democracy. While these experts approach the issue of voting ages from a variety of different angles, they generally align on the view that using the age of 18 as a proxy for democratic competency is arbitrary and cannot be justified by what we currently know about youth decision making.

Second, my team began preparing the legal documents that will be filed to initiate the challenge. These documents incorporated a significant amount of the research compiled by Asper Centre students in previous terms. This task afforded me a much appreciated opportunity to be involved in legal teamwork, which I believe is one of the most positive aspects of working in a clinic environment. My team members and I had the opportunity to discuss the voting age research that had been collected and bounce ideas off each other for how to structure arguments, thereby deepening our understanding of the issues and Canadian voting jurisprudence generally. We also received valuable feedback on our work from each other

and from Professor Milne. The feedback I received gave me useful insight into how I can improve my own drafting skills, insight that will benefit me long after I complete my studies at the University of Toronto's Faculty of Law.

The experience helped me to see the tangible legal fruits that are borne out of thoughtful preparation and thorough research.

Overall, it was an exciting time for myself and my fellow students to be working on the voting age challenge. I personally learned a lot from being involved in the process of using preparatory research and stakeholder consultations to build the legal ingredients needed for a court challenge. The experience helped me to see the tangible legal fruits that are borne out of thoughtful preparation and rigorous research. It also gave me great pleasure to be involved in something that has the potential to enrich Canada's democratic landscape and make positive change for generations of young Canadians to come.

Sarah Nematallah is a 3L JD student at the Faculty of Law and was an Asper Centre Clinic student in Fall 2020.

Constitutional Challenges to Canada's Immigration and Refugee Law Regime

By Monica Layarda, Anson Cai and Wei Yang

Refugees and other migrants, like everyone else in Canada, deserve to have their rights fully protected under the Canadian Charter of Rights and Freedoms (“Charter”). Unfortunately, parts of our current immigration and refugee law regime, including provisions in the Immigration and Refugee Protection Act (“IRPA”) and the Safe Third Country Agreement (the “STCA”) between Canada and the U.S., significantly curtail their Charter rights. These impugned provisions arguably deny asylum-seekers the opportunity to obtain protection before they have a chance to make their case for reasons that often lie beyond their own control. This year, the Asper Centre’s Immigration and Refugee Law student working group provided research support for two public interest litigation cases challenging the constitutionality of the STCA and IRPA, respectively.

STCA Intervention at the Federal Court of Appeal

Under the STCA regime, refugee claimants who arrive in Canada from the U.S. by land, at a port-of-entry, are deemed ineligible to make a refugee claim in Canada and sent back to the U.S; they are presumed to have access to a fair process in the U.S. and vice versa. There were, however, mounting concerns surrounding the increasingly limited protection afforded to asylum seekers in the U.S. and the documented practice of routine detention of asylum seekers. Last year, a number of individual applicants as well as three public interest litigants including the Canadian Council for Refugees (“CCR”), successfully challenged the constitutionality of the STCA at the Federal Court on the grounds that the STCA infringed claimants’ s. 7 rights to liberty and security of the person. Since then, the federal government appealed this determination while the respondents cross-appealed on the grounds that, inter alia, the trial judge erred in

failing to rule on whether the STCA discriminates against women. In its submissions at trial, the respondents had also advanced a s. 15 argument which presented the court with evidence that the US refugee system lacked sufficient protections for women claimants with gender-persecution claims.

The Asper Centre, in collaboration with the Women’s Legal Education & Action Fund (LEAF) and West Coast LEAF, had applied for leave to intervene at the Federal Court of Appeal in support of the respondents’ cross-appeal. The team had intended to explore the intersectionality of s. 7 and s. 15 as well as argue that the court must rule on an equality rights claim when Charter litigants have expended significant resources to enforce their equality rights and the court recognizes the seriousness of the constitutional question raised. In other words, this was an inappropriate application of judicial restraint. Unfortunately, in January 2021, the Federal Court of Appeal dismissed the joint motion (along with the applications of all other five proposed interveners—all of whom also sided with the respondents). Despite this disappointing decision our working group eagerly awaits the outcome of the case.

IRPA Security Inadmissibility Provision Challenge

Our second project this term concerns the security inadmissibility provisions of IRPA. The Asper Centre is conducting research for the legal team representing the CCR and the Canadian Association of Refugee Lawyers’ (“CARL”) in their Charter challenge against s.34(1)(f) of IRPA. Under s. 34(1), applicants are deemed inadmissible if they are found to have engaged in acts such as espionage against Canadian interests, subversion against any government, or terrorism. However, s. 34(1)(f) has a much wider scope, deeming refugee applicants inadmissible if they are found to “[be] a member of an organization that there are reasonable

Asper Centre Working Group Reflection

grounds to believe engages, has engaged or *will engage*” in any of the aforementioned prohibitions.

The working group members have met twice with lawyer and adjunct professor, Warda Shazadi Meighen, who is part of the legal team representing the public interest litigants. The students researched whether the impacts of non-deportation violate a claimant’s s. 7 rights to liberty and security of the person and their s. 12 right to not be subjected to cruel and unusual treatment. Non-deportation restricts applicants’ mobility rights and access to family, in addition to the psychological harm caused by being stuck in a state of legal uncertainty and under constant threat of deportation to persecution. The working group’s research has included exploring refugee inadmissibility regimes in international and foreign law as well as researching ss. 7 and 12 jurisprudence. Currently, the CCR and CARL are awaiting the Federal Court’s decision on their motion for public interest standing.

A truly rewarding experience

It has been an exciting and rewarding experience for the working group to engage with on active Charter cases that potentially affect the lives of many refugee claimants and immigrants in Cana-

da. For the first-year student researchers, these cases have undoubtedly presented them with an invaluable opportunity to hone their legal research and writing skills and gain exposure to the dynamics of public interest litigation early on in their legal career. For the group’s co-leaders, it has also been a delightful experience to work closely with the student researchers who, despite being remote, continued to impress us with their enthusiasm and impressive work product. Ultimately, for all of us involved, this year’s projects have served as an important reminder that we need to continue to work towards improving our immigration and refugee regime so that it will truly protect the Charter rights of those who require it.

Monica Layarda and Anson Cai are 2L JD students at the Faculty of Law and the co-leaders of this year’s Asper Centre Immigration & Refugee Law working group (along with Kiyan Jamal). ***Wei Yang*** is a 1L JD student and researcher in the working group.



A family preparing to cross US-Canadian border despite signage warning them no crossing is permitted here so they can request asylum, Roxham Road, Champlain, NY

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The Supreme Court of Canada: Year in Review

By Annie Chan

Over the past year, a number of compelling and significant constitutional law cases were decided by the Supreme Court. The following are a selection of key decisions of particular interest.

[Newfoundland and Labrador \(Attorney General\) v Uashannuat \(Innu of Uashat and of Mani-Utenam\)](#)

This case involved a claim brought by the Innu First Nations in response to a mining megaproject which they allege to have been conducted on their traditional territory without their consent, depriving them of the use and enjoyment of their territory. The Innu filed suit in Quebec for a permanent injunction against the project, \$900 million in damages and a declaration of Aboriginal title and other Aboriginal rights. The issue was whether the Quebec Superior Court has jurisdiction to decide all issues relating to the claim, as the traditional territories claimed by the Innu spanned both Quebec and Newfoundland and Labrador. In a 5-4 split, a narrow majority of the SCC held that the Quebec court had jurisdiction over the entire claim. The Civil Code of Quebec provides that Quebec courts have jurisdiction over a matter where the defendant resides in the province, except with respect to real actions (legal actions relating to rights over real property). Here, the defendant mining companies were both headquartered in Montreal. Further, the majority held that Aboriginal title is a sui generis right, not a real right. Given that Aboriginal rights existed before provincial borders were imposed on Indigenous peoples, the honour of the Crown and access to justice concerns require flexible interpretation of jurisdictional rules to allow Quebec courts to adjudicate cross-border s. 35 claims.



[Conseil scolaire francophone de la Colombie-Britannique v British Columbia](#)

In this case, the Supreme Court broadened the scope of protection for minority language education rights under s. 23 of the Charter. The Conseil scolaire francophone de la Colombie-Britannique (“CSF”), BC’s French-language school board, along with three parents who are s. 23 rights-holders brought a claim alleging that the province’s allocation of funding to the CSF was insufficient to meet the standards required by s. 23. Wagner, writing for the majority, clarified the “sliding scale” approach outlined in Mahe to determine the level of services guaranteed under s. 23. If claimants can identify a majority language school serving a given number of students, the minority is prima facie entitled to a comparably sized homogenous language school. Additionally, the level of services provided to children of s. 23 rights holders must be substantively equivalent to that provided to the majority. Wagner also noted that “the fair and rational allocation of limited public funds” is not a pressing and substantial objective that can justify s. 23 breaches under s. 1. Applying these tests, the Court found that the appellants were entitled to eight homogenous schools that were denied by

the lower courts as well as \$6 million in damages for the province's *inadequate funding of school transportation*. The [Asper Centre intervened in this appeal](#) to address the issue of whether the Court should extend a broad qualified immunity from damages when laws are struck under s. 52 of the Constitution Act, 1982 to damages sought solely under s. 24(1) of the Charter.

[Reference re Genetic Non-Discrimination Act](#)

In this case, the SCC affirmed the constitutionality of Parliament's Genetic Non-Discrimination Act as within the federal government's criminal law powers under s. 91(27) of the Constitution Act, 1867. Valid criminal law must consist of (1) a prohibition (2) a penalty and (3) a criminal law purpose. The Genetic Non-Discrimination Act establishes rules relating to genetic testing, including prohibitions against forcing individuals to take or disclose genetic tests as a condition for accessing goods, services or contracts or utilizing individuals' test results without their written consent. Violation of the prohibitions is punishable by fine or imprisonment. The Court unanimously agreed that the Act met the prohibition and penalty requirements of criminal law. The Court split 5-4 as to whether the law had a valid criminal purpose. The majority itself was divided as to the pith and substance of the law as well as what the criminal law purpose was. Three justices characterized the law's pith and substance as combatting genetic discrimination while two others contended that it was protecting individuals' control over the intimate information revealed by genetic testing. Accordingly, the majority was split in the characterization of the risk of harm or criminal purpose being addressed by the law with options including protection of autonomy, privacy, equality and public health.

[R v Thanabalasingham](#)

The issue in this appeal was whether the 43-month delay in Thanabalasingham's criminal trial

was in violation of his s.11(b) *Charter right to be tried within a reasonable time*. T was charged with second degree murder of his spouse in August 2012. The preliminary hearing lasted over a year and the trial was ultimately scheduled for April 2017; T remained in custody throughout the delay. In their 2016 judgment in [R v Jordan](#), the SCC established that any delay over 30 months between when an accused is charged and the completion of their trial should be presumed to be "unreasonable", barring a discrete exceptional event. Before his trial, T brought a motion for a stay of proceedings on the basis that his s. 11(b) rights had been infringed. In upholding the stay of proceedings granted by the trial judge, the Court noted that despite most of the delay in T's case having occurred prior to Jordan, the case would equally have qualified for a stay under the previous R v Morin framework, as the 43-month institutional delay greatly surpassed the 14 to 18 month guidelines set out in that case.

[Fraser v Canada](#)

This case centered on whether the RCMP's limitation on job-sharers' abilities to buy back pension credits discriminates on the basis of sex. The claim was brought by three retired members of the RCMP who participated in the job-sharing program offered by the RCMP to allow them to balance their work and childcare responsibilities. Like the claimants, most RCMP members enrolled in the program were women with children. However, job-sharers, unlike full-time employees, were not allowed to "buy back" pension credits lost due to suspension or unpaid leave. The lower courts found that the pension scheme did not violate s. 15 as the disadvantage was due to the claimants' "choices" to work part-time rather than their gender or family status. The majority of the SCC overturned the lower court's holding, finding that the limitation disproportionately impacts women and perpetuates their historical disadvantage. This constituted a prima facie breach of s. 15 which could not be justified under s. 1.

This decision clarified the Court's approach to adverse impact discrimination as the majority found that differential treatment may violate s. 15 irrespective of whether there was discriminatory intent, whether the protected characteristic "caused" the group to be more affected or whether all group members are adversely impacted.

[Quebec \(Attorney General\) v 9147-0732 Quebec inc](#)

In this appeal, the SCC ruled that the right "not to be subjected to any cruel and unusual treatment or punishment" under Section 12 of the Charter extends only to human beings and not to corporations. 9147-0732 Quebec Inc. was a corporation convicted of doing construction work as a contractor without a license, in violation of s. 46 of Quebec's Building Act. The Court of Quebec imposed the minimum mandatory fine of \$30,843 for the violation. The corporation challenged the fine on the basis that it infringed on their s. 12 rights against cruel and unusual punishment. The Court unanimously denied the appeal, holding that the purpose of s. 12 was to safeguard human dignity and thus does not apply to corporations.

[Ontario \(Attorney General\) v G](#)

The issue in this case was whether part of Ontario's sex-offender registry law (Christopher's Law) discriminates against individuals on the basis of mental disability in violation of s. 15 of the Charter. In 2002, G was found not criminally responsible by reason of mental disorder (NCRMD) of two sexual offences and was subsequently given an absolute discharge by the Ontario Review Board. Christopher's Law requires individuals convicted of or found not criminally responsible of a sex offence to register under the provincial sex offender registry. Exemptions are available for individuals found guilty, for example if they obtain a discharge at sentencing. However, these options are unavailable to those in G's situation (persons found NCR

and granted an absolute discharge). G sought a declaration that the application of Christopher's Law to persons in his situation infringes their rights under ss. 7 and 15 of the Charter. The SCC held that Christopher's Law violated the section 15 rights of those in G's situation and could not be upheld under s.1. They considered the appropriateness of the ONCA's remedy of (1) suspending the declaration of invalidity for 12 months and (2) exempting G from the suspension. The [Asper Centre intervened in the appeal](#) to recommend that the Court apply flexible rules for the use of suspended declarations of invalidity and personal remedies for successful individual claimants. The majority accepted the Asper Centre's recommendation of a "principled approach" in the determination of an appropriate remedy. They upheld the remedy granted by the ONCA on the basis that it would balance the interests of protecting public safety while ensuring that G is not denied the benefit of his successful claim.

Annie Chan is a 1L JD student and was an Asper Centre's work-study student in 2020-2021.



Reframing Section 15:

What Fraser v Canada means for equality litigation

By Julia Nowicki

On October 16th, 2020, the Supreme Court of Canada released its decision in the case of [Fraser v Canada](#). It was a long-anticipated catalyst for equality jurisprudence. The history of s.15 claims has been fraught with confusion and ambiguity in the 35 years following the Supreme Court's first decision under the equality rights provisions in the 1982 Charter of Rights and Freedoms. Since [Andrews v Law Society of British Columbia](#), the test for successfully making out a claim of discrimination in relation to a law or government action has been altered numerous times. Justice Abella in writing for the majority not only clarifies the Court's current test under s.15, but likewise addresses many underlying notions that must inform judges in their decisions, including substantive equality, adverse effects discrimination, and the role of choice in finding discrimination. While the potential impact on s.15 litigation remains to be determined, clarity from Canada's highest court is being heralded by scholars and litigators alike. However, the dissents' reluctance to accept some of the concepts put forward by the majority, which inform Canadian law's understanding of equality and discrimination in society, leaves a small air of apprehension in celebrating Fraser v Canada as a truly breakthrough case.

Joanne Fraser, Allison Pilgrim and Colleen Fox are retired members of the Royal Canadian Mounted Police. While serving as police officers for over 25 years, the three women accessed the RCMP job-sharing program in order to relieve burdens brought on by childcare responsibilities. The program involved a system of job-sharing, allowing for members to split full-time duties with other participants as an alternative to taking leave without pay (LWOP). The RCMP classified

job-sharing as part-time work and denied those who participated full-time pension credits of the ability to buy-back full-time credits--an option available to members accessing other full-time work relief such as LWOP or suspension which leaves pension benefits unaffected.

Initially failing at both the Federal Court and Federal Court of Appeal, Justice Abella held that to deny participants pension benefits due to a temporary reduction in working hours through the job-share program violated s.15(1) on the basis of sex and was not saved by s.1.

Section 15(1) of the Charter states that every individual is equal before and under the law and has the right to the equal protections and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. To prove that an impugned law or state action has prima facie violated s.15(1), a claimant must show that the law or action (1) on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and (2) imposed burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

Legislation can create this distinction both explicitly or implicitly through its impact. In this case, the claimants had argued that the pension consequences had an adverse impact on women with children as they made up the majority of the participants in the job-share program. This distinction must be based on a prohibited ground and through its effect have a disproportionate impact on a protected group, including through restrictions, criteria that may act as headwinds, or absence of accommodations. These impacts can be proved by either evidence about the situation of the claimant group, including physical, social,

cultural or other barriers, or evidence about the results of the law, including statistics.

Imposing pension consequences for a temporary reduction in working hours had a disproportionate impact on women as evidenced by the fact that the majority of RCMP members who accessed the job-sharing program were women with young children. The Court cited evidence such as Commission reports, judicial decisions, and academic work to support the conclusion that inequitable treatment of part-time workers in general disadvantages women as they make up a larger proportion of the part-time workforce across Canada. Likewise, the primary reason for women pursuing part-time employment was the arrival of a new child (Part-time Work in Canada: Report of the Commission of Inquiry into Part-time Work (1983)). These patterns have continued in more recent years. Women are still over-represented in part-time and temporary work, and further, hold the burden of domestic responsibilities. In imposing less favourable pension consequences on the

job-sharing program, therefore created a distinction based on sex, and the first stage of the s.15(1) was satisfied.

In determining whether the distinction imposes burdens or denies a benefit with the effect of reinforcing, perpetuating, or exacerbating disadvantage, the Court reiterates its position outlined in [Withler v Canada](#). Although there is no rigid template of relevant factors, harms to the protected group can include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms, or political exclusion and “must be viewed in light of any systemic or historical disadvantages faced by the claimant group”. The distinction created by the RCMP perpetuated bias through its pension plans, which have historically been designed to favour male-pattern employment in middle and upper class income ranges. As women tend to drop out of the labour force at a higher rate than men, with high-turnover of employment, plans which benefit long-term, full-time, and higher paid workers contributes to the femini-



zation of poverty. This means that a higher percentage of women than men are living below the poverty line after the age of 65. Bearing in mind other “normative, political, and tangible economic implications”, the second stage of the test was found to be satisfied, and the statutory scheme could not be saved by s.1 of the Charter for lack of a compelling objective that explains why job-sharers should not be granted full-time pension credit.

Following the release of the decision on October 30th, 2020, the University of British Columbia Peter A. Allard School of Law held a virtual panel discussion with a number of feminist scholars and lawyers from across Canada to review the implications of Fraser on s. 15 litigation in the future. Although much of the impact has yet to be realized or fully determinable, Jonnette Watson Hamilton, professor at the University of Calgary Faculty of Law, said that amongst the positives of the decision was the explicit clarification of the s. 15 test. Fraser is a welcome attempt to simplify the analytical approach to s.15, which has been overly complicated as well as overly changeable, Watson Hamilton said.

Not only does Justice Abella clarify the test for s.15 claimants, the majority likewise undertakes what Watson Hamilton refers to as an important “brush-clearing” effort, identifying explicitly what claimants must and need-not prove to successfully make out a claim of discrimination. For example, a claimant does not need to prove a discriminatory intent of the legislation, nor will an ameliorative purpose underlying the legislation be sufficient to shield it from scrutiny. Claimants likewise do not need to prove that a protected characteristic caused the disproportionate impact, nor that the law itself was responsible for creating any particular social or physical barriers which in turn made the law disadvantageous. Claimants do not need to prove that all members of the group were impacted in a similar manner. This synthesis of the requirements will prove to

be helpful for litigators in the future, Danielle Bisnar, partner at Cavalluzzo LLP and counsel for LEAF, which intervened in the case, said, as Justice Abella likewise clarifies many of the evidentiary elements necessary to support a claim.

Although clarity and reinforcement of the particular values which underpin s. 15 jurisprudence are important, Fay Faraday, assistant professor at Osgoode Hall Law School, contends that this continued re-litigation of issues decided decades ago threatens to perpetuate the dismissive public discourse that finds every equality claim as illegitimate. “The fact that the section 15 test is so disputed,” Faraday said, “the fact that we need to, 35 years in, do this brush-clearing is not normal. That’s not how constitutional law operates.” The notion of choice, as an example, is an issue that has been consistently disputed and emphasized in s. 15 decisions. The “choice” to job-share was the crux of the Federal Court and Court of Appeal’s dismissal of Fraser’s claim, despite the fact that choice has long been held to be irrelevant in finding discrimination. Justice Abella refers to *Brooks v Safeway* for this premise, where the SCC rejected arguments that pregnancy was voluntary and therefore leave should not be compensated for under the employer’s insurance plan. Subsequent cases have affirmed this stance, including [Quebec v. A](#), Justice L’Heureux-Dubé’s dissenting opinion in [Nova Scotia \(Attorney General\) v. Walsh](#), and [Lavoie v. Canada](#).

The dissenting opinions written by Justices Rowe and Brown and Justice Côté likewise signal a reluctance of the SCC to fully endorse some of the reasoning put forward by the majority for fear of over-broadening s. 15 and its potential influence on legislation. Although Justice Rowe and Brown concede that s. 15 protects rights against adverse effect discrimination through substantive equality, the Court cannot strike down legislation or statutory schemes for being insufficiently remedial. Likewise, claimants would have to prove causation between the law and disadvantage. Jus-

tice Cote in her dissent would have dismissed the claim on grounds the scheme does not discriminate on the basis of sex, rather the distinction arises from caregiving requirements, which should not be recognized as an analogous ground in the case at hand. Further, Côté J writes, “[is proportionate impact alone cannot be sufficient to meet step one of the s. 15(1) analysis. In other words, simply pointing to the fact that the majority of job-sharers are presently women with children cannot in itself be sufficient to say that step one has been met.”

**Adverse effects
discrimination is important
because if you don’t see the
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and you don’t do anything
about it.**

Although some scholars remain questioning of the potential positive impacts to be realized, Fraser is a welcome decision in terms of its clarification of s.15 and discussion on adverse effects discrimination. Adverse effects discrimination coincides with the ideas of substantive equality and systemic discrimination, as it looks beyond what is written on paper and requires an evaluation on the actual impact an impugned law may have on groups protected under the equality provision. “Adverse effects discrimination is important because if you don’t see the disproportionately negative effects imposed by a law you don’t see systemic or institutional discrimination and you don’t

do anything about it,” Watson Hamilton said. Including Fraser, there have only been three successfully litigated adverse effects discrimination cases in Canada, with the last decision pre-dating Fraser by 20 years. There is potential for Fraser to move past the factual basis on which it was decided and some continued ambiguity in what constitutes substantive discrimination may in fact be a positive which will prevent government entities from attempting to circumvent their equality obligations through precisely crafted legislation or statutory schemes. The decision also provides a potential foothold for claims regarding discrimination against other groups included under the Charter to proceed, said Sonia Lawrence, associate professor at Osgoode Hall Law School, including in systemic or institutional discrimination on the basis of race. The potential impacts of the decision will take time to come to head in trial and appellate courts across Canada, but it is clear that Fraser v Canada will be an important and influential case for claimants, litigators, and scholars alike in this era of s. 15 litigation.

Julia Nowicki is a 2L JD student at the Faculty of Law and was an Asper Centre’s work-study student in 2020-2021.

R v Sullivan and the Extreme Intoxication Defence

By Maia Caramanna

On December 23, 2020, the Supreme Court of Canada (SCC) granted leave to appeal from the judgment of the Ontario Court of Appeal (ONCA), [R v Sullivan](#). In Sullivan, s. 33.1 of the Criminal Code was declared to be of no force and effect on grounds of unjustifiable ss. 7 and 11(d) Charter violations.

Section 33.1 of the Code precludes an accused from using the defence of non-mental disorder automatism caused by self-induced intoxication to an offence that includes an interference or threat of interference with another person's bodily integrity (which the Court in Sullivan calls "violence-based offences"). In the 1999 case of [R v Stone](#), automatism was defined as "a state of impaired consciousness... in which an individual, though capable of action, has no voluntary control over that action." When the involuntariness stems from something other than a disease of the mind, the defence is classified as non-mental disorder automatism. This defence rests on the principle that volition is a component of every criminal offence, and where it does not exist, the accused is entitled to either a complete acquittal or a not-criminally responsible verdict.

The History

Before 1994, a common law rule limited the non-mental disorder automatism defence to specific intent offences, as opposed to general intent offences. The requisite mens rea for general intent offences, like sexual assault, could usually be inferred from the mere commission of the actus reus, and as such, intoxication could not raise a reasonable doubt with respect to the guilty mind. The SCC in [R v Daviault](#) held that distinction to be unconstitutional. Evidence of extreme intoxication akin to automatism could still raise a reasonable doubt. The Charter required the non-mental disorder automatism defence to be available for all criminal offences.

After Daviault, public outcry ensued at the thought of a sexual assault potentially going unpunished. In response, Parliament enacted s. 33.1 of the Code in 1995. It is in the present case, Sullivan, where a constitutional challenge of s. 33.1 will reach the SCC for the first time.

The Decision

Mr. Chan and Mr. Sullivan were both charged with violence-based offences and attempted to use non



-mental disorder automatism as defence. Chan's charges occurred during an unexpected drug-induced psychosis after he ingested psychedelic mushrooms. Sullivan's occurred during a suicide attempt, where he ingested prescription pills and experienced a break from reality. Although both automaton states were unforeseen, they were self-induced by intoxication—their cases came within the ambit of s. 33.1. They were barred from using the defence and consequently convicted.

On appeal to ONCA, they argued that s. 33.1 unjustifiably breaches ss. 7 and 11(d) of the *Charter*. *Unanimously, ONCA allowed the appeal. The court recognized that s. 33.1 circumvents numerous fundamental constitutional and criminal law principles for the sole purpose of imposing liability on the accused.*

At the heart of the judgment is the balance between, on the one hand, the protection of those principles and the rights of accused persons and, on the other hand, the public interest function of criminal law. The court analyzes the former at the ss. 7 and 11(d) analysis, and the latter at the s. 1 stage.

Beginning with the ss. 7 and 11(d) analysis, Paccio-co JA recognized three established fundamental criminal law principles that s. 33.1 essentially casts aside. Firstly, every criminal offence must contain a voluntariness element with respect to the gravamen of the offence. The gravamen for any offence within the reach of s. 33.1 is the act of violence—that is the act which needs to be performed voluntarily. However, s. 33.1 eliminates the defence of involuntariness at the time of such an act. It thereby displaces the constitutionally required element of volition with the intention to become intoxicated, effectively creating a pathway for conviction by evading the voluntariness principle.

Secondly, the principles of fundamental justice stipulate penal negligence as the minimum mens rea requirement for any criminal offence. An ac-

cused whose conduct is a marked departure from that of a reasonable person may be penally negligent. According to the court, s. 33.1 allows conviction where the accused is not even penally negligent. It enables conviction for a violence-based offence when the accused had intention to intoxicate, was intoxicated, and committed the actus reus of a violence-based offence. Section 33.1 foregoes any link of foreseeability of risk flowing from the decision to become intoxicated.

At the heart of the judgment is the balance between, on the one hand, the protection of fundamental constitutional principles and the rights of accused persons, and on the other hand, the public interest function of criminal law

Not only does s. 33.1 lack the foreseeability element of penal negligence, but it also does away with the 'marked departure' element. Section 33.1 captures an accused who intended to only become mildly intoxicated and was met with abnormal effects. These defendants cannot be said to depart markedly from the conduct of a reasonable person—to suggest otherwise is to be "untethered from social reality." Therefore, s. 33.1 allows conviction where the minimum constitutionally required level of fault is not met.

Lastly, criminal law principles dictate that the actus reus and the mens rea must coincide at some point in the commission of an offence. Section 33.1, however, creates offences where the mental element from the act of consuming intoxicants transplants the mental element required by the

offence charged. It enables a conviction where the mens rea had passed before the actus reus of the offence charged ever began.

Paciocco JA concluded that s. 33.1 contravenes “virtually all the criminal law principles that the law relies upon to protect the morally innocent,” constituting multiple profound ss. 7 and 11(d) violations. However, criminal law is not solely premised on morality. This is where the other hand of the balancing act comes in: criminal law also functions for the public interest. In recognition of this function, Paciocco JA, in his s.1 analysis, considers whether s. 33.1 furthers a social objective.

The purpose of s. 33.1 is to protect potential victims, including women and children, from violent acts committed by individuals in a state of automatism. The question then becomes, does s. 33.1 effectively achieve such a purpose? It was said that s. 33.1 deters people from becoming intoxicated to the point of automatism. The Court did not accept

that. Foresight is necessary for effective deterrence; a reasonable person may not foresee the risk of lapsing into a state of automatism and committing a violent act while voluntarily consuming intoxicating substances. If he was, he would not be an automaton; he would have reduced inhibitions and clouded judgment—which the law already provides is no excuse for violence-based acts.

Paciocco JA found better means to achieve this purpose, the first of which would be to make a stand-alone offence of criminal intoxication. The gravamen of the offence would be dangerous intoxication, not an act committed while under a state akin to automatism. With this approach, there would be no voluntariness, improper substitution, or mens rea breaches. It would be more effective than s. 33.1 because it would “criminalize the very act from which the Crown purports to derive the relevant moral fault.”

Another alternative means is to simply allow the



Daviault decision to operate. Even after Daviault, automatism remained very hard to establish. It must have an air of reality, it is reverse onus, and it requires expert evidence. Further, there is evidence that alcohol intoxication on its own is not capable of inducing automatism. Section 33.1 does not add any meaningful deterrence.

Paciocco JA also found little, if any, salutary effects to s. 33.1. The proposal that s. 33.1 catches the morally blameworthy who self-intoxicate and cause injury to others is problematic. Section 33.1 does not merely catch the morally blameworthy individual who knew he was becoming dangerously intoxicated—the provision has a wider net. It catches those who unforeseeably fall into automatism after only choosing to become mildly intoxicated, and those who are merely complying with a prescribed drug regimen. These accused cannot be said to be blameworthy, and yet, under s. 33.1 they are precluded from defending themselves.

Paciocco JA found that s. 33.1 recognizes and promotes the equality, security, and dignity of victims of crime but this cannot be the basis of a salutary effect, stating that:

“...[t]hey are victims, whether their attacker willed or intended the attack. However, to convict an attacker of offences for which they do not bear the moral fault required by the *Charter* to avoid this outcome, is to replace one injustice for another, and at an intolerable cost to the core principles that animate criminal liability (at para 157).”

According to Paciocco JA, s. 33.1 does not further its social objective. There is thus little difficulty here in balancing the protection of an accused person’s rights with the public interest; the former predominates and consequently prevails. The Crown had failed to demonstrate that s. 33.1’s severe ss. 7 and 11(d) infringements were justifiable under s. 1. Therefore, in Ontario, s. 33.1 is of no force and effect.

Public Response

Similar to the aftermath of *Daviault*, the outcome of the ONCA decision spurred public discountenance. Lawyers have attributed this outcry to media misrepresentation. News outlets have characterized the Sullivan decision as allowing intoxication as a defence for violence-based offences. However, these headlines are an inaccurate depiction of the Court’s judgments; they conflate intoxication with automatism. As canvassed above, the Court explicitly references that intoxication causing reduced inhibitions and clouded judgement will continue to not be a defence to violence-based offences. Only where it is proven by the accused that he was physically incapable of voluntary action (i.e., in a state of automatism) will a self-induced intoxication defence be considered. Both judgments recognize that Parliament’s objective to protect potential victims of violence is pressing and substantial but conclude that s. 33.1 is not rationally connected to that objective.

Striking down s. 33.1 does not mean allowing the blameworthy to walk free; it means protecting fundamental and democratic *Charter* rights. As the Court states in *Sullivan*, the instant point is that when Parliament purports to make statutory changes, it must do so consistently with the *Charter*.

The question of s. 33.1’s constitutionality is now left to the Supreme Court of Canada.

Maia Caramanna is a 1L JD student at the Faculty of Law.

Mathur v Ontario: Moving Towards a Greener Future

by Geri Angelova and Ryan Deshpande

The climate movement is as diverse as the world it hopes to save. Across the globe, people are taking action in different ways, shapes, and forms to pressure their governments to address the climate crisis. It involves political action, such as the Fridays for Future Movement, where school-aged children from nearly every country protest each Friday to encourage government action. There is cultural action, as Indigenous peoples fight to exercise their cultural rights, which are proven to benefit the environment. There is also legal action, as people challenge governments and corporations who harm the environment in the courts. According to Columbia University's Sabin Center for Climate Change Law, there are over 2000 ongoing or completed climate change related court cases around the world. One of the most famous cases is [*Urgenda v State of Netherlands*](#), where the Supreme Court of the Netherlands ordered the Dutch government to lower its emissions to 25% of 1990 levels by 2020 in order to protect human rights. Youth are considered the leaders of the climate movement, and this is especially apparent in climate litigation. In cases such as [*Juliana v United States*](#) and [*Do-Hyun Kim et al v South Korea*](#), youth are asserting that their fundamental rights have been violated due to government actions that have destabilized the climate. This is the context in which the Asper Centre is supporting its own youth-led climate litigation: *Mathur v Ontario*.

Canadian courts are now following in the footsteps of other courts in relation to climate change actions brought against government actors around the world. Three youth-based climate justice lawsuits have been brought against the Canadian government in the past three years for insufficient action to reduce greenhouse gas ("GHG") emissions and mitigate the effects of climate change.

Environnement Jeunesse c Procureur général du Canada

Environnement Jeunesse ("Jeunesse"), a non-profit organization largely composed of young environmental activists, first filed an application to authorize a class action against the Government of Canada in 2018. The proposed class, all Québec residents aged 35 and under, allege that the government's adoption of inadequate GHG emission targets violates the class members' rights to life, liberty, and security of the person under section 7 of the Charter, the right to a healthy environment as protected by section 46.1 of Québec's Charter of Human Rights and Freedoms and their equality rights under section 15 of the Charter. [The Superior Court of Québec dismissed the application](#) to authorize the class action. While Justice Morrison found that the impact of climate change on Charter-protected rights was justiciable and not a purely political matter, he refused to certify the proposed class on the basis that the 35-year age cut-off was legally arbitrary. The Court ultimately concluded that the inability to objectively identify a principled age cut-off confirmed that a class action was not the appropriate procedural vehicle in this case. Jeunesse has since sought leave to appeal the decision before the Québec Court of Appeal.

La Rose v Canada

The second Charter claim, [La Rose v Canada](#), was filed in the Federal Court in October 2019 on behalf of a group of fifteen young plaintiffs. The

plaintiffs in *La Rose* alleged that Canada's contribution to GHG emissions is incompatible with a stable climate and violates their Charter rights as well as the rights of future generations under the public trust doctrine. The relief sought includes a declaration that the government has a duty to act in a manner that is compatible with maintaining a stable climate system and an order requiring the government to implement a Climate Recovery Plan with judicial oversight.

In October 2020, Justice Manson of the Federal Court granted the Government's motion to strike. The court held that the Charter claims were not justiciable because they allege "an overly broad and unquantifiable number of [government] actions and inactions" that effectively attempt to subject a holistic policy response to climate change to Charter scrutiny. The fundamental problem with the pleadings in *La Rose* was that they did not point to a particular law that disproportionately burdens youth but challenged a sweeping range of

impugned government conduct. As such, Justice Manson dismissed the plaintiffs' claim due to the "undue breadth and diffuse nature of the Impugned Conduct and the inappropriate remedies sought by the Plaintiffs". The plaintiffs in *La Rose* have also appealed the decision to the Federal Court of Appeal.

Mathur v Ontario

The third Charter challenge, [Mathur v Ontario](#), was filed in November 2019 in the Ontario Superior Court of Justice on behalf of seven young environmental activists residing in Ontario. The plaintiffs in *Mathur* challenge Ontario's 2030 GHG emission target under the Cap and Trade Cancellation Act, 2018 which increased the permissible level of GHG emissions in a manner contrary to Canada's international obligations under the Paris Agreement. As such, the plaintiffs allege that Ontario's GHG emission reduction targets infringe the constitutional rights of youth and future generations.



Mathur is the first youth-based climate change Charter challenge in Canada to be given the green light to proceed to trial. Justice Brown of the Ontario Superior Court of Justice dismissed the government's motion to strike on the basis that it was not plain and obvious that the application disclosed no reasonable cause of action or had no prospect of success. Justice Brown held that the preparation of Ontario's GHG target along with Ontario's climate change plan are reviewable by the courts regardless of whether they are considered "law" for the purposes of conducting a Charter analysis. Justice Brown noted that the GHG target and climate change plan may be more akin to guidelines but are nonetheless legislatively mandated. Justice Brown further held that the issue of whether the government had a constitutional obligation to take positive steps to redress the future harms of climate change should be decided on a full evidentiary record, not on a preliminary pre-trial motion.

Interestingly, there are many similarities between the arguments raised in *La Rose* and *Mathur*. In both cases the youth plaintiffs assert that they will bear a disproportionate share of the burden imposed by climate change that is being further exacerbated by the government setting inadequate GHG emission reduction targets (Canada, in *La Rose* and Ontario, in *Mathur*). Additional similarities to *La Rose* include the plaintiffs seeking an order requiring their respective government defendant to adopt science-based GHG emission reduction targets and revise their climate plan.

The differing outcomes in the two decisions mainly stem from the way these arguments were framed. The key difference between *La Rose* and *Mathur* is that Canada's GHG emission targets in *La Rose* could not be traced to a specific piece of legislation, whereas Ontario's 2030 target could. Justice Brown was able to distinguish *Mathur* from the Federal Court's decision in *La Rose* primarily on this basis. In this respect, *La Rose* and

Mathur reveal how form, as opposed to substance, can significantly influence the outcome of Charter challenges.

Canadian courts now have the opportunity to lead by example, by holding the government accountable to its international obligations and requiring meaningful state action to combat climate change.

Looking Forward

The conflicting decisions in *La Rose* and *Mathur* suggest there is uncertainty in Canadian law with respect to the judiciary's role in protecting the environmental rights of youth and future generations that will need to be resolved by appellate courts. If successful at trial, *Mathur* would create an important precedent in support of the right to a healthy environment. Urgent action is required to mitigate the catastrophic consequences of climate change as recent projections show that the world is on a path to warm around 3°C by 2100. The Paris Agreement is a collective response to this collective problem. The Canadian government has repeatedly failed to meet its climate targets and is not on track to meet its 2030 target under the Paris Agreement. Canadian courts now have the opportunity to lead by example, along with the Netherlands' judiciary, by holding the government accountable to its international obligations and requiring meaningful state action to combat climate change.

Geri Angelova and **Ryan Deshpande** are 3L JD students at the Faculty of Law and were Asper Centre Clinic students in Fall 2020.

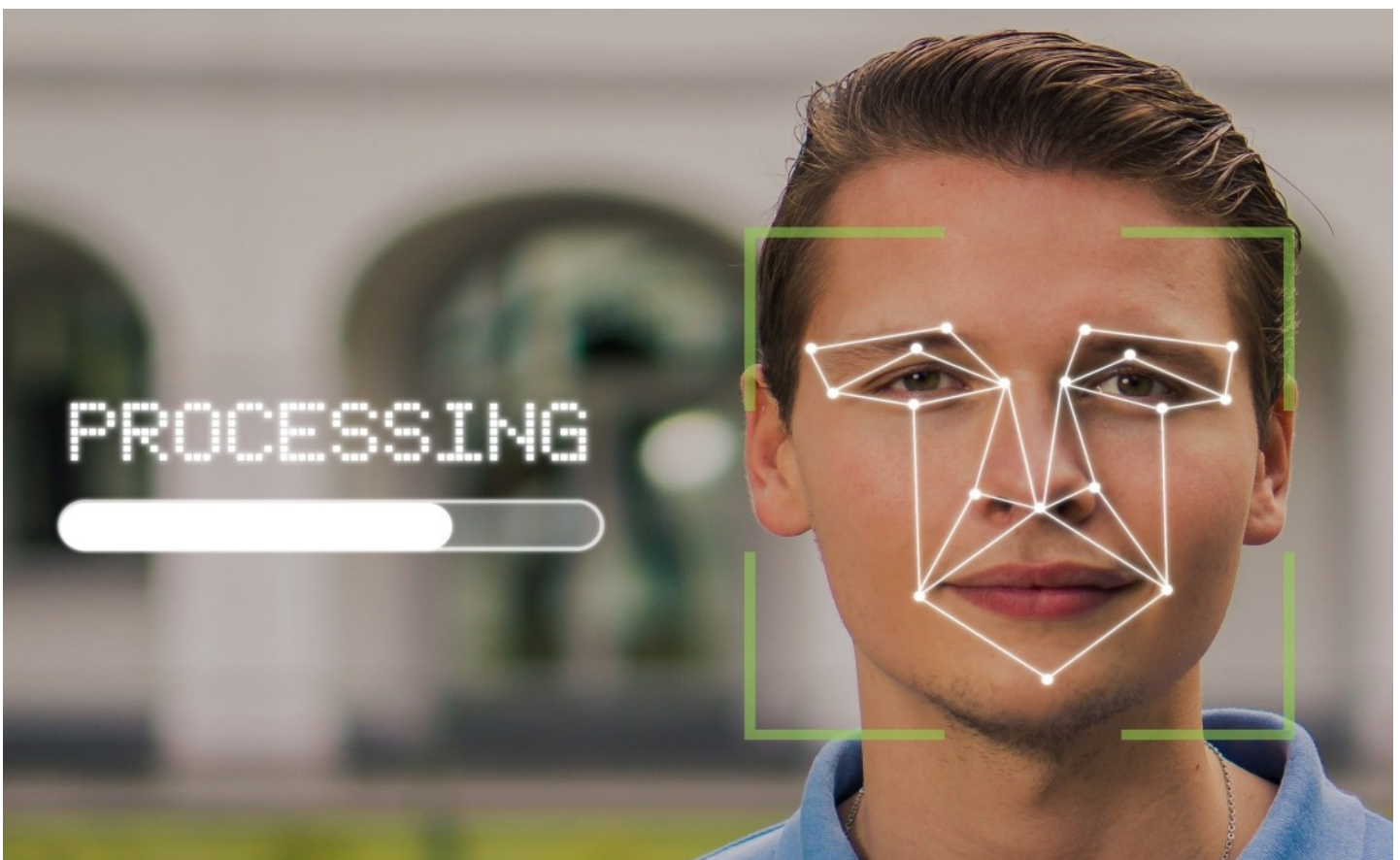
Addressing the Use of Facial Recognition Software, Privacy, and Law Enforcement in Canada

By Annecy Pang and Rachael Tu

New technologies are continually being developed, introduced, and implemented at a rapid rate. As exciting as these developments can be, there is a worrying lack of regulation in Canada for artificial intelligence technologies. An example is Clearview AI, a facial recognition software that has faced considerable criticism for acquiring its image database by scraping images from public social media profiles. Primarily marketed toward law enforcement agencies, the facial recognition app allows users to upload a picture of a person in order to view every public image of that person, along with links to where those images were published. Clearview AI

no longer offers its technology in Canada, but it was tested by dozens of law enforcement agencies across Canada without any type of external oversight, guidelines, or accountability measures.

Clearview AI is merely one example of how law enforcement bodies are utilizing increasingly powerful surveillance technologies. This year, the Asper Centre's Artificial Intelligence & Constitutional Rights student working group sought to explore the impact facial recognition software has on the Constitutional rights of citizens when used by police agencies. Specifically, we looked into how this type of software might affect the privacy rights of individuals under



section 8 of the Charter. We sought to answer questions such as: does someone have a reasonable expectation of privacy in the photos they choose to post and make public on social media? How does our current search and seizure jurisprudence interact with emerging technologies and digital information? If an individual's privacy interests are not engaged under s.8 of the Charter, is there space for other legislation to fill the gaps?

With the guidance of the working group's Faculty advisor Professor Vincent Chiao, working group members researched topics such as: current AI use and regulation in Canada, the United States, and the European Union; a review of case law involving new technologies and alleged s.8 Charter infringements; and whether any accountability measures are in place for law enforcement bodies. We reviewed the work of various civil society organizations in the area, and have identified gaps in our current privacy legislation regime.

Our plan is to provide a written submission to the House of Commons' Standing Committee on Access to Information, Privacy, and Ethics (ETHI) for their ongoing study on the Impact of Facial Recognition and Artificial Intelligence. Through our research on the use of technology by law enforcement and its interaction with the Charter, we sought to address a number of points relevant to ETHI's study, including the impact of this technology on vulnerable communities, or how it can be used for illegal surveillance purposes. Our final submission focuses on the limitations of the 'reasonable expectation of privacy' framing in s.8 and recommends more robust biometric data protection law for consumers and individuals. We also suggest enhancing accountability and oversight mechanisms for law enforcement bodies to make decisions around the implementation of new technologies.

Although the working group was entirely virtual this year due to the COVID-19 pandemic, we tried to build community within the group of working

group members. We held mid-semester check-ins, paired students together for most of the research topics, and emphasized that the working group leaders' in-boxes were always open for any questions. In the winter semester, we periodically hosted drop-in "lab" hours for students to drop by, ask clarification questions, or just chat. It has been exciting to watch the project move from merely an idea to tangible final product, and are hopeful that it will influence ETHI's work in the study.

As a first-year working group member, Rachael conducted research on case law and secondary sources in the Fall semester with a focus on the section 8 privacy analysis—particularly the thorny issue of what constitutes a reasonable expectation of privacy in certain situations. For the Winter semester, she switched gears to examining privacy law reform. In spite of the virtual format, she found it enriching to collaborate with her peers on this crucially relevant issue which is capable of affecting everyone in a tangible way. Along the way, Rachael was exposed to the complexities and nuances of legal research, got the chance to delve into Charter jurisprudence for a specific subject, and reinforced her deepening interest in the intersection of technology and the law.

Annecy Pang is a 2L JD student at the Faculty of Law and a co-leader of the Artificial Intelligence and Constitutional Rights working group, and **Rachael Tu** is a 1L JD student and member of the working group.



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