

ASPER CENTRE OUTLOOK

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Sola Fide, Ktunaxa, and the Character of Religious Freedom in Canada

IN THIS ISSUE

Freedom of religion and conscience ensures that the civic and the private spheres of life preserve a degree of independence in matters of morality and spirituality. The scope of this protection implicates an underlying judicial philosophy of religion. As such, “we must first ask ourselves what we mean by ‘religion’” (*Syndicat Northcrest v Amselem* at para 39). The recent *Ktunaxa Nation v British Columbia* decision suggests that what the Supreme Court of Canada (SCC) means by “religion” has been shaped by the Protestant faith. In this article, I will offer a few arguments for why I think this is, how this matters for s.2(a) jurisprudence, and how two pending SCC decisions may further affect the character of religious freedom in Canada.

The Case of the Grizzly Bear Spirit

According to the SCC, the purpose of s.2(a) is to “ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and in some cases, a higher or different order of being” (*R. v Edwards Books and Art Ltd*, p. 759).

Yet, in *Ktunaxa*, the majority of the SCC ruled that s.2(a) does not protect “subjective spiritual meaning.” The court found no substantial interference with the Ktunaxa Nation’s sincere religious beliefs and practices (*Amselem*) when the state approved the development of a ski resort in a sacred place, causing the Grizzly Bear Spirit to leave and undermining the Ktunaxa Nation’s associated religious beliefs and practices. Protection under s.2(a) was held to be limited to freedom to hold beliefs and freedom to manifest those beliefs.

What does it mean for “subjective spiritual meaning” to be outside the scope of s.2(a) protection when a

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sincere subjective belief is required for s.2(a) consideration?

In his dissent, Moldaver recognized a s.2(a) infringement. He argued that the majority's reasoning was Judeo-Christian. However, understanding the reasoning as Protestant in nature is more helpful in understanding its coherence, regardless of its other qualities.

The majority's reasoning in effect repudiates an intrinsic connection between religiosity and corporeal manifestations of the divine in the world. This is a Protestant idea: one's spirituality is neither dependent nor focused on *things*. Many religions, including Judeo-Christian religions, intimately bind the subjective spiritual meaning and the material. Jews hold sacred the Holy of Holies. Catholics hold sacred the Eucharist.

Consider a hypothetical. If it were possible for government action to deprive the Eucharist of the subjective spiritual meaning it provides in Catholicism, would the remnant ability for Catholics to consume

mere wine and wafers in Holy Communion exempt this from amounting to a substantial interference? This is arguably worse than coercing Catholics to not perform the Eucharist: it destroys the meaning of the act itself, not just the actor's ability to perform it. Protestant reformers repudiated the religious necessity of the Eucharist; in *Ktunaxa*, the majority found that undermining the religious significance of rituals did not amount to a substantial interference.

There are two aspects to s.2(a): (1) freedom of beliefs and (2) freedom to manifest those beliefs. *But in excluding protection of "subjective spiritual meaning," the majority appears to treat the two "aspects" of s.2(a) as independent rather than two facets of the same construct. Indeed, belief is only ever apparent to others when manifested in behaviour that is suggestive of or enacts that belief. Yet, a manifestation rendered void of sincere religious significance (belief) remained intact according to the Ktunaxa majority.*

This raises a question: what does s.2(a) protect that is not protected by freedom of expression? Perhaps the distinction is that freedom of expression provides *freedom to* do things, while s.2(a) guarantees *freedom from* coercion or public exclusion. The Ktunaxa Nation was not *forced to act* against their conscience (*Saguenay*) nor were they forced to choose between participation in the public sphere or maintaining their religious practices (*Multani*). Rather, the Ktunaxa Nation wanted to preserve the religious value of their actions.

In the Protestant faith, subjective spiritual meaning is a personal responsibility; it cannot be deprived

from without. Protestantism concerns a personal relationship with God and conducting oneself in accordance with one's understanding of Scripture and God's will. Institutional mediation is not necessary for salvation. Holy objects, spaces, or persons (save perhaps one) are not instrumental to the Protestant religious experience.

This posited Protestant judicial philosophy helps elucidate how the majority framed the *Ktunaxa* Nation's claim as seeking to protect the deity itself, the "the object of belief," rather than the freedom to maintain their beliefs and practices apropos this deity. The notion of a deity corporeally dependent is foreign to Protestant religion. Indeed, the claim was construed almost as a freedom of expression issue: persons cannot impose restrictions on others in order to preserve their own beliefs. The law protects the pursuit of truth, not your truth. This is consistent with s.2(b), which ensures that others are free to act contrary to or challenge ideas and beliefs.

So, what does s.2(a) protect that s.2(b) cannot? State neutrality readily jumps to mind (*Big M Drug Mart*). But can this not in effect be guaranteed in relation to individuals by equality rights under s.15(1)? *Religion is an enumerated ground protected against discrimination. Following the two-part test for s.15(1) claims (Kahkewistahaw First Nation v Taypotat), a claim of discrimination on the basis of religion must demonstrate (1) that the state action distinguished on the basis of religion and (2) this distinction created an arbitrary disadvantage. An arbitrary disadvantage includes a failure to respond to the needs of the group members and the imposition of a burden. Is there a qualitative differ-*

ence between this and not trivially or insubstantially interfering with a sincere beliefs or practice as outlined in the Amselem test for s.2(a) infringement?

Considered together, s.2(b) and s.15(1) seem to leave little distinct protection offered by freedom of religion after *Ktunaxa*. Two decisions pending at the SCC will bring further significant developments to religious freedom in Canada.

Trinity Western University v Law Society of Upper Canada

Trinity Western University (TWU) argued that the Law Society of Upper Canada's decision to deny TWU's law school accreditation infringed freedom of religion because it was based on their Commu-

Granting religious organizations s.2(a) rights would add a unique character to religious freedom that is not covered by s.2(b) or s.15(1)

nity Covenant's promotion of traditional evangelical Christian morality. Specifically, it restricts morally acceptable sexual behavior to that which occurs between heterosexual, monogamous, married partners.

The trial and appellate decisions readily found s.2

(a) infringement, but upheld the Law Society's decision regardless. After *Ktunaxa*, it is very possible that the SCC will not recognize a substantial interference with the would-be students' sincere beliefs because denying accreditation does not restrict their freedom to maintain and manifest their religious beliefs. The individuals do not require institutional regulations to maintain a free religious community.

Given this, the SCC may finally rule on whether religious organizations have s.2(a) protection because it may determine the outcome of this case (*Loyola High School v Quebec*). In *Loyola*, this was not the case, so the majority expressly left the issue unaddressed. However, the minority recognized that an organization can have s.2(a) rights if (1) it is constituted primarily for religious purposes, and (2) its operation accords with these religious purposes. TWU's Mission Statement states that its purpose is to educate "godly

Christian leaders" with "thoroughly Christian minds" who serve "God and people in the various market-places of life." By the *Loyola* minority standard, TWU would qualify for s.2(a) protection.

Granting religious organizations s.2(a) rights would add a unique character to religious freedom that is not covered by s.2(b) or s.15(1). It would also change the focus of the analysis to the contested belief's connection with the "religious purpose" of the organization, which suggests a less subjective approach to evaluating "substantial interference."

Highwood Congregation of Jehovah's Witnesses v Randy Wall

Although the *Randy Wall* case has attracted significantly less attention than TWU, its implications for religious freedom in Canada are significant.

Randy Wall was a member of the Highwood Congre-



Photo: Wikimedia Commons

Reflection: Character of Religious Freedom

gation of Jehovah's Witnesses. After two incidents of drunkenness, he was disfellowshipped by the Judicial Committee of elders for being insufficiently repentant. He was therefore shunned by the community, including his wife and children, and many of his business clients. He appealed this decision through religious authorities without favourable results. He now seeks judicial review.

This case will therefore address whether separation of church and state goes both ways, and how far. How much autonomy do religious organizations have to assess morality, impugn behavior, and exclude others on this basis?

Must religious judicial processes be consistent with natural justice? Are non-criminal religious decisions that do not engage any legally cognizable private law rights (property, contract, *etc.*) to be subject to judicial review by secular authorities? If some immunity is recognized, what is the scope of that immunity?

The *Randy Wall* decision will significantly affect s.2(a) jurisprudence and further define the scope and character of religious freedom in Canada.

Conclusion

Martin Luther ignited, and in many ways defined, the Protestant reformation with his Diet of Worms proclamation: "I am bound by the Scriptures I have quoted and my conscience is captive to the Word of God. I cannot and will not recant anything, since it is neither safe nor right to go against conscience." This focus on freedom from coercion, individual autonomy, and a

personal relationship with a transcendent God is central to Protestant faith. This individualization of religion initiated the arduous process toward religious freedom in the West, but that same quality may now be reducing the unique protections that freedom of religion offers in Canada. The *TWU* and *Randy Wall* cases will be significant cases for what may be of increased focus in s.2(a) jurisprudence to come: the legal status and autonomy of religious organizations.

by Ryan Howes, 1L JD Candidate at the Faculty of Law and 2017 Asper Centre work-study student.

Supreme Court of Canada

2017 Year in Review

2017 saw a number of important decisions coming out of the Supreme Court impacting Canadian constitutional law and beyond. In this article, I will outline a few of these significant developments.

Ernst v. Alberta Energy Regulator

The Supreme Court of Canada split 4-1-4 on the constitutionality of an immunity clause that bars civil action against the Alberta Energy Regulator.

Ernst initially brought a claim for Charter remedies, alleging the Regulator breached her right to freedom of expression under s. 2(b) of the Charter of Rights and Freedoms. The Regulator responded that s. 43 of the Energy Resources Conservation Act barred Ernst's claim. This immunity clause reads:

No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) [technical specialists or personnel] in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

On appeal, Ernst challenged the constitutionality of s. 43, arguing the clause was inoperable to the extent that it barred a claim for Charter remedies.

For the majority, Cromwell J found Ernst did not discharge her burden of showing that the immunity clause was unconstitutional, so the clause applied and struck down her original claim. Even if the clause did not apply, Ernst could not secure Charter damages under the *Vancouver (City) v. Ward* framework. This framework denies Charter damages when there is an effective alternative remedy or when damages would be contrary to good governance. Both elements in the *Ward* framework militated against awarding Charter remedies in this case. First, judicial review offered an alternative and

more effective remedy for this dispute. Second, granting damage claims could undermine the Regulator's functions. Such claims could deplete the Regulator's resources, distract from its statutory duties, compromise its impartiality, and essentially allow collateral attacks against its decisions.

In dissent, McLachlin CJ and Moldaver and Brown JJ stated that courts must use the *Ward* framework in order to determine whether it is plain and obvious that Charter damages are not an appropriate and just remedy. If it is not plain and obvious that Charter damages are inappropriate, then courts determine whether it is plain and obvious that the immunity clause applies. In this case, it was not plain and obvious that Charter remedies would be inappropriate. Ernst had an arguable claim, and Charter damages would achieve vindication and deterrence. The Regulator did not show that judicial review would be an effective alternative to Charter remedies. Further, it was not plain and obvious that the immunity clause barred Ernst's claim, as the Regulator's actions arguably fell outside the clause's scope.

The decisions unfortunately fixate on the availability of Charter remedies and largely ignore the actual issue: Whether a statute can remove an individual's chance to even claim a Charter breach. By upholding the constitutionality of a statute that eliminates this chance, *Ernst v. Alberta Energy Regulator* potentially weakens Charter rights.

BC Freedom of Information and Privacy Association v. BC (Attorney General)

The Supreme Court of Canada unanimously upheld the British Columbia Election Act.

The BC Freedom of Information and Privacy Association alleged the Election Act infringed freedom of expression by requiring individuals to register as "sponsors" for election advertising. This requirement unjustly limited the rights of individuals who

display signs in their windows, put bumper stickers on their cars, or wear shirts with political messages. The Association sought a declaration that this requirement was inoperable to the extent that it applied to sponsors who spend less than \$500 in an election period.

The Court noted that the Election Act infringed freedom of expression, but it found the infringement was justified. The requirement has a pressing and substantial objective: To increase transparency, openness, and public accountability in the electoral process. The requirement is minimally impairing, as it does not affect individuals who engage in political self-expression; properly interpreted, the Election Act does not capture individuals who neither pay others for advertising services nor receive advertising services from others without charge. The requirement also has few deleterious effects, as it only delays or inhibits sponsorship; and numerous benefits that include allowing the public to know who engages in political advocacy, ensuring sponsors comply with election laws, and enabling the Chief Electoral Officer to enforce the Election Act.

Does *BC Freedom of Information and Privacy Association v. BC (Attorney General)* correctly

define “sponsor” in the age of social media? Or does its definition underestimate the influence of an individual with a large social media following?

[Clyde River \(Hamlet\) v. Petroleum Geo-Services Inc.](#)

and

[Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.](#)

These companion cases developed the jurisprudence around the duty to consult Indigenous Peoples. The Supreme Court of Canada unanimously agreed that the NEB can trigger the duty to consult, as it effectively acts on behalf of the Crown when deciding whether to approve a resource project. The Crown also can use the NEB to fulfill its duty to consult, as long as the Crown informs the affected Indigenous Peoples that it is using the NEB to fulfill this duty. The SCC explained that the NEB has “considerable institutional expertise” in conducting consultations and assessing impacts. The NEB further has the procedural powers to implement consultation, as well as remedial powers to accommodate affected Indigenous claims and/or rights. Finally, the SCC declared that if a tribunal can consider questions of law, the



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tribunal must decide whether consultation is constitutionally sufficient, when this issue is raised properly. The tribunal usually must provide written reasons that explain its conclusion.

In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, Petroleum Geo-Services applied for the National Energy Board's approval to conduct offshore seismic testing for oil and gas in Nunavut. The tests would impact the Inuit of Clyde River's treaty rights. Petroleum Geo-Services addressed relevant concerns in an online 4,000-page document that was difficult to access because of internet speed and costs. The NEB approved the tests since Petroleum Geo-Services made "sufficient" efforts to consult the Inuit of Clyde River, and the tests likely would not cause significantly adverse environmental effects.

The SCC found the Crown did not meet its duty to consult. The Crown owed a duty of deep consultation since the Inuit of Clyde River had treaty rights to hunt and harvest marine animals, and the tests posed a severe risk to these animals. The Crown failed to inform the Inuit of Clyde River that it would rely on the NEB process to discharge its duty. The NEB process itself was also inadequate. The Inuit of Clyde River had limited participation, and Petroleum Geo-Services did not effectively address their

concerns.

In *Chippewas of the Thames Nation v. Enbridge Pipelines Inc.*, Enbridge applied to modify its Line 9 pipeline in order to reverse its flow and increase its capacity. The National Energy Board notified the Chippewas of the Thames First Nation about Enbridge's application and upcoming NEB hearings to discuss the project. The NEB also offered financial support to ensure the Chippewas of the Thames First Nation could participate in the NEB process. The Chippewas of the Thames First Nation filed evidence and delivered oral arguments that the pipeline would adversely impact their use of the land. The NEB ultimately concluded Enbridge's proposal would have minimal impact, and its impacts would be appropriately mitigated. The NEB approved the project.

The SCC found the Crown discharged its duty to consult. The NEB gave sufficiently early notice to the Chippewas of the Thames First Nation and sought their participation in the NEB process. The NEB offered financial support to prepare evidence and held an oral hearing. The Chippewas of the Thames posted formal information requests to Enbridge, to which they received written responses; and made closing oral submissions. The NEB's final decision acknowledged the rights and interests at stake, as well



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as assessed the risks that the proposal posed to the rights and interests.

These decisions offer guidance about regulatory processes that can discharge the Crown's duty to consult, and processes that fall short.

R v. Marakah and R v. Jones

In these companion cases, the SCC ruled that in some instances, text messages can attract a "reasonable expectation of privacy." Someone can have a reasonable expectation of privacy for their texts, even if another person possesses the text or can access it. Nor does the risk that a recipient might disclose a text negate this expectation of privacy. If a claimant has a reasonable expectation of privacy, s. 8 of the Charter protects those text messages from unreasonable search or seizure.

In *Marakah*, Marakah and Winchester texted about illegal firearm transactions. The police obtained the texts from Winchester's phone and used them to convict Marakah. Marakah argued that the texts were inadmissible evidence, as they were obtained in violation of his s. 8 right.

For the majority, McLachlin CJ acquitted Marakah on the grounds that the search was unreasonable, so the evidence must be excluded. The subject-matter of the search was a private conversation between Marakah and Winchester. Marakah had a direct interest in that subject-matter, as a participant in the conversation and the author of the texts in question. Marakah subjectively expected the conversation to remain private as well. This reasonable expectation to privacy meant that Marakah had a s. 8 right that protected against unreasonable search and seizure of the texts.

In dissent, Moldaver J emphasized that Marakah lacked control over the texts; indeed, Winchester could have disclosed the texts to anyone, at any time or for any purpose. The dissent criticized the majority's approach for

ignoring current s. 8 jurisprudence. This approach might cause a "sweeping expansion" of s. 8 standing, further burdening the criminal justice system.

In *Jones*, Jones and Waldron sent text messages regarding a potential transfer of firearms. The police obtained the texts pursuant to a Production Order that directed Telus to disclose texts associated with Waldron's subscriber account. The police then used the texts to secure search warrants. The searches uncovered evidence of drug trafficking. Jones sought to exclude the texts as evidence, as the texts were obtained in violation of his s. 8 right.

For the majority, Côté J found Jones had a reasonable expectation of privacy. The majority affirmed that texts are private communications, and the parties intended their communication to remain private. It is "objectively reasonable" that Jones expected Telus to keep the texts private, given that its purpose is to deliver private communications. However, the police did not violate Jones' s. 8 right since it lawfully seized those texts through a production order.

In dissent, Abella J agreed that Jones had a reasonable expectation of privacy. Yet, she found the police violated Jones' s. 8 right since the police did not secure a Part VI authorization.

These decisions clarify privacy rights in this ever-increasingly digital era. Modern communications are entitled to the same protection as more conventional communication.

by Catherine Ma, 2L JD Candidate at the Faculty of Law and the Asper Centre's Indigenous Rights student working group co-leader

FOR CANADA'S SESQUICENTENNIAL:

Constitutional Roundtables & Symposium

In 2017 the Asper Centre hosted a series of Constitutional Roundtables and a Constitutional Law Symposium in which scholars discussed the development of Canada's constitutional law jurisprudence since Confederation.

Roundtables

On January 19, 2017 the special Constitutional Roundtable series commemorating the Sesquicentennial kicked off with the Faculty of Law's Morris A. Gross memorial lecture, presented by the Honorable George S. Strathy, the Chief Justice of Ontario. Strathy's thoughtful lecture was aptly titled *Judicial Courage and Restraint in Canadian Constitutional History*. This was followed on February 9 by Professor Hugo Cyr, Dean of the Faculty of Political Science and Law at the Université du Québec à Montréal, presenting on "Normalizing the Exception in Canada." On March 1, Professor Richard Haigh, Director of York University's Centre for Public Policy and Law, presented on "The Al-

berta Press Case." On March 22, Professor Jamie Cameron from Osgoode Hall Law School presented a talk titled "Section 7 and the Idea of the Charter." And finally, on September 27, the roundtable series hosted Professor Richard Albert from Boston College Law School, who presented a comparative analysis of the Supreme Court of Canada in his talk "The Most Powerful Court in the World? Constitutional Amendment after the Senate reform and Supreme Court Act References."

The roundtable series culminated in the Asper Centre Constitutional Law Symposium for Canada's Sesquicentennial. On October 20, three panels, each composed of three presenters and one mediator, presented on a particular constitutional theme. The symposium was brought to a close by key note speaker Professor John Borrows, Canada Research Chair in Indigenous Law at the University of Victoria Law School.

Symposium Panel 1:

Section 7 of the Charter of Rights and Freedoms

The first panel was chaired by Carol Rogerson, an eminent Constitutional law professor at the University of Toronto's Faculty of Law.

The panelists were: Hamish Stewart, Professor at the University of Toronto, Faculty of Law; Martha Jackman, Professor, University of Ottawa, Faculty of Law; and, Audrey Macklin, Director of the Centre for Criminology & Sociolegal Studies, and Professor & Chair in Human Rights Law, University of Toronto, Faculty of Law.

Professor Stewart opened the morning's discussions with comments on the landmark 2015 Supreme Court decision of *Carter v Canada* and new and ongoing related litigation brought by Julia Lamb and the British Columbia Civil Liberties Association. *Carter*, applying section 7, reined in the criminal prohibitions against assisted death, which prohibited those suffering from grievous and irremediable medical conditions from seeking physician-assisted death. The *Lamb v Canada* case challenges aspects of Parliament's response to *Carter* in Bill C-14. Bill C-14 – equipped with a robust preamble highlighting the importance of human dignity and autonomy, the equal value of every life, and the need to safeguard from abuses against vul-

nerable persons – permits patients to seek physician assisted death only when their death is “reasonably foreseeable.” Professor Stewart briefly hypothesized that this aspect of the new provision might be overbroad.

The focus of his discussion, however, was on a recently released pre-trial decision in the *Lamb* case. Ms. Lamb asked the court to order that certain factual findings from the *Carter* case were binding on the Attorney General. The court refused to make such an order, meaning that Ms. Lamb and the BCCLA will be tasked with building their own complete factual record. The court's decision was based on the premise that the *Carter* judgment was inextricably linked to the legislative and social facts before the *Carter* court and that Ms. Lamb could not be permitted to rely on those facts in her case challenging different legislation in a different context. This decision raises interesting questions for constitutional litigation and challenges. The more a constitutional decision is tied to its specific facts, the less general force it has. This case leaves us with questions about whether or



not the current format of constitutional litigation is best suited to the goal of effective Charter driven law reform.

Next, Professor Jackman took the room for a critical analysis of the case of *Gosselin v Quebec*. Following *Irwin Toy v Quebec*,

“corporate-commercial economic rights” were excluded from the Charter. However, Chief Justice Dickson left open the possibility that “economic rights fundamental to the human life or survival” may nevertheless fall within the ambit of section 7. Professor Jackman explained that the legal impact of *Gosselin* has been to render such a reading of section 7 rights a fleeting aspiration at best. In 2002, the Supreme Court rejected Ms. Gosselin’s argument that her section 7 rights were violated due to a Quebec poverty scheme which forced her to live on \$170 a month. Professor Jackman explained that, despite the voluminous evidence of the harm Ms. Gosselin faced due to her poverty, including a 5000 page record, the Supreme Court held that the evidence was insufficient to support her claim.

Providing insights into her upcoming paper, Professor Jackman repeatedly returned to the phrase, “one step forward and two steps back” to explain the legacy of this case. On the positive side, eight justices acknowledged that, while section 7 was primarily a negative rights guarantee, it could be interpreted to support positive rights given the right facts. On the neg-

ative side, Professor Jackman first argued that the way the court approached the evidence in this case places a disproportionate burden on the claimants as opposed to governments. Second, the case exhibited numerous stereotypes about poverty and those living in poverty. Rather than directly addressing the voluminous record, backed by professional organizations, about the harms of living in poverty, the Court relied on various stereotypes about those living in poverty, such as their weak work ethic and the idea that poverty is a choice.

In conclusion, Professor Jackman reiterated that the case was disheartening, on an intellectual and emotional level, and that the legacy of the case is a Charter out of touch with Canada’s international human rights obligations. Professor Jackman’s paper will explore ways to change this situation so that everyone can truly be accorded equal benefit and protection under the Charter.

The final presentation in the panel was delivered by Professor Macklin. Professor Macklin focused on Canada (*Minister of Employment and Immigration v Chiarelli*), a leading immigration law case. *Chiarelli* held that deportation of



permanent residents who have violated a condition of their residency in Canada does not violate section 7 of the Charter. Professor Macklin focused on the Court's reasoning, which subordinated section 7 of the Charter to the common law principle of the Crown prerogative. Professor Macklin carefully guided the room through the logic in the jurisprudence which was relied on to come to the conclusion in *Chiarelli*: (1) every state has a right to exclude and expel under international law; (2) there is a common law right of states to exclude and expel and no alien (a non-citizen of the state) has a right to enter or remain in the country; (3) therefore, there is no breach of fundamental justice when excluding or expelling aliens; and (4) consequently, deportations do not breach life, liberty or security of the person under s.7.

Professor Macklin asked the question: how do we connect the first proposition to the third? The lack of a right to remain does not mean that deportation fails to engage life, liberty or security of the person. To drive this point home, Professor Macklin offered various analogies where section 7 is engaged despite having no absolute, unqualified related right: for example, the right to counsel is not an unlimited right, yet we still guarantee state funded legal counsel to those accused of criminal offences. Professor Macklin's paper, titled "The Inside-Out Constitution," focuses on exploring this jurisprudential logic and question its doctrinal coherence and normative basis.

All three panelists were met with interesting and engaging questions from the Symposium

attendees. The session illustrated that the right to life, liberty and security of the person is a complex and challenging – yet immensely important – section of the Charter. Section 7 will continue to challenge courts and academics alike. If developed consistently, logically, and in line with the Charter's true vision, it holds great promise for everyone in Canada.

by Chris Puskas and Nic Martin, 2L JD Candidates at the Faculty of Law and co-leaders of this year's Asper Centre Refugee & Immigration Law student working group.

Symposium Panel 2: Seminal Cases for Past Reflection and Future Consideration

The second panel featured Ben Berger, Associate Dean and Associate Professor, Osgoode Hall Law School; Richard Moon, Professor, University of Windsor, Faculty of Law; and Margot Young, Professor, University of British Columbia, Allard School of Law. The panel was moderated by Breese Davies, the Asper Centre's 2017 Constitutional Litigator-in-Residence.

The presentations all concerned the development of Charter rights jurisprudence in Canada. The introduction of the Charter in 1982 challenged the Supreme Court of Canada (SCC) to adapt to its role as interpreter of Charter rights and integrate them into the existing constitutional body and Canadian society. Each panelist discussed an instance of this process and a perspective it offers on the development and future of Canadian constitutional jurisprudence.

For Canada's Sesquicentennial

Professor Berger's presentation, based on his paper entitled "Assessing Adler: The Weight of Constitutional History and the Future of Religious Freedom" considered the seminal case of *Adler v Ontario (AG)* within the broader context of Canadian constitutional logic and subsequent freedom of religion jurisprudence. *Adler* was an SCC decision that upheld the constitutionality of selective public funding for Catholic and denominational schools to the exclusion of Jewish schools. The SCC held that s. 93 of the British North America Act, which mandated the existing funding scheme, had constitutional status and was therefore immune from the s. 15 Charter challenge advanced in the case.

The SCC emphasized the historical importance of s. 93 to federation in its reasoning in *Adler*. For Professor Berger, this exemplifies what he calls the particular logic of Canadian constitutionalism, which preserves past constitutional compromises and defers to them in addressing contemporary concerns. This he contrasts with universal logic, which consists of faith in reason of legal principle and demonstrates a distancing from past arrangements or the status quo in reasoning about contemporary issues. This universal logic values past constitutional arrangements to the extent that they are upheld by legal principles. The particular logic, by contrast, is not so limited in its evaluation.

Adler anticipated the key role that education would play in the relationship between law and religion in subsequent Canadian jurisprudence. The reasoning in *Adler* foreshadowed an in-

creased judicial awareness of the communal or collective element in religion when contemplating religious freedom. This development is evident in *Loyola v Quebec*, which constitutes the Supreme Court's most ambitious statement so far regarding collective interest in the context of religion.

Professor Moon, in his presentation titled "Dolphin Delivery and the Court's Loss of Confidence" discussed how the SCC's interpretation and application of Charter rights developed. When the Charter became active in 1982, there were high expectations that the courts would adopt a wide interpretation of rights. This was true at first, but the SCC gradually began to understand that this involved the courts in complicated political and social questions. Liberal interpretation of rights granted the courts a concerning power to reconstruct and reform the rights they were interpreting. The *Dolphin Delivery* case exemplified the SCC's retreat from this mode of jurisprudence.

In *Dolphin Delivery*, a court injunction on employees picketing outside a business was challenged on the basis of s. 2(b) infringement. The court injunction was issued because the common law banned the kind of picketing the employees sought to do. The SCC held that the Charter applies to state action, including the common law, but does not apply to private litigation divorced from government action. This limited the range of applicable rights-based claims. The SCC applied the s. 1 proportionality test and held that the picketing caused sufficient harm to the target business to justify the injunc-

tion's infringement on s. 2(b).

Professor Moon observed a tendency in SCC's reasoning when it applies the s. 1 proportionality test that demonstrates two distinct understandings of the individual and their rights. The first step of the test is to understand the value of the right in question. Here, the SCC adopts a noble view of the individual and bestows intrinsic value on rights, such as the values of self-fulfillment, pursuit of truth, and democracy. The second step considers the infringing law in question and gauges whether the problems it addresses justifies infringing the implicated right. Here, the SCC adopts a behavioral view of the individual and a pragmatic understanding of rights. Rights first granted near-absolute value are then reduced to flexible treatment and subordinated to policy considerations that invariably and necessarily fail to contemplate all the relevant factors or protections that exist against the harm in question. The ordering of these two conflicting treatments is relevant to the outcome and facilitates findings that justify infringement.

The final panelist in this session was Professor Young, who based on her forthcoming paper entitled "Equality at Large: Section 15 and the rest of the Charter" discussed how equality rights can be and have been interpreted in a manner that fundamentally changes how rights operate. Rights traditionally operate to insulate the individual from abuses of state power. They



limit state interference in private life. But some s. 15 Charter arguments take the opposite approach. They justify state interference in private life. The state can impose social norms under the guise of protecting equality rights. The shield becomes the sword. And that sword can then be used to infringe other rights.

The ongoing Trinity Western University case exemplifies the complicated challenge equality claims present when in conflict with other rights. Trinity Western University wished to open a law school with students and staff that willingly sign a community covenant promising to abstain from lifestyles deemed immoral from their particular Christian worldview. This includes abstaining from homosexual behavior. The Ontario and British Columbia bar refused to license Trinity Western University law school graduates on the basis that the school was discriminatory. Trinity Western claims this infringes their freedom of religion.

The Trinity Western University case poses a question: Should communities composed of willing participants be free to collectively repudiate particular lifestyles and exclude persons

For Canada's Sesquicentennial

living such lifestyles from their community? The alternative is state enforced indiscriminate integration and punitive noncompliance measures. This is of course a matter of degree and context. Professor Young argued that the space in which such conflicts occur must inform the decision. For example, Trinity Western is a private law school, but its program qualifies graduates for a law license, a public resource. These qualities define the space being considered. If it were instead a private business school, considerations should account for and reflect the differences in these cases. Isolating rights conflicts from the space in which they occur neglects their complexity and condemns the debate to a principle standoff.

Taken together, the panelists' presentations suggested the SCC's adaptation to the Charter exemplifies a balance of liberal and conservative concerns. Professor Young identified the potential for s. 15 equality rights to reform our Canadian constitutional law. Yet, Adler demonstrated the SCC's concern to insulate the existing constitutional body from s. 15 based claims for reform, while Dolphin Delivery too limited Charter claims to instances of government action, denying their applicability to private litigation. Upcoming cases like Trinity Western University will inform how this process will continue into the future.

by Ryan Howes, 1L JD Candidate at the Faculty of Law and the Asper Centre 2017 work-study student.

Symposium Panel 3: Outside the Four Corners of the Charter

The panel featured **Eric Adams**, an associate Professor at the University of Alberta, Faculty of Law; Professor **Richard Stacey** from the University of Toronto, Faculty of Law; and University of Toronto Law Professor **David Schneiderman**. The panelists' respective papers explored the Bill of Rights, the duty to consult Indigenous Peoples, and unwritten constitutional principles. Professor **Lorraine Weinrib** from the University of Toronto, Faculty of Law moderated.

Professor Adams began the session by presenting his paper, entitled "Writing Rights: the Canadian Bill of Rights in Canadian Constitutional History" and arguing that the Bill of Rights holds an important – and often overlooked – place in constitutional law. He acknowledged that the Bill of Rights largely lacks jurisprudential value, as the Supreme Court of Canada has rejected most legal arguments invoking the Bill.

Further, in the only case where the Bill of Rights was successfully argued, *R v. Drybones*, the SCC expressly said that the Bill of Rights only renders legislation inoperative, if the legislation subjected groups to harsher treatment on its prohibited grounds. *Drybones* is also notable for the dissent by Cartwright CJ, who stressed that the Bill of Rights does not permit courts to invalidate laws in conflict with the Bill – an assertion that is diametrically opposed to his earlier statements in other Bill of Rights cases. Despite admitting these limitations, Professor Adams declared that the Bill of Rights is important for changing

public “imagination” and dialogue around constitutional law, which ultimately enabled the Charter of Rights and Freedoms to arise.

Professor Stacey, drawing from his paper entitled “Honour and Sovereignty: How Democratic

in consultations between Indigenous Peoples and industry proponents? If so, how much Crown involvement would be required? Professor Stacey answered his own questions by situating the duty to consult in a broad understand-

ing of reconciliation. For him, reconciliation means harmonizing two “paradoxically opposed” perspectives: The belief that Canada has enjoyed sovereignty over Indigenous Peoples since Confederation, and the view that many Indigenous Peoples never surrendered their sovereignty to the Canadian state. This conception of reconciliation suggests s. 35 of the Constitution Act, 1982 should be a framework to restore self-determination to Indigenous Nations – and guarantee Indigenous Peoples’ meaningful participation in decisions affecting them.



Accountability Shapes the Duty to Consult Indigenous Peoples” questioned the extent to which the Crown can delegate its duty of consult Indigenous Peoples. He noted that in *Haida Nation*, the SCC stated that the Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development. This statement makes “no sense” since the Crown effectively would be delegating its duty to consult Indigenous Peoples to the industries whose work is undermining Indigenous rights. So, would the Crown need to be involved

Professor Schneiderman in his presentation titled “Unwritten Constitutional Principles in Canada: Genuine or Strategic?” contended that the SCC acts strategically when invoking unwritten constitutional principles in its decisions. He elaborated the SCC does not intend for unwritten constitutional principles to guide jurisprudence in constitutional law; rather, the SCC appeals to these principles in order to “get out of a jam” and “escape from its legitimacy problem.” In *Reference Re: Secession of Quebec*, the SCC applied the principles of federalism, democracy, constitutionalism and the

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rule of law, and protection of minorities in order to disavow unilateral secession and found a constitutional duty to negotiate when a province wishes to secede from Canada. Yet, in *BC v. Imperial Tobacco Canada Ltd.*, the SCC rejected appeals to the rule of law; and in *Quebec v. Canada*, the SCC similarly rejected the idea of cooperative federalism. This behaviour suggests that the SCC is acting rationally to secure their desired objectives.

The audience was interested in the nuances of the panelists' arguments. They questioned if public imagination influenced the Bill of Rights – or if only the Bill shaped public opinion, other ways that sovereignty might manifest for Indigenous Peoples, and whether unwritten unconstitutional principles have strength due to their actual content or the fact that these principles are unwritten. Other questions linked ideas from the different papers together. Such questions included: Is the Honour of the Crown an unwritten constitutional principle that guides s. 35 jurisprudence?

by Catherine Ma, 2L JD Candidate at the Faculty of Law and co-leader of the Asper Centre's Indigenous Rights student working group.

Symposium Keynote Address:

John Borrows

Professor John Borrows from the University of Victoria Faculty of Law gave the Symposium's keynote address, in which he discussed Indigenous legal tradition and the need for Indigenous communities to have greater autonomy of self-governance. Indigenous legal traditions are deeply rooted in the unique and shared values of its

people. Professor Borrows' presentation expressed the need for greater understanding of these legal traditions within Canadian society.

Indeed, a pivotal moment in the history leading to Federation was the decision to permit Quebec to retain its unique legal tradition and culture. This capacity to self-govern in accordance with the society's own legal tradition and culture is important to the dignity of its people. The United Nations Declaration on the Rights of Indigenous People (UNDRIP) proclaims that indigenous people have the right to self-determination and self-government on matters relating to internal and local affairs. A crucial step on the path to reconciliation will be full recognition this legal autonomy for Indigenous Nations.



Click Image to view Borrows' Keynote Address

Bill C-59: The Good, the Bad, and Where We're At

When Bill C – 51, the Federal Government's revised Anti-Terrorism Act, was pushed through Parliament following the attacks on Parliament Hill in 2015, the reaction from the public and civil liberties societies was swift. The Canadian Civil Liberties Association challenged key provisions of the Act under the Charter, and Professors Roach and Forcese (among others) wrote numerous articles decrying the law as "radical" and "unbalanced." It also became a hot topic of debate in what turned out to be a contentious Federal Election, one that saw the Liberals win a surprising majority over Harper's conservative flagship.

But when the dust settled from the election season, the question loomed large: would the Liberals take any action to reform the new law? At the time, there was reason to be skeptical. The law had received Royal Assent with support from both the Conservative and Liberal parties. And with the election of the U.S. chest-pounder-in-chief, Donald Trump, many thought the Liberals would shy away from anything that might portray them as either soft on terror or weak on national security matters.

So when the Liberals introduced Bill C – 59, An Act Respecting National Security Matters, there was reason to believe it would be a mere nodding attempt to keep a half-hearted campaign promise. In some ways the Bill does disappoint - and the Asper Centre has released a detailed analysis of its shortcomings. But in many ways it is a valiant effort to roll back some of Bill C-51's

glaring excesses.

The most obvious improvement in the legislation is the implementation of a multi-agency review mechanism. The new bill sets up a whole-of-government review committee that can assess and review all national security information (except Cabinet confidences) and produces frequent classified reports to Parliament as well as an annual unclassified report to the public regarding its findings. These provisions remedy a major deficiency in accountability that has

The most obvious improvement in the legislation is the implementation of a multi-agency review mechanism.

been lacking for years in Canada's national security framework. Until now, each national security agency had different oversight bodies, which could not collaborate with each other, despite the fact that the work of each agency is often intertwined. This created a "siloing" effect, where reviewing bodies could not follow the evidence down whatever rabbit hole it may have led. By contrast, the new "whole of government" mandate means that the entirety of Canada's national security apparatus can be held accountable for its actions, including the CBSA (Canadian Border Services Agency) which had previously not been subject to any independent



review.

The Bill is commendable in other areas as well. For example, Bill C – 51 introduced a new speech offence to the Criminal Code that made it an offence to “advocate or promote a terrorism offence in general.” The provision is breathtaking in scope. It makes it an offence to perform tasks as innocuous as promoting the assistance of designated terrorist groups, advocating for the provision of “material aid” to listed groups, and advocating for the provision of charitable aid to a listed terrorist organization. There were also no defences worked into the provision such as opinions in the furtherance of a religious belief, commentary on matters of public interest, or the articulation of truth.

Bill C – 59, to its credit, limits the scope of this

offence to actions that actually “counsel” a terrorist activity. This is important because “counselling” criminal activity has always been a Criminal Code Offence – one that has been upheld as constitutional under the Charter.

All this being said, the Bill is not a model of perfection. The Liberals have come up at least one base short of a legislative home run. Canada’s national security framework remains sorely lacking in the area of privacy protection in that it still permits an enormous amount of sharing of Canadians’ personal information between federal agencies. As of now, the broad collection and sharing of Canadians’ personal information is authorized if the information pertains to acts that might “undermine the security of Canada.”

While this might sound perfectly reasonable, it is in fact alarming when one looks at the definition of what “undermines the security of Canada.” The category includes such unremarkable matters as interference with the economic or financial stability of Canada as well as any effort to “unduly influence” the government of Canada by any “unlawful means.” The term “unlawful,” it should be noted, is not the same thing as “criminal.” Canadians’ private information can be swept up and shared on the grounds that the target of the information had contravened an act of Parliament in an effort to merely “influence” government action (think of violations of the Ontario Labour Relations Act). Bill C-59 does nothing to remedy these deficiencies.

So what has been the progress on Bill C – 59?

The Bill is currently being prepared for Second Reading in Committee, so there is still hope that modifications could be made. But there is no

guarantee that changes to the bill won't move in a less happy direction. The Progressive Conservatives, under their new leader Andrew Scheer, have made a habit of taking the Liberals to task on any matter that has the appearance of being "soft on terror," including the management of returning ISIS fighters and – most controversially - the 10-million-dollar settlement with Omar Khadr. The Conservatives also appear to have taken issue with the restrictions on CSIS's so-called threat reductions powers. Bill C – 51 made it legal for CSIS agents to take positive steps to reduce national security threats short of causing bodily harm, intruding on sexual integrity or obstructing justice. It also allowed CSIS to seek a warrant from courts that would authorize Charter violations. Bill C – 59 changes this. The Liberal government has reformed these provisions by requiring that all such actions be Charter compliant, and prohibits CSIS agents from using its powers to detain, torture, or damage property to the extent that it endangers life.

These are important changes, but it is not obvious that the Liberals will be able to pass it into law without a fight. For this reason, when it comes to debating the bill in second reading, one hopes that Liberals and Conservatives will come together to strike an appropriate balance between national security matters and rights-preservation.

In other words, that cooler heads might prevail.

by Patrick Enright, 3L JD Candidate at the Faculty of Law and 2016 Asper Centre Clinic student.

Asper Centre Clinic 2017: R v. Bird & Bill C-56

The Asper Centre's 2017 fall term provided five students with an opportunity to engage with topical issues in the fields of constitutional, criminal and administrative law. Students worked on preparing the Asper Centre's Intervenor Factum in R v Bird and creating a draft policy brief proposing revisions to Bill C-56.

Many law students aspire to engage with contemporary issues in the law. Often, students attend special guest-panels, undertake directed research papers, or seek out unique summer opportunities to satiate this desire. Rarely do students create a factum to be submitted to the Supreme Court of Canada. Fortunately for those within the Asper Centre's fall clinic, this was precisely the task received.

In 2005 Spencer Bird was designated a long-term offender (LTO) and sentenced to 54 months of imprisonment and 5 years of long-term supervision. Upon completing his sentence, Mr. Bird was subject to a residency condition imposed pursuant to s.134.1(2) of the Corrections and Conditional Release Act (CCRA). Mr. Bird was made to reside at Oskana Centre, a federal penal institution for the purposes of the CCRA. Failing to abide by his curfew while at Oskana, Mr. Bird was found to have breached his long-term supervision order contrary to s.753.3(1) of the Criminal

Code. In defence, Mr. Bird has maintained that the residency condition mandated by the Parole Board was outside of their jurisdiction to order and contrary to s.7 of the Charter. In May of 2017 the Court of Appeal for Saskatchewan overturned a trial decision acquitting Mr. Bird on the basis that his defence was an impermissible collateral attack on an order of the Parole Board.

Mr. Bird's appeal to the Supreme Court presents two issues. First, whether the Parole Board's may make a long-term supervision order requiring an individual to reside in a penitentiary. Second, whether the doctrine of collateral attack bars Mr. Bird's Charter challenge. The focus of the Asper Centre's intervention was on the latter.

The application of the doctrine of collateral attack to administrative orders was set out by L'Heureux-Dubé J. in *R v Consolidated Maybrun Mines Ltd and R v Al Klippert Ltd*. Maybrun provides five factors to be considered in determining whether a collateral attack may be permitted. Importantly, constitutional rights and a potential loss of liberty were not engaged on the facts of Maybrun or Klippert. Drawing on Canadian Charter jurisprudence, the public policy defence, and recent developments in access to justice, students in the Asper Centre proposed additions to the Maybrun framework. Namely, considerations of access to, and administrative of, justice. The Constitutional-Litigator-in-Residence, Breese Davies, will present the arguments of the Asper Centre's students before the Supreme Court on March 16th, 2018. If practical, the team of five students will be able to attend Mr. Bird's appeal to witness Ms. Davies' submissions.*

Bill C-56-An Act to amend the Corrections and

Conditional Release Act and the Abolition of Early Parole Act, purports to amend Canada's administrative segregation regime and make additional changes to the CCRA. Specifically, the Bill proposes to: move to a 15-day presumptive release for offenders in administrative segregation, implement independent external reviews with respect to offenders in administrative segregation exceeding 21 days, and authorize the head of CSC, after review, to order that an inmate's segregation be continued or ended. For the students involved with the Asper Centre, Bill C-56, as drafted, does not adequately protect the constitutional rights of inmates. Accordingly, the student group prepared a draft policy brief illuminating the features of a constitutionally compliant administrative segregation regime. The framework proposed by the student group incorporates lessons from social science evidence on the deleterious effects of segregation, developments in international law, ss.12 and s.7

*"The best part of appearing
at the Supreme Court on
behalf of the Asper Centre
was having two of our
amazing students (Misha
Boutilier and Josh Foster)
with us who helped draft the
factum see their hard work
come to life before the
Court."*

-Breese Davies, 2017
*Asper Centre Constitutional
Litigator-in-Residence*

Charter jurisprudence, and procedural fairness. Considering the ground-breaking decisions by the Ontario Superior Court in *CCLA v Her Majesty the Queen* (2017) and the British Columbia Supreme Court's in *BCCLA v Canada* (Attorney

General) (2018) the policy brief may serve to be both informative and persuasive. Students continuing with the Asper Centre in the 2018 winter term will have the opportunity to finalize the policy brief under the direction of Director Cheryl Milne and Ms. Davies.

Through experiential learning, the Asper Centre's clinical placement promotes academic and professional development. In providing a brief overview of the nature of the work undertaken by the students of the Asper Centre through the fall of 2017, under the tutelage of Director Milne and Ms. Davies, it is the author's hope that students at the Faculty of Law take advantage of this unparalleled learning opportunity. The Asper Centre is at the forefront of evolution in Canadian constitutional law and is well positioned to provide students with an opportunity to respond to its challenges.

by Joshua Foster, 2L JD Candidate at the Faculty of Law and a 2017 Asper Centre Clinic Student.

*Josh was able to attend at the SCC to hear the oral arguments in the case on March 16, 2018.

Asper Centre Student Working Groups Making Meaningful Impacts

This academic year, the Asper Centre is fortunate to have three student working groups involved in a number of impactful legal research and advocacy projects.

The *Police Oversight student working group* is researching and drafting a comprehensive public guide to navigating each province's police oversight system, as well as covering the territories and RCMP. It will include information on the structure, important timelines, helpful strategies, and realistic expectations of success in the various police complaints structures. The initial purpose of this project was to critically evaluate the oversight systems that hold police officers accountable in Canada and make the police complaints structures more accessible to all Canadians. This project expands upon research undertaken by Asper Centre student Sarah Strban, currently a 2L JD Candidate at the Faculty of Law and the student working group's initiating leader. The group's other leaders are Joshua Favel and Natalie Marsh. Sarah held an Asper Centre summer fellowship position in 2017.

During her fellowship, Sarah assisted Toronto lawyer Mary Eberts in conducting research into Indigenous policing as part of advocacy being conducted in the context of the National Inquiry into Missing and Murdered Indigenous Women and Girls. The research was conducted in part-

nership with LEAF.

In recent years, there have been many high-profile clashes between Indigenous peoples and the police. There have been allegations of systemic racism and improper conduct, such as against the RCMP of northern British Columbia and the Thunder Bay police force and there have also been countless allegations of police apathy and shoddy work when dealing with Indigenous persons, something that may very well have contributed to Canada's missing & murdered Indigenous women.

Independent and objective police oversight helps ensure public confidence in the police, which in turn helps the police service maintain public safety. For police oversight mechanisms to be effective, members of the public need to know and understand how to navigate these complex procedures. It is hoped that the police oversight public education guides will promote victims' access to justice as they will empower individuals and communities to become more aware of their legal rights and responsibilities, as well as allowing victims to be able to effectively participate in police oversight processes.

The Asper Centre's *Indigenous Rights student working group* is working in conjunction with the Chiefs of Ontario (COO) to prepare comprehen-

sive research and legal advocacy documents regarding Indigenous peoples' rights to substantive equality and self-determination/jurisdiction in primarily the child welfare service provision area. The project was initiated by 2L JD Candidate Zachary Biech and his co-leaders are Alexis Gianellia and Catherine Ma. The COO is a political forum and secretariat for collective decision-making, action, and advocacy for the 133 First Nations communities located within the boundaries of the province of Ontario.

Lastly, the *Immigration and Refugee Law student working group* was initiated by the Asper Centre's 2017 summer research assistant, Natasha Anzik, currently a 2L JD Candidate at the Faculty of Law. Natasha's co-leaders are Nicholas Martin and Christopher Puskas. The main focus of the group this year has been to provide pro-bono legal research and support to the team of lawyers who are representing the public interest litigants (Canadian Council of Refugees, Amnesty International and the Canadian Council of Churches) in a Constitutional challenge to the Canada-U.S. Safe Third Country Agreement. at the federal Court of Canada, in which the designation of the U.S. as a safe third country for refugees to seek protection is being contested.



Members of the Asper Centre Refugee & Immigration Law student working group with Senator Ratna Omidvar at Faculty of Law seminar, which they convened

Executive Director's Message

Focus on Jury Reform

Jury selection has been in the public eye since the beginning of, and the ultimate acquittal of Gerald Stanley in, the trial of the shooting death of Colten Boushie, a resident of the Cree Red Pheasant First Nation of Saskatchewan. The Stanley trial highlighted concerns about the selection of individual jurors. The media reported that defence counsel for Mr. Stanley appeared to using peremptory challenges to reject any potential juror who was visibly a First Nations person. Peremptory challenges require no reason, and are mainly used by counsel to reject people who don't "look" like they might be favourable to their client. The case law on this practice primarily focuses on the actions of the Crown attorney in this selection process and the accused's right to an impartial jury. Rarely have juries been dismissed or mistrials declared as a result. It is even rarer for the use of such challenges by defence counsel to be called into question.

Prof. Kent Roach, Chair of the Asper Centre's Advisory Group, notes in an Op-Ed he wrote for the *Globe & Mail*, "Such challenges, where the accused or the prosecutor look the prospective juror in the eye and simply says challenge or not, are a stone-cold invitation for jury selection to be infected by conscious or unconscious racist stereotypes." Roach states that now is the time to

abolish peremptory challenges to eliminate this manifestation of bias in the system.

The Charter right to an impartial jury is that of the accused and not the victim nor the community. However, the majority of the Supreme Court in *R v Kokopenace* stated that the role of representativeness includes legitimizing the jury as the conscience of the community and promoting public trust in the criminal justice system. Asper Centre clinic students examined the role of juries in the clinic in the Fall of 2011. Their research on the issue of jury representativeness and race informed the legal arguments that we put forward both at the Ontario Court of Appeal and the Supreme Court of Canada in the *Kokopenace* case. The focus of the legal arguments was the underrepresentation of First Nations people, who live on primarily Northern reserves, on the jury pools from which individual jurors are picked. In the particular jurisdiction where Mr. Kokopenace was tried, First Nations on-reserve people made up approximately 30-36% of the population, yet they represented only 4% of the people within the jury pool. Mr. Kokopenace's jury was selected from a panel on which only 2% were on-reserve residents.

The reasons, as in most cases of systemic racism, are complex and numerous. The Asper Cen-

tre arguments at the Supreme Court, made jointly with LEAF, focused on equality and discrimination in the criminal justice system, which is a value inherent in the concept of representativeness. An analysis of the Supreme Court reasoning in *Kokopenace* can be found on the Asper Centre website. It is perhaps unsurprising that the Court was unwilling to address the s.15 arguments put forward. Despite this, it is clear that discrimination in the formation of the jury pool was a key underlying issue. As LEAF noted in its press release, "The case was rife with evidence of systemic discrimination and yet the Court declined to find a violation of s. 15 of the *Charter*. A s. 15 analysis, or an equality analysis of s. 11 would have put into perspective the profound marginalization of Indigenous peoples in the Canadian criminal justice system and the resulting "reluctance" to participate in its structures."

The Asper Centre has focused on the role of juries in our criminal justice system in several clinic projects. In our first clinic in 2009, a student researched the case law on jury representativeness and how a jury trial functions in order to lead a mock trial in Thunder Bay with First Nations high school students. The issue of lack of representativeness of juries in Northern Ontario had been disclosed within the context of two coroners inquests involving the deaths of First Nations people. The aim of the project which was done in partnership with the Ontario Justice Education Network (OJEN), was to educate young people, particularly First Nations youth, about the role of juries and the importance of participation in juries to our criminal justice system. The subsequent Iacobucci Independent Review, *First*

Nations Representation on Ontario Juries, pointed to the lack of education about the criminal justice system as an issue to be addressed, but listed many more factors that demonstrate the complexity of the problem and the need for more than education to remedy the situation. Systemic discrimination and the lack of trust in a system that is viewed as working against indigenous people are deeper factors that require better understanding to resolve.

Another issue identified in the Iacobucci review was "concern for the protection of the privacy rights of their citizens with respect to the unauthorized disclosure of personal information for the purposes of compiling the jury roll." The Asper Centre in another clinic project focused on the treatment of prospective jurors in the series of jury vetting cases that was heard by the Supreme Court in 2012. There the focus of the appeal was Crown Attorneys' use of private information obtained by police but not shared with defence counsel to vet prospective jurors. The Asper Centre again focused on the impact on jurors in respect of their participation in the criminal justice system. While the court's decision primarily focuses on the unfairness to the accused, they did note the right to privacy held by the jurors in some of the records disclosed. In the end the convictions were upheld.

For reconciliation to have any meaning in the criminal justice system, all aspects of the system must be scrutinized. Equitable participation by First Nations, Métis and Inuit peoples as decision makers, not just as accused or victim, must be supported and valued. Practices that mask conscious or unconscious biases against indigenous

peoples, such as peremptory challenges, or that discourage participation through failure to remedy under-representation on the jury rolls themselves, need reform. At the very least courts should be holding people accountable in these situations, whether acting for the Crown or defence. Many of the recommendations in the Iacobucci report should be applied more broadly by the federal government. To quote Prof. Roach, "Reasonable perceptions that jury selection and trials are stacked against Indigenous people have long existed ... [but] reform must come."

A group of nine academics have formed a think tank to look more closely at the Gerald Stanley trial. The jury selection is only one concern that has been raised. We hope that this group, which includes Prof. Roach, can shed some light on the systemic issues that have left many in the community, and in particular the First Nations communities in Saskatchewan, with the view that an injustice was done.



***P.S. The Asper Centre
turns 10 in 2018 !***

***To celebrate, and give
thanks, we will be
convening a series of
events later this year.***

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up to date.***

by Cheryl Milne, Asper Centre Executive
Director



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While this might sound perfectly reasonable, it is in fact alarming when one looks at the definition of what “undermines the security of Canada.” The category includes such unremarkable matters as interference