

Volume 14, Issue 1 (April 2022)

# ASPER CENTRE OUTLOOK



David Asper Centre for Constitutional Rights  
UNIVERSITY OF TORONTO



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# The Trucks, the Police, and the Emergencies Act: *Reflections on a moment of Constitutional Import*

by Bailey Fox

When trucks descended on downtown Ottawa, and later various border crossings along the Canada-US border, in February 2022, many Canadians did not know what to make of such events. Questions swirled, including how and if police would respond, where the boundaries of a peaceful protest lie, and the extent of a Court's injunctive power. When the federal government announced it was invoking the *Emergencies Act*, RSC 1985 c. 22 on February 14, 2022, it catapulted the chaos of the month into a lasting moment of constitutional import.

On Tuesday March 2, 2022, days after the trucks had been cleared by law enforcement from downtown Ottawa, the [Asper Centre convened an expert Panel discussion](#) on the *Emergencies Act*, Police Powers and COVID protests. The virtual Panel, chaired by Cheryl Milne and featuring Abby Dushman, Mary Eberts, Kent Roach, David Schneiderman, and Wesley Wark as Panelists discussed the many legal issues invoked by the protests, the failures and legitimacy of various institutional responses, and concerns and issues going forward. In this article I will summarize the Panel's discussion, complemented with my analysis, and conclude with some remarks about where to go from here.

The Panel started off by discussing the problems the protests caused. Mary Eberts, a constitutional law expert and former Constitutional Litigator in Residence at the Asper Centre, noted that the border crossing protests caused some US-Canada foreign relations issues and impacted local economies and cross-border transactions. David Schneiderman, Professor at the Faculty of Law at Universi-

ty of Toronto, noted that the occupation of downtown Ottawa was a different sort of problem in comparison to the blockades at border crossings – however all the protests had a common goal, which was advocating for ending all COVID related mandates and restrictions. All responders to the question noted that by the time the federal *Emergencies Act* was invoked, police had the border protests under control.

A key theme throughout the Panel discussion, as well as public discourse during the protests, was the police response. Many were struck by the seemingly lackluster response by Ottawa Police, especially in comparison to the more swift and effective policing technique deployed at the border. Mary Eberts noted that the 'hands-off' response in Ottawa permitted the protestors to become thoroughly entrenched in its downtown streets. For Ms. Eberts, this begged the question of whether the Ottawa police had intelligence about the protestors' intentions, and ignored it, or why the police believed the protest's leaders that they would only be there for two to three days? Ms. Eberts also noted that the good relationship between the police and protestors, a stark contrast to the harsh reactions by police to protest by people of colour and Indigenous protestors. This was to her a signal that there was some white racism at play here.

In addition to the question of differential treatment of protestors, the police response in Ottawa revealed some gaps in police governance as well as fault lines between different levels of government. Kent Roach, Professor of law at the University of Toronto, provided a more structural analysis, noting that one of the lessons from the pro-



tests is that police governance is “a mess” at all levels. Specifically, Professor Roach pointed to the in-fighting in Ottawa between different levels of government. First, Professor Roach observed that the Ottawa police did not have an advance plan for how to police this protest, even though they did have such plans for labour and Indigenous protests. Second, Federal Ministers expressed the view that because police operations are independent, they had no role to play. However, this reflects a misunderstanding of the legal ambit of police independence. Third, the mayor of Ottawa attempted to negotiate with protestors on his own volition, leading to acrimony among city councilors and other levels of government. The palatable sense that the issue should be left to the Ottawa police also sidelined the question of why neither the OPP nor the RCMP were involved or seemed to have responded to requests for assistance, a point Ms. Eberts raised.

In my opinion, the jurisdictional confusion about the police response may also stem from Ottawa’s unique status as the nation’s capital. Even though Ottawa is part of Ontario, it is also the seat of the Federal government and this impacted the governance dynamics at play. No one questioned, for example, the absence of OPP as well as any action by Ontario’s leadership until a couple weeks into the protest. The focus instead was on municipal and federal response. Queen’s Park would have likely taken a much more active role had the protest been in Toronto. The effect of Ottawa’s capital status on the police’s response, and police governance more broadly, is an interesting question to take forward when thinking of lessons learned.

There is also an interesting question here about when police response is warranted and necessary. Notably, the Charter guarantees a right to *peaceful* protest. So when is a protest no longer “peaceful” such that police response is necessary? The protests were peaceful in the sense that there was no physical violence. Clearly, *though*, an occupation

does violence to community life and well-being. There were also reported incidence of harassment by protestors against individuals who were wearing masks and business owners. There seemed to be a discrepancy between police, protestors, Ottawans and Canadians about whether or if the protests/occupation was peaceful, and, if not, the appropriate legal response.

The police response is such a vital aspect of the protest because the occupation’s longevity was a contributing factor to the federal government invoking the *Emergencies Act*. That is, if the protests had cleared earlier (as was achieved by police at border crossings), the Federal government likely would not have invoked the *Emergencies Act*. Naturally, then, The Panel’s discussion shifted from the police response to the legislative one. As Wesley Wark, Senior Fellow at the Centre for International Governance Innovation, noted, the *Emergencies Act* was not only invoked at the federal level; both Ottawa and Ontario had invoked their emergencies legislation prior to the federal government doing so.

However, this was the first time the federal government invoked the *Emergencies Act* since it was enacted in 1988. In this regard, Professor David Schneiderman provided some historical context about the *Emergencies Act*. He recalled that it was the successor to the *War Measures Act*, which had been invoked by Pierre Elliott Trudeau in response to civil unrest in Quebec in the 1970s. Due to con-

The Asper Centre presents an ONLINE EXPERT PANEL on the

## EMERGENCIES ACT, POLICE POWERS & COVID PROTESTS



On **MARCH 2, 2022**  
at 12:30-2:00PM EST

*Featuring*

**Abby Deshman**, Director, Criminal Justice Program, Canadian Civil Liberties Association

**Mary Eberts**, Order of Canada, Constitutional law expert

**Kent Roach**, Professor, Faculty of Law, University of Toronto

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

**Wesley Wark**, Senior Fellow, Centre for International Governance Innovation

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sultations with civil society groups, including the Canadian Civil Liberties Association (CCLA), the *Emergencies Act* was made subject to the Charter. Professor Schneiderman also noted that at the time the legislation was drafted it was important that the Act clearly articulated the thresholds for declaring an emergency.

Notably, the Panelists disagreed on whether the government had met those statutory thresholds. For Professor Schneiderman, the legislative criteria was not met. For example, the Act stipulates that all other legal measures must be exhausted, that provinces do not have the capacity to deal with the issue, and that no other law is available to address the emergency. However, the fact that

Even if the thresholds in the *Emergencies Act* for an emergency were not met, invoking the Act ultimately led to police action and enforcement that cleared the protest.

law enforcement managed to clear the blockades at the Coutts and Ambassador Bridge border crossings demonstrates that the existing legal frameworks could deal with the issue. Conversely, Mr. Wark was of the opinion that the government had met the legislative criteria here. However, he noted that the legislation's definitions are outdated and do not include, for example, critical infrastructure or how national security threats have evolved since the 1980s.

Abby Deshman, Director of the Criminal Justice Program at the CCLA noted a number of concerns with invoking the *Emergencies Act* in this context. Ms. Deshman agreed with Professor Schneiderman that it was unlikely the legislative thresholds were met. However, even if the thresholds were

met, Ms. Deshman expressed the CCLA's worry that the emergency orders themselves were overly broad, for example prohibiting anyone from participating in a public assembly that may lead to a breach of the peace. Further, local police officers and financial institutions were to apply the orders, without any due process or oversight. Since the *Emergencies Act* allows the Executive to enact orders prior to a vote in the legislature, the Act raises both democratic and constitutional concerns.

In my opinion, an interesting aspect of the debate is that it seems like invoking the Act *worked*. That is, even if the thresholds in the *Emergencies Act* for an emergency were not met, invoking the Act ultimately led to police action and enforcement that cleared the occupation. How do we take account of this as lawyers and law students? While the result may justify the means from a political perspective, I do not think it sanctions it from a legal perspective, if the statutory thresholds were not met. This is especially the case given that it appears that other legal mechanisms could have worked, as demonstrated by the police response at the border crossings. In my opinion, what we can take from this is a lesson about how to coordinate the legislative and regulatory frameworks for police cooperation such that invoking the *Emergencies Act* would not be necessary for the police operation that ultimately cleared the protest.

Finally, the Panel considered [what comes next](#). Mr. Wark noted that the *Emergencies Act* requires the government to call an inquiry within sixty days of it being invoked and that Ottawa was planning on striking its own inquiry. The *Emergencies Act* inquiry, in order to be effective, should be independent and public-facing and should be given broad terms of reference and significant resources to effectively meet its mandate. Mr. Wark noted some unique challenges that this inquiry would likely face, specifically that many of the relevant documents may be classified as involving national security or cabinet confidence, or pro-

tected under solicitor-client privilege. Professor Roach agreed that access to documents will be a challenge, especially given the one-year statutory timeline for completing the inquiry. Professor Schneiderman reminded the Panel that not only will there be an inquiry, but that there is an ongoing constitutional challenge against the government's use of the *Emergencies Act* brought by civil liberties groups including the CCLA. Professor Schneiderman was of the view that the litigation would not be replicative of the inquiry's work and that judicial review would be valuable here to offer guidance into whether the legislative thresholds were actually met. Such judicial review would be especially valuable in situations like this where invoking the Act did not go through usual democratic procedures. The Panelists also spoke of the import of updating the *Emergencies Act* so it captures the type of emergencies the twenty-first cen-

tury has generated.

Some interesting themes and questions emerged from the Panel's discussion as well as the underlying protests. One is the relationship between race, protest, and policing. On a few occasions, the Panelists noted how this protest – largely made up of white individuals – seemed to be treated differently from protests by marginalized communities, people of colour and Indigenous people. Regarding policing, the Panelists compared the relatively lax initial response by Ottawa police to the protest in comparison to the often swift and sometimes violent police action against other protests. However, the Panel also noted that the OPP, for example, has a lot of experience with protests and implemented a number of lessons from the Ipperwash protest that could have been applied here – and yet they were not there to assist, either not re-



From top, left to right, host Cheryl Milnes discusses the *Emergencies Act* with panelists Wesley Wark, Abby Deshman, Mary Eberts, David Schneiderman and Kent Roach. March 2, 2022.

sponding to requests for assistance or were not asked.

There were also questions about the precedent the legal response set for future protests, including those led by Indigenous people and other marginalized communities. In the context of the private litigation brought by Ottawa residents against the protestors, Ms. Ebert and Ms. Deshman expressed concern that seeking injunctive

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relief, could be brought by corporations against protestors, for example in the context of Indigenous people seeking to prevent land development. While here the civil suit was brought by community members seeking to fill a gap left by ineffective police response, typically, civil law is used by companies to target marginalized communities in a situation where the police are allowing peaceful protest.

What the events and the Panel highlighted is the effect of not having a law of protest in Canada, a point made by Professor Roach, and the need to develop a principled response for such protests. For many, the legal tools applied achieved a desirable outcome in this scenario and yet applying the same tools in a different context would appear problematic. Many normative questions arise as we begin to think about such a principled response. Should an injunction sought and granted by the community be applauded while a corporation using a similar legal tool be a matter of concern? Or should there be rules or guidance for when resort to injunctive relief is appropriate?

Similarly, is it acceptable to use the *Emergencies Act* as a means to ending the protest irrespective of whether the necessary statutory thresholds were met? When is a protest no longer “peaceful” and does the definition of peaceful depend on who is protesting or the nature of their activity? While the outcome may have been desirable in this case, we should be wary about the precedent the legal response creates, including the future use of injunctions and emergency orders against marginalized groups.

**Bailey Fox** is an LLM student at the Faculty of Law, and was the Asper Centre’s work study student this year.



# The Supreme Court of Canada: 2021 Year in Review

by Rose Ma

2021 saw the Supreme Court of Canada decide 54 cases, of which eight grappled with constitutional law matters. Considering wide-ranging issues from *Charter* challenges to the scope of superior court jurisdiction, these decisions grew the living tree that is the Constitution. This article summarizes the facts, issues, and holdings of these cases. The case summaries are presented in reverse-chronological order.

## [\*R v Albashir\*, 2021 SCC 48](#)

This case examined the issue of how courts should handle crimes that are committed after the Supreme Court has declared a law unconstitutional but before the declaration has taken effect. The Defendants in this case were convicted in 2019 of making a living off the money made by sex workers (then in violation of s 212(1)(j) of the *Criminal Code*). The Defendants operated a sexual escort

service in Vancouver from 2013 to 2016. In 2013, the Supreme Court ruled in *Canada (Attorney General) v Bedford*, 2013 SCC 72 that the *Criminal Code*'s prostitution laws were unconstitutional. The Court gave Parliament a one-year period to change the law in light of the judgment. The Defendants committed the s 212(1)(j) offences during the one-year period and were charged after it ended. The Supreme Court upheld the Defendants' convictions. The Court held that since the purpose of the suspension was to protect sex workers while Parliament updated the law, the impugned section was only unconstitutional after the suspension period had terminated.

## [\*Ward v Quebec \(Commission des droits de la personne et des droits de la jeunesse\)\*, 2021 SCC 43](#)

The Supreme Court held that the Québec Human Rights Tribunal did not have jurisdiction to proceed





with a complaint against a comedian who mocked a teenager with a disability. The Court reasoned that the Tribunal did not have jurisdiction because the incident did not constitute discrimination under the Québec Charter of human rights and freedoms. The Tribunal had found that Mr. Gabriel (the teenager) was targeted for his fame rather than for his disability. The Supreme Court explained that since fame is not a prohibited ground of discrimination under the Québec *Charter*, the Tribunal did not have authority to proceed against Ward.

[Toronto \(City\) v Ontario \(Attorney General\), 2021 SCC 34](#)

In this case, the Supreme Court found an Ontario law that decreased the number of Toronto city councillors in a 2018 municipal election to be constitutional. The Court held that the provincially enacted law did not violate the s 2(b) freedom of expression rights of candidates or voters. The City of Toronto launched a municipal election campaign in May 2018 with candidate nominations due in July. On the day nominations closed, the Ontario government announced their plan to pass a law that would cut the number of electoral wards from 47 to 25. This law subsequently came into force in August 2018. The City then challenged the law in court, arguing that the law violated s 2(b) of the *Charter* and certain unwritten constitutional principles, like democracy. The Supreme Court held that the law did not violate freedom of expression as it did not restrict what candidates could say or do. On the issue of unwritten constitutional principles, the Court held that these principles, such as democracy, can be used to understand and interpret the Constitution, but cannot invalidate laws.

[Reference re Code of Civil Procedure \(Que.\), art. 35, 2021 SCC 27](#)

The issue in this case was whether a change to the *Code of Civil Procedure* in Québec infringed the constitutionally protected jurisdiction of superior courts. Ultimately, the Supreme Court held

that an amendment that would raise the amount of damages available for cases heard by the Court of Québec was unconstitutional. The proposed change would raise the monetary value from any amount under \$75,000 to any amount under \$85,000. The Court held that this increase would give the Court of Québec exclusive jurisdiction to preside over too wide a range of legal issues. This would in turn bar the Superior Court from exercising its constitutionally protected right to hear and rule on critical Québec private law matters. The Court also stated that the provincial government failed to show that access to justice was improved by the raising of the monetary ceiling.

[R v Chouhan, 2021 SCC 26](#)

The Supreme Court held that the abolition of peremptory challenges is constitutional. In this case, the Court was asked to rule on whether *Criminal Code* changes to the jury selection process were constitutional. The impugned changes abolished the practice of allowing the Crown and defence to exclude a certain number of jurors without giving any explanation. Excluding jurors in this fashion is called a peremptory challenge. Parliament chose to abolish peremptory challenges to combat discrimination in the jury selection process. The Defendant, Mr. Chouhan, claimed that the abolition violated his rights to an independent and impartial jury trial under ss 11(d) and 11(f) of the *Charter*. The Court stated that the constitutionality of the jury selection process must be evaluated holistically. The majority reviewed the current process, given the amendments Parliament made when it introduced the abolition of peremptory challenges, and found that the jury selection process continues to fulfill the guarantees set out in ss 11(d) and (f), thus holding that the abolition of peremptory challenges is constitutional. The majority noted that protections kick in long before the accused selects the jury in court. They emphasized that provincial authorities make consistent and earnest efforts to compile a diverse jury that represents a broad cross-section of society.

### [R v CP, 2021 SCC 19](#)

In this case, the Court held that s 37(10) of the *Youth Criminal Justice Act* (“YCJA”) is constitutional. The provision denies young offenders an automatic right to appeal to the Supreme Court. The case involves a 15-year-old boy who was accused of sexually assaulting a 14-year-old girl at a Toronto-area beach party. The trial judge found the Defendant, CP guilty. CP appealed his conviction to the Ontario Court of Appeal where he lost, but one of the three judges disagreed with their colleagues on a point of law. Adults convicted of serious crimes such as sexual assault and who lose their appeals, have the automatic right to appeal with the Supreme Court when the judges at the Court of Appeal disagree on a point of law. The same does not hold true for young offenders under s 37 (10) of the YCJA. CP claimed that the provision violates the s 7 and 15 *Charter* rights of young offenders. Section 7 guarantees an individual’s right to life, liberty, and security of the person. Section 15 protects groups against discrimination, including on the basis of age. The majority held that s 7 was not violated because the youth justice system offers greater and more tailored protections to youth that recognizes the vulnerability of young offenders. The majority also held that s 15 had not been breached and that Parliament did not discriminate against young people by passing the YCJA. They held that the law appropriately balances the benefits of appellate review against the harms of the appeal process, such as creating unnecessary delays.

### [R v Desautel, 2021 SCC 17](#)

The Supreme Court held that non-citizens and non-residents could claim an Aboriginal right under the Constitution. The Defendant, Mr. Desautel, had shot and killed an elk without a hunting license in British Columbia in 2010. The Defendant belongs to the Lakes Tribe of the Colville Confederated Tribes in Washington state. Desautel was charged with hunting without a license and hunting big game while being a non-resident of

British Columbia. The Defendant did not deny shooting the elk but argued that since the Lakes Tribe is a successor group to the Sinixt people whose traditional territory included the hunting ground, he was exercising an Aboriginal right under s 35. The majority stated that a fundamental purpose of s 35 is to recognize the prior occupation of Canada by autonomous Aboriginal groups. Thus, the meaning of “Aboriginal peoples of Canada” should encompass the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, even if those societies are no longer located in Canada. In the result, the Court held that Mr. Desautel was properly exercising a s 35 Aboriginal right and was rightfully acquitted of all charges at trial.

### [References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11](#)

The Supreme Court held that the federal carbon pricing law is constitutional. In 2018, Parliament passed the *Greenhouse Gas Pollution Pricing Act* in response to empirical evidence that greenhouse gas emissions contribute to the global climate crisis. The Act was also passed to implement the commitment Canada made under the 2015 Paris Agreement to drastically reduce their greenhouse gas emissions. The law mandated that provinces and territories either implement their own carbon gas pricing systems by January 1, 2019 or adopt one designed by the federal government. The majority found the Act to be intra vires to the federal government as global warming causes harm across provincial boundaries and is a matter of national concern under the “peace, order and good government” clause in s 91 of the Constitution.

For the full list of the 2021 Supreme Court of Canada decisions, click [here](#).

**Rose Ma** is 2L student at the Faculty of Law and was the Asper Centre work study student this year.

# Voting Age Challenge: Updates and Reflections

by Maia Caramanna

In November 2019, the David Asper Centre for Constitutional Rights and Justice for Children and Youth (JFCY) began working on a challenge to the minimum federal voting age set out in s. 3 of the *Canada Elections Act*, SC 2000, c 9. The application claims that the legislation breaches s. 3 of the *Charter*, given that in *Frank v Canada (AG)*, 2019 SCC 1, voting rights were held to only be tethered to citizenship. It further claims a breach of s. 15 of the *Charter* because it is premised on inaccurate stereotypes that young people lack the competency to vote and perpetuates prejudicial attitudes that young people are less capable and less worthy of recognition in Canadian society.

## Updates

On November 30th, 2021, two years after initiating efforts, the Asper Centre and JFCY filed a Notice of Application to formally commence legal proceedings against the Attorney General of Canada on behalf of 13 youth litigants.

A media statement was released on December 1st, which garnered a significant amount of press coverage. The youth litigants have spoken to numerous news sites, including CBC, CP24, and Global News. Most of the media has been fair and respectful towards the plaintiffs, and either objective or supportive of the challenge. The coverage is





peppered with some negative articles, but such articles seem to be premised on an inaccurate characterization of the challenge, with one article stating incorrectly that the Asper Centre is seeking an abolition of a voting age altogether and that “the children aren’t actually the ones behind it; the lawyers are.”

### Student Perspective

This semester at the Asper Centre Clinic, a significant amount of work was done to get ready for filing and to prepare materials for the record.

Clinic students helped finalize the Notice of Application and drafted the Notice of Constitutional Question. Others put together a Motion to Dispense with Litigation Guardians for the youth applicants because ONSC rules otherwise require that litigants under 18 have an adult as a litigation guardian.

**People fully develop “cold cognition” by age 16, the type of decision-making that allows for deliberation and measured thought.**

A large part of the preparation involved drafting affidavits of expert witnesses. Students worked on an affidavit by a developmental psychologist and leading expert on adolescent brain

development and leading researcher on social policy who studies political participation and attitudes, particularly of young people.

The developmental psychology research provides evidence of the cognitive capacity of youth, specifically that people fully develop “cold cognition” by age 16, the type of decision-making that allows for deliberation and measured thought. Since voting requires cold cognition,

youth under 18 are just as capable as adults when it comes to voting.

Other research addresses common arguments against extending the right to vote to youth. In response to the contention that youth lack the political knowledge or interest to vote, research shows that enfranchised youth are more engaged with political issues than their un-enfranchised counterparts. Furthermore, strengthening civics education in schools can help prepare youth for voting for the first time. Addressing concerns that youth are easily manipulated or will just replicate their parents’ votes, research shows that in Scotland (where the voting age is 16) young people do not take on what they are told by parents or peers uncritically.

These pieces of expert evidence show that the law is premised on arbitrary and demeaning stereotypes against youth. They also help to dispel myths and general assumptions against youth, proving that the government has not met their justificatory burden under s. 1 of the *Charter*. There is currently no satisfactory basis for depriving youth of their right to vote.

My team’s work at the Clinic focused on the youth applicants, including interviewing them, drafting affidavits about their motivations for voting and experiences in politics, and creating educational materials about the challenge.

A very valuable experience was meeting all the young people and hearing about why they are passionate about this challenge. Most of them are worried about the disproportionate impacts that climate change will have on them. Voting is the primary mechanism for ensuring your values are represented in society; the youth applicants are no longer okay with being barred from access to that institution.

As a student in the Asper Centre Clinic, there is no shortage of opportunities to learn and grow. In terms of the case work, we had the

## Voting Age Challenge Update

chance to interact with clients and expert witnesses, work on factums, and draft motions and affidavits – all important skills as a litigator. I will be taking everything I have learned from those experiences into my future career.

There was also a seminar component to the clinic, where guest lecturers, in addition to Cheryl Milne and the Asper Centre's Constitutional Litigator-in-Residence, Jonathan Rudin, taught about substantive law and offered practical litigation advice. To name a few examples, there was a workshop on legislative history research with Sooin Kim, a class on equality rights and race issues in criminal proceedings with Faisal Mirza, and even a seminar on advocacy perspectives from the bench with former appellate judge, Justice Harry LaForme. We were able to learn about a diverse range of legal fields from a variety of people. Class discussion was stimulating, and each lecturer offered their own personal stories to tell. It was a refreshing departure from the typical law school class.

My time at the Asper Centre Clinic also taught me a lot about teamwork. At the beginning of the semester, my colleagues and I divided up the casework between four teams of two. We maintained our partners throughout the term. Having someone to tackle projects with and encourage each other allowed me to better manage my workload and stress. My partner quickly became someone I could rely on and bounce ideas off. We ended up motivating each other. Outside of project partners, throughout the course, there were opportunities for peer review with other classmates. Each peer review provided me with valuable insight as to my strengths and weaknesses in research and writing. The element of teamwork at the Asper Centre Clinic was one of the most positive aspects of my time there.

Overall, being a part of the Asper Centre Clinic and working on the voting age challenge was

an extremely rewarding experience. We built reservoirs of practical litigation skills to take into our future studies and career. We also gained insight into various social justice issues inherent in *Charter* litigation work. But perhaps my favourite part, we were a part of something that sheds light on important children's rights issues and will hopefully one day benefit future generations of young Canadians.

***Maia Caramanna*** is 2L student at the Faculty of Law and was a student in the Asper Centre Clinic during the 2021-2022 academic year.

# Updating Canada's Privacy Act to be Constitutionally Compliant

by Natasha Burman, Sabrina Macklai and Wei Yang

This year, the Asper Centre's Privacy Act Reform student working group, under the supervision of Professor and Chair of Law and Technology, Dr. Lisa Austin, will submit a policy brief to the Privacy Commissioner and the House of Commons Standing Committee on Access to Information, Privacy, and Ethics Committee ("ETHI Committee"). In 2017, the Government of Canada committed to conducting a review of the *Privacy Act*, RSC 1985, c. P-21 ("the Act"), Canada's federal privacy legislation. This brief will contain recommendations for amending the Act in order to ensure it is constitutionally compliant.

Canada's *Privacy Act* came into force in 1983 and has not been updated since to reflect technological advances and social change. Following a 2016 report by the ETHI Committee, which recommended the Act be reformed, the Department of Justice ("DOJ") held a public consultation on mod-

ernizing the Act in late 2020 to early 2021. Despite being released over five years ago, many of the report's recommendations, including legislatively defining "metadata" and creating interdepartmental information sharing agreements, were absent from the DOJ's summary of the public consultation. This oversight raises concerns over how comprehensive the upcoming legislative reform will be. Our working group aims to address this gap.

Students researched seven questions over the Fall 2021 term. They investigated how Canada's *Privacy Act* should be reformed to be compliant with the *Canadian Charter of Rights and Freedoms*, how the Act diverges from similar international public and consumer privacy legislation, how the Act enables governmental investigative bodies to collect and use personal information, and more. Their research is currently being consolidated into a list of recommendations for the





Privacy Commissioner and the ETHI Committee. This article provides a snapshot of what we learned so far.

### Reforming the *Privacy Act* to be Section 8 and Section 7 *Charter* Compliant

As privacy-related claims predominantly engage sections 8 and 7 of the *Charter*, working group members focused on examining case law featuring these provisions as they relate to the *Privacy Act*.

Working group members researched the potential *Charter* issues arising from how law enforcement agencies acquire personal information under the *Act*. Under sections 8(2)(e) and (f) of the *Act*, investigative bodies, including law enforcement agencies, can obtain personal information from federal bodies for the purpose of furthering ongoing investigations. These provisions have been criticized for giving investigative bodies a legal shortcut to seize and use personal information without obtaining direct consent, and for enabling warrantless searches. Notably, powers granted under section 8 of the *Act* are limited. *R v Flintroy*, 2019 BCSC 213, a 2019 British Columbia Supreme Court case, interpreted s. 8 of the *Act* to hold that the section was not meant to authorize a search, but to allow the keeper of a record to disclose it in only certain conditions.

Section 8 of the *Charter*, the right to be secure against unreasonable search and seizure, is engaged when s. 8 of the *Act* is used. When this occurs, claimants are entitled to a reasonable expectation of privacy. This is determined through a four-part test known as the “totality of the circumstances analysis.” If there is a reasonable expectation of privacy found under the test, on the balance of probabilities, s. 8 will be engaged and will prevent state intrusion except under the authority of a reasonable law. The working group members found that narrowing what is considered to be an objectively reasonable expectation of privacy un-

der s. 8 of the *Charter* is a possible route for further protection of privacy rights.

Working group members also analyzed the extent to which an individual's privacy rights in their personal records apply to the right to life, liberty, and security of the person under section 7 of the *Charter* and where such *Charter* concerns may arise. The Supreme Court of Canada has been reluctant to acknowledge a direct linkage between s. 7 and privacy rights; however, the Court has expressed sympathy for privacy's importance. For example, in *R v O'Connor* [1995] 4 SCR 411, L'Heureux-Dubé J, writing for the majority, explicitly located the reasonable expectation of privacy as part of the liberty and security of the person interests protected by s. 7. Section 7 jurisprudence presents a potential avenue for the protection of personal information and should be considered when reforming the *Privacy Act*.

**Section 7 [Charter] jurisprudence presents a potential avenue for the protection of personal information and should be considered when reforming the *Privacy Act*.**

### Beyond Sections 7 and 8

Although most privacy-related issues predominantly engage sections 7 and 8 of the *Charter*, additional sections of the *Charter* are relevant to privacy rights. For example, the Supreme Court held in *Ruby v Canada (Solicitor General)*, 2002 SCC 75, that a provision in the *Privacy Act* that required information disclosure appeal hearings to be held *in camera* violated the appellant's s. 2(b) freedom of expression rights. Despite this decision being released almost 20 years ago, Parliament has not yet amended the provision. This exemplifies the

government's slow-to-act approach to privacy rights reform.

### Drawing from Other Privacy Legislation

The upcoming reform can also benefit from incorporating the general trends of other jurisdictions' public and private sector privacy legislation. Several countries, including Japan and New Zealand, have begun more closely aligning its privacy legislation with the European Union's General Data Protection Regulation ("GDPR"). Although the GDPR is viewed as primarily consumer privacy rights legislation, the substance of the legislation is rich with ideas. The legislation grants data subjects the rights to access, correct, erase, restrict, make portable and object to the processing of one's personal data. These rights are more extensive than the scope of the *Privacy Act*, which only provides the data subject the right of access and correction. Our working group members explored these rights in full, proposing which of these may be appropriately introduced in our federal legislation.

### Considering Privacy-Related Complaints Against the RCMP

Our working group members also took a deeper look at various privacy-related complaints against the Royal Canadian Mounted Police ("RCMP") and how the *Privacy Act* reform may address this. Numerous privacy complaints have been filed against the RCMP regarding their use of cell-site simulators, social media surveillance, inappropriate disclosure, disclosure refusals, and the use of Clearview AI's database. There is evidently a grey area with respect to what the RCMP is permitted to do under sections 4 and 22.1 of the *Privacy Act* and still be *Charter*-compliant. We plan to propose amendments that keep these complaints in mind.

### What's to Come

Now that our initial research is completed, our working group is in the process of consolidating our ideas and finalizing a list of recommendations for the policy brief. Stay tuned for our suggestions on how the much-anticipated *Privacy Act* reform should proceed!

**Natasha Burman, Sabrina Macklai, and Wei Yang** are 2L JD students at the Faculty of Law and the co-leaders of this year's Asper Centre's Privacy Act Reform working group.

# Renewing Canada's Commitment to Indigenous Children in 2022

## Part 1: Jordan's Principle

by Brianna Morrison

**Editor's note:** This article is the first of a three part series discussing First Nations' Child Welfare. This article will give an overview of the Human Rights Tribunal proceedings and the issues at play. The next two articles discuss research that Asper Centre students undertook regarding specific issues related to the settlement.

### Introduction

The chronic underfunding of child welfare services for First Nations children living on reserve and in the Yukon Territory continues to jeopardize the safety and well-being of First Nations children. Everyday, First Nations families face barriers to accessing health and social services. The stark disparities in access to health services for on-reserve First Nation children compared with health services available for other children perpetuate the historical disadvantages endured by Indigenous Peoples. Indigenous children make up 7 percent of the youth population in Canada but represent [approximately 52.2 percent of children in foster care](#).

The systemic over-representation of Indigenous youth within the foster care system is, to a substantial degree, a consequence of Canada's failure to implement Jordan's Principle (a child-first initiative intended to ensure that Indigenous children receive the public services they need when they need them). The lack of resources available to First Nations parents – because of the underfunding of child welfare services – increases the risk of [First Nations children being investigated and eventually apprehended by the child welfare system](#). Jordan's Principle is designed to identify and address underfunding in services for First Nations communities. Its efficacy, however, is dependent on the federal government's commitment to implementing Jordan's Principle's full scope and meaning.

### Jordan's Principle

Jordan's Principle is named in memory of Jordan River Anderson. Jordan was a First Nations child from Norway House Cree Nation in Manitoba who died in-hospital care at the age of five. Jordan suffered from a rare neuromuscular disease that required hospitalization for the first two years of his life. In time, Jordan's condition stabilized, and his doctors determined that he was well enough to go to a specialized foster care home. Jordan's family agreed to place Jordan in foster care to access funding support from the federal government. The federal government was willing to pay foster parents at the time to look after First Nations children with special needs, but not the child's own family to care for the child at home. However, a jurisdictional dispute arose between the federal and provincial governments regarding financial responsibilities for Jordan's in-home care, preventing Jordan from ever spending a day in a family home before passing.

Jordan's Principle advances the equitable treatment of First Nations children relative to other children by ensuring that no child experiences denials, delays, or disruptions in accessing care. Under the Principle, the government of first contact must cover the cost of service without delay and then refer the matter to jurisdictional dispute mechanisms. Government action/legislation must be consistent with the vision of Jordan's Principle to ensure that First Nations children receive services that follow provincial/territorial standards. In 2016, the Canadian Human Rights Tribunal (CHRT) discovered that the \$11 million Health



Canada fund, established nine years prior to resolve Jordan's Principle cases, had yet to be accessed (*First Nations Child and Family Caring Society of Canada and Assembly of First Nations v Attorney General of Canada* 2016 CHRT 2).

### Constitutional Division of Powers

The history of First Nations child welfare services has been fraught with jurisdictional debate. Disagreements over which level of government should provide the delivery of health services for First Nations children frequently devolves into attempts to limit jurisdictional responsibilities and concomitant financial obligations. Under section 91(24) of the *Constitution Act, 1867*, the federal government has exclusive legislative authority over "Indians, and Lands reserved for Indians." Section 92 of the *Constitution Act, 1867*, grants provincial legislatures extensive power to manage and deliver health care services. Consequently, Indigenous child welfare legislation operates as a patchwork system. The federal government provides funding

to First Nations Child and Family Service (FNCFS) agencies and the provinces/territories to regulate and deliver the services. Due to the complexities in navigating the funding and service delivery schemes, First Nations children often experience service gaps that would ordinarily be available to other children.

Jurisdictional ambiguities over providing health services for First Nations children have caused significant adverse outcomes for the safety and well-being of First Nations children as services are often denied or delayed. Exacerbating the issue is the comparatively lower levels of funding allocated to FNCFS Agencies than provincial/territorial services. Government records show that the federal government funds provincial and territorial services between two to four times greater than FNCFS services. The need for transparent jurisdictional resolution processes and equitable funding is paramount. Without proper implementation of Jordan's Principle by the federal government, First



## Jordan's Principle

Nations children will continue to suffer under a system that denies services for the sake of protecting government budgets.

### Human Rights Case

In 2007, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (AFN) filed a complaint with the CHRT alleging discriminatory practices by Indigenous and Northern Affairs Canada, or INAC (previously Aboriginal Affairs and Northern Development Canada). The CHRT agreed. In 2016, the Tribunal ruled that First Nations children and families living on reserve and in the Yukon were denied equal child and family services contrary to section 5(a) of the *Canadian Human Rights Act* and that Canada had discriminated against First Nations children by taking an overly narrow approach to Jordan's Principle (para 473). The federal government's approach to Jordan's Principle failed to safeguard against service gaps, delays, and denials, forcing many First Nations families living on reserve to place their children in foster care to access the same services available to all other Canadians. The CHRT subsequently ordered INAC to "cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle." (para 481). In 2019, the CHRT also ordered Canada to pay the maximum compensation of \$40,000 to each First Nation child removed from their home after 2006 (unless the child was taken into the child welfare system because of abuse) (2019 CHRT 39 at para 245).

A particularly problematic element of the federal government's funding formula for the delivery of child welfare involved Directive 20-1. Reports admitted to the Tribunal revealed that under Directive 20-1, the federal government only allocated funding for complete reimbursements to foster care, group home, and institutional care agencies, thereby incentivizing placing First Nations children in out-of-home care. The CHRT found

that the propensity for out-of-home placements for First Nations children – induced by the government's funding formula — "perpetuates the damage done by Residential School" by severing the child's familial and cultural ties. Directive 20-1 undermines Canada's commitment to implementing Jordan's Principle by failing to provide sufficient funding for all child and family services (including ones that allow for the child to remain in in-home care).

### Conclusion

On January 4, 2022, the federal government announced that it reached a \$40 billion [agreements-in-principle](#) to compensate First Nations children and their families, including those impacted by the government's narrow definition of Jordan's Principle. Though the agreements-in-principle is encouraging news for meaningful change within the child welfare system, the agreements are not-binding. Canada, the AFN, and the Caring Society – in consultation with Nishnawbe Aski Nation, Chiefs of Ontario, and the Canadian Human Rights Commission – must still negotiate the final settlement agreements over the coming months before long-term reform can begin. While the next two pieces reflect on the challenges of allocating this compensation, it is nevertheless time for Canada to honour its commitment to First Nations children by operationalizing Jordan's Principle through structural change.

**Brianna Morrison** is a 1L student at the Faculty of Law.

# Renewing Canada's Commitment to Indigenous Children in 2022

## Part II: Compensation Framework

by Szymon Rodomar

In 2021, the Asper Centre assisted on a project jointly led by the Factor-Inwentash Faculty of Social Work at the University of Toronto and the McGill School of Social Work to be presented to Indigenous Services Canada. The project in question reviewed the data and process considerations for a compensation order set out by the Canadian Human Rights Tribunal (“CHRT”) in the recently settled Caring Society litigation (*Canada v First Nations Child and Family Caring Society of Canada*, 2019 CHRT 39 or the “compensation decision”).

In *Canada v First Nations Child and Family Caring Society of Canada*, 2016 CHRT 2 or the “merits decision” the CHRT found that “First Nations children and families living on reserve and in the Yukon were denied equal child and family services, and/or differentiated adversely in the provision of child and family services” in a manner contrary to section 5 of the *Canadian Human Rights Act* (para 4). The CHRT deferred its decision on a remedy and sought input from the parties regarding compensation. In 2019, the CHRT decided upon the appropriate remedy to accompany its finding. With the benefit of additional submissions, the CHRT ordered compensation for:

1. First Nations children and their parents or grandparents in cases of unnecessary removal of a child in the child welfare system (para 245);
2. First Nations children in the child welfare system in cases of necessary removal (para 249);
3. First Nations children and their parents in cases of unnecessary removal of children to the to obtain essential services that would have been available under Jordan’s Principle (para 250); and
4. First Nations children and their parents in cases of unnecessary removal of children who experienced gaps, delays and denials of services that would have been available under Jordan’s Principle (para 250).

Canada filed an application for judicial review of the compensation decision to the Federal Court. Prior to the recent settlement between the federal government and the applicant, the Federal Court dismissed Canada’s judicial review application in September of 2021 (*Canada v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 302).



## Compensation Framework

As part of our work on the project, Asper Centre students attended and documented the judicial review hearings concerning the compensation order in June of 2021. During the hearings, the students tracked the development of the compensation categories and definitions concerning the scope of those categories over time, including how the parties presented the compensation categories in their oral submissions. The positions of the parties at the judicial review hearing were cross-referenced with the opinion of the CHRT in the compensation decision, CHRT decisions pertaining to the Caring Society litigation issued after the compensation decision, and the final compensation framework.

After cross-referencing the positions of the parties at the judicial review hearing with other decisions and the compensation framework, we found that some definitions remained unclear for the purposes of realizing the compensation order; namely, those of “unnecessary and necessary removal,” “essential service,” and “service gap.” The difference between unnecessary and necessary removal was blurred by the uncertain distinction between emotional maltreatment and neglect. The CHRT insisted that neglect is not required for classifying a removal as “necessary,” a finding that would disentitle caregivers from compensation. With respect to “essential service” and “service gap” in the context of Jordan’s principle, the ambiguity centred on whether a referral or recommendation from a professional with expertise regarding a child’s given need was a necessary condition for compensation eligibility.

Likewise, the Asper Centre students assisted with the part of the report that considered the necessary data for compensation. I provided the research team with a memo on the data retention policies under the child and family services and privacy legislation in each Canadian province and territory. The report was intended to assist in identifying the individuals who would be eligible for compensation, given how far back in time the or-

der reached and its national scope. The memo was specifically focused on when the relevant provincial legislation mandated the destruction of personal records. I found many jurisdictions actually left the question of destruction to the discretion of an administrative decision-maker. As such, I reviewed and consolidated the content of applicable guidelines and regulations when the discretion of the relevant administrative decision-makers empowered under the legislative frameworks is exercised.

Overall, the experience provided students with a unique opportunity to witness a high-profile judicial review hearing concerning pressing and relevant subject-matter concerning Indigenous peoples. It provided students with the opportunity to apply their knowledge of administrative law in a practical context. At the same time, the project provided an invaluable experience working within a unique intersection between law, social work, and policy. With the matter between the Caring Society and the federal government now settled, it is hoped that the final report, which has now been submitted to Indigenous Services Canada, will facilitate a just and efficient compensation process.

***Szymon Rodomar** is a 3L student at the University of Toronto Faculty of Law and was an Asper Centre research student in Fall 2021.*



# Renewing Canada's Commitment to Indigenous Children in 2022

## Part III: Operationalizing CHRT 39

by Graham Rotenberg

In 2019, the Canadian Human Rights Tribunal (CHRT) issued a historic judgment, ordering Canada to compensate First Nations children who were denied the right to stay safely with their families and to receive adequate medical care or social services because of discriminatory practices perpetrated by the federal government. As the case worked its way through multiple appeals, and, ultimately, an agreement in principle was reached in December 2021, the question of how to implement the decision remained unanswered.

Many questions remained. What were the gaps in data that existed? What were some of the unique challenges of working with eligible claimants – many of whom were still children and would still be youth when the claims process commenced?

Consequently, Indigenous Services Canada sought assistance from a team of independent researchers at the University of Toronto to determine how to operationalize the order and implement the judgment in the most effective manner. Led by Nico Trocme (McGill University) and Barbara Fallon (University of Toronto), the “CHRT 39” research team had diverse academic backgrounds including law and social work. We sought to offer multidisciplinary answers to the unique challenges posed by interpreting and implementing the order.

As part of the Asper Centre's contribution to the project, my assignment was to research the lessons learned from past compensation frameworks – specifically through large class action settlements in Canada for residential and day schools and similar levels of displacement and cultural genocide in Australia, New Zealand, and Israel. Three questions governed my approach. How could we avoid, or minimize, the mistakes of the past by designing a legal process that did not re-traumatize applicants? How could the burden of proof be allocated

fairly between the government, claimants, and individuals responsible for administering claims? How were compensation processes structured in Canada compared with other jurisdictions abroad and at home?

### Core Findings

Although the approach taken by different governments in Canada and globally varied procedurally, many of the core lessons across compensation frameworks were similar. Each compensation framework offered lessons about how to effectively communicate with the target population of claimants, create a claimant-friendly application process, and leverage technology to execute processes efficiently and cost-effectively. Our objective was to elevate victims and claimants concerns about where legal processes fell short using their voices wherever possible, and by offering workable solutions to complex, multi-year compensatory frameworks.

Across compensation processes, courts and implementing parties had areas where communications could be improved. Although many notice plans reached many claimants, these communications frequently used complex legal jargon to explain how and where to apply. Sometimes communications were unavailable where claimants were and conveyed in languages claimants did not speak. We recommended that notice plans tailor communications using accessible language, minimize legal jargon, and use multi-channel communications plans to ensure all claimants have an opportunity to receive compensation.

The application process supplied many of the lessons learned. Forms could be complex, with tight deadlines that required applicants to explain in vivid detail the time, place, frequency, and duration

of traumas or abuses experienced. At best, claimants felt like compensation recognized their harm. At worst, it elevated trauma and forced them to re-live their abuse. We recommended that forms be simplified, and claimants be provided with free legal assistance and adequate mental health supports to ensure that their claims were recognized rather than re-traumatized.

Finally, we found that administering bodies often received a greater volume of applications than anticipated. In turn, this meant that there were not enough resources for processing the higher-than-anticipated volume of applications. Consequently, we developed recommendations for harnessing technology to promote efficient processing and minimize exclusion from the compensation process.

#### Reflections on the Research Assistant Experience

The CHRT 39 research project was the academic highlight of my law school experience. I was able to lead calls with leading government practitioners in order to conduct in-depth interviews on how compensation decisions were made in federal and provincial contexts. My opinion was valued and respected. I was able to work closely with Marie Saint-Girons and Johanna Caldwell – the project

coordinators- and Asper Centre Director Cheryl Milne who iterated on the structure of the assignment, provided feedback on my work, and helped formulate a research plan.

Personally, this experience was exceptionally enriching and will hopefully make the compensation process more equitable, less retraumatizing, and offer victims some semblance of recognition for the harms they have suffered. I am forever grateful to the Asper Center for allowing me to use my research skills to hopefully improve how claimants interact with large, complex, multi-year legal processes. Our hope is that this research will help ensure that the settlement is implemented in a manner that minimizes trauma, processes claims efficiently and provides recognition of claimants suffering.

**Graham Rotenberg** is a 3L student at the University of Toronto Faculty of Law and was a research assistant with the Asper Centre in the Fall of 2021.



The Caring Society's Spirit Bear, who represents the children impacted by the case

Source: <https://fncaringsociety.com/about-spirit-bear>

# Canadian Council of Disabilities:

## Asper Centre intervenes to defend public interest standing

by Natasha Williams and Elise Burgert

In its 2012 decision *Canada v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (“*DESW*”), the Supreme Court of Canada (“SCC”) clarified and relaxed the test for public interest standing. Prior to *DESW*, the test consisted of three requirements: (1) a serious justiciable issue, (2) a genuine interest on the part of the applicant, and (3) no other reasonable and effective manner to bring the issue before the courts. In *DESW*, the SCC held that these factors should not be treated as hard requirements but should instead be assessed and weighed cumulatively. In particular, the SCC relaxed the third factor, which now requires the applicant to show that the proposed suit is *a* reasonable and effective way to bring the claim before the courts, rather than the only way.

The reformulated test cemented the role of public interest groups in constitutional litigation and was an important affirmation of their function in ensuring access to justice for disadvantaged groups. The test also recognizes the importance of systemic remedies under s. 52(1) of the *Constitution Act, 1982*, which aims to achieve justice for all citizens affected by unconstitutional legislation.

Given this expanded approach to public interest standing, organizations were understandably concerned when the BC Supreme Court, in *MacLaren v British Columbia (Attorney General)*, 2018 BCSC 1753 agreed with the Attorney General of British Columbia that the Council of Canadians with Disabilities (“CCD”) failed to meet the test for public interest standing. The issue of whether the CCD should have standing went all the way to the SCC.

### Background to the Case

The CCD and two individuals challenged the constitutionality of British Columbia’s *Mental Health Act*, arguing it fails to give people who are involuntarily detained under the *Act* any participation in their treatment. After about a year, the two individuals were unable or unwilling to continue with the case, and the CCD planned to continue the litigation on their own. The Province applied to the BC Supreme Court to have the case dismissed on the basis that the CCD did not meet the test for public interest standing.

Chief Justice Hinkson of the BC Supreme Court agreed and dismissed the case. In his decision, he relied largely on the fact that the CCD could not put forward “a particular factual context of an individual’s case.” For the Chief Justice, this meant there was no serious justiciable issue. He also found that there was an insufficient factual matrix to consider the CCD’s claim. The Chief Justice rejected the CCD’s argument that it is not realistic to expect individual plaintiffs with mental disabilities to pursue a complex constitutional challenge and found that there are other reasonable ways for the case to come to court.

### Appellate Stage

CCD was successful in its appeal to the BC Court of Appeal (“BCCA”), who reaffirmed that courts must be flexible and generous when applying the test (*Canadian Council for Disabilities v BC (Attorney General)*, 2020 BCCA 241). The BCCA clarified that individual facts are not always necessary for a serious justiciable issue to be raised and that the Chief Justice erred in his analysis under this first element of the test (para 114). Although the BCCA did not need to address the other elements, it disagreed with the Chief Justice’s contention that it is always preferable for a public interest organization to assist an individual plaintiff rather than seek standing alone (para 115).

In October 2019, a class action proceeding was commenced seeking a similar declaration of unconstitutionality against the *Act*. The BCCA found this was relevant, but not determinative on the issue of standing, and remitted the decision back to the BC Supreme Court.

In April 2021, the Province was granted leave to appeal at the Supreme Court of Canada. The Asper Centre was granted leave to intervene in the case, as were 18 other public interest organizations and four Attorneys General.

### Asper Centre's Intervenor Position

The Asper Centre did not take a position on the outcome of the appeal. The Asper Centre's position was that it was important to maintain a liberal test for public interest standing. As a frequent public interest intervenor, narrowing the test for public interest standing could impact the Asper Centre's ability to represent important perspectives in the future. Furthermore, altering the test from *DESW* could set back all public interest organisations seeking to bring constitutional challenges. Given the number of other intervenors in the case, the Asper Centre narrowed the focus of its intervention to explore in more depth two specific arguments that would bring important perspectives to the Court.

The Asper Centre's first main argument focused on the essential role of public interest litigants in increasing access to justice, particularly in constitutional challenges seeking systemic remedies. Vulnerable or marginalized plaintiffs who are subject to unconstitutional legislation often face challenges that make it even harder for them to access the legal system. For example, when a person is experiencing challenges such as financial insecurity, incarceration, racism, or mental or physical health problems, that very vulnerability can both be compounded by a potential Charter violation and present a systemic barrier to them bringing a challenge. The Asper Centre argued that this dynamic highlights the

important role that public interest litigation can play. Public interest organisations can defend the rights of marginalised people who may not be able to engage in costly, time-consuming Charter litigation on their own.

Second, the Asper Centre responded to the argument that Charter class actions are not an appropriate substitute for public interest litigation. This issue arose in this case due to a parallel class action proceeding that the BC Attorney General relied on to argue that the CCD should not have standing. In their submissions, the Asper Centre distinguished public interest litigation from class actions, emphasising the importance of organisations bringing cases that deal with important rights issues, regardless of whether the case is economically viable as a class action. Class actions and public interest litigation also focus on achieving different remedies: while class actions typically grant monetary remedies, public interest litigation often focuses on achieving a declaration of unconstitutionality under s. 52 of the *Constitution Act*. Without public interest litigation, there is a risk that only those cases that are economically viable for lawyers will go forward, potentially leaving unconstitutional legislation on the books.

### Conclusion

The Asper Centre's intervention in this appeal advocated for increasing access to justice by highlighting the important role that public interest litigants play in the justice system. It hopes that the public interest standing test will be kept broad so this mechanism can remain a viable method of challenging unconstitutional laws.

**Natasha Williams** is a 3L JD student and **Elise Burgert** is a 2L JD student at the Faculty of Law. Both were enrolled in the Asper Centre Clinic and the Asper Centre Practicum.



# Ward v Quebec:

## Forced to get along

By Evan Morin

Recently, in *Ward v Quebec*, 2021 SCC 43, the Supreme Court examined conflicts between free speech and dignity and raised the bar for what constitutes a dignity violation. The concept of dignity is found throughout the Charter and constitutional documents around the world. The Supreme Court has cited dignity in analyses of ss. 2, 7, and 15 of the Canadian Charter, and the Quebec Charter guarantees a right to the safeguard of dignity in s. 4. Similar sections protecting human dignity are found in almost every province's Human Rights Code. How these provisions are interpreted has a significant impact on the lives of Canadians — particularly those from marginalized backgrounds who are at a higher risk of having their dignity infringed.

The Supreme Court in *Ward v Quebec* set out a new framework for thinking about dignity. This framework sets a high standard for violations of dignity, building off the hate speech framework set out in *R v Whatcott*, 2013 SCC 11. As a consequence, the new standard requires a level of toler-

ance for some dignity violations.

Mike Ward is a comedian in Quebec. From 2010 – 2013 he performed a routine that mocked public figures including Jérémy Gabriel, a young singer with a disability. Many of Ward's comments were directed at Gabriel's disability contributing to Gabriel being bullied in his high school, and causing Gabriel serious mental harm. Gabriel's parents went to the Human Rights Commission who referred the complaint against Ward to the Human Rights Tribunal, which found that Ward had discriminated against Gabriel. After both the Trial Court and Court of Appeal found that Ward discriminated against Gabriel, the Supreme Court overruled the lower courts and found Ward's comments were protected by the Charter and Gabriel's right to dignity did not override Ward's right to free expression.

### Changes to the dignity framework

Since dignity is such an ethereal concept, courts have had trouble producing a consistent test for



finding infringements of dignity. While s. 4 of the Quebec Charter guarantees a positive right to the protection of dignity, Quebec courts typically assess violations of dignity through s. 10, the equality clause of the Quebec Charter, which guarantees equal rights (including the right to dignity) to everyone. To show a violation of the equality clause, a claimant must prove that a distinction was made that was based on a prohibited ground (in this case Gabriel's disability) and prevents them from exercising a protected right (in this case, their right to dignity).

This test is very similar to the equality analysis under s. 15 of the Canadian Charter and it requires courts to balance conflicting rights at the final stage of analysis. Many provinces have similar protections in their Human Rights Codes, and the Court in *Ward* stressed that this decision is applicable to those tribunals as well. Prior to *Ward*, Quebec courts found that any significant disrespect based on an enumerated or analogous ground violated a person's equal right to dignity under s. 10.

The Court in *Ward* narrowed the scope of what the right to dignity covers. Importantly, the majority found that dignity only protects "the *humanity* of every person in its most fundamental attributes". According to the Court, violations of dignity only occur where actions strip a person of their humanity and deny someone's worth as a human being. Further, according to the majority, the right to dignity is not a personal right held by an individual, but a collective right to protect society from rampant devaluing of life. This significantly raises the standard for dignity violations because dignity is interpreted so restrictively.

The majority and dissenting opinions disagreed on the perspective, and therefore the applicable test, for dignity violations. Since the majority saw dignity as a collective right, it held that an objective standard of violating society's morals should be applied. By contrast, Abella J, in her dissenting opinion, suggested that the impact of a statement on an individual was the essence of dignity, and

similar to the Court's equality jurisprudence, the focus should be on the effects of a person's conduct on the specific individual. This would require a modified objective approach which considers the perspective of a person in the targeted group.

Under the majority's approach, courts should use the perspective of a reasonable person that is not a member of the target group. In this case, because Gabriel alleged a distinction based on his disability, the Court considered the perspective of someone without a disability, and whether they would see a violation of dignity.

Throughout the Court's judgement, there is a message of caution to courts when restricting expression, even where the expression is potentially discriminatory.

### Conflicts between expression and dignity

In addition to narrowing the scope of dignity, the Court in *Ward* articulated the process for judging situations where rights to dignity and free expression conflict. Given that dignity only protects a person's basic humanity, the Court felt it was appropriate to draw upon the jurisprudence involving hate speech established in *Whatcott* to assess these conflicts.

The test from *Whatcott* for situations where dignity can override a right to free expression has two parts. First, would a reasonable person view the speech as exposing someone to vilification (hatred)? Second, does this conduct have the potential to lead to discriminatory treatment of the group? The test is assessed from the perspective of a reasonable person that is not part of the target group and is used to assess if conduct infring-

es someone's right to dignity. Significantly, if expressive conduct does not have the potential to lead to discriminatory treatment in the eyes of a reasonable person, its protections under expression outweigh the potentially adverse effects on the marginalized group.

In *Ward*, the Court found that a reasonable person would not view a comedic performance as exposing someone to vilification and thus Ward's expression was not discriminatory and outweighed Gabriel's right to dignity.

#### A duty to tolerate

Throughout the Court's judgment, there is a message of caution to courts when restricting expression, even where the expression is potentially discriminatory. Under the new standard, human rights tribunals can only intervene where conduct meets the standards of hate speech. However, even that may not be enough in some circumstances.

The Court in *Ward* found that Gabriel was not the subject of Ward's comedy because of his disability, but because he was a public figure. If Ward did not distinguish based on Gabriel's disability, Gabriel cannot rely on the equality clause of the Charter as a remedy. This prevents finding dignity violations for public figures since they will always be the subject of comments because of their fame, rather than any prohibited ground, and creates a duty to tolerate for those in the public eye.

This distinction between the individual's status as a public figure or private individual may become relevant in other contexts beyond the Quebec Charter, including the law of defamation. Traditionally, the same standard for defamation applies to both public and private figures, with no requirement for public figures to tolerate hurtful speech to their reputations. However, in the United States, people are allowed to make comments about public officials and these comments are a price of being a public figure. The distinction between public and private figures in *Ward*, may signal an openness to re-evaluating how defamation claims are categorized and evaluated in Canadian law.

#### Conclusion

The Court has clearly signalled its preference for not getting involved in mediating people's words. With high thresholds to finding a dignity violation, most claimants will be unable to seek redress through human rights regimes. While the Court suggests going through private mechanisms of defamation or harassment, these options may not be available for many claimants since such litigation must be brought by the individual rather than the Human Rights Commission. In a world where divisive expression is becoming more and more common, this may be an attempt by the courts to re-emphasize the value of free speech, even when that speech is offensive.

**Evan Morin** is a 1L student at the Faculty of Law.

# Public Legal Education and Police Accountability

## Student Working Group Update

by Meaza Damte

Filing a complaint against law enforcement can be an intimidating and complex process. Potential complainants must weigh a variety of factors in their decision to proceed with filing a formal complaint; navigating the legislative framework governing police oversight in Ontario may be one of those considerations.

The *Community Safety and Policing Act*, which is part of the *Comprehensive Ontario Police Services Act* will replace the *Police Services Act*, RSO 1990 c. p 15. It is unclear when this legislation will come into force but the students in the Police Accountability Working Group are working on a step-by-step guide to help people filing complaints against the police in Ontario. Students are largely focused on transforming the information in the legislation into a more accessible format. The guide will include resources, statistics, and real-life examples. They are also researching various contextual issues that may impact the complaints process and taking inspiration from similar public legal education guides. The Police Accountability Working Group is striving to de-mystify the process and ensure that potential complainants are not left behind by this legislative transition.

Students at the Asper Centre began working on this guide in 2019 but as the *Community Safety and Policing Act* is not yet in force, the guide will not be immediately available to the public. Once the guide is complete and the legislation in force, the guide will be relevant to Ontarians who want to lodge complaints against the five types of law enforcement officials that the legislation governs: the Ontario Provincial Police, Municipal Polices Forces, Special Constables employed by the Niagara Parks Commission, Peace Officers in the Legislative Protective Services and First Nations Police. It may also apply to members of certain law enforcement boards. The guide will not cover complaints

against the Royal Canadian Mounted Police, Special Constables not employed by the Niagara Parks Commission, Military Police and Auxiliary Constables because they fall outside the legislative framework.

**Police accountability has always been and will always be important; but the murder of George Floyd by Minneapolis police officers in 2020 led to renewed public scrutiny of police misconduct around the world.**

First year law students have been divided into two research groups. One group has been working on translating the legislation and regulation into accessible language. Clear and plain language, instead of legalese, is very important for ensuring that the guide is helpful to the public. The second group of students has been researching how similar guides present legal information to ensure that the Asper Centre's guide is presented in as accessible a manner as possible.

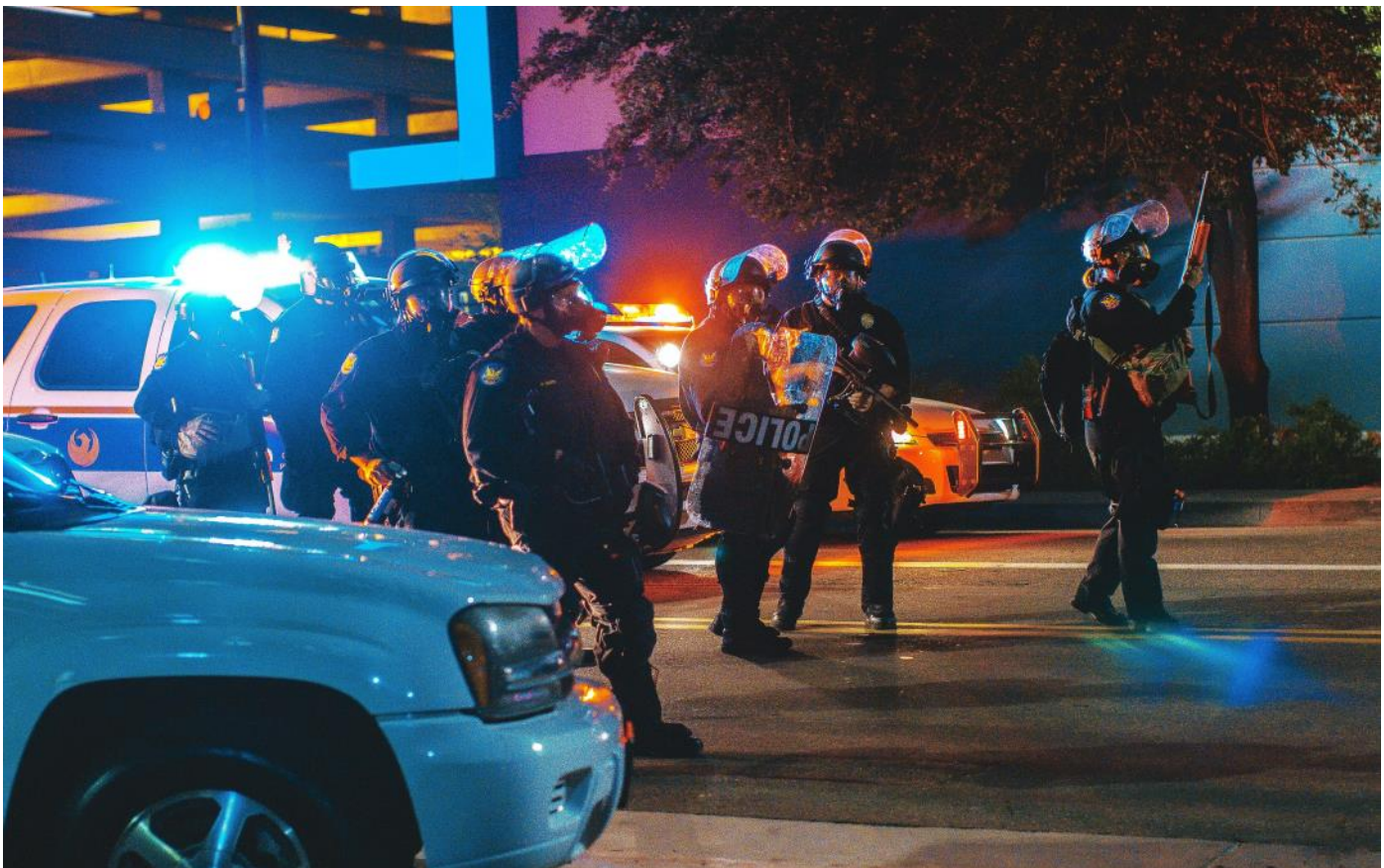
Police-community relations are mediated by a variety of factors including concerns about potential retaliation, privacy or even the role of systemic racial bias. Therefore, it is extremely important that the guide consider and address these contextual issues. Beyond the letter of the law, contextual issues are meant to address all the individualized concerns that potential complainants may have. As students are working on the guide, they



ask themselves: “what would I want to know/be worried about if I were lodging a complaint against the police?”.

Police accountability has always been and will always be important; but the murder of George Floyd by Minneapolis police officers in 2020 led to renewed public scrutiny of police misconduct around the world. It is imperative that there are accessible accountability mechanisms in place to ensure that the state’s monopoly on the use of force is exercised appropriately and equally. The legislative framework is only part of the accountability process. If the public cannot understand the procedures laid out in the legislation for lodging a complaint, police accountability is seriously undermined. By working on creating public legal education documents, law students are contributing to ensuring that the law is accessible to all especially in the face of discriminatory police conduct.

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# Restoule v Canada:

## Reconciliation through Reading Treaties

by Bailey Fox

In November 2021, the Ontario Court of Appeal released its decision in *Restoule v. Canada (Attorney General)*, [2021 ONCA 779](#) (*Restoule*). The decision comes twenty years after some of the plaintiffs first initiated their claim in 2001 and is important both for the Indigenous parties involved and the future of constitutionally guaranteed treaty litigation in Canada.

At issue in *Restoule* is the interpretation of the annuities clause in two treaties signed by the Crown and Anishinaabe peoples in the 1850s. The Robinson-Huron and Robinson-Superior Treaties require the Crown to make annual payments to the treaty beneficiaries, as well as for an increase in annuity amounts in defined circumstances. The annuity amount of \$4 per person has not increased since 1875. The treaty beneficiaries brought claims alleging that the Crown had breached the annuity provisions in the treaties. The complex proceedings were divided into three stages, and after Stages One and Two were decided, Ontario appealed the trial judge's findings (Canada was a co-defendant but did not appeal).

In Stage One, the trial judge held that the Crown is required to increase the treaties' annuities based on economic conditions. The trial judge interpreted the treaties' augmentation clause to mean that the Crown must consult with the Treaty signatories to determine the amount of resource-based revenues derived from the territories, and pay an increased annuity amount that reflects a 'fair share' without the Crown incurring a loss. The trial judge held that the Honour of the Crown and doctrine of fiduciary duty impose an obligation on the Crown to diligently implement the treaties' promise. In Stage Two the trial judge held that neither Crown immunity nor provincial limitations legislation bar the claim.

A five-judge panel of the Court of Appeal, writing three sets of reasons, dismissed the appeal from Stage Two and allowed the Stage One appeal in part.

The majority of the Court agreed that the honour of the Crown is engaged. Lauwers and Pardu JJ, with Hourigan J agreeing, held that the Honour of the Crown requires the Crown to increase annuities as part of its duty to implement the treaties. Strathy CJO and Brown JA held that the honour of the Crown requires the Crown to consider increasing the annuities from time to time. Further, the Court rejected Ontario's argument that the augmentation clause was not justiciable, unanimously agreeing that the Crown's discretion to augment the annuities is justiciable because the interpretation and enforcement of treaty obligations, what was at issue here, is a core judicial function.

The Court also unanimously agreed that the trial judge erred in finding that the Crown is under a fiduciary duty regarding the augmentation clause. Hourigan J wrote that the trial judge did not properly apply the test for an ad hoc fiduciary duty and erred in finding that the Crown agreed to act in the treaty beneficiaries' best interests. This part of the ruling was set aside.

Regarding Stage Two, the Court unanimously agreed that limitations legislation does not apply, noting that Aboriginal Treaty is not mentioned in the applicable limitations legislation and that Aboriginal Treaties are not "contracts" "speciality" or "action of account" as those words are used in the limitations legislation. The Court dismissed this ground of appeal, meaning that the claims could proceed. Pending further appeal to the Supreme Court (Ontario has [reportedly](#) filed an application to appeal) or a settlement (a spokesper-

son for Canada has [indicated](#) they are negotiating with the plaintiffs), Stage Three of the trial will address the plaintiffs' specific claim for damages and allocate liability as between Ontario and Canada.

One notable aspect about the decision is the judges' approach to treaty interpretation. Treaty interpretation requires a court to examine the text and content of the treaty in order to determine the parties' intentions at the time the treaty was signed. The trial judge considered the Anishinaabe perspective when determining the context, concluding that the only interpretation of the augmentation clause that reflects the parties' common intention is one that reflects a common intention to share the revenues from the land-based resources. A majority of the Court (Lauwers and Pardue JJ with Justice Hourigan concurring) upheld this interpretation. By contrast, the dissenting judges faulted the trial judges for not prioritizing a plain meaning reading of the treaties. However, the dissent assumes that one can determine a plain meaning without bringing any legal or cultural assumptions to bear on that interpretation. The majority's approach to interpretation, conversely, represents how Indigenous perspectives, including Indigenous legal understandings of treaties as relationships can be incorporated into existing Canadian interpretative policies. It recognizes that all interpretation is informed by a broader world view, and represents a notable example of how broadening the

criteria of relevant evidence results in an interpretation that better reflects the parties' common intention.

While *Restoule* can certainly be considered a 'win' in the context of securing an honourable interpretation of the treaties, the process and timeline of the litigation is concerning from an access to justice and a reconciliation perspective. The Court notes in its finding on justiciability that treaty interpretation is a core judicial function. While that may be so, one may question the length of time it took to get such an interpretation. The Robinson-Huron claim was initiated in 2001, and the Robinson-Superior plaintiffs filed their claim in 2014. Both were heard together in the process of a three-stage trial that required marshalling large volumes of evidence and expert and lay witnesses. While the large scope and extended timeline for Indigenous rights litigation is not a new problem, it is one that Indigenous litigants continue to face, especially in the context of limited resources. Reflecting on the process, irrespective of the outcome on the substantive legal process, is an important part of answering the question of whether reconciliation has been achieved or justice advanced.

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The Asper Centre Outlook is the official newsletter of the David  
Asper Centre for Constitutional Rights.

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