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ASPER CENTRE OUTLOOK

David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

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The Quebec Reference:

Child and Family Services and Indigenous Self-Governance at the Supreme Court

by Talia Wolfe

On December 7th and 8th, 2022, the Supreme Court of Canada heard oral arguments in *Attorney General of Quebec, et al. v. Attorney General of Canada, et al.*, an appeal of Re An Act respecting First Nations, Inuit and Metis children, youth and families. With four hundred pages of transcripts and three dozen interveners – the David Asper Centre included – the Supreme Court is now deciding on the constitutionality of Bill C-92 and its recognition of an inherent right of self-government for Indigenous Peoples in Canada. Given the stated purpose of the Act and the significant implications of its adoption, the Supreme Court's decision in this case will no doubt have wide-reaching ramifications for Indigenous Peoples in this country.

An Act respecting First Nations, Inuit and Metis children, youth and families

An Act Respecting First Nations, Inuit and Metis children, youth and families ("the Act") received Royal Assent on June 21, 2019, and came into effect on January 1, 2020. This Act was an intentional step taken by Parliament to advance the project of reconciliation with Indigenous Peoples. The Act sought to address and remedy the overrepresentation of Indigenous children in child and family service systems across the country. Given Canada's legacy regarding Indigenous children in its care and given Parliament's recent adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Act set out two new mechanisms by which Indigenous children will be protected should they require interaction with child and family services.

Part I of the Act created a set of national principles by which the provision of child and family services to Indigenous families must abide. These principles include the consideration of a child's cultural, linguistic, religious and spiritual upbringing and heritage; the provision of services that take into account the child's culture and family origins; the prioritization inter-family or inter-community placements; and the continuous promotion of a child's emotional ties to their family, where appropriate.

Part II of the Act expressly affirmed an inherent right of self-government derived from section 35 of the Constitution Act, 1982 as including jurisdiction over child and family services. Indigenous governing bodies are thus able to exercise legislative authority in relation to child and family services. Further, section 22 of the Act states clearly that, where there is a conflict between Indigenous law and federal law regarding child and family services, the law of the Indigenous group must prevail. The Act in its preamble centers the importance of the right of self-determination for Indigenous Peoples and highlights the need for genuine cooperation and partnership with Indigenous communities to support the dignity and well-being of Indigenous children.

Reference to the Court of Appeal of Quebec

On December 20, 2019, the Government of Quebec filed a Notice of Reference to the Court of Appeal to seek an answer to the following question: Is the Act respecting First Nations, Inuit and Metis children, youth and families ultra vires the jurisdiction of the Parliament of Canada under the Constitution of Canada?

Positions of the Parties

Quebec took issue with both mechanisms described in the Act. Quebec alleged that Part I of the Act is invalid as it has the effect of dictating to provinces the manner by which they are to provide child and family services, thus reaching beyond the federal jurisdiction set out in section 91(24) of the Constitution Act, 1867. Quebec alleged that Part II of the Act is invalid as it views the recognition of a right to self-governance which includes child and family services as an attempt to amend s.35 of the Constitution Act, 1982, undermining the established constitutional order and effectually creating a third level of government in Canada.

Canada responded that the pith and substance of the Act place it squarely within its jurisdiction via s. 91(24), as the purpose of the act is to protect Indigenous children and families who interact with child and family services. Canada also rejected the notion that the Act impermissibly pushes outside the bounds of s. 35 consistent with case law.

Decision of Chief Justice Mainville

In his decision released on February 10, 2022, Mainville CJA affirmed the constitutionality of the Act, save two provisions. His decision dove deep into the legacy of Canada regarding the treatment and care of Indigenous children in the state's care. From Residential Schools to the Sixties Scoop, Chief Justice Mainville stated clearly and unequivocally that the legislation before him was critical for the movement towards reconciliation with Canada's Indigenous Peoples. His reasons made clear the necessity of Indigenous-led, culturally and historically conscious policy for the emotional, mental, spiritual, and physical well-being of Indigenous children and families requiring these services.

Embedded within this behemoth of a judicial ruling, Mainville CJA offered some novel and deeply influential recognition of a broad right to self-governance contained within section 35 of the Constitution Act, 1982. Beyond his decisions regarding the pith and substance of the Act, Chief Justice Mainville made clear the sociopolitical importance of recognizing this right, and the active role that both courts and legislatures must play to rectify historic and present-day injustices experienced by Indigenous Peoples in Canada.

In considering the origins of this right of self-governance, the Court considered two potential interpretations: under the first perspective, Aboriginal governance is a political issue which can only be recognized in individual situations by Parliament or provinces operating within their own exclusive jurisdiction; under the second perspective, however, the right to Aboriginal self-government is derived from the original sovereignty of Indigenous Peoples prior to the Crown's assertion of sovereignty and is thus a general and fundamental right protected by s.35 of the Constitution Act, 1982. The QCCA unequivocally endorsed this second perspective (at paras 363-64). The Court then rejected the argument that s.35 rights could only be recognized via legal action, creating space for Parliament to recognize these rights via legislation or political action; in fact, Mainville CJA noted that the honour of the Crown imposes a proactive duty on governments to do just that, as a refusal to mark these rights can result in the "de facto denial of their very existence" (at para 44).

This Reference represents the first time a court has recognized that Indigenous Peoples have a constitutionally protected right of self-government.

In considering the availability of recognizing jurisdiction over child and family services as an Aboriginal right under s.35, the Van der Peet test requires an affirmative demonstration of the practice being sufficiently culturally distinct and that the recognition of the right would facilitate the project of reconciliation. The Court's review of expert evidence on this point highlighted the deep connection between family and culture and the significant benefits associated with moving child welfare services from the hands of the Crown into the families' own communities. The QCCA makes the express finding that the regulation of child and family services is an existing Aboriginal right under s.35 of the Constitution Act, 1982 and that it is a generic right which extends to all Indigenous Peoples.

Despite this broad affirmation of the constitutionality of the Act, Chief Justice Mainville could not endorse the two provisions included that sought to give Indigenous law in this context the force of federal law (s.21) nor supremacy over conflicting provincial regulation (s.22(3)).

Going Forward

In March 2022, Canada announced its intention to appeal the case to the Supreme Court, looking for its authority and guidance on this right to Indigenous self-governance over child and family services. Quebec filed its own appeal, reiterating its position that the Act in its entirety is unconstitutional.

The stakes for this appeal are high. This Reference represents the first time a court has recognized that Indigenous Peoples have a constitutionally protected right of self-government. The highest court in the country has heard from First Nations governments, constitutional scholars, child welfare organizations, policy workers, and government officials, all with the aim of determining how Canada is able to understand, regulate, and activate the inherent rights of Indigenous Peoples living within its borders. In light of the country's adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2021, it is now more important than ever to gain constitutional clarity on the ability of the state to empower Indigenous Peoples, rectify past injustices, and make space for true self-determination.

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The Supreme Court of Canada: 2022 Year in Review

by Hang Lyu

The Supreme Court of Canada decided a total of 54 cases last year. This article highlights some of the Court's key Constitutional law-related decisions from 2022, presented in reverse-chronological order. This article concludes with a Looking Forward section highlighting some interesting Leaves granted by the SCC in 2022 that we are keeping an eye out on.

R v. Sharma, 2022 SCC 39

In this appeal, the Supreme Court ruled that banning conditional sentences for certain offences is constitutional. The appellant, Ms. Sharma is a biracial Indigenous woman, whose ex-boyfriend used her as a drug mule, and she was charged and convicted with importing just under 2kgs of cocaine. She would have been a suitable candidate for a conditional sentence but for the prohibition preventing drug importers from receiving a conditional sentence. In response to Ms. Sharma's s.15 Charter argument that s.742.1(c) of the Criminal Code is unconstitutional as it disproportionately affects Indigenous women by removing the ability to serve their sentences as conditional sentences, the Court held that there is no reason to believe that the prohibition, on the record before it, created an adverse effect such that it can qualify as a distinction based on Aboriginal status. The Court restored Ms. Sharma's 18-month prison sentence. However, since she has already served her time in prison, no further orders were made. The Asper Centre previously intervened in this case in 2019 at the Court of Appeal for Ontario. Further, the Asper Centre intervened in the appeal at the Supreme Court of Canada.

R v. Ndhlovu, 2022 SCC 38

The Supreme Court held that the mandatory and lifetime registration on the sex offender registry is

unconstitutional. The appellant Mr. Ndhlovu pled guilty to sexual assault against two people at a party when he was nineteen and sentenced to six months in jail with three years of probation. The judge thought he was unlikely to re-offend after reviewing his history and evidence. However, he was automatically subject to a lifetime registration on the national sex offender registry after the legislative change in 2011. The Court held that Criminal Code sections 490.012 and 490.013(2.1) infringe on the s.7 liberty right of offenders because "registration has a serious impact on the freedom of movement and of fundamental choices of people who are not at an increased risk of re-offending" and that the Crown was unable to meet its burden under s. 1. The purpose of registration is to capture information and help police investigate sex offences. Registering offenders who are not at risk of committing another sex offence is disconnected with the purpose. The Court ordered a declaration of invalidity of s.490.012 to take effect in one year and the finding on s.490.013(2.1) takes effect immediately and is considered invalid from 2011. Mr. Ndhlovu did not have to register in the sex offender registry. And, because the declaration affects all those impacted by the enactment of the provision since 2011, offenders who are subject to a lifetime order pursuant to this provision after having been convicted of more than one sexual offence without an intervening conviction can seek a s. 24(1) remedy to change the length of their registration.

R v. J.J., 2022 SCC 28

This appeal concerns the constitutionality of a new record screening process in the Criminal Code. This process sets out to decide: first, if a complainant's private documents can be used by an accused in a sexual offence trial; and second, how evidence of the complainant's past sexual activity can be used. J.J. was accused of sexual assault in BC and wanted to use the records of communication between himself and the complainant to cross-examine the complainant. The judge decided that this new record screening process does not violate J.J.'s Charter rights. The accused's right to silence is not in issue because they are not forced to testify during the record screening process. Further, the accused's right to a fair trial does not mean they can receive the most advantageous or beneficial trial possible. Finally, the accused's right to present and challenge evidence is not unlimited. Ambushing complainants with their own highly private records at trial could be unfair and prejudicial to complainants and thus, contrary to the search for truth. The Court also explained that the record screening process was created to remove barriers preventing sexual assault victims from coming forward and to protect the interests of complainants in their own private documents when an accused has those documents and wants to use them at trial.

British Columbia (Attorney General) v. Council of Canadians with Disabilities, 2022 SCC 27

In this appeal, the Supreme Court ruled that the Council of Canadians with Disabilities (CCD) can challenge British Columbia's mental health laws as a public interest litigant. The CCD and two individual plaintiffs claimed that provisions of British Columbia's mental health legislation infringe s. 52 of the Constitution Act, 1982 and ss. 1, 7 and 15 of the Charter. The two individual plaintiffs discontinued their claims and withdrew from the case. The CCD filed an amended statement of claim setting out generalized allegations of constitutional violations and removing the particulars pleaded by the individual plaintiffs. The Attorney General of British Columbia applied for summary judgment to dismiss the action, which the judge granted. The action was dismissed due to the CCD lacking public interest standing to pursue the claim on its own. The Court of Appeal allowed the appeal, set aside the summary judgment, and remitted the matter of public interest standing for reconsideration. The Asper Centre intervened at the Supreme Court, arguing that the test from

Canada (AG) v Downtown Eastside Sex Workers Against Violence is a suitable test for public interest standing. This test recognizes the systemic remedial role of s. 52(1) and responds to access to justice concerns and difficulties in seeking and obtaining effective systemic s. 24(1) remedies. In its decision, the Court stated that the below court was wrong to conclude that the principles of legality and access to justice merit "particular weight" in the Downtown Eastside test. Existing case law and the Downtown Eastside framework already addresses these factors both implicitly and explicitly. When standing is challenged at a preliminary stage, the plaintiff should not be required to provide trial evidence as this would be procedurally unfair because it allows the defendant to obtain evidence before discovery. However, a mere undertaking or intention to submit evidence will not be sufficient to persuade a court that the evidentiary basis will be forthcoming.

R v. Bissonnette, 2022 SCC 23

In this appeal, the Supreme Court decided that it is unconstitutional for s.745.51 of the Criminal Code to allow for consecutive parole ineligibility periods of 25 years in cases involving multiple first-degree murders. The accused, Mr. Bissonnette entered the Great Mosque of Quebec with a semi-automatic weapon and opened fire on worshippers. Six people were killed, and five others were seriously injured. He pled guilty to all charges against him. The prosecutor asked the judge to apply s.745.51 so that the offender would serve a total of 150 years in prison. The Chief Justice of the Supreme Court held that this section violates s.12 of Charter, which guarantees the right to not be subjected to cruel and unusual punishment. For multiple murders, s.745.51 "authorizes a court to order an offender to serve an ineligibility period that exceeds the life expectancy of any human being, a sentence so absurd that it would bring the administration of justice into disrepute". This section is declared invalid from the time it was enacted in 2011 and the law that existed before that date continues to apply. Mr. Bissonnette was ordered to serve a life sentence without eligibility for parole for a total of 25 years.

R v. Sullivan, 2022 SCC 19

This decision was released concurrently with R. v. Brown (see below). The Supreme Court confirmed Mr. Sullivan's acquittal in this appeal. Mr. Sullivan took an overdose of a prescription drug, fell into an impaired state and attacked his mother with a knife, and was charged with aggravated assault and assault with a weapon. Criminal Code s.33.1 prevents a person from using automatism as a defense in this context, but Mr. Sullivan argued this violates his Charter s.7 right to life, liberty and the security of his person, and his Charter s.11(d) right that guarantees the presumption of innocence until proven guilty. The Supreme Court agreed, confirming the unconstitutionality of s.33.1 of the Criminal Code and applied the R v. Brown judgement to this case. The accused can be acquitted because he had proven that he was intoxicated to the point of automatism and the trial judge had found he was acting involuntarily. The Court heard this case together with R v. Brown and judgements were rendered at the same time.

R v. Brown, 2022 SCC 18

This decision was released concurrently with R. v. Sullivan (see above). The Supreme Court restored Mr. Brown's acquittal for attacking a woman while in a state of automatism. In this case, the accused Mr. Brown consumed alcohol and 'magic mushrooms' at a party, broke into a nearby home, violently attacked a woman inside. The victim suffered permanent injuries as a result, but the accused had no memory of the incident. Mr. Brown was charged with aggravated assault, breaking, and entering, and mischief to property. He used the defense of 'automatism', which was prevented by the Criminal Code s.33.1 in this context. He also

argued the unconstitutionality of this provision in that it violated his Charter s.7 and s.11(d) rights. The Supreme Court judges unanimously agreed that s.33.1 violates section 11(d) of the Charter because society could interpret someone's intent to become intoxicated as an intention to commit a violent offence; and section 7 because a person could be convicted without the prosecution having to prove that the action was voluntary or that the person intended to commit the offence. The Court explained that Parliament could enact new legislation to hold an extremely intoxicated person accountable for a violent crime. The Court emphasized that, "protecting the victims of violent crime – particularly in light of the equality and dignity interests of women and children who are vulnerable to intoxicated sexual and domestic acts – is a pressing and substantial social purpose."

Looking forward

While we continue to await decisions from important Constitutional-law related appeals heard by the Supreme Court in 2022 (such as the Safe-Third Country Agreement appeal, in which the Asper Centre intervened), the Supreme Court also granted several interesting 'leaves to appeal' last year, which may exert influence on the future of our Constitutional landscape. Below are some brief highlights.

In Canada (Attorney General) v. Restoule (2021), the Court will consider Aboriginal treaty rights, specifically in terms of the Robinson Huron Treaty and the Robinson Superior Treaties' annuity provisions and territory cessation.

In Murray-Hall v. Québec (Attorney General) (2021), the Court will decide on the constitutional validity of ss.5 and 10 of the Cannabis Regulation Act, which prohibits the possession of cannabis plants and the cultivation of cannabis for personal purposes in Québec.

Lastly, in Dickson v. Vuntut Gwitchin First Nation (2021), the Court will decide whether the 'within 14 days' relocation requirement for election to the Council in Vuntut Gwitchin First Nation ("VGFN") Constitution violates s.15(1) of the Charter.

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Report on Children's Environmental Rights in Canada

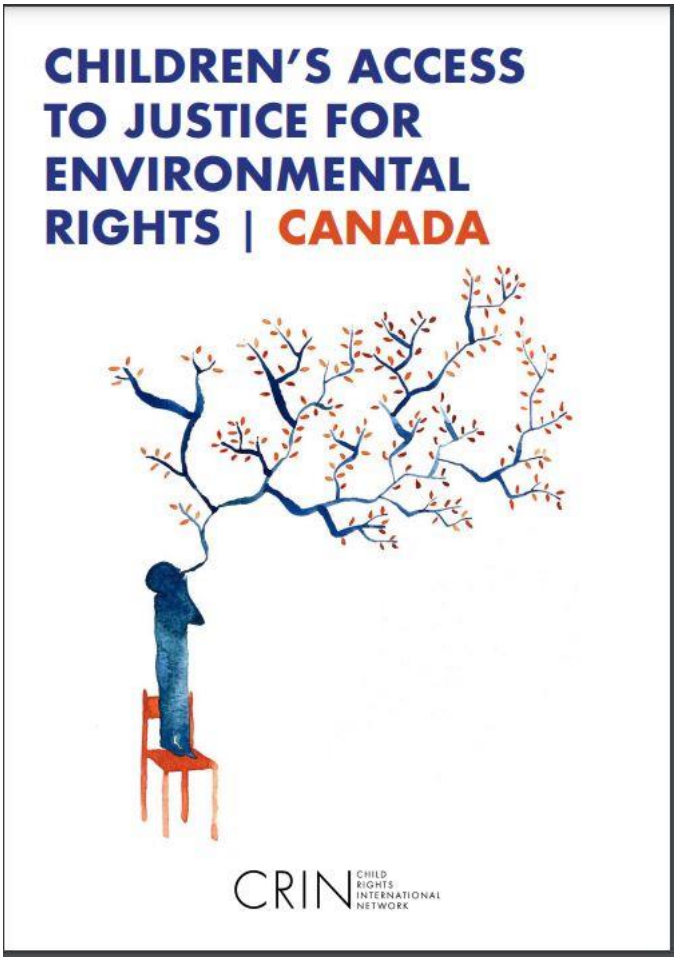
by Elise Burgert and Hannah West

Environmental rights intersect with many other areas, one being children's rights. In the Fall 2022 term, the Child Rights International Network (CRIN) reached out to the Asper Centre looking for reviewers to collaborate on a project documenting children's access to environmental justice throughout the world, and as leaders of the Climate Justice working group, we were asked to review CRIN's report on children's environmental rights in Canada.

CRIN is an organization based out of the UK that was endeavoring to compile a thorough guide of access to children's environmental rights around the world. Their report on Canada substantively covers what rights are protected in the Canadian constitution, how the courts have applied these rights in the main climate change cases, how intergenerational equity has been considered by the courts, environmental protection legislation (including legislative reform), and pollution control efforts. The report also deals with access to courts, including statutory, constitutional and common law avenues to standing, the specific treatment of child plaintiffs, the burden and standard of proof in cases, limitation periods, and the availability (or lack of availability) of legal aid. The report covers the remedies that courts can impose in environmental cases, as well as which remedies courts are actually inclined to order. Finally, the CRIN report covers civil and political rights and how these apply to children.

Our role in the project was to review CRIN's report on Canada. We were able to add some context that an international organization might not be aware of, such as cultural differences between provinces and how those influence the general attitudes of different courts, as well as some of the differences in what kinds of services different Canadian public interest environmental law firms provide. Overall, we were happy to contribute to the project because research regarding the connections between children's rights and environmental justice is important for ensuring that children's rights are represented and advocated for, as well as for highlighting where children's rights are lagging behind the rights of other populations.

Elise Burgert and ***Hannah West*** are JD students at the Faculty of Law and are the current co-leaders of the Asper Centre's Climate Justice student working group.



Protecting and Enhancing Reproductive Justice in Canada: *An Update from the Reproductive Rights Student Working Group*

by Lauren di Felice

This year, the Asper Centre's Reproductive Rights Working Group will publish a report on the state of reproductive justice in Canada.

This new working group developed as a reaction to the *Dobbs v. Jackson Women's Health Organization (2022)* decision in the United States. The U.S Supreme Court overturned abortion access as a constitutional right, allowing individual states to regulate abortion as they see fit. Several states had trigger bans that immediately came into effect with varying degrees of restriction. There has been ample concern about how the decision would limit access to reproductive justice in the U.S., and how the decision may impact reproductive rights in Canada. The working group explored the current status of reproductive rights in Canada and hosted a roundtable of experts to gather recommendations for future developments.

The upcoming report features an overview of the landscape of reproductive rights in Canada and the main obstacles of achieving an equitable and effective system. It also outlines expert recommendations yielded through a roundtable discussion hosted by the working group earlier this year.

The group's student co-leaders are Lauren Di Felice, Vivienne Stern, Ian T. D. Thomson, and Laura Clerk. Under the supervision of Professor Emerita Rebecca Cook, the Co-Director of the International Reproductive and Sexual Health Law Program, 12 law students conducted research on the following four topics:

(1) Access and use of abortion services;
(2) International and comparative constitutional norms regarding access and use;
(3) Cross border issues; and
(4) Constitutional amendment and legal developments.

The students identified some of the main legal issues on each topic and developed questions for the experts, including:

-Where are there gaps in services, from the perspective of different subgroups of people seeking access to abortions (e.g., adolescents, Indigenous peoples, and migrants)?
-What actions are being taken by individuals impacted by the restrictions on reproductive services and their allies on the U.S/Mexican and U.S/Canadian borders?
-What are the advantages and disadvantages of pursuing a constitutional amendment or legislation?

The expert roundtable brought together leading minds in the field to answer these questions, including: (i) Joanna Erdman, the chair of the Global Health Advisory Committee of Dalhousie's Public Health Program. Joanna serves on the advisory board of the Women's Rights Program, Open Society Foundations. She is also a past chair of the World Health Organization's Department of Reproductive Health and Research Gender and Rights Advisory Panel; (ii) Kat Owens, the project director of Leaf, who currently leads LEAF's Reproductive Justice Project; and (iii) Dr. Angela Foster has led multi-methods research projects on women's health in Asia, Europe, the Middle East and North Africa, North America, and Sub-Saharan Africa; she currently leads projects in 22 countries.

In addition to suggesting future areas of research, the experts provided practical changes to enhance reproductive rights in Canada. For example, rather

than pursuing legal change to entrench rights to abortion, experts suggested creating a federal policy on reproductive justice. Implementing this recommendation would require tangible commitments from the federal government, similar to other policies on climate justice and housing policy. The policy would then ensure an allocation of budget towards the issue. This policy could also include tangible measures to meaningfully support those impacted by reproductive services throughout their lives.

The final report with the full set of recommendations is set to be published in the summer of 2023. Stay tuned!

Lauren Di Felice is a 2L student at the Faculty of Law and a co-leader of the Asper Centre's Reproductive Rights Student Working Group in 2022/2023.

Stop Skipping Section 15!

STCA at the Supreme Court

by Talia Wolfe

The case of Canadian Council for Refugees, et al. v. Minister of Citizenship and Immigration, et al. reached the Supreme Court in late 2021 after a protracted battle in the federal courts. The case itself questions the constitutionality of the Safe Third Country Agreement (STCA) between Canada and the United States and associated provisions within the Immigration and Refugee Protection Act (IRPA). Beyond arguing that provisions of the STCA were ultra vires, the Canadian Council for Refugees argued the combined effects of the agreement and associated legislation unjustifiably infringed sections 7 and 15 of the Charter.

The need for such a challenge arose from the swarm of evidence emanating from the US regarding gross mistreatment of refugee claimants in that country. Given that the logic of the STCA relies on the premise that the two countries are functionally equivalent for the purpose of mounting a claim for refugee status, it is no wonder that refugee and human rights organizations are calling for this agreement to be dropped due to the US's recent record.

At the Courts Below

The Applicants in this case encapsulate their concern with two connected allegations of Charter breaches. The Canadian Council for Refugees argues that sending asylum seekers back to the US (as a condition of the STCA) denies them of their section 7 rights to liberty and security of the person because of the US's current policy of detaining and imprisoning "illegal" refugees. The Applicants also argue that, given the US's narrower interpretation of criteria for gender-based asylum claims than in Canada, the STCA has a disproportionate impact on female-identifying refugee claimants, thus violating their section 15 right to equality.

This case was originally heard in the Federal Court in 2020.[1] There, the STCA was found to unjustifiably infringe section 7 of the Charter. Given this

finding, the Court decided to forgo a section 15 analysis and move ahead to a determination of remedies. At the Federal Court of Appeal, Justice Stratas disagreed with both the factual findings of the lower court and whether the STCA or the IRPA should have been targeted by the challenge.[2] The Federal Court of Appeal allowed the appeal without consideration of the Appellant's section 15 argument once again.

Asper Centre at the Supreme Court

After being denied leave to intervene on this issue at the Federal Court of Appeal[3], the Asper Centre – alongside LEAF and West Coast LEAF – was granted leave at the Supreme Court to intervene. The Asper Centre's Director, Cheryl Milne, presented oral arguments at the Supreme Court in October 2022.

The substance of the Asper Centre, LEAF, and West Coast LEAF intervention concerns the treatment of the section 15 analysis in multi-issue Charter litigation. Broadly, the three organizations take serious issue with courts' tendency to refuse to consider an equity claim in favour of resolving the issue in front of them on the basis of another Charter claim. The Interveners assert in their factum (which can be read here) that this pattern of neglect is wrong for three reasons:

(a) A purposive Charter analysis requires a ruling on section 15.[4] Where a claimant presents a mutli-rights claim, all harms must be examined. The purposive approach to the Charter requires that key issues raised under section 15 must be addressed not only to understand the particular harms under that section but also because it can animate, inform, and provide context to harms arising from the violation of other Charter rights.[5] In declining to consider the equality claim before it, a court effectively circumvents an appropriate wholistic analysis of the constitutional challenge.[6] Not only is this a critical neglection of an animating and fundamental purpose of the entire Charter, shirking the section 15 claim alters the government's burden to prove justification under section 1 and modifies the determination of an appropriate remedy in the circumstance.[7]

The purposive approach to the Charter requires that key issues raised under section 15 must be addressed not only to understand the particular harms under that section but also because it can animate, inform, and provide context to harms arising from the violationer rights.

(b) Judicial restraint should not constrain a court from addressing Charter claims properly placed before it.[8] A refusal to engage with key issues in a fully presented Charter equality claim is not justified or appropriate judicial restraint.[9] Such refusal is, in fact, an abdication of the judicial role and responsibility to decide issues that may be dispositive of the constitutional claims raised by the litigation.[10] Courts must engage with all the Charter claims to ensure access to justice and the supremacy of the constitution. The principle of judicial restraint was not meant for a court to prefer one Charter claim over another.[11]

(c) Failure to deal with section 15 minimizes the problem of gender-based violence.[12] Courts must engage in a full contextual and intersectional analysis to appreciate the existing indirect and adverse effects experienced by women and 2SLGBTQQIA survivors of violence.[13] Moreover, given that assembling a section 15 record is incredibly time-consuming and expensive, and that many section 15 claims do not get leave, it is important for cases

that do get heard by the courts to receive a careful analysis. [14] The court's failure to do so raises concerns about fundamental fairness, perpetuation of intersecting inequalities, access to justice, and the rule of law, all of which move in favour of the court hearing and ruling on the section 15 claim.[15]

Looking Forward

The implications of this intervention have the potential to be highly significant. The crux of the Asper Centre's position is not constrained by the case at bar. The Asper Centre, LEAF, and West Coast LEAF have effectively called for an end to sidestepping difficult considerations of equality in favour of easier and more constrained Charter determinations. Depending on the weight that the Supreme Court gives to this line of argument, this case may represent a turn towards increased judicial respect for section 15 claims and an associated broadening of available and useful jurisprudence on the subject.

It is situations like this that remind us that justice must be effectuated not only on the facts but also on the system. The protections guaranteed in the Charter must be guarded fiercely and actualized constantly. The time is now to see if the highest court in the country agrees that Charter protections cannot and should not be cast aside for the sake of judicial minimalism.

[1] *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770.
[2] *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72.
[3] *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, leave to intervene refused (27 January, 2021).
[4] *Canadian Council for Refugees, et al. v. Minister of Citizenship and Immigration, et al.*, Court File No. 39749 (Factum of the Joint Interveners David Asper Centre for Constitutional Rights, West Coast Legal Education and Action Fund Association and Women's Legal Education and Fund Inc. at paras 4-5) [Factum of the Joint Interveners].
[5] *Ibid*, at para 7.
[6] *Ibid*, at para 4.
[7] *Ibid*, at paras 4 and 9-10.
[8] *Ibid*, at para 18.
[9] *Ibid*, at para 22
[10] *Ibid*.
[1] *Ibid*.
[12] *Ibid*, at para 24.
[13] *Ibid*, at para 28.
[14] *Ibid*, at para 29.
[15] *Ibid*.

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Advancing the Right to a Healthy Environment in Ontario: An update from the Climate Justice Working Group

by Elise Burgert and Hannah West

The Right to a Healthy Environment is an actively developing concept in Canadian law. What form this right would take is the subject of current debate and law reform efforts, from an active Bill seeking to add the right to the Canadian Environmental Protection Act, to stronger but more ambitious calls to explicitly constitutionalize the right in the Charter.

The strengthening of environmental rights is a pressing issue as environmental crises like climate change worsen and become serious issues of concern for many Canadians. Moreover, there are a number of environmental rights available to Canadians in current law, as well as potential to find environmental rights under current rights regimes (such as climate rights under the Charter) being explored in ongoing cases.

However, Ontario faces a serious lack of publicly accessible information on what environmental rights are available to people living in Ontario. Changing political environments and legislation have created a complicated web of rights, many of which are not functionally what they appear to be on paper. For example, as part of a widespread weakening of environmental protections, the latest Ontario government removed the Environmental Commissioner, which was supposed to be an oversight and public legal education body for implementing the Ontario Environmental Bill of Rights. This has left an absence of public legal information in a dynamic field, despite significant potential for the use of environmental rights in the coming decades of climate action.

Our working group seeks to fill the gap in up-to-date publicly available legal information on environmental rights available to Ontarians. The goal of the Asper Centre working group is to create a plain language handbook on Environmental Rights in On-

tario which will be distributed to community members and activists working in this space.

> **The strengthening of environmental rights is a pressing issue as environmental crises like climate change worsen and become serious issues of concern for many Canadians.**

To this end, the working group members conducted research on the different legal tools that provide environmental rights in Ontario, specifically the Ontario Environmental Bill of Rights, the Charter, nuisance law, law reform, and emerging source of environmental rights. The working group members then translated this legal research into a plain language handbook that is accessible to the general public. The plain language is being reviewed by leading practitioners in the field, namely lawyers from CELA, Ecojustice, and Pacific CELL to ensure accuracy.

In the future, the working group leaders intend to facilitate the distribution of the plain language guide to community groups who have expressed an interest in this topic.

Alongside aiming to produce a plain language guide that is actually useful to community members and activists in the field, the leaders of the working group wanted to create a useful learning experience for the first year students who worked on this project. In this regard, all the working group members were asked to write a legal memo and given feedback about the quality and style of their work. Additionally, the first year students were given the opportunity to develop their plain language writing skills, which is not a skill that is often taught to students in law school. The working group leaders have noticed how engaged the first year students have been with this topic and how hard they have all worked to ensure that the plain language handbook is accessible and interesting for the general public.

Elise Burgert and ***Hannah West*** are 3L and 2L JD students at the Faculty of Law and are the current co-leaders of the Asper Centre's Climate Justice student working group.

Consent and the Constitution:

A working group update

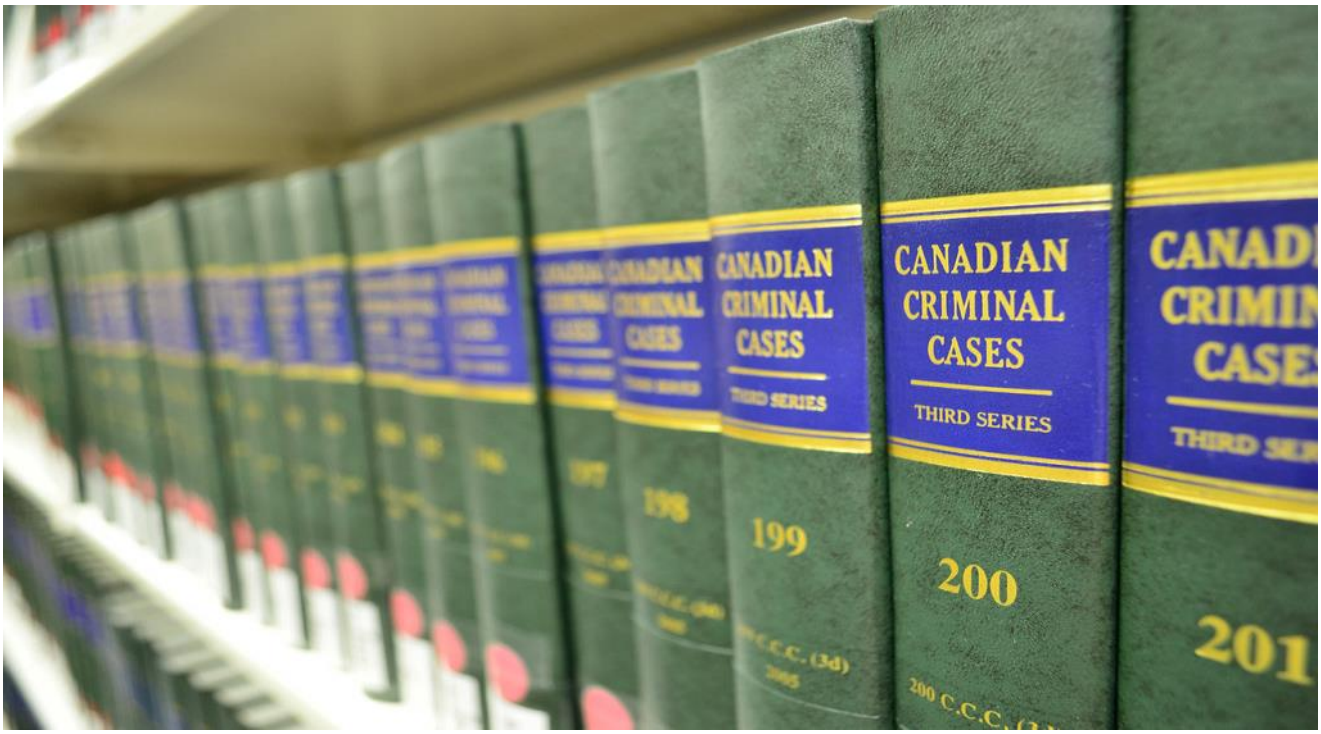
By Kathryn Mullins

When the Supreme Court of Canada released its decision in R v Brown 2022 SCC 18, social media websites quickly became rife with misleading posts claiming that drunkenness had become a defence to a charge of sexual assault in Canada. Originating from non-legal sources and going largely unquestioned, the posts spread like wildfire, causing a panic among many users - for good reason. For the leaders of the Consent and the Constitution Working Group, the experience was eye-opening. After spending months studying criminal and constitutional law in 1L, we realized that the gap between the public understanding of the law surrounding sexual violence and that of law students and lawyers was unacceptably wide.

Our working group set out to demystify R v Brown, and in the process of brainstorming solutions, we also decided to address other 2022 SCC decisions related to criminal sexual assault law: R v Kirkpatrick 2022 SCC 33 and R v JJ 2022 SCC 28. Though the facts and legal issues are very different, all three are newsworthy cases about which there appeared to be confusion and/or misunderstanding among wider non-legal audiences.

Another interesting aspect of these cases that our working group has sought to consider is the fact that they involve a complicated dilemma: they are fundamentally about balancing the legal rights (ss. 7-12 of the Charter) of accused persons with the dignity and equality rights of complainants, as well as the interests of survivors of sexual violence more generally. This controversial aspect of jurisprudentially significant sexual assault cases is perhaps why they receive so much attention - especially where they are perceived to shift the balance too far away from survivors.

For that reason, the goal of the Consent and the Constitution Working Group is to address this widespread misinformation and ultimately to inform both survivors and the general public about what



rights complainants in sexual assault proceedings have in light of R v Brown, R v Kirkpatrick and R v JJ.

Our Progress So Far

With the help of Professor Martha Shaffer, working group members began in Fall 2022 by breaking down the cases into their key components. Subgroups each focused on one of the three cases. They had two overarching concerns in mind: how are the rights of complainants engaged, and how has media or social media caused confusion about the purpose and meaning of the case?

Members prepared case briefs summarizing the most important information about their respective cases, and worked with Professor Shaffer to ensure that their briefs provided clear and accurate information. Now, over the course of the spring semester, the members are working hard to create accessible public legal education materials. These materials will be shared with partner organizations: the National Association of Women and the Law, and Students for Consent Culture Canada.

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Next Steps

Working group members will work on tailoring their public legal education materials to the appropriate audience (including, for example, survivors considering pursuing criminal charges, or post-secondary students who have experienced sexual violence on campus). Their materials will educate readers in a practical and easy-to-understand way about what they need to know in light of the three cases - for example, with R v JJ, that complainants have the right to participate in records hearings, with R v Kirkpatrick, that where condom use was an essential condition of consent, a failure to use condoms can amount to sexual assault, and with R v Brown, that mere drunkenness will not defeat a sexual assault charge.

Our goal is to partner with local student groups to share these resources both on social media and in physical locations so that victims of sexual violence and the larger public have access to information that is thoroughly fact-checked and does not misrepresent the law in a way that causes unnecessary fear. In light of the fact that sexual violence is already severely underreported,[1] it is important that public confidence in the justice system is not undermined by inaccurate information that further discourages survivors from reporting and/or pursuing criminal charges if they so choose.

Stay tuned for the release of our public legal education materials, as well as the case briefs and links to other resources which will accompany them for those seeking further understanding.

Kathryn Mullins is a 2L student at U of T Law, and a co-leader of the Asper Centre's Consent and the Constitution Student Working Group

Improving Police Accountability in Canada:
Bill C-20 and the Police Oversight Working Group

by Aakriti Pasricha

The murder of George Floyd in May 2020 brought the issue of police misconduct to the forefront of public consciousness and sparked widespread action on the matter. Although this tragedy occurred in the United States, Canada has a similar history of oppressing Black, Indigenous, and other minority groups, and is not immune to this issue. In Canada, strengthening police oversight on the federal level is an important aspect of maintaining the rule of law and ensuring that police are held accountable to the public they serve.

Presently, the Civilian Review and Complaints Commission (CRCC,) which oversees the Royal Canadian Mounted Police (RCMP), has been criticized for its inefficacy in providing meaningful independent oversight due to its limited mandate and resource limitations. Moreover, the Canada Border Services Agency (CBSA) currently has no independent review and complaints mechanism, which raises concerns about its accountability.

To address these shortcomings, in January 2020, the federal government tabled Bill C-3, which was an act aimed at amending the RCMP Act and CBSA Act, to overhaul the oversight framework of federal law enforcement in Canada. Bill C-20 is the successor to Bill C-3 and proposed to establish the Public Complaints and Review Commission (PCRC), which would oversee both the RCMP and CBSA. The PCRC is intended to replace the CRCC, which currently exists for the RCMP, and will establish the first-ever civilian oversight body for the CBSA. In particular, the PCRC will be able to review and investigate complaints concerning the conduct and level of service of RCMP and CBSA personnel, and conduct reviews of specified activities of RCMP and CBSA members.

This year, the Asper Centre's Police Oversight Student Working Group assisted in researching ways to improve the accessibility, fairness, transparency, independence, and effectiveness of the proposed PCRC as outlined in Bill C-20, and drafted a parliamentary submission about the Bill. The law students worked under the supervision of faculty advisor Professor Kent Roach and in conjunction with the Canadian Civil Liberties Association (CCLA).

The Police Oversight Student Working Group divided their research into five questions, to be completed in pairs, during the start of the 2022 academic year. The research questions focused on the independence, fairness, effectiveness, accessibility, and transparency of police oversight bodies. At the end of the semester, each pair submitted a research memo relating to their respective question.

Furthermore, during the fall, students had the opportunity to attend a meeting with Professor Roach to pose questions based on their preliminary research. Additionally, students also had the chance to participate in a technical briefing session on Bill C-20 enabling them to pose questions to government officials, in order to gain a deeper understanding of the Bill.

In the Winter term, each student was tasked with drafting one section of the parliamentary submission on Bill C-20, building off their research from the previous semester. As part of the submission, the recommendation I worked on was advocating for complainants to have a right to regular updates on the status of any disciplinary process that derives from their complaint to the PCRC. As Bill C-20 currently stands, complainants have almost no rights to information or participation in the discipli-

nary process. Transparency and inclusivity is an important aspect of accountability because it ensures that complainants are kept apprised of the progress of their complaint, and allows them to have a voice in disciplinary matters. Nonetheless, it was recommended that updates to complainants should be provided with clarity, in a culturally competent manner, and without unnecessary delay.

Through this experience, I, along with my peers, was able to contribute to promoting police accountability and access to justice in Canada as it relates to the RCMP and CBSA, and ensuring adherence to the rule of law. Personally, I gained a fulsome understanding of policing, administrative law, and criminal law through this process. Further, I honed my research and memo writing skills, an extremely valuable asset for my legal career.

During the second semester, I learned to adapt my writing style to contribute to a parliamentary submission by making recommendations that were clear and succinct, in order to communicate what changes should be made to Bill C-20 and justify them appropriately.

Overall, this experience was extremely rewarding for me, as I was able to collaborate with other law students to contribute to improving federal police accountability in Canada. I also enjoyed the enriching discussions I had with my group members while working on our memo on improving fairness in police oversight. The legislative changes that Bill C-20 will usher in have the potential to rebuild trust between marginalized communities and the police. It is essential that police oversight bodies are effective, independent, transparent, and accessible to ensure that federal law enforcement is held accountable for their actions and that justice is served. The work of the Police Oversight Student Working Group is a crucial step towards achieving this goal and is one step closer to a more just and equitable society.

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