ASPER CENTRE SYMPOSIUM

Re-Opening the Door:
Litigating Positive Rights under the *Canadian Charter of Rights and Freedoms*

Friday Jan 16, 2026

Jackman Faculty of Law, University of Toronto

SYMPOSIUM AGENDA

8:45am-9:00am	Registration & Welcome (Outside Room P120, Jackman Building)		
9:00am-9:45am	Keynote Address	**Aoife Nolan** (School of Law, University of Nottingham)**,** Enforcing Positive Social Rights in an Anti-Democratic Era	Room P120, Jackman Building
9:45am-11:00am	Plenary: Government duties and responsibilities	**Joel Bakan,** Staying Positive About Positive Rights **Henry Federer,** The Two-Tier Conception of a Charter Right **Anthony Sangiuliano,** Omissive Causation and Exposition	Room P120, Jackman Building
11:00am-11:15am	Break (Outside Room P120, Jackman Building)		
11:15am-12:30pm	Concurrent Panel A: MAiD in Canada	**Joanne Cave,** MAiD After Carter: Legislative Change, Dialogue Theory and Practical Lessons for Charter Litigators **Trudo Lemmens & Kanksha M. Ghimire,** Negative and Positive Rights in the Context of Eldercare: Contrasting MAiD and Better Care Litigation **Jennifer Nason,** A Positive Rights Approach to Protecting the Right to Life of Involuntary Psychiatric Patients Eligible for MAiD	Room P115, Jackman Building

	Concurrent Panel B: Climate justice	**Brooke Granovsky,** Opening a Window: How Mathur Changed the Positive-Negative Rights Landscape **Nathan Hume,** Dignity, Existential Threats, and Democracy **Leslie Anne St. Amour,** Reassessing Positive Rights Through Climate Litigation: A Comment on La Rose v. Canada	Room P120, Jackman Building
12:30pm-1:30pm	Lunch (Outside Room P120, Jackman Building)		
1:30pm-2:45pm	Plenary: Judicial anxieties	**Benjamin Perryman,** The Overlapping Powers Doctrine, **Kent Roach,** The Inevitability of Positive Rights and Remedies: The Case of Criminal Justice **Margot Young,** The Company It Keeps: The Distinction Between Positive and Negative Rights **Angela Cameron & Lara Koerner-Yeo**, Gosselin 20 Years Later: Presumption of Conformity and the Role of Positive Rights under the Charter	Room P120, Jackman Building
2:45pm-3:00pm	Break (Outside Room P120, Jackman Building)		
3:00pm-4:15pm	Concurrent Panel C: Canada in comparison	**Rob De Luca**, Positive Fundamental Freedoms as Reflecting a Canadian Vision: Revisiting the U.S. Comparison **Saambavi Mano**, Duty, Deference, and Discretion in the Charter Analysis **Sanjay Ruparelia,** Litigating positive rights: Critical reflections from the global South	Room P115, Jackman Building
	Concurrent Panel D: The power of positive rights	**Rob Currie & Alex Neve**, Could Positive Rights Crack the Extradition Dilemma? **Sujit Choudhry,** Positive Constitutional Rights for the Unhoused: Extending Adams **Dr. Seána Glennon,** Positive Obligations by Another Name? Section 7 of the *Charter* and the Constitutional Limits on Withdrawing Supervised Consumption Services **Tanzim Rashid,** Constitutional Triangulation: R v. Bykovetz and the Need to Redefine the State's Role in Charter Regulation	Room P120, Jackman Building
4:15pm-5:30pm	Reception (Fireplace Lounge, Flavelle House)		

SPEAKERS' BIOS & ABSTRACTS

KEYNOTE (9:00am-9:45am in P120)

Aoife Nolan

Enforcing Positive Social Rights in an Anti-Democratic Era

Aoife Nolan is Professor of International Human Rights Law and Director of the Human Rights Law Centre at the University of Nottingham. Since 2023, she has been President of the Council of Europe's European Committee of Social Rights, Europe's leading economic and social rights monitoring body, to which she was elected in in 2017, having served as Vice-President from 2021-22. Aoife's professional experience in human rights and constitutional law straddles the legal, policy, practitioner and academic fields. She has acted as an expert advisor to several governments as well as a wide range of international and national organisations and bodies working on human rights issues, including numerous UN Special Procedures, UN treaty bodies, the Council of Europe, the World Bank multiple NHRIs and NGOs. She has held visiting positions at academic institutions in Europe, Africa, the US and Australia. In addition to her academic role at Nottingham, she is currently a Visiting Professor at the Grantham Research Institute on Climate Change and the Environment, LSE, and at Ulster University. She is an Academic Expert member at Doughty Street Chambers where she co-leads the Children's Rights Group and is a member of the Doughty Street International Steering Group. In 2025, she was elected a Fellow of the Royal Society of Arts on the basis of her "world-leading expertise and practice on the rights of children, especially in relation to the socio-economic impacts of poverty and cost of living".

PLENARY: GOV'T DUTIES & RESPONSIBILITIES (9:45-11:00am in P120)

Joel Bakan

Staying Positive About Positive Rights

Claims that governments have Charter obligations to create laws and policies that protect people from problems like homelessness, poverty, ill health, environmental pollution, and climate change defy the "archetypal feature" of a Charter claim, as courts have described it – namely, that the claim challenge the presence of law, not its absence. In cases like Adams, Gosselin, La Rosa, and Mather, to name a few, courts affirm that the Charter protects vulnerable people from coercive state action, but that it does not impose obligations on states to take action to protect people for socioeconomic ills. Yet, it is the latter protection most vulnerable people need most of the time. The threats they face are not (primarily) from laws that coerce them, but from a lack of laws needed to protect them. The excerpted chapters from my recent book, Just Rights: The Canadian Charter in Troubled Times (forthcoming, University of Toronto Press, 2026), argue that Charter law should transcend this limitation – that courts should conceive Charter rights as obligating state actors to protect people from socio-economic ills, at least in some circumstances. Part I of the first chapter documents Canadian courts' persistent rejection of freestanding positive rights. Part II reveals how, despite that rejection, courts have developed a jurisprudence of non-freestanding positive rights. Part III examines two leading Charter cases on climate change, Mathur v Ontario (Mathur) and La Rose v Canada (La Rose), each of which confirms judicial rejection of freestanding positive rights, while also casting doubt on judicial commitment to non-freestanding positive rights. Part IV discusses how, despite all of this, there are compelling jurisprudential pathways for courts to recognize freestanding positive rights. The second excerpted chapter, which is the concluding chapter of the book, underlines the case for courts to embrace freestanding positive rights while canvassing some possible barriers to their doing so.

Joel Bakan is Professor of Law and Distinguished University Scholar at the Peter A. Allard School of Law at the University of British Columbia. His recent book, Just Rights: The Canadian Charter in Troubled Times (forthcoming, 2026), follows release of his book and film, The New Corporation (2020), which received international acclaim and numerous awards, including best documentary director and writer nominations for Bakan at the 2022 Canadian Screen Awards. The New Corporation is a sequel to Bakan's award-winning and widely translated book and film, The Corporation (2004). Other of Bakan's works include Just Words (1997) and Childhood Under Siege (2012), as well as numerous contributions to scholarly journals, edited collections, textbooks, and media.

Henry Federer *The Two-Tier Conception of a Charter Right*

What is a positive Charter right? Canadian courts, with some narrow exceptions, hold that they don't exist. When a litigant seeks to make a positive Charter claim—that is, a claim to obligate state action—Canadian courts conceptualize Charter rights as multidimensional. This is because, courts claim, Charter rights can impose both negative duties and positive obligations on the state; accordingly, it is not accurate to describe a Charter right as being either negative or positive. This article first argues that Canadian courts adoption of the multidimensional approach to conceptualizing positive claims under the Charter is a source of constitutional confusion. Descriptively, it fails to provide a comprehensive account of how courts characterize the differences between the positive obligations and negative duties a Charter right can produce. Normatively, it does not provide a useful framework for understanding how Charter rights can be used to impose positive obligations on the state from a litigation perspective. The article then goes onto present a better way to understand how Charter rights can impose positive obligations on the state. The "Two-Tier Conception" characterizes a right based on the primary and secondary duties it creates. At first instance, a right is characterized based on whether it primarily imposes a negative duty or positive obligation on the state. At second instance, the right is recharacterized based on whether its primary duty or obligation, once engaged, creates a secondary duty or obligation. Applied to the Charter, the two-tier conception analytically clarifies how Charter rights can be used to impose positive obligations on the state.

Henry Federer is a J.S.D. candidate at NYU School of Law, where he is affiliated with the Center for Law and Philosophy. His doctoral project, "Liberal Egalitarianism and Positive Constitutional Rights", evaluates the relationship between positive constitutional rights, political institutions, and liberal egalitarian theories of justice. More generally, his academic interests include constitutional law and theory, administrative law, legal and political philosophy, and international trade law. Previously, Henry completed a LL.M. in Legal Theory at NYU Law and received his J.D. from Queen's University. Before commencing graduate legal studies, he worked as a litigation associate in Toronto.

Anthony Sangiuliano

Omissive Causation and Exposition

Positive constitutional rights impose correlative duties on the state to undertake certain actions, such as enacting laws that protect the right-holder from third-party harm. But they raise a question that has gone unaddressed in the comparative constitutional law literature: how can a state omission to take such action cause a violation of the relevant right? In the literature on legal causation, little has been written on causation in public law, and even less on causation of rights infringements by state omission. This paper begins to redress these gaps. I review recent developments in Canadian constitutional law that show how the legitimacy of positive rights requires us to reckon with omissive causation. I then rehearse a philosophical argument for why omissive causation is not essentially descriptive or metaphysical in nature but normative or evaluative; the claim that an agent's omission has caused an outcome depends on whether, for reasons of morality, justice, or public policy, an agent has a duty to take action to prevent a given outcome. These discussions provide a backdrop for

deploying an analytical device that in previous work I called “exposition.” Exposition is a technique for interpreting conclusions about causation in judicial opinions in constitutional law that directs an interpreter to look behind what present as factual causal claims and expose the more fundamental normative claims that the court tacitly endorses while masking them as purely factual. The present work offers an opportunity to demonstrate the utility of exposition for reading constitutional judgments about positive rights and duties and omissive causation. I perform exposition on a recent judgment of the Supreme Court of Canada in case called Société des casinos, which concerned whether a state omission to include certain workers under protective labour relations legislation caused a violation of the workers’ freedom of association. In the process, I deepen the comparative credentials of exposition and highlight cross-jurisdictional convergence on it by showing how my expository interpretation of this Canadian judgment parallels scholarly analysis of omissive causation under the European Convention on Human Rights.

Anthony Sangiuliano is an Assistant Professor at Osgoode Hall Law School and an Associate Member of the Graduate Faculty of the York University Department of Philosophy. He holds a J.D. from Osgoode and a Ph.D. from the Sage School of Philosophy at Cornell University and was a law clerk at the Ontario Court of Appeal and Supreme Court of Canada. He writes on the morality and law of antidiscrimination, in both its public and private law dimensions, as well as health law and bioethics, legal and ethical issues raised by artificial intelligence, and comparative constitutional theory. His work has been published in the Oxford Journal of Legal Studies, the University of Toronto Law Journal, the McGill Law Journal, Law & Philosophy, Global Constitutionalism, the Canadian Journal of Law and Jurisprudence, and the American Journal of Law and Equality. He is also an editor of the Canadian Constitutional Law textbook published by Emond. One of his current projects examines the role of legal causation in comparative constitutional theory. His writing on this project is forthcoming in the International Journal of Constitutional Law.

PANEL A: MAiD in CANADA (11:15am–12:30pm in P115)

Joanne Cave

MAiD After Carter: Legislative Change, Dialogue Theory and Practical Lessons for Charter Litigators

Carter v Canada has never been overtly framed as a “positive rights” case in Canadian Charter litigation, but the impact it has had on the Canadian policy landscape for medical assistance in dying (MAiD) has been unmistakable. The Government of Canada has now developed a robust legislative framework for assessing MAiD requests and is currently preparing legislative amendments for the inclusion of mental illness as an eligible medical condition, to be implemented in 2027. This paper will trace advocacy, policy change and Charter litigation efforts regarding MAiD prior to Carter, followed by an analysis of how the legislative and regulatory landscape for MAiD changed after Carter and the remaining gaps in Canada’s legislative and regulatory framework for MAiD. Situated within the concept of dialogue theory, this paper will conclude by discussing how Charter litigation and advocacy and policy change efforts can complement and reinforce each other to achieve lasting social change. This paper is intended to provide practical recommendations and lessons learned for legal practitioners engaged in Charter litigation or political advocacy.

Joanne Cave leads Cave Law, a law and policy advisory firm based in Edmonton, Alberta. Her legal practice focuses on workplace investigations, labour, employment, human rights, administrative and constitutional law. She also provides policy research and advisory services to clients across Canada on various social and economic policy issues. Joanne started her legal career by clerking at the Court of Appeal of Alberta and the Supreme Court of Canada in the Chambers of Chief Justice Richard Wagner. She holds a Juris Doctor with Distinction from the University of Alberta Faculty of Law, a

Masters in Science in Comparative Social Policy (thesis-based) and a Masters in Science in Public Policy (course-based) from the University of Oxford and a Bachelor of Arts with High Distinction from the University of Toronto. Joanne completed her studies at the University of Oxford as a Rhodes Scholar.

Trudo Lemmens & Kanksha M. Ghimire

Negative and Positive Rights in the Context of Eldercare: Contrasting MAiD and Better Care Litigation

Canadian law reveals a troubling imbalance: robust state facilitation of death through Medical Assistance in Dying (MAiD) alongside fragile supports for dignified living. In Carter v. Canada (AG), the Supreme Court applied section 7 of the Canadian Charter of Rights and Freedoms as a negative constraint on state power—invalidating the blanket ban on (consensual) homicide and assisted suicide and expressly not compelling providers to ensure the prior provision of alternatives to ending of life—while deferring policy design to legislatures. In response, Canadian parliament introduced an exemption to the criminal code, creating a Medical Assistance in Dying (MAID) framework delivered through provincial health systems and covered by public insurance. In contrast, in Ontario Health Coalition v. Ontario (AG), the Ontario Superior Court upheld legislation authorizing mandatory transfers of elderly patients to long-term care (LTC) homes under penalty of $400 per day, disregarding meaningful autonomy and post-COVID evidence on the significant harms and threats to life of social isolation.

This paper situates these cases within a broader policy gap: MAID is widely accessible, while long-term care options remain inadequate, creating structural pressures that undermine voluntariness in end-of-life decision making. Empirical data on hospital bed shortages, LTC vulnerabilities, and MAID uptake underscore the stakes. In contrast to Canadian constitutional case-law, international human rights norms—the Vienna and Madrid Plans and UN Human Rights Conventions and authoritative interpretations—reinforce that autonomy requires both freedom from interference and conditions for living with dignity. We argue for a rights-based eldercare framework. Without systemic reform, Canada risks perpetuating a model where choice at the end of life is geared towards opting for a medical system hastened death, defended as some form of constitutional right, while choice to live with dignity is not meaningfully protected.

Trudo Lemmens (LicJur KULeuven; LLM Bioethics & DCL McGill) is Professor and Scholl Chair in Health Law and Bioethics at the University of Toronto Jackman Faculty of Law and the Dalla Lana School of Public Health. His research deals with legal, ethical, and policy issues of health care, biomedical research, health product development, and knowledge production, with recent work focusing on human rights, disability rights, and assisted dying (euthanasia and assisted suicide). Professor Lemmens is a fellow of the Canadian Academy of the Health Sciences and of the Hastings Center. He has been a visiting professor at leading academic institutions in Argentina, Belgium, Colombia, New Zealand, the United Kingdom, and the United States. His publications include two co-authored books, several co-authored volumes (including the 2025 McGill-Queens University Press volume Unravelling MAID in Canada: Euthanasia and Assisted Suicide as Medical Care) and more than 150 chapters and articles in leading law, policy, science, medicine and bioethics journals. Professor Lemmens has chaired and been a member of numerous advisory, governance, and ethics committees, including for Health Canada, the World Health Organization, and the Pan American Health Organization. In the last decade, he was a member of two Council of Canadian Academies' expert panels, on medical assistance in dying and on governance of health data. He currently is a member of the Office of the Chief Coroner for Ontario's MAID Death Review Committee. He was also an expert witness for the federal Attorney General in two assisted dying cases.

Kanksha Mahadevia Ghimire (SJD, LLM University of Toronto) is a legal scholar and regulatory expert with over 15 years of global experience in law and regulation. She currently serves as Research

Associate at the University of Toronto Faculty of Law, coordinating an interdisciplinary project on disability rights, public health governance, and pandemic policy funded by the New Frontiers in Research Fund of the Social Sciences and Humanities Research Council. She was an Adjunct Faculty at the University of South Pacific School of Law for over a decade, where she has taught advanced law courses involving 12 South Pacific jurisdictions. Her academic work focuses on health law, international law, and regulatory governance, with a strong emphasis on human rights and equity in health systems. Her publications include a co-authored book, several book chapters, technical papers for the World Health Organization, a policy report for the Office of the Privacy Commissioner of Canada and multiple scholarly papers in leading academic journals. Dr. Ghimire combines rigorous academic analysis with practical insights from her extensive professional experience, including advisory roles with the World Bank. Her scholarship and practice reflect a deep commitment to advancing human rights, regulatory accountability, and inclusive health systems globally.

Jennifer Nason

A Positive Rights Approach to Protecting the Right to Life of Involuntary Psychiatric Patients Eligible for MAiD

The Charter right to life has generally been interpreted as conferring "negative" rights only: people have the right to be free of state interference depriving them of their life, liberty, and security of the person, but they do not have a positive right to state action that maximizes or guarantees these goods. However, in Gosselin c. Québec (Procureur general), the Supreme Court of Canada held that in special circumstances, the right to life could ground positive state obligations. In this paper, I examine the case of medical assistance in dying ("MAiD") for individuals subject to involuntary psychiatric detention without additional safeguards. I argue that this situation creates just the sort of special circumstances the Supreme Court was alluding to in Gosselin. Involuntary psychiatric detention severely reduces a person's autonomy and causes significant suffering through the deprivation of a person's basic liberties and practices such as seclusion and restraint. This creates the risk that detention itself, rather than a medical condition, will drive MAiD requests from this population, resulting in a threat to involuntary psychiatric detainees' right to life. I argue that the fiduciary nature of the relationship between involuntary detainees and provincial governments, together with governments' active role in creating the conditions that could drive involuntary patients towards death, ground positive section 7 obligations to create additional safeguards for involuntary patients seeking MAiD.

Jennifer Nason is a lawyer with the Mental Health Law Program at the Community Legal Assistance Society in Vancouver. She provides representation to people who have been involuntarily detained under the Mental Health Act, as well as to people who are under the jurisdiction of the British Columbia Review Board. She also teaches Mental Health Law as a sessional instructor at the University of Victoria Faculty of Law. Jennifer has a JD from the University of Victoria and an LLM from the University of Toronto. She wrote her Master's thesis on the issues associated with extending medical assistance in dying to involuntary psychiatric patients.

PANEL B: CLIMATE JUSTICE (11:15am – 12:30pm in P120)

Brooke Granovsky

Opening a Window: How Mathur Changed the Positive-Negative Rights Landscape

This case comment explores the impact of Mathur v. Ontario, 2024 ONCA 762, leave to appeal to SCC dismissed, on the litigation of positive rights claims against government actors. First, I set out the distinction between positive and negative rights in constitutional law. I describe the burden to establish an infringement of either a positive or a negative right. Second, I situate the Court of Appeal's decision

in Mathur v. Ontario within the positive-negative rights framework. I discuss how the Court of Appeal's reasons on s. 7 infringement depart from the jurisprudential understanding of state obligations as either positive or negative, and instead carve out a novel middle-ground option: government undertakings that, while not compelled by the Charter, may nonetheless give rise to Charter obligations when voluntarily assumed. I focus on why the Court found that Ontario had voluntarily committed to an emissions reduction target and highlight which of the applicants' arguments were most influential in supporting this finding. Third, I explore the broader doctrinal and strategic consequences of Mathur on positive rights litigation. I consider how future applicants might draw on Mathur to reframe positive claims as negative claims requiring a Charter-compliant response, to rebut the government's interpretation of its own legislation, and to support progressive litigation on sociopolitical issues beyond climate change. In concluding, I remark on the potential of Mathur to recalibrate the boundaries of state accountability under the Charter.

Brooke Granovsky is an Assistant Crown Attorney with the Ministry of the Attorney General, currently practicing in the Sudbury Crown Attorney's Office. She previously articled in the Constitutional Law Branch, where she worked on Charter litigation and public law matters at all levels of court. Brooke holds a BA from Brandeis University and a JD from Western University, where she received the Royal Society of Canada's Justice Rosalie Silberman Abella Prize for her commitment to equity and social justice. Her research interests lie at the intersection of criminal law, constitutional litigation, and the role of courts in adjudicating novel Charter claims.

Nathan Hume

Dignity, Existential Threats, and Democracy

In recent decades, Canadian constitutional jurisprudence has treated dignity as synonymous with personal autonomy and has grounded Charter analysis (particularly under ss. 7 and 15) in a conception of the individual as a self-determining rights-bearer entitled primarily to freedom from state interference. That liberal understanding of dignity has reinforced a structural preference for negative rights, judicial restraint, and deference to legislative choices concerning the distribution of social benefits and economic risk, while limiting the development of positive constitutional obligations. This paper argues that existential threats to our constitutional order, such as climate change, pandemics, and disinformation, expose the limits of dignity conceived as autonomy. Examining the Supreme Court of Canada's jurisprudence across three eras of Charter interpretation, the paper identifies and elaborates the democratic aspect of dignity, which prohibits objectification and requires preservation of the institutional and material conditions for meaningful participation in collective self-government over time. By recovering democratic dignity from within existing case law, the paper explores how Canadian constitutionalism can meet the existential demands of the twenty-first century without abandoning its foundational commitments.

Nathan Hume is a partner at Ratcliff LLP. He represents Indigenous governments and public interest organizations in litigation, negotiations, and regulatory matters. His practice focuses on the intersection of constitutional, environmental, and financial issues. Nathan is qualified to practice law in British Columbia and New York. He has received law degrees from Columbia University and the University of Toronto, and he has published articles on a range of topics from international law and federalism to civil procedure and mortgage finance.

Leslie Anne St. Amour

Reassessing Positive Rights Through Climate Litigation: A Comment on La Rose v. Canada

The Federal Court of Appeal in 2023 ruled on Motions to Strike in the matters of La Rose and Misdzi Yikh together in La Rose v Canada FCA 2023. The FCA held that both cases could be heard on the basis that they were not strictly positive rights cases, and they provided a specific legislative action to which the deprivation of s. 7 could be tied. In considering these matters, the court raised issues with

the false dichotomy of positive and negative rights and considered whether climate litigation could be the exceptional circumstances required to ground a finding of a positive right. While the court made no specific findings on these matters, the debate provides additional guidance and support for these ideas in future s. 7 rights cases. This article considers these discussions, how they have been used in additional cases to date, and where they may go from here forward.

Leslie Anne St. Amour (she/her) completed her BA at McGill University in Political Science and a minor in Indigenous Studies, before spending a year as a Pathy Foundation Fellow. Leslie Anne completed her JD at the University of Toronto. Leslie Anne has worked in private practice and as a non-profit Executive Director before her current role as a Police Accountability Lawyer. Leslie Anne currently sits on the Board of Directors of the Algonquin Wildlife Research Station and previously on the Board of Aboriginal Legal Services.

PLENARY: JUDICIAL ANXIETIES (1:30pm-2:45pm in P120)

Benjamin Perryman

The Overlapping Powers Doctrine

The separation of powers doctrine is a feature of many common law and civil law systems. The shared rationale for the doctrine is to ensure that each branch of government respects their constitutionally mandated role. This has significant implications for the judicial role, particularly in the context of positive rights claims, because the doctrine shapes what constitutes judicial "overstepping". The consensus on the rationale for the separation of powers doctrine masks considerable divergence on how the doctrine is conceived and applied in different countries.

Part I of this paper provides a comparative analysis, based on historical, empirical, and functional considerations, of the separation of powers doctrine in Canada, the United States, South Africa, France, and Germany. This analysis reveals several important observations about the separation of powers doctrine: (1) there is no universal doctrine, (2) the doctrine is dynamic not static, and (3) the doctrine is amenable to reconceptualization. Part II of the paper reviews recent attempts to theorize and reconceptualize the separation of powers doctrine, mostly in non-Canadian contexts. Building on these attempts, Part II develops the concept of an overlapping powers doctrine. An overlapping powers doctrine recognizes there is inevitable and desirable overlap between the branches of government in responsibility for interpreting and applying the constitution. This shared and overlapping responsibility is an incident of modern constitutionalism, especially the increasing importance of proportionality, dialogue, and justification in rights adjudication. An overlapping powers doctrine changes how each branch of government shares responsibility for the constitution. It also changes how the judicial role should be understood within this shared arrangement. Part III of the paper reflects on how an overlapping powers doctrine might alter the judicial role in the context of positive rights claims or other novel rights claims, with reference to economic and social rights cases from three jurisdictions.

Benjamin Perryman is an Associate Professor at the University of New Brunswick Faculty of Law. He teaches and writes in the areas of constitutional law, evidence, migration, and private international law, focusing on the intersection between social science evidence and judicial decision-making.

Kent Roach

The Inevitability of Positive Rights and Remedies: The Case of Criminal Justice

Most Charter litigation involves the criminal justice system. An examination of this jurisprudence, often neglected in constitutional scholarship, reveals that what judges and commentators frequently regard as the paradigm of negative rights that protect individuals from state interference- legal or due process rights- often require positive state action. There are some explicitly positive rights, such as the right to

an interpreter or the right to be informed about counsel, but most of the Charter's other legal rights have implicit positive dimensions when interpreted in any realistic sense. Even in cases where the courts employ negative remedies such as stays of proceedings and exclusion of unconstitutionally obtained evidence, compliance with the Charter often requires positive action. These findings suggest that the idea that only some Charter rights and remedies mandate positive state action is a myth. Moreover, it is a dangerous myth that ignores the spending implications of due process rights and that can foster a form of minimalism and exceptionalism about Charter rights and remedies.

Kent Roach is a Professor of Law at the University of Toronto. The 8th edition of his text written with Robert Sharpe, The Charter of Rights and Freedoms will be published by University of Toronto Press this year. He has represented intervenors before the Supreme Court in a number of cases.

Margot Young

The Company It Keeps: The Distinction Between Positive and Negative Rights

The *Canadian Charter of Rights and Freedoms* is at a moment of existential crisis. This claim reflects two things, each of ironically opposite origin: first, the thinness of judicial recognition of rights and, second, the rise of resort to section 33 of the *Charter* to staunch rights assertion. Both threaten diminishing relevance for the *Charter*. This paper takes up the first facet of the crisis. The failure of courts to shape the *Charter* as relevant to our most significant human rights problems has rendered the *Charter's* "bark" worse than its "bite". Substantive equality demands protection of socio-economic equality rights. And, such protection requires positive obligations. Here the courts equivocate. For example, the Ontario Superior Court's decision in *Cycle Toronto v AGO* demonstrates typical judicial preoccupation with the significance of distinguishing negative state obligations from claims for positive rights. The backdrop of this judicial failure is revealing: debate over positive and negative rights trails a larger constellation of concerns involving social and economic rights, justifiability, application, and separation of powers anxieties. All of these are barriers to claims that invoke explicit redistributive ambitions and owe their significance and impact in caselaw to a recognizable ideological cant that keeps social justice litigation on an unsuccessful course. Judicial intransigence to engage critically with the indeterminacy of the distinction between positive and negative rights has limited the social justice reach of the *Charter*. The paper concludes by noting that the second aspect of the crisis—right wing populist resort to s. 33 to protect inequalities from judicial oversight—is a challenging partner to claims of *Charter* ineffectiveness. Yet, both scenarios may speak to each other. What light can be shed on the politics of the *Charter* by examining this match up between, first, political perceptions of judicial pronouncements on *Charter* rights as unduly disruptive and, second, the bemoaning of the *status quo* sustaining nature of too many *Charter* cases?

Margot Young is Professor at the Allard School of Law, University of British Columbia. She researches and teaches in the areas of constitutional law, equality theory, social and economic rights, housing law, and feminist legal theory. Margot sits on the boards of Justice for Girls, the Suzuki Institute, and the Community Legally Assistance Society. She is co-editor of the forthcoming collection Just Methods: Communities of Practice in Law and Society Research.

Angela Cameron & Lara Koerner-Yeo

Gosselin 20 Years Later: Presumption of Conformity and the Role of Positive Rights under the Charter

In *Gosselin*, the Supreme Court of Canada holds that in "special circumstances" section 7 of the Charter may impose positive obligations to sustain life, liberty or security of the person (para 83). Yet in the 20 years since the release of this decision, the jurisprudence has not meaningfully developed such "special circumstances" and myriad attempts to advance the Charter's scope of protection to encompass economic (basic income: see Bowman), social (affordable housing: see Tanudjaja) and

cultural (language: see NTI) rights have been zealously opposed by governments and in most cases dismissed by the courts. There are various lines of inquiry to explore in assessing how the "special circumstances" pathway has failed to meaningfully deliver. We propose to focus on the presumption of conformity in relation to the positive / negative rights framing of ss. 7 and 15 Charter rights and consider its role as a key interpretive tool to expand the Charter's protection of positive rights. We intend to advance the thesis that meaningful implementation of the presumption in domestic law requires that the Charter protect economic, social and cultural rights, all rights that have been categorized (to their detriment, typically) as "positive" rights. Our analysis will consider the recent developments on the presumption of conformity, querying why to date the presumption has failed to allow for the protection of ss. 7 and 15 positive rights and the interplay between the presumption of conformity and positive / negative rights framing.

Angela Cameron is an Associate Professor at the Faculty of Law, uOttawa, Common law section. Professor Cameron teaches Property Law; Gender, Sexuality and Law; and a graduate seminar in Contemporary Legal Issues. She is the co-ordinator of the faculty's 1L Truth and Reconciliation course, and also teaches part of this mandatory program. Since 2014 she has been the co-chair of the faculty's Reconciliation and Decolonisation committee. Angela has expertise in international human rights law and the status of domestic implementation.

Lara Koerner-Yeo is a public law lawyer at JFK Law LLP, Toronto Office with a focus on Aboriginal, administrative and Charter law. Lara was class co-counsel in the Bowman basic income class action, advancing the section 7 Charter argument in the certification motion (2020 ONSC 7374) and on appeal (2022 ONCA 477). Lara has also acted for predominantly women workers in pay equity matters, which has encompassed advancing section 15 Charter argument (see e.g. 2019 ONSC 2168, aff'd 2021 ONCA 148). More recently, Lara acted for Grand Council Treaty #3 as an intervenor in the Mathur case (2024 ONCA 762) and is co-counsel for Inuit as represented by NTI in advancing a section 15 Charter challenge (see e.g. 2024 NUCA 2, 2024 NUCA 9). In addition to advocacy at the provincial and federal levels, Lara has appeared before human rights treaty bodies at the United Nations. This work has encompassed highlighting gaps in the domestic implementation of women's human rights.

PANEL C: CANADA IN COMPARISON (3:00-4:15pm in P115)

Rob De Luca

Positive Fundamental Freedoms as Reflecting a Canadian Vision: Revisiting the U.S. Comparison

This article offers an assessment of Canadian contemporary positive rights jurisprudence through a comparative examination of Canada's and the United States' contrasting constitutional protections for the fundamental freedoms, with a focus on freedom of expression. The article begins with a discussion of Canada's current judicial approaches to freedom of expression sounding in positive obligations, via City of Toronto. In important respects, City of Toronto reflects a model of rights-adjudication akin to the negative model that has long been dominant in the U.S. This article argues, through a critical examination of these two contrasting traditions, and through Canadian courts' reliance upon the U.S. tradition in its early positive rights cases, that Canadian courts' cautious or "negative" approach is out of keeping with Canada's larger constitutional design and traditions, including as reflected in the Charter's significant departures from the U.S. Constitution and the First Amendment. The article concludes by arguing, contra Canadian practice, that the comparison argues in favour of adopting a more positive frame for interpreting s. 2, thereby leaving issues related to the separation of powers and practicality to the section 1 analysis. This approach would help resolve the deep divides on issues of categorization that have plagued the Court's s. 2 positive rights jurisprudence and would also better facilitate the necessary constitutional dialogue as to when or whether legislatures must intervene in

novel contexts that press against the bounds of the Court's current freedom of expression jurisprudence.

Rob De Luca is a Research Associate at the Asper Centre, where his responsibilities include supporting the Centre's legal research and policy advocacy projects. Prior to joining the Centre, Rob's work experience has included practicing as a lawyer at a boutique labour firm in Vancouver; advocating on Charter-related policy issues, and directing interventions across Canada, as a lawyer and program director at the Canadian Civil Liberties Association; and, most recently, working for the Centre for Constitutional Studies, and teaching constitutional law as a sessional instructor, at the University of Alberta Faculty of Law. Rob holds a J.D. from Stanford Law School and a Ph.D. in political science from the University of Texas at Austin.

Saambavi Mano

Duty, Deference, and Discretion in the Charter Analysis

Every constitutional democracy is confronted with the puzzle of delineating the boundaries between judicial and political authority. In Canada, the enactment of the Charter of Rights and Freedoms expanded the universe of issues that came before the courts, prompting concerns about judicial entanglement in inherently "political questions." Although the Supreme Court of Canada has rejected a formal "political question doctrine," it nonetheless mediates the tension between its constitutional duty to review Charter claims and concerns about the institutional competence and legitimacy of courts through the justiciability inquiry and the section 1 analysis. This paper suggests that the resulting approaches to justiciability and justifiability are neither deferential in posture nor legal in nature, but rather involve highly discretionary and inherently political assessments of the wisdom of judicial intervention. For this reason, both proponents of positive rights and judicial review skeptics have reason to be wary of the Court's recent attempts to invoke considerations of institutional competence and legitimacy when determining whether a Charter right has a "positive" dimension. Where the Court has sought to manage the institutional tension between duty and deference, it has ultimately enhanced its own discretion to take prudential considerations into account. The Court's recent line of reasoning risks extending the discretionary posture pervading the justiciability and justifiability analyses to the core of the duty of Charter review.

Saambavi Mano is a graduate student at Yale Law School. She holds law and undergraduate degrees from the University of Toronto and is admitted to practice in Ontario and New York. Prior to her graduate studies, she worked as a litigation associate at an international law firm in New York and served as a law clerk at the Court of Appeal for Ontario and the Supreme Court of Canada.

Sanjay Ruparelia

Litigating positive rights: Critical reflections from the global South

Since the 1980s, social activists in major constitutional democracies of the global South have struggled to expand welfare entitlements through rights-based campaigns. Significantly, they often employed the language of constitutionalism and citizenship, and engaged the law and the courts, to extend these entitlements to historically excluded workers. What explains this novel development? How are rights conceptualized, justified and pursued in the moral imaginaries, legal arguments and political strategies in such campaigns? What legal, institutional and policy reforms have various rights campaigns won, how and under what conditions? The rise of the 'new constitutionalism' represents a significant new paradigm for advancing social welfare in the global South. This paper examines these questions in three major cases: India, South Africa and Brazil. Several lessons emerge. First, rights activists used the repertoire of citizenship, law and constitutionalism to build progressive coalitions, secure landmark rulings, shape new legislation, pressure administrative reform and advance policy change that expanded welfare entitlements. Their efforts marked a striking departure from the traditional counter-movements against capitalist dispossession in the North in the early twentieth century, the South after

WWII and many Westminster democracies in the neoliberal era, where apex judiciaries represented a conservative obstacle to overcome. Second, new civic actors played a novel role in these developments. Historically, traditional labor mobilization was key to securing welfare entitlements. Yet it privileged male workers in the formal economy, institutionalizing a dualistic welfare regime that excluded agrarian labor and informal workers, and marginalized women. In contrast, social activists, progressive lawyers and activist judges emerged to represent them in the courts, constituent assemblies and civil society. Third, the legal aspect of enforcing social rights faces many challenges, from fragmented rulings to poor institutional capacity. Codifying positive rights could sometimes even lead to perverse outcomes. Rights activists could expend tremendous effort, time and resources in the courts for relatively meager gains. Lastly, rights-based social welfare could neither realize popular aspirations for decent paid work, nor tackle growing economic inequalities and mounting public corruption. These failures encouraged the rise of autocratic populists in all three countries, which delivered social entitlements as cash transfers and gifts of patronage.

Sanjay Ruparelia is Professor of Politics and Public Administration at Toronto Metropolitan University, where he is inaugural Jarislowsky Democracy Chair, and a Senior Fellow of the Asia Pacific Foundation of Canada. His books include Divided We Govern: coalition politics in modern India; The Indian Ideology; and, Understanding India's New Political Economy. Sanjay serves as a co-chair of Participedia, which studies democratic innovations globally, and on the editorial boards of Indian Politics and Policy and Pacific Affairs. He co-hosts On the Frontlines of Democracy, a monthly podcast and lecture series, and regularly contributes to media in North America and Asia. Sanjay previously served as a consultant to the United Nations Development Programme, United Nations Research Institute on Social Development and the Asia Foundation, and taught at the New School for Social Research and Columbia University. His research has been supported by the Commonwealth Foundation, American Council of Learned Societies, and Social Science and Humanities Research Council as well as Cambridge, Johns Hopkins, Notre Dame, Princeton, Stellenbosch and Yale. He earned a B.A. in Political Science from McGill, and a M.Phil in Sociology and Politics of Development and Ph.D. in Politics from Cambridge.

PANEL D: THE POWER OF POSITIVE RIGHTS (3:00-4:15pm in P120)

Rob Currie & Alex Neve

Could Positive Rights Crack the Extradition Dilemma?

Canada's law of extradition—the surrender of individuals to face criminal proceedings in foreign states—has historically been a negative rights space, where human rights protections are applied through the lens of the Charter s. 7 right against deprivation of liberty except in accordance with the principles of fundamental justice. Yet as the case law shows, "fundamental justice" in this context is compromised by powerful state interest in facilitating extradition and the government's enlistment of the courts in carving out a largely Charter-immune process, driven by hyper-stimulated notions of international comity and deference to Ministerial discretion. A particularly glaring and poignant illustration is the infamous case of Hassan Diab, whose decades-long wrongful prosecution by France has been actively facilitated by the government of Canada, demonstrating the impoverished insubstantiality of s. 7 in extradition.

This paper will discuss how the application of negative rights in the extradition space fails adequately to protect the liberty rights that are at stake, and propose an admittedly novel solution: a positive right for the individual to be protected by the state, based in customary international law norms that allow states to seek "diplomatic protection" of their nationals. This could entail a human rights-based obligation on the state to: refuse some extradition requests at an early stage, even before they have been formally registered; diplomatically intervene with the foreign state to end a criminal case and thus stop persecution; seek the cancellation of INTERPOL Red Notices; and even to bring international

proceedings against the foreign state for breach of the International Covenant on Civil and Political Rights (or other relevant human rights treaties), an applicable extradition treaty, or other norms protecting foreign nationals from mistreatment.

Alex Neve is a visiting and adjunct professor in international human rights law at the University of Ottawa and Dalhousie University, and a Senior Fellow with the University of Ottawa's Graduate School of Public and International Affairs. He presently serves as a Member of the UN Human Rights Council's Independent International Fact-Finding Mission on Venezuela. He was Secretary General of Amnesty International Canada's English Branch from 2000 – 2020. He is a lawyer, with a Master's Degree in International Human Rights Law from the University of Essex. Alex was the 2025 CBC Massey Lecturer, addressing the theme of Universal: Renewing Human Rights in a Fractured World. Alex Neve is an Officer of the Order of Canada.

Robert J. Currie, KC, is the Viscount Bennett Professor of Law at the Schulich School of Law, Dalhousie University. His scholarly work examines crimes that cross borders and the systems of law that seek to suppress it, and his publications in the field have been cited by Canadian courts, including the Supreme Court of Canada. He is the lead editor of Kindred's International Law, 10th edition (Emond, 2025), and the original sole author of International & Transnational Criminal Law (4th edition co-authored with G. MacNeil & J. Mohammed, Irwin/UTP, forthcoming 2026). He is a frequent contributor to continuing education for the judiciary and the legal profession, and to the popular media.

Sujit Choudhry

Positive Constitutional Rights for the Unhoused: Extending Adams

Martha Jackman has argued that the British Columbia Court of Appeal's groundbreaking decision Adams confers little more than the "right to sleep outside at night under a box" and is a far cry from a positive right to housing. In this article, I take up Jackman's important challenge. I make the following points. First, Adams establishes a conditional right to shelter outside when there is inadequate or inaccessible shelter supply and, therefore, creates incentives for municipal governments to increase shelter capacity, ensure shelters are accessible, and/or adopt policies to increase housing supply – including through providing alternative housing. Second, Heegsma – the Hamilton encampment case, currently before the Ontario Court of Appeal – seeks to attach damages liability under section 24(1) of the Charter for individuals who are prohibited from exercising their Adams rights, which would increase those incentives. Third, Adams has been applied by the Yukon Supreme Court in Wright to extend constitutional protection to eviction from public housing, which is a form of positive rights protection. Taken together, there is reason to think that Adams is only a first step to vindicating positive rights to housing for the unhoused.

Sujit Choudhry is a public law litigator at Circle Barristers, with a broad practice in administrative and constitutional law encompassing appeals, judicial reviews, arbitrations, public inquiries, and an increasing focus on Charter class actions against governments. He is co-author of the Canada chapter in *Chambers Global Practice Guide: Public and Administrative Law*, he has litigated and advised on a wide range of public law issues, including national security, democratic governance, citizenship and immigration, social policy, regulation, and economic sectors. He also maintains an extensive counsel practice, advising NGOs, governments, corporations, and public sector bodies on complex constitutional matters. Prior to founding Circle Barristers, Sujit was a constitutional law scholar at the University of Toronto, NYU, and Berkeley, clerked for Chief Justice Antonio Lamer of the Supreme Court of Canada, and was a Rhodes Scholar; his work—comprising nine edited books and over 100 publications—has been cited by the Supreme Court of Canada and courts internationally, and he has advised constitutional and peace processes around the world.

Dr. Seána Glennon

Positive Obligations by Another Name? Section 7 of the Charter and the Constitutional Limits on Withdrawing Supervised Consumption Services

Canada's opioid crisis has prompted the establishment of supervised consumption sites (SCSs) as a harm-reduction strategy aimed at preventing overdose deaths, curbing the spread of infectious diseases and connecting users to health and social services. The Supreme Court of Canada's landmark decision in PHS Community Services Society (Insite) confirmed that the question of access to SCSs is capable of engaging the Charter; the Court stopped short, however, of recognising a right of access to SCS services. Recent efforts by provincial legislatures to roll back SCS access - including Ontario's recent restrictive statutory measures and the resulting Neighbourhood Group Community Services litigation - have brought the constitutional questions around SCS access back to the fore.

This paper explores the question: does s.7 of the Charter impose limits on legislative decisions to revoke access to an established, life-preserving health service, even where s.7 does not impose a standalone obligation to establish that service in the first place? This paper argues that it does. It argues that s. 7 forbids state action - such as the imposition of a legal prohibition or the withdrawal of an established regime - that deprives individuals of their rights to life or security of the person in a manner that is arbitrary, overbroad or grossly disproportionate. Drawing on Insite, the Supreme Court's jurisprudence on positive obligations under s.7 and recent litigation concerning the revocation of life-preserving measures, the paper argues that where the state has created a health service that demonstrably preserves life and individuals have come to rely on it, obligations to continue that service provision arise. These obligations do not necessarily require the state to create SCSs in the first place. Once created and operated, however, the state may not withdraw access in a way that foreseeably endangers life and security without meeting the standards of the principles of fundamental justice.

Dr. Seána Glennon is a Postdoctoral Fellow at the University of Ottawa Public Law Centre. Her research lies at the intersection of constitutional law and deliberative democracy, with a particular focus on citizen deliberation in constitutional and legislative reform. Her postdoctoral fellowship is funded by the Unwritten Constitutional Norms and Principles project, an Open Research Area-funded comparative initiative examining unwritten constitutional principles in Canada, the UK and Germany. Seána's doctoral research examined the role of citizens' assemblies in legal reform, focusing on Ireland's Citizens' Assembly and abortion law reform. Her current work explores the potential for deliberative democratic institutions to enhance democracy in Canada. She holds law degrees from Trinity College Dublin and the University of Toronto, and a PhD from University College Dublin. Prior to entering academia, she practised as a public and administrative law solicitor in an international law firm in Dublin, and she is qualified as a solicitor in Ireland, England and Wales.

Tanzim Rashid

Constitutional Triangulation: R v. Bykovetz and the Need to Redefine the State's Role in Charter Regulation

What redress does an individual under Canadian law have against a private entity – which is neither under the control of the government nor governmental in either its nature or activity – when it abridges their Charter-guaranteed rights and freedoms? The levers of Canada's constitutional machinery presently provide no such redress, despite the guarantees embedded under s. 24 (1) of the Charter. Specifically, the framework developed under s. 32(1) of the Charter by the Supreme Court of Canada in Eldridge v. British Columbia (Attorney General), remains insufficient to account for those instances where purely private entities are responsible for Charter infringing activity. Filling this vacuum requires a larger and more liberal understanding of the constitutional relationship underpinning the Charter. Relying on the Supreme Court of Canada's recent decision in R v. Bykovetz, this paper proposes giving concrete expression to what Karakatsanis J. described as the 'tripartite' nature of Canada's

constitutional ecosystem, by construing a superordinate positive obligation on the state to protect an individual's exercise of their negatively construed Charter rights and freedoms. In support of this position, it will rely on case law that has developed around s. 24(1) and s. 32(1) of the Charter and place them within the broader framework governing constitutional interpretation. It will conclude by setting out in precise terms what the superordinate obligation is, how it would work coextensively with the Eldridge framework, and how a claimant may rely on the obligation to obtain redress for any abridgements to their Charter rights and freedoms. This paper is a working draft that runs in parallel with a longer manuscript that features four additional chapters. Those chapters discuss how the tripartite conception of the constitutional relationship and the superordinate obligation a) do not wade into construing Charter rights and freedoms in positive terms, which the Supreme Court of Canada has consistently rejected, b) avoids trying to fit a constitutional square peg into a contractual, tortious, or statutory round hole, and c) steers clear of the second-order effects that flow from recognizing Charter rights and corresponding responsibilities as applying between private citizens. It also features a literature review canvassing the scholarship (presently available) around the need for a more expansive understanding of the scope and content of Canada's Charter of Rights and Freedoms.

Tanzim Rashid is a licensed Barrister and Solicitor in Ontario who was called to the bar in 2024. He is a graduate of the JD/MBA program at Osgoode Hall Law School and the Schulich School of Business, and spent his summer, articling term, and first year as an associate at a premier civil litigation firm in Toronto. Tanzim's scholarly work has and will continue to focus on constitutional law, legal theory, and the application of international human rights law to multinational corporations. He hopes in the foreseeable future to return to academia to pursue a doctorate in juridical sciences.