

CELEBRATING 10 YEARS



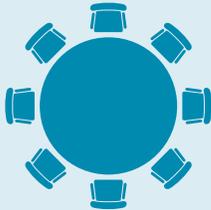
David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

BY THE NUMBERS



20

Interventions at the Supreme Court of Canada



46

Constitutional Roundtables



10

Conferences and symposia



21

Student working groups



7

Constitutional Litigators-in-Residence

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MESSAGE FROM EXECUTIVE DIRECTOR

There have been numerous times over the past ten years when I have been contacted by human rights organizations or university law faculties to inquire about how we do it. How does The David Asper Centre for Constitutional Rights choose its cases, fund its projects, work with students, teach in a clinical setting? It is with pride that I share how we have managed, at times through trial and error, to strategically develop the reputation the Centre now has for authoritative contributions to constitutional law in Canada. It is hard to believe that ten years have passed since I took on the task of helping to create a one-of-a-kind Centre as part of the University of Toronto Law Faculty. But when I look at what we have accomplished, it is hard to believe that we have done so much in only ten years.

Over this time, there have been many changes to Canada's constitutional landscape, including changes in government and new appointments to the Supreme Court of Canada. The role of interveners in constitutional litigation has also changed with more intervening groups achieving standing but with tighter controls on how they can contribute. Within that context, I have tried to be strategic in the cases that the Centre has chosen in order to make the biggest impact. We have also had the privilege of working with some of the best lawyers in the country, including our Constitutional Litigators in Residence, faculty members at this law school and other top litigators. As time passes, I am starting to see our clinic alumni develop into similar roles. Indeed, I see that as one of our biggest accomplishments.

As I mentioned in our most recent annual report, the next 10 years will challenge us to innovate and grow. We are no longer the "new kid on the block" and will be expected to continue our substantive contributions to constitutional law in Canada based upon the high expectations we have generated from our past work. I look forward to the challenge.



Cheryl Milne



A BRIEF HISTORY OF THE ASPER CENTRE

One day, a little over a decade ago, Professor Lorraine Weinrib’s constitutional litigation class was discussing the then recent cancellation of the Court Challenges Program. The federally-funded non-profit provided financial assistance to those challenging legislation on the grounds of infringing Canada’s constitutionally-protected language and equality rights.

One “passionate and idealistic” student who had done a lot of pro bono work on wrongful convictions asked Weinrib how much was in the fund. She estimated \$5 million.

“And he said, ‘You know, that’s really doable,’” Weinrib recalls.

That student, of course, was David Asper, a Winnipeg-based criminal defence lawyer turned businessman who was working on his LL.M. at the

University of Toronto. And his concerns weren’t limited to the cancellation of the Court Challenges Program.

“Government funding Charter challenges and constitutional litigation [seemed to be] an inherent conflict of interest because government can give and government can take away,” Asper says. “If you’re being successful against the government because the government is offending the Charter, the government may respond by eliminating the funding. So to be reliant on government to do that very important work in a rights-based society was problematic for me.”



Big dreams on campus

Asper ended up donating \$7.5 million to the university to start a project advocating for constitutional rights and kick-start the new Jackman Law Building campaign. “Initially, we had conversations about something that wasn’t as ambitious because we never talked about the financial commitment,” says Mayo Moran, who was dean of the Faculty of Law at the time and who was instrumental in developing the Centre. “... But David said we should dream bigger. So we did.” And the David Asper Centre for Constitutional Rights was born.

Moran and Asper briefly discussed funding party representation, like the Court Challenges Program, but realized if the Centre went that route, it could take on fewer cases. Plus, due to time constraints, students working on interventions would be more likely to be able to see their initial research memos morph into arguments before the Supreme Court.

It took less than a year to get the Centre up and running. “We thought it’d be great for the law in Canada to have a more sophisticated conversation around [constitutional rights],” Moran says. “So we pushed the pedal to the metal and made it happen really quickly. Now to get it up to full capacity, it was another matter.”

Since there was no precedent for this kind of organization in Canada, Moran and her team had to decide on faculty involvement, students’ roles, whether the Centre could offer for-credit courses, and the involvement of the broader legal community.

Moran was acutely aware that in its first few cases in particular, the Centre had to build

its credibility. “... We felt that as an academic institution, we could bring a sense of the larger literature that perhaps is outside the law,” she says. “We could provide the courts with a unique, more objective point. We had no particular issue case after case that we were pressing. Our goal was to say, ‘How can we assist the court from the vantage point of people who are experts in a wide variety of fields?’”

One of the Asper Centre’s main priorities is to introduce students to constitutional advocacy. Upper-years can take the for-credit courses in which they prepare policy briefs and interventions on Charter-related issues, and students in all years can participate in research groups.

It took less than a year to get the Centre up and running.

“The ideal of a rights-based society doesn’t just happen,” Asper says. “... History shows it only happens if you’re prepared to fight for it, and to continue to look for evolving trends in the meaning of rights. And so from a student perspective, the more we can educate students that this is a never-ending challenge and how to do it effectively kind of sows the seeds and makes it more likely we will have a rights based society because we’ll have people who understand that you have to fight for it and how to do it.”



Professor Lorraine Weinrib



Mayo Moran, Provost of Trinity College, Toronto and former Dean of the Faculty of Law



David Asper Launch Event

Living law

Traditional law curricula focus on reading final appellate judgements. “That’s akin to studying medicine by only performing autopsies,” Weinrib says. Courses like the Asper Centre clinic allow students to consider each party’s arguments and narrative arcs, the role of interveners, and how storytelling crafts arguments. They get to see the living, breathing organs of the law, and the imagination and organization required to bring forward Charter challenges.

Clinical education at the Asper Centre also shows students how different law classes converge in practice, says Professor Kent Roach, chair of the Centre’s advisory group. “It’s also important for students to learn some lessons about professional responsibility and professional ethics. We may not be representing a particular individual but we’re still representing the Asper Centre and all of us working on the file have duties to the client and duties to the court.”

In addition to its education and advocacy, the Asper Centre organizes several talks, workshops and conferences throughout the year. “Especially with us being at a university that prides itself on scholarship, it’s important for us not only to do the work in court, which we’ve often done very

well, but also to reflect on the broader trends affecting constitutional law and constitutional rights in Canada,” Roach says. “... We’ve tried to contribute to knowledge about constitutional rights, and also to provide a forum for people to come together to talk about constitutional litigation, in a way that is forward-thinking, critical and independent, and isn’t simply a review of what the court decided over the last year.”

Some of the most meaningful events have included the broader community, Weinrib says. For example, in January 2013, the Centre hosted an evening panel discussion on the 25th anniversary of *R. v. Morgentaler*, the Supreme Court decision that had struck down Canada’s restrictive abortion law. Panellists included Dr. Robert Scott, a co-accused; Morris Manning, counsel for Dr. Morgentaler and Dr. Scott; *Globe and Mail* justice reporter Kirk Makin who covered the story; Carolyn Egan, an expert witness at the trial, and Weinrib herself. They discussed how difficult it was for women to access abortion before *Morgentaler*, how the decision was the turning point in ensuring the Supreme Court operates as a constitutional court, and the importance of the Charter in the case.

The following day one of Weinrib’s students approached her: “I never knew why the Charter was so important,” she told me,” Weinrib said. “But now I understand.”



Professor Kent Roach



Panel discussion on 25th anniversary of *R. v. Morgentaler*



Public Interest Litigation Conference
March 2018

WHO IS DAVID ASPER?

When he started law school at the California Western School of Law in San Diego, Asper was “fully on track” to enter corporate law. But upon returning to Winnipeg for articles, he found himself “going crazy, sitting in an office reading mortgages and drafting shareholder agreements,” he says. It seemed to him that his colleagues who were most enjoying themselves were working in criminal law. “And so much to my parents’ chagrin, I covertly applied to jobs at criminal firms and went and did that. I thoroughly enjoyed it and had a pretty good career there.”

In the 1990s, he successfully represented David Milgaard in overturning his rape and murder conviction. Afterwards, “I was completely burned out mentally, but I was also pretty disgusted with the legal system,” he says. Plus, since he’d been working on the Milgaard case full-time for a few years, he had no clients left. So he decided to join his family’s business, Canwest Global Communications Corporation, which had owned numerous newspapers and television stations including the *National Post*.

“The good news is when I went into business, I was able to find a number of things that kept me connected to the law,” he says. “I went into the media business so we were often in conflict with the law, the rights of journalists and free expression, and I actually got to oversee some pretty important litigation with some of our newspapers dealing with government.”

Return to the academy

After 15 years in the media business, Asper decided to apply to the University of Toronto for his LLM, where he researched the role of defence counsel in wrongful convictions. “I was overwhelmed that U of T Law would even admit me,” he says. “And then when I went back into the program, it was such a tremendous reminder of the value of formal education. Because I got to step away from my life, where I was having to make concrete decisions every day, all day long, and never really get the opportunity to think and reflect and take a step a back. . . . It was so good for my brain -- the greatest educational experience I ever had.”

After completing his LLM., Asper returned to Winnipeg and taught criminal law, ethics, advocacy and advising business start-ups at Robson Hall, the University of Manitoba’s law school. “I found that to be probably the most intellectually challenging thing I’ve ever done,” he says. “. . . Kids are so smart! You have to stay at least half a step ahead of them, and I had to dig back deep into the law. Not just know the cases to be an advocate on one side or another but to try to get the deeper meaning to talk about it with students.”

In terms of his involvement at the Asper Centre, he remains arms-length. “I find great enjoyment in reading about the activities of the Centre,” Asper says. “It’s such a wonderful gift because I don’t have to do anything other than enjoy it and celebrate that they’re in there, getting their hands dirty and helping the cause of constitutional rights in Canada.”



David’s Favourites

Favourite books: *Sapiens: A Brief History of Humankind* and *Homo Deus*, both by Yuval Harari

Favourite snacks: Miss Vickie’s chips and chocolate chip cookies

Favourite thing about Winnipeg: Watching the Winnipeg Blue Bombers beat the Saskatchewan Roughriders

Favourite Asper Centre intervention: *Henry v. Her Majesty the Queen*, which established that damages are an appropriate Charter remedy in wrongful conviction cases

A DECADE OF ADVOCACY

Unlike civil liberties organizations or women's rights associations, the Asper Centre's interventions aren't issue-based. So "there were a lot of challenges at first," says Professor Kent Roach, chair of the Asper Centre's advisory group. "The first couple of cases we intervened in, there was always a danger that courts might not accept us as an intervener. . . . We had to stake out a role that could both assist the court and be true to who we are."

To do that, the Centre chose their interventions carefully. "We started a lot of consultation and

discussion," says Mayo Moran, who was dean of the law school when the Centre was founded. "In those early cases, both the selection and how we were going to approach them, we knew it was incredibly important that we do a great job and convince the court that if the Asper Centre was there, it brought something distinctive and valuable for consideration."

As it got started, the Centre often collaborated with other groups. In *Conway v. Her Majesty the Queen*, for example, the Centre partnered with the Criminal Lawyers' Association; in *City of*

Vancouver v. Alan Cameron Ward, it worked with the British Columbia Civil Liberties Association, and in *Prime Minister of Canada v. Omar Khadr*, the Centre was granted standing with the university's International Human Rights Program and Human Rights Watch.

"[Executive Director] Cheryl Milne has done a really good job of maintaining communications with groups, so that everyone sticks in their own lane and plays a complementary rather than a competing role," Roach says.

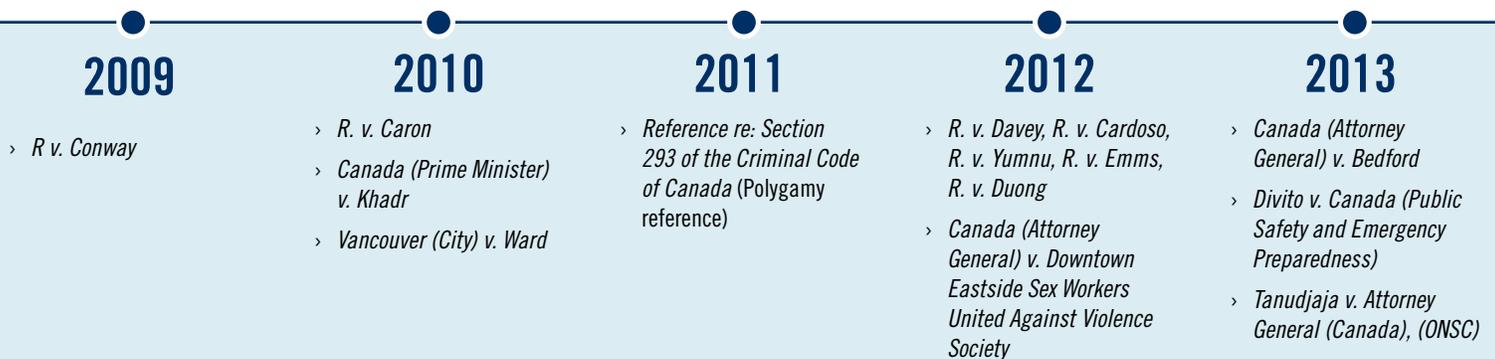
Gifts that keep giving

In 2010, Roach served as counsel in some of the Asper Centre's first interventions, both of which involved Charter damages. One of them, *Ward*, was the first that the Supreme Court heard on Charter damages. It involved a lawyer who was seeking damages for an unconstitutional strip-search he was subjected to after he was arrested at a protest.

"That was a very rewarding case," Roach says. "Chief Justice McLachlin wrote a decision articulating grounds for when we should award *Charter* damages. For me, it was interesting as a litigator, as someone who was on my feet, but also as someone who writes a lot about constitutional remedies. It was a gift that kept on giving in many ways."

In 2012, the Asper Centre welcomed Joseph Arvay as its first Constitutional Litigator-in-Residence. Arvay, who is based in Vancouver, came to Toronto for a month, during which he met clinic students three times a week and guided the Centre's intervention in *Canada v. Bedford*, the decision that determined the legality of certain aspects of the prostitution sections of the

(Continued p. 7)



TIMELINE OF CASES

Criminal Code. The Centre argued that *stare decisis* is subordinate to the Constitution, and that lower courts should consider social change when conducting legal analysis based upon the *Charter of Rights and Freedoms*. The Supreme Court agreed with the Centre, holding that lower courts can revisit a constitutional matter if a new legal issue is raised or if there is a significant change in the circumstances or evidence.

“It was my idea to intervene in *Bedford* on the point of *stare decisis* because I believed it was the very kind of legal submission that

the Asper Centre should be doing,” Arvay says. “It wasn’t engaging in the merits of the case. They didn’t have any particular expertise in matters relating to sex work and all of that, but they would have cared deeply about *stare decisis* in the constitutional system and it just seemed like an obvious fit.”

It’s not all about litigation

While the Centre has developed its reputation from its litigation matters, students have also worked on other forms of advocacy. “If you only taught constitutional rights advocacy from a litigation perspective,” says Executive Director Cheryl Milne, “you would be failing to educate students about the many other ways that lawyers can make a difference in the law.” Students have worked

on policy briefs that have been delivered to all levels of government on a range of issues such as privacy rights of jurors, amendments to the *Criminal Code of Canada*, and the treatment of federal prisoners. Working with constitutional and political science scholars, the Centre has also held symposia and co-written reports on the state of Canada’s constitutional democracy and constitutional conventions.

Constitutional Litigators-in-Residence

2012	Joseph Arvay
2013	John Norris
2014	Mary Eberts
2015	Raj Anand
2016	Janet Minor
2017	Breese Davies
2018	Susan Ursel

2014

- › *R v. Kokopenace*
- › *Henry v. British Columbia (Attorney General)*
- › *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*
- › *R. v. Anderson*
- › *Tanudjaja v. Canada (Attorney General), (ONCA)*
- › *Kazemi Estate v. Islamic Republic of Iran*

2015

- › *R v K.R.J.*
- › *B010 v Canada (Citizenship and Immigration)*

2016

- › *Ernst v. Alberta Energy Regulator*

2017

- › *India v. Badesha*

2018

- › *Spencer Dean Bird v. Her Majesty the Queen*
- › *Gillian Frank, et al. v. Attorney General of Canada*
- › *Barton v. Her Majesty the Queen*

ALUMNI REFLECTIONS

Megan Savard (J.D. '09), now a criminal defence lawyer in Toronto, joined the Asper Centre student clinic in its inaugural year. At the time, a lot of attention was starting to be paid to Indigenous under-representation on juries, and her project involved running a mock jury trial at a high school for Indigenous students near Thunder Bay.

“The idea was to go and have a trial and have the kids be the jury and decide the case so they could experience the justice system and get early exposure to it as a positive thing within the school,” she says. “... I was able to organize with a defence lawyer, a Crown and a judge in Thunder Bay and get them all on board to argue that case for me, and I was just going to go and stickhandle it and keep a record of how it went.”

Savard found that practical experience was particularly helpful as she began her practice. “Eighty percent of what I do has nothing to do with what I learned in the classroom”, she says. “... The work I did at Downtown Legal Services and at the Asper Centre really gave me exposure to what really being a lawyer is like, and I think the earlier students can get that experience, the better.”



Megan Savard

Savard found that practical experience was particularly helpful as she began her practice.

Lawyering lessons

By the time Jennifer Luong (J.D. '13) joined the clinic four years later, students were tackling more formal legal work, but still benefitting from practical lessons.

Having summered at the Ministry of the Attorney General's Constitutional Law Branch, she was keen to see the other side of the fence and got valuable research experience working on the Centre's intervention in *Divito v. Minister of Public Safety and Emergency Preparedness*.

“What I found most helpful about the Asper Centre clinic course was the opportunity

to develop skills necessary for real-world legal practice,” Luong says. “For example, conflicts of interest from having multiple clients or due to transfers between law firms are a common ethical issue that comes up all the time for practicing lawyers.”

When a conflict arose because of her summer work, Luong investigated how to handle it. “One of my first assignments in the clinic course was to look up the Law Society's rules about managing such conflicts, setting up an ethical wall, and drafting a memo for the class outlining everyone's responsibilities with respect to maintaining the ethical wall,” she says.



Jennifer Luong

From the other side

Since being called, Savard has returned to the Asper Center and worked with students on challenging the constitutionality of various provisions of the *Canadian Assisted Human Reproduction Act*. The statute prohibits compensating surrogates, gamete donors and those arranging such services.

“There are some real criminal law offences too: you can’t create a chimera, you can’t create a clone, basically the mad scientist prohibitions,” Savard says. “These others don’t really reflect societal realities, medical realities or advance

the purpose for which they were designed, which was to protect a vulnerable population.”

Savard and Asper Centre students worked on a policy brief to Health Canada when it was considering imposing regulations. The brief was ignored, but Savard is now considering a constitutional challenge to the legislation.

“This longstanding interest in a very non-lucrative issue was an opportunity for me to go back and work with Cheryl from time to time,” Savard says. “... In the process, I’ve gotten the chance to meet some really great lawyers who are doing constitutional

litigation in other venues: labour lawyers, corporate litigators or lawyers who do Indigenous litigation to see how they use the Charter and the constitution to advance their clients’ goals. That’s been the main unexpected side benefit of working with the Centre over the years, getting to broaden the network and keep a finger in pies outside the criminal world.”



Clockwise from top left:

Megan Savard, The State of Canada’s Constitutional Democracy Conference, David Asper & Raj Anand Fireside Chat, Constitutional Law Symposium for Canada’s Sesquicentennial



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