



Montreal, QC, Canada – June 20-23, 2010

History

The Joint Study Institute is a conference held jointly with the American Association of Law Librarians (AALL), Australian Law Librarian Association (ALLA), the British and Irish Association of Law Libraries (BIALL) and the Canadian Association of Law Libraries (CALL). The JSI has been held every two years since 1998 when the first JSI was held in Cambridge, England. Organizers endeavour to provide an intense, high-level learning experience for delegates. The host country's legal traditions and heritage are featured and speakers are drawn from the country's legal community. Academics, lawyers, judges, librarians, and tech-savvy professionals present on the chosen theme. For more information on the history and objectives of the JSI, see [History of the Joint Study Institutes](#).

Overview

On June 20-23, 2010, I attended the Joint Study Institute (JSI) in Montreal, Quebec. The theme of this year's JSI was "*Diversity, Culture and Contrasts: Canada's Legal Kaleidoscope*". Canada's system was explored through sessions devoted to constitutional and parliamentary law, aboriginal law, civil law, the courts and the judiciary, the use of international law in Canadian Courts, access to information, legal ethics and sovereignty. This was a small but invigorating conference. In total, there were 51 delegates from Canada, the United States, the United Kingdom, and New Zealand. The small number of delegates afforded each of us the opportunity to get to know the fellow attendees in a way that many of the large conferences don't; there were plenty of occasions to network with colleagues including the opening reception evening at the [McCord Museum](#), a 'dutch treat' dinner at [Boris Bistro](#), a reception and tour at the [Nahum Gelber Law Library](#) and the closing dinner at the [Hotel Nelligan](#) in Old Montreal.

Summaries of each of the conference sessions follow. Links to speaker bios, cases referenced, presentations, and other materials of interest have been included where available. For more commentary on the JSI conference and sessions, please see the upcoming issue of the Canadian Law Library Review (2010, vol.35, no.3).

Jacquelyn DeGreeve, BA, MLIS
Reference Librarian
Burnet, Duckworth & Palmer
August 18, 2010

Sessions – Module 1

"Canada: The Constitution and the Charter"

[Beverly Baines](#), Faculty of Law, Queen's University

[Mahmud Jamal](#), Partner, Osler Hoskin & Harcourt LLP

The conference began, appropriately, with a presentation on Canada's Constitution and Charter by *Mahmud Jamal*. Mr. Jamal provided a brief history of Canada's constitution (a challenge!) from the BNA Act of 1867 to the Constitution Act 1982. He outlined Canadian civil rights and liberties entrenched under the Charter of Rights and Freedoms and then focused on the "freedom of religion". Mr. Jamal noted, interestingly, that s. 2(a), the "freedom of conscience and religion" can actually be seen to conflict with the part of the Charter preamble that states "whereas Canada is founded upon principles that recognize the supremacy of God...", especially in the case of atheists.

Some recent cases that considered the right to "freedom of religion" include [Alberta v. Hutterian Brethren of Wilson Colony](#), [2009] 2 S.C.R. 567 and [Multani v. Commission scolaire Marguerite Bourgeoys](#), [2006] 1 S.C.R. 256. The Multani case exhibited a couple of interesting approaches. Firstly, the "subjective sincerity" approach to freedom of religion wherein the courts do not adjudicate religious dogma. Secondly, the question of whether or not the individual "subjectively and sincerely believed" that the contested kirpan was required by their religion – the burden of proof was not trivial. Social benefits and costs were weighed (ie. religious tolerance & collective safety and security).

- Mahmud Jamal's presentation - [Canada: The Constitution and the Charter](#).

Beverly Baines provided a feminist perspective on equality rights, competing rights (situations where the rights of two individuals appear to be in conflict), and intersectional rights through an examination of the Charter 30 years on. Ms. Baines asserts that the jury is still out on whether s.15(1) of the Charter promotes sex equality. The three tests (as set out in [Andrews v. Law Society of BC](#), [Law v. Canada](#) and [R. v. Kapp](#)) are confusing and contested. Likewise, cases considering competing rights are controversial. For example, the issue of polygamy in the case of [Blackmore v. BC](#), (2009) 247 C.C.C. (3d) 544 illustrates how section 293 of the Criminal Code (outlawing polygamy) competes with the right to religious freedom in s.1 of the Charter. She asks, is there a rational connection between the criminalization of polygamy and the protection of women and children? The 'niqab issue' in [R. v. N.S.](#), 95 O.R. (3d) 735 demonstrates how 'intersectional rights' seekers (eg. those who refuse to choose between religious freedom and sex equality) pursue two rights equally. In this case, N.S. refused to remove her niqab arguing that such an action would violate her rights under ss. 7 and 15 of the Charter (see [Factum of the Intervener, Legal Education Women's Fund](#)). Ms. Baines overview of these cases showed how rights given and protected by the Charter can in fact conflict, compete and intersect in certain circumstances.

- Beverly Baines presentation - [The Charter @ 30](#).

"The View from the Peace Tower"

[Greg Tardi](#) – Senior Parliamentary Counsel, House of Commons, Parliament of Canada

Greg Tardi provided an insightful session on some of the individuals and groups who contribute to the inner workings of Parliament of Canada. The Parliament is a statutory creation wherein each Member (MP) is a "legal entity". It is subject only to the constitution; it interacts with the executive and judicial branches with its constitutionally-based privileges whole and intact (parliamentary privilege). Policies

that Parliament makes are not rules of general application in society. Rather, they are used for internal governance and are part of Parliament's self-governance.

The [Board of Internal Economy](#) is the governing body of the House of Commons (HC) and the HC Administration supports its functions and services. The Office of the Law Clerk and Parliamentary Counsel is one of five service areas that fall under [House Administration](#). The Law Clerk's responsibility has evolved from legislative drafter to non-partisan legal and legislative advisor to the House. Legislative Services is a small group of lawyers dedicated to the drafting of legislation. Legal Services is a also group of lawyers who are responsible for pretty much everything else including matters of constitutional law, litigation, legal education, intellectual property, procurement and contracting, drafting policy instruments and so on.

Mr. Tardi also provided a brief examination of "political law". Political law is where public law (eg. constitutional and administrative law), public administration and politics intersect. Information on political law is available from the [Institute of Parliamentary and Political Law](#) as well as Mr. Tardi's book on the topic - "Law of Democratic Governing: Principles & Jurisprudence", Carswell, 2004.

Sessions – Module 2

"Redressing the Right Wrong: Can Canada Get it Right?"

[Douglas Sanderson](#) - Faculty of Law, University of Toronto

Douglas Sanderson spoke on the present condition of indigenous affairs and why "starting from scratch" is necessary. Mr. Sanderson believes that the current state of indigenous people is rooted in oppression. He subscribes to Aristotle's theory of 'corrective justice' and feels it must be applied in order "right the wrong". Corrective justice holds that the parties are equal, that amends must be made, and what has been lost must be returned. How does today's government reconcile for damages inflicted long ago? He argues that things cannot be made exactly as they were but rather that the parties should be put in the position that they would have been in had the offence not occurred. He suggests that simply focusing on returning land as a way of righting a wrong is to focus on an empty goal; the act does not meet the standard of "corrective justice". Rather, a committed political response is required wherein indigenous social, political and economic institutions are allowed to flourish.

"Ahki, Anishinaabek, kaye tash Crown"

Wapshkaa Ma'iingan (Aaron Mills), Student at Law, Olthius Kleer Townshend

Aaron Mills' presentation asserted that the contemporary dialogue that exists between the Crown and indigenous groups is rooted in outdated colonial concepts and is therefore detrimental to indigenous communities (such as the Anishnaabe) who have a very different legal framework. He contends that Canadian and Anishnaabe legal orders are fundamentally irreconcilable. While the Western framework is centralized and codified, the indigenous orders are decentralized and codified verbally. It is Mr. Mill's belief that until Canada begins to subscribe to a world view that is more in line with that of its indigenous communities, there is little hope of reconciliation. It is fundamental that Canada recognize and engage with the indigenous legal framework before relations will be 'righted'.

- Aaron Mills is a Bear Clan Anishinaabe from Couchiching First Nation was the recipient of the [University of Toronto's President's Award for Outstanding Native Student of the Year in 2009](#).

"Can Euro-Canadian Law and Indigenous Law Find Common Ground?"

[Roger Townshend](#), Partner, Othuis Kleer Townshend

Roger Townshend spoke about the concept of reconciliation in relation to Euro-Canadian and indigenous law. In applying this concept, the Supreme Court has ruled that in adjudicating aboriginal rights, equal weight must be given to the aboriginal and common law perspective ([R. v. Van der Peet \[1996\] 2 S.C.R. 507](#), para. 43). Mr. Townshend suggests that the concept of reconciliation is the basis of the doctrines of aboriginal title and aboriginal rights and that the tests for establishing rights under these doctrines have been developed in Euro-Canadian courts. He argues that 'aboriginal title', as it currently stands, flows from common law property rights and is therefore contradictory to the indigenous perspective on land and way of life. A close examination of key aboriginal rights doctrines reveals that reconciliation has not and will not be reached until the conceptual tools afforded by common law are used in a true spirit of good faith, with imagination and courage. When there exists "a willingness and ability to interact fairly with a worldview that is fundamentally different", Canada and its indigenous peoples will be on the path to reconciliation.

- Roger Townshend has a number of [papers](#) available on the [Olthuis Kleer Townshend](#) site.

"Quebec Civil law: The C.O.D.E"

Denis LeMay, Université Laval (1975-2006)

Denis LeMay's presentation on the Québec Civil Code was especially useful to those of use who remain rather unfamiliar with this piece of legislation. The civil law is codified into the laws of Quebec. There were two codifications; the first was in 1886 when it replaced the Civil Code of Lower Canada and the second revision was in 1994. The Code is one piece of legislation and has the same characteristics as any other system of law. It is a body of rule that lays down the "jus commune" and is the foundation of all other law. It governs persons, relations and property (civil rights and family law). In total, there are 3168 articles in the civil code with most of the books being logically presented.

The Quebec system is in fact a mixed system (a duality) where the common and civil law systems co-exists. The Code also exists in harmony with the Charter and the general principles of law. Interestingly, it is one of the only bijuridical systems in the world.

- Denis LeMay's presentation - [Quebec Civil Law: The C.O.D.E](#)

Sessions - Module 3

"Canadian Courts and the Judiciary"*

[Justice Julie A. Thorburn](#), Ontario Superior Court

[Justice Sean Harrington](#), Federal Court

This session was an insightful and concise examination of the Canadian court system. Madam *Justice Julie Thorburn* of the Ontario Superior Court and *Mr. Justice Sean Harrington* of the Federal Court presented an overview of the Canadian courts and judiciary while addressing some of the challenges that the courts currently face.

To begin, Justice Harrington explained that the bijural and linguistically diverse nature of our system renders it rather unique; Canada is one of the few countries in the world operating under two systems of law (common and civil) and enacting legislation in both official languages (each being equally authoritative). Justice Harrington also outlined how the Supreme Court and the Federal Courts of Canada operate and then briefly explored the concepts of bijuralism, national courts (advantages and disadvantages), and judicial independence.

Madam Justice Thorburn provided an explanation of the provincial court system with a focus on the Ontario Superior Court. She also offered some insight into the workings of the judiciary. She noted that there has been a trend toward specialization amongst the judges as cases have become ever more complex. They now cycle their way through various teams (eg. criminal, corporate, general civil, long trial, etc.) to achieve the necessary level of understanding required to work in a generalist court. Judges also take courses and are assigned mentors to guide them in their positions.

The presentation concluded with a discussion a number of key challenges facing the courts. Access to justice appears to be a major issue as are lengthy criminal trials. Delays in the justice system (eg. processing of cases) and endemic social problems such as drug addiction and mental health issues are also major challenges to the courts. It seems that the courts face many frictions which are unlikely to diminish in the near future.

- Download a copy of this presentation, [Canada's Courts](#).
- A complete version of this summary will appear in the upcoming edition of the *Canadian Law Library Review* (2010, vol.35, no.3).

"The Application of International Law in Canadian Courts"*

[Joseph Neuberger](#), Lawyer, Neuberger Rose

[Allan Manson](#), Faculty of Law, Queen's University

Allan Manson and *Joseph Neuberger* presented on the application of foreign and international law in Canadian courts. Mr. Manson outlined Canada's history of reliance on foreign and international law and Mr. Neuberger carried the discussion forward with a focus on how Canada is applying foreign and domestic law in extradition cases. Both speakers addressed a number of notable cases including [United States. v. Burns](#), [R. v. Hape](#) and [Canada \(Prime Minister\) v. Khadr](#) and the impact that these decisions have had on the application of international law.

Mr Manson led the discussion by asking a number of provocative questions including whether or not commonwealth courts could be considered pioneers in the area of global jurisprudence. If so, what responsibilities are tied to this role? By way of exploring this notion, he provided some history of foreign law application in Canadian courts. Over the past 10 years, it has become clear that Canada should be looking to other Commonwealth countries as a way to further their own analysis and shape their own views.

Mr. Neuberger, a criminal lawyer, addressed how Canada has dealt with extradition and the extra-territorial application of the *Charter of Rights and Freedoms*. Canada has traditionally adhered to the principles of international extradition law: reciprocity, comity and respect for differences in other jurisdictions. However, a number of factors including globalization and increased movement of peoples, has rendered it increasingly difficult to prosecute perpetrators locally in a simple and expedient manner. Sometimes Canadian courts are forced to balance domestic values of fairness, justice and expediency with the norms of foreign law.

Occasionally, our courts are required to deal with states whose procedures may "sufficiently shock the conscience", or where the accused's rights are violated under section 7 of the *Charter*. These situations bring up the issue of extra-territorial application of the *Charter*. To what extent can the Charter be applied to investigations or proceedings in foreign jurisdictions? This is an area being tested. The *Khadr* decision demonstrates a departure from previously held notions about the application of foreign and international law and reveals the direction in which the extra-territorial treatment of the Charter may be heading.

- Mr. Neuberger's paper - [When Paths Cross: A Look at the Interplay Between Foreign Law and Domestic Law in Extradition Cases](#).
- A complete version of this summary will appear in the upcoming edition of the *Canadian Law Library Review* (2010, vol.35, no.3).

Sessions – Module 4

"Transparency and Access to Information"

Justice John H. Gomery, President, [Quebec Press Council](#)

John Gomery is probably best known as the Commissioner of the [Inquiry into the Sponsorship Program and Advertising Activities](#) (informally known as the 'Gomery Commission' into the 'Sponsorship Scandal'). Mr. Gomery spoke on the issue of political transparency. Although economic progress tends to overshadow other kinds of progress, there has actually been spectacular advances in democratic progress which has increased the extent to which citizens can be informed about the administration of their governments. This is often referred to as "transparency" although the meaning of this term has really evolved to mean "open government".

Mr. Gomery proposed that transparency should be more than just a political promise. Rather, he envisions it as a norm, an ethical requirement and/or a political right. He views section 2 (b) of the Constitution as a 'cousin' of the right to freedom of information (ie. of a quasi-Constitutional nature). Currently, a dichotomy exists between the theory of access and the practice of access; in his view, "access delayed is access denied". Too often, the press and media are seen as adversaries and public officials are prone to invoke reasons for non-disclosure. There has to be political will to make 'access to information' legislation actually work. Although both the Gomery Commission and the House of Commons Standing Committee on Privacy and Access to Information recommended amending and strengthening the 'access to info' legislation, this has not yet happened. Until it does, the status quo will persist.

In the United States, President Obama recently signed an order directing in very clear terms that access to information requests were to be taken as obligatory. Mr. Gomery suggests that this is the direction that Canada will also eventually have to take.

"Governance and Ethics in the Legal Profession"

[Derry Millar](#), Treasurer, Law Society of Upper Canada and Partner, WeirFoulds LLP

Derry Millar represented [The Law Society of Upper Canada](#) (which regulates all lawyers and paralegals in Ontario) and addressed the issue of civility in the legal profession. Since the 1960's, we have seen rapid development of technology (eg. cell phones, automated attendants, etc) and with it, a decline in societal civility. Mr. Millar addressed why this has become a major concern within the legal profession.

From 2004 to 2009, one third of all complaints had a civility component. The largest proportion of these complaints related to civil litigation, followed by family law, and then real estate. Complaints of rudeness, profanity, disrespect and bullying have become rife and have resulted in a lack of respect for the

profession and a threatened ability to self-regulate. As a result, the Law Society has introduced a number of measures to address the problem including a new discipline process, a mentoring program, protocols, civility forums, continuing education responsibilities in the area of ethnics and civility, and a review of the law schools' commitment to teaching ethics/civility. It is Mr. Millar's hope that these tactics will have a positive impact on the current situation. In his words, "civility costs nothing but buys everything".

"Sovereignty and Shipping in the Northwest Passage"

[Jean-Marie Fontaine](#), Partner, Borden Ladner Gervais

Jean-Marie Fontaine gave an interesting talk on Canada's sovereignty and shipping through the Northwest Passage (the marine corridor between the Beaufort Sea and Baffin Bay). His presentation tied together many of the themes that had been addressed over the course of the Conference.

The debate around shipping through the Northwest Passage is heating up for a variety of reasons. Global warming is shrinking the amount of ice in the Arctic Ocean at an alarming rate. It is entirely feasible that there will be year-round commercial shipping through the Passage by the year 2030. The fact that the Passage shaves off approximately 2,480 miles from the Panama Canal route and provides a natural route between Asia and North America makes this an attractive option to many.

There are four countries that border the Passage: U.S., Canada, Russia and Denmark. This has obviously led to competing claims. Canada considers the Passage internal water based on a historical/consolidated title or coastal baseline argument. The USA and European Union have claimed that it is an international strait based on customary international law and the [United Nations Convention on the Law of the Sea](#) (UNCLOS) and therefore assert that it is subject to a right of transit of foreign flagged ships. Both arguments have strengths and weaknesses and it remains to be seen as to whether the Passage will be designated international or not. Issues of sovereignty and acquiescence by foreign states will undoubtedly persist in this debate.

Sessions – Module 5

"Presentations by Librarians"

Maryvon Cote, Nahum Gelber Law Library, McGill University

Monique Stam, Centre d'accès à l'information juridique (CAIJ)

Ivan Mokanov, LEXUM

Maryvon Cote presented on "***Building a Transsystemic Library Collection at McGill***". Students at McGill can graduate from law school with both a civil and common law degree. This bilingual training program enables students to study the world's great legal traditions in an integrated fashion and within a bilingual environment. This approach is not new. In some law schools it has been done for years; for example, in comparative law classes. However, it is somewhat revolutionary for a law faculty as a whole to embrace this approach regarding legal education. McGill's law school has subscribed to this interdisciplinary approach since 1999 through examination of other jurisdictions like Louisiana and France. Consequently, the approach to collection development has been adjusted. Doctrinal sources involving various legal systems are given preference according to McGill's academic priority of transsystemic legal education. These include sources on local law, national law, continental law, international law, indigenous law, and non-territorial legal systems. The challenge is to meet the needs of both the students and faculty.

- For more information on McGill's approach to legal education, see [Legal Education that Crosses Borders and Challenges Boundaries: Case for Support](#) from the Faculty of Law.

Monique Stam presented on "*Making Legal Information Available to Lawyers, Anytime, Anywhere*" through Barreau du Quebec's [CAIJ \(Centre d'accès à l'information juridique\)](#). The CAIJ provides online access to the Barreau du Quebec as well as the public. Prior to launching the CAIJ, user needs were assessed through research and training services, educational programs in research, user testing of the tools, implication from the legal community and, of course, surveys. There were a number of challenges regarding legal content which the developers faced: a large territory, language barriers (only 5% access English case law), civil law vs common law and insufficient distribution potential.

It was determined that in order for the CAIJ to be a success, five specific needs would have to be met:

1. Centralized access beyond regular library hours (24 hours / 7 days a week)
2. Heightened access to inexpensive electronic content
3. Regular updates (RSS) on recent acquisitions, new legal questions, new legislation and fields of law.
4. Access to services beyond library walls (eg. ILLs within 24 hrs, documents to you inbox, electronic librarian, etc).
5. User friendliness – natural language searching with a familiar look and feel.

It would appear that the CAIJ has been successful at meeting these needs. To continue to do so will require a commitment to exploring new technologies and listening to user feedback. This will increase the likelihood that the site remains accessible and practical.

Fast Facts on the CAIJ:

- The budget for the site comes from 22,000 members of the QC bar.
- CAIJ Human Resources include 40 permanent staff across the province, 17 staff at headquarters, 9 at the Montreal library. The focus is on diversified expertise (programmers, librarians, lawyers, etc.
- CAIJ now has a mobile version of their products which can be used on Blackberries, etc.
- Video tutorials will be launched in Fall 2010.

Lastly, *Ivan Mokanov* presented on "[LEXUM](#)", a privately owned firm which originated at the University of Montreal and specializes in legal informatics. Although they may be best know for their design and operation of CanLII, they also create custom tailored products for the legal community at large. One of their recent projects (which was demonstrated for the delegates) was BC's [Continuing Legal Education \(CLEBC\)](#) site. This is an impressive site which appears to bring exceptional functionality to the user's desktop. For example, CLEBC members can now access entire practice manuals in a browseable, searchable format through the site. Hyperlinks to cases, forms, etc. are embedded as are "referenced links" for cases (ie. links that will bring up other sections of other practice manuals that reference that case). LEXUM is also in the process of designing a federated search for the CLEBC.