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PROGRAM REPORT

PANEL No. 1

DEFINING CULTURAL AND RELIGIOUS DIVERSITY IN THE ADMINISTRATION OF JUSTICE: ARE THERE DIFFERENT PERSPECTIVES?

Monday, October 2, 2017

SPEAKERS

- Mr. Rodney D. Small, Halifax
- Mr. Gurbaj Singh Multani, Montréal
- Ms. Sheema Khan, Patent Agent, Shapiro Cohen LLP
- Mr. Jack Jedwab, President, Association for Canadian Studies
- Ms. Viviane Michel, President, and Ms. Véronique Picard, Justice and Public Security Coordinator, Quebec Native Women Association

Chair: The Hon. Nicole Duval Hesler, Chief Justice of Quebec

REPORT WRITTEN BY

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This report was issued by the Canadian Institute for the Administration of Justice on January 16, 2018, following the 42nd Annual Conference on Cultural and Religious Diversity in the Administration of Justice *"The Charter Challenge Conundrum: The Clash of Rights and Values and the Canadian Cultural Mosaic."* The Honourable Nicole Duval Hesler, Chief Justice of Quebec, was Honorary Chair for the conference which was held in Montréal from October 2 to 4, 2017. The event and brought together 160 participants, including 40 speakers.

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The first panel of the conference offered the testimony of plaintiffs and interveners from different communities and backgrounds. The opening statement heard prior to the panel had suggested that discrimination is oftentimes an involuntary by-product of an ethnocentric perspective founded in a dominant cultural viewpoint. These testimonies thus challenged the dominant viewpoint by offering a unique perspective into the personal experiences in overcoming institutional challenges barring the right to equality.

The presentation was divided in two parts. The first was composed of the testimony of Rodney D. Small and Gurbaj Singh Multani. These two individuals were thrust into the legal system during their childhood, in cases that reached the Supreme Court of Canada and shaped modern Canadian case law. Their stories provide a glimpse into the effects of litigation for young individuals from minority groups and the multidimensional nature of litigants. The second section presented the experience of interveners from different communities. It is notable how the institutional problems intersect across different Canadian minority groups. The speakers for this part of the symposium were Sheema Khan, Jack Jedwab, Viviane Michel and Véronique Picard. Unfortunately, the discussion was cut short due to a lack of time.

This brief account of the first panel will follow a similar format and focus on the similarities and contrasts between the accounts.

A. Fighting for your rights

Mr. Rodney D. Small

Over the years, Rodney D. Small became a mentor for many young men and women by coaching elite basketball. He holds a degree in management and is pursuing further studies. He is a social enterprise developer at Common Good Solutions. In the legal community, however, he is known as RDS. He was arrested when he was only 15. Throughout his testimony, his voice cracked with emotion. He was deeply moved to have been invited to tell his story to an attentive audience.

Before delving deeper into his personal experience, it may be useful to recall the outline of the case. In *R*. v. *S*. (*R.D.*), [1997] 3 SCR 484, the issue was whether the decision of the trial judge to acquit should be struck because of an apprehension of bias. In her oral reasons, the judge remarked that police officers were known to have misled the court in the past and that this was particularly prevalent in cases involving non-white groups. She added, that her comments were not aimed at the particular police officer who had testified before the court. Both the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal held that these comments justified a new trial. The Supreme Court of Canada decided that, based on all the circumstances specific to this case, the comments had not crossed the line and that there was no need for a new trial.

On the face of it, this decision seems theoretical. In fact, one might even go so far as to consider that the actions of the judge were at issue rather than those of the accused. However, one must remember that the charges against the then 15-year-old boy, were alarmingly serious: unlawfully assaulting a police officer, unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. Indeed, Small's testimony showed that, to him, this process was very real indeed and a tremendous burden.

Small began by explaining what life was like growing up as a member of the African community in Nova Scotia. Africville, as it's known, was shown to be "a façade and an easy solution to relocation." The community was plagued with violence and drugs. Tension was omnipresent

between inhabitants and police. Small's own father was not present when he was growing up because he was in jail. His brother was also later jailed for drug offenses. To Small, the justice system had always been a beast.

One day, while coming home on his bicycle, he heard about a young local being arrested. A small crowd had formed at the scene of the altercation. Small tried to see if everything was alright, and was immediately told to "shut up" or otherwise, he would be arrested. Upon asking the young man if he wanted Small to tell his mother what was happening, the police officer placed Small in a chokehold. At that moment, he feared for his life. He couldn't breath. After being thrown into the patrol car, the pair were taken for a rough ride in an attempt to intimidate and harm them. Small had to do his best to keep both of them from being injured. When he was finally released from custody at the police station in front of a small crowd, he was facing so many accusations he couldn't even remember all of them.

The effect of these events was devastating. As his life spiraled out of control, he went so far as to stop playing basketball; which had been his only refuge. He lost all hope. Although in the end he won his case in the Supreme Court of Canada, Small remains unconvinced that the judicial system is able to protect members of the black community.

Mr. Gurbaj Singh Multani

Gurbaj Singh Multani was only 12 when he began his long battle with the justice system. He had only been in Canada for a little over a year when he dropped his kirpan on the basketball court at school. There wasn't a problem at the time, but later that day, the principal of the school gave him an ultimatum: remove the kirpan or go home!

Once more, it is revealing to consider the facts and the law as laid out by the Supreme Court of Canada before relating Multani's personal account of the events. In *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, the issue was whether the Commissioner's decision complied with the requirements of the Canadian *Charter*. The Court established that a contextual

analysis under Section 1 of the *Charter* would balance the relevant competing values. It was held that the complete prohibition of the kirpan did not constitute minimal impairment and therefore, the decision was nulified. This case thus laid the framework for the analysis of administrative decisions that impede on *Charter* rights which would later be clarified in *Loyola High School* v. *Quebec* (Attorney General), 2015 SCC 12. Although the Court did address misconceptions about the kirpan and the Sikh faith that had been raised in the respondents' factum, its decision remained abstract and did not show the full effect of the School Board's decision. In the end, the appropriate remedy was simply a declaratory judgment because, after all these years, Multani no longer attended Sainte-Catherine-Labouré school.

Multani explained how the kirpan is not just "a knife". It is a religious symbol his faith requires him to carry. The word itself, he explained, has two components: "kirpa" - mercy, and "aanaa" - honour. Understanding the meaning and significance of the kirpan is a prerequisite to being allowed to carry it. Although, at first he had been successful before the Superior Court, Multani was not protected from public opinion and the reluctance of his School to follow-up on the outcome of the appeal. Indeed, the School continued to refuse access. In addition, the publicity of the case drew in a large crowd of people who disapproved of him, insulted him and threatened both himself and his family. Even in the face adversity, his parents told him to remain hopeful and to trust that in Canada, liberty and freedom of belief would be protected. Multani witnessed this before the Supreme Court of Canada when he saw how many lawyers were present to defend him and his right to religious freedom. In closing, Multani stated that he is proud to be Canadian and proud to be Sikh, today.

The fact that these individuals had to go through such grueling trials when they were children, is a cause for concern. They have in common, the strain that discrimination has had and continues to have on their lives. They did not simply win before the Supreme Court of Canada, they lived through years of litigation and had to find great strength to hold on to hope. These testimonies give life and substance to the very real nature and effects of litigation.

B. Fighting for others

Ms. Sheema Khan

The second part of the panel opened with a discussion by Sheema Khan about the Muslim perspective. Khan has a B.Sc. in Chemistry from McGill, a Master's Degree in Physics and PhD in Chemical Physics from Harvard. She pursued post-doctoral research at MIT and McGill. She now works as a Patent Agent with Shapiro Cohen LLP in Ottawa and writes monthly for the Globe and Mail on Islam and Muslims from a modern and liberal perspective. In addition, she has contributed to "The Family Honour Project", a comprehensive, multinational approach towards combatting honour-based violence. Khan's presentation covered four areas: access to justice, civil rights, open trials, and cultural tensions.

In recent years, there has been an significant increase in the amount of cases brought forward by members of Canada's Muslim Community. Access to justice, however, has been difficult because it remains difficult to convince police to take denunciations seriously. In addition, due to the depiction of certain incidents by the media and recent Bills before the Québec Legislature, Muslims feel under siege today. Costs of litigation are also a common challenge for all Canadians. Notwithstanding these challenges, it is encouraging that Canadian courts have been protecting Muslims' civil rights in notable cases such as *Almaki*, *Elmaati*, *Nureddin*, *Khadr*, *Abdelrazik*, and *Ishaq*. Open trials in terrorism cases provide an eye opener and a reality check having a beneficial effect on public relations. Indeed, transparency is vital. Still, these positive advances have not removed cultural tensions. The Ontario "Shariah" arbitration debate spiralled out of control and failed to present the requests of the community adequately. But, controversial issues can be beneficial. The Shafia trial provided an opportunity to put forward important issues regarding families, abuse of women, and cultural beliefs. It led to a campaign to educate men about violence against women. For many, moving to Canada offered a new life in which women could obtain equality by the law and society.

Mr. Jack Jedwab

Jack Jedwab presented the Jewish viewpoint from an academic perspective. Jedwab is the Executive Vice-President of the Association for Canadian Studies and the Canadian Institute for Identities and Migration and has a Ph.D. in Canadian History from Concordia University. He taught at the Université of Québec in Montréal and McGill University. He proposed that a complex issue such as cultural identity is irreducible to a single definition. There is indeed a multiplier effect caused by different interpretations of a matter over a long period of time. To demonstrate his point, Jedwab used the *Charter of Values* as a sample case showing the different ways in which a question of identity can be framed and how definitional ambiguity advances a particular agenda.

Different manifestations of the "us vs. them" debate was at the heart of the discussion. Discourse about accommodation of difference, shared values and social cohesion has the implicit effect of creating a divide that represents a threat to cohesion. Framing the issue in a confrontational way, "us vs. them", encourages a shift towards a majority versus minority debate that is, in turn, expressed in cultural and/or religious terms. Through carefully crafted questions, public opinion quickly takes over and gives precedence to majority values. Generality is preferred here by proponents of the majority viewpoint because it omits unappealing controversial details. In addition, symbols of the minority group are cast as an imposition on the collective "us". The issue is unilateral, however, as symbols of the majority are left out of the debate and are not considered as an imposition on "them". The plurality of definitions and models of secularism or laïcité are not acknowledged in public discourse. It follows that unity can be crafted by escaping definition. The absence of clearly defined terms continues in legislation that omits indicating the meaning of fundamental expression like "cohesion" and "living together" (le vivre ensemble). Thus, perhaps, at issue is a question of branding that is difficult to overcome.

Ms. Viviane Michel

Viviane Michel has been the president of Québec Native Women, Inc. ("QNW") since 2012. Michel is the spokesperson for the group on aboriginal women interests before government and institutions. She actively promotes traditional practices and respect for the identity and culture of both aboriginal nations and women. Michel was accompanied by Véronique Picard who holds a degree in criminology and acts as Justice and Public Security Coordinator for QNW.

Michel began with a message of thanks to the Creator and by pointing out the lack of an Innu translation for conference attendees. Her message was strong when she stated, "We come here with respect, but also with truths and observations." QNW was founded 44 years ago and defends members of all 11 Aboriginal Nations in the Province of Québec. The group promotes non-violence and justice in addition to the participation of women within their communities. Considering that aboriginal persons are still overly represented in the correctional system, that the judicial system very rarely provides solutions adapted to the cultural needs of aboriginal nations that aboriginal persons are not taken seriously in their denunciations and testimonies and that there are many tragedies that have been ignored and downplayed over the years the promotion of justice remains a challenge. Systemic racism and institutional discrimination toward aboriginal groups predates confederation. But, it is time to break the silence. The justice system must respond and work with Aboriginal Nations and women in putting solutions in motion that will be adapted to their needs.

It was at this time that Picard was informed that there would not be enough time for her presentation. The floor was opened up for questions, but there were no takers.

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