

The 40th Anniversary of the Canadian Charter: Unfinished Business

Centre for Human Rights and Legal Pluralism, McGill University
A roundtable, co-hosted by Colleen Sheppard & Vrinda Narain

8 April 2022
Program

(All times are for Montreal, Eastern Daylight Time; all sessions will be hosted on Zoom and recorded.)

09:15 am (ET)

Welcome and Introduction
Colleen Sheppard

09:30 – 11:00 am

Session 1: Missing Rights?

Moderator:

- Nandini Ramanujam

Speakers:

- Mirja Trilsch: “The Charter at 40 – Who’s *still* afraid of social rights?”
- Sébastien Jodoin: “Including the Right to a Healthy Environment in the Charter”
- François Crépeau, O.C.: “The human rights of migrants: a blind spot everywhere”

11:00-11:15 BREAK

11:15 – 12:45 pm

Session 2: Interpretive Complexities

Moderator:

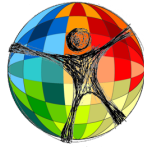
- Vrinda Narain

Speakers:

- Tamara Thermitus, Ad.E.: « Le droit à l’égalité et l’accès à la justice : une utopie pour les personnes racisées ? »
- Joshua Nichols: "Section 35 is not in the *Charter*: A Review of the Constitutional "Background" of R. v. Sparrow"
- Colleen Sheppard: “Retrospective on Substantive Equality: Fissures & Fracture”

12:45 – 13:00 pm

Closing remarks
Vrinda Narain



The 40th Anniversary of the Canadian Charter: Abstracts and bios

Nandini Ramanujam

Moderator: Missing Rights panel



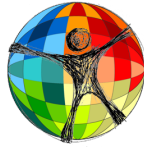
Bio:

Professor Nandini Ramanujam is the Co-Director and Director of Programs of the Centre for Human Rights and Legal Pluralism at McGill University's Faculty of Law.

Nandini Ramanujam's research and teaching interests include Law and Development, Institutions and Governance, Economic Justice, Food Security and Food Safety, the role of civil society and the Fourth Estate (Media) in promotion of the rule of law, as well as the exploration of interconnections between field based human rights work and theoretical discourses.

Before joining McGill's Faculty of Law, Dr Ramanujam was involved in the successful systemic reform of higher education in the former communist countries of Eastern Europe and the Soviet Union, including Aga Khan's Central Asian University and Smolny College in St. Petersburg. She has sat as Director of the Higher Education Support Program of the Open Society Institute in Budapest and Regional Director of Baltic and Eurasian Programs of Civic Education Project. She also has extensive experience in human rights issues, strategic planning, governance and programming, with a particular focus on education and civil society. She has been involved in the development of strategic planning for human rights institutions such as the Cambodian Centre for Human Rights and the Open Society Institute's Disability and Law Network. She served on the Board of Directors of the Canadian Human Rights Foundation (Equitas) from 2001-2008, and was President of Board between 2003-2008. She is a member of the Board of Directors of Centraide of Greater Montreal.

Nandini Ramanujam received her Doctorate in Economics from Oxford University for her dissertation on *Price Mechanism in Russia: Its role in the Old Planning and the New Markets*. She holds a M.Phil and a M.A. in Economics with 1st class honours from Bhopal University.



Mirja Trilsch

The Charter at 40 – Who's *still* afraid of social rights?



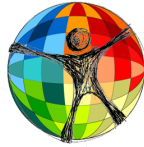
Abstract :

More than 30 years ago, in *Irwin Toy, Dickson J* stated that it was too early to exclude "economic rights" from the ambit of section 7: "This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. " 40 years later, the attempts of having socio-economic rights recognised under section 7 - or under any other section of the Charter, for that matter - have produced only incremental success. Contrary to other constitutions or international instruments, the dichotomy between civil and political rights on the one hand and socio-economic rights on the other hand remains strong in Canadian Constitutional Law. This presentation will give an overview of past and current advocacy strategies for the constitutional protection of socio-economic rights and question whether, 40 years down the road, the recognition of these rights remains a relevant and attainable goal.

Bio:

Mirja Trilsch is a professor at the *Département des sciences juridiques* at *Université du Québec à Montréal* (UQAM) where she teaches Constitutional Law and International Human Rights Law. Since 2011, she is also the Director of UQAM's International Clinic for the Defence of Human Rights (CIDDHU in its French acronym). Her research focuses on the issue of social justice under both Constitutional and International Human Rights Law. She has published on the enforcement of Economic, Social and Cultural Rights in several jurisdictions. In 2014, she was the Canadian National Rapporteur on "Social and economic rights as fundamental rights" at the XIXth International Congress of Comparative Law.

Born and raised in Germany, Mirja holds a law degree from the University of Düsseldorf (Germany) and a Master's degree in International and Comparative Human Rights Law from McGill University (2001). She obtained her PhD with distinction from the University of Düsseldorf (Germany), her thesis dealing with the justiciability of Economic, Social and Cultural Rights. She is fluent in German, English, and French.



Sébastien Jodoin

Including the Right to a Healthy Environment in the Charter

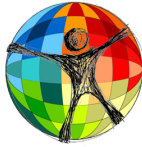


Abstract:

While most countries in the world recognize the right to a healthy environment in their constitutions, Canada does not. This oversight has undoubtedly undermined the pursuit of environmental justice in this country, but it is not the end of the story. [In this presentation, I will discuss how and to what extent existing rights in the Charter have been and can be interpreted to safeguard individuals and communities from environmental harm and discrimination.](#) I will then explain the important role that the inclusion of a right to a healthy environment in Canadian constitutional law could play in improving the environment and thereby protecting the rights and well-being of Canadians. At the same time, I will argue that the transformative potential of this right hinges not simply on its constitutional recognition, but on other social, legal, and institutional factors as well.

Bio:

Sébastien Jodoin is an Associate Professor in the Faculty of Law of McGill University, where he holds the Canada Research Chair (tier 2) in Human Rights, Health, and the Environment. He is also a member of the McGill Centre for Human Rights and Legal Pluralism and an Associate Member of the Bieler School of Environment, the McGill Institute of Health and Social Policy, and the Max Bell School of Public Policy. He is the founding director of the [Disability-Inclusive Climate Action Research Programme](#), a pioneering initiative to generate, co-produce, and translate knowledge at the intersections of disability and climate justice.



François Crépeau, O.C.

The human rights of migrants: a blind spot everywhere



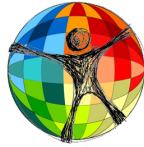
Abstract:

“Human rights can only be made effective through activism from a politically significant group of individuals. Without the right to vote and under the constant fear of being returned to their country of origin, migrants with little social capital (they are the majority) generally keep quiet and have little traction on the production and implementation of migration policies. These are often made to serve the host country’s economic needs for cheap labour and the electoral needs of politicians, in particular through the inception and maintenance of a “permanent crisis” around border controls. Changing this without electoral incentive will be difficult. One essential ingredient will be the development of long-term strategic planning of migration policies, in a process involving all actors, and in particular the voice of the migrants themselves”

Bio:

François Crépeau is Full Professor and the Hans & Tamar Oppenheimer Chair in Public International Law, at the Faculty of Law of McGill University. He is a member of the Scientific Committee of the European Union Agency for Fundamental Rights (Vienna, AT) and the Chair of the Thematic Working Group on Migrant Rights and Integrations in Host Communities, KNOMAD - Global Knowledge Partnership on Migration and Development, World Bank Group (Washington, DC). He was the United Nations Special Rapporteur on the Human Rights of Migrants (2011-2017) and the Director of the McGill Centre for Human Rights and Legal Pluralism (2015-2020).

François Crépeau est professeur et titulaire de la Chaire Hans et Tamar Oppenheimer en droit international public, à la Faculté de droit de l'Université McGill. Il est membre du Comité scientifique de l'Agence pour les droits fondamentaux de l'Union Européenne (Vienne, AT) et Président du Thematic Working Group on Migrant Rights and Integration in Host Communities, KNOMAD - Global Knowledge Partnership on Migration and Development, World Bank Group (Washington DC). Il fut Rapporteur spécial des Nations Unies pour les droits de l'homme des migrants (2011-2017) et Directeur du Centre pour les Droits de la personne et le pluralisme juridique de McGill (2015-2020).



Vrinda Narain

Moderator: Interpretive Complexities panel

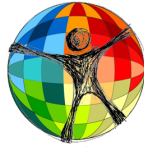


Bio:

Professor Vrinda Narain's research and teaching focus on constitutional law, social diversity and feminist legal theory.

She is the author of two books: *Reclaiming the Nation: Muslim Women and the Law in India* (University of Toronto Press, 2008) and *Gender and Community: Muslim Women's Rights in India* (University of Toronto Press, 2001).

Professor Vrinda Narain is the 2017 recipient of the Canadian Institute for the Administration of Justice's Charles D. Gonthier Research Fellowship. She was Associate Dean, Academic, at the Faculty of Law from 2016 to 2019.



Tamara Thermitus, Ad.E.

Le droit à l'égalité et l'accès à la justice : une utopie pour les personnes racisées ?



Abstract:

Pour les personnes racisées, l'avènement de l'article 15 de la *Charte canadienne des droits* est porteur de transformations sociales et, par conséquent, systémiques afin de remédier aux inégalités auxquelles sont confrontées les personnes racisées. Michel-Rolph Trouillot nous enseigne que :

« L'histoire est le fruit du pouvoir, mais le pouvoir lui-même n'est jamais transparent à un point tel que son analyse devienne superflue. La marque ultime du pouvoir est son invisibilité ; le défi ultime, l'exposition de ses racines » *Silencing the Past*.

Prenant pour assise cette citation, les causes structurelles à la source de l'injustice raciale sont-elles appréhendées par les acteurs du système de justice ? Est-ce que le système judiciaire et ses acteurs comprennent les composantes historiques des relations avec les personnes racisées ? La compréhension du contexte social du droit est-elle une avenue de transformation pour le système juridique et ses acteurs ?

Bio:

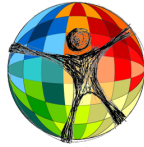
Ms. Thermitus Ad.E. is a Visiting Scholar at the McGill Centre for Human Rights and Legal Pluralism.

Ms. Thermitus has been a lawyer for almost 35 years and has always been concerned with equality issues. She holds a Master of Laws degree (2013) from McGill University on human rights issues including racial discrimination and defamation from a critical race theory perspective.

Ms. Thermitus was Chief of Staff to the Deputy Minister of the *Office of Indian Residential Schools Resolution* in 2003 and served as Director of Policy and Strategic Planning from 2004 to 2006. As Chief Negotiator for the federal government, she helped define the mandate of the Truth and Reconciliation Commission.

Ms. Thermitus has a long history of involvement in anti-discrimination work. From 2004 to 2010, she was President of the *Comité sur les communautés culturelles* of the Quebec Bar. In this capacity, she was among the first to raise awareness within the Bar on issues related to racial discrimination in the profession and in the judicial system in Quebec.

McGill Centre for
Human Rights
and Legal Pluralism



Centre sur les droits de la
personne et le pluralisme
juridique de McGill

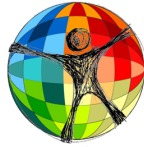
Workshop Co-Hosts

Professor Colleen Shepard
Professor of Law & former CHRLP Director

Professor Vrinda Narain
Professor of Law & CHRLP member

In addition to lecturing on these issues, she is notably behind the development of the course on the social context of law offered by the Bar School. In 2014, Ms. Thermitus was the co-initiator of the project that led to the Quebec Bar's report: "*Forum: Pour une profession inclusive*", *La diversité ethnoculturelle dans la profession d'avocat*".

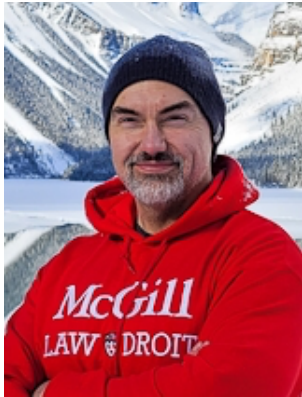
Ms. Thermitus has received several distinctions including in 2011, the Quebec Bar awarded her the prestigious *Mérite du Barreau* distinction (2011), the first black woman lawyer to receive such a distinction. She received the Queen Elizabeth Jubilee Medal (2012), the Leadership in Employment Equity and Diversity Award (Department of Justice, 2010 and 2016).



Joshua Nichols

Section 35 is not in the *Charter*:

A Review of the Constitutional "Background" of *R. v. Sparrow*



Abstract:

Over 30 years ago in *Sparrow*, the Supreme Court has recognized that section 35(1) of the *Constitution Act, 1982*, “represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights.” Despite this the Court went on to hold that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown”. This statement establishes the “background” that allows the Court to reconcile “federal power” under s. 91(24) with the “federal duty” that is recognized and affirmed in s. 35. And it is the legal weight of this "federal power" that provides the Court with the justification for applying an *Oakes*-like s. 1 analysis to a provision of the *Constitution Act, 1982* that is not actually in the *Charter*. My focus is on recalling what is left in the "constitutional background" and how it has prevented the constitutional recognition of Aboriginal peoples.

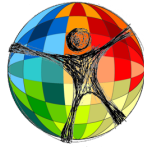
Bio:

Joshua Nichols is Metis from Treaty 8 Territory in British Columbia. He is an Assistant Professor in the Faculty of Law at McGill University. He teaches Aboriginal law, constitutional history, and legal theory.

His research centers on the legacy of British Imperialism and the conflictual constitutional relationship between Canada and Indigenous peoples. In particular, he is interested in how Indigenous constitutional practices have responded to the development of the centralized administrative state since the mid-19th century.

In his latest projects, he is exploring the historical genealogy of the administrative state within the British Empire and the possibilities for post-Westphalian forms of multinational federalism.

His latest book, *A Reconciliation without Recollection: An Investigation of the Foundations of Aboriginal Law*, was published by the University of Toronto Press in 2019.



Colleen Sheppard

Retrospective on Substantive Equality: Fissures & Fracture



Abstract:

The concept of substantive equality has long been endorsed by the Supreme Court of Canada. It continues, however, to generate debate about its precise meaning, and how it should be applied in a modern regulatory state. One of the most important dimensions of substantive equality is its commitment to securing equitable outcomes in a world where diverse groups and communities face significant social disadvantages. Substantive equality is also closely linked to the constitutional imperative of equal benefit of the law – an obligation that requires laws and programs to take into account and respond to specific needs and differences of individuals and groups. While a majority of the Supreme Court of Canada has continued to affirm these foundational aspects of substantive equality, over the years, small fissures in the foundation of substantive equality have recurred. More troubling, however, are recent dissenting judgments premised upon an overt fracturing of the foundations of substantive equality.

Bio:

Colleen Sheppard is a Professor at McGill University, Faculty of Law, and former Director of the McGill Centre for Human Rights and Legal Pluralism. She completed her legal studies at the University of Toronto and Harvard University. Her teaching and research focus on constitutional law, human rights, equality law and feminist legal theory. Her most recent book is *Discrimination Stories: Exclusion, Law & Everyday Life* (2021). Other book publications include *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010); *Human Rights & Diverse Societies* (2013) (ed. with François Crépeau); and *Dialogues on Human Rights & Legal Pluralism* (2013) (ed. with René Provost). Colleen Sheppard was elected a fellow of the Royal Society of Canada's Academy of Social Sciences in September 2016.