Student Article: Is the Federal Impact Assessment Act a Trojan Horse?

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Introduction

The *Impact Assessment Act* (*IAA*) is a piece of federal legislation that sets out processes for federal oversight of projects that impact the environment in Canada.[1] Though this sounds mundane, the *IAA* has the potential to have a significant effect on Canadians across the country. For example, it applies to projects that cause noise or pollution, and projects that extract the natural resources and energy that we use in our daily lives (including "mega-projects" like the development of mines, dams, or highways).[2]

In March 2023, the Supreme Court of Canada (SCC) heard an appeal regarding the constitutionality of the *IAA*.[3] The Alberta Court of Appeal (ABCA) had previously ruled that the *IAA* was *ultra vires* the federal government's authority, which means that the feds lacked the constitutional power to pass it.[4] The SCC's forthcoming decision on appeal will have important implications for the federal government's role in environmental regulation and management. If the SCC finds that the *IAA* is valid, then the federal government can continue to exercise considerable oversight of large development projects across Canada. If it does the opposite, the federal government may be sent back to the drawing board.

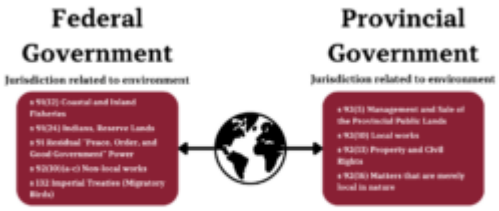
Federalism Analysis

To determine if a piece of legislation is within federal powers, courts begin by considering the pith and substance of the law.[5] Another way of describing this is "the basic purpose and effect of the law," or the essential character of the law.[6] To evaluate this, the courts consider an array of factors, including a law's contents, the process of passing it, and its legal and practical effects.[7] This is known as the "characterization" stage of federalism analysis.

After defining the pith and substance of a law, the court will then determine whether the pith and substance falls underneath a head of power for the level of government that enacted it. This is called the "classification" stage of the analysis. If the legislation is within one of the enacting government's heads of power (listed in the *Constitution Act, 1867*), it is

valid. If it is not, it is not valid and can be struck down by the court. Striking the legislation down means it is no longer in force.[8] The court could also trim the unconstitutional parts of the law and/or add parts to the law to make it constitutional, thereby allowing it to remain in force.[9]

This analysis is particularly complicated where the law at issue is an environmental regulation. In the past, the Supreme Court has described the environment as "too diffuse a topic to be assigned by the Constitution exclusively to one level of government."[10] This is because aspects of many areas of jurisdiction at either level of government have an environmental angle, as the diagram below indicates.



Because the *IAA* regulates the environment, it is prone to these difficulties. Certain provisions of the *IAA* very clearly direct for assessment of a development project's impact on matters under federal jurisdiction (fisheries, navigable waters, birds),[11] but others are less clearly couched under an area of federal jurisdiction (social and economic impacts of projects).[12] It is therefore a very complicated and multi-faceted case.

Understanding the Main Issues

In what follows, some of the key issues are reviewed from the perspective of the appellant (the federal government) and the respondent (the Alberta government). However, many other issues were raised by these parties that are not covered in this article.

Additionally, interveners participated in the SCC hearings, including several other provinces[13] and a range of non-governmental organizations, such as the World Wildlife Fund Canada, Eco-justice, several First Nations, the Canadian Tax-payers Federation, and the Canadian Association of Petroleum Producers. They also raised other issues not covered in this article.

The Federal Government

As the appealing party, the federal government focused on critiquing the ABCA decision and asserting that the *IAA* is constitutional. In their factum, they claimed that the ABCA improperly took a project-based approach as opposed to an effects-based approach to understanding the *IAA*.[14] The idea of project-based and effects-based approaches is clarified in the diagram below.

The federal government also asserted that the ABCA's approach was inconsistent with the existing case law that favours a co-operative approach to federalism and shared federal-provincial jurisdiction over the environment. The idea of co-operative federalism envisions provincial and federal governments working collaboratively to achieve mutual goals, rejecting a strict approach to defining the powers of each level of government.[15] Applied, this approach often allows overlap between provincial and federal laws.[16]

Above all, the federal government states that the ABCA was wrong to have dismissed federal jurisdiction to regulate the effects that development projects have on federally regulated matters (e.g. fisheries).[17] Relatedly, they also asserted that the ABCA interpreted the province's ability to regulate natural resources under 92A too broadly.[18]

The Alberta Government

Alberta took the position that the *IAA* is unconstitutional, describing it as a "sweeping regime" that does not fit under any federal head of power.[19] To them, the *IAA* treats provinces as "subordinate levels of government" and not equals within Canada's federal constitutional system.[20] Some of Alberta's specific concerns with the *IAA* include that:

1) Even if the federal government can validly regulate under a federal head of power, they may deny the project based on grounds beyond that federal head of power.[21] For example, Alberta explained that the *IAA* could allow the federal government to assess a project under its fisheries power (section 91(12) of the *Constitution Act, 1867*), but ultimately make a decision based on a litany of other factors, including broad public interest considerations.[22]

2) The *IAA* is focused on regulating physical activities themselves and not their effects due to the comprehensiveness of the regulatory regime, in that section 64 of the *IAA* allows the feds to place conditions on and monitor relevant projects.[23] To Alberta, this means the *IAA* extends into and undermines areas of exclusive provincial jurisdiction, including natural resource projects and electricity generation facilities.

To summarize, Alberta's viewpoint is that the *IAA* is a "Trojan horse," which goes far beyond regulating effects of large projects on matters within federal jurisdiction and invades areas of provincial jurisdiction.[24]

Conclusions: Is the *IAA* Really a Trojan Horse?

The federal expansion of some facets of the environmental impact assessment process does not necessarily mean that the *IAA* is a Trojan horse galloping unconstitutionally into provincial areas of jurisdiction. Rather, one may argue that prior (more minimal) federal approaches to environmental impact assessment were examples of "federal deference for provincial preference," meaning that the federal government opted not to regulate in the past — despite having constitutional jurisdiction to do so — because they deferred to the provinces in these areas.[25] However, Alberta's submissions raise important questions that could result in the *IAA* receiving a bit of a trim, at the very least. For example:

Question 1: How far can the federal government go with its POGG powers?

The federal government's power to make laws for the "peace, order and good government of Canada" (or POGG for short) has been used to uphold environmental regulations in the past. How far does this power allow the feds to go, though, in regulating major projects that have interprovincial impacts?[26]

Question 2: Can the federal government assess under one power, but decide under another?

Alberta's concern that an assessment initiated under the guise of something like the fisheries power, but decided based on other public interest considerations, presents the Court with the opportunity to finesse its direction provided over thirty years ago in *Friends of Old Man River*. There, the Court said that environmental assessment can be broad and may consider potential consequences for "a community's livelihood, health and other social matters from environmental change."[27] Presumably, though, there's a limit to the role that these factors can play. In this regard, Alberta highlighted other parts of the *Friends of Old Man River* decision, which suggested that the scoping of the assessment will depend on what federal head of power is being relied on.[28]

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To conclude, federal attempts to regulate environmental impacts are not necessarily Trojan horses seeking to invade provincial jurisdiction. Engaging the counter-factual is vital here, as Greckol J does in her dissent at the ABCA.[29] As she suggests, the province could validly say "no" to a major project under section 92(10) of the Constitution (local works and undertakings), while the feds could say "yes" to the same major project under section 91(12) due to a lack of negative impacts on fisheries or other matters within federal jurisdiction. In this scenario, the province would not have stymied the federal government's ability to say "yes" to the project. Rather, the federal government's approval is simply insufficient in making the project move forward based on environmental considerations.

That said, it is worth reiterating that the heads of power being relied on by the federal government may support varying scales of intrusion into areas of provincial jurisdiction.[30] If the Court finds that the power being relied on does not support such broad federal

intervention, and if it is possible to read down the legislation in those areas, the SCC could try to give the law a trim to better reflect the scope of those heads of power. Or, if the Court embraces broader acceptance of Alberta's position — that the federal law is truly a "Trojan horse" that massively intrudes into provincial jurisdiction — it could also end up taking the *IAA* or substantial parts of it to the glue factory.

[1] *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].

[2] David V Wright, The New Federal *Impact Assessment Act*: Implications for Canadian Energy Projects, 2021 59-1 Alberta L Rev 67 at 72.

[3] Elise von Scheel, "Supreme Court examining controversial environmental assessment law this week", CBC News Calgary, March 21, 2023.

[4] *Reference re Impact Assessment Act*, 2022 ABCA 165 [ABCA].

[5] Peter W Hogg & Wade Wright, Constitutional Law of Canada, 5th ed (Toronto: Thomson Reuters Canada) ch 15, § 15:4–5.

[6] *Ibid*.

[7] *Ibid*.

[8] *R v Big M Drug Mart*, [1985] 1 SCR 295 at 355-356, 18 DLR (4th) 321.

[9] *R v Smith*, 2015 SCC 34 at para 31; *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.

[10] *Friends of Oldman River Society v Canada*, [1992] 1 SCR 3, 63, 64, 70 (*FORS*); POGG, 5th edition 2022 (30:31)) [*FORS*].

[11] *IAA*, s 2.

[12] *IAA*, s 22.

[13] This includes Ontario, Manitoba, NB, and Quebec. BC also intervened and proposed a different approach, which supported allowing the federal government to assess projects, but not to have ultimate approval or denial powers over whether a project proceeds.

[14] Appellant Factum, paras 1-5.

[15] Eric M Adams, "Judging the Limits of Cooperative Federalism" (2016) 76 SCLR (2nd); *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 17 .

[16] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 149.

[17] Appellant factum, paras 32, 51-56.

[18] Appellant factum, paras 143-148.

[19] Respondent factum, para 14.

[20] Respondent factum, para 22.

[21] Respondent factum, paras 76-77.

[22] Respondent factum, para 77.

[23] Respondent factum, paras 108-112.

[24] Respondent factum, paras 145-146, citing *FORS* at 71-72.

[25] Marie-Ann Bowden and Martin Olszynski, "Old Puzzle, New Pieces Red Chris and Vanadium and the Future of Federal Environmental Assessment" 2011 89-2 Canadian Bar Review 445 at 480; William R MacKay, "Canadian Federalism and the Environment: The Literature" (2004) 17 Geo Int'l L Rev 25 at 34.

[26] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 417 and 438; *Interprovincial Co-operatives Ltd et al v R*, [1976] 1 SCR 477 at 513-514 and 520.

[27] *FORS* at para 37.

[28] *FORS* at 67.

[29] ABCA at para 758.

[30] *FORS* at 67.

R v Bissonnette: The Weight of Human Dignity

An Overview of the Supreme Court's Decision to Strike Down Section 745.51 of the *Criminal Code*

On May 27th, 2022, the Supreme Court of Canada (the "SCC" or the "Court") rendered its judgement in *R v Bissonnette*. The case before the SCC centered on the validity of section 745.51 of the *Criminal Code*. This section allowed for a sentencing judge to stack periods of parole ineligibility for mass murders.[1] Under Canadian law, an adult convicted of first-

degree murder receives an automatic life sentence with no chance of parole for 25 years.[2] When an accused committed multiple murders, the sentencing judge had the power under section 745.51 to impose consecutive periods of parole ineligibility for each murder (in 25-year increments). For instance, Alexandre Bissonnette — the claimant at issue here — murdered six people, so under section 745.51 the sentencing judge could have imposed a life sentence with no chance of parole for up to 150 years.

Mr Bissonnette challenged the constitutionality of this provision on the grounds that it unjustifiably violated his rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The Court agreed unanimously and struck down section 745.51. The aim of this article is to explain how the Court arrived at this conclusion.

Section 745.51 Struck Down by Lower Courts

In an Islamophobic attack on a mosque, Mr Bissonnette murdered six people in 2017. At trial, he pleaded guilty to multiple charges including six counts of first-degree murder.[3] The Crown asked the trial judge to apply section 745.51 and impose a life sentence with no chance of parole for 150 years, which would have guaranteed that Mr Bissonnette would die in prison. However, the trial judge found that section 745.51 was unconstitutional in that it violated section 7 (the right to life, liberty, and security of the person) and section 12 (the right to be free from cruel and unusual punishment) of the *Charter*.[4] To remedy these violations, the trial judge read the provision so as to give judges discretion in choosing the length of parole ineligibility above 25 years. As a result, the judge was able to impose a period of parole ineligibility of 40 years.[5]

On appeal, the Quebec Court of Appeal unanimously agreed with the trial judge that section 745.51 was unconstitutional. However, the Court of Appeal found that judges could not impose *any* excess periods of parole ineligibility.[6] As a result, Mr Bissonnette's sentence became life in prison with no chance for parole for only 25 years. The Crown then appealed to the SCC.

Section 745.51 Constitutes Cruel and Unusual Punishment

Section 12 of the *Charter* protects a person's right to be free from cruel and unusual treatment or punishment.[7] Since the law in question involved sentencing, the Court focused on the punishment aspect of the right. In considering whether this right had been violated, the first question the Court had to answer was accordingly whether consecutive periods of parole ineligibility constituted punishment. The SCC found that it did. Parole ineligibility, the Court said, is a consequence of conviction and impacts the liberty and security of the offender, making it a clear instance of punishment.[8]

The Court then stated the importance that the concept of human dignity plays in a section 12 analysis. While human dignity is not itself a constitutional right, the SCC noted that it is a "fundamental value" that guides *Charter* interpretation.[9] To reflect this, section 12 has been interpreted as prohibiting two dignity-offending types of punishment:

1. Punishment that is so excessive that it is incompatible with human dignity, i.e. punishment that is grossly disproportionate to what would be "just and appropriate."[10]

2. Punishment that is "intrinsically incompatible with human dignity."[11]

Such punishment, according to the Court, is cruel and unusual by nature (or "degrading and dehumanizing") and can never be imposed without offending human dignity. Corporal punishment is one such example.[12]

In this case, Chief Justice Wagner, writing for the Court, found that section 745.51 constituted the latter type of punishment. As the Court explained, section 745.51 allowed a judge to sentence a person convicted of multiple murders to a prison term that effectively denied them a chance at parole. In other words, a judge could sentence such a person to die in prison. The Court found that such a sentence was, by its very nature, incompatible with human dignity.[13] Stripping a person of their autonomy and degrading them by negating their chance to rehabilitate and reintegrate into society was described by the Court as "shak[ing] the very foundations of Canadian criminal law,"[14] including the principle of human dignity. "To ensure respect for human dignity," the Court wrote, "*Parliament must leave the door open for rehabilitation*, even in cases where this objective is of minimal importance."[15]

The Court did note, however, that rehabilitation did not take precedence over other objectives of sentencing like deterrence and denunciation. Instead, the Chief Justice found that those other objectives were already satisfied with the automatic sentence for first degree murder — life in prison without parole for 25 years.[16] Compared to many other democratic states, this is actually a relatively harsh sentence. In Denmark and Finland, for example, the comparable ineligibility period is only 12 years, and in Germany and Switzerland it is 15.[17]

The Provision Is Not Saved by Judicial Discretion or the Royal Prerogative of Mercy

Despite section 745.51's detrimental impact on human dignity, the Crown argued that the provision could be saved on the grounds that it gave a sentencing judge discretion on whether to impose consecutive parole ineligibility periods (and since such a decision could be reviewed on appeal). However, the Court found that discretion could not save a law that was, by its nature, cruel and unusual; such punishments must not exist even as a possibility.[18]

The Crown also argued that the Royal Prerogative of Mercy could save the provision since it provided another avenue a prisoner could use to seek release outside of parole. This argument, however, was also rejected by the Court. While the Governor General possesses the power to release an inmate under the prerogative on the advice of cabinet,[19] this power is only used in exceptional cases where there is "substantial injustice or undue hardship."[20] For this reason, the Court found that the prerogative does not count as an "acceptable review process"[21] for most inmates. It does not allow for a realistic chance at

parole, the Court said, for an inmate serving a life sentence who would be ineligible for any other parole under section 745.51.[22]

Section 1 Not Argued

When a court has determined that a law infringes upon the *Charter* rights of an individual, the state may be able to justify that infringement under section 1 of the *Charter*, which permits "reasonable" limits on *Charter* rights if they can be "demonstrably justified in a free and democratic society."[23] In this case, though, the Crown chose not to try to justify the impugned provision.[24]

As a result, Chief Justice Wagner, finding that section 745.51 breached section 12 of the *Charter*, struck down the provision effective immediately.[25] This declaration of invalidity was retroactive to the date the impugned provision was enacted, which meant that any inmate who may have been "doomed to die" in prison under section 745.51 is now eligible for parole 25 years after the start of their sentence.[26]

Conclusion: No Guarantee of Parole

As soon as it was handed down, the Supreme Court faced a high degree backlash for this decision, with some federal politicians (including prime ministerial hopefuls) advocating for the use of the notwithstanding clause to revive section 745.51.[27] However, the Court has made it clear that striking down section 745.51 does not mean the murderers it applied to will be walking the streets in 25 years. It simply means that after 25 years they will be eligible for parole, and it will then be up to the parole board to determine if an offender has been rehabilitated to the extent that they can safely reintegrate into society.[28] Even after *Bissonnette*, a murderer who never reaches that stage of rehabilitation will still spend the rest of their lives in a prison cell.

[1] *Criminal Code*, RSC 1985, c C-46, s 745.51.

[2] *Ibid*, s 745.

[3] *R v Bissonnette*, 2022 SCC 23, paras 10-12 [*Bissonnette*].

[4] *Ibid* at paras 15-17. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*].

[5] *Bissonnette*, *supra* note 3 at paras 18-19.

[6] *Ibid* at para 20.

[7] *Charter*, *supra* note 4 at s 12.

[8] *Bissonnette*, *supra* note 3 at para 58.

[9] *Ibid* at para 59.

[10] *Ibid* at paras 60-62.

[11] *Ibid* at para 60.

[12] *Ibid* at paras 66-67.

[13] *Ibid* at para 81.

[14] *Ibid* at para 84.

[15] *Ibid* at para 85 [emphasis added].

[16] *Ibid* at para 89.

[17] *Ibid* at para 91.

[18] *Ibid* at para 111.

[19] *Ibid* at paras 113-114.

[20] *Ibid* at para 115.

[21] *Ibid* at para 116.

[22] *Ibid* at para 118.

[23] *Charter*, *supra* note 4 at s 1.

[24] *Bissonnette*, *supra* note 3 at para 121.

[25] *Ibid* at para 122.

[26] *Ibid* at para 137.

[27] Madeleine Cummings, “Alberta murder victim's parents, MP criticize top court's decision on parole ineligibility”, CBC News, June 28, 2022; Aaron Wherry, “The case for making the notwithstanding clause politically awkward again”, CBC News, June 1, 2022.

[28] *Bissonnette*, *supra* note 3 at para 41.

Hate Speech and Freedom of Expression: The Constitutionality of the Trudeau Government's Plans to Criminalize Holocaust Denial

The Trudeau government, as part of its 2022 Budget, set out its intention to amend the Canadian Criminal Code to "prohibit the communication of statements, other than in private conversation, that willfully promote antisemitism by condoning, denying or downplaying the Holocaust."[1] This raises several key constitutional questions. The first is whether this proposal infringes upon rights listed under Section 2(b) of the *Charter*, which guarantees individuals' "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[2] The second question is whether such an infringement, if it exists, can be justified under Section 1 of the *Charter*, which states that the rights and freedoms in the *Charter* can be limited if this "can be demonstrably justified in a free and democratic society."[3]

What Constitutes Free Expression? The Scope of Section 2(b)

In *R v Keegstra* (1990), a landmark case on the constitutionality of hate speech regulation, the Supreme Court stated that all activity that conveys or attempts to convey meaning is considered expressive and within the ambit of Section 2(b), regardless of how distasteful or unpopular it is.[4] To avoid any misunderstanding, the Court explicitly affirmed that hate speech is captured by section 2(b), and that the only form of expression that would not fall within section 2(b)'s ambit would be physical violence.[5] Similarly, in *R v Zundel* (1992), the Court held that the publication of false news — as an activity that evidently attempts to convey meaning — is also a form of expression guaranteed protection under section 2(b).[6]

Given this expansive reading of Section 2(b) of the *Charter*, it is clear that the promotion of antisemitism by condoning, denying, or downplaying the Holocaust would legally constitute a form of expression that is captured within Section 2(b). It is also clear that with this law the government intends to interfere with this expression, and thus there is an infringement of section 2(b) which must be tested under section 1 of the *Charter*.

Section 1 and the *Oakes* Test

The limitations clause in section 1 of the *Charter* was explicated in a 1986 case, *R v Oakes*, where the Court set out a 2-step test to determine whether a government infringement of a

Charter right can be justified:

1. The government must show that the law in question has a goal that is both "pressing and substantial."[7]

2. The court then conducts a proportionality analysis using three sub-tests:

a) The government must first establish that the impugned law is *rationally connected* to its purported purpose.

b) The law must only *minimally impair* the violated *Charter*

c) Even if the government can satisfy the above steps, the impact on *Charter* rights may be too high a price to pay for the benefit the provision would procure. In other words, there must be a balance between the law's *salutary and deleterious effects*.[8]

To shed light on how this test might apply to the government's proposed Holocaust denial law, it is useful to examine two seminal cases in which the criminalization of antisemitism was at issue. Those cases are the two that were mentioned above: *R v Keegstra* (1990) and *R v Zundel* (1992). At first glance, these cases appear to produce opposite conclusions, and we accordingly need to assess which is more relevant when considering the justifiability of the law under consideration here.

Case Study 1: *R v Keegstra*

Mr Keegstra, a high school teacher, was promoting antisemitism to his students by describing Jews as "treacherous," "subversive," and "sadistic."[9] As a result, he was charged with wilfully promoting hatred against an identifiable group under section 281(2) of the Criminal Code (now Section 319(2)). While the Supreme Court found that section 319(2) infringed upon the rights guaranteed under section 2(b), the majority also found that such an infringement was justified under the *Oakes* test.

In applying the *Oakes* test, the Court first noted the significant harm caused by hate propaganda, both to members of the targeted group and to society at large. The Court accordingly had no trouble concluding that the criminalization of hate speech via section 319(2) had a pressing and substantial objective: namely, addressing the significant harm caused by hate speech.

Moving on to the three-step proportionality stage of the *Oakes* test, the Court had little trouble concluding that the criminalization of hate speech was "rationally connected" to the state's pressing and substantial objective. Even if criminalizing hate speech didn't actually suppress hate speech, the Court said, it clearly addresses the harms of hate speech in at least one important sense: by reflecting "the severe reprobation with which society holds messages of hate directed towards racial and religious groups."[10]

Next, the Court considered the question of minimal impairment — the second prong of the proportionality analysis — by noting that the scope of section 319(2) is limited in several key

ways. Firstly, it does not capture private communications, or communications that were intended to be private but inadvertently became public.[11] Secondly, it requires the promotion of hatred to be wilful, i.e. *intentional*.[12] And thirdly, it requires that an individual intended to "promote *hatred*," not merely ridicule or disparagement. In combination, these factors mean that section 319(2) only captures those few individuals who "intend or foresee as substantially certain a direct and active stimulation of hatred."[13] This, for the Court, was a sufficiently narrow sphere of application to make the provision "minimally impairing" of *Charter* rights.

Finally, in assessing the overall proportionality of the provision, the Court noted that while the nature of regulated expression is not relevant in determining whether or not it falls within the ambit of section 2(b), it does become relevant in assessing whether or not the suppression of the expression can be justified under section 1.[14] Thus, because hate speech has no connection to (and in fact undermines) the values underlying section 2(b) — e.g. the promotion of democratic values — the Court concluded that the restrictions of section 319(2) were easier to justify.[15] The Supreme Court therefore upheld section 319(2) as a justifiable limit on free expression.

Case Study 2: *R v Zundel*

Mr Zundel published a pamphlet that downplayed the Holocaust, suggesting that it was a myth promoted as part of a global Jewish conspiracy. Consequently, he was charged with spreading false news under section 181 of the Criminal Code.[16]

In response to Mr Zundel's claim that this unjustifiably infringed his expressive freedom, the Supreme Court found that the dissemination of false information was distinct from the dissemination of hate, even where it can be said that the false information might be injurious to the public wellbeing.[17] Affirming the parameters set out in *Keegstra*, the Court found that publication of false information is protected by section 2(b) of the *Charter*, regardless of how false or misleading it is.[18] Furthermore, the Court found that the consequence of section 181 was to restrict expression, and thus there was an infringement on the rights guaranteed under section 2(b).[19]

Having found a section 2(b) infringement, the Court then turned to assessing whether the infringement could be justified through the *Oakes* test. This is where we find the decisive part of the Court's analysis. To quote the Court: "in determining the objective of a legislative measure for the purposes of s[ection] 1, the Court must look at the intention of Parliament when the section was enacted or amended. It cannot assign objectives, nor invent new ones according to the perceived current utility."[20] In essence, this means that to pass the *Oakes* test, the benefit the law provides must have been the one intended by Parliament at the time of enactment. Furthermore, in searching for the objective of the impugned law, the Court will require something more specific than just a general protection from harm.[21] Given these self-imposed restrictions, the Court could not find a pressing and substantial objective behind section 181, and it was accordingly deemed unjustified and unconstitutional.[22]

Having found that section 181 lacked a pressing and substantial objective, the rest of the *Oakes* test was unnecessary to deem the law to be invalid. Nonetheless, the Court noted that even if such an objective had been found, a ban on publishing false information that is likely to cause public mischief is simply too broad to be justified under section 1.[23]

Putting it All Together: Is Criminalizing Holocaust Denial Constitutional?

When looking at the government's proposed Holocaust denial law, we must begin by acknowledging the problem of antisemitism in Canada. In 2021, Canada saw record levels of antisemitic incidents, including violence, and an overall increase of seven percent compared to the year prior.[24] The fact that the government has described the law in question as "[p]rohibiting the promotion of Antisemitism" suggests that it clearly considers Holocaust denial to be part of a larger problem of antisemitism as opposed to just being a case of revisionist history or false information untethered from hate speech. As such, there is evidently a pressing and substantial objective that the proposed law seeks to achieve: namely, suppressing antisemitism in Canada. The presence of this pressing and substantial objective — which is closely related to the objective that was identified and validated in *Keegstra* — seems to distinguish the proposed law from the provision that was invalidated in *Zundel*. In other words, the law seems to be narrower and more specific in scope than the *Zundel* law (indeed, it is even narrower than the law that was upheld in *Keegstra*).

Going on to the second part of the *Oakes* test, we see that the government was careful to tie together the promotion of antisemitism and the denial, downplaying, or condoning of the Holocaust. In this regard, the law does not simply criminalize denial, downplaying, or condoning of the Holocaust, but rather does so only when this expression is used to *wilfully* promote antisemitism. Once again, the specificity of this wording shows the government's efforts to ensure that the law is narrow enough to survive a challenge under section 2(b) of the *Charter*. Moreover, the law takes direct cues from the Supreme Court's analysis in *Keegstra* by replicating much of the wording deemed there to be indicative of minimal impairment. For example, like section 319(2) — the provision that was upheld in *Keegstra* — the proposed law won't apply to private communications, and only applies where the promotion of antisemitism is "wilful," as opposed to ignorant or inadvertent.

In sum, then, given the pressing and substantial problem of antisemitism, and the similarity in the wording of the proposed law to section 319(2), it seems likely that the new prohibition (if it passes) would survive a *Charter* challenge under section 2(b). While freedom of expression is an important *Charter* right, the Supreme Court's rulings on laws regulating hate speech make it clear that socially harmful expression is far from unassailable, and will receive less protection than expression that aligns with the deeper values of the *Charter* and the Constitution.

[1] See here: <https://budget.gc.ca/2022/report-rapport/anx3-en.html#wb-cont>.

[2] *Canadian Charter of Rights and Freedoms*, s 2, part I of the *Constitution Act, 1982* [*Charter*].

[3] *Ibid*, s 1.

[4] *R v Keegstra*, [1990] 3 SCR 697 at 729 [*Keegstra*].

[5] *Ibid* at 732.

[6] *R v Zundel*, [1992] 2 SCR 731 at 753-755 [*Zundel*].

[7] *R v Oakes*, [1986] 1 SCR 103 at para 69 [*Oakes*].

[8] *Ibid* at para 71.

[9] *Keegstra*, *supra* note 4 at 714.

[10] *Ibid* at 769.

[11] *Ibid* at 773.

[12] *Ibid* at 773.

[13] *Ibid* at 777.

[14] *Ibid* at 760.

[15] *Ibid* at 761-762, 766.

[16] *Zundel*, *supra* note 6 at 732.

[17] *Ibid* at 743.

[18] *Ibid* at 753-755.

[19] *Ibid* at 750.

[20] *Ibid* at 761.

[21] *Ibid* at 762.

[22] *Ibid* at 767.

[23] *Ibid* at 768.

[24] "Antisemitism in Canada at record levels in 2021 with surge in violence, audit finds", *CBC News* (April 25 2022), online: <https://www.cbc.ca/news/canada/canada-antisemitism-violence-report-1.6430495>.

Interpretive Prism or Shield? A Primer on Section 25 of the *Charter*

The *Dickson v Vuntut Gwitchin* case ("*Dickson*"),[1] which is now before the Supreme Court of Canada, provides us with an opportunity to reconsider the role of section 25 of the *Charter* — an oft-neglected provision that deals with the interplay between Indigenous peoples' rights and other sections of the *Charter*. Section 25 states that:

The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and b) any rights or freedoms that now exist by way of land claim agreements or may be so acquired.[2]

Broadly speaking, *Dickson* concerns the relationship that this provision establishes between the self-government rights of First Nations and the *Charter* rights of their members. In short, the case originated when Cindy Dickson, a member of the Vuntut Gwitchin First Nation ("VGFN"), was prevented from taking up a VGFN Council seat because of a residency requirement in the VGFN Constitution that she was unable to comply with. While the Yukon Court of Appeal held that this residency requirement infringed section 15 of the *Charter* (the equality rights section) it concluded that section 25 effectively shields the requirement from challenge, since allowing the challenge would limit the self-government rights of the VGFN.

In anticipation of the Supreme Court's consideration of this case, this article offers a brief primer on section 25. While there has been a relative dearth of litigation on section 25, the Supreme Court (and one Justice in particular) has dropped a number of breadcrumbs that provide some sense, at least, of its meaning and scope. This article aims to follow those breadcrumbs.

What's the Purpose of Section 25?

There are basically *two* competing interpretations of the purpose of section 25.

The first interpretation is that section 25 serves as an *interpretative prism*. According to this view, section 25 requires that other sections of the *Charter* should, if possible, be understood in such a way as to avoid a negative impact on Aboriginal rights. However, if such an interpretation is not possible, section 25 will not save the impugned law or

government action, even if invalidating or discontinuing that law/action will have a detrimental impact on Aboriginal rights.[3]

The second interpretation, by contrast, is that section 25 acts as a *shield*. According to this view, if Aboriginal rights would be limited by a *Charter* claim, section 25 would be engaged and would bar that *Charter* claim.[4] This is the approach that the Yukon Court of Appeal adopted in *Dickson*: Ms Dickson's equality rights claim could not proceed because of the detrimental impact that this would have on the collective, self-government rights of her First Nation. This interpretation of section 25 was also the one favoured by the concurring opinion of Justice Bastarache in *R v Kapp* ("*Kapp*"), a landmark Supreme Court decision on constitutional equality rights.[5]

A Note on *Kapp*

Kapp is a seminal case on Aboriginal rights and section 15 (equality rights) of the *Charter*. In it, the Supreme Court held that a communal fishing license granted exclusively to several Indigenous groups did not constitute a violation of section 15 of the *Charter*, as had been claimed by a group of non-Indigenous commercial fishers. This was because section 15(2) explicitly allows governments to take measures to ameliorate the circumstances of disadvantaged groups, even if this means granting them preferential treatment over others.[6] While the majority of the Supreme Court held the government licensing scheme to be valid due to section 15(2),[7] one judge, Justice Bastarache, wrote a concurring opinion based on section 25 of the *Charter*, arguing that this provision shielded the government scheme from the *Charter* challenge.[8]

What Rights Are Covered?

Although they did not decide the case based on section 25, the majority in *R v Kapp* suggested in passing that only rights which are of "a constitutional character" are likely to fall within its scope.[9] In contrast, Justice Bastarache's concurrence argues for a broader reading of section 25 which protects all Aboriginal rights that are unique to Aboriginal communities because of "their special status."[10] Following from this more expansive reading, Justice Bastarache suggested that any "legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from Charter scrutiny."[11] In *Dickson*, the Yukon Court of Appeal affirmed this approach.[12]

Following from this, another question which arises around section 25 is whether it can be invoked by Indigenous *governments* in response to *Charter* claims by their own members. While this question wasn't at issue in *Kapp*, Justice Bastarache tentatively suggested that such usage would be contrary to the spirit of section 25, since it would partially remove Indigenous people from "the *Charter* protection scheme"[13] (rather than bolstering and protecting their rights).

On a related note, some scholars have wondered if the *Charter* actually applies to laws passed by self-governing Indigenous nations, since section 32 of the *Charter* limits its

application to federal and provincial governments.[14] However, in *Dickson*, the Yukon Court of Appeal rejected this argument, holding that the *Charter* applies to Indigenous governments when they are, by their very nature, exercising governmental power (although after finding that the *Charter* applied to the VGFN, the Court of Appeal then held that section 25 effectively blocked Ms Dickson's *Charter* claim).[15]

How (and When) Should Section 25 Be Applied?

Another complicated question relating to section 25 concerns the point at which it should be factored into legal analysis. While there are a number of ways of approaching this question, in *Kapp*, Justice Bastarache offered a potential roadmap for future courts by articulating a three-step approach. To quote Justice Bastarache:

"The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s[ection] 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right."[16]

The key point here is that, for Bastarache, section 25 should be applied *before* there has been a full analysis of whether the *Charter* has been violated.[17] Although this three-step process has not (yet) been affirmed by the Supreme Court, the Yukon Court of Appeal did use it in *Dickson v Vuntut Gwitchin First Nation*.[18] That said, it must be noted that the Yukon Court did not use, nor comment upon, Justice Bastarache's suggestion that section 25 *might* apply differently in the case of a restriction placed on an Indigenous person by an Indigenous government (i.e. precisely the type of "internal restriction" that is at issue in the *Dickson* case).[19]

Conclusion: The Tension Between Individual and Collective Rights

The issue of balancing the rights of individuals against the collective rights of a political community or nation is a difficult one, especially when one considers the historical context of Crown-Indigenous relations in Canada. On the one hand, a key premise of the *Charter* regime in Canada is that all individuals will be protected against problematic exercises of governmental power. On the other hand, a key dimension of reconciliation between the Canadian state and Indigenous communities is the recognition of Indigenous peoples right to collectively manage their own affairs — even (and perhaps especially) when this means deviating from the *Charter*. The fact that the Supreme Court is soon going to be weighing in on this tension has the potential to provide much needed clarity on the relationship between Indigenous individuals, Indigenous governments, and the Canadian Constitution.

[1] The case is on appeal from the Yukon Court of Appeal. See *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 [*Dickson*].

[2] *Canadian Charter of Rights and Freedoms*, s 25, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] *R v Kapp*, 2008 SCC 41 at para 79 [*Kapp*].

[4] *Ibid* at para 79.

[5] *Ibid* at para 81.

[6] *Charter*, *supra* note 2, s 15(2).

[7] *Kapp*, *supra* note 3 at para 61.

[8] *Ibid* at paras 76-77.

[9] *Ibid* at paras 63, 65.

[10] *Ibid* at para 103.

[11] *Ibid* at para 103.

[12] *Dickson*, *supra* note 1 at paras 145-146 [*Dickson*].

[13] *Kapp*, *supra* note 3 at para 99.

[14] *Ibid* at para 100.

[15] *Dickson*, *supra* note 1 at para 98. See also *Eldridge v British Columbia (Attorney General)*, [1998] 2 SCR 624 at para 44.

[16] *Ibid* at para 111.

[17] On Justice Bastarache's reasoning on this point, see *Kapp*, *supra* note 3 at para 109.

[18] See *Dickson*, *supra* note 1, e.g. at para 146.

[19] See *Kapp*, *supra* note 3 at para 99.

Innocent if Intoxicated? Part 2:

The *Brown* Decision

A Breakdown of the Supreme Court's Decision in *R v Brown*

This is the second article in a two-part series on the criminal defence of extreme intoxication in Canada. Part 1 focused on the history of the defence as well as the creation of section 33.1 of the *Criminal Code*. This section prohibited a person accused of a general intent offence from using the extreme intoxication defence if the intoxication was self-induced and their actions threatened the bodily integrity of another person.[1]

This second article will focus on the Supreme Court of Canada's decision to invalidate section 33.1 in the recent case of *R v Brown* (2022).

Matthew Brown Consumes Magic Mushrooms and Goes on a Rampage

On a winter's night Matthew Brown went to a friend's party and consumed alcohol as well as several portions of magic mushrooms. At around 3:45am Mr Brown removed his clothing and ran barefoot into the cold.[2] Shortly afterwards, while in an intoxicated state, he broke into a nearby house and violently attacked the resident with a broken broom handle. The resident was left with cuts, contusions, and broken bones in one of her hands.[3]

Mr Brown subsequently broke into another house where the police found him on the bathroom floor with visible injuries to his bare feet. He was whispering to himself and appeared confused. He would later state that he had no recollection of his actions at either home.[4]

Mr Brown was charged with two counts of breaking and entering, one count of aggravated assault, and one count of mischief to property over $5000. Evidence indicated that the magic mushrooms caused his delirium.[5]

At trial, Mr Brown argued he should be found not guilty by reason of automatism, since his intoxication was so severe that he was deprived of the ability to control himself and to *intentionally* commit criminal acts. The Crown, however, invoked section 33.1, which precluded Mr Brown from using the extreme intoxication defence for the charge of aggravated assault (the defence was available, however, for the mischief charge).[6] In response, Mr Brown challenged the constitutionality of section 33.1, arguing that it violated sections 7 and 11(d) of the *Charter of Rights and Freedoms* (the *Charter*). He was successful at trial and was acquitted of the mischief and assault charges. However, the Alberta Court of Appeal overturned the lower court's ruling and convicted Mr Brown of aggravated assault.[7] Mr Brown then appealed to the SCC.

The Supreme Court Strikes Down Section 33.1

In a weighty 9-0 decision, Justice Kasirer, writing on behalf of the Court, struck down section 33.1 as unconstitutional. By denying the extreme intoxication defence to those accused of certain general intent offences, the Court held, Parliament had unjustifiably violated the *Charter of Rights and Freedoms*.

A poorly drafted provision

One of the key issues the SCC faced in *Brown* was the interpretation of section 33.1. The Crown's lawyers argued that section 33.1 not only eliminated the extreme intoxication defence for certain crimes, but also created a new "predicate" offence of extreme intoxication. This would allow an individual to be held criminally responsible for violent conduct if they "knew or ought to have known" that consuming an intoxicant could cause them to lose control and harm others.[8] However, the Crown (and various interveners) admitted that a plain reading of section 33.1 did not support this argument, conceding that the section's drafting was "odd" and "inelegant."[9] The Crown instead encouraged the SCC to "read words into the text to overcome"[10] these defects, thereby giving effect to the law's underlying purpose: to "create… a new mode of liability."[11] Justice Kasirer, however, refused this invitation. As he put it: "To do [this] would strain the meaning beyond what the text can reasonably bear."[12]

Mr Brown's section 7 and 11(d) rights were violated by section 33.1

Years before Mr Brown's case made its way through the courts, one legal scholar claimed that sections 7 and 11(d) of the *Charter* were clearly violated by section 33.1 of the *Criminal Code*, and that it should be uncontroversial to say so.[13] In *Brown*, the Supreme Court seemed to agree.

Section 7 states that a person's liberty cannot be infringed except in accordance with the principles of fundamental justice.[14] In *Brown*, the SCC noted that it is a principle of fundamental justice that an individual will only be convicted of a crime where there is "proof of fault reflecting the offence and punishment faced by the accused."[15] Section 33.1 violated this principle, the Court said, because it would allow someone to be convicted — and deprived of their liberty — even if the harm they caused was not a reasonably foreseeable consequence of their intoxication. For example, a person could be convicted if they simply had a bad reaction to prescribed painkillers or if they took a drug that is not known to cause such adverse reactions.[16] In other words, section 33.1 would allow a court to convict an accused despite a lack of *mens rea* (i.e. a "guilty mind").[17]

The Court also held that section 33.1 violated a second principle of fundamental justice: the requirement that individuals are only held criminally responsible for *voluntary* conduct. Section 33.1 violated this requirement by allowing someone in a state of automatism — someone who is *incapable* of voluntary action by definition — to be convicted of a crime.[18]

Finally, the Court then considered Mr Brown's argument that section 33.1 violated section 11(d) of the *Charter*. Section 11(d) protects an accused's right to be presumed innocent

until proven guilty, which means that all essential elements of the offence must be proven beyond a reasonable doubt.[19] However, under section 33.1, the intent to commit certain violent offences was effectively replaced by the intent to become intoxicated, thereby establishing what the Court called a "guilt-by-proxy" regime.[20] Section 11(d) prohibits this substitution, the Court said, because it "cannot be said that, 'in all cases' … the intention to become intoxicated can be substituted for the intention to commit a violent offence."[21] As mentioned above, an individual may innocently "consume legal intoxicants for personal or medical purposes"[22] without being able to foresee the risk that they would then commit a violent offence. In such cases, the blameworthiness of the individual cannot be proven simply by proving their earlier intent to consume intoxicating substances.

Section 33.1 cannot be saved under section 1

Having found that section 33.1 infringed the rights protected under sections 7 and 11(d) of the *Charter*, the Court then turned to the question of whether the provision was nonetheless legally justified under section 1 of the *Charter*. As noted in the previous article, a law that infringes fundamental rights can be saved under section 1 of the *Charter* if it is justified under an analysis referred to as the *Oakes* test.[23] In order for the law to be saved, it must have a pressing and substantial objective and meet a three-part proportionality test:

1. It must be rationally connected to its objective;

2. It must be minimally impairing of *Charter* rights, and;

3. It must be proportionate, meaning that there must be an overall balance between its "deleterious" and "salutary" effects.[24]

In *Brown*, the SCC noted that section 33.1 had two pressing and substantial objectives: first, to protect victims of intoxicated violence (especially women and children), and second, to hold accountable those who voluntarily ingest intoxicants and create a risk to others through doing so.[25]

Having identified and validated these objectives, the Court then moved on to the application of the aforementioned proportionality test. The first prong of this test, assessing whether the law is rationally connected to its objectives, was easily satisfied. The Court noted that the threat of criminal sanction provided for by the law would have at least some deterrent effect, which makes it relevant to its protective purpose. Further, the law clearly holds accountable those who become extremely intoxicated and commit a violent crime, thus connecting it to its second objective.[26]

However, the Court found that the second step of the proportionality analysis, the minimal impairment step, was not met. In this regard, Justice Kasirer noted that there were "real and substantial" alternatives to achieving Parliament's objectives that were less impairing of *Charter* rights.[27] These alternatives included the creation of a stand-alone offence (an offence of criminal intoxication) or a new standard of criminal negligence.[28]

Finally, the Supreme Court turned to weighing the law's salutary benefits and deleterious

effects.[29] To begin with, the Court noted that section 33.1 did have substantial benefits, especially insofar as it helped ensure equal protection of the law for women and children. However, for the Court, these benefits were ultimately outweighed by the law's deleterious impact on fundamental rights. As Justice Kasirer wrote, it is "difficult to imagine more serious limitations than the denial of voluntariness, mens rea, and the presumption of innocence all in one."[30] The Court accordingly invalidated section 33.1 on the basis that its impact on fundamental rights was too severe to be justified under section 1 of the *Charter*.

Parliament Responds With Bill C-28

The *Brown* ruling provoked outcry across the country,[31] and Parliament accordingly moved quickly to introduce new legislation on the extreme intoxication defence.

On Friday June 17th, the government introduced Bill C-28, which appears to address the issues that resulted in section 33.1 being struck down. Under these new rules, the extreme intoxication defence will no longer be available if an accused departed from a reasonable standard of care with respect to the consumption of an intoxicating substance before committing the offence. That departure must be assessed by a court based on numerous factors, including foreseeability of risk and whether the accused took steps to minimize the risk.[32] Therefore, it is likely that someone who has an adverse and unexpected reaction to prescription medication, for example, would still be able to use the defence.

In creating this new framework, Parliament seems to have taken its cues directly from the SCC, which had opined in *Brown* that the creation of a standard of criminal negligence would allow Parliament to pursue section 33.1's objectives without falling foul of the Constitution. If Bill C-28 is enacted, the extreme intoxication defence will again be restricted in Canada, but this time in a way that has less of a detrimental impact on individuals' *Charter* rights.

[1] *Criminal Code*, RSC 1985, c C-46, s 33.1.

[2] *R v Brown*, 2022 SCC 18 paras 15-16 [*Brown*].

[3] *Ibid* at para 17.

[4] *Ibid* at para 18.

[5] *Ibid* at paras 19-20.

[6] *Ibid* at paras 20-21.

[7] *Ibid* at paras 22-29.

[8] *Ibid* at para 73.

[9] *Ibid* at para 74.

[10] *Ibid*.

[11] *Ibid* at para 73.

[12] *Ibid* at para 88.

[13] Michelle S Lawrence, "Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the Criminal Code" (2017) 40:3 MLJ 391 at 415.

[14] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

[15] *Brown*, *supra* note 2 at para 95.

[16] *Ibid* at paras 91-93.

[17] *Ibid* at para 95.

[18] *Ibid* at para 96.

[19] *Charter*, *supra* note 14, s 11(d).

[20] *Brown*, *supra* note 2 at para 103.

[21] *Ibid* at para 104.

[22] *Ibid*.

[23] *Charter*, *supra* note 14, s 1.

[24] *Brown*, *supra* note 2 at para 110.

[25] *Ibid* at paras 119-122.

[26] *Ibid* at paras 132-134.

[27] *Ibid* at para 141.

[28] *Ibid.*

[29] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 122.

[30] *Brown*, *supra* note 2 at para 155.

[31] Warren Kinsella, "Supreme Court ruling makes Canada a less-safe place", Toronto Sun, May 17, 2022; Elizabeth Sheehy, Isabel Grant & Kerri A Froc, "Supreme Court of Canada ruling a setback for women", Toronto Star, May 13, 2022.

[32] Bill C-28, *An Act to amend the Criminal Code (self-induced extreme intoxication)*, 1st

Sess, 44th Parl, 2022, cl 33.1.

Innocent If Intoxicated? Part 1: Before *Brown*

An Overview of the Defence of Extreme Intoxication Prior to the Decision in *R v Brown*

On May 13, 2022, the Supreme Court of Canada ("SCC") rendered its judgement in *R v Brown* ("*Brown*"). The decision struck down section 33.1 of the *Criminal Code*, which eliminated self-induced intoxication as a defence to certain types of crimes. This case generated significant controversy at lower levels of the court system, and the decision from the SCC was no different. A quick Google search reveals news headlines such as: "Supreme Court ruling makes Canada a less-safe place" and "Supreme Court of Canada ruling a setback for women."[1] One commentator even went as far as saying that this ruling allows rapists and murderers to walk free.[2]

So, what was the *Brown* case about, and why did it cause such a firestorm of controversy? This is the first article in a two-part series that will address these questions. This first article examines the history of what has become known as the extreme intoxication defence in Canada, while the second focuses on the *Brown* ruling itself.

Before 1994, Intoxication Was No Defence for General Intent Offences

In 1994, the SCC released a landmark decision on the use of intoxication as a defence to a criminal act. This case was *R v Daviault*. Before *Daviault,* the common law (law created through court decisions) only allowed a defence of extreme intoxication for "specific intent" offences, not for "general intent" offences. Whereas specific intent offences (e.g. murder) require that a defendant intended to cause a particular kind of criminal *harm*, general intent offences (e.g. manslaughter) require only that they intended to perform a particular criminal *act*, regardless of whether they intended to produce the harm that resulted from that act.

Throughout the 20thcentury, several English cases restated the rule that extreme intoxication is only a valid defence for specific intent offences. In 1963, the English judge Lord Denning stated the rule as follows: "If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge … in which a specific intent is

essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary."[3]

In *R v Leary*, the Supreme Court of Canada affirmed this same principle, which meant that voluntary intoxication — however extreme — could not be used to escape liability for most crimes in Canada. However, this changed dramatically in 1994.[4]

Daviault Allows the Defence of Extreme Intoxication for General Intent Offences

In 1994, the decision in *Daviault* reformed the Canadian common law to expand the defence of extreme intoxication beyond specific intent offences. *Daviault* revolved around the sexual assault of a 65-year-old woman who was partially paralysed and restricted to a wheelchair. The accused was a chronic alcoholic who, that night, had drank seven or eight beers and approximately 35 ounces of brandy. In his testimony, he denied sexually assaulting the victim, saying that he did not remember anything that happened after arriving at the victim's home.[5] During the trial, an expert witness noted that the amount of alcohol the accused drank would have caused a moderate drinker to fall into a coma or die. The witness also noted that the accused could have been in a state of automatism where he had no awareness of his actions and had lost contact with reality.[6] Such a state has been defined as when a person is capable of movement but does not have voluntary control; when there is a disconnect between their mind and their body.[7]

The cases mentioned above, including *R v Leary*, were decided before the enactment of the *Charter of Rights and Freedoms* ("*Charter*") in 1982. However, *Daviault* was decided twelve years after the passage of the *Charter*, and the question before the Court was now whether banning the defence of extreme intoxication for general intent offences violated any *Charter* rights. Specifically at issue were:

1. Section 7 of the *Charter*, which protects the right of a person not to be deprived of life, liberty, or security of the person "except in accordance with the principles of fundamental justice."[8]

2. Section 11(d) of the *Charter*, which states that an accused must be "presumed innocent until proven guilty."[9]

The Supreme Court in *Daviault* found that the common law principle adopted by the SCC in *R v Leary* violated both these *Charter* sections. For the Court, the rights contained in these sections were breached because the principle from *Leary* unjustifiably substituted the *mens rea* of an offence.[10] To explain this point: for general intent offences, the common law principle effectively substituted the intention to commit the criminal act with the intention to become intoxicated. With this substitution, a person's intention to become drunk would be enough to satisfy the mental element of a general intent offence, even without proof they intended to commit the criminal act.

According to the SCC, eliminating the mens rea for an offence in this way violates sections 7

and section 11(d) of the *Charter*. In finding that the law violated section 7, the Court defined the voluntariness requirement as a principle of fundamental justice, suggesting that a person should not be criminally liable for something they did not voluntarily choose to do.[11] Further, the Court held that section 11(d) was violated by the fact that someone may raise a reasonable doubt as to the voluntariness of their actions yet still be convicted of a general intent offence, thereby violating the presumption of innocence.[12]

When a law is found to violate a *Charter* right, it may nonetheless be justified and upheld under the *Oakes* test, a two-part test derived from section 1 of the *Charter*. However, in *Daviault*, the Court stated that the violations were too "drastic,"[13] and that the law could accordingly not be "saved" under section 1.

Rather than striking down the law, though, the Court modified the common law principle from *Leary* to make it compatible with the *Charter*. Adopting the flexible approach taken by Justice Wilson in a previous case (*R v Bernard*), the *Leary* principle was altered to make the defence of extreme intoxication available for general intent offences *in exceptional circumstances*.[14] These exceptional circumstances were those in which an accused could show that their state of extreme intoxication was akin to automatism or insanity. To use the Court's words, this type of "[d]runkenness of the extreme degree … will only occur on rare occasions."[15] On such occasions, the onus will be on the accused to prove that they were in such a state, and expert evidence would be needed to verify their claim.[16] Therefore, because of the Court's judgement in *Daviault*, a modified common law principle was created to allow for the use of extreme intoxication as a defence for general intent offences "on rare occasions."

Parliament Codifies the Original Common Law Principle From *Leary*

Following the Supreme Court of Canada's judgement in *Daviault* there was significant public outcry, and pressure mounted on the federal government to respond.[17] In 1995, Parliament responded to this pressure by passing section 33.1 of the *Criminal Code*. Section 33.1 stated that no defence of extreme intoxication would be available for general intent offences that involved an interference with the bodily integrity of another person (e.g. assault).[18] While plenty of observers welcomed Parliament's response,[19] legal experts had concerns that section 33.1 ran afoul of the *Charter*.[20] For example, in 2017, one legal scholar noted that a *Charter* challenge seemed inevitable, given that section 33.1 effectively restored the guilt-by-proxy regime that was invalidated in *Daviault*.[21]

Despite these concerns, it took until *R v Brown* in 2022 for the issue of section 33.1's validity to make it to the SCC. My second article in this series will examine *R v Brown*, explaining why the SCC unanimously struck down section 33.1 of the *Criminal Code*, and considering what might happen next.

[1] Warren Kinsella, "*Supreme Court ruling makes Canada a less-safe place*", Toronto Sun,

May 17, 2022 [Kinsella]; Elizabeth Sheehy, Isabel Grant & Kerri A Froc, "*Supreme Court of Canada ruling a setback for women*", Toronto Star, May 13, 2022.

[2] Kinsella, *supra* note 1.

[3] *Bratty v Attorney-General for Northern Ireland*, [1961] 3 WLR 965, [1963] AC 386 at 410.

[4] *R v Leary*, [1978] 1 SCR 29, [1978] 1 RCS 29 [*Leary*].

[5] *R v Daviault*, [1994] SCJ No 77, [1994] 3 SCR 63 at paras 71-72 [*Daviault*].

[6] *Ibid* at para 73.

[7] *R v Brown*, 2022 SCC 18.

[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[9] *Ibid*.

[10] *Daviault, supra* note 5 at para 40.

[11] *Ibid* at para 44.

[12] *Ibid* at para 43.

[13] *Ibid* at para 47.

[14] *Ibid* at paras 50-53.

[15] *Daviault*, *supra* note 5 at para 63.

[16] *Ibid* at para 67.

[17] Debra Black, "A licence to rape? Women fear that a Supreme Court ruling tells men sexual assault is okay as long as they're drunk", Toronto Star, October 27, 1994; "Drunks who rape and go free; Top court ruling means law should be changed", Montreal Gazette, October 4, 1994.

[18] *Criminal Code*, RSC 1985, c C-46, s 33.1.

[19] Stephen Bindman, "Drunk defence to be outlawed", Calgary Herald, February 25, 1995

[20] *Ibid*.

[21] Michelle S Lawrence, "Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the Criminal Code" (2017) 40:3 MLJ 391 at 393.

Bill C-7: Addressing the Gaps in the Regulation of Medical Assistance in Dying (MAID)

Medical assistance in dying, or MAID, is a controversial topic that has generated much constitutional debate and litigation in Canada. For some people, providing legal access to MAID enhances the personal autonomy and dignity of people with serious illnesses, giving them "control over the manner of … [their] death."[1] For others, though, it's a dangerous medical advancement that "devalues the … lives" of already marginalized people and "renders them vulnerable to unwanted assistance in dying."[2] In 2016, the Canadian Parliament weighed in on this debate when it legalized MAID for people who meet certain eligibility requirements. In 2021, the government then enacted Bill C-7 to address what it regarded as holes in the 2016 legislation.[3]

The History of MAID in Canada

Helping a person to commit suicide was, and still is, illegal under section 241(1)(b) of the *Criminal Code*.[4] However, through a series of amendments to the *Criminal Code*, exemptions were made in 2016 for medical practitioners and healthcare providers who provide MAID in accordance with certain legislative guidelines.[5]

The story of these amendments began in 1993, when the Supreme Court of Canada ruled on a case called *Rodriguez v British Columbia (AG)*. In *Rodriguez*, the Court upheld the original *Criminal Code* provisions, which prohibited MAID under all circumstances.[6] By a 5-4 majority, the Court rejected the claim that the *Criminal Code* provisions unjustifiably infringed various *Charter* rights, including the rights contained in sections 7, 12, and 15 of the *Charter*. The Court held that even if section 15 — the equality rights section of the *Charter* — had been infringed, the blanket prohibition on assisted suicide was still legally justified because it protected vulnerable people who are at risk of being pressured into ending their lives prematurely.[7]

Just over two decades later, the Supreme Court unanimously overturned *Rodriguez* in *Carter v Canada (AG)*, recognizing that people who are "grievously and irremediably ill … may be condemned to a life of severe and intolerable suffering"[8] without medical assistance in dying. In arriving at this decision, the Court considered the public's evolving sentiments regarding MAID, as well as international precedents that had legalized MAID in other places since the *Rodriguez* ruling. In light of these factors, the Court held that the blanket prohibition of MAID unjustifiably violated section 7 of the *Charter*, which protects

each individual's right not to be deprived of life, liberty, or security of the person in a way that breaches "the principles of fundamental justice."[9] Having dealt with the case under section 7, the Court found it unnecessary to consider whether the prohibition also violated the equality rights section of the *Charter* (section 15).[10]

In a rare move, then, the Supreme Court of Canada had overturned its previous ruling in *Rodriguez*. Rather than striking down the blanket prohibition on MAID immediately though, the Court issued a suspended declaration of invalidity so that Parliament would have time to create its own regulatory framework.[11] This prompted Parliament to pass Bill C-14, which created exemptions to the blanket prohibition by allowing medical professionals to administer MAID in accordance with strict safeguards and eligibility requirements.[12] If these requirements were met, medical practitioners would not be held criminally responsible for providing MAID.[13]

Although Bill C-14 opened the door to MAID in Canada, its eligibility requirements and safeguards were still subject to challenges under the *Charter of Rights and Freedoms*. These challenges were at the heart of a 2019 Quebec Superior Court case, *Truchon c Procureur général du Canada*.[14]

Charter Challenges to Bill C-14

The *Truchon* case brought up two main *Charter* challenges under sections 7 and 15. These challenges were directed at the requirement that a person's natural death must be "reasonably foreseeable" before they will be eligible for MAID.

The Section 7 Challenge

In *Truchon*, the Superior Court found that the "reasonably foreseeable" requirement violated the liberty and personal security of people who are suffering from grievous and irremediable illnesses but are barred from accessing MAID because their natural deaths are not reasonably foreseeable.[15] More specifically, the requirement infringed on the liberty of such individuals because it prevented them from making important medical choices,[16] and it threatened their security of the person by potentially prolonging their suffering.[17] While such infringements are permissible under section 7 if they are found to be "in accordance with the principles of fundamental justice," the Court decided that this was not the case here, since the infringements were overbroad and grossly disproportionate to the law's intended purpose: namely, the goal of protecting vulnerable people from being taken advantage of.[18]

As with other *Charter* violations, a section 7 violation will be upheld by a court if it is shown to be "demonstrably justified in a free and democratic society"[19] (this possibility is laid out in section 1 of the *Charter*). To determine whether a violation is "demonstrably justified," courts use a two-step test known as the *Oakes* test, which requires that the violation serves a "pressing and substantial objective" and is "proportionate."[20] In *Truchon*, the Court concluded that the violation of section 7 could not be saved under the *Oakes* test. In the Court's view, the violation was not "proportionate" because it did not

"minimally impair" the claimants' section 7 rights,[21] and because the law's potential benefits did not outweigh its deleterious effects on seriously ill people whose deaths are not reasonably foreseeable.[22]

The Section 15 Challenge

The claimants in *Truchon* also asserted that the "reasonably foreseeable" requirement violated their section 15 equality rights. The claimants argued that the law discriminated against people based on the nature of their disability or illness. While a person with grievous and irremediable physical disabilities would be unable to legally obtain MAID if their natural death wasn't reasonably foreseeable, access *could* be legally provided to a person with comparably serious disabilities whose natural death *was* reasonably foreseeable. The Court agreed with the claimants that this constituted a violation of section 15 of the *Charter* and could not be saved under the *Oakes* test.[23]

Parliament's Response: Bill C-7

In 2021, in response to the *Truchon* ruling, the Canadian government introduced Bill C-7.[24] This Bill modified the eligibility requirements and safeguards for accessing MAID in an attempt to address the section 7 and section 15 *Charter* violations that were recognized in *Truchon*. To do this, Bill C-7 expanded legal MAID access by creating two sets of safeguards.[25]

On the one hand, for people whose deaths are reasonably foreseeable, Bill C-7 removed the final consent requirement and allowed them to give consent to MAID in advance (of course, they can still withdraw consent anytime).[26] This addressed concerns about people choosing to end their lives early due to fear of losing their capacity to consent.

On the other hand, for people whose deaths are not reasonably foreseeable, Bill C-7 applied slightly more stringent safeguards while now allowing them to legally access MAID. For example, Bill C-7 created a mandatory 90-day assessment period for people whose deaths are not reasonably foreseeable — a requirement that doesn't exist for people whose deaths *are* naturally foreseeable.

For many, these amendments mark important step in rectifying the section 7 and 15 infringements recognized in *Truchon*.[28] While the safeguards are different for people whose natural deaths are not immanent, many more people who are suffering from grievous and irremediable illnesses will now have legal access to MAID, regardless of the nature of their illness.[29]

Did Bill C-7 Solve the Issues With MAID in Canada?

Although Bill C-7 addressed some of the more prevalent *Charter* challenges to MAID laws, it is still possible for new *Charter* challenges to come up in the future. For example, MAID is currently unavailable to those who are suffering solely from mental illness, which could be framed as a violation of equality rights under section 15 of the *Charter* insofar as it entails another distinction based on the nature of a person's illness or disability. Whether MAID

laws in Canada will be subject to further constitutional challenges will accordingly depend, in part, on whether new legislation opens up access to MAID for people suffering solely from mental illness (note: new legislation *is* expected by the end of March 2023).

[1] *Carter v Canada (AG)*, 2015 SCC 5 at para 10 [*Carter*].

[2] *Ibid* at para 10.

[3] *Bill C-7: An act to amend the Criminal Code (medical assistance in dying)* (September 2021), online: *Charter Statements* <https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c7.html>.

[4] *Criminal Code*, RSC 1985, c C-46, s 241(1)(b).

[5] *Ibid* at s 241(2).

[6] *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

[7] *Ibid*.

[8] *Carter*, *supra* note 1 at para 1.

[9] *Ibid*.

[10] *Ibid* at para 93.

[11] *Ibid* at para 128.

[12] Bill C-14, *An Act to amend the Criminal Code and to make amendments related to other Acts (medical assistance in dying)*, 1st Sess, 42nd Parl, 2016, (assented to 16 June 2016) SC 2016 c 3.

[13] *Ibid* at cl 1.

[14] *Truchon c Procureur général du Canada*, 2019 QCCS 3792 [*Truchon*].

[15] *Ibid* at para 522.

[16] *Ibid* at para 527.

[17] *Ibid* at para 528.

[18] *Ibid* at paras 536-544.

[19] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1.

[20] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

[21] *Truchon*, *supra* note 14 at para 617.

[22] *Ibid* at para 637.

[23] *Ibid* at para 690.

[24] Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 2nd Sess, 43rd Parl, 2021, (assented to 17 March 2021) SC 2021 c 2.

[25] Bill C-14, *supra* note 12 at cl 1(3.1).

[26] *Criminal Code, supra* note 4, s 241.2(3).

[27] *Ibid*, s 241.2(3.1).

[28] Dying With Dignity, "A Triumph of Compassion and Choice: Bill C-7 Receives Royal Assent" (March 17, 2021), online: *Dying With Dignity* <https://www.dyingwithdignity.ca/blog/bill_c7_royal_assent/>.

[29] However, it should be noted that there is still strong opposition to Bill C-7 and MAID laws in general, and some individuals and organizations believe that MAID inherently devalues the lives of people suffering from disabilities. See PRESS RELEASE: MAiD Bill violates equality rights of people with disabilities (February 2020), online: *Inclusion Canada* <https://inclusioncanada.ca/2020/02/28/medical-assistance-in-dying-bill-violates-equality-rights-of-people-with-disabilities-it-must-be-stopped/>.

Our Constitution's "Most Basic Normative Commitments"?

Unwritten Constitutional Principles, Municipal Elections, and Democracy

This is the second of two articles on the Supreme Court of Canada's judgment in *Toronto (City) v Ontario (Attorney General)*.[1] In the first article, I focused on the City of Toronto's claim that Ontario's *Better Local Government Act*, which restructured Toronto City Council in the middle of a municipal election, violated the *Canadian Charter of Rights and Freedoms*. In this article, I consider a second, arguably more ambitious claim made by the City: namely, that restructuring the Council mid-election violated the *unwritten* constitutional principle of democracy. As this article will explain, addressing this claim required the Court to mull over fundamental questions about the nature of the constitutional order, the role of unwritten principles within it, and the powers of the courts as the Constitution's guardians.

What Are Unwritten Constitutional Principles?

Unwritten constitutional principles are "foundational"[2] parts of the Canadian Constitution that are not explicitly laid out in any constitutional text, e.g. the *Constitution Act, 1867*. As the Supreme Court wrote in the *Reference re Secession of Quebec*, these principles are the "vital unstated assumptions upon which the text [of the Constitution] is based."[3] For example, the division of legislative power between the federal and provincial governments laid out in sections 91 and 92 of the *Constitution Act, 1867* infuses the Canadian Constitution with a foundational commitment to federalism — a commitment that is viewed as part of the Constitution in its own right as an unwritten principle.

What Was the City of Toronto's Argument?

In *Toronto v Ontario*, the City of Toronto argued that the sudden, mid-election changes that Ontario made to Toronto's ward boundaries were inconsistent with the unwritten principle of democracy — a principle that was notably affirmed by the Supreme Court in the *Quebec Secession Reference*. Even more importantly, the City argued that this inconsistency rendered the ward changes *invalid*, since section 52 of the *Constitution Act, 1982* specifies that laws that are inconsistent with the Constitution are "of no force or effect."

What Did the Court Say? The Meaning of "Full Legal Force and Effect"

In *Toronto v Ontario*, the Supreme Court recognized that the Constitution is composed of both written and unwritten norms, and that unwritten principles have "full legal force."[4] What, though, does it mean for unwritten principles to have "full legal force"? For the

Court, unwritten principles do not have force in the same way that written "provisions" of the Constitution do, which means that their violation doesn't render a law invalid (as the City of Toronto suggested). Rather, according to the Court, unwritten principles have force in the sense that they help determine how the "Constitution's written terms — its *provisions* — are to be given effect."[5] Practically speaking, this means that unwritten principles can be used by the courts in two ways: 1) as an interpretive aid for better understanding the Constitution's written provisions, and 2) to develop doctrines that, while unstated, are necessary to give full effect to the Constitution's written provisions.[6]

Why, though, should unwritten principles be confined to this relatively minimal role? And why can they not be used to invalidate legislation?

The Court supplied several distinct answers to these questions. Firstly, the Court noted that unwritten principles are problematically "abstract," "nebulous," and open to interpretation.[7] As such, using them to invalidate democratic legislation would potentially undermine "'legal certainty and predictability' in the exercise of judicial review,"[8] and depart from or undermine choices that were consciously made by the Constitution's framers (such as the choice not to protect the right to vote in municipal elections).[9] As the Court put it: "[i]t is not for the Court to do by 'interpretation' what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment."[10]

The Court also noted that using unwritten principles to invalidate legislation runs into two problems in relation to the *Charter of Rights and Freedoms*:

1. Section 33 of the *Charter* (the "notwithstanding clause") provides legislatures with a way to override certain *Charter* rights. However, if courts started using unwritten principles to invalidate legislation, this could effectively render section 33 meaningless, since section 33 only allows for the override of certain rights — *not* the unwritten principles that underpin those rights.[11]

2. Section 1 of the *Charter* allows for justifiable limits on rights that are laid out in the *Charter*. However, given that unwritten principles are not laid out in the *Charter*, their violation would accordingly not be justifiable under section 1. This would mean, as the Court wrote, that the state would have "no corresponding justificatory mechanism"[12] that would shield "pressing and substantial" laws that contravene unwritten principles from invalidation.

For all of these reasons, the Court rejected the City of Toronto's claim that the violation of an unwritten principle would allow a court to invalidate an otherwise valid law. Unwritten principles are a key component of Canadian constitutional law, the Court said; but their legal effect is far less direct or consequential than the City had claimed.

The Principle of Democracy and the Case at Hand

Having offered clear commentary on the role that unwritten constitutional principles play in Canadian constitutional law, the Court then turned to the question of the specific role

played by the democracy principle in the case at hand. To this end, the Court began by affirming the principle of democracy as a core unwritten principle of Canada's Constitution which encompasses both the processes and substantive goals of self-government. However, despite this affirmation, the Court was equally clear that this principle, like other unwritten principles, "cannot be used as an independent basis to invalidate legislation."[13] The Court then addressed the question of how this principle of democracy interacts with other relevant constitutional provisions: namely, sections 92(8) of the *Constitution Act, 1867* and section 3 of the *Charter.*

Section 92(8) gives provinces authority to legislate in regards to municipal affairs, and the Court noted that it had previously found that this authority is "absolute and unfettered," subject only to the *Charter*.[14] Moreover, the Court noted that a number of unwritten principles — including the rule of law, constitutionalism, and the democracy principle itself — actually serve as strong arguments for upholding the *Better Local Government Act*, given that this *Act* was passed by a duly elected government in compliance with written constitutional law.[15]

As mentioned in the first article in this series, section 3 of the *Charter* lays out democratic rights, giving all Canadians the right to vote for representatives of federal and provincial legislative bodies. Addressing the argument that the principle of democracy added an implied right to municipal representation to this section, the Supreme Court claimed that there is no textual basis for this conclusion. If anything, the Court said, the explicit omission of municipalities from section 3 of the *Charter* indicates a deliberate choice, on the part of the *Charter's* framers, to not confer any form of protected constitutional status on municipalities. Thus, to "read in" a constitutional right to municipal representation would not be a case of interpreting the Constitution, but rather amending it by giving new constitutional status to a third order of government.[16]

Moving Forward: Unwritten Principles and the Constitutional Status of Municipalities

Justice Abella, writing for the dissent, argued that constitutional texts emanate from (but are not exhaustive of) underlying unwritten principles, which in turn are the "Constitution's most basic normative commitments."[17] As such, the dissent rejects the notion that these unwritten principles exist primarily to fill structural gaps in written texts and as aids to the interpretation of written constitutional provisions. Rather, for Justice Abella, unwritten principles exist independently of written constitutional provisions, and may even predate them. She accordingly suggests that the "full legal force and effect" of unwritten principles means that, like written constitutional texts, they can render inconsistent laws invalid. In other words, Abella regards a violation of an unwritten principle as an independent ground for declaring the violating law invalid — even if no written provision of the Constitution has been violated.[18]

Conclusion: A Divided Court, an Uncertain Future

While the Court's ruling might make it seem like the role of unwritten principles is now somewhat settled, it is interesting to note one important caveat: the Court's openness on the role that could be played by the unwritten principle of the honour of the Crown in Aboriginal law.[19] While the Court did not say that this unwritten principle can be invoked on its own invalidate legislation, it did explicitly leave open this possibility, thereby leaving ample room for the debate over the role of unwritten principles to continue in the future.

More generally, though, the sharp split between the 5-judge majority and the 4-judge dissent suggests that the role of unwritten principles (and the role of the judges who enforce them) is in fact far from legally settled. As the Court's composition gradually changes over time, it is possible that the *Toronto* majority will either solidify or dissolve. This is particularly true in light of the increasing usage of the notwithstanding clause, since using unwritten principles (and unwritten rights) as grounds for judicial invalidation is one way of potentially taming the notwithstanding clause and inhibiting its most damaging effects.[20] For now, though, the role of unwritten principles has been constrained, and it remains to be seen if the radically different route offered by the dissent could open up in the future.

[1] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [*Toronto v Ontario*]

[2] *Ibid* at para 49.

[3] *Reference re Secession of Quebec*, 1982 2 SCR 217 at para 49.

[4] *Toronto v Ontario*, *supra* note 1 at para 49.

[5] *Ibid* at para 54.

[6] *Ibid* at paras 55-56.

[7] *Ibid* at para 59.

[8] *Ibid* at para 59.

[9] *Ibid* at paras 59 & 82.

[10] *Ibid* at para 82.

[11] *Ibid* at para 60.

[12] *Ibid* at para 60.

[13] *Ibid* at para 78.

[14] *Ibid* at para 79.

[15] *Ibid* at paras 79-80.

[16] *Ibid* at paras 81-82.

[17] *Ibid* at para 168.

[18] *Ibid* at para 169.

[19] *Ibid* at para 62.

[20] For example, see Kristopher Kinsinger, "Can the Notwithstanding Clause Be Used to Violate Pre-existing Rights?", *The National Post* (5 May 2021), online: <https://nationalpost.com/opinion/kristopher-kinsinger-can-the-notwithstanding-clause-be-used-to-violate-pre-existing-rights>.

Toronto v Ontario: Municipal Elections, Freedom of Expression, and Provincial Authority

Can a province change the number of electoral wards in the middle of a municipal election? According to the recent Supreme Court decision in *Toronto (City) v Ontario (Attorney General)*,[1] the answer is yes.

As the 2018 Toronto municipal elections were well underway, the Ontario government decided to reduce the size of Toronto City Council. The government announced its intention on July 27th, the same day that nominations for the elections closed. Several weeks later, the *Better Local Government Act, 2018*[2] came into effect, reducing the number of City Council seats from 47 to 25. The *Act* was challenged in court by the City of Toronto, and the Ontario Superior Court declared the *Act* invalid. However, the Ontario Court of Appeal disagreed, and thus the election proceeded with 25 wards, as required by the *Act.*

Despite the election's end, Toronto appealed the decision of the Ontario Court of Appeal to the Supreme Court. The City of Toronto argued (among other things) that the *Act* was unconstitutional because it violated rights that are protected by section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*),[3] including candidates' freedom of expression and voters' right to effective representation. On October 1, 2021, the Supreme Court ruled in favour of the province, deeming the *Better Local Government Act* constitutional and legally valid.

Charter Sections 2(b) and 3 and Their Role in Municipal Elections

The *Charter* issues in this case revolved around:

Section 2(b), which guarantees individuals' "freedom of thought, belief, opinion and expression." The City argued that by changing the ward boundaries so close to the election, the provincial government had unjustifiably infringed upon these rights of the candidates.

Section 3, which guarantees that "every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." While section 3 only applies to provincial and federal elections, the City argued that the principle of effective representation that underpins it can be "read into" section 2(b) and made applicable to municipal elections.

By a narrow majority of 5-4, the Supreme Court decided that the province had not violated the section 2(b) rights of the candidates, and that the section 3 right of effective representation does not extend to municipalities via section 2(b).

Provinces Have Constitutional Authority Over Municipalities

To understand the Court's ruling, it is first important to understand the constitutional status of municipalities. Under section 92(8) of the *Constitution Act, 1867*,[4] municipalities are under provincial jurisdiction. This means that provinces have the "constitutional authority"[5] to change "municipal institutions"[6] — including the size of city councils — if they so choose.

At the same time, though, provincial laws and actions must still comply with other portions of the Constitution, including the *Charter*. Accordingly, in this case the question was not whether the Ontario government could restructure Toronto City Council — section 92(8) of the *Constitution Act, 1867* empowers it to do so — but whether the unusual ***timing*** of the ward changes infringed on the section 2(b) rights of the candidates and voters.

The Supreme Court's Reasoning on Section 2(b) Rights

The City's argument is a positive rights claim.

The Court divided section 2(b) rights into *positive* and *negative* rights. A positive right is one which imposes an obligation upon the government to do something for an individual — in this case, to facilitate expression and provide a platform for it. In contrast, a negative right is one which requires the government not to interfere in an individual's ability to do something — in this case, an individual's ability to express themselves.

In *Toronto v Ontario*, the Court found that the City's claim is a positive claim: the City wanted the provincial government to provide candidate's with a specific platform for

expression by either restoring the previous 47-ward structure, or by maintaining the ward distribution in place at the time of the election's commencement.[7] While the former is obviously a positive claim, the Court found that the latter also amounts to a positive claim — albeit in a less obvious way. In the Court's view, both versions of the City's claim involve asking the provincial government to *do something*: namely, to provide electoral candidates with a specific platform (the council structure that was in place at the beginning of the election cycle) through which they can exercise their freedom of expression.

The section 2(b) positive rights test

Courts use different tests to assess positive and negative rights claims under section 2(b). Positive rights violations are harder to prove than negative ones, and for them to succeed three questions will all need to be answered in the affirmative:

1. Is the claim grounded in freedom of expression?

2. Does the lack of access to a particular platform for expression amount to a *substantial interference* with freedom of expression, or was it done with the purpose of interfering with freedom of expression; and

3. Is the government responsible for the inability of the claimant to exercise their freedom of expression?[8]

In *Toronto v Ontario*, the Court summed up this test in one question: "Was the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government had either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression?"[9]

Having applied this test to the City's claim, the Court determined there was no section 2(b) violation. In support of this conclusion, the Court relied on two key arguments. Firstly, it claimed that there was no interference in the freedom of candidates to campaign or to say what they wanted in their campaigns,[10] and noted that the City wasn't claiming that the Province acted with the purpose of interfering with expressive freedom.[11] Secondly, it noted that the threshold of "substantial interference" is quite high, and will be met only in extreme and rare cases when meaningful expression has been "effectively precluded" by the state.[12] Given that candidates still had 69 days to campaign under the new ward boundaries and were able to raise significant amounts of funds, the Court decided that this high threshold was not met in this case.[13]

Section 3 Rights Cannot Be Extended to Municipal Elections Via Section 2(b)

Section 3 of the *Charter* guarantees citizens the rights to vote and run for office in provincial and federal but not municipal elections. While the text of section 3 doesn't mention a right to "effective representation," the Supreme Court has recognized this

additional right as an "incident"[14] of section 3 — although like the rights to vote and run for office, this right only applies to the federal and provincial levels.

However, in *Toronto v Ontario*, the City argued that the principle of "effective representation" applies to municipal affairs via section 2(b). Furthermore, the City argued that the new ward distribution violated the principle of effective representation — and hence section 2(b) — by creating wards of roughly equal size as opposed to wards based on population distribution (as would have been the case under the 47-ward distribution).[15]

The Court, though, found that the principles of section 3 — including the principle of effective representation — are quite distinct from those of section 2(b) and cannot be captured under it. According to the Court, the *Charter*'s framers intentionally did not include municipal representation in section 3, and the rights and principles that it covers should accordingly not be extended to municipal elections.[16]

Justice Abella's Dissent

This case was clearly a difficult one for the Court, and four of the Court's nine Justices expressed their disagreement with the five-Justice majority by writing a separate "dissenting" opinion.

The dissent, written by Justice Rosalie Abella, argues that one of the key purposes of section 2(b) is the protection of political discourse.[17] While Justice Abella did not dispute the fact that a province has the legal authority to change municipal wards, she found that doing so in the middle of a municipal election was an interference with the ability of candidates and voters to express themselves politically.[18] This interference included: the absence of notice; the lack of additional time to fundraise; and the fact that more than half of the candidates certified before the ward changes dropped out of the elections after the changes came into effect.[19]

The majority used the wrong test for the right

Crucially, the dissent disagreed with the majority's conclusion that the City's claim concerned a positive right.[20] In this regard, the dissent frames the case as being "about government interference with the expressive rights that attach to an electoral process" and not about the provincial government "provid[ing] … a municipal election so that [the claimants] … can express themselves."[21] The dissent accordingly suggested that the correct test for the case is the less arduous test for violations of *negative* section 2(b) rights, which requires the claimant to show that the activity under consideration conveys or attempts to convey meaning, and that the legislation or action under scrutiny interferes with that activity.[22]

Having established that municipal elections are crucial vehicles for political expression and that the government's redrawing of the ward boundaries mid-election was an interference with that expression, the dissent found that the section 2(b) rights of candidates and voters had been violated. Furthermore, the dissent found that these violations could not be legally

justified under section 1 of the *Charter*, which permits violations that are "reasonable," "prescribed by law," and "demonstrably justified in a free and democratic society." The dissent accordingly argued that the impugned provisions of the *Better Local Government Act* were unconstitutional and invalid.[23]

Conclusion: The *Charter*, Political Expression, and Municipal Elections

While the decision of the majority essentially affirmed longstanding constitutional norms of provincial jurisdiction over municipalities, Justice Abella's dissent demonstrates that the Court is sharply divided over the impact that the *Charter* has on these longstanding norms. Given the growing role of municipalities in Canadians' everyday lives, it will be interesting to see if future Supreme Court cases on the relationship between provincial jurisdiction and municipal governance continue or break with the reasoning of the majority on this issue.

* Part Two of this article will evaluate the Court's ruling on whether the *Better Local Government Act*'s alleged violation of an unwritten constitutional principle rendered it invalid.

[1] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.

[2] *Better Local Government Act, 2018*, SO 2018, c 11.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[4] *Constitution Act, 1867*, RSC 1985, Appendix II, No. 5, s 92(8).

[5] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 3.

[6] *Ibid* at para 2.

[7] *Ibid* at para 30-32.

[8] *Ibid* at para 23.

[9] *Ibid* at para 25.

[10] *Ibid* at para 37.

[11] *Ibid* at para 27.

[12] *Ibid* at para 27.

[13] *Ibid* at para 37.

[14] *Ibid* at para 44.

[15] *Ibid* at paras 44, 47.

[16] *Ibid* at para 45.

[17] *Ibid* at para 114.

[18] *Ibid* at para 89.

[19] *Ibid* at para 105.

[20] *Ibid* at para 152.

[21] *Ibid* at para 151.

[22] *Ibid* at para 156.

[23] *Ibid* at para 162.

"Equitable Compensation" for a Breach of the Crown's Fiduciary Duty Towards First Nations

The Crown has a fiduciary relationship with Indigenous Peoples. What remedy do Indigenous Peoples have when the Crown breaches its fiduciary duty? The Supreme Court of Canada recently addressed this question in *Southwind v Canada*, which involved a breach that occurred nearly 100 years ago.

In February 1928, the Governments of Canada, Ontario, and Manitoba entered into an agreement to dam Lac Seul in order to generate electricity for the growing city of Winnipeg.[1] The governments planned to raise the water level of Lac Seul by ten feet, which they knew would cause "very considerable" damage to the Lac Seul First Nation (LSFN), whose Reserve was — and still is — located on the southeastern shore of the lake.[2] When the dam was built, "[a]lmost one-fifth of [LSFN's] best land was flooded and … [LSFN's] members were deprived of their livelihood, robbed of their natural resources, and driven out of their homes."[3] LSFN was not consulted on either the project itself,[4] or on the adequacy of the $50,000 compensation package that Canada and Ontario paid into the LSFN's trust account in 1943.[5]

As a general rule, the Crown owes a fiduciary duty towards an Indigenous group when it

"assumes discretionary control over a specific Aboriginal interest."[6] The Crown breached its duty in the Lac Seul dam project.[7] In this case, the remedy for the breach was "equitable compensation," which the trial judge calculated according to what the Crown would have owed the LSFN under the laws of expropriation in 1929, when the breach occurred.[8] Mr Southwind, who was acting on behalf of the members of the LSFN, disagreed with this calculation and argued that the trial judge failed to consider the doctrine of equitable compensation in light of the constitutional principles of the honour of the Crown and reconciliation.[9]

On July 16th, 2021, the Supreme Court ruled on Mr Southwind's appeal. This article will examine the Supreme Court's decision on the appropriate legal remedy for a breach of the Crown's fiduciary duty towards Indigenous Peoples.

The Nature of the Crown's Fiduciary Duty Towards Indigenous Peoples

There was no question in this case that the Crown had breached its fiduciary duty to the LSFN; the Crown conceded this.[10] However, "the specific nature of the Crown's fiduciary duty … especially over reserve land, informs how equitable compensation must be assessed,"[11] and so the Court began with an overview of the duty itself.

The fiduciary relationship between the Crown and Indigenous Peoples is *sui generis* in nature,[12] which means that it is unique and distinct from other legal relationships normally found in the common law tradition. As the Court stated in *Southwind*, this *sui generis* relationship is rooted in two principles of Aboriginal Law: (1) the honour of the Crown; and (2) the goal of reconciliation.[13]

The honour of the Crown is a constitutional principle that underpins Aboriginal Law,[14] the branch of Canadian constitutional law that deals with the rights of the Indigenous Peoples of Canada[15] and their relationship with the Crown.[16] It imposes a duty upon the Crown to act honourably towards Indigenous Peoples and to take their interests into account when it makes decisions that may impact them.[17]

For the Court, the principle or goal of reconciliation has two aspects. On the one hand, it seeks to reconcile "Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."[18] On the other hand, it seeks to make consistent two seemingly inconsistent realities: prior occupation of the land we now call Canada by Indigenous Peoples and the Crown's assertion of sovereignty over that land.[19]

The second aspect of this principle is especially pertinent to the Crown's control over reserve lands because "the Indigenous interest in land *did not flow from the Crown*; it pre-existed the Crown's assertion of sovereignty."[20] Further, Indigenous Peoples' unique relationships with their land, and especially reserve land, heightens the importance of their interest in reserve land and by extension, the fiduciary duty.[21] In *Southwind*, the Court concluded that the Crown's fiduciary duty "imposes the following obligations on the Crown:"[22]

- "Loyalty, good faith, full disclosure, and, where reserve land is involved, the protection and preservation of the First Nation's quasi-proprietary interest from exploitation."[23]
- "[I]n the context of a surrender of reserve land … [the obligation to] protect against improvident bargains, manage the process to advance the best interests of the First Nation, and ensure that it consents to the surrender."[24]
- "In an expropriation, the obligation to ensure consent is replaced by an obligation to minimally impair the protected interest."[25]

The Principles of Equitable Compensation for Breach of the Crown's Fiduciary Duty

To quote the Court in *Southwind*:

> *When the Crown breaches its fiduciary duty, the remedy will seek to restore the plaintiff to the position the plaintiff would have been in had the Crown not breached its duty … [and w]hen it is possible to restore the plaintiff's assets in specie, accounting for the profits and constructive trust are often appropriate.[26]*

"*In specie*" means that the actual assets would be returned — for example, in this case, the assets *in specie* would be the flooded land.

In cases where returning the actual assets is not possible, such as this one, equitable compensation is the appropriate remedy.[27] While both parties agreed on "[t]he basic principles of equitable compensation … [they] disagree[d] about their application to the Crown's fiduciary duty in relation to land held for the benefit of Indigenous Peoples." [28]

The doctrine of equitable compensation has two objectives: (1) to remedy the loss suffered by "restor[ing] the actual value of the thing lost through the fiduciary's breach" (the "lost opportunity"),[29] and (2) to enforce the trust which forms the heart of the fiduciary relationship by deterring future wrongdoing.[30]

To be eligible for equitable compensation, the plaintiff must show that the fiduciary's breach —in this case the Crown's breach — caused their lost opportunity.[31] Here, the Court clarified that the test for causation is the low-threshold "but for" test: but for the fiduciary's breach, would the plaintiff have suffered the loss?[32]

The Court further explained that a fiduciary cannot limit their liability by arguing that the loss suffered by the plaintiff was unforeseeable.[33] The doctrine of equitable compensation aims to "compensate … the plaintiff for the lost opportunity caused by the breach, regardless of whether that opportunity could have been foreseen at the time of the breach."[34] Equitable compensation, the Court continued, will "[look] at what actually happened to values in later years," even if it causes an "unexpected windfall" to the plaintiff.[35] This is because equitable compensation "look[s] to the policy behind

compensation for breach of fiduciary duty and determine[s] what remedies will best further that policy."[36] The dual purpose of remedying the loss suffered and deterring future wrongdoing therefore drive the calculation of equitable compensation, and foreseeability is not relevant. In the context of a fiduciary breach, equitable compensation "should not be limited by foreseeability, unless it is necessary to reach a just and fair result."[37]

To inform its assessment in *Southwind*, the Court set out several presumptions and requirements that apply to equitable compensation:

- The presumption that "the plaintiff would have made the most favourable use of the trust property,"[38] although "[t]he most favourable use must be realistic."[39]
- "The focus is always on whether the plaintiff's lost opportunity was caused in fact by the fiduciary's breach."[40]
- The presumption of legality — that parties would have complied with the law — which "prevents breaching fiduciaries from reducing compensation by arguing that they would not have complied with the law."[41]
- In a case of failure to disclose material facts, the breaching fiduciary cannot argue "that the outcome would be the same regardless of whether the facts were disclosed."[42]

How to Calculate Equitable Compensation for the Crown's Breach of its Fiduciary Duty Towards Indigenous Peoples

The Court disagreed with the trial judge's decision to calculate equitable compensation based on the amount required under the expropriation laws that existed at the time of the breach.[43] It was incorrect, the Court said, to presume that Canada would have failed to reach an agreement with the LSFN and would have proceeded directly to expropriation. In this regard, the trial judge erred by "focus[ing] on what Canada would *likely have done* instead of what Canada *ought to have done* as a fiduciary."[44]

Following the first step in assessing equitable compensation the Court "determine[d] what the fiduciary would have been expected to do had it not breached its obligations."[45] In this case, although Canada had the legal discretion to expropriate lands[46] or take up lands for public works,[47] this did not preclude it or excuse it from carrying out its fiduciary duties.[48] Rather, Canada was expected to represent the interests of the Indigenous Peoples to whom it was a fiduciary while at the same time considering the broader public interest.[49] Before resorting to expropriation laws, "Canada ought to have first attempted to negotiate a surrender" of the land in accordance with its fiduciary obligations.[50]

The Court then provided guidance on how to calculate the value of LSFN's lost opportunity caused by this breach. In the Court's view, this calculation must be based on what Canada *ought* to have done: namely, "to negotiate in order to obtain the best compensation based upon the value of the land to the Project."[51] In *Southwind*, this meant considering the

value of the land in light of its anticipated use for hydroelectricity generation.[52]

Finally, the Court confirmed that the calculation must consider whether the "award is sufficient to fulfill the deterrent function of equity."[53] Deterring the Crown from breaching its fiduciary duty to Indigenous Peoples is "especially important," the Court said, because it encourages the Crown to act honourably and with a view towards reconciliation.[54] The award should therefore be such that it acts as a meaningful deterrent and thereby reflects "the honour of the Crown and the goal of reconciliation."[55]

Conclusion

The outcome of the Supreme Court's judgment in *Southwind* is that the case goes back to the trial court, which must now reassess the equitable compensation award to the LSFN based on the Supreme Court's guidance.[56] Above all, the Supreme Court's decision reaffirms that the Crown's fiduciary duty towards Indigenous Peoples is alive and well, especially as it relates to reserve lands. It confirms the Crown's obligations that arise from its fiduciary duties in relation to reserve lands, and frames equitable compensation in a way that upholds the honour of the Crown and the objective of reconciliation. As the Court recently held in *Desautel*, "the honour of the Crown looks back" to the Crown's assertion of sovereignty over Indigenous Peoples and "also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, mutually respectful long-term relationship."[57]

[1] See *Southwind v Canada*, 2021 SCC 28 at para 1 . See also paras 17-20.

[2] *Ibid* at paras 2-3. See also paras 14-16.

[3] *Ibid* at para 2 (internal quotations removed). See also paras 27-28.

[4] *Ibid* at para 4. See also paras 20-26.

[5] *Ibid* at paras 29-30.

[6] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (CanLII) at para 73(1).

[7] See *Southwind*, *supra* note 1 at paras 37-42, 87-89 and 94.

[8] *Ibid*.

[9] *Ibid* at para 49.

[10] *Ibid* at para 54.

[11] *Ibid*.

[12] *Ibid* at para 60.

[13] *Ibid* at para 55.

[14] *Ibid*.

[15] See *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35.

[16] See Thomas McMorrow, "Upholding the Honour of the Crown" (2018) 35 Windsor YB Access to Justice 311 at 313.

[17] See *Southwind*, supra note 1 at para 55.

[18] *Ibid*.

[19] *Ibid*.

[20] *Ibid* at para 56 (emphasis in original).

[21] *Ibid* at para 62.

[22] *Ibid* at para 64.

[23] *Ibid*.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid* at para 68.

[27] *Ibid*.

[28] *Ibid* at para 65.

[29] *Ibid* at para 69. See also paras 67 ("Equitable compensation … is a loss-based remedy; the purpose is to *make up* the plaintiff's loss") and 68 (when it is not possible to restore the plaintiff's assets *in specie*, "equitable compensation is the preferred remedy").

[30] *Ibid* at paras 66, 71-72.

[31] *Ibid* at para 70.

[32] *Ibid* at para 75.

[33] *Ibid* at paras 66, 74 and 77.

[34] *Ibid* at 74.

[35] *Ibid* at 76.

[36] *Ibid* at para 73.

[37] *Ibid* at para 76 (citing *Hodgkinson v Simms*, 1994 2 SCR 377 at 443).

[38] *Ibid* at para 79.

[39] *Ibid* at para 80.

[40] *Ibid*.

[41] *Ibid* at para 81.

[42] *Ibid* at para 82.

[43] *Ibid* at para 89.

[44] *Ibid*. See also para 111.

[45] *Ibid* at para 93.

[46] *Ibid* at para 94.

[47] *Ibid* at para 96.

[48] *Ibid* at paras 94 and 96-97.

[49] *Ibid* at paras 101-03.

[50] Ibid at paras 112-14.

[51] *Ibid* at para 118. See also paras 121-22, 127 and 129.

[52] *Ibid* at para 127. While Justice Côté agreed with the majority that Canada ought to have negotiated a surrender, she did not agree that the lost opportunity includes an "opportunity to negotiate a surrender of those lands *for hydroelectricity generation*" (para 172, emphasis in original) because there was insufficient evidence to make that finding of fact. Justice Côté disagreed with the majority's decision to reconsider evidence to reach its own conclusions because doing so overreaches the appellate standard of review for mixed fact and law, which is reasonableness, not correctness (see paras 170, 174-75, 181, 184 and 188).

[53] *Ibid* at para 144.

[54] *Ibid*.

[55] *Ibid*.

[56] *Ibid* at para 147.

[57] *R v Desautel*, 2021 SCC 17 at para 30.