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The Editorial Board also thanks the University of Victoria's Faculty of Law for its institutional support, as well as the sponsors whose contributions to Appeal Publishing Society made publishing this volume of *Appeal: Review of Current Law and Law Reform* possible.

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PREFACE

"The best thing a human being can do is to help another human being know more"

Charles Munger

Dear Reader,

Welcome to Volume 30 of *Appeal: Review of Current Law and Law Reform.*

Established in 1995 with a vision of amplifying student voices, *Appeal* has grown into a journal that fosters thoughtful analysis and meaningful dialogue on the state of Canadian law. This milestone edition is a testament to the journal's enduring mission to make legal scholarship accessible, relevant, and representative of the next generation of legal minds. As we celebrate three decades of student-driven publishing, we remain committed to the values that shaped *Appeal* from the beginning: a belief that law is not static but constantly evolving, shaped by those willing to question, critique, and reimagine its future.

Today, the journal's reach continues to impress. Volume 30 received nearly 30 paper submissions, and over 20 applications for nine positions on this year's editorial board. Our team includes 11 board members and approximately 40 student volunteers, each contributing to the journal's success. Our affiliated podcast, *Stare Indecisis*, furthers our mission of making legal discourse more accessible. In season six, discussions of legal principles were paired with practical insights aimed at helping students navigate their legal education and future careers.

We would like to thank our Faculty Advisor, Mark Zion, for his leadership and expertise. Thank you to the Faculty of Law, the staff at the Diana M. Priestly Law Library, the University of Victoria Law Students' Society, our graphic designer Michael Doborski, and the CFUV radio station for their support and guidance throughout the year. We are grateful for our Volunteer Editors and Expert Reviewers who went above and beyond to assist us in the selection and editing of our papers. The caliber of the following six papers reflects their hard work and dedication to student scholarship.

Nicholas Olson examines the constitutionality of municipal bylaws which regulate personal property on public lands. Advocating for a novel application of section 12 of the *Canadian Charter of Rights and Freedoms,* Olson applies the test for cruel and unusual punishment on a regulatory framework that disproportionately affects the unhoused population in Victoria.

Youbin Seo seeks to fill a gap in copyright scholarship by exploring the legal implications of AI generated artwork. Seo proposes an avenue for artists to claim copyright infringement against generative AI companies and provides policy recommendations to protect the rights of artists and promote artistic expression.

Liam Byrne considers the challenge of an important insolvency principle operating as a judicial construct. Using a paramountcy analysis to showcase how the Single Proceeding Model could fail against provincial legislation, Byrne highlights the need for codification of the Single Proceeding Model in the *Bankruptcy and Insolvency Act* and *Companies' Creditors Arrangement Act*.

Megan Walwyn analyzes the constitutionality of restrictions on political expression imposed on registered charities under the *Income Tax Act*. Walwyn examines these limitations in light of section 2(b) of the *Canadian Charter of Rights and Freedoms* and considers the broader role of charities in Canadian society. Walwyn's work offers a compelling critique of the legal framework governing charitable advocacy and its implications for freedom of expression.

Olivia Meier examines the legal and moral justifications for holding individuals accountable for violent acts committed in a state of automatism due to voluntary intoxication. Analyzing the Supreme Court of Canada's decision in *R v Brown* and the federal response, she explores the defense's impact on public safety and vulnerable groups. Meier proposes modifying section 33.1 of the *Criminal Code* by introducing an intoxication threshold to enhance clarity and accountability.

Emilio Abiusi analyzes the impact of Canada's anti-money laundering and anti-terrorist financing regulations on charitable organizations. Highlighting the risks of both exploitation and overregulation, Abiusi argues that charities should be treated as co-collaborators rather than threats in combating terrorist financing.

On a personal note, we extend our deepest gratitude to the Board of Editors whose dedication and hard work brought this volume of *Appeal* to life: Aishah Ali, Rachel Bishop, Caterina Fusco, Benjamin Gelfand, Sydney Kanigan-Taylor, Manisha Mann, Alessandro Molnar, Meagan Siemaszkiewicz, and Rosemary Xinhe Hu. This volume of *Appeal* is a testament to their hard work and dedication, and we could not have asked for a more outstanding team.

Pahul Gupta & Kate Garland

Editors-in-Chief

ARTICLE

A NO HOPE GUARANTEE: THE CRUEL AND UNUSUAL TREATMENT OF VICTORIA'S BYLAW IMPOUND SCHEME

Nicholas Olson *

CITED: (2025) 30 *Appeal* 1

ABSTRACT

Since the inclusion of section 12 in the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), much has been written about cruel and unusual punishment. However, relatively little attention has been paid to the issue of cruel and unusual *treatment*. As society becomes increasingly regulated and individuals interact with government through administrative bodies with broad discretion, clearer protections against cruel and unusual treatment are necessary to fully realize the intent of the *Charter* right. Over the past two decades, the City of Victoria has progressively restricted the use of public spaces by individuals experiencing homelessness. While these restrictions have been challenged under various *Charter* provisions, section 12 has rarely been considered. The 2023 amendments to the City of Victoria's public space bylaws offer a timely opportunity to consider the application of section 12 in the context of non-punitive administrative decisions that amount to government treatment. Although the test for cruel and unusual treatment requires further clarification, Victoria's bylaw scheme underscores the need for section 12 analyses to more explicitly address government treatment, or risk neglecting the *Charter*'s dignity-centred focus.

* Nicholas Olson completed his law degree at the University of Victoria in December 2024. He would like to thank the community members and people with lived and living experience whose ideas and resistance shaped the ideas in this paper.

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INTRODUCTION

In a nation-wide housing crisis that manifests in increasing levels of visible homelessness, municipal regulations have an immediate impact on individuals forced to shelter on municipally owned public property. For example, in British Columbia, the City of Victoria (the "City"), has recently intensified its regulation of public space and how it is used by the unhoused community.[1] To do so, the City has taken measures such as adding parks to the list of prohibited sheltering areas,[2] and updating bylaws that regulate personal property on City-owned land. In December 2023, Victoria City Council passed several new bylaws which attempt to clarify law enforcement's authority to seize and destroy items occupying public space (the "Bylaw Impound Scheme").[3] These amendments continue to allow for the destruction of survival-related items such as tents and sleeping bags. Research shows such actions contribute to increased risks of overdose and death among the unhoused population.[4]

Municipal decisions that disproportionately harm the unhoused community have primarily been challenged through section 7 of the *Charter*,[5] which guarantees the right to life, liberty, and security of the person. Although past litigation has invoked various other *Charter* rights,[6] section 7 has proven effective in upholding the rights of people who rely on public space.[7] However, its analysis of gross disproportionality when considering the principles of fundamental justice requires a comparison between the rights infringement and the *objective* of the law.[8] This approach pits the dignity and rights of the unhoused against the interests of

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1 When referring to "public space" or "public property," this paper is focussing on municipally owned lands such as parks and sidewalks. Other forms of public property owned by different levels of government are outside of the scope of this paper.

2 Since 2015, the number of parks that had been closed to sheltering grew from one to twenty-four. See City of Victoria, by-law No 23-070, *Parks Regulation Bylaw, Amendment Bylaw (No. 18)* (2 Nov 2023); City of Victoria, by-law No. 24-038, *Parks Regulation Bylaw, Amendment Bylaw (No. 07-059)* (4 July 2024).

3 Chad Pawson, "City of Victoria streamlines impounding rules, drawing concern from poverty advocate", *CBC News* (16 December 2023), online: www.cbc.ca/news/canada/british-columbia/impounding-city-of-victoria-homelessness-belongings-1.7061103 [perma.cc/8DFA-YGPD].

4 Jamie Suki Chang et al, "Harms of encampment abatements on the health of unhoused people" (December 2022) 2 SSM - Qualitative Research in Health, 100064 at 2667-3215, online: <doi.org/10.1016/j.ssmqr.2022.100064>; Bailey Seymour, "Outreach workers: 9 people dead in downtown Victoria in past week", *Saanich News* (19 November 2024), online: <www.saanichnews.com/local-news/outreach-workers-nine-people-dead-in-downtown-victoria-in-past-week-7656800> [perma.cc/6MZU-MHPD].

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

6 See Sarah Ferencz et al, "Are Tents a 'Home'? Extending Section 8 Privacy Rights for the Precariously Housed" (2022) 67:4 McGill L J 369. For section 15 equality rights see *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Shantz*].

7 *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams 1*]; *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams 2*]; *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 at para 101 [*Waterloo*]; *Vandenberg v Vancouver (City) Fire and Rescue Services*, 2023 BCSC 2104 at para 155 [*Vandenberg*].

8 *Canada (Attorney General) v Bedford*, 2013 SCC 72, para 123 [*Bedford*].

housed neighbours and the municipality's power to regulate public space, further entrenching conflicts between these groups. Scholars and advocates such as Dr. Yun Liew and Emily Knox have proposed alternative approaches to resolving this issue: using anti-discrimination provisions in the *Charter* or other quasi-constitutional legislation,[9] or focusing on flexible remedies to bridge these gaps.[10] However, discrimination-focused provisions, such as section 15 of the *Charter* or provincial human rights codes, are limited by the requirement to demonstrate a direct link between adverse treatment and a protected identity. Establishing this link is particularly difficult in facially neutral bylaws such as the Bylaw Impound Scheme where the bylaws are applied against all residents and corporate entities, as well as individuals who live unhoused. Further difficulties arise in jurisdictions such as British Columbia ("BC") where homelessness and poverty are not protected grounds of social condition.[11]

For these reasons, this paper focuses on Section 12 of the *Charter*, which provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Section 12 has been extensively debated in the criminal law context, particularly with regard to sentencing and *punishment*. However, it has received limited attention in the context of *treatment*, that is, state intervention outside the penal context. As it currently stands, section 12 has been criticized by Dr. Jamie Cameron as "little more than a faint hope guarantee": a narrow, stringent test applied to only a small subset of government actions.[12] Without a broader application, section 12 risks becoming a no hope guarantee.

Using the City's Bylaw Impound Scheme as an example, this paper argues for a broader application of section 12 in administrative decisions that amount to treatment. Part I outlines the regulatory framework of the Bylaw Impound Scheme and highlights its effects on individuals who rely on public space for survival. Part II compares how section 12 has been applied to *punishment* versus how it has been applied to *treatment*, using the Bylaw Impound Scheme as a test case. Applying leading section 12 principles, the Bylaw Impound Scheme is an example of a regulatory framework that violates human dignity to the point of being cruel and unusual treatment.

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9 Emily Knox, Jeanne Mayrand-Thibert & Michelle Pucci, "Ticketing Poverty: An Analysis of The Discriminatory Impacts of Public Intoxication By-Laws on People Experiencing Homelessness in Montreal" (2023) Dal J Leg Stud 157.

10 Jamie Chai Yun Liew, "Finding Common Ground: Charter Remedies and Challenges for Marginalized Persons in Public Spaces" (2012) 1:1 Cdn J of Poverty L.

11 See Knox, *supra* note 9 at 173. Social condition is a protected ground in other jurisdictions such as Manitoba, New Brunswick, Quebec, and Northwest Territories. See also Knox, *supra* note 9 at 195.

12 Jamie Cameron, "Fault and Punishment under Sections 7 and 12 of the Charter" (2008), 40 SCLR (2d) 553 at 588.

I. THE BYLAW IMPOUND SCHEME

A. The Regulatory Framework

The *Parks Regulation Bylaw*[13] ("*Parks Bylaw*") and *Streets and Traffic Bylaw*[14] ("*Streets Bylaw*") regulate the personal belongings of individuals experiencing homelessness on City-owned land. Prior to 2009, these bylaws prohibited erecting a shelter to protect a person from the elements on public property across the city.[15] In the 2009 decision in *Victoria (City) v Adams*,[16] the BC Supreme Court ("BCSC") held that when there are no indoor shelter alternatives available, this bylaw violated a person's section 7 *Charter* right to life, liberty, and security of the person. Following this decision and its affirmation by the BC Court of Appeal ("BCCA"), the *Parks Bylaw* was amended to permit overnight sheltering in designated city parks,[17] providing some protection for personal property. For example, if a "homeless person,"[18] as defined by the *Parks Bylaw*, shelters within the specified times and areas outlined in the bylaw, the City generally cannot impound their personal belongings. In contrast, the *Streets Bylaw* prohibits sheltering at any time,[19] thus allowing the City to seize property from sidewalks or storefronts. In practice, the bylaws are enforced and belongings are seized in both parks and on sidewalks during daytime hours.

In 2023, the Victoria City Council unanimously passed two new bylaws: the *Administration of Property in City Custody Bylaw*[20] ("*Property in Custody Bylaw*") and the *Miscellaneous Amendments Bylaw*[21] ("*Amendment Bylaw*"). The *Amendment Bylaw* modifies the *Parks Bylaw* and *Streets Bylaw*, and in conjunction with the *Property in Custody Bylaw*, has the purpose of establishing "consistent practices" and regulations regarding the removal, seizure and impounding of property in public places.[22] The City claims these changes enhance "clarity and transparency"[23] by unifying enforcement practices under a single bylaw.

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13 City of Victoria, by-law No 07-059, *Parks Regulation Bylaw* (14 December 2023) [*Parks Bylaw*].

14 City of Victoria, by-law No 09-079, *Streets and Traffic Bylaw* (14 December 2023) [*Streets Bylaw*].

15 *Adams 1*, *supra* note 7 at para 32.

16 *Adams 1*, *supra* note 7*; Adams 2*, *supra* note 7.

17 *British Columbia v Friends of Beacon Hill Park*, 2023 BCCA 83 at para 18.

18 *Parks Bylaw*, *supra* note 13, s 2.

19 *Streets Bylaw*, *supra* note 14, ss 102–103.

20 City of Victoria, by-law No 23-105, *Administration of Property in City Custody Bylaw* (7 December 2023) [*Property in Custody Bylaw*]. See Appendix A.

21 City of Victoria, by-law No 23-106, *Miscellaneous Amendments Bylaw (for Administration of Property in City Custody Bylaw)* (7 December 2023) [*Amendment Bylaw*]. See Appendix B.

22 City of Victoria, "Victoria City Council Chambers: Revised Agenda" (7 December 2023) online: <pub-victoria.escribemeetings.com/Meeting.aspx?Id=64280164-e88b-47b0-be92-7152dec0baef&Agenda=Merged&lang=English> [perma.cc/9LQB-2Z7F].

23 Shannon Perkins, "Committee of the Whole Report: Administration of Property in City Custody Bylaw" (28 November 2023) at 6, online: <pub-victoria.escribemeetings.com/filestream.ashx?DocumentId=94412> [perma.cc/6BM9-8A6H].

These bylaws, collectively referred to as the "Bylaw Impound Scheme",[24] empower City officials to remove, seize, and impound property unlawfully occupying[25] City-owned land, including parks,[26] streets, sidewalks, and other public spaces.[27] The *Property in Custody Bylaw* outlines the procedure for retrieving impounded belongings,[28] associated fees,[29] and conditions under which the City can dispose of impounded property.[30] While the Bylaw Impound Scheme includes mandatory compliance agreements, ticketing offences, and possible police involvement, this paper focuses on the City's authority to seize, impound, and destroy personal property, and the associated fees.

B. Effects of the Bylaw Impound Scheme

Impacts of the Bylaw Impound Scheme, both before and after the recent amendments, are evident in legal cases and reports. In *Victoria (City) v Adams*,[31] the BCSC and the BCCA recognized that the bylaws in force at the time which prevented individuals from erecting shelter and permitted City employees to impound belongings, exposed homeless individuals to a "risk of serious harm, including death from hypothermia."[32] Similarly, in *British Columbia v Adamson*,[33] the BCSC acknowledged that losing possessions to bylaw enforcement was a common experience among Victoria's unhoused population. The court quoted an encampment resident saying:

> On many occasions, I had my belongings thrown out by bylaw enforcement. This would happen when the bylaw officers found my camps during the day time. When this happened, I would have to start again from zero, find new clothes and buy or steal new hygiene products.

More recently, shortly following the enactment of the *Property in Custody Bylaw*, reports emerged of bylaw enforcement repeatedly seizing individuals' "last remaining personal belongings," including "clothes, tents, blankets, bike tires, and then the bike itself."[34]

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24 *Property in Custody Bylaw, supra* note 20; *Amendment Bylaw, supra* note 21; *Parks Bylaw, supra* note 13; *Streets Bylaw, supra no*te 14.

25 *Amendment Bylaw*, *supra* note 21, ss 4(a), 5(e).

26 *Parks Bylaw*, *supra* note 13, s 19.

27 *Streets Bylaw*, *supra* note 14, s 102(3).

28 *Property in Custody Bylaw*, *supra* note 20, s 5.

29 *Ibid*, s 6.

30 *Ibid*, ss 4, 5(2), 5(3).

31 See *Adams 1*, *supra* note 7*; Adams 2*, *supra* note 7.

32 *Adams 1*, *supr*a note 7 at para 142. See also *Adams 2*, *supra* note 7 at para 102.

33 *British Columbia v Adamson,* 2016 BCSC 584 at para 152. For other examples from this case, including City authorities seizing the entirety of a person's belongings including their personal identification documents, see Nicholas Olson & Bernie Pauly, "'Forced to Become a Community': Encampment Residents' Perspectives on Systemic Failures, Precarity, and Constrained Choice" (2022) 3:2 Intl J on Homelessness at 124 at 130.

34 Kori Sidaway, "Victoria council's new impound rules will make unhoused people suffer further, say outreach workers", *Chek News* (14 December 2023), online: <cheknews.ca/victoria-councils-new-impound-rules-will-make-unhoused-people-further-suffer-say-outreach-workers-1181157/> [perma.cc/Y4M7-4AXZ].

Despite recent changes to the Bylaw Impound Scheme, its core purpose and effects remain largely the same.[35] A report written by the Director of Bylaw Services, which recommended the adoption of the new bylaw scheme, suggested that the changes made to the scheme are modest and do not "expand impound authority."[36] Instead, the new iteration of the scheme claims to better address the well-being of those sheltering outside. For example, the *Property in Custody Bylaw* exempts "life-supporting items" from retrieval fees[37] in an attempt to "ensure that persons experiencing homelessness are not placed at undue risk as a result of impoundment."[38] However, the scheme still permits the seizure and destruction of life-supporting items,[39] along with the immediate destruction of certain items such as food and controlled substances.[40] Additionally, the new amendments result in an increasingly onerous retrieval process through a reduced impound duration from thirty to fourteen days.[41] The well-documented and ongoing harmful effects of the Bylaw Impound Scheme, juxtaposed with the City's supposed efforts to reduce "undue risk,"[42] underscore the value in exploring an analysis of the scheme's compliance with the *Charter*.

II. SECTION 12 – APPLICATION AND ANALYSIS

The concept of cruel and unusual punishment has been a core foundation of modern international and domestic rights frameworks for centuries. The concept has roots in the *Canadian Bill of Rights*;[43] international instruments, such as the *Universal Declaration of Human Rights*[44] and the *International Convention of Civil and Political Rights*;[45] and, even further back, "firmly grounded in the original English Bill of Rights of 1688."[46] However, a scan of Canadian jurisprudence and academic consideration of the language embodied in section 12 of the *Charter* demonstrates that most discussions and implementation of the section have been in relation to criminal charges and punishment, with a particular focus on mandatory minimum sentences.[47] Markedly less time or research has gone into the treatment aspect of section 12. This may be related to the "high bar"[48] and "stringent and demanding"[49]

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35 *Interpretation Act*, RSBC 1996, c 238, s 37(2).
36 Perkins, *supra* note 23 at 2.
37 *Property in Custody Bylaw*, *supra* note 20, s 6(3).
38 Perkins, *supra* note 23 at 5.
39 *Property in Custody Bylaw, supra* note 20, s 5(2).
40 *Ibid*, ss 2, 4.
41 Perkins, *supra* note 23 at 6.
42 *Ibid* at 5.
43 *Canadian Bill of Rights,* SC 1960, c 44, s 2(b).
44 *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 5.
45 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976, accession by Canada 19 May 1976).
46 Michael Jackson, "Cruel and Unusual Treatment or Punishment" (1982) UBC L Rev 189.
47 *Quebec (Attorney General) v 9147-0732 Quebec Inc*, 2020 SCC 32 at para 63 [*9147-0732 Quebec*].
48 *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 at para 9 cited in *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at para 530.
49 *Steele v Mountain Institution,* 1990 CanLII 50 (SCC) at 1417.

requirements of finding cruel and unusual punishment, a principle put into place so as not to "trivialize the Charter."[50]

In 2020, Justice Brown (as he then was) and Justice Rowe of the Supreme Court of Canada ("SCC") explained the purpose of section 12 as protecting human dignity by "prevent[ing] the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment."[51] Two years later, Chief Justice Wagner of the SCC expanded on what human dignity is, making it clear that "the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect" and that "[t]his respect is owed to every individual, irrespective of their actions."[52] Although these quotes were taken from punishment-centred decisions, the recent focus on dignity in SCC jurisprudence provides a critical backdrop when applying section 12 to administrative decisions, such as the Bylaw Impound Scheme. The BCCA has specifically addressed the impact of such schemes on dignity, stating that preventing homeless individuals from using basic forms of overhead protection is a "significant interference with their dignity and independence."[53] However, much of the discussion around dignity in the context of bylaws impacting unhoused populations has centred around section 7 analyses.[54] Sections 7 and 12 have been understood to be closely connected based on their mutual consideration of human dignity, the ways that punishment is often linked to security of the person and liberty considerations, and the consideration of fault in the analysis.[55] This suggests that bylaws which violate human dignity under section 7 are likely to violate human dignity under section 12 as well.

Broadly, the test for applying section 12 requires two steps: (1) determining whether the government action constitutes punishment or treatment,[56] and (2) determining whether that punishment or treatment is either (i) cruel and unusual by nature, or (ii) grossly disproportionate.[57] A review of the existing tests for cruel and unusual treatment or punishment in relation to the Bylaw Impound Scheme reveals a lack of coherence and applicability to government action that amounts to treatment. This lack of clarity highlights the need for a reconsideration of how the rights protected by section 12 should be interpreted and protected.

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50 *Ibid*. For consideration of how the constitutional right to be free from cruel and unusual punishment has been applied in US courts in the context of municipal bylaws prohibiting life-sustaining activities and use of bedding in public space, see, respectively, *Pottinger v Miami*, 810 F Supp 1551 (SD Fla 1992); *Johnson v City of Grants Pass,* 50 F4th 787, 813 at 4, 40 (9th Cir 2022).

51 *9147-0732 Quebec*, *supra* note 47 at para 51, unanimous on this point.

52 *R v Bissonnette*, 2022 SCC 23 at para 59 [*Bissonnette*].

53 *Adams 2, supra* note 7 at para 109 [emphasis added].

54 *Shantz, supra* note 6 at para 246. See also *R v Morgentaler*, 1988 CanLII 90 at 166 (SCC).

55 Cameron, *supra* note 12 at 558.

56 *Rodriguez v British Columbia (Attorney General)*, 1993 CanLII 75 at 608–609 (SCC) [*Rodriguez*].

57 *Bissonnette*, *supra* note 52 at paras 61, 64, 69.

A. Punishment and Treatment

i. Punishment

The SCC established the legal test to determine whether government action is "punishment" in 2016.[58] First, the action must be "a consequence of conviction" and part of the available sanctions for a particular offense.[59] Second, the action must either be "imposed in furtherance of the purpose and principles of sentencing" or "significantly impact" an offender's "liberty or security interests."[60]

Regarding the first step, the language of "conviction" connotes a "deliberated *judicial* decision"[61] leading to a determination of guilt,[62] which suggests a penal or at least quasi-penal setting. Although fines have recently been confirmed as a form of punishment,[63] one of the purposes of the *Property in Custody Bylaw* is to "allow for the City to *recover* costs associated"[64] with impoundments. This suggests that the fees associated with the scheme are not intended to penalize non-compliance. Further, the fact that fees are not judicially determined suggests that they are not intended to be punitive in nature. As a result, the concept of punishment would not apply to the Bylaw Impound Scheme which lacks any form of judicially determined conviction.[65] Additionally, the SCC has stated that *treatment* within the context of section 12 "*may* include"[66] contexts outside a penal or quasi-penal nature, suggesting that the concept of punishment is almost certainly understood to apply exclusively to a penal context. Given these considerations, along with the fact that "punishment" has been prioritized in past discussions regarding section 12 rights, this paper focuses on how the Bylaw Impound Scheme is more likely to be considered under the concept of "treatment" and the limitations that exist in this application.

ii. Treatment

Although the concept of "treatment" has been found to encompass a broad range of government actions such as deportation,[67] immigration detention for non-punitive reasons,[68]

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58 *R v KRJ*, 2016 SCC 31 at para 41.

59 *Ibid*.

60 *Ibid*.

61 Steve Coughlan, John A Yogis & Catherine Cotter, *Barron's Canadian Law Dictionary,* (Hauppage, NY: Barron's Educational Series Inc, 2013) sub verbo "adjudication" at 11 [emphasis added].

62 *Ibid* sub verbo "conviction" at 78.

63 See *R v Boudreault*, 2018 SCC 58 [*Boudreault*].

64 *Property in Custody Bylaw*, *supra* note 20, Preamble [emphasis added].

65 Regarding the second step of the punishment test, the purpose of deterrence of the Bylaw Impound Scheme is discussed in Perkins, *supra* note 23 at 5. For caselaw regarding security interests being engaged through displacement of encampments and subsequent loss of belongings, see *Waterloo*, *supra* note 7 at paras 96–97; *Vandenberg, supra* note 7 at paras 145–55; *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 194 [*Bamberger*].

66 *Rodriguez*, *supra* note 56 at 611 [emphasis added].

67 *Canada (Minister of Employment and Immigration) v Chiarelli*, 1992 CanLII 87 at 735 (SCC) [*Chiarelli*].

68 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 95–98.

and DNA sampling,[69] the SCC has not laid out a general legal definition of the term in connection to section 12 of the *Charter*.[70]

In *Rodriguez v British Columbia (Attorney General)* ("*Rodriguez*"),[71] the SCC considered section 241(b) of the *Criminal Code* which precluded a terminally ill person from accessing medical assistance in dying. Here, the Court found the provision did not qualify as "treatment."[72] *Rodriguez* determined that while treatment may apply outside of a penal or quasi-penal context,[73] for government action to amount to treatment, it must involve "enforcing a state administrative structure."[74] Additionally, there must be some "active state process in operation, involving an exercise of state control over the individual."[75]

The *Rodriguez* framework suggests that, on its face, the Bylaw Impound Scheme would likely align with the Court's concept of treatment. *Rodriguez* stands for the proposition that a prohibition "without more"[76] may not amount to treatment. While the Bylaw Impound Scheme includes a prohibition on leaving property on City land, the City's ability to seize, impound, and destroy people's personal belongings, with provisions that restrict retrieval with fees and signing a mandatory "compliance agreement,"[77] should be understood to meet the *Rodriguez* "something more" requirement.

Moreover, in *R v Montague* ("*Montague*"),[78] the forfeiture of weapons was determined to be a form of treatment, even though it was intended as deterrence.[79] This suggests that a seizure of belongings, which the head of Bylaw Services claimed is a form of deterrence,[80] would similarly be considered treatment. Likewise, in *Canadian Doctors for Refugee Care v Canada (Attorney General)* ("*Canadian Doctors*"),[81] an administrative immigration regime was found to be treatment by restricting the rights of refugee claimants.[82] Impounding belongings similarly has implications on one's rights and opportunities in ways that align with the administrative scheme in *Canadian Doctors*. By enacting powers granted to it under the *Community Charter*,[83] the Bylaw Impound Scheme enforces an administrative structure likely rising to the point of being considered "state control over [an] individual."[84]

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69 *R v Rodgers*, 2006 SCC 15 at para 63.

70 Department of Justice Canada, "Section 12 – Cruel and unusual treatment or punishment" (13 August 2024), online: <justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art12.html> [perma.cc/HZ97-YKJL].

71 *Rodriguez*, *supra* note 56.

72 *Ibid* at 612.

73 *Ibid* at 611.

74 *Ibid* at 610.

75 *Ibid* at 610–12.

76 *Ibid* at 611.

77 *Property in Custody Bylaw*, *supra* note 20, s 6(5).

78 *R v Montague,* 2014 ONCA 439 at para 38 [*Montague*].

79 *Ibid* at para 52.

80 Perkins, *supra* note 23 at 1, 4, 5.

81 *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 [*Canadian Doctors*].

82 *Ibid* at para 585.

83 *Community Charter,* SBC 2003, c 26, s 8(3)(b).

84 *Rodriguez*, *supra* note 56 at 612.

Framing treatment solely around prohibitions and positive or negative state action risks unduly narrowing the section 12 right and its dignity-focused purpose. *Rodriguez* contemplates that even "positive action"[85] may not amount to treatment without a "more active state process"[86]; a test nearly impossible to meet. An alternate concept of treatment was considered by the Federal Court in *Canadian Doctors* where treatment could be based on whether the government "could be held responsible for the applicant's suffering, rather than on whether the conduct in issue constituted positive or negative state action."[87] Similarly, in *Prairies Tubulars (2015) Inc v Canada (Border Services Agency)* ("*Prairies Tubulars*"), the Federal Court suggested that government actions which implicate "personal freedoms fundamentally connected to the concept of human dignity" are more likely to rise to the level of treatment.[88] Such an approach that acknowledges the suffering and impact on dignity by state action, distinguishes treatment sufficiently from a conviction-centered notion of punishment. Accordingly, this interpretation aligns with the SCC's stated purpose of section 12 which is to prevent the state from "inflicting physical or mental pain and suffering."[89] Additionally, this interpretation of section 12 removes overwrought analysis of negative actions, positive actions, and prohibitions. In the context of the Bylaw Impound Scheme, this alternate framework would ensure that the scheme is considered treatment, even if it does not meet the more restrictive tests based on negative state action or determinations of quasi-judicial decisions.

iii. Laws of General Application

Laws of general application are typically excluded from the scope of "treatment" under section 12, even if they have an adverse differential impact on specific individuals or groups.[90] In the municipal context, the BCSC has stated that a municipal bylaw does not need to be "absolutely universal" [91] to be considered a law of general application. Bylaws fall outside this category of general application only if they have "a degree of specificity, limited application, and exception."[92] The Bylaw Impound Scheme, and particularly the *Property in Custody Bylaw*, could be considered a law of general application as it applies to any person and their belongings on City property, and not exclusively to people experiencing homelessness. This is also demonstrated by the Bylaw's explicit regulation of commercial property.[93]

Determining whether the bylaws within the Bylaw Impound Scheme could be considered laws of general application is an important step in the current approach to treatment in section 12. However, this approach to section 12 leads to inherent limitations for three key reasons.

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85 *Ibid.*

86 *Ibid.*

87 *Adam, R (on the application of) v Secretary of State for the Home Department*, [2005] UKHL 66, cited in *Canadian Doctors*, *supra* note 81 at para 602.

88 *Prairies Tubulars (2015) Inc v Canada (Border Services Agency)*, 2021 FC 36 at para 82 [*Prairies Tubulars*].

89 *9147-0732 Quebec*, *supra* note 47 at para 51.

90 *Rodriguez*, *supra* note 56 at 611; *Canadian Doctors*, *supra* note 81 at para 586.

91 *Martin Corp v West Vancouver (District)*, 85 BCLR (2d) 305 at para 37, 1993 CanLII 1390 (BCSC) [*Martin Corp*].

92 *Ibid.*

93 See *Property in Custody Bylaw*, *supra* note 20, s 6(4).

First, although a law of general application can be universal and general in form, by nature it may disproportionately impact a certain population. For example, the Bylaw Impound Scheme is inevitably more regularly enforced against individuals experiencing homelessness who rely on City-owned property for survival and have nowhere else to store their belongings, including essential survival-related items. In *Cheung v Canada (Minister of Employment and Immigration)*,[94] the Federal Court of Appeal ("FCA") stated that "[c]loaking persecution with a veneer of legality does not render it less persecutory."[95] Similarly, if a government entity could immunize itself from section 12 scrutiny by merely framing a law as general, even if it disproportionately targets marginalized groups, it would undermine the dignity-focused purpose of section 12 and the *Charter*.[96]

Second, laws of general application could *implicitly* have a limited application, both through the contents of the bylaw and the historical context in which it is drafted. For example, the *Property in Custody Bylaw* includes several provisions and definitions that suggest the bylaw will be predominately enforced against certain populations. Terms such as "homeless person," "shelter," "bulky item" (which includes shelter), and "life-supporting item[s]" are explicitly defined and used throughout the bylaw.[97] Yet, while the bylaw also regulates "commercial property,"[98] it offers no definition or explanation as to what this term might include. This drafting style, coupled with the historical context of City concerns regarding the amount of property seized from people experiencing homelessness,[99] suggests that bylaws can explicitly be general, while implicitly having "specificity [or] limited application."[100]

Finally, in *Prairies Tubulars*,[101] the Federal Court stated that laws of general application, including those imposing positive obligations such as paying outstanding fees, do not amount to treatment. However, this interpretation stems from *Rodriguez*, a case which was explicitly referring to laws of general *prohibition*, citing examples of the *Criminal Code* and the since-repealed *Narcotics Control Act*.[102] Laws of general application that amount to positive state actions such as a tax or seizing belongings, were not contemplated in *Rodriguez,* and thus a blanket interpretation that all laws of general application are not treatment cannot be applied.

The Bylaw Impound Scheme exemplifies the limitations of applying current case law to the treatment portion of the section 12 assessment. In a complex society increasingly regulated by administrative decision makers, a broad and undefined definition of treatment and an overbroad and restrictive reliance on laws of general application fences section 12 into an exclusively punitive application. This risks missing both the purpose of the section, and the

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94 *Cheung v Canada (Minister of Employment and Immigration)*, 1993 CanLII 2946 (FCA).

95 *Ibid* at 323i.

96 See *Bissonnette*, *supra* note 52.

97 *Property in Custody Bylaw*, *supra* note 20, ss 2, 6(3).

98 *Ibid*, s 6(4).

99 Katie Derosa, "Victoria police investigating suspected 'chop shop' in Beacon Hill Park", *Times Colonist* (14 July 2020), online: <timescolonist.com/local-news/victoria-police-investigating-suspected-chop-shop-in-beacon-hill-park-4682702> [perma.cc/2WWR-B8QJ]

100 See *Martin Corp*, *supra* note 91.

101 *Prairies Tubulars*, *supra* note 88 at para 80.

102 *Rodriguez*, *supra* note 56 at 611.

broader purpose of the *Charter*. If law enforcement interactions that result in seizure and destruction of personal belongings on a regular basis are not considered state control over an individual because they apply universally, then the test for treatment loses its relevance.

B. The Two Prongs of Cruel and Unusual

Cruel and unusual treatment or punishment can be assessed under two prongs: (i) cruel by nature, or (ii) grossly disproportionate.[103] Although there are subtle differences between the two, both prongs consider whether the treatment is "incompatible with human dignity" or an "outrage to standards of decency."[104] While much of the legal framework for section 12 was developed by the SCC in the context of mandatory minimum sentencing,[105] appellate-level courts have adapted these principles to assess gross disproportionality in non-punitive government actions. Under this approach, the Bylaw Impound Scheme should be considered cruel and unusual.

If a *Charter* right is violated, the analysis would then move to section 1 of the *Charter* to determine if that right is subject to "reasonable limits."[106] Recent SCC decisions suggest that it would be difficult to justify a violation of section 12 under section 1.[107] As such, this portion of the analysis will not be addressed in this paper.

i. Cruel by Nature

Punishment or treatment is intrinsically cruel, or cruel by its very nature, if the "particular *form*"[108] of treatment is contrary to human dignity. In *R v Bissonnette*, the SCC relates this analysis to the "Canadian criminal context"[109] making it somewhat unclear whether this prong is reserved only for a "narrow class of *punishments*."[110] However, the Court similarly lists both punishments *and* treatments that have been found cruel by nature, including corporal punishment, lobotomization, castration, and torture.[111]

What is considered cruel and unusual by nature is contextual and evolves in line with societal changes. This is consistent with the principle that the Constitution is a "living tree capable of growth and expansion…to meet the new social…realities of the modern world."[112] For instance, in 1965, the Manitoba Court of Appeal in *R v Dick*[113] decided that corporal

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103 *Bissonnette*, *supra* note 52 at para 60.

104 Lisa Kerr & Benjamin Berger, "Methods and Severity: The Two Tracks of Section 12" (2020), 94 SCLR (2d) 235 at 239–40.

105 Although the caselaw is not explicit as to whether these prongs both apply to both punishment *and* treatment, the academic source in which the caselaw is rooted suggests that it applies to both (see Kerr and Berger, *ibid* at 235–36).

106 *Charter*, *supra* note 5, s 1.

107 *Bissonnette*, *supra* note 52 at para 121; *R v Nur*, 2015 SCC 15 at para 111 [*Nur*].

108 Kerr and Berger, *supra* note 104 at 239 [emphasis added].

109 *Bissonnette*, *supra* note 52 at para 67.

110 *Ibid* at para 64 [emphasis added].

111 *Ibid* at para 66.

112 *Ibid* at para 65 citing *Edwards v Attorney General for Canada*, 1929 CanLII 438 (UK JCPC).

113 *R v Dick, Penner and Finnigan*, 1964 CanLII 693 (MBCA).

punishment was not unusual punishment.[114] However, by 1982, the SCC determined that such actions "will always outrage our standards of decency" to the point of being cruel and unusual.[115] As such, the current context of a nation-wide housing crisis and a public health emergency of toxic drugs increasingly killing people experiencing homelessness,[116] must be taken into consideration when determining if the Bylaw Impound Scheme is cruel and unusual by nature.

The Bylaw Impound Scheme gives City officials the authority to seize and impound belongings,[117] immediately dispose of certain personal property,[118] and impose fees and other measures to retrieve one's belongings.[119] The effects of this state action can be considered when determining whether such treatment is cruel by nature.[120] While the effects of losing essential survival items could be devastating, the more general act of impounding property or imposing fees for an administrative process is unlikely to be seen as cruel and unusual by nature.

In *R v Boudreault*, the SCC determined monetary fines had a "valid penal purpose"[121] and thus, by their very nature, were not cruel or unusual. Similarly, in *Montague* and *R v Lambe*, the Courts of Appeal determined that the forced forfeiture of property does not amount to cruel and unusual treatment.[122] These cases suggest that courts are hesitant to limit the constitutionality of government entities' ability to generally seize property or levy fines. However, like other aspects of the treatment test, courts could offer greater clarity around whether non-penal government action can *ever* be caught under this part of the test. Given the very real and detrimental effects of having survival supplies confiscated, treatment should not be excluded from this branch despite its potentially limited application.

ii. Grossly Disproportionate

Even if the treatment is not cruel by nature, it can still be cruel and unusual if its *severity* is grossly disproportionate to the nature of the offence.[123] For example, in *Boudreault*, a victim surcharge fine was held to be cruel and unusual. In that case, the Court did not find the general act of levying a fine to be unconstitutional. Instead, the fine was found

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114 Debra Parkes, "The Punishment Agenda in the Courts" (2014) 67 SCLR (2d) 589 at 595.

115 *R v Smith (Edward Dewey)*, 1987 CanLII 64 at 1074 (SCC) [*Smith*].

116 BC Coroners Service, Information Bulletin, "Sharp rise in deaths among people experiencing homelessness continues in 2022" (14 December 2023), online (pdf): <gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/news/2023/bccs_homeless_deaths_2023.pdf> [perma.cc/4WSM-76KT].

117 *Amendment Bylaw*, *supra* note 21, ss 4(1), 5(e).

118 *Property in Custody Bylaw*, *supra* note 20, s 4.

119 *Ibid*, ss 5, 6. Merely because bylaw officers could exercise discretion not to impound or destroy items, or that the impounded life-sustaining items can be released without a fee, does not necessarily preclude the impound or destruction from being cruel and unusual by the very nature of the actions. See *Bissonnette*, *supra* note 52 at para 68.

120 See Kerr & Berger, *supra* note 104 at 239.

121 *Boudreault*, *supra* note 63 at para 62.

122 See *Montague*, *supra* note 78 at para 51. See also *R v Lambe*, 2000 NFCA 23 at para 56.

123 *Bissonnette*, *supra* note 52 at para 62. See also Kerr & Berger, *supra* note 104 at 240.

to be cruel and unusual due to its grossly disproportionate effects on low-income and marginalized individuals.[124]

Charter test cases are often very fact dependent, yet the gross disproportionality analysis under section 12 can be determined either by (1) assessing the facts specific to the case at hand *or* by (2) assessing a reasonable hypothetical situation that could arise under the impugned law.[125] Under the second method of analysis, hypotheticals must be "reasonable" in view of the "range of conduct in the offence in question" and can consider certain personal characteristics.[126]

In this vein, this paper will present two hypothetical situations with which to consider whether the Bylaw Impound Scheme is grossly disproportionate.

1. First, a person with a substance use disorder who has their harm reduction supplies and drug of choice destroyed in the process of the Bylaw Impound Scheme being enforced ("Hypothetical #1").

2. Second, a person who is unable to comply with the bylaws because of a mobility-related disability and has their tent, sleeping bag, and mobility aid impounded ("Hypothetical #2").

In *Canadian Civil Liberties Association v Canada* ("*CCLA*"), the Ontario Court of Appeal ("ONCA") clarified that determining whether government action is grossly disproportionate is "an inherently comparative exercise."[127] When conducting an analysis of the principles of fundamental justice for a section 7 *Charter* analysis, gross disproportionality compares the rights infringement caused by the law with the objective of the law.[128] When determining gross disproportionality under section 12, it is less clear precisely what the impugned punishment or treatment should be compared to.

As previously noted, many of the case precedents discussing section 12 have been developed by the SCC in the context of criminal law. In these cases, gross disproportionality is a comparison between the mandatory minimum sentence and a fit and appropriate sentence considering the objectives and principles of sentencing.[129] However, the principles of sentencing do not neatly apply to non-punitive administrative decisions. Instead, in the context of administrative segregation in carceral spaces, the ONCA has developed a two-part approach to section 12 gross disproportionality modelled after the SCC mandatory minimum sentence case law.[130] In this approach, the court must first establish a "benchmark"[131] of what appropriate conditions or treatment would be. For example, in *Ogiamien v. Ontario* ("*Ogiamien*"),

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124 *Boudreault*, *supra* note 63 at para 110.

125 *R v Hills*, 2023 SCC 2 at paras 68-71 [*Hills*]. Reasonable hypotheticals have also been applied to non-criminal penalties as well, see *Canadian Doctors*, *supra* note 81 at paras 169, 641–42.

126 *Hills, supra* note 125 at para 77.

127 *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243 at para 86 [*CCLA*].

128 *Bedford*, *supra* note 8.

129 *Hills, supra* note 125 at para 4.

130 *Ogiamien v Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 [*Ogiamien*]; *CCLA*, *supra* note 127.

131 *Ogiamien, supra* note 130 at para 10.

the ONCA considered what would be "appropriate" or ordinary prison conditions.[132] Second, the court must assess the extent to which the impugned treatment departs from the benchmark ("*Ogiamien* Test"). In *Ogiamien*, for example, if the effects of a prison lockdown resulted in treatment grossly disproportionate to treatment under ordinary conditions, then section 12 would be violated.[133]

The factors outlined by the SCC for assessing whether government action is grossly disproportionate have also been developed in the context of mandatory minimum sentence cases.[134] However, it is less clear whether these factors apply similarly using the *Ogiamien* Test. In the 2023 decision of *R v Hills*, the SCC regrouped a wide range of factors to outline three key considerations to determine gross disproportionality: "(1) the scope and reach of the offence; (2) the effects of the penalty on the offender; and (3) the penalty, including the balance struck by its objectives."[135]

Numerous SCC decisions highlight the importance of comparing the punishment or treatment with the scope, nature, or seriousness of the offence,[136] as well as the effects of the treatment.[137] However, the ONCA has expressly stated that considering the purpose or reason of the government treatment is not consistent with the jurisprudence for treatment-related cases.[138] As such, this paper will focus on the two key factors in determining whether treatment is grossly disproportionate: the scope, nature, or seriousness of the offence and the effects of the treatment. Combining leading appellate-level decisions with case law from the SCC, the author suggests that the appropriate test for determining whether treatment is grossly disproportionate so as to be cruel and unusual is as follows:

1. First, the court must establish a benchmark of appropriate or ordinary conditions or treatment.

2. Second, the court should assess the extent the impugned treatment departs from that benchmark, considering:

   a. the scope and reach of the offence; and

   b. the effects of the treatment on the offender.

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132 *Ibid.*

133 *Ibid*.

134 Kerr & Berger, *supra* note 104 at 240.

135 *Hills, supra* note 125 at para 121. For a list of factors considered in a case where treatment has been found to be grossly disproportionate but was decided prior to the two prongs articulated in *Bissonnette*, see *Canadian Doctors*, *supra* note 81 at para 614. However, these factors have since been found not to apply to situations where discretion is permitted in the decision of treatment or punishment (see *Hassouna v Canada (Citizenship and Immigration)*, 2017 FC 473 at para 182).

136 *R v Goltz*, 1991 CanLII 51 (SCC) [*Goltz*]. See also *R v Konechny*, 1983 CanLII 282 (BCCA) [*Konecny*]; *R v Ferguson*, 2008 SCC 6 at para 13 [*Ferguso*n]*; R v CAM*, 1987 CanLII 128 (NSCA)*; R v CBA*, 2021 BCSC 2107.

137 *Smith*, *supra* note 115 at 1072: "the effect of that punishment must not be grossly disproportionate to what would have been appropriate"; *Goltz*, *supra* note 136 at 513*; Konecny*, *supra* note 136 at para 28.

138 *CCLA, supra* note 127 at paras 87–89, 96.

a. The "Benchmark" of Appropriate Treatment

The "benchmark" approach was established in ONCA decisions considering whether administrative segregation or lockdown of inmates in federal and provincial correctional institutions constitutes cruel and unusual treatment. In *Ogiamien*, the benchmark was defined as the "appropriate" and "ordinary" prison conditions in the absence of a lockdown. In *CCLA*, the benchmark was the comparison between "the effects of prolonged administrative segregation" and "incarceration in an ordinary prison range."[139]

Courts across Canada have similarly begun to recognize the appropriate and ordinary conditions for unhoused individuals, as determined under the *Charter*, as having the right to protect themselves from the elements by erecting basic shelter in public space.[140] While bylaws aligning with these court decisions have limited sheltering to overnight hours, implicit in these decisions is the principle that individuals should not be subjected to regular and repeated seizure of belongings that were part of previous overnight sheltering bans. In this way, the benchmark for appropriate treatment can be understood as the right to maintain the necessary equipment required to meaningfully protect oneself from the elements.

As discussed, the Bylaw Impound Scheme effectively prevents individuals from experiencing the benefit of this right. The Scheme prohibits individuals from sheltering during daytime hours and prevents people from sheltering overnight by impounding people's belongings, leading to their inability to shelter for several days before they are able to retrieve their property from the City or source new sheltering materials. Recent decisions across Canada have considered the ways that encampments reduce risk of overdose death.[141] Similarly, recent provincial initiatives to decriminalize possession of illicit substances in legal sheltering areas further suggest that the benchmark also includes the right to possess substances and associated harm reduction materials.[142] In this way, the appropriate benchmark from which to compare gross disproportionality includes one's ability to free from regular seizure of belongings required for personal safety and wellbeing. The scope of offending the Bylaw Impound Scheme and the effects of the treatment will be briefly discussed below.

b. The Scope and Reach of the Offence

The Bylaw Impound Scheme permits law enforcement to impound and destroy belongings for violations of the *Parks Bylaw* and *Streets Bylaw*. While these bylaws are notionally applicable to all citizens, they are disproportionately enforced against individuals who rely on public space to survive. Individuals experiencing homelessness have limited options for shelter and

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139 *Ibid* at para 97.

140 See *Adams 1*, sup*ra note* 7 and *Adams 2, supra no*te 7. See also *Shantz, supra* note 6; *Waterloo, supra* note 7.

141 See *Waterloo, supra* note 7.

142 Health Canada, "Subsection 56(1) class exemption to possess small amounts of certain illegal substances in the province of British Columbia – health care clinics, shelters and private residences", online: <canada.ca/en/health-canada/services/health-concerns/controlled-substances-precursor-chemicals/policy-regulations/policy-documents/subsection-56-1-class-exemption-health-care-clinics-shelters-private-residences.html> [perma.cc/XT6E-SRHK].

storing their belongings. As a result, they inevitably violate the restrictive bylaws that govern public space, demonstrating a general lack of willfulness or moral culpability in the offence. Further, unlike the criminal offences often discussed in section 12 analyses, violations of the Bylaw Impound Scheme are relatively minor and property-related offences.

c. Actual Effect of the Treatment

In 2016, the British Columbia Government declared a public health emergency due to the increasing overdose deaths across the province.[143] Since then, social science evidence has demonstrated that law enforcement seizures of controlled substances, especially opioids, lead to a significantly higher prevalence of overdoses compared to individuals who have not had their substances seized.[144] Further, research shows that the more times a person overdoses, the greater the chance that they will eventually experience a fatal overdose.[145] The *Property in Custody Bylaw* explicitly permits immediate disposal of items such as food, controlled substances, or items "manufactured for single use."[146] This definition includes harm reduction supplies which are meant to curb the spread of communicable diseases and prevent overdose death. In the 2023 case of *Harm Reduction Nurses Association v British Columbia (Attorney General)*, the BCSC granted an interim injunction against British Columbia's *Restricting Public Consumption of Illegal Substances Act*[147] on the basis that irreparable harm would be caused by increasing overdose death risk through the seizure of people's substances.[148] While injunction applications have a significantly lower bar than a section 12 analysis, a bylaw that permits the destruction of substances or harm-reduction supplies should be seen as grossly disproportionate, especially when considered against the backdrop of efforts to decriminalize drugs in legal sheltering areas.

For example, in Hypothetical #1, a bylaw impound scheme which allows for the immediate seizure and disposal of substances, thereby substantially increasing a person's likelihood of overdose death, should be understood as grossly disproportionate to the benchmark established by the decriminalization of drugs. Someone at risk of overdose death could be placed at a significantly greater risk by having their substance or naloxone kit immediately destroyed if they happen to sleep past 7 a.m., or at any hour, if they shelter outside of the few lawful sheltering areas.

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143 British Columbia Ministry of Health, News Release, "Provincial health officer declares public health emergency" (14 April 2016), online: <news.gov.bc.ca/10694> [perma.cc/HG45-4LPG].

144 Kanna Hayashi et al, "Police seizure of drugs without arrest among people who use drugs in Vancouver, Canada, before provincial 'decriminalization' of simple possession: a cohort study" (2023) 20:117 Harm Reduction J 1 at 4; Ray Bradley et al, "Spatiotemporal Analysis Exploring the Effect of Law Enforcement Drug Market Disruptions on Overdose, Indianapolis, Indiana, 2020–2021" (2023) 113 Am J Public Health 750; G Mohler et al, "A modified two-process Knox test for investigating the relationship between law enforcement opioid seizures and overdoses" (2021) 477 Royal Society Publishing J 1.

145 Alexander Caudarella et al, "Non-fatal overdose as a risk factor for subsequent fatal overdose among people who inject drugs" (2016) 162 Drug Alcohol Dependence 51 at 53.

146 *Property in Custody Bylaw*, *supra* note 20, ss 2, 4.

147 *Restricting Public Consumption of Illegal Substances Act,* SBC 2023, c 40.

148 *Harm Reduction Nurses Association v British Columbia (Attorney General)*, 2023 BCSC 2290 at paras 76, 89.

Beyond the authority to immediately destroy certain items, the Bylaw Impound Scheme places no limit on the types of items that can be seized and impounded if they are deemed unlawfully present on City property. The Bylaw Impound Scheme also makes no distinction between impoundment of commercial property versus items one relies on for daily survival. Further, it acknowledges that life-supporting items are vulnerable to be seized,[149] with only the loose promise that the City will "endeavor to return" the items within 48 hours.[150] This means that as a result of government intervention, people can be left without life-sustaining items such as their tents, sleeping bags, and waterproof or winter apparel for up to two days. Previous City bylaws which restricted the use of similar items were found to be unconstitutional for interfering with a person's right to life and security, particularly by infringing on their dignity.[151]

Considering Hypothetical #2, forcing a person with a mobility-related disability to dismantle and relocate their shelter daily or risk having their belongings impounded, followed by a two-day wait to retrieve them, is likely grossly disproportionate to the benchmark of being able to protect oneself from the elements with rudimentary shelter. Under the Bylaw Impound Scheme, a person with reduced mobility could be separated from their survival items for 48 hours in the middle of a Canadian winter, if their belongings are impounded. If it is contrary to human dignity to prevent people from sheltering overnight, as has been established by courts across Canada, it is certainly contrary to human dignity to enforce bylaws that effectively prevent sheltering by seizing and destroying the very materials required to shelter.

Personal characteristics of a specific offender or reasonably hypothetical offender should be considered when discussing the effects of government treatment.[152] Characteristics such as "age, poverty, race, Indigeneity, mental health issues, and addiction"[153] are valid and important considerations in determining gross disproportionality in sentencing.[154] It would be counter-intuitive if they were not similarly considered for non-penal forms of government treatment, such as the Bylaw Impound Scheme. In Victoria, the unhoused population is disproportionately comprised of Indigenous people,[155] meaning, by inference, that Indigenous people are disproportionately impacted by the Bylaw Impound Scheme. Indigenous peoples are overrepresented in drug poisoning deaths in British Columbia,[156] and their risk of overdose is likely to increase when interacting with the Bylaw Impound Scheme. The ongoing harms

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149 *Property in Custody Bylaw*, *supra* note 20, s 6(3).

150 *Ibid*, s 5(1).

151 See *Adams 2*, *supra* note 7 at para 109.

152 *Hills*, *supra* note 125 at paras 67, 133, 135.

153 *Ibid* at paras 86–7.

154 *Nur*, *supra* note 107 at para 74. See also Debra Parkes, "Punishment and its Limits" (2019) 88:1 SCLR 351 at 359.

155 Lauren Davis et al, *2023 Greater Victoria Point-in-Time Homeless Count and Housing Needs Survey* (Victoria: Capital Regional District, 2023), online (pdf): <communitycouncil.ca/wp-content/uploads/2023/08/2023-Point-in-Time-Count-Report.pdf> [perma.cc/3734-YJ7H].

156 BC Coroners Service, *Death Review Panel: An Urgent Response to a Continuing Crisis* (Victoria: Government of British Columbia, 1 November 2023), online (pdf): <gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/death-review-panel/an_urgent_response_to_a_continuing_crisis_report.pdf> [perma.cc/73H7-RPY7] at 14.

of colonial policies should carry significant weight when considering the effects of the scheme and their gross disproportionality.[157]

Further, nearly one in four people experiencing homelessness in Victoria are over the age of 55,[158] with only thirteen per cent earning employment income.[159] Additionally, more than two-thirds of this population has a substance use issue and nearly half have a physical disability.[160] This suggests that seniors, people experiencing poverty, and people with disabilities are also disproportionately impacted by homelessness, and by extension, the bylaws that are enforced in public space. Considering the vulnerable populations that make up Victoria's unhoused community, the effects of immediate food or controlled substances disposal and temporary impoundment of survival belongings appears significantly more severe.

The deleterious effects of the Bylaw Impound Scheme have also been acknowledged more broadly by the judiciary, administrative bodies, and the public. Courts in British Columbia are beginning to acknowledge the harms caused by displacement and the loss of personal survival items as "substantial hardship"[161] and "serious harm" [162] to vulnerable people. Public bodies such as the Canadian Human Rights Commission have acknowledged that such "harassment and violence from police [and] bylaw officers…[is] an assault on…human dignity."[163] Similarly, community members have turned out in numbers to express their disapproval of the Bylaw Impound Scheme and the arbitrary nature of impoundments and disposals.[164] These increasing levels of public engagement with the issues caused by the Bylaw Impound Scheme demonstrate outraged standards of decency as contemplated by the section 12 test.[165] Although gross disproportionality does not depend on "whether a majority of Canadians support the penalty" or not,[166] they do speak to the issue of compatibility with human dignity, an objective which underlies *Charter* jurisprudence regarding section 12.

d. Treatment is Grossly Disproportionate to the Benchmarks

Considering the seriousness of the offence and the effects of enforcement, the Bylaw Impound Scheme should be understood as cruel and unusual on the basis of being grossly disproportionate to the appropriate or ordinary conditions of legal sheltering. The Bylaw Impound Scheme is enforced for relatively non-serious property-related bylaw offences

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157 United Nations Economic and Social Affairs, *State of the World's Indigenous Peoples*, UNDESA, UN DocST/ESA/328 (2009) at 21 [*UNSOWIP*].

158 Davis et al, *supra* note 155.

159 *Ibid* at 6.

160 *Ibid*.

161 *Bamberger*, *supra* note 65 at para 194.

162 *Prince George (City) v Johnny*, 2022 BCSC 282 at para 82.

163 Canadian Human Rights Commission, "Homeless encampments" (19 July 2023), online: <housingchrc.ca/en/homeless-encampments> [perma.cc/PPQ7-AMHW].

164 Kori Sidaway, "Approximately 100 people protest Victoria's enforcement of sheltering bylaws", *Chek News* (21 April 2023), online: <cheknews.ca/hundreds-protest-victorias-enforcement-of-sheltering-bylaws-1149641/> [perma.cc/WZ9P-G3RA].

165 Kerr & Berger, *supra* note 104 at 239–40.

166 *Hills*, *supra* note 125 at para 110.

committed by persons experiencing homelessness who lack moral culpability or willfulness in the offence. The effects of the Scheme cause serious harms to life by confiscating life-sustaining belongings and increasing overdose risks, especially considering the various personal characteristics of those experiencing homelessness. This gross disproportionality rises to the level of being "incompatible with human dignity" and "an outrage to standards of decency."[167]

CONCLUSION

Section 12 of the *Charter* has been seen by scholars as "little more than a faint hope guarantee."[168] Until the courts meaningfully consider including administrative decisions that amount to treatment, the test risks becoming so restrictive so as to be a no hope guarantee. The City's Bylaw Impound Scheme demonstrates that the treatment branch of the test for section 12 cruel and unusual treatment or punishment could be clarified and expanded. It is difficult to conceive of a government action that more clearly engages the dignity-focused purpose of section 12 than the Bylaw Impound Scheme. Further, it is hard to imagine a government intervention more grossly disproportionate than seizing a person's belongings in a way that significantly increases their risk of death for merely violating a municipal property bylaw. In a society increasingly regulated by administrative decision makers, the Bylaw Impound Scheme highlights the need for clarifying the section 12 analysis to ensure people are protected from non-penal violations of their human dignity.

As with many communities across Canada, Victoria's unhoused population is disproportionately represented by Indigenous people. Considering the historical and ongoing harms caused by colonial government policies of displacement and dispossession,[169] and Canadian governments' domestication of the *United Nations Declaration on the Rights of Indigenous Peoples*,[170] there is an increased legal and moral obligation to align bylaws with the *Charter*. Beyond the *Charter*, municipalities and courts alike should begin seriously considering whether policies such as the Bylaw Impound Scheme are consistent with the province's *Declaration on the Rights of Indigenous Peoples Act*[171] and assertions of Indigenous legal orders.

Until the courts begin to address the existing limitations and uncertainties inherent in current legal tests that are used to determine cruel and unusual treatment or punishment, the *Charter* value of human dignity will remain in question. Unfortunately, it will undoubtedly require a *Charter* challenge, after harm has already been caused and lives have been lost, before any meaningful change is made. What is clear is that government actions that do not amount to punishment, through regimes like the Bylaw Impound Scheme, will continue to have detrimental effects on some of society's most vulnerable. Until the "meaning of cruel and unusual" is considered "afresh" through the Charter's "underlying values,"[172] Victoria's unhoused population will not receive the full benefit of the *Charter*.

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167 Kerr & Berger, *supra* note 104 at 239–40.

168 Cameron, *supra* note 12 at 588.

169 United Nations Economic and Social Affairs, *State of the World's Indigenous Peoples*, UNDESA, UN DocST/ESA/328 (2009) at 21.

170 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 (2007).

171 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

172 Cameron, *supra* note 12 at 588.

APPENDIX A – ADMINISTRATION OF PROPERTY IN CITY CUSTODY BYLAW

NO. 23-105

ADMINISTRATION OF PROPERTY IN CITY CUSTODY BYLAW

A BYLAW OF THE CITY OF VICTORIA

The purpose of this Bylaw is to:

1. establish consistent practices and regulations pertaining to the removal, seizure and impounding of items occupying public places; and

2. allow for the City to recover costs associated with managing such items.

Contents

Under its statutory powers, including sections 8(3)(b) and (h), 36, 46 and 64 of the *Community Charter*, the Council of the Corporation of the City of Victoria in an open meeting assembled enacts the following provisions:

PART 1 - INTRODUCTION

Title

1 This Bylaw may be cited as the "Property in Custody Bylaw".

Definitions

2 In this Bylaw:

"at cost"

means the actual cost of the work as determined by the City, including the amount expended by the City for gross wages and salaries, employee fringe benefits, materials, equipment rentals at rates paid by the City or set by the City for its own equipment, administration charges, the cost to hire third parties to perform the work, transportation costs, disposal fees, and any other expenditures incurred in undertaking the work;

"bulky item"

includes large, heavy, unwieldy or irregularly shaped items, such as furniture, sheet plywood, lumber, heaters, fencing, structures, and includes a shelter, unless such shelter is lawfully temporarily placed, secured, erected, used or maintained by a homeless person in accordance with Parks Regulation Bylaw;

"Director"

means the Director of Bylaw Services or their authorized delegate;

"hazardous material"

includes items, agents, substances or materials which may be hazardous to human health or the environment, and includes, but is not limited to, fuel, harmful chemicals, noxious substances, animal or human waste, mould, food, controlled substances within the meaning of the *Controlled Drugs and Substances Act*, weapons (real or imitation), sharp objects, needles, or any another similar item, agent, substance or material, and includes property or things that may be contaminated by any of the foregoing;

"homeless person"

has the same meaning as in the Parks Regulation Bylaw;

"owner"

includes a person who owned, controlled, possessed or was entitled to possession of a property or thing immediately prior to its removal, seizure or impounding;

"property return facility"

means a location designated from time to time by the Director as where members of the public can attend for the purpose of requesting the return of

seized property, the location of which facility shall be published on the City's website (www.victoria.ca) and posted at the Bylaw Services office;

"retained property"

means any property or thing that is removed, seized, or impounded by the City or a police officer that is not disposed of pursuant to section 4 ;

"rubbish"

includes any item that, in the opinion of a City employee:

(a) appears to be of no resale value, or negligible resale value,

(b) is damaged or soiled to the extent that it appears it cannot reasonably be used for its intended purpose,

(c) was manufactured for single use,

(d) appears to contain an unidentifiable, noxious, or hazardous substance,

(e) is perishable,

(f) was manufactured for the purpose of packaging a product or thing, including food or beverage, or

(g) was part of a cart, bicycle, machine, or other similar item, including wiring and other small parts;

"shelter"

means a structure, improvement or overhead shelter, including a tent, lean-to, or other form of overhead shelter constructed from a tarpaulin, plastic, cardboard or other rigid or non-rigid material;

"work"

means any action taken by the City to remove, seize, transport, store, or dispose of or to cause the removal, seizure, transport, storage or disposal of any property or thing placed or left in a public place in contravention of the provisions of a City bylaw or the terms of a licence under a City bylaw.

Application

3 (1) This Bylaw applies to any property or thing that is removed, seized, or impounded by the City or a police officer pursuant to any City bylaw.

(2) Notwithstanding subsection (1), this Bylaw does not apply to vehicles impounded pursuant to a City bylaw or animals impounded pursuant to the Animal Responsibility Bylaw.

PART 2 – MANAGEMENT OF REMOVED, SEIZED OR IMPOUNDED PROPERTY

Immediate Disposal

4 Any property or thing that is removed, seized, or impounded may be immediately and permanently disposed of without notice or compensation to any person if it is rubbish, hazardous material, or a bulky item.

Claiming and Disposal of Retained Property

5 (1) Within 14 days of the date of removal, seizure or impounding, owners of retained property may attend at the property return facility to claim and request the return of the retained property, after which the City will endeavor to return the retained property within 48 hours.

(2) Any retained property that is not claimed pursuant to subsection (1) may be immediately and permanently disposed of without notice or compensation to any person.

(3) Permanent disposal of unclaimed retained property may be made to a landfill, recycling facility, or other waste disposal facility or, with the permission of the Director, to a registered charity.

(4) Notwithstanding subsection (1), the Director may provide any retained property to the police if they believe that such property may be stolen, may have been used in commission of a crime, or may be misplaced or lost.

Fees and Conditions for Removed, Seized or Impounded Property

6 (1) For each removal, seizure or impounding of any property or thing under a City bylaw, the owner of that property or thing must pay the fee prescribed in Schedule A to the City.

(2) Retained property which has been seized shall not be released without payment of the applicable fee.

(3) Notwithstanding subsections (1) and (2), no fee is payable for return of retained property to a homeless person where in the opinion of the Director such item is a life-supporting item such as a tent, sleeping bag, medication, medical device, cell phone, personal identification, or waterproof or winter apparel.

(4) For the purposes of subsection (1), where commercial property or things are removed, seized or impounded:

(a) the fee is payable regardless of whether the property or thing is impounded or seized, and

(b) if the person who unlawfully placed or left the property or thing is not the owner, the owner and the person who unlawfully placed or left the property or thing are jointly and severally responsible for the fee.

(5) Persons claiming retained property must, as a condition of claiming such property, execute a compliance agreement in a form prescribed by the Director stating that the claiming party will not repeat the unlawful behaviour.

PART 3 – GENERAL

No Common Law Duty

7 Nothing in this Bylaw shall be construed to impose a private law duty of care on any City employee, agent of the City, or police officer with regard to the removal, seizure, impounding, return, disposal or donation of any property or thing pursuant to this Bylaw or any related statutory authority.

No Liability

8 No City employee, agent of the City, or police officer shall be liable to any person or entity for the application of this Bylaw.

Severability

9 If any provision or part of this Bylaw is declared by any court or tribunal of competent jurisdiction to be illegal or inoperative, in whole or in part, or inoperative in particular circumstances, it shall be severed from the Bylaw and the balance of the Bylaw, or its application in any circumstances, shall not be affected and shall continue to be in full force and effect.

Commencement

10 This Bylaw comes into force on adoption.

READ A FIRST TIME the	**7th**	day of	**December**	2023
READ A SECOND TIME the	**7th**	day of	**December**	2023
READ A THIRD TIME the	**7th**	day of	**December**	2023
ADOPTED on the	**14th**	day of	**December**	2023

"CURT KINGSLEY"
CITY CLERK

"MARIANNE ALTO"
MAYOR

APPENDIX B – MISCELLANEOUS AMENDMENTS BYLAW (FOR ADMINISTRATION OF PROPERTY IN CITY CUSTODY BYLAW)

NO. 23-106

MISCELLANEOUS AMENDMENTS BYLAW (FOR ADMINISTRATION OF PROPERTY IN CITY CUSTODY BYLAW)

A BYLAW OF THE CITY OF VICTORIA

The purpose of this Bylaw is to amend the *Parks Regulation Bylaw* and the *Streets and Traffic Bylaw* to:

1. establish consistent practices for the impounding or disposal of objects occupying a highway or public place; and

2. insert references to the new *Property in Custody Bylaw*.

Contents

Under its statutory powers, including sections 8(3)(b) and (h), 36, 46 and 64 of the *Community Charter*, the Council of the Corporation of the City of Victoria in an open meeting assembled enacts the following provisions:

Title

1 This Bylaw may be cited as the "Miscellaneous Amendments Bylaw (For Property in Custody Bylaw)".

***Parks Regulation Bylaw* Amendments**

2 Bylaw No. 07-059, the Parks Regulation Bylaw, is amended in the Table of Contents as follows:

(a) the entry for section 19 is repealed and replaced with "Removal, Impounding and Disposal".

3 The Parks Regulation Bylaw, is further amended in section 14 as follows:

(a) by repealing subsection (5) entirely and replacing it with the following:

"(5) [Repealed]"; and

(b) by inserting the following new subsections immediately after subsection (6):

"(7) A person must not place, or cause or permit to be placed or left, any property or thing so as to occupy any part of a park.

(8) Subsection (7) does not apply to a person who is authorized to occupy such part of a park pursuant to this Bylaw or another City bylaw."

4 The Parks Regulation Bylaw is further amended as follows:

(a) by repealing section 19 entirely and replacing it with the following:

"**Removal**, **Impounding and Disposal**

19 The Director, a person authorized by the Director, a bylaw officer, or a police officer, may remove, seize, and impound or cause the removal, seizure or impoundment of any property or thing that unlawfully occupies, or has been unlawfully placed or left in, a park, and such item will be dealt with in accordance with the Property in Custody Bylaw."

***Streets and Traffic Bylaw* Amendments**

5 Bylaw No. 09-079, the Streets and Traffic Bylaw, is amended in section 102 as follows:

(a) in subsection (1), by striking out "subsections 101" and replacing it with "section 101(1)";

(b) by repealing subsections (1)(a) and (b) entirely and replacing them with the following:

"(a) A person must not place, or cause or permit to be placed or left, any of the following items so as to occupy, obstruct, or cause a nuisance on any part of a street, sidewalk or other public place:

(i) any property or thing, or

(ii) a sign, as defined in the Sign Bylaw.

(b) [Repealed]";

(c) in subsection (2), by striking out "(a)"

(d) in subsection (2)(d), by striking out "102" and replacing it with "101";

(e) by repealing subsection (3) entirely and replacing it with the following:

"(3) The Director of Engineering, a person authorized by the Director of Engineering, a bylaw officer, or a police officer, may remove, seize, and impound or cause the removal, seizure or impoundment of any property or thing that unlawfully occupies, or has been unlawfully placed or left in, a street, sidewalk or public place, and such item will be dealt with in accordance with the Property in Custody Bylaw.";

(f) by repealing subsections (4) through (10) entirely; and

(g) by renumbering current subsection (11) as new subsection (4).

6 The Streets and Traffic Bylaw is further amended as follows:

(a) in both sections 102A(13) and 103A(4), by inserting the following immediately after the words "this section":

", and the portable sign will be dealt with in accordance with the Property in Custody Bylaw.";

(b) Schedule H (Detention, removal and impoundment fees) is repealed entirely; and

(c) in the Table of Contents, the entry for Schedule H is repealed and replaced with the following:

"Schedule H – [repealed]".

Commencement

7 This Bylaw comes into force on adoption.

READ A FIRST TIME the	**7th**	day of	**December**	2023
READ A SECOND TIME the	**7th**	day of	**December**	2023
READ A THIRD TIME the	**7th**	day of	**December**	2023
ADOPTED on the	**14th**	day of	**December**	2023

"CURT KINGSLEY"
CITY CLERK

"MARIANNE ALTO"
MAYOR

ARTICLE

AI AT THE EASEL OR AT THE PHOTOCOPIER? THE APPLICATION OF CANADIAN COPYRIGHT LAW TO AI GENERATED IMAGES

Youbin Seo *

CITED: (2025) 30 *Appeal* 31

ABSTRACT

The rapid development and proliferation of generative artificial intelligence ("AI") has drastically impacted the art industry in just a few years. Generative AI's reliance on the consumption and processing of protected works without authorization raises significant copyright concerns that remain unresolved. This article analyses Canadian copyright law and argues that the use of copyrighted works by generative AI companies, as well as AI's production of images substantially similar to unique elements of an artist's style, constitutes copyright infringement. Given the unprecedented nature of generative AI and copyright infringement in the Canadian legal context, this article also reviews relevant case law from the United States, where several lawsuits against AI companies for copyright infringement are already underway. Finally, the article proposes three recommendations to balance AI innovation with the protection of artists' rights: regulating text and data mining, requiring transparency from AI companies, and establishing licensing models to ensure proper artist remuneration.

* Youbin Seo is a third-year law student at the University of Victoria's Faculty of Law. She is deeply grateful to Professor Robert Howell for his guidance and support throughout the drafting of the paper. The author is also greatly appreciative of the edits and comments from the Appeal editorial team, volunteers, Sara, and the anonymous expert reviewer.

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INTRODUCTION

The past two years have been revolutionary for artificial intelligence ("AI") image generators. Work that would have usually required commissioning an artist or purchasing a licence is now available for cheaper and faster through the development of text-to-image AI models. By simply typing in a prompt on a generative AI platform, users are able to generate images in less than a minute.[1] These prompts can be as descriptive and imaginative as the user wants and gives them the option to adjust the output image based on the style, medium, and content to their liking.[2]

Through this rapid advancement, a major copyright issue is whether generative AI companies infringe on artists' copyrights. It is essential that as technology evolves, it continues to follow copyright laws as such laws are in place to balance the encouragement of the dissemination and progress of the arts and intellect with ensuring a fair reward for creators.[3] If AI companies are infringing on artists' copyrights, they are restricting artists from maintaining control of their works and their ability to derive financial benefits from their art.

In this paper, I argue that downloading and using copyright protected works and reproducing unique expressions of those works likely infringes artists' copyrights. This paper also makes three recommendations to ensure artists' rights are not overlooked for innovation, and that such rights are not a hindrance to artistic and intellectual development.

I. COPYRIGHT INFRINGEMENT IN CANADA

In Canada, the *Copyright Act* (the "*Act*") grants owners the exclusive and legal right to produce, reproduce, sell, licence, publish, or perform their original work or a substantial part of it.[4] As long as the owner holds the copyright, any copying or reproducing their work infringes their copyright (aside from certain statutory exceptions, such as fair dealing).[5] For an artist to prove that their copyright was infringed through unauthorized reproduction of their work, there needs to be *substantial similarity* between the artist's work and the alleged reproduction and *proof of access* to the original work.[6]

A. Substantial Similarity

Reproduction does not need to be an identical replication of the original work. If the reproduced work is substantially similar to the original, it can still be considered an infringement as non-literal copying.[7] In Canada, the foundational case for this concept is

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1 Stability AI, "Image Models" (last visited 20 February 2025), online: <stability.ai/stable-image> [perma.cc/3EBN-GXEK].

2 Runway, "Text to Image Generation" (last visited 20 February 2025), online: <runwayml.com/ai-tools/text-to-image/> [perma.cc/3B44-WJEE].

3 *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 CanLII 45 at para 40 (SCC) [*SOCAN*].

4 *Copyright Act*, RSC 1985, c C-42, s 3(1) [*Copyright Act*].

5 *Ibid* at ss 3 and 29.

6 *Cinar Corporation v Robinson*, 2013 SCC 73 [*Cinar*].

7 *Ibid* at para 25.

Cinar Corporation v Robinson ("*Cinar*"), where the Supreme Court of Canada ("SCC") ruled that enough material was copied from the plaintiff's work to be considered an infringement while also noting that "the Act does not protect every 'particle' of an original work."[8]

Instead of examining how much of the reproduced work is made up of the original work, the courts assess whether the amount of the original work *taken* is substantial enough to warrant an infringement.[9] A modified copy that is "notably different from a plaintiff's work" does not eliminate the possibility that a substantial part of their work was copied.[10]

Canadian courts take a holistic approach to determine substantiality by examining the work's qualitative aspects through an intuitive analysis.[11] Instead of a technical approach that breaks the work into segments, the "look and feel" of the entire work is analysed. This is done "from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects."[12] Certain cases require expert witnesses to aid the judge in assessing the situation from the point of view of "someone reasonably versed in the relevant art."[13]

In *Cinar*, the SCC agreed with the trial judge's finding that the plaintiff's work, a submission for a children's television show inspired by Daniel Defoe's novel *Robinson Crusoe*, was substantially copied. The courts found that the defendant had copied the appearance and personalities of the plaintiff's characters, as well as the visuals of the village where the characters resided.[14] The defendants argued that only the *idea* of the plaintiff's show was copied and not the *expression* of the idea, as copyright law only protects expression.[15] The courts rejected this argument and held that the defendants copied more than the abstract idea of a children's show based on *Robinson Crusoe*, but instead had copied the very way the plaintiff *expressed* this idea.[16]

In *CCH Canadian Ltd v Law Society of Upper Canada* ("*CCH*"), another fundamental SCC case on copyright, original expression is defined as an idea that is expressed through skill and judgement that is more than a "purely mechanical exercise."[17] In her judgement of the Court, Chief Justice McLachlin described skill as "the use of one's knowledge, developed aptitude or practised ability in producing the work" and judgement as "the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work."[18] As long as it is not a copy of another work and involves a level of intellectual effort, the expression does not have to be novel or unique to be granted protection.[19]

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8 *Ibid* at para 25.
9 *Ibid*.
10 *Ibid*.
11 *Ibid* at para 35.
12 *Ibid* at para 51.
13 *Ibid*, citing David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed (Toronto: Irwin Law, 2011) at 187.
14 *Ibid* at para 43.
15 *Ibid*.
16 *Ibid*.
17 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 16 [*CCH*].
18 *Ibid*.
19 *Ibid*.

This definition of "original expression" is applied in the context of visual arts in *Rains v Molena* ("*Rains*"), an Ontario Superior Court of Justice case from 2013.[20] The plaintiff claimed that the defendant had infringed the plaintiff's copyright in his still-life oil paintings depicting crumpled paper against a dark backdrop. The defendant had also painted still-lifes of crumpled paper, but argued that the plaintiff's crumpled paper paintings were not unique since the plaintiff used common "tropes" (such as lighting and shading) that other painters had been using for centuries.[21] Justice Chiappetta ultimately ruled that despite sharing the same ideas, the paintings' expressions were different given their varied creative process, motives, and the skill and judgement exercised by both parties in each of their paintings.[22] However, Justice Chiappetta explained that if there are sufficient similarities between an original work and its alleged copy after omitting any commonly used techniques, substantial copying would likely be found.[23] If the similarities are not "commonplace, unoriginal, or consist[ing] of general ideas" and the combination of these techniques are original, then the work may be protected by copyright.[24]

A more recent case is *Pyrrha Design Inc v Plum and Posey Inc* ("*Pyrrha*"), a 2019 Federal Court case on the infringement of copyrighted jewellery designs.[25] The plaintiff claimed that the defendant infringed the plaintiff's copyright in wax seal jewellery designs, where jewellery is made by impressing pre-existing wax seals into metal. Justices Berger and Schutz held that since the method and idea of creating jewellery by casting wax seal designs are public domain and not inventions of the plaintiff's, they cannot be copyrighted.[26] Instead, the plaintiff's individual designs were copyrightable, as the wax seal impressions were expressed in a unique way through the skill and judgement in selecting and conducting the particular process of oxidation and polishing.[27]

B. Access

In addition to substantial similarity, infringement requires proof of *access* to the original work.[28] The onus is on the plaintiff to demonstrate that the defendant had access to their work.[29] This evidence can be circumstantial, such as through blatantly clear similarity, or direct, like a witness or confession. Therefore, infringement is difficult to establish unless the plaintiff is able to demonstrate strong circumstantial evidence that the defendant had direct access to their work. In *Grignon v Roussel*, the burden was on the plaintiff to prove that the defendant had access to the music score or other forms of reproduction like a cassette tape.[30]

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20 *Rains v Molea*, 2013 ONSC 5016 [*Rains*].
21 *Ibid* at para 13.
22 *Ibid* at para 99.
23 *Ibid* at para 40.
24 *Ibid* at paras 38, citing *Designers Guild Ltd v Russell Williams (Textiles) Ltd*, (2000) 1 WLR 2416 (HL), and 40.
25 *Pyrrha Design Inc v Plum and Posey Inc*, 2019 FC 129, aff'd 2022 FCA 7 [*Pyrrha*].
26 *Ibid* at para 94.
27 *Ibid* at paras 107 and 109.
28 *Grignon v Roussel*, 1991 CanLII 6894 at 5 (FC).
29 *Ibid*.
30 *Ibid*.

Through witness testimony, the plaintiff proved that the defendant had access as he had heard the song and had possessed a cassette recording of it for some time.[31]

II. POSSIBLE COPYRIGHT INFRINGEMENTS BY AI

A. How AI Works

To accurately assess how AI companies could infringe on creator rights, the technological process and composition of generative AI should be understood. As the overall system of generative AI is immensely intricate and complex, this paper only explores the relevant sections of the process in a simplified and condensed overview.

Generative AI uses machine learning models that have been trained on an enormous amount of data to complete a task.[32] In the context of AI images, these models are trained on millions of images online to generate pictures based on the content they have ingested. This training process is different from the traditional method of programming, in which a programmer manually inputs instructions for the computer to follow in order to produce the desired output. For AI, the programmer trains the model to program itself on massive volumes of data, also known as datasets. This method is called machine learning.[33] Machine learning is heavily reliant on data since the model's output is entirely dependent on what is extracted from the dataset. The more extensive the dataset, the more information the model has with which to train itself, resulting in a higher performing model.[34] Such enormous extraction and processing of data is possible through text and data mining ("TDM"), the computational analysis of digital material to identify patterns, extract data, and identify other information.[35]

B. Copyright Infringement: AI Training

A copyright owner's exclusive right to reproduce their work is likely infringed when datasets containing their images are downloaded to train an AI model. Assigning liability of such infringement is complicated as AI companies generally do not collect and gather the data themselves; rather, the creation of these datasets is typically done by third parties. One such third party is the Large-Scale Artificial Intelligence Open Network ("LAION"), a non-profit organization that creates and releases large-scale machine learning models and open datasets to the public for free.[36] Their datasets are used by many AI companies such as Stability AI, Runway, and Midjourney Inc.[37]

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31 *Ibid*.

32 Andrej Karpathy et al, "Generative Models" (16 June 2016), online: <openai.com/research/generative-models> [perma.cc/7LUX-G5A4].

33 Sara Brown, "Machine learning, explained" (21 April 2021), online: <mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained> [perma.cc/PM28-ZPM6].

34 *Ibid*.

35 University of Waterloo Library, "Text and Data Mining (TDM): Overview" (11 August 2023), online: <subjectguides.uwaterloo.ca/text-and-data-mining> [perma.cc/LQ23-P3Z6].

36 LAION, "About" (last visited 20 February 2025), online: <laion.ai/about/> [perma.cc/35PL-XT69].

37 Stability AI, "Stable Diffusion 2.0 Release" (24 November 2022), online: <stability.ai/news/stable-diffusion-v2-release> [perma.cc/FTD8-KEMK]; Christoph Schuhmann & Peter Bevan, "LAION POP: 600,000 High-Resolution Images With Detailed Descriptions" (17 November 2023), online: <laion.ai/blog/laion-pop/> [perma.cc/R3HF-LFMG].

LAION's most recent and extensive dataset to date is LAION-5B, a collection of over 5.8 billion images.[38] It is crucial to note that this mega dataset does not contain any actual copies of the images. Instead, the dataset includes the online address of the image (the "URL"), any caption describing the image, and other information, like the image's dimensions.[39] This would mean that anyone wanting to use the data for training purposes would need to download the images themselves, thus creating their own copies of copyright protected images. This process is made easy through LAION's free software program called "img2dataset," which downloads the images from the URLs, resizes them, and stores them along with any associated information.[40] By downloading copies of protected works to train and commercially distribute their programs using LAION-5B's dataset, AI companies have very likely infringed on the copyright owner's exclusive right to reproduce their work.

One of the greatest obstacles for artists in establishing infringement in the context of AI is access. It will likely be incredibly difficult for artists to provide direct evidence that their works were, in fact, amongst the billions of images used in AI training datasets. The sheer number of images used as sources for training data separates issues raised by AI from past Canadian case law, where defendants were typically accused of copying from a single plaintiff, not tens of thousands. Still, substantial similarity and access can be very strongly inferred.

Based on *Cinar,* substantial similarity is established through the substantial copying of a plaintiff's work by the defendant.[41] The question "focuses on whether the copied features constitute a substantial part *of the plaintiff's work*—not whether they amount to a substantial part *of the defendant's work.*"[42] Since the entirety of works are copied and stored into the training systems, a substantial part of an artist's work has indeed been copied. However, since AI-generated images are hybrids of numerous works used during the model's training, such large-scale copying would render it difficult to establish substantial similarity to the work of a single artist.

This concern may be alleviated by considering the intention behind AI image generation reflected by its users and creators. One of the appeals of AI is its ability to mimic the styles of popular modern artists. If the goal of AI image generation was to create a program that could simply generate images of any kind, AI companies could rely on the millions of artworks and images in the public domain or available for commercial use.[43] Instead, protected works are used despite the potential legal repercussions because a wider audience can be attracted from AI images that are highly similar to current and popular art styles. The reproduction of an artist's style would not be possible if their works were not contained in the training datasets.

Employees of AI companies themselves promote the creation of art in the distinct style of certain artists. An example of this is a post on X (formerly known as Twitter) by Katherine Crowson,

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38 LAION, "FAQ" (last visited 20 February 2025), online: <laion.ai/faq/> [perma.cc/89CV-PN3F].

39 Romain Beaumont, "LAION-5B: A New Era Of Open Large-Scale Multi-Modal Datasets" (31 March 2022), online: <laion.ai/blog/laion-5b/> [perma.cc/7N9J-W62E].

40 *Ibid*.

41 *Cinar*, *supra* note 6 at para 39.

42 *Ibid* [emphasis in original].

43 *Andersen v Stability AI Ltd*, ND Cal 2023, 3:23-cv-00201 [*Andersen*] (Amended complaint of 29 November 2023, Plaintiffs at para 55) [*Andersen Amended Complaint*].

a principal researcher at Stability AI, where she provided instructions on how to elicit output images similar to Greg Rutkowski's art, after Rutkowski's name was prohibited on Stability AI after a legal complaint.[44] She suggested using the names of artists with a similar style as Rutkowski and listed several artists as examples.[45] Since generative AI would require an artists' works in its dataset to imitate their art, there is an extremely strong inference that a substantial part of Rutkowski's works, along with the other artists listed in Crowson's X post, were taken.

C. Copyright Infringement: Copying an Artist's Style

Aside from unauthorized copying to train AI models, another argument of copyright infringement could be that the output images made by AI themselves are an unlawful reproduction of an artist's style. This is a challenging argument as currently, there is no precedent in Canadian case law that states that the copying of an artist's *style* is substantial enough to be considered a copyright infringement. Even if the objective viewer recognizes an image as replicating an artist's style, arguing for the copyright protection for style as a new legal right is difficult.

One challenge in protecting style through copyright law is the ambiguity in identifying when style crosses the line from being a series of *ideas* to an original *expression*. For instance, Claude Monet's impressionist style can be described as serene landscape oil paintings depicted through loose brushwork, hazy shapes, and dappled colours. The question is when and whether Monet's iconic and recognizable style itself, as opposed to the actual painting, becomes an original expression unique to him, given that these techniques are and have been used by other artists and should continue to remain available to the public.[46]

Despite the lack of explicit finding of style to be copyright protected, rulings in *Rains* and *Pyrrha* could be interpreted to suggest that certain aspects of style could be protected. In *Rains*, the court held that despite having the same idea of painting crumpled paper, it was each party's expression of the still-life through their individual skill and judgement that granted copyright protection.[47] In *Pyrrha*, the court held that since each jewellery piece had unique finishing techniques that required skill and judgement, this made the pieces original expressions that were protected by copyright.[48] For both cases, common artistic methods such as lighting and wax impressions were not protected by copyright, but original and distinct application of these methods through the creators' skill and judgement could be protected. In summary, both courts in *Rains* and *Pyrrha* focused on the unique way an idea had been expressed by examining specific, protectable elements in original art works that were copied.

Therefore, although an artist's overall, general style most likely cannot be copyrighted, it could be argued that specific elements of an artist's style that is unique to them and requires their skill and judgement could be considered expression. If an AI-generated image copies

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44 *Ibid* at para 226.

45 Katherine Crowson, "If Stable Diffusion 2.0 doesn't know your favorite artist…" (24 November 2022), online: <twitter.com/RiversHaveWings/status/1595945910785409026> [perma.cc/8JRS-UWVX].

46 *Rains*, *supra* note 20 at para 40.

47 *Ibid* at para 15.

48 *Pyrrha*, *supra* note 25 at paras 107 and 109.

these specific, original details or techniques that are substantially similar to the way the artist expresses them, it could be considered infringement. However, distinguishing between an idea and its expression is inherently ambiguous, making it difficult to determine when a stylistic element becomes an expression. It should also be noted that in *Rains*, the defendant's specific works were being assessed for copying against the plaintiff's specific works.[49] Even though general style itself most likely cannot be copyright protected, there could be an infringement of copyright if the unique techniques in one artwork are substantially copied in a particular AI generated image.[50]

Creating images highly resembling an artist's work is technologically possible with generative AI. For example, CLIP (Contrastive Language–Image Pre-training) models are used to connect prompts from AI users to images in datasets. In a simplified explanation, CLIP is an AI model that is trained to correlate images to words.[51] The model learns connections between words and pictures by processing a large quantity of images and their corresponding captions.[52] For artworks, captions often include the name of the artist.[53] Thus, when CLIP is trained on an artist's work, it learns to associate the work with the artist's name when the name is in the caption.[54] For instance, if a user inputs "Monet" in their prompt, CLIP would associate the word with images of Monet's art and nudge the model to produce an image using Monet's works. The CLIP model would have learned the association between Monet's artwork and his name by having processed numerous Monet art with captions that included his name.

This high similarity between an artist's original work and an AI-generated image in that artist's style is confirmed, ironically, by AI. In 2023, Stephen Casper, a PhD student at Massachusetts Institute of Technology, and his team sought to test AI's capacity to mimic and recognize artists' style.[55] Their approach was to first generate works using the prompt "Artwork from <artist's name>."[56] The AI generated images were then encoded using a CLIP image encoder that converted the images into numbers.[57] Alongside the encoded images, text encoders consisting of the artist names were added in. CLIP was then tested to see if it was able to classify the encoded images with the encoded labels.[58] In simpler terms, the team was testing whether the AI tool was able to correspond the generated images (CLIP image encoder) to their imitated artists (encoded labels). The team conducted this experiment using 70 digital artists and found that CLIP correctly correlated the AI generated works to the right artist 81.0 percent of the time. This research demonstrates that not only can AI accurately generate

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49 *Rains*, *supra* note 20 at para 32.

50 *Ibid* at para 40.

51 Alec Radford et al, "CLIP: Connecting text and images" (5 January 2021), online: <openai.com/research/clip> [perma.cc/N2HE-6NGN].

52 *Ibid.*

53 *Andersen Amended Complaint*, *supra* note 43 at para 106.

54 *Ibid* at para 109.

55 Stephen Casper et al, "Measuring the Success of Diffusion Models at Imitating Human Artists" (2023) arXiv 2307.04028, online: <doi.org/10.48550/arXiv.2307.04028 >.

56 *Ibid* at 1.

57 *Ibid*.

58 *Ibid.*

images closely resembling the requested artist's works, but also that the images generated were similar enough for an AI model to classify them with the artist's name.

Given the direct use of an artist's work to train a model to imitate their style and this ability being one of the promotional elements of AI image generators, substantial similarity may be inferred.

D. Proving Access

Even if substantial similarity is proven, plaintiffs still need to prove that the defendant's had access to their work. Access is likely difficult for plaintiffs to prove directly, as it is the defendants who know what works they used and how they obtained them.

There are certain ways for artists to see if their works are being used. Websites like "https://haveibeentrained.com" allow artists to search their art and see if it had been included in LAION-5B.[59] Karla Ortiz, a prominent digital artist from the United States, was able to confirm that her works had been taken and included in the LAION dataset through a similar website, which retrieved a copy of her work along with the exact captions that accompanies that artwork on her website.[60] Although such websites are not direct proof that AI companies themselves accessed the work, it does establish a strong inference of access, as AI companies must download images from datasets, such as LAION-5B, to train their models.

Furthermore, AI companies could argue that they did not download all 5.8 billion pictures from the dataset and that the plaintiff must prove that their works were specifically downloaded. Of course, this would be an incredibly difficult task, given the billions of images used as data and the overall lack of transparency from the companies. Nevertheless, given that certain outputs are so substantially similar to an artist's style that it is not recognizable by AI, and that AI works are reproductions from the training dataset, it is highly likely that copyright protected works were accessed and used. Therefore, AI generated images have a strong possibility of infringing owner's rights through reproduction.

E. Current Cases on AI and Copyright Infringement

Due to the novelty of generative AI, there are few legal precedents on copyright infringement by AI companies. Several notable cases are currently in progress, including a lawsuit in the United States directly related to generative AI images and other legal actions in the United States and Canada from major media companies claiming copyright infringement of their protected works.

i. *Andersen v Stability AI Ltd et al*

These potential copyright infringement issues are at the centre of *Andersen v Stability AI Ltd*, an ongoing case in the United States.[61] In 2023, three artists in the United States filed a class action against three AI companies: Stability AI Ltd., DeviantArt Inc., and Midjourney Inc. The artists allege that their artworks were used without licence to train AI programs,

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59 Have I Been Trained, "About" (last visited 20 February 2025), online: <haveibeentrained.com/about> [perma.cc/V2T7-M2R5].

60 *Andersen Amended Complaint*, *supra* note 43 at paras 74–76.

61 *Andersen*, *supra* note 43.

resulting in AI generated images in their art styles.[62] They argued that downloading, storing, and creating derivatives of their works were direct infringements of their copyrights.[63]

All but one of the claims were dismissed with leave to amend.[64] The one exception was a claim against Stability AI for direct copyright infringement by downloading, storing, and using images for AI training without permission.[65] The court found that the plaintiffs presented enough evidence to reasonably infer that their copyrighted works had been downloaded and included in datasets used by Stability AI.[66] Although the allegations of the output images being derivatives of protected works were dismissed for lack of substantial similarity, the court stated that the argument could be reintroduced with "clarified theories and plausible facts."[67]

An amended complaint with seven additional plaintiffs was filed on November 29, 2023. On August 12, 2024, the defendants' motions to dismiss copyright infringement claims were denied.[68] The court held that the plaintiffs had sufficiently alleged that their works were included in Stable AI's model, Stable Diffusion. The works being in a different form than their original medium, such as in an algorithmic or mathematical figure, was determined to not be a hindrance to the claim.[69]

The court's orders on the motion to dismiss is not indicative of the final decision as the case is still ongoing. It does, however, underline the unprecedented nature of AI compared to other technological tools in the context of copyright law. The outcome of this case will be instrumental in establishing the scope of creators' copyrights and other associated legal concepts in the United States, such as fair use, in light of the rapid development and pervasiveness of generative AI. Although this is an American case and its impacts in Canadian law are unknown, it is nevertheless likely to be very influential in Canada as it is one of the first lawsuits against AI companies for breaching artists' copyright.

ii. *New York Times v Open AI and Microsoft*

Another recent and ongoing case is *New York Times v Open AI and Microsoft*, where the New York Times ("NYT") alleges in their Complaint that the defendants copied and processed NYT's copyright protected material to produce content that commercially competes with NYT.[70] These allegations are evidenced through Open AI's program, ChatGPT, producing text that either closely summarizes or copies NYT articles, imitates NYT's writing style, and attributes incorrect information to NYT.[71] Microsoft has also been named in the Complaint

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62 *Andersen Amended Complaint*, *supra* note 43 at paras 2–5.
63 *Ibid.*
64 *Ibid* at 28.
65 *Ibid* at 7.
66 *Ibid* at 6–7.
67 *Ibid* at 13.
68 *Andersen*, *supra* note 43 (Order of 12 August 2024).
69 *Ibid* at 17.
70 *The New York Times Company v Microsoft Corporation*, SDNY 2023, 1:23-cv-11195 (Complaint of 27 December 2023, Plaintiff).
71 *Ibid* at para 4.

as its AI search engine, Copilot, is based on Open AI's GPT model. Notably, NYT's content is behind a paywall, which gives readers access upon payment but requires separate licenses for commercial use of NYT's content.[72] NYT alleges that although numerous licensing agreements are available, Open AI did not obtain them. Negotiations between the parties were unsuccessful, as the defendants claimed that their unlicensed use was transformative enough to be protected under fair use.[73]

In addition to illegally copying content and attributing incorrect information to NYT, users can also ask ChatGPT to produce articles that readers would normally need a NYT subscription to access. NYT is asking for statutory and compensatory damages, as well as the destruction of all models created from NYT's content. If NYT is successful, this case could set a precendent in the United States where all learning models based on infringed works are destroyed. In such a case, AI companies would likely have to start from scratch using only original, licensed, or public-domain works.

iii. *Toronto Star Newspapers Limited et al v Open AI Inc et al*

In a new Canadian case, major Canadian media outlets allege copyright infringement by Open AI's use of generative AI.[74] The plaintiffs, including Toronto Star Newspapers Limited, Canadian Broadcasting Corporation, and the Globe and Mail Inc., filed a statement of claim in the Ontario Superior Court of Justice on November 28, 2024.[75] Among other claims, the plaintiffs allege that the defendant AI companies are jointly and severally liable for infringing, authorizing, and/or inducing the infringement of the plaintiffs' copyright protected works contrary to section 3 of the *Act*.[76]

The lawsuit claims that copyright protected works were accessed and copied to develop generative AI models without obtaining appropriate licenses from the plaintiffs and without regard to the works' terms of use.[77] The challenge rights holders face when proving access is reflected in this lawsuit as the statement of claim states, "[t]he full particulars of when, from where, and exactly how, the Works were accessed, scraped, and/or copied is within the knowledge of OpenAI and not the News Media Companies."[78]

The plaintiffs are requesting a permanent injunction to restrain the defendants from infringing on their protected works.[79] Additionally, they are seeking an order for damages and a share of the defendants' profits.[80] Although this Canadian lawsuit comes quite late compared to the other legal action in the United States and other countries, it is still significant for Canadian law and its application to the rapidly evolving technology.

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72 *Ibid* at para 156.

73 *Ibid* at para 8.

74 *Toronto Star Newspapers Limited v OpenAI, Inc*, Toronto, ONSC 24-00732231-00CL (Statement of claim of 28 November 2024, Plaintiffs) [*Toronto Star*].

75 *Ibid.*

76 *Ibid.*

77 *Ibid*.

78 *Ibid* at para 46.

79 *Ibid*.

80 *Ibid*.

III. DEFENCES BY AI COMPANIES

Fair use is a defence that is relied on by many AI companies in the United States as demonstrated in Stability AI's statement to Toronto Star: "anyone that believes that this isn't fair use does not understand the technology and misunderstands the law." In Canada, this doctrine is referred to as "fair dealing."[81] Despite the similarity in name, the conditions for fair use in the United States and fair dealing in Canada are quite distinct.

Another defence that AI companies could use is the opt-out feature that they offer to copyright holders.[82] AI companies could argue that they have made reasonable efforts to accommodate the rights of copyright holders by providing a way for protected works to be excluded from AI training data sets.

A. Fair Dealing

Copyright law in Canada aims to balance the public interest in promoting artistic and intellectual progress with creators' rights to receive rewards from their original works through benefits such as copyright protection.[83] Fair dealing is an exception to copyright law under section 29 of the *Act*. The doctrine serves to prevent excessive copyright from restricting the public domain's ability to "incorporate creative innovation in the long-term interests of society as a whole."[84] Its purpose can be interpreted as granting users the right to stand on the shoulders of pre-existing copyrighted works for the intention of innovation. In *CCH*, the SCC emphasizes that like other exceptions in the *Act*, fair dealing is more than a defence but a user right.[85] Since both the author's right and the user's interest need to be evaluated, the doctrine is interpreted broadly so that both rights are fully assessed.[86]

Fair dealing requires the defendant to prove that their "purpose" falls under the statutorily-enumerated categories of research, private study, education, parody, satire, criticism, review, or news reporting.[87] As the name states, the defendant must also demonstrate that their dealing was fair.[88] There is no set test to determine fairness, but the following factors are used in the assessment: the dealing's purpose, its character, amount of the dealing, non-copyrightable alternatives, the nature of the work, and its effect on the original work.[89] If AI companies' uses fall under the exception of fair dealing, they would not be infringing.

AI companies may have difficulties relying on fair dealing for several reasons. The first is the question of whether AI tools fall under a category required by the *Act*. The most fitting

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81 *Copyright Act*, *supra* note 4, s 29.

82 Melissa Heikkilä, "Artists can now opt out of the next version of Stable Diffusion" MIT Technology Review (16 December 2022), online: <technologyreview.com/2022/12/16/1065247/artists-can-now-opt-out-of-the-next-version-of-stable-diffusion/> [perma.cc/PRA5-7PKP].

83 *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at para 30.

84 *Ibid* at para 32.

85 *CCH*, *supra* note 17 at para 48.

86 *Ibid*.

87 *Copyright Act*, *supra* note 4, ss 29–29.2.

88 *CCH*, *supra* note 17 at para 50.

89 *Ibid* at para 53.

category for AI is likely research. Is the development of AI that generates pictures actually research or is it a commercial tool that streamlines the creation of "art"? This categorization of research can be strutinized alongside the first stage of the *CCH* factors for determining fair dealing: the purpose of the dealing.

Purpose is decided from the perspective of the *user* of the copy, not the copier.[90] This distinction in perspective is discussed in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* ("*Alberta Education*"), a case where teachers making copies of textbooks to distribute to students was considered fair dealing. The SCC found that although it was the teachers who made the copies, the *students* were the *users* of the copies. Since the students were using the textbook copies for private study, it was considered fair dealing under section 29 of the *Act*. For generative AI, it can be argued that the copiers are the AI companies and the users are individuals or businesses who prompt the program to generate images. Unless the generated images are used for the purposes of research, private study, education, parody, satire, criticism, review, or news reporting, the purpose cannot be considered fair dealing.

However, this user-focused analysis does not render the copier's reasons for copying irrelevant. Their ulterior motives, especially if they are commercial, can make a dealing unfair.[91] For AI platforms, these motives are difficult to generalize as each company has a different model plan. Midjourney Inc. employs a monthly subscription based model where more expensive plans generate images faster and in greater quantities.[92] Runway AI offers various paid plans with increased access to benefits like watermark removal and higher resolution images.[93] Stability AI offers free models for non-commercial purposes, like personal and research use, while charging a monthly fee for enterprises, depending on their annual revenue.[94] Unlike Runway AI where the services available are much more limited for the free subscription, Stability AI's free plan offers almost the same benefits as their paid plan. Based on these various models, it can be argued that fair dealing may apply to the free plans used by individuals for personal purposes. It is unlikely that fair dealing applies to paid subscriptions for businesses, as this demonstrates a commercial motive for both user and copier.

To make the purpose analysis more complicated and equivocal, the SCC in *CCH* has expressed that a research purpose is not restricted to just non-commercial and private contexts.[95] *CCH* involved a library providing copies of legal material like decisions and statutes for their patrons, such as lawyers conducting legal research for their business of law.[96]

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90 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [*Alberta Education*].

91 *Ibid* at paras 20–21.

92 Midjourney, "Subscription Plans" (last visited 20 February 2025), online: <docs.midjourney.com/docs/plans> [perma.cc/W2FY-QBA7].

93 Runway, "Choose the Best Plan for You" (last visited 20 February 2025), online: <runwayml.com/pricing/> [perma.cc/UCG7-P9AB].

94 Stability AI, "Stability AI Membership" (last visited 20 February 2025), online: <stability.ai/membership> [perma.cc/P8L7-RTZ8].

95 *CCH*, *supra* note 17 at para 51.

96 *Ibid*.

One distinction between lawyers and AI companies is that a law business' model is not entirely founded on using copyrighted materials for profit. Although lawyers' research is essential to provide professional legal services, using copyright protected materials is not the profit-driving element of their business.

Despite the lingering question of "purpose," other factors likely prevent fair dealing from applying. The character and amount of copying is likely not fair since millions to billions of images are copied and stored in their entirety.[97] If only the essential portions of the work were taken, or the copies destroyed after use, the dealing may have leaned more towards being considered fair.[98] It is also key to consider the factual differences between case law and AI contexts. In *Alberta Education*, a limited number of copies were made for the students in the class from a textbook written and distributed for educational purposes. In an AI context, billions of images were copied, a vast majority of them with the intention of being used to train AI models.

Another crucial element to take into account are the alternative options AI companies can take that do not involve using copyrighted works.[99] Such options include paying for licenses, asking for permission before copying, or using images available in the public domain.[100]

The final factor is the "effect of dealing on the work."[101] AI has already had a detrimental impact on artists. Since it is much cheaper and quicker to produce, there is an incentive for prospective clients to use AI tools rather than commission artists. This impact is already being felt in the art community, as Wacom, a company that sells tablets used by artists to digitally draw, recently used an AI-generated image for promotional purposes.[102]

B. Fair Use

In the American fair use doctrine, the defendant does not need to prove their "use" falls within a statutorily-enumerated category, unlike the Canadian doctrine of fair dealing.[103] To determine if the use of a work is a fair use, the following factors are assessed: the purpose and character of the use, the nature of the original work, the amount and substantiality of the original work used, and the impact of the use on the original work's market value.[104] Of these four factors, the first, purpose and character of the use, is extensively evaluated in *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* ("*Warhol*"), a 2023 Supreme Court of the United States ("SCOTUS") case.[105]

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97 *Ibid* at para 55–56.

98 *Ibid*.

99 *Ibid* at para 57.

100 This is not to suggest that paying artists to use their work is not an alternative or solution to overlook their economic and moral rights to the work.

101 *CCH*, *supra* note 17 at 59.

102 Jess Weatherbed, "Artists are making creative companies apologise for using AI" *The Verge* (9 January 2024), online: <theverge.com/2024/1/9/24031468/wacom-wizards-of-the-coast-mtg-artists-against-generative-ai> [perma.cc/8FXC-4Z2S].

103 17 USCS §107.

104 *Ibid*.

105 *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith*, 598 US 508 (2023) [*Warhol*].

The first factor considers whether the use is transformative.[106] If the new work's purpose is sufficiently distinct from the original, it may qualify as fair use, even if it is in a commercial context.[107] In *Authors Guild v Google* ("*Google Books*"), Judge Leval of the Second Circuit ruled that fair use applied, despite the defendant scanning millions of books and uploading them online.[108] The purpose of the copying was found to be transformative, as the defendant had search functions that allowed users to search up specific snippets of a text.[109] The defendant's commercial motives did not rule out the applicability of fair use given the established transformative purpose and the copies not significantly competing with the original books in the market.[110]

In contrast, fair use was found not to apply in *Warhol*. In this case, the defendant took the plaintiff's photograph of Prince, a musician, and altered it.[111] The modifications included colourizing, cropping, drawing, and overlaying silkscreens onto the photo. The altered work was then sold and licensed. SCOTUS ruled that the defendant's work was not transformative enough as it substantially shared the same purpose as the original photograph. Justice Sotomayor, writing for the majority, stated both the original and derivative portraits of Prince had the same purpose of being used in magazine features of the celebrity.[112]

These precedents are influential in determining whether fair use applies to generative AI despite the differences in circumstances. In *Warhol* and *Google Books*, the secondary works were exact copies of specific original works that were modified to various degrees. In the context of AI, it is difficult to pinpoint the precise work used to create an AI generated image. However, if the law is applied on a case-by-case basis, a specific AI image that is substantially similar to the work it was trained on and serves the same purpose as the original could be considered non-transformative, thus not falling under the conditions of fair use.

C. Opt-Out Feature

A feature offered by many AI companies, to supposedly reflect their consideration of artists, is the opt-out feature.[113] Although this option may seem positive, it is a controversial feature as it requires artists to take positive actions to protect their rights rather than AI companies practising due diligence as to not infringe on protected rights. This is an onerous task for artists as there are numerous AI platforms, with new ones emerging as generative AI becomes more prevalent. Rightsholders would also need to continuously monitor AI activity to ensure

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106 *Campbell v Acuff-Rose Music, Inc*, 510 US 569 (1994) [*Campbell*]. Additionally, Justice Abella stated in *SOCAN v Bell Canada*, 2012 SCC 36 at para 24: that although transformative use is a factor (albeit not "absolutely necessary") in determining fairness, Canadian courts have cautioned against using American copyright concepts "given the 'fundamental differences' in legislative schemes."

107 *Campbell*, *supra* note 106.

108 *Authors Guild v Google*, 804 F (3d) 202 (2nd Cir 2015) [*Google Books*].

109 *Ibid* at 23.

110 *Ibid* at 26.

111 *Ibid.*

112 *Ibid.*

113 Heikkilä, *supra* note 82.

compliance.[114] It is unfair for artists to have to request their protected works not be used, rather than AI companies seeking permission to use the works.

Not only do artists need to upload the artwork they want removed, but they also need to write a physical description for every piece. For rights holders with numerous artworks online, like the Georgia O'Keeffe Museum, this would be more than 2000 individual submissions for removal.[115] There is also no guarantee that the artist's works will be removed after requesting it. First, images are only removed after the company reviews the submission and verifies that the image is in their datasets.[116] Second, if the dataset belongs to a third party, the company is unable to remove it.[117] Third, this would require rights holders to request their artwork be removed from each AI company and dataset.

One example of this removal option being ineffective is Sam Yang's experience with Civit AI Inc (also known as "Civitai"), which allows users to share models and images.[118] Yang is a popular Canadian artist with more than two million followers on Instagram and has a recognizable and distinct art style.[119] By using his online artwork, users on Civitai created models to generate images in his style.[120] These models were then posted on Civitai to be shared and sometimes even sold.[121] The images generated by the models clearly imitated Yang's style and blatantly included Yang's name in their model names.[122] Despite this demonstration of his artwork being used in the training of AI models, images and models created from his works have not been removed by Civitai.[123]

It is worth noting that many generative AI platforms have expressed their respect and support for artists. Even Stability AI has stated on an official reddit post that they "are committed to supporting artists as AI develops."[124] They also declared that 70 percent of the "proceeds" generated from sales of the AI generated image in the artist's style will go to the artist and/or model creator, while the rest will be used to maintain the program; it should be emphasized

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114 Society of Composers, Authors and Music Publishers of Canada, "SOCAN AI Submission to Government of Canada" (last visited 20 February 2025), online: <socan.com/socan-ai-submission-to-government-of-canada/> [perma.cc/X2L9-CTRB].

115 Kali Hays, "OpenAI offers a way for creators to opt out of AI training data. It's so onerous that one artist called it 'enraging'" *Business Insider* (29 September 2023), online: <businessinsider.com/openai-dalle-opt-out-process-artists-enraging-2023-9> [perma.cc/8Y5S-3DDB].

116 Open AI, "Artist and Creative Content Owner Opt Out" (last visited 20 February 2025), online: <share.hsforms.com/1_OuT5tfFSpic89PqN6r1CQ4sk30> [perma.cc/FDG7-NDBH].

117 *Ibid.*

118 *Toronto Star*, *supra* note 74.

119 Instagram, "samdoesarts" (last visited 20 February 2025), online: <instagram.com/samdoesarts> [perma.cc/Q2F5-BBJD].

120 Lykon, "SamDoesArts (Sam Yang) Style LoRA" (6 May 2023), online: <civitai.com/models/6638/samdoesarts-sam-yang-style-lora> [perma.cc/3BXU-Q3GB].

121 *Toronto Star*, *supra* note 74.

122 *Ibid.*

123 *Ibid.*

124 Official Civitai AI, "Civitai: Artists and AI" (16 December 2022), online: <reddit.com/r/StableDiffusion/comments/znrzdb/civitai_artists_and_ai/> [perma.cc/XNC5-TC2N].

that *artist* and *model creator* are used synonymously, despite the fact that model creators primarily use unauthorized works to produce the models.[125]

Nevertheless, the onus should not be on artists to actively monitor these companies to ensure that their works are not being used without their consent. The opt-out feature is not only ineffective and laborious, but it also shifts artist autonomy and authority over their own rights to the AI companies.

IV. RECOMMENDATIONS

To maintain a copyright regime that supports the development of science while continuing to protect the rights of artists, I propose the following three suggestions:

1. Not creating AI exceptions for laws around TDM.
2. Requiring complete transparency and disclosure from AI companies on their data sources.
3. Using licensing models to ensure original creators are compensated.

These recommendations are primarily derived from the incorporation of various responses to the Government of Canada's 2021 consultation on matters related to AI for the purposes of developing policy and laws around copyright.[126] Responses were submitted by Canadian organizations and individual experts, sharing their perspectives and feedback on the subject.

A. No AI Exceptions to TDM

Given the novelty of generative AI, there are not many legal precedents or regulations surrounding copyright issues. However, one area that is relatively regulated is TDM.

To obtain certain information from source material, data mining may require the reproduction of copyrighted works.[127] Reproducing without a licence or permission from the creator would infringe copyright.[128] Since TDM involves accessing a vast number of materials, acquiring authorization from each of the right holders would be a serious hindrance to the process and pace.[129] TDM is a crucial stage in the training of AI as massive amounts of data is required to train the program. It is essential for Canada to establish clear laws on TDM, to ensure copyright exceptions to TDM support effective and efficient research rather than enabling for-profit exploitation.

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125 *Ibid.*

126 Government of Canada, "Consultation on Copyright in the Age of Generative Artificial Intelligence" (16 January 2024), online: <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/consultation-copyright-age-generative-artificial-intelligence> [perma.cc/KT8V-XVDP]. This paper's recommendations were most influenced by submissions from Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic; the Society of Composers, Authors and Music Publishers of Canada; The Writers' Union of Canada; and the Canadian Artists Representation/Le Front des artistes canadiens.

127 *Ibid.*

128 *Copyright Act*, *supra* note 4, s 3(1).

129 *Ibid.*

There have been alternating approaches worldwide in response to the rising infringement concerns over data mining for purposes that are not entirely for research. In Japan and the Republic of Singapore, exceptions have already been established to allow TDM reproductions, mainly for the purposes of advancing AI development.[130] In the European Union, TDM for commercial purposes is allowed unless the rights holder expressly opts-out of the TDM process.[131] In the United Kingdom, there was a proposal to allow computational analysis, such as processing data for AI training, as a TDM exception as long as the company had lawful access to a dataset.[132] This proposal was withdrawn, leaving mining for non-commercial purposes as the only exception to TDM in the United Kingdom.[133] Had this proposal been implemented, the exemption would have allowed for a speedier and cheaper TDM process, while consequently restricting rights holders from charging additional licence fees for those who mine their data rather than merely accessing it.[134]

If such an exception was made in Canada, artists would no longer have control over their works once they post them online, such as on social media platforms like Instagram and X. This is highly disadvantageous to artists in the current digital era, many of whom rely on social media exposure to garner work and establish their standing in the art world. Moreover, under such exceptions, works posted behind a paywall could legally be extracted and used as long as there was payment for access. This would likely eliminate any need or demand for licensing, a system that allows artists to be paid if their content is being used.[135]

It is challenging to prove copyright infringement from TDM if generative AI does not substantially reproduce the data used.[136] This challenge continues in copyright infringement for generated images due to the lack of precedent in copyright and AI, a subjective element to substantial similarity in art styles, and difficulty in proving the defendants had access to the plaintiff's work. Therefore, safeguards should be established to protect artists' rights before the work is accessed. Artists should have autonomy over who can use their work and how it is used.

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130 Rachel Montagnon & Sungmin Cho, "UK withdraws plans for broader Text and Data Mining (TDM) copyright and database right exception" (1 March 2023), online: <hsfnotes.com/ip/2023/03/01/uk-withdraws-plans-for-broader-text-and-data-mining-tdm-copyright-and-database-right-exception/> [perma.cc/X6GH-ZTKG].

131 European Union, *Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, [2019] OJ, L 130/92 at art 4.

132 *Ibid.*

133 *Ibid*.

134 James Marsden & Anna Copeman, "UK government announces new text and data mining copyright exception in response to AI and IP consultation" (14 July 2022), online: <dentons.com/en/insights/articles/2022/july/14/uk-government-announces-new-text-and-data-mining-copyright-exception> [perma.cc/8BPK-RD76].

135 Society of Composers, Authors and Music Publishers of Canada, *supra* note 114.

136 Jordan Geist, "Fair Use and AI: The Case for a Broad Text and Data Mining Exception" (25 February 2024), online: <cippic.ca/articles/fair-use-and-ai-the-case-for-a-broad-text-and-data-mining-exception> [perma.cc/HC5N-YKKE].

B. Transparency and Disclosure

The most significant impediment preventing artists from arguing for their rights or even simply negotiating with AI platforms are the platforms' lack of transparency and disclosure. Since AI companies do not publicly name the artists or sources used to train their programs, there is no concrete way to determine whether an AI company has accessed or used artwork.[137] Therefore, Canada should require transparency from AI companies from the start, rather than requiring disclosure once the company is called to the courtroom.

The current lack of transparency not only makes it difficult to prove access in court, but also takes away the foundation to negotiate licensing terms.[138] If there is no proof that AI companies are using works, then there is no reason for them to pay for licences. Instead of the artists having to investigate whether their art is being used, AI companies should be required to provide their artwork sources. If there are no copyright infringements, there should be no disincentive to releasing creators' names that are used in datasets. The excessive number of names the company would have to list should not be a valid excuse. Failure to properly document datasets and their origins should not be rewarded by being excused from accountability.

C. Licensing Models

Lastly, instead of finding ways to allow AI to develop with minimal restrictions to promote innovation, the focus should shift to a solution that remunerates artists while fostering scientific advancement. Licensing is likely the most feasible answer; it would require AI companies to seek permission and pay for usage and would allow artists to be aware of how their works are being used while also generating revenue. If permission is denied and the work is processed anyways, the AI developers should be liable for copyright infringement like any other defendant.[139] The progress of science should not come at the unfair expense of artists, as this would undermine the balance between promoting public interest and fairly rewarding creators.[140] In particular, corporations with commercial motives should not be allowed to operate without compensating the artists whose works helped train the models under the justification of public interest and technological advancements.[141]

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137 *Ibid*.

138 Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC), "CARFAC-RAAV's recommendations regarding AI and visual artists" (30 January 2024), online: <carfac.ca/news/2024/01/30/carfac-raavs-recommendations-regarding-ai-and-visual-artists/> [perma.cc/VVE8-2U4H].

139 Society of Composers, Authors and Music Publishers of Canada, *supra* note 114.

140 *SOCAN*, *supra* note 3 at para 40.

141 The Writers' Union of Canada, "Consultation on Copyright in the Age of Generative Artificial Intelligence- Summary Position" (December 2023), online (pdf): <writersunion.ca/sites/default/files/2024-02/TWUC%20Submission%20AI%20Final.pdf> [perma.cc/C5JQ-XU5H].

CONCLUSION

Despite there being no Canadian case law or legislation specific to AI and copyright, this paper concludes that there are strong factual and legal bases that generative AI does infringe on artists' rights. A copyright owner's exclusive right to reproduce is likely breached when their work is downloaded and stored from datasets in order to train AI models. This right may also be infringed through the production of an AI image if the image is substantially similar to the unique elements of an artist's style and previous work(s). This copying is even more likely to infringe copyright when an artist's works are used to train an AI model and when their names are used in the prompt to specifically request images in their style.

It is undeniable that AI's ability to take a text prompt and generate an image through correlation is an extraordinary and remarkable scientific achievement. Even so, it is important that generative AI is regulated for both legal and ethical reasons. Allowing AI to continue to advance could hinder innovation as generative AI is founded on the copying of human expression. If AI companies continue to freely infringe artists' rights, then there is no incentive for artists to continue creating new forms of art and posting them online as it would feed into the development of the very program that is negatively impacting their careers. If there is no new expression, there would be no growth in generative AI as there is no new material for the program to learn from. Since AI images are the reproduction of numerous original artwork without contributing any form of original expression, it would be recycling the same content with no advancements.

Copyright law must balance the ambition for innovation with the detrimental effects of overlooking creator rights. Regulations and policies should be established to compensate creators for their involuntary contributions to the creation of generative AI and ensure applicable legal repercussions are faced by AI companies like any other defendant violating copyright. As revolutionary as AI models are, it is crucial to not lose focus on one of copyright law's main purposes: to reward creators for their original expression by granting them exclusive rights and protection of their work.

ARTICLE

PETROWEST, PARAMOUNTCY, AND THE SINGLE PROCEEDING MODEL

Liam Byrne *

CITED: (2025) 30 *Appeal* 52

ABSTRACT

The single proceeding model ("SPM") in insolvency law seeks to make insolvency proceedings faster and more efficient by concentrating claims related to one insolvency into one single legal proceeding. The SPM is not explicitly included in Canada's two federal insolvency statutes, the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, but is instead a principle that courts have developed through case law and justified through provisions that give judges discretionary power in insolvency proceedings. However, the SPM occasionally conflicts with provincial legislation. This notably occurred in the Supreme Court of Canada case *Peace River Hydro Partners v Petrowest Corp* where British Columbia's *Arbitration Act* collided with the single proceeding model. Instead of applying paramountcy to have the federal insolvency statute prevail over the *Arbitration Act*, the Supreme Court of Canada sidestepped the issue by interpreting the *Arbitration Act* in a manner that avoided any conflict between the *Arbitration Act* and the SPM, but also allowed them to follow the SPM. This is not an isolated incident as other courts have also avoided applying paramountcy when using the SPM as a justification for overriding provincial legislation.

This paper argues that this approach is unsustainable in the long term and eventually the courts will have to rely on paramountcy to implement the SPM in a scenario where the SPM conflicts with provincial legislation. In the context of the *Bankruptcy and Insolvency Act*, the SPM would likely not prevail as the two provisions used to implement it, sections 183(1) and 243, have been interpreted in a manner that make their success in a paramountcy analysis questionable. The paper concludes by arguing that codification of the SPM would be desirable to ensure that the single proceeding model would prevail in a paramountcy analysis.

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INTRODUCTION

The single proceeding model (the "SPM") is a crucial component of Canadian insolvency law. It centralizes legal actions related to an insolvency into either a *Bankruptcy and Insolvency Act* ("*BIA*") or *Companies' Creditors Arrangement Act* ("*CCAA*") proceeding.[1] This allows for more efficient insolvency proceedings by preventing each individual stakeholder from starting a separate action against the debtor to realize their claim.[2] Traditionally, the SPM was seen as being a "shield" to protect a debtor from creditors; however, recently it has also acted as a "sword" allowing debtors to initiate claims within the insolvency proceedings against third parties as long as that third party is not a "stranger" to the insolvency proceedings.[3]

Despite the SPM's importance in Canadian insolvency law, it is not expressly included in any provision of the *BIA* or the *CCAA*; instead, it is a "judicial construct."[4] This lack of explicit inclusion means judges must rely on various discretionary provisions to provide statutory backing to their decisions relating to the SPM. Sections 183(1) and 243 of the *BIA* and section 11 of the *CCAA* have all been used to provide backing to the SPM.[5] These sections are discretionary relief provisions that allow courts to provide relief not explicitly considered in the statutes.[6]

Recently, the SPM has been invoked in three *BIA* decisions to override provincial statutes and bring legal actions into the insolvency proceedings. The most prominent of these decisions is the Supreme Court of Canada's ("SCC") decision in *Peace River Hydro Partners v Petrowest Corp* ("*Petrowest*") where the SPM prevailed over a provincial arbitration act.[7] *Re Mundo Media Ltd* ("*Mundo*") is an Ontario Court of Appeal ("ONCA") decision which mirrors *Petrowest* as it also has the SPM prevailing over a provincial arbitration act.[8] Finally, in the Saskatchewan Court of King's Bench's ("SKKB") decision *Re Tron Construction* ("*Tron*"), the SPM was used to overide provincial lien legislation.[9]

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1 *Sam Lévy & Associés Inc v Azco Mining Inc*, 2001 SCC 92 at paras 26–27; *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paras 54–55 [*Petrowest*]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]; *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

2 *Petrowest*, *supra* note 1 at para 55.

3 *Mundo Media Ltd (Re)*, 2022 ONCA 607 at para 52 [*Mundo*]; *Petrowest*, *supra* note 1 at paras 34–35; *Tron Construction (Re)*, 2022 SKKB 203 at para 53 [*Tron*].

4 *Mundo*, *supra* note 3 at para 40. The stay provisions found in *BIA*, *supra* note 1, s 69(1) and *CCAA*, *supra* note 1, s 11.02 do provide statutory support for the "shield" view of the SPM as they explicitly prevent creditors from commencing actions against the debtor outside the insolvency proceedings if a stay is in place. However, these provisions only relate to creditors claiming against the debtor and provide no statutory support for allowing the debtor to centralize other types of legal proceedings, like claims against third parties, within insolvency proceedings.

5 *BIA*, *supra* note 1, ss 183(1), 243; *CCAA*, *supra* note 1, s 11.

6 Eamonn Watson, Gray Monczka & Jordan Schultz, "Anything You Can Do, I Can Do Better: Does the CCAA Provide Broader Discretionary Relief than the BIA?" (2022) 20 Annual Rev Insolvency L at 12–13, 41–43 (CanLII PDF).

7 *Petrowest*, *supra* note 1.

8 *Mundo*, *supra* note 3.

9 *Tron*, *supra* note 3.

The most interesting aspect of these cases is their avoidance of paramountcy.[10] The paramountcy doctrine holds that where there is a conflict between federal and provincial law and both laws are *intra vires*, the federal law will prevail, and the provincial law will be inoperative to the extent of the conflict.[11] As a federal statute, the *BIA* can override provincial statutes that come into meaningful conflict with it, but in all three cases the courts avoided invoking paramountcy. In *Petrowest* and *Mundo*, the courts avoided the use of paramountcy through clever interpretation of the provincial arbitration acts. In *Tron*, the court did not conduct a paramountcy analysis as it seems that no party seriously contested the court's jurisdiction to override the provincial act.[12]

This paper demonstrates that courts will, at some point, have to turn to paramountcy to give effect to the SPM in the *BIA* context, and there will be significant issues in using section 183(1) as the statutory backing for the SPM. I conclude by proposing that the SPM be codified into the *BIA* to provide greater certainty and enforceability to an important insolvency law concept. First, I will briefly summarize *Petrowest, Mundo,* and *Tron* to illustrate where the SPM conflicted with provincial legislation and how courts have avoided relying on paramountcy to deal with these conflicts thus far.

I. RECENT DEVELOPMENTS IN THE USE OF THE SPM

A. *Peace River Hydro Partners v Petrowest Corp*

In *Petrowest,* a receiver brought a claim within *BIA* proceedings against the debtor's former clients for amounts owing for previously completed work.[13] However, the debtor and their client had an arbitration agreement specifying that all disputes must be settled through arbitration.[14] Under section 15(1) of the British Columbia *Arbitration Act* ("*BCAA*"), if an arbitration agreement applies to a claim, a court must stay the claim so arbitration can occur—in a process called an "arbitration stay."[15] There is a carveout in section 15(2) that states a court does not have to order an arbitration stay if the arbitration agreement is "void, inoperative or incapable of being performed."[16] The debtor's client applied to stay the proceedings to allow arbitration to occur, and thus put the SPM into conflict with the *BCAA*.

To resolve this conflict between a federal and provincial statute, the SCC did not employ paramountcy. Instead, the Court stated that sections 243(1)(c) and 183(1) of the *BIA* provide

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10 It is also somewhat concerning as it circumvents the requirement that notice be given to the Federal and Provincial Attorney Generals before a provincial act is made inapplicable by a federal act. For examples see *Constitutional Question Act*, RSBC 1996, c 68, s 8(2); *Courts of Justice Act*, RSO 1990, c C.43, s 109(1); *The Constitutional Questions Act*, 2012, SS 2012, c C-29.01, s 13.

11 *Alberta (AG) v Moloney*, 2015 SCC 51 at paras 15–16, 90 [*Moloney*].

12 *Tron*, *supra* note 3 at para 15.

13 *Petrowest*, *supra* note 1 at para 3.

14 *Ibid.*

15 *Arbitration Act*, RSBC 1996, c 55, s 15(1) [*BCAA*]. In 2020, British Columbia adopted a new Arbitration Act, *Arbitration Act*, SBC 2020, c 2. *Petrowest* was litigated under the previous act, but s 15 of the old act remains substantially unchanged in s 7 of the new act.

16 *Ibid*, s 15(2).

statutory jurisdiction for a court to find an arbitration agreement "inoperative" thereby allowing the application of the stay exception in section 15(2) of the *BCAA*.[17] The SCC specified that this is a discretionary power that a judge should only invoke when the arbitration would "compromise the orderly and efficient resolution of insolvency proceedings."[18] In this case, the Court concluded it was appropriate to exercise that discretion to enforce the SPM, as this would increase the efficiency and lower the cost of the insolvency process.[19]

B. *Mundo Media Ltd (Re)*

As *Petrowest* was being decided by the SCC, *Mundo* was undergoing its own proceedings. The situation mirrored *Petrowest*: a receiver was claiming against a third party to collect funds owed, and the third party sought to rely on an arbitration agreement to move the proceedings from *BIA* proceedings into arbitration.[20] Unlike *Petrowest*, which dealt with the *BCAA,* the relevant statute in *Mundo* was the Ontario *International Commercial Arbitration Act* ("*ICAA*"), as this was an Ontario proceeding dealing with an international arbitration agreement.[21]

The *ICAA* has nearly identical wording to the *BCAA* in that it requires a court to order a stay if an arbitration agreement applies unless the agreement "is null and void, inoperative or incapable of being performed." [22] Using nearly the exact same logic as *Petrowest,* the ONCA concluded that *BIA* section 243 could be utilized to render an arbitration agreement inoperative to advance the objectives of the SPM.[23]

C. *Tron Construction (Re)*

Tron differs in that it was a *BIA* proposal proceeding and involved a provincial statute unrelated to arbitration. In this case, a party applied to the court overseeing the proceedings to replace the lien claims process prescribed by the Ontario *Construction Act* ("*OCA*") with an alternative process to be administered by the overseeing judge.[24] To support their application, the applicant cited the SPM as a justification for overriding the *OCA*.[25]

For the sake of costs, efficiency, and adherence to the SPM, the SKKB utilized *BIA* section 183(1) to supplant the *OCA* process and ordered an alternative process.[26] In taking this action, the court overrode a provincial statute, yet—surprisingly—paramountcy was not discussed at all.

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17 *Petrowest*, *supra* note 1 at para 149.
18 *Ibid* at para 155.
19 *Ibid* at paras 173–180.
20 *Mundo*, *supra* note 3 at paras 3–4.
21 *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sched 5 [*ICAA*].
22 *Ibid*, art 8.
23 *Mundo*, *supra* note 3 at para 37.
24 *Tron*, *supra* note 3 at paras 1–11; *Construction Act*, RSO 1990, c C.30.
25 *Tron*, *supra* note 3 at para 22.
26 *Ibid* at paras 11, 18, 47–55, 60, 68. The alternate process was the creation of a summary claims process administered by the proposal trustee, instead of the usual procedure under the *OCA*.

It appears that no party made any forceful arguments on this point, which might explain why the court did not discuss paramountcy.[27] Nevertheless, it is surprising that the court would be willing to override a provincial statue without even a cursory paramountcy analysis.[28]

II. DISCUSSION

As demonstrated from these decisions, courts have used *BIA* sections 183(1) and 243 to give effect to the SPM when confronted with provincial statutes that would impede its application. So far, they have managed to do this without conducting a paramountcy analysis. However, the current avoidance of paramountcy is likely not sustainable in the long term.

A. Other Provincial Arbitration Acts

In *Petrowest* and *Mundo*, the SCC and the ONCA preserved the SPM despite conflicts with provincial arbitration acts by leveraging statutory exceptions allowing a judge to not order an arbitration stay if the arbitration agreement is "void, inoperative or incapable of being performed."[29] In both cases, the courts relied on the term "inoperative" to exercise their statutory discretion to render the arbitration agreements inoperative.[30] This method enabled them to enforce the SPM while avoiding a direct conflict between the *BIA* and the arbitration acts. By avoiding a conflict, the courts avoided paramountcy analyses that would normally have to be conducted for the *BIA* to prevail over the provincial arbitration acts.[31]

However, this approach is likely not applicable nationwide because other provincial arbitration acts have stricter standards than the *BCAA* and *ICAA* for when a judge can decline to order an arbitration stay.[32] For example, instead of "void, inoperative or incapable of being performed," the Alberta and Ontario arbitration acts only allow a judge to decline to order an arbitration stay if the arbitration agreement is "invalid."[33] This stricter standard likely means that the same approach taken in *Petrowest* and *Mundo* cannot be applied to situations involving the Alberta and Ontario arbitration acts.[34]

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27 *Ibid* at para 14.

28 For another example of where a court overrode provincial lien legislation in insolvency proceedings without providing a paramountcy analysis see *Royal Bank of Canada v M&L General Contracting Ltd* (17 March 2015), Winnipeg CI14-01-90850 (MBQB). This case was discussed in *Tron*, *supra* note 3 at para 75. No reasons were provided, but in this case, the Manitoba Court of Queen's Bench granted an order creating a procedure for determining claims against trusts created under Manitoba's *Builder's Liens Act* even though the *Builder's Liens Act* did not contemplate such a procedure.

29 *BCAA*, *supra* note 15, s 15; *ICAA*, *supra* note 21, art 8.

30 *Mundo*, *supra* note 3 at para 37; *Petrowest*, *supra* note 1 at para 152.

31 *Petrowest*, *supra* note 1 at para 129.

32 Virginia Torrie & Laurent Crépeau, "Peace River Hydro Partners v. Petrowest: Arbitration and Insolvency – Two Solitudes?" (2023) 67:2 Can Bus LJ 213 at 227–228 (Physical Copy); Ari Y Sorek & Benjamin Dionne, "Peace River Hydro Partners v Petrowest Corp: Opening the Floodgates for Forum Selection Clauses, or a Meandering Return to the Headwaters of the 'Single-Control Doctrine'?" (2023) 21 Annual Rev Insolvency L at 13–14 (CanLII PDF).

33 *Arbitration Act*, RSA 2000, c A-43, s 7(2); *Arbitration Act*, 1991, SO 1991, c 17, s 7(2).

34 Torrie & Crépeau, *supra* note 32 at 227–228; Sorek & Dionne, *supra* note 32 at 13–14.

This is supported by the definition of "invalid" and the SCC's statements in *Petrowest*. Black's Law Dictionary defines "invalid agreement" as being synonymous with "void or voidable" agreement.[35] In *Petrowest*, the SCC stated that an arbitration agreement will only be found void if it was "'intrinsically defective' (and therefore void *ab initio*) according to the usual rules of contract law."[36] Section 183(1) or 243 of the *BIA* would not be able to make an agreement void at conception, and therefore, under the Alberta or Ontario arbitration acts, judges seem to be mandated to provide the arbitration stay regardless of ongoing insolvency proceedings.

B. Paramountcy

This opens the door for paramountcy to play a role in resolving SPM conflicts between the *BIA* and provincial arbitration acts. Paramountcy will also have to be considered if someone challenges a court's jurisdiction to issue an order overriding a provincial statute—similar to what happened in *Tron*. Paramountcy applies when either "(1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment."[37] If paramountcy applies, then the provincial law is made inoperative to the extent of the conflict.

The SPM is a "judicial construct," meaning it needs statutory backing to be successful in a paramountcy analysis as a court's inherent jurisdiction cannot override provincial statues.[38] There is no explicit *BIA* section that codifies the SPM, so judges will have to rely on discretionary sections of the *BIA* to give effect to the SPM.[39]

The primary source of discretionary power in the *BIA* is section 183(1).[40] Section 183(1) vests in the superior courts of each province "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction."[41] The courts have interpreted this provision as constituting a broad grant of powers allowing them to make various types of orders that further the objectives of the *BIA* and that are not explicitly contemplated within

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35 Bryan A Garner, *Black's Law Dictionary*, (St. Paul, Minn: Thomson West, 2019) sub verbo "invalid agreement."

36 *Petrowest*, *supra* note 1 at para 136.

37 *Moloney*, *supra* note 11 at para 18.

38 *Baxter Student Housing Ltd v College Housing Co-operative Ltd*, 1975 CanLII 164 (SCC) at 480–481; Sam Babe, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring", (2020) Annual Rev Insolvency L at 25–26 (CanLII PDF); *Mundo*, *supra* note 3 at para 40; *Alderbridge Way GP Ltd (Re)*, 2023 BCSC 1718 at para 46, *Alderbridge* is in the *CCAA* context but it confirms that the SPM itself is not a jurisdictional basis to issue an order.

39 See *Tron*, *supra* note 3 at para 15 where the court states "[a]bsent s. 183(1), it is doubtful that this Court would have jurisdiction" to issue an order circumventing the *OCA*." It can be argued that the *BIA* stay sections are a codification of the SPM. However, that only applies to creditor claims against the debtor and not the expanded "sword" basis the SPM is now understood as encompassing.

40 Watson, Monczka & Schultz, *supra* note 6 at 25.

41 *BIA*, *supra* note 1, s 183.

the *BIA*, such as reverse vesting orders ("RVO").[42] However, the exact scope of the powers that Parliament intended to grant through section 183(1) remains unclear, and section 183(1) has not previously been considered in a paramountcy analysis.[43] This vague purpose and lack of precedent makes it difficult to imagine how a court would conduct a paramountcy analysis involving section 183(1).

Fortunately, the SCC has considered an alternative source of discretion within the *BIA* in a paramountcy analysis—section 243. Section 243 provides courts with discretion to appoint a receiver over the debtor and order the receiver to, among other things, "take any other action that the court considers advisable."[44] Section 243 has been interpreted to give courts the jurisdiction to make orders not explicitly contemplated within the *BIA*, such as granting a vesting order that transfers property free and clear of encumbrances.[45]

In *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd* ("*Lemare*"), the SCC considered section 243 in the context of a paramountcy analysis.[46] As will be discussed, the SCC's decision in *Lemare* precludes using section 243 to enforce the SPM in a conflict with provincial legislation. However, the SCC's consideration of section 243 in a paramountcy analysis can provide insight into how courts would consider a similar issue involving section 183(1).

In *Lemare*, the SCC considered paramountcy in a conflict between section 243 and the *Saskatchewan Farm Security Act* ("*SFSA*").[47] The *SFSA* stipulated that a receiver could not be appointed over a farmer's land until the expiry of a 150-day grace period. As section 243 provides that a receiver can be appointed after a ten-day waiting period, this discrepancy created a potential conflict between the *BIA* and *SFSA*.

The SCC determined that there was no operational conflict between the laws that would require paramountcy because creditors could choose not to appoint a receiver until the conditions in the *SFSA* were met.[48] Additionally, the SCC concluded that the *SFSA* did not conflict with the purpose of section 243 because the SCC narrowly defined section 243's

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42 *PaySlate Inc (Re)*, 2023 BCSC 608 at paras 82–85 [*PaySlate*]; *KW Capital Partners Limited v Vert Infrastructure Ltd* (8 June 2021), Toronto CV-20-00642256-00CL (ONSC (CL)); *Proposition de Brunswick Health Group Inc*, 2023 QCCS 4643 at paras 48–52; Victor Olusegun, "The Journey of Reverse Vesting Orders from "Extraordinary" to Ordinary: Is it Time for Parliamentary Intervention?" (2024) Annual Rev Insolvency L at 8–11 (CanLII PDF).

43 Thomas GW Telfer, "Equitable Subordination Redux? Section 183 of the *Bankruptcy and Insolvency Act* and Respecting the 'Legislative Will' of Parliament" (2021) 64:3 Can Bus LJ 316 at 325 (Physical Copy).

44 *BIA*, *supra* note 1, s 243.

45 *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at paras 76, 84, 87.

46 *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 [*Lemare*].

47 *Ibid* at paras 1–4.

48 *Ibid* at para 25. This statement is consistent with previous SCC jurisprudence that when there is a provincial act that is stricter than a federal act no operational conflict will be found unless the provincial act frustrates the federal act's purpose. See *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 at paras 22–24.

purpose as allowing for the appointment of a national receiver.[49] Such an interpretation is logical considering the history of section 243. Prior to the 2009 amendments that added section 243 to the *BIA*, courts had used section 47 of the *BIA* to create national receiverships.[50] One could argue that invoking section 47 for this purpose was somewhat tenuous, as the provision was intended to apply only to interim receiverships of limited duration.[51] The enactment of section 243 gave national receiverships a stronger legal justification. However, the SCC's narrow interpretation of section 243's purpose in *Lemare*—to only allowing for national receiverships—means that it would not be able to serve as statutory backing for the SPM in a paramountcy analysis.

In making their decision, the majority stated that "[v]ague and imprecise notions like timeliness or effectiveness cannot amount to an overarching federal purpose that would prevent coexistence with provincial laws like the *SFSA*."[52] The Court also stated that "[a] judicially coined expression, however magnetically phrased, that describes judicial practices in the context of restructurings, can hardly be said to be evidence of the legislative purpose of a national receivership regime."[53]

Applying *Lemare* to a potential paramountcy conflict between the SPM effected through section 183(1) and a provincial act leads to the conclusion that the provincial act is likely to prevail. The SCC's statement that an operational conflict between a discretionary *BIA* section and a provincial statute can be resolved by a party refraining from applying for the discretionary remedy appears to preclude any success for section 183(1) under the operational conflict branch of paramountcy.[54] For example, applying this principle to *Tron*, there would be no operational conflict as the applicant could have avoided the conflict by not applying to the court for an order under section 183(1) to override the *OCA*.

This suggests that the only path for section 183(1) to prevail in a paramountcy analysis would be through the frustration of federal purpose branch. The issue here is that the legislative purpose of section 183(1) is unclear. When section 183(1) was originally enacted, its purpose

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49 *Ibid* at para 68.

50 Kevin P McElcheran, *Commercial Insolvency in Canada*, 4th ed (Toronto: LexisNexis, 2019) at paras 4.185–4.186.

51 Roderick J Wood, "The Incremental Evolution of National Receivership Law and the Elusive Search for Federal Purpose" (2017) 26:1 *Const Forum* at 2 (CanLII PDF).

52 *Lemare*, *supra* note 46 at para 68.

53 *Ibid* at para 41, here the SCC was making specific reference to the phrases "real-time litigation" and the "hothouse of real-time litigation" that are often used to explain why judges are given such discretionary power in insolvency proceedings.

54 *Ibid* at paras 25, 47, 48. There is a potential alternative argument that the paramountcy issue could be solved by preventing a party from applying for a stay order under an arbitration act similarly to how the SCC prevented a party from applying under the *BIA* to appoint a receiver in *Lemare*. However, this would be a misunderstanding of the nature of the stay provisions contained in arbitration acts. Stay provisions in arbitration acts are mandatory provisions that judges must follow unless a statutory exception applies, see *TELUS Communications Inc v Wellman*, 2019 SCC 19 at paras 63–65. Therefore, the approach taken in *Lemare* could not be applied to arbitration stay applications as arbitration stay provisions are not discretionary provisions in contrast to *BIA* receivership applications which are discretionary.

was to empower the newly created and short-lived Bankruptcy Courts.[55] Parliament kept section 183(1) after the demise of the Bankruptcy Courts suggesting that the provision represents some grant of jurisdiction, but the scope of that grant is unclear.[56] There is no evidence that Parliament's purpose in enacting section 183(1) was to provide statutory backing for the SPM.

In *Lemare,* the SCC stated that phrases like "timeliness or effectiveness" are too vague to serve as the federal purpose in a paramountcy analysis.[57] Previously, the SCC identified the SPM's purpose as providing efficiency and orderliness to the insolvency system.[58] This suggests that using the SPM's purpose as the federal purpose of section 183(1) would not help in a paramountcy analysis as the SPM's purpose is too vague to be used as a federal purpose. Also in *Lemare*, the SCC stated that a "judicially coined expression" cannot substitute for evidence of the legislative purpose of a provision.[59] The SPM itself is a judicially coined expression and, as such, would not be able to act as a federal purpose for section 183(1).[60] Therefore, there would likely be significant difficulties in using section 183(1) to uphold the SPM in a scenario where paramountcy is required.

C. Discretion in the *CCAA* and Paramountcy

In comparison to the *BIA*, the *CCAA* jurisprudence is very clear that orders made under section 11 of the *CCAA* have paramountcy over provincial legislation, including provincial arbitration acts.[61] This is because courts have identified section 11's purpose as being to grant courts "broad and liberal powers" to preserve and enhance an insolvent corporation's value.[62]

The courts' treatment of *CCAA* section 11 is important to understanding how a court may interpret *BIA* section 183(1) because there is currently a strong trend of harmonization between the *BIA* and the *CCAA*, particularly in regards to the discretionary powers available under each statute.[63] This follows from the SCC's statement in *Century Services Inc v Canada (AG)* that the two statutes should be considered in a harmonious fashion.[64] In *Tron*, the court pointed to harmonization when using section 183(1) to override the *OCA* because in

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55 Telfer, *supra* note 43 at 321–325.

56 *Ibid* at 325.

57 *Lemare*, *supra* note 46 at para 68.

58 *Century Services Inc v Canada (AG)*, 2010 SCC 60 at para 22 [*Century Services*].

59 *Lemare*, *supra* note 46 at para 41.

60 *Tron*, *supra* note 3 at para 15.

61 See *Hy Bloom inc v Banque Nationale du Canada*, 2010 QCCS 737 at paras 116–117; *Chef Ready Foods Ltd v Hongkong Bank of Canada*, 1990 CanLII 529 (BCCA); *Pacific National Lease Holding Corp v Sun Life Trust Co*, 1995 CanLII 2575 (BCCA) at paras 40–43; for arbitration acts see *Luscar Ltd v Smoky River Coal Limited*, 1999 ABCA 179 at paras 73–75.

62 *Sulphur Corporation of Canada Ltd*, 2002 ABQB 682 at paras 25–33 [*Sulphur*].

63 Watson, Monczka & Schultz, *supra* note 6 at 38–40; Roderick J Wood, "'Come a Little Bit Closer': Convergence and its Limits in Canadian Restructuring Law" (2021) J Insolvency Institute Can at 1 (Westlaw PDF).

64 *Century Services*, *supra* note 58 at para 24.

Re Comstock a *CCAA* court had used its discretion to override provincial lien legislation.[65] This suggests that a paramountcy analysis could be resolved by arguing that the goal of consistent application requires section 183(1) to be able to override provincial statutes. Similar logic has led to RVOs being ordered under section 183(1).[66]

However, this harmonization argument has two weaknesses. Firstly, it can be argued that the two statutes can be distinguished by the greater extrinsic evidence of Parliament's intention in enacting the *CCAA* than in enacting *BIA* section 183(1).[67] It may be justified to say that Parliament's purpose in section 11 was to grant courts broad discretionary power without being limited by provincial statutes.[68] However, as previously discussed, section 183(1)'s legislative purpose is unclear. The SCC has stated, "absent clear evidence that Parliament intended a broader statutory purpose, courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation."[69] The lack of clear evidence on what jurisdiction Parliament meant to grant courts through section 183(1) precludes section 183(1) from being applied in the same manner as *CCAA* section 11. The SCC's statements about harmonization are not enough to substitute for this lack of clear evidence as "judicially coined" expressions cannot substitute for evidence of the legislative purpose of a provision.[70]

Secondly, the SCC has repeatedly identified the *CCAA* as providing greater judicial discretion than the *BIA*.[71] Logically, this means harmonization has limits, and that there are orders that can be ordered under section 11 that cannot be ordered under section 183(1). This could include orders that override provincial statutes.

CONCLUSION: NEED FOR CODIFICATION

I have shown that implementing the SPM through section 183(1) is not sustainable long-term. Both the unclear legislative purpose of section 183(1) and the ability of judges to avoid operational conflict with provincial statutes by not exercising their discretion complicate the paramountcy analysis of section 183(1). Additionally, harmonization of the *BIA* and the *CCAA* will likely not be sufficient to justify section 183(1) prevailing over provincial statutes.

Even if the SPM could be enforced through section 183(1) through judicial pragmatism, this is undesirable. The SPM is a crucial part of insolvency law and should be enforced through a Parliament-created mechanism that is clear on when and where the SPM applies. Codifying the SPM into the *BIA* would provide this certainty. This provision should grant judges the discretion to stay the enforcement of provincial statutes that disrupt the orderly and efficient

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65 *Tron*, *supra* note 3 at para 22; John Margie, "Comstock Canada Ltd. (Re), A Model of Efficiency" (2015) 63 J Can College Construction Lawyers at 13–16 (Westlaw PDF).

66 *PaySlate*, *supra* note 42 at paras 81–85.

67 Wood, *supra* note 51 at 5.

68 *Sulphur*, *supra* note 62 at paras 35–37.

69 *Lemare*, *supra* note 46 at para 23.

70 *Ibid* at para 41.

71 *Century Services*, *supra* note 58 at para 14; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 73.

resolution of an insolvency matter by creating a parallel proceeding.[72] This would centralize all appropriate legal actions into the insolvency proceedings, thereby achieving the goal of the SPM. There is precedent for codifying concepts that developed in the jurisprudence into the *BIA* to provide greater certainty, and the SPM would benefit from this approach as well.[73]

72 This is more or less an adoption of the SCC's test in *Petrowest* for where it is appropriate to make an arbitration agreement inoperative, see *Petrowest*, *supra* note 1 at para 155. Parliament could also consider whether to provide powers related to federal statutes, which would not be subject to the paramountcy issue but still require clear guidance from Parliament regarding which statute is to take precedence and in what circumstances.

73 For example, see the development of interim financing in the case law and later its explicit amendment into the *BIA* in Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 2nd Sess, 39th Parl, 2007, cl 18 (assented to 14 December 2007), SC 2007, c 36.

ARTICLE

DOES CANADA'S REGISTERED CHARITY REGIME WITHSTAND CHARTER SCRUTINY? THE INTERPLAY BETWEEN CHARITIES, POLITICS, AND FREEDOM OF EXPRESSION FOLLOWING CANADA WITHOUT POVERTY

Megan Walwyn *

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ABSTRACT

In the 2018 decision *Canada Without Poverty v AG Canada*, the Ontario Superior Court of Justice ("ONSC") held that the former iteration of subsection 149.1(6.2) of the *Income Tax Act*, which limited registered charities to spending no more than 10 percent of their resources on non-partisan political activities, unjustifiably infringed the applicant charity's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "Charter"). This decision appears to leave the present subsection 149.1(6.2) vulnerable to a similar constitutional challenge, as it continues to restrict charities from engaging in partisan political activities and pursuing political purposes. Building on charity law scholar Kathryn Chan's paper "Constitutionalizing the Registered Charity Regime," this paper presents a hypothetical *Charter* challenge to test whether the amended subsection 149.1(6.2) could withstand a section 2(b) challenge and, if so, whether it could be justified under section 1. Through its *Charter* analysis, this paper critically examines the long-standing assumption that politics and charities are incompatible and evaluates justifications for maintaining the separation between politics and charities.

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INTRODUCTION

What is political?

This is the question that Justice Morgan of the Ontario Superior Court of Justice ("ONSC") led with in the 2018 decision *Canada Without Poverty v Attorney General of Canada*, ("*Canada Without Poverty*")[1] and is one that the voluntary sector and the Canadian government had grappled with for decades prior. In *Canada Without Poverty*, Justice Morgan found that paragraphs 149.1(6.2)(a) and (b) of the *Income Tax Act* ("*ITA*"),[2] which prohibited registered charities from devoting more than 10 percent of their resources to non-partisan political activities, unconstitutionally and unjustifiably infringed the applicant's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3] In doing so, he suddenly and unceremoniously brought an end to the long-established and controversial registered charity regime. Parliament was quick to respond with amendments to subsection 149.1(6.2) of the *ITA* that signified a new era of charities regulation in Canada.

The Canadian charitable sector celebrated these amendments. The changes to subsection 149.1(6.2) and the accompanying policy guidance provided directions and leniency for registered charities to participate in public policy development activities, thus reducing the chilling effect that the prior regime had on charitable advocacy. However, subsection 149.1(6.2) continues to restrict charities from engaging in partisan political activities and from pursuing any political purpose. The present regulatory scheme raises two critical questions that this paper seeks to address: do these remaining prohibitions on the expression of registered charities also violate section 2(b) of the *Charter*, and if so, can they be justified under section 1?

This paper first outlines the common law and statutory rules governing charities' political activities prior to and following *Canada Without Poverty*. Then, building on charity law scholar Kathryn Chan's paper "Constitutionalizing the Registered Charity Regime,"[4] this paper presents a hypothetical *Charter* challenge to test whether the current subsection 149.1(6.2) could withstand a section 2(b) challenge, and if so, whether the provision could be justified under section 1. The question at the heart of this paper is not quite "what is political?", as posed by Justice Morgan. Rather, this paper seeks to answer the questions: why are politics not charitable, and is this position constitutionally valid?

I. REGULATING CHARITIES' POLITICAL ACTIVITIES

A. Common Law Position: Prohibition Against Political Purposes

At common law, there are two criteria for a purpose to qualify as charitable: it must fall within one of the four broad categories of charity described in *Commissioners for Special Purposes*

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1 2018 ONSC 4147 [*Canada Without Poverty*].

2 RSC 1985, c 1 (5th Supp) [*ITA*].

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

4 Kathryn Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020) 6 Can J Comp & Contemporary L 151.

of Income Tax v Pemsel,[5] and it must provide a public benefit.[6] Regulating and limiting charities' political expression has been a long-standing concern in Canada. This stems from the common law doctrine of political purpose, which bars charities from pursuing political purposes.[7] The political purpose doctrine originated from *obiter dicta* in the 1917 House of Lords case *Bowman v Secular Society* ("*Bowman*"), wherein Lord Parker held that trusts with political objects have "always been held invalid," because courts cannot assess "whether a proposed change in the law will or will not be for the public benefit."[8]

Today, the leading case on the political purpose doctrine is *McGovern v Attorney General*, where Justice Slade held that trusts for political purposes were non-charitable.[9] Justice Slade employed logic akin to that of *Bowman* in finding that a court cannot assess a political purpose's public benefit, as required for a purpose to be considered charitable at law.[10]

B. Pre-*Canada Without Poverty* Political Activities Regulatory Scheme

Prior to 2018, subsections 149.1(6.1) and (6.2) of the *ITA* stipulated that charities could engage in limited non-partisan political activities, as long as "substantially all" of their activities were charitable (and thus non-political). As tax authorities generally interpret "substantially all" to mean over 90 percent, this is often referred to as the "10 percent rule."[11] As a matter of interpretation and enforcement, the Canada Revenue Agency (the "CRA") divided advocacy activities into two categories: submissions to the government and public advocacy.[12]

The CRA interpreted subsection 149.1(6.2) to mean that submissions directly to the government were entirely charitable and could be pursued by charities without limit, provided they were connected to the organization's purpose. However, the CRA considered advocacy that communicated similar policy messages to the public to be a political activity, subject to the 10 percent rule.[13] The CRA also required that less than 10 percent of the political activities be ancillary to the organization's charitable activities and that they be non-partisan, pursuant to paragraphs 149.1(6.2)(b) and (c) of the *ITA*. This rule applied regardless of whether the subject matter of the charity's advocacy fit within the pursuit of its charitable purpose.

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5 [1891] AC 531 (HL) [*Pemsel*]. The House of Lords articulated "four heads" of charitable purposes: (1) relief of poverty; (2) advancement of education; (3) advancement of religion; or (4) advancement of "other purposes beneficial to the community" (at 55).

6 *Oppenheim v Tobacco Securities Trust Co Ltd*, [1951] AC 297 (HL) at 307.

7 Adam Parachin, "Charity, Politics and Neutrality" (2015) 18 Charity L & Practice Rev 23 at 26 [Parachin, "Neutrality"].

8 *Bowman v Secular Society Ltd*, [1917] AC 406 (HL) at 442 [*Bowman*]. It is interesting to note that Lord Parker's remark was erroneous: See Adam Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2008) 45:4 Alta L Rev 871 at 877-880 [Parachin, "Politics of Purpose"].

9 *McGovern v Attorney General*, [1982] Ch 321 (HC) at 340.

10 *Ibid* at 336-337.

11 Samuel Singer, "Charity Law Reform in Canada: Moving from Patchwork to Substantive Reform" (2020) 57:3 Alta L Rev 683 at 694.

12 Canada Revenue Agency, *Political activities*, Policy Statement CPS-022 (Ottawa: Canada Revenue Agency, 2 September 2003).

13 *Ibid*.

The voluntary sector generally felt that this regulatory regime provided unclear guidance regarding political activities as it "marrie[d] imprecise rules with dire consequences for non-compliance."[14] Many charities complained of an "advocacy chill," whereby they reduced their advocacy work or refrained altogether for fear of having their registered charity status revoked.[15]

C. The *Canada Without Poverty* Decision

Canada Without Poverty ("CWP") is a non-profit corporation that has operated as a registered charity for over 45 years with the stated charitable purpose of "relieving poverty in Canada" by numerous means, including providing information to the government and public "to increase knowledge of poverty related issues and how to more effectively relieve poverty."[16] CWP engaged in public advocacy for "policy and attitudinal change."[17]

In 2014, the CRA audited CWP for the period of April 1, 2009 to March 31, 2012. The audit report concluded that "virtually all" of CWP's activities were communicative or expressive to the public, and thus all "political" in some sense of the word.[18] The Charities Directorate notified CWP that it intended to revoke its charitable status. CWP responded by filing a Notice of Application in the ONSC, seeking a declaration that subsection 149.1(6.2) of the *ITA* unjustifiably violated sections 2(b) and 2(d) of the *Charter*.

CWP argued that it was asserting a negative section 2(b) right: subsection 149.1(6.2) restricted expression "within an existing statutory scheme or platform" aiming to limit the "public communications of charities based on content."[19] CWP submitted that this restriction violated section 2(b) of the *Charter* and could not be justified under section 1. Conversely, the Attorney General of Canada argued that CWP was claiming a positive right to "government financial support through subsidized funding," by virtue of being granted registered charity status under the *ITA*.[20] The Attorney General submitted that subsection 149.1(6.2) did not violate section 2(b), but if it did, that it was justified under section 1.[21]

Justice Morgan ultimately held for the ONSC that subsection 149.1(6.2) and the CRA's 10 percent rule violated CWP's section 2(b) rights. However, Justice Morgan's reasons for judgment deviated significantly from both the parties' written submissions and the well-established legal framework for adjudicating freedom of expression claims.[22]

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14 Adam Parachin, *Charity versus Politics: Reforming the Judicial, Legislative and Administrative Treatment of the Charity-Politics Distinction* (Edmonton: The Pemsel Case Foundation, 2018) at 3 [Parachin, *Charity versus Politics*].

15 *Ibid*.

16 Chan, *supra* note 4 at 163, citing *Canada Without Poverty, supra* note 1 (Affidavit, Leilani Farha at para 4) and *Canada Without Poverty*, *supra* note 1 at para 14.

17 *Canada Without Poverty*, *supra* note 1 at para 12.

18 *Ibid* at paras 19, 11.

19 *Canada Without Poverty, supra* note 1 (Factum of the Applicant) at paras 51–54 [CWP Factum].

20 *Canada Without Poverty, supra* note 1 (Respondent's Memorandum of Fact and Law) at para 47 [AG Canada factum].

21 *Ibid* at paras 40–44, 51.

22 Chan, *supra* note 4 at 165.

Justice Morgan first discussed CWP's purposes and activities. He drew specific attention to CWP's submissions regarding the incoherence of the *ITA*'s distinction between non-partisan "political activities" and charitable activities, and noted that the CRA's interpretation and enforcement of subsection 149.1(6.2) "restrict[ed] virtually all of [CWP's] communications to the public regarding law reform or policy change."[23] He also highlighted the conclusion of a government report, which found that "the restrictions on political participation in subsection 149.1(6.2) of the *ITA* were outmoded and required legislative change."[24]

In his section 2(b) analysis, Justice Morgan made two significant factual findings: (i) that CWP could not pursue its "charitable purposes … while restricting its politically expressive activity to 10 percent of its resources as required by the CRA," and (ii) that CWP could not function, or would struggle to function, without registered charity status.[25] Justice Morgan did not explicitly determine whether CWP was claiming a positive or negative section 2(b) right. Ultimately, relying on section 2(a), 2(b), and 2(d) authorities, Justice Morgan held that the "shortcomings of [this] legislative regime undermine[d] or burden[ed]" CWP's exercise of its section 2(b) rights, impairing it from taking advantage of a "state supplied platform that it could otherwise freely access were it not for its insistence on exercising that right."[26] Justice Morgan concluded that subsection 149.1(6.2) and its accompanying policy measure infringed CWP's freedom of expression.

On the question of justification under section 1, Justice Morgan found that the Attorney General had failed to identify a pressing and substantial objective for the provision, contra both parties' written submissions.[27] The Attorney General submitted that the objective of subsection 149.1(6.1) was to permit registered charities to "use political means to further their views on matters pertaining to the wholly charitable ends, within reasonable limitations designed to ensure that those activities do not predominate."[28] Justice Morgan found that, read differently, this measure ensured "that registered charities [could not] engage in most political activities," and thus its objective was to "limit political expression" without further rationale.[29] Justice Morgan also noted that this purpose seemed to minimize the activity that the government supposedly sought to encourage—"a registered charity's ability to participate in public policy dialogue where these activities advance its charitable purpose."[30]

Without a pressing and substantial objective, Justice Morgan concluded that subsection 149.1(6.2) and the 10 percent rule unjustifiably violated CWP's right to freedom of expression

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23 *Canada Without Poverty*, *supra* note 1 at paras 18, 23.

24 *Ibid* at para 26, citing Canada Revenue Agency, "Report of the Consultation Panel on the Political Activities of Charities" (31 March 2017) at 5, online: <canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html> [perma.cc/7AWY-KN3G].

25 *Ibid* at paras 42–43.

26 *Ibid* at para 48.

27 *Ibid* at para 66; Chan, *supra* note 4 at 177.

28 *Ibid* at paras 53–54.

29 *Ibid* at paras 56–57.

30 *Ibid* at para 59.

under section 2(b) of the *Charter*.[31] The ONSC ordered an immediate declaration that the CRA cease to interpret and enforce subsection 149.1(6.2) with the "substantially all" requirement and that the phrase "charitable activities" used in that section be read to include unlimited non-partisan political activities.[32] This decision thus brought the long-established rules limiting the political activities of registered charities to an "abrupt and rather undignified end."[33]

D. Post-*Canada Without Poverty* Political Activities Regulatory Scheme

The Attorney General ultimately did not appeal *Canada Without Poverty*, and subsection 149.1(6.2) of the *ITA* was amended in 2018 through Bill C-86.[34] This omnibus bill made three key modifications to the *ITA*'s registered charity provisions:

1. the definition of "charitable organization" was amended to clarify that an entity must be "constituted and operated exclusively for charitable purposes";
2. the definition of "charitable activities" was amended to include "public policy dialogue and development activities" carried out to further a charitable purpose; and
3. a clause was added to the definition of "charitable organization" stipulating that an entity that devotes part of its resources to support or oppose any political party or candidate was not considered to be constituted and operated exclusively for charitable purposes.[35]

An explanatory note added that the extent to which a charity could engage in non-partisan political activities would be determined by reference to the common law, rather than the "substantially all" requirement.[36]

The CRA also released a policy guidance to replace policy statement CPS-022, which elaborated on what constituted permissible public policy dialogue and development activities ("PPDDAs") under the amended subsection 149.1(6.2).[37] PPDDAs include activities that a charity undertakes to participate in the public policy development process or to facilitate the public's participation in that process.[38] The policy guidance outlined that a charity can engage in unlimited PPDDAs as long as it carries out these activities in furtherance of its stated charitable purpose.[39] Permissible PPDDAs include an organization providing accurate information related to its charitable purposes to persuade the public with regards to public

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31 *Ibid* at paras 64–66.

32 *Ibid* at paras 70–74.

33 Chan, *supra* note 4 at 152.

34 *Budget Implementation Act 2018, No. 2*, SC 2018 c 27.

35 *Ibid* s 17.

36 Library of Parliament, "Bill C-86: A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures" (14 December 2018) at 13, online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c86-e.pdf> [perma.cc/PR2H-CEXC].

37 Canada Revenue Agency, *Public policy dialogue and development activities by charities*, Policy Guidance CG-027 (Ottawa: Canada Revenue Agency, 21 January 2019) [PPDDA policy guidance].

38 *Ibid*.

39 *Ibid*. To be in furtherance of a charitable purpose, the PPDDAs must be connected to the purpose and provide a public benefit when considered with the purpose.

policy, and advocating to retain, oppose, or change a law, policy, or decision of the Canadian government.[40] However, PPDDAs are strictly non-partisan. Any activity that directly or indirectly supports or opposes a political party or candidate is not a permissible PPDDA.[41]

E. Outstanding Issues with the Current Regime

Following the 2018 *ITA* amendments, the voluntary sector's advocacy regarding political activities has largely quieted. There are, however, some outstanding questions following the *Canada Without Poverty* decision. In *Canada Without Poverty*, CWP framed its section 2(b) challenge specifically with regard to the *ITA*'s restrictions on non-partisan political expression. The current regulatory regime reflects this distinction between non-partisan political activities (now permitted) and partisan political activities (still prohibited). Further, the *Canada Without Poverty* decision addressed only political activities, not political purposes—and the amendments maintained the general prohibition on charities pursuing political purposes.

This raises the question of whether the *ITA*'s remaining prohibitions on registered charities participating in partisan political activities and pursuing political purposes also violate section 2(b) of the *Charter*. If so, is there a "pressing and substantial" objective for these remaining prohibitions, and are they proportional to their objective?

II. CHARTER ANALYSIS OF SUBSECTION 149.1(6.2)

The following sections of this paper consider whether subsection 149.1(6.2)'s continued ban on charities conducting partisan political activities and pursuing political purposes violates section 2(b) of the *Charter*, and whether this infringement is justified under section 1. The following fictitious fact pattern will guide the analysis:

- ABC, a registered charity with the purpose of relieving poverty in Canada, is generally politically active and posts on its website endorsing specific political candidates whose platforms align with ABC's views on a policy issue related to poverty relief.
- In 2023, the CRA audits ABC and issues an audit report which concludes that ABC's posts are impermissible partisan political activities, contravening subsection 149.1(6.2). Moreover, the report finds that ABC's high degree of participation in non-partisan political activities suggests that its purposes are actually political, also contravening subsection 149.1(6.2). ABC is notified that its charitable status will be revoked.
- ABC challenges the revocation, on the basis that subsection 149.1(6.2) unjustifiably infringes its rights under section 2(b) of the *Charter*. ABC challenges both the restrictions on charities engaging in partisan political activities and pursuing political purposes.[42]

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40 *Ibid*.

41 *Ibid*.

42 This fact pattern intentionally mirrors the factual scenario in *Canada Without Poverty*.

A. Preliminary Issue: Registered Charities as Constitutional Rights-holders

For a registered charity to invoke the right to freedom of expression under section 2(b), it must be recognized as a constitutional person entitled to *Charter* protection. Justice Morgan's reasons for judgment in *Canada Without Poverty* did not address this issue. Given the "complex and in large part unsettled" state of the law on the constitutional personhood of corporations and unincorporated associations, it is "unclear upon what basis [Justice] Morgan recognized CWP as a constitutional rights-holder."[43] Thus, ABC's *Charter* challenge could fail at the outset if ABC does not provide a well-reasoned basis for extending section 2(b) protection to registered charities. However, for the following analysis, I will accept the precedent set in *Canada Without Poverty* that registered charities are protected under section 2(b) of the *Charter*.

B. Section 2(b) Analysis

Section 2(b) of the *Charter* states that everyone has the "fundamental…freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[44] Freedom of expression has been described as "the foundation of a democratic society."[45] While section 2(b) protects all manners of expression, political speech is the "linchpin" that "lies at the core" of freedom of expression.[46] Based on its fundamental importance, courts tend to interpret section 2(b) expansively.[47]

Following the ONSC's finding in *Canada Without Poverty* that the former *ITA* subsection 149.1(6.2) violated charities' freedom of expression, it is tempting to simply conclude that the amended subsection 149.1(6.2)'s ongoing prohibitions on partisan political activities and political purposes must also violate charities' section 2(b) rights. However, in *Canada Without Poverty*, Justice Morgan did not follow the well-established section 2(b) analytical framework, which would almost "certainly" have been an issue on appeal.[48] Thus, the issue of whether the *ITA*'s current prohibitions on partisan political expression and political purposes breach ABC's section 2(b) rights merits further reflection.

i. Positive or Negative Rights Claim?

Section 2(b) jurisprudence firmly distinguishes between positive and negative rights claims.[49] Positive claims require the government to "legislate or otherwise act to support or enable an expressive activity."[50] Conversely, negative claims are "freedom from" government action

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43 Chan, *supra* note 4 at 167, 169.

44 *Charter*, *supra* note 3, s 2(b).

45 *Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at 172—173.

46 *BC Freedom of Information and Privacy Association v British Columbia (AG)*, 2017 SCC 6 at para 16 [*FOI v BC*], citing *Harper v Canada (AG)*, 2004 SCC 33 at para 1 [*Harper*].

47 *Irwin Toy Ltd v Quebec (AGl)*, 1989 CanLII 87 (SCC) [*Irwin Toy*].

48 Chan, *supra* note 4 at 177.

49 *Ibid* at 173.

50 *Ibid*, citing *Baier v Alberta*, 2007 SCC 31 at para 35 [*Baier*]

that suppresses an expressive activity in which rights-holders could otherwise engage without government enablement.[51] This distinction is important because the characterization of a claim as positive or negative substantially impacts an applicant's likelihood of proving a section 2(b) breach.[52] Positive claims are subject to the framework set out in *Baier v Alberta* ("*Baier*"), which provides an "elevated threshold" to limit situations where the government must act to support freedom of expression.[53] Negative claims are evaluated under the expansive *Irwin Toy* framework.[54]

In practice, characterizing a section 2(b) claim as positive or negative is often difficult and contentious. In her dissent in *Toronto (City) v Ontario (Attorney General)* ("*City of Toronto*"), Justice Abella disagreed with the majority's characterization of the claim and generally criticized the distinction between positive and negative rights as "promot[ing] confusion rather than rights protection."[55] Nonetheless, the current section 2(b) analytical framework continues to require this distinction.

In *Canada Without Poverty*, Justice Morgan did not explicitly characterize CWP's claim as positive or negative, despite the fact that both CWP and the Attorney General framed their written submissions in accordance with this approach.[56] Drawing on Chan's analysis of CWP's claim, ABC's claim could be plausibly classified as either positive or negative:

- Subsection 149.1(6.2) excludes a class of taxpayers defined, in part, by their (in)ability to engage in partisan political expression or pursue political purposes from an advantageous statutory platform. This "category of persons restriction" frames ABC's claim as positive.
- Subsection 149.1(6.2) restricts the political expression of a class of taxpayers (registered charities) within a statutory platform they are otherwise entitled to use. This "content restriction" frames ABC's claim as negative.[57]

Chan highlights several factors to support the position that CWP's section 2(b) claim is properly characterized as positive and these arguments are similarly applicable to ABC's claim. First, the *ITA*'s registered charity regime restricts the benefits of its statutory platform to a class of taxpayers (registered charities) based on criteria in subsection 149.1(6.2) that are used to determine who may benefit from the selective platform.[58] Second, ABC (like CWP) is not asserting a right to engage in political expression in itself, but rather seeks to engage as a *registered charity.* To pursue this claim, ABC requires government enablement: the Minister of National Revenue has "sole authority" to grant ABC registered charity status,

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51 *Ibid*, citing *Baier* at para 34.

52 *Ibid* at 178.

53 *Toronto (City) v Ontario (AGI)*, 2021 SCC 34 at para 18 [*City of Toronto*].

54 See *Irwin Toy*, *supra* note 47 at 967—977.

55 *City of Toronto*, *supra* note 53 at para 155, per Abella J (dissenting). See paras 152 –156 for a fulsome discussion of this issue.

56 Chan, *supra* note 4 at 177.

57 *Ibid* at 178.

58 *Ibid* at 178 –179, citing *Canada Without Poverty*, *supra* note 1 at para 5.

which confers the corresponding tax advantages.[59] Third, characterizing ABC's claim as positive is consistent with Federal Court jurisprudence, which has described registered charity status as "public funding through tax exemptions for the propagation of opinions."[60] These considerations are consistent with *City of Toronto*, where the majority characterized a claim for access to a particular statutory platform as positive.[61] Therefore, ABC's section 2(b) claim is likely a positive rights claim.

ii. Applying the *Baier* Framework

As a positive rights claim, ABC's claim is properly analyzed using the *Baier* framework. In *City of Toronto*, the Supreme Court of Canada (the "SCC") distilled the *Baier* framework into a single question: "is 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 has either substantially interfered with freedom of expression, or has the purpose of interfering with freedom of expression?"[62] The statutory scheme must "effectively preclude" meaningful expression, representing "an exceedingly high bar…met only in extreme and rare cases."[63]

For ABC's claim, the government could argue that subsection 149.1(6.2) does not violate section 2(b), as it does not restrain speech—it merely withholds tax subsidies for such speech, by barring access to the registered charity statutory regime.[64] This is supported by the SCC's decision in *Baier*. The claimants in *Baier* alleged that a statute which barred school employees from running for a school trustee election infringed their section 2(b) rights, as it prevented them from expressing themselves on education issues. The SCC ruled against the claimants, finding that their claim was "grounded in access to the particular statutory regime," and that their exclusion "deprived them only of one particular means of expression" on education matters.[65]

In *Canada Without Poverty*, Justice Morgan drew an analogy between CWP and the agricultural workers in *Dunmore v Ontario*,[66] implying that CWP lacked an alternative space for political expression.[67] Chan notes that this inference seemed linked to the factual finding that CWP could not pursue its charitable purposes "while restricting its politically expressive activities to 10 [percent] of its resources as required by the CRA."[68] As Chan observes, the only way to conclude that CWP lacked an alternative space for expression is by framing its section 2(b)

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59 *Ibid* at 179.

60 *Ibid* at 180 –181, citing *Human Life International in Canada Inc v MNR,* 1998 CanLII 9053 at para 18 (FCA).

61 *City of Toronto*, *supra* note 53 at paras 29 –32.

62 *Ibid* at para 25.

63 *Ibid* at para 27, citing *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 33; *Baier*, *supra* note 50 at para 27; and *Dunmore v Ontario*, 2001 SCC 94 at para 25 [*Dunmore*].

64 Joyce Chia, Matthew Harding & Ann O'Connell, "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*" (2011) 35:2 Melbourne UL Rev 353 at 364.

65 *Baier*, *supra* note 50 at paras 44, 48.

66 *Canada Without Poverty*, supra note 1 at para 48.

67 Chan, *supra* note 4 at 182.

68 *Ibid* at 182 –183, citing *Canada Without Poverty*, *supra* note 1 at para 44.

right as "a right to express itself as a not-for-profit corporation with registered charitable tax status."[69] This appears incompatible with the precedent set in *Baier* and the high bar that the SCC articulated for section 2(b) infringements in *City of Toronto*. It would be entirely plausible for a court to find that subsection 149.1(6.2) does not "effectively preclude" ABC's section 2(b) rights, as ABC is free to express itself without restriction; it simply cannot do so as a registered charity. A difficulty with this position is that when a registered charity is issued a notice of intention to revoke, it must pay a revocation tax equal to the fair market value of all its property, less any debts and expenditures incurred while winding up operations.[70] This tax would make it very difficult or impossible for ABC to convert its existing resources to non-charitable uses, suggesting that ABC cannot simply accept the revocation of its registered charity status to enjoy free expression.

ABC could argue that the government is not relieved of its obligations to comply with the *Charter* by providing the option of relinquishing a statutory benefit: this reasoning would immunize governments from *Charter* scrutiny across various benefit programs and legislation.[71] In *Osborne v Canada (Treasury Board)* ("*Osborne*"),[72] the SCC held that legislation which prohibited public servants from engaging in work for or against a candidate or political party infringed section 2(b). The SCC in *Osborne* found that the suggestion that the scope of section 2(b) should be limited because of the particular status of the rights-holder (a public servant) was unsupported.[73] Drawing on this reasoning, ABC could argue that the scope of its right to freedom of expression should not be limited based on its particular status as a registered charity. A difficulty with this argument is that, unlike in *Osborne*, people who work with charities can freely express their personal views on their own time, including by participating in partisan activities.[74]

In the *Canada Without Poverty* section 2(b) analysis, Justice Morgan placed weight on the factual findings that CWP could not pursue its charitable purposes while complying with the *ITA* regime, and could not function, or would have difficulty functioning, without registered charity status.[75] While these findings are case-specific, these circumstances are not unique to CWP as a registered charity, and very well may also be the case for ABC. Depending on the circumstances, ABC may draw on *Canada Without Poverty* to argue that subsection 149.1(6.2)'s bans on partisan political expression and political purposes are at odds with ABC achieving its charitable purpose of relieving poverty. Additionally, ABC would have difficulty functioning without registered charity status—and thus subsection 149.1(6.2) infringes its section 2(b) rights. It is somewhat difficult to imagine a court finding poverty relief to require partisan political expression. However, this finding would be case-specific, and a court may find arguments persuasive regarding the connection between political purposes and poverty relief.

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69 *Ibid* at 183.
70 *ITA*, supra note 2 s 188(1.1).
71 CWP factum, *supra* note 19 at para 57.
72 [1991] 2 SCR 69, 1991 CanLII 60 (SCC) [*Osborne*].
73 *Ibid* at 93.
74 PPDDA policy guidance, *supra* note 37.
75 *Canada Without Poverty*, *supra* note 1 at paras 42–43.

Further, the SCC in *City of Toronto* did not purport to make the *Baier* section 2(b) framework a more challenging hurdle for claimants.[76] Thus, in *Canada Without Poverty*, if CWP brought a positive section 2(b) claim, Justice Morgan implicitly found that the claim met the *Baier* framework by finding that the former subsection 149.1(6.2) breached section 2(b). Consequently, Justice Morgan arguably expanded the scope of "exceptional cases" whereby positive claims breach section 2(b). Drawing on this precedent, ABC could argue that partisan political activity is political speech, akin to non-partisan policy advocacy considered in *Canada Without Poverty*. Therefore, subsection 149.1(6.2) burdens ABC's expressive activities under section 2(b), and would have to be justified under section 1.[77]

Overall, it is not clear whether a court would find that subsection 149.1(6.2) of the *ITA* breaches ABC's right to freedom of expression using the *Baier* framework. However, finding a section 2(b) breach is, at the very least, a plausible outcome of this analysis.

C. Section 1 Analysis

Once a court determines that a claimant's *Charter* right has been infringed, it must then decide whether the state can defend the breach under section 1 as "demonstrably justified in a free and democratic society."[78] Section 1 analyses are guided by "the values and principles essential to a free and democratic society," including "faith in social and political institutions which enhance the participation of individuals and groups in society."[79] In *R v Oakes* ("*Oakes*"), the SCC outlined a two-stage justification test under section 1: (i) the limiting measure must have a "pressing and substantial" objective; and (ii) the means chosen must be proportional to the objective.[80] The proportionality test has three components: (a) the limit must be rationally connected to the objective; (b) the limit must impair the right no more than reasonably necessary to achieve the objective; and (c) the law's deleterious and salutary effects must be proportional.[81] With respect to limits on section 2(b) rights, the SCC has held that freedom of expression is paramount in a democratic society, and should "only be restricted in the clearest of circumstances."[82]

For ABC's claim, the *Oakes* test necessitates engagement with fundamental questions regarding the objectives and proportionality of subsection 149.1(6.2). The following analysis will first discuss potential objectives for subsection 149.1(6.2)'s restrictions on partisan political activities and political purposes. Then, using the most compelling of these objectives (namely, to maintain the separation between charity and politics), this paper will consider the proportionality of subsection 149.1(6.2).

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76 *City of Toronto*, *supra* note 53 at para 21.
77 Chan, *supra* note 4 at 184.
78 *Charter*, *supra* note 3 s 1.
79 *R v Oakes*, 1986 CanLII 46 at paras 69–70 (SCC) [*Oakes*].
80 *Ibid* at 138–139.
81 *Ibid* at 139.
82 *Canada Without Poverty*, *supra* note 1 at para 52, citing *Edmonton Journal v Alberta (AG)*, 1989 CanLII 20 at 1336 (SCC).

i. Does the Limit Have a Pressing and Substantial Objective?

Under the first branch of the *Oakes* test, courts must determine whether an objective is "pressing and substantial" such that it is sufficiently important "to warrant overriding a constitutionally protected right or freedom."[83] In *Canada Without Poverty*, it was at this first stage of analysis that the justification for infringement failed. The Attorney General submitted that the objectives of former subsection 149.1(6.2) were to "recognize that it is appropriate for a registered charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals, and prohibit partisan political activities."[84] Justice Morgan found that this objective was not pressing and substantial, as the government could not justify limiting charities' section 2(b) rights "for the very purpose of ensuring [they] use no more than 10 percent of their resources on the exercise of free expression."[85]

However, there are several compelling objectives for the present subsection 149.1(6.2)'s remaining prohibitions on partisan political activities and political purposes, rooted in rationale for the political purposes doctrine. This section will discuss three potential objectives for subsection 149.1(6.2): (a) to protect the distinct function of the charitable sector by maintaining the separation between charity and politics; (b) to uphold parliamentary sovereignty; and (c) to execute a tax policy decision that certain charitable purposes and activities deserve fiscal support. Based on the following analysis, a court would most likely find objective (a), protecting the distinct function of the charitable sector, to be pressing and substantial.

1. Protect the Distinct Function of the Charitable Sector

Charities play a unique role as advocates in Canada's political sovereignty.[86] In the Australian context, Associate Professor Jennifer Beard argues that maintaining the independence of charitable purposes distinct from party politics is a legitimate purpose, as it "preserves the coherence of the sector as a distinctive social force within our democracy, the charitable purposes of which are, and should be, different" from the government's aims and responsibilities.[87] This purpose is similarly compelling in the Canadian context.

Further, holding charity and politics distinct ensures that political organizations cannot receive registered charity status. Political organizations are strictly regulated and do not receive the same tax benefits as charities. Removing or reducing the limits for registered charities participating in politics could result in broader public sector organizations, which depend on government funding, using tax-subsidized charitable contributions to run advertising campaigns to maintain or increase their funding.[88] Additionally, without regulations in place, there is a legitimate concern that political parties and candidates could use registered charities

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83 *Oakes*, *supra* note 79 at para 69, citing *R v Big M Drug Mart Ltd*, 1985 CanLII 69 at para 139 (SCC).

84 AG Canada Factum, *supra* note 20 at para 52.

85 *Canada Without Poverty*, *supra* note 1 at para 62.

86 Chan, *supra* note 4 at 187–188.

87 Jennifer Beard, "Charity Law and Freedom of Political Communication: The Australian Experience" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham, UK: Edward Elgar, 2018) 252 at 270.

88 Geoffrey Hale, "Policy Forum: Charity and Politics – A Dubious Mix?" (2017) 65:2 Can Tax J 379 at 385.

to skirt campaign finance laws.[89] This engages the "role and integrity" of charities in Canada's electoral system and the financing of election campaigns, which is relevant to maintaining the "constitutionally prescribed system of representative government."[90]

As a counterargument, the separation between charity and politics may be more theoretical than practical. Charity and politics do not act in isolation: both share a "unified concern for the public benefit," and it is through the prevailing social context (partly coloured by political considerations) that we define the "common good" and determine what is "charitable."[91] Further, the argument that charitable tax subsidies could be used to unjustly skew the balance of political speech fails to recognize the already unequal distribution of political speech; charitable advocacy may actually lessen this inequality "by representing under-represented interests and improving the quality of decision-making through charities' expertise and connection with the voiceless."[92] However, while this view accounts for the "inherent nature of charity and politics," it ignores the fact that the registered charity regime "must retain its credibility and legitimacy in the eyes of the public."[93] All considered, maintaining the separation between charity and politics to protect the charitable sector's distinct function is a compelling objective that a court would likely find to be pressing and substantial.

2. Uphold Parliamentary Sovereignty

An alternative objective for subsection 149.1(6.2) could be to uphold parliamentary sovereignty. This objective is most relevant to the prohibition on charities pursuing political purposes. At common law, a purpose must provide a public benefit to be charitable. This objective stipulates that evaluating whether a political purpose is charitable would require courts to impermissibly intrude into the realm of Parliament when considering the purpose's public benefit, as doing so would require courts to acknowledge a public benefit in the specific law reform or party being advocated for by the charity.[94]

There are several conceptual difficulties with this objective, especially if a political purpose is non-partisan. First, it is inconsistent with how courts assess the public benefit of religious charities. Instead of finding a public benefit in specific religious doctrines, courts broadly assume that religion generally provides a public benefit.[95] Courts could similarly abstract political purposes to a level of non-controversy by assuming that there is a public benefit in advocacy related to law reform generally, rather than considering specific reforms.[96]

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89 Andrew Coyne, "Problem with Charities Isn't their Politics, It's Their Generous Tax Credit", *National Post* (27 August 2014), online: <nationalpost.com/opinion/andrew-coyne-preferred-tax-status-corrupts-the-definition-of-charity-and-should-be-abolished> [perma.cc/YNZ5-5MNW].

90 Beard, *supra* note 87 at 272.

91 Nicola Silke, "Please Sir, May I Have Some More – Allowing New Zealand Charities a Political Voice" (2002) 8:2 Canterbury L Rev 345 at 360.

92 Chia, Harding & O'Connell, *supra* note 64 at 366.

93 Silke, *supra* note 91 at 361.

94 Susan Glazebrook, "A Charity in All but Law: The Political Purpose Exception and the Charitable Sector" (2019) 42:2 Melbourne UL Rev 632 at 652; Parachin, *Charity versus Politics supra* note 14 at 10.

95 Parachin, "Neutrality", *supra* note 7 at 33.

96 Parachin, *Charity versus Politics*, *supra* note 14 at 10. This was the approach taken by the High Court of Australia in *AID/WATCH Inc. v Commissioner of Taxation*, [2010] HCA 42.

Second, the parliamentary sovereignty objective is inconsistent with judicial commentary on law reform. Broadly, courts frequently and properly suggest that Parliament could take action where the common law is confused or outdated, or where new situations have arisen that would benefit from legislative regulation.[97] The case *Vancouver Society of Immigrant and Visible Minority Women v MNR* provides an example of this in the charity law context: the SCC commented that Canadian charity laws were "in need of reform" and that it was "difficult to dispute that the law of charity has been plagued by a lack of coherent principles on which consistent judgment may be founded." [98] Thus, it appears clearly within the purview of the courts to comment on the desirability of law reform without unduly entrenching into the legislature's domain. Indeed, charity law scholar and Associate Professor Samuel Singer posited that "there are few people better qualified than judges" to assess the public benefit of a change in the law.[99]

The third conceptual difficulty with the parliamentary sovereignty objective is that it ignores the effect of the *Charter* on the role of the courts in interpreting law. Today, courts play a constitutionally validated role in interpreting and enforcing constitutional rights and freedoms–a role that "overtly involve[s] courts in the normative evaluation of law."[100] In *Charter* jurisprudence, courts rule on the public benefit of *Charter*-based law reform activities.[101] This suggests that it is irrational to justify a ban on charities pursuing political purposes as changes to the law may further constitutional values, a perspective consistent with *Charter* jurisprudence.[102]

3. Tax Policy

A third objective for subsection 149.1(6.2) is that, in a context of limited fiscal resources, the government ought to reserve funds to fiscally support traditional charitable activities, such as "feeding the hungry or teaching the young," and thus bar political activities from charitable tax status.[103] However, Chan notes several criticisms of this objective. Firstly, organizations that seek law reform are not unanimously considered more valuable than those which seek to feed the hungry.[104] Further, budgetary constraints have generally been found insufficient to justify limits on *Charter* rights.[105] Given the fact that both municipalities and amateur athletic associations are considered "qualified donees" under the *ITA*, it is challenging to

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97 Glazebrook, *supra* note 94 at 652.

98 *Vancouver Society of Immigrant and Visible Minority Women v MNR*, 1999 CanLII 704 at paras 179, 201 (SCC).

99 Singer, *supra* note 11 at 687, citing LA Sheridan, "Charitable Causes, Political Causes and Involvement" (1980) 4:2 Philanthropist 5 at 12.

100 Parachin, "Politics of Purpose", *supra* note 8 at 883.

101 *Ibid*.

102 Mayo Moran, "Rethinking Public Benefit: Charity in the Era of the *Charter*" in Jim Phillips, Bruce Chapman & David Stevens, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal: McGill-Queen's University Press, 2001) 251 at 265.

103 Chan, *supra* note 4 at 187.

104 *Ibid*.

105 *Ibid*, citing *Newfoundland (Treasury Board) v NAPE,* 2004 SCC 66 at para 64.

argue that the *ITA* stringently prioritizes philanthropic support.[106] Therefore, this objective is not particularly compelling, and would likely not be considered pressing and substantial.

ii. Is the Limit Proportional to its Objective?

The second branch of the *Oakes* test involves determining whether an unconstitutional limit on a *Charter* right is proportional to its objective. For ABC's claim, to find subsection 149.1(6.2) proportional, a court would have to be satisfied of three factors on a balance of probabilities: (a) that there is a rational connection between the section 2(b) infringement and the law's objective; (b) that subsection 149.1(6.2) minimally impairs section 2(b) rights; and (c) that the impact of the section 2(b) infringement is proportional to the likely benefits of subsection 149.1(6.2).[107] The following analysis will discuss proportionality using the objective of protecting the distinct role of the charitable sector, identified above as the most persuasive.

1. Rational Connection

The rational connection requirement is satisfied if a limit on a *Charter* right is "carefully designed to achieve the objective in question" and is not "arbitrary, unfair or based on irrational considerations."[108] The SCC has described the rational connection test as "not particularly onerous"; it must be reasonable that the limit "may further the goal, not that it will do so."[109]

Based on this low bar, a court would likely find that the limit in subsection 149.1(6.2) is rationally connected to the law's objective: a registered charity pursuing a political purpose would almost certainly blur the line between charities and political organizations. For the restriction on partisan political activities, however, there is some merit to the argument that the limit is arbitrary.

ABC may argue that under the present regulatory scheme, a charity could align all its policy recommendations with those of a particular candidate; as long as it does not name the specific candidate, this would be considered a permissible PPDDA. However, if the registered charity named the candidate, this communication would become partisan, and thus unlawful under subsection 149.1(6.2). Therefore, while subsection 149.1(6.2) and its policy guidelines purport to distinguish between partisan and non-partisan activities in furtherance of a charity's objective, this distinction may be arbitrary in practice, and thus not rationally connected to the objective of maintaining the separation between charity and politics. Despite this, a court would likely find that the present regulatory scheme may further Parliament's objective to protect the charitable sector's distinct function, and as a result satisfies the rational connection test.

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106 *Ibid*, citing *ITA*, *supra* note 2 s. 149.1(1) "qualified donee".

107 *Oakes*, *supra* note 79 at 139.

108 *Ibid*.

109 *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 228; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48 [*Wilson Colony*].

2. Minimal Impairment

The test for whether a law minimally impairs a *Charter* right is whether "there is an alternative, less drastic means" of realizing its objective.[110] A limit can fall within a "range of reasonable alternatives" to achieve its objective; a law is not overly broad merely because a court can "conceive of an alternative which might better tailor objective to infringement."[111] At this stage, courts will consider evidence adduced by the government as to why it did not choose less intrusive and equally effective measures to accomplish its objective.[112]

The government may argue that the limits on partisan activities and political purposes in subsection 149.1(6.2) minimally impair ABC's section 2(b) rights, as these restrictions apply only to registered charities—non-profit organizations are not subject to the same limitations. Therefore, subsection 149.1(6.2) tailors its impingement on freedom of expression to what is required by its objective, by confining its restrictions to organizations accorded registered charity status.[113]

At this stage, courts may also look to laws and practices in other jurisdictions.[114] ABC would likely highlight more relaxed approaches taken in other countries to regulate charities' political activities. For example, in the United States, charities can have political purposes; however, such entities are excluded from some fiscal benefits associated with charitable status if a "substantial part" of their activities are political.[115] In Scotland, while an entity cannot be charitable if its purpose is to promote a political party, charities can participate in any general political engagement, including "supporting a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation."[116]

ABC could argue that to minimally impair its section 2(b) rights, the government ought to take a more lenient approach to regulating charities' political activities, akin to that employed in the United States and Scotland. For instance, the CRA could create a new form of advocacy organization within the umbrella of registered charity that may be eligible for fewer tax concessions and subject to more stringent reporting requirements.[117] However, there are some significant drawbacks to this approach: it would further complicate an already complex regulatory scheme for registered charities; more stringent reporting requirements would require scarce charitable resources to be directed towards ensuring compliance; and, following the controversial United States Supreme Court decision *Citizens United v Federal Election Commission*,[118] there would likely be skepticism towards the Canadian government adopting or shifting towards the American approach. On balance, it seems likely that a court would find that subsection 149.1(6.2) minimally impairs registered charities' section 2(b) rights, given the substantial disadvantages to alternative measures of achieving its objective.

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110 *Wilson Colony*, *supra* note 109 at para 55.

111 *RJR-MacDonald Inc v Canada (AG)*, 1995 CanLII 64 at para 160 (SCC).

112 *Ibid*.

113 This is a similar line of reasoning to that of the SCC in *FOI v BC*, *supra* note 46 at para 53.

114 *Carter v Canada (AG)*, 2015 SCC 5 at paras 103–104.

115 Glazebrook, *supra* note 94 at 654.

116 *Ibid* at 655; Chia, Harding & O'Connell, *supra* note 64 at 362.

117 Chia, Harding & O'Connell, *supra* note 64 at 365.

118 558 US 310 (2010).

3. Proportional Balancing Between the Law's Salutary and Deleterious Effects

The third component of the *Oakes* proportionality test requires that the salutary effects of the impugned law outweigh its deleterious impact on the affected rights-holder, with reference to the identified legislative objective.[119] This inquiry focuses on the law's practical impact, and necessitates examining benefits that the measure will "yield in terms of the collective good sought to be achieved" and the importance of the limitation on the right to determine whether the restriction is justified.[120]

The deleterious effect of subsection 149.1(6.2) is that it restricts registered charities from fully participating in political discourse—an activity that charities are arguably well-equipped to do, and one that "lies at the heart of the guarantee of free expression."[121] Based on their frontline experience, grassroots connections, and proximity to communities, charities are uniquely situated to contribute to public dialogue, raise awareness on matters of collective interest, and generally "facilitate participatory forms of justice."[122] Charities also offer "ready sources of normative perspectives on law and policy" as their organizing principle is idealism, distinct from the marketplace's emphasis on economic self-interest.[123] There is also evidence that charities are trusted groups to speak out on politics: a 2013 study found that 79 percent of Canadians have "some or a lot of trust in charities," and 62 percent of Canadians generally value charities' opinions on issues of public concern "because they represent a public interest perspective."[124]

The government could argue that, because of this notable public trust in charities, the salutary effect of subsection 149.1(6.2)—to protect the distinct function of charities as separate from politics—is especially important. The impugned law may "enhance more than harm the democratic process," as it purports to preserve the coherence of registered charities as unique social forces within our democracy and maintain the constitutionally prescribed system of representative government.[125] In amending subsection 149.1(6.2) in 2018, the government could argue that Parliament was attempting to reduce the advocacy chill that the previous regulatory scheme had on the voluntary sector, while retaining some limits on charities' political activities to maintain charities as distinct from political organizations. The deleterious effects of subsection 149.1(6.2) are mitigated by the fact that charities' political voices are not entirely silenced by the registered charity regime: charities can contribute to political discourse through PPDDAs, following *Canada Without Poverty*.

As section 1 of the *Charter* mandates that limits on constitutional rights be demonstrably justified, the government would have to introduce evidence of the benefits that society stands

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119 *Oakes*, *supra* note 79 at 138–139.

120 *Canada (AGI) v JTI-Macdonald Corp*, 2007 SCC 30 at para 45.

121 *Harper*, *supra* note 46 at para 41.

122 Adam Parachin, "Shifting Legal Terrain: Legal and Regulatory Restrictions on Political Advocacy by Charities" in Nick Mule & Gloria DeSantis, eds, *Shifting Terrain: Nonprofit Policy Advocacy in Canada* (Montreal, McGill-Queen's University Press, 2017) 33 at 34.

123 *Ibid*.

124 Gloria DeSantis & Nick Mule, "Advocacy: A Contested yet Enduring Concept in the Canadian Landscape" in Nick Mule and Gloria DeSantis, *supra* note 122 at 9.

125 Beard, *supra* note 87 at 270–272.

to gain from subsection 149.1(6.2)'s restrictions on charities conducting partisan political activities and pursuing political purposes. While this evidence may dictate the outcome of a court's proportional balancing analysis, the salutary effects of subsection 149.1(6.2) appear to outweigh its deleterious impacts on charities' freedom of expression.

CONCLUSION

For its high degree of influence and impact in the Canadian charity law sphere, the *Canada Without Poverty* decision raises several significant questions that have yet to be addressed by the courts—namely, how can the government draw constitutionally-compliant boundaries between registered charities and other organizations, and what is Parliament's objective for continuing to limit charities' political advocacy?[126] Justice Morgan's finding that the former *ITA* subsection 149.1(6.2) and associated policy guidelines violated charities' right to freedom of expression under section 2(b) appears to leave the present subsection 149.1(6.2) vulnerable to a similar constitutional challenge.

The outcome of this challenge would likely depend on the evidence presented by the parties, and the court's willingness to engage more deeply with constitutional law and charity law than Justice Morgan did in *Canada Without Poverty*. The freedom of expression analysis in this paper casts doubt on whether Justice Morgan would have found the former subsection 149.1(6.2) to violate CWP's section 2(b) rights had he applied the governing framework from *Baier* for analyzing positive rights claims. Despite this issue, it is at least plausible that a court would find that the current *ITA* provisions and policy guidelines governing charities' political advocacy breach section 2(b). As subsection 149.1(6.2) likely advances a pressing and substantial objective and proportionately limits charities' section 2(b) rights, the provision may be justified under section 1 of the *Charter*. Thus, the question shifts from asking whether section 2(b) *could* be used to strike down subsection 149.1(6.2), to whether it *should*. I suggest that to preserve charities' distinctive role in Canadian society, this should be answered in the negative.

126 Chan, *supra* note 4 at 189.

ARTICLE

ESTABLISHING BLAMEWORTHY CONSUMPTION: ADDRESSING INTOXICATED VIOLENCE WHILE IN A STATE OF AUTOMATISM

Olivia Meier *

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ABSTRACT

The issue of intoxicated violence in a state of automatism poses significant legal and moral challenges in Canada's criminal justice system. In *R v Brown*, the Supreme Court of Canada invalidated section 33.1 of the *Criminal Code*, prompting legislative reform that introduced foreseeability as a requirement for culpability. This analysis examines the tracing principle, which links voluntary intoxication to criminal responsibility for subsequent involuntary acts. This paper also examines the tracing principle's implications for public safety, especially for vulnerable groups.

This analysis proposes the adoption of intoxication thresholds, modeled on impaired driving regulations, to address evidentiary challenges in the current law. Intoxication thresholds would establish clear legal standards, enhance accountability, and strengthen protections for society.

By incorporating objective intoxication limits and the tracing principle, the proposed framework seeks to balance the rights of the accused with public safety. These reforms would ensure accountability for foreseeable consequences of voluntary intoxication while addressing broader concerns about intoxicated violence in Canadian law.

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INTRODUCTION

This paper addresses how Parliament ought to regulate the public concern of intoxicated violence: the concept of self-induced extreme intoxication akin to automatism.[1] An accused may be deemed in a state of automatism where they were neither aware of nor in control of their actions at the moment of committing a prohibited offence.[2] Under Canadian law, the defence of extreme intoxication can be applied to any offence. However, an exception applies for general intent offences, where this defence is unavailable to those accused with lower levels of intoxication. Furthermore, the common law rule maintains that intoxication cannot serve as a defence for crimes of general intent, except in cases of extreme intoxication.[3] When an accused raises the defence of extreme intoxication, they are claiming that due to their own state of extreme intoxication, they were acting involuntarily and unintentionally.[4] As a result, the accused lacked both the necessary intent to commit the crime and the required criminal action, and are therefore entitled to an acquittal.[5]

Part I argues it is morally justifiable to hold someone responsible for intoxicated violence while they were in a state of automatism. Using the principle of tracing, Part I examines how a prior blameworthy voluntary act can be used to hold the accused criminally responsible for the involuntary act(s) that were subsequently committed. This Part will additionally consider what consequences this defence poses for public safety. The defence of extreme intoxication creates challenging and controversial policy decisions. The old version of section 33.1 of the *Criminal Code* barred the defence of self-induced intoxication for violent general intent offences. It applied if the accused was intoxicated, the intoxication was self-induced, and their actions markedly departed from reasonable care by harming or threatening another. Liability required proof of extreme intoxication causing loss of control and the violent act occurring in that state.[6] The 2022 Supreme Court of Canada's ("SCC") decision of *R v Brown* ("*Brown*")[7] ruled that the previous section 33.1 was unconstitutional and violated sections of the *Canadian Charter of Rights and Freedoms* ("*Charter*"),[8] and Parliament quickly enacted a new version.[9] Further, this Part examines the implications of this defence for those who are at a greater risk of facing violence, such as women and children.

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1 This paper examines the defence of extreme intoxication as it applies to 'general intent' offences, where voluntary intoxication is not a defence. Historically, common law allowed the defence of extreme intoxication only for specific intent offences, which requires intent to cause particular harm (e.g., murder). Not so for general intent offences, which require intent only to perform the criminal act itself (e.g. assault).

2 *R v Brown,* 2022 SCC 18 at para 46 [*Brown*]; *R v Daviault,* 1994 CanLII 61 at 16 (SCC) [*Daviault*].

3 *Brown, supra* note 2 at 376.

4 *Ibid.*

5 *Ibid* at para 56; *Daviault*, *supra* note 2 at 74–75.

6 *Brown, supra* note 2 at paras 76–77, 81.

7 *Brown, supra* note 2.

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

9 *Criminal Code,* RSC 1985, c-C46, s 33.1.

Part II of this paper proposes a modification to section 33.1 of the *Criminal Code*. While Parliament has taken steps towards enacting effective policies, it would be clearer to set an intoxication limit similar to those provided for impaired driving offences. Broadly speaking, setting an intoxication limit would help the courts hold the public accountable for what an accused should have known and been aware of before they became intoxicated. Additionally, incorporating a rebuttable presumption similar to section 445.1(3) of the *Criminal Code* is proposed.[10] Section 445.1(3) deals with animal cruelty offences and establishes a rebuttable presumption related to the intentional infliction of pain, suffering, or injury on animals.[11] Specifically, it states that if an individual is found to have injured or harmed an animal, it is presumed that they did so willfully, unless they can provide evidence to the contrary. This mechanism places the burden on the accused to prove that their actions were unintentional or lawful. This presumption would allow courts to assume that a violent act committed while the accused was above the intoxication limit was voluntary unless the accused could provide evidence to the contrary. Such evidence would need to show that a violent loss of control was unforeseeable in their specific circumstances. This would set a clear standard of responsibility and ensure that individuals are held accountable for reaching a level of intoxication where harm to others becomes foreseeable.

I. LEGAL RESPONSIBILITY AND INTOXICATION

A. History of the New Section 33.1

The history of the defence of extreme intoxication in Canada begins with the SCC decision *Leary v The Queen* ("*Leary*").[12] From this sexual offence case stemmed the *Leary* Rule, which provided that intoxication could never be used as a defence for crimes of general intent.[13] However, this decision was subsequently overturned in *R v Daviault* ("*Deviault*").[14] There, Mr. Daviault was convicted of sexually assaulting a 65-year-old, disabled woman but argued that his extreme intoxication rendered him incapable of forming the necessary intent for the offence. The trial court acquitted Mr. Daviault based on the *Leary* Rule. The SCC later ruled that he had been unconstitutionally denied the defence of extreme intoxication, setting a precedent for its use in general intent offences like sexual assault.[15] The *Daviault* decision set out that the *Leary* Rule violated sections 7 and 11(d) of the *Charter*. The Court held that where an accused has committed a crime of general intent, there should be a defence available, such as claiming that they were intoxicated to the point of automatism so that they had the bodily control or intention to commit the crime.[16] Due to the intoxication, the Crown was therefore unable to prove the necessary elements of the offence.

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10 *Ibid*, s 445.1(3).

11 *Ibid.*

12 *Leary v The Queen,* 1977 CanLII 2 (SCC) [*Leary*].

13 *Daviault*, *supra* note 2 at 16.

14 *Daviault*, *supra* note 2.

15 Dennis Baker & Rainer Knopff, "*Daviault* Dialogue: The Strange Journey of Canada's Intoxication Defence" (2014), 19 *Rev Const Stud* 35 at 4–5.

16 *Ibid.*

The *Daviault* decision was subject to negative public reactions, as it appeared that the Court was not considering public safety or the policy implications of gender-based violence. Critics argued that the defence enabled men to commit violence against women without consequence. The media further affirmed this message;[17] a 1994 *Toronto Star* article headlined: "A license to rape? Women fear that a Supreme Court ruling tells men that sexual assault is okay as long as they're drunk."[18] Facing criticism, Parliament enacted section 33.1 of the Criminal Code, which stated that the defence of extreme intoxication akin to automatism would not be available in cases where the accused voluntarily became self-intoxicated and committed an offence of violence.[19] This law would last until the trilogy cases of *R v Chan* ("*Chan*"),[20] *R v Sullivan* ("*Sullivan*"),[21] and *Brown.*[22]

B. *R v Sullivan* and *R v Brown*

In *Sullivan*, David Sullivan, and Thomas Chan both reached a state of extreme intoxication tantamount to automatism resulting in assault with a knife. Mr. Chan voluntarily took Psilocybin mushrooms with friends in his mother's basement. A few hours later, he broke into his father's home. Unable to recognize his father due to extreme intoxication, he stabbed him to death and seriously injured his stepmother. In the case of Mr. Sullivan, he intended to die by suicide by overdosing on prescription drugs. As a result of ingesting the drugs, he entered an automatic state leading him to stab his mother who was in the house at the time. In *Brown*, Matthew Brown simultaneously consumed alcohol and Psilocybin mushrooms then broke into two homes, attacking a woman in the first house. Justice Kasirer, writing for a unanimous court, found that section 33.1 breached sections 7 and 11(d) of the *Charter*.[23] In his view, section 33.1 allowed the accused to be convicted without any inquiry into the blameworthiness of the accused for both committing the crime or consuming the intoxicants. Prior to the trilogy cases, section 33.1 allowed the fact that the accused became voluntarily intoxicated to be substituted for the fault element of the crime. In essence, the section set only conditions of liability, not conditions of fault sufficient to justify criminal responsibility.[24] After *Brown*, Parliament sought to propose a new way to balance the rights of the accused with public safety.

C. The Stand-Alone Offence

To address concerns after the trilogy, Parliament first considered creating a stand-alone offence of intoxication. Legal scholars have differing opinions about creating an offence

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17 David Vienneau, "Drinking ruled a rape defence Feminists outraged at Supreme Court decision", *Toronto Star* (1 October 1994); Stephen Bindman, "Drunk & disorder in the court: `License to rape' ruling unites Canadians in outrage" *Daily News* (29 December 1994); "Drunks who rape and go free; Top court ruling means law should be changed" *Montreal Gazette* (4 October 1994).

18 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).

19 *Criminal Code, supra* note 9, s 33.1(2).

20 *R v Chan,* 2018 ONSC 7158 [*Chan*].

21 *R v Sullivan,* 2020 ONCA 333 [*Sullivan*].

22 *Brown, supra* note 2.

23 *Ibid* at para 12.

24 *Ibid* at para 79.

that would criminalize extreme intoxication.[25] In *Brown*, the Court appropriately determined that establishing a dangerous intoxication offence would infringe on the accused's rights as minimally as possible among the available options. However, such an offence would not offer the same level of protection for society as the negligence standard that Parliament ultimately implemented in the amended section 33.1.[26]

Ultimately, a stand-alone intoxication offence would be inadequate.[27] Establishing a new provision would offer protection against intoxicated violence, but it would not meet Parliament's objectives of holding those accountable to a justifiable punishment for the acts that were committed.[28] Further, although an accused could be found guilty under this new offence, they would not be held accountable for the crime that was actually committed, i.e. assault or sexual assault, which possesses a greater stigma and punishment.[29] Speaking to the Senate on behalf of the National Association of Women and the Law, Ms. Suzanne Zaccour described this as a "drunkenness discount."[30] Perpetrators would not be convicted to the full extent for the violent act committed, but would instead receive a conviction for a lower offence.[31]

One way of addressing this criticism would be to set a maximum sentence for a stand-alone offence of dangerous intoxication. This would grant judges a significant amount of discretion in sentencing and allow them to impose appropriate sentences for those who commit violent acts while intoxicated. However, concern has been expressed about the effect this would have on public opinion, perceptions and attitudes surrounding intoxicated violence, despite greater flexibility in sentencing.[32] Professor Kent Roach comments that creating a stand-alone offence would diminish the gravity of violence. Labeling the accused's actions as intoxicated violence instead of assault makes the crime seem less serious. To avoid the stigma of sexual assault, the accused might agree to plead to intoxicated violence, thus hiding the fact that they have committed the more serious offence. Three levels of sexual assault already exist based on severity: level 1, level 2, and level 3.[33] Level 1 (outlined in s. 271 of the *Criminal Code*) of the Criminal Code) involves non-consensual sexual contact without bodily harm, threats, or weapons, carrying a maximum penalty of 10 years.[34] Level 2 (s. 272 of the *Criminal Code*) addresses sexual assault that causes bodily harm or involves a weapon or threats to a third party, punishable by up to 14 years.[35] Level 3 (s. 273 of the *Criminal Code*) covers aggravated

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25 Notably, when speaking at the Senate, Professor Steve Coughlan argued in favour of an intoxication offence. In contrast, Professor Kent Roach and Ms. Suzanne Zaccour (Director of Legal Affairs, National Association of Women and the Law) presented opposing perspectives. See Senate of Canada, *Self- Induced Extreme Intoxication and Section 33.1 of the Criminal Code* (April 2023) (Chair: Brent Cotter) at 27–29 [*Senate of Canada*].

26 *Brown, supra* note 2.

27 *Ibid* at paras 125–138.

28 *Ibid.*

29 *Ibid.*

30 *Senate of Canada, supra* note 25 at 28.

31 *Ibid*; *Brown, supra* note 2 at para 138.

32 *Senate of Canada, supra* note 25.

33 *Ibid* at 28.

34 *Criminal Code, supra* note 9, s 272.

35 *Ibid.*

sexual assault, involving wounding, maiming, disfiguring, or endangering the victim's life, with a maximum sentence of life imprisonment.[36] These levels help courts assess and penalize offences based on severity. In the vast majority of cases, the accused pleads to the lowest level, even when charged with a more aggravated form. Introducing a fourth, additional level of dangerous intoxication, would further devalue the seriousness of the perpetrated violence, regardless of any maximum penalty.[37]

Ultimately, Parliament pursued rewording section 33.1 rather than introducing a separate offence. The amended section 33.1 introduces an element of foreseeability: where an accused has voluntarily become self-intoxicated, they can be found liable for the offence with which they are charged if the risk of harm to others as a result of their self-intoxication was objectively foreseeable. With the new provision, courts will be able to trace the involuntary actions back to a culpable, voluntary one. Under the amended section 33.1, an accused can be culpable where they failed to avoid a foreseeable risk of violent loss of control.

D. The Revised Section 33.1

The decision in *Brown* to revise section 33.1 left a gap in the law: individuals who intentionally committed violent assault could be acquitted of their crimes. Such individuals could still be acquitted if their actions fall within specific legal exceptions, such as extreme intoxication. The new version addresses this gap by taking a criminal negligence approach requiring foreseeability.[38] This means a person can be held liable if their voluntary intoxication created a foreseeable risk of loss of control leading to harm. The law holds individuals accountable if they failed to take reasonable precautions to avoid this risk. The newly amended section 33.1 ("New Section 33.1") addresses this gap by adopting a criminal negligence approach that requires foreseeability. To do so, Parliament enacted Bill C-28 with twin objectives: protecting the public, particularly women and children, from extremely intoxicated violence, as well as holding individuals accountable for the violence they inflict on others.[39]

Future courts will have to decide whether a reasonable person should be expected to know that consuming certain quantities of intoxicants could put them in a state where they are no longer in control of their actions. The Crown must prove two things to establish such foresight: (1) before consuming the intoxicant, a reasonable person in the position of the accused could have foreseen a loss of control once the intoxicant was consumed, and (2) that loss of control could lead to violence.[40]

The New Section 33.1 partially closes the gap left by *Brown,* but it still allows a defence for those that either abuse an intoxicant or negligently become intoxicated. If the defence is successful,

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36 *Ibid,* s 273.

37 *Ibid*.

38 Government of Canada, "Changes to Section 33.1 of the Criminal Code on Self-Induced Intoxication" (23 June 2022), online: <justice.gc.ca/eng/csj-sjc/pl/sei-ive/index.html> [perma.cc/RW7C-KHR2].

39 Government of Canada, "Bill C-28: An Act to amend the Criminal Code (self-induced extreme intoxication)" (27 November 2023), online: <justice.gc.ca/eng/csj-sjc/pl/charter-charte/c28_1.html> [perma.cc/M3EQ-37V9].

40 *Criminal Code, supra* note 9, s 33.1(2).

the accused will be acquitted. The law in its present state fails to protect the public to its fullest capacity. Instead, it allows perpetrators of violent assaults to raise a defence, burdening the Crown with proving that violence was a foreseeable consequence of intoxication.

E. Proving Foreseeability of Harm

Prior to the enactment of the new provision, parliamentary committees discussed reconstructing section 33.1 without subsection 2, which includes the element of foreseeability. Incorporating the element of foreseeability ensures that the accused is linked back to an element of fault.[41] This ensures that criminal liability is not imposed solely based on the act of becoming intoxicated, but rather on the reasonable foreseeability that such intoxication could lead to a loss of control and potentially violent behavior. The old version was unconstitutional as it permitted convictions based solely on interference with another's bodily integrity, violating sections 7 and 11(d) of the *Charter*. It eliminated the need for the Crown to prove a blameworthy state of mind or fault element for the offence.[42]

Scholars have argued that the element of foreseeable violence would be nearly impossible to prove, as it would place a high burden on the Crown.[43] Professor Isabel Grant suggested to the Senate that a reasonable alternative might be to only require proof of foreseeable loss of control rather than foreseeable harm.[44] Professor Roach believed that courts would not have difficulty in determining whether a reasonable person could foresee harm due to extreme intoxication, suggesting "courts are likely to require the reasonable person to be cautious, especially when combining drugs."[45]

The first requirement focuses on whether the accused could have reasonably anticipated losing control due to intoxication. The second requirement—that this loss of control could lead to violence—adds an additional layer of complexity, making it more difficult to secure a conviction, as violence is not always a foreseeable consequence of intoxication. However, this challenge could be addressed by establishing intoxication thresholds, akin to those employed in impaired driving laws, and by instituting a rebuttable presumption akin to the one outlined in section 445.1(3) of the *Criminal Code*.[46] Section 445.1(3) presumes that harm caused to an animal was intentional unless proven otherwise. Applying a similar presumption in cases of extreme intoxication akin to automatism would mean that if an accused exceeds a set intoxication threshold, their violent actions would be presumed intentional unless rebutted with evidence. This threshold would serve to inform and alert individuals that attaining a particular level of intoxication might increase the likelihood of posing harm to others.

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41 *Brown, supra* note 2 at 25–26.

42 *Ibid.*

43 Notably, Professor Emerita Elizabeth Sheehy and Professor Isabel Grant expressed at a House of Commons committee meeting that the second standard will be impossible for the Crown to prove. See House of Commons, *The Defence of Extreme Intoxication Akin to Automatism: A Study to the Legislative Response to the Supreme Court of Canada Decision R. v. Brown* (December 2022) (Chair: Sarai Randeep) at 23–24.

44 *Brown, supra* note 2 at 28.

45 *Ibid* at 26.

46 *Criminal Code, supra* note 9, s 445.1(3).

II. PROPOSAL FOR REFORM

A. Implementing a Rebuttable Presumption

Proving foreseeable violence would place an unduly high burden on the Crown.[47] Even still, Parliament should consider amending section 33.1 to align more closely with the approach outlined in section 445.1(3) of the *Criminal Code*. Section 445.1(3) creates a presumption that allows a court to infer the guilty mind of the offence from proof that animals have been unreasonably neglected. Its purpose is to assist the Crown in prosecuting animal welfare cases by requiring individuals to exercise reasonable care when tending to animals, with willful neglect constituting an offence. The presumption in section 445.1(3) will not be applied if the accused provides evidence that they did not act negligently. Essentially, if there is proof that proper steps were taken to exercise reasonable care, and despite the provision of proper efforts made, the animals still faced pain and suffering, then the accused could not be found guilty. The provision holds individuals to a certain standard of care and level of responsibility when caring for animals. Making this alteration to the provision and establishing an intoxication limit would relieve the Crown of the high burden in proving foreseeable violence.

Section 445.1(3) reflects policy considerations that contribute to a more compassionate society that protects the lives and wellbeing of animals. A similar alteration can be made to the New Section 33.1 which would establish a standard for what a reasonable person is expected to know regarding the risk of losing control and engaging in violent behavior when consuming intoxicants. The New Section 33.1 could be modified to incorporate a presumption that if a prohibited act did occur, it would be presumed to be voluntary in the absence of evidence to the contrary. In other words, if a violent act was committed while the accused was above the intoxication limit, they would be assumed to have acted voluntarily unless there was leading evidence that a violent loss of control was unforeseeable.

B. Involuntary Act and the Use of the Tracing Principle

People should reasonably be expected to accept responsibility for becoming voluntarily intoxicated. Ultimately, it comes down to choice: people make the decision to become intoxicated by continuing their consumption of alcohol one drink at a time, so if there is a voluntary choice being made, they should be held responsible for their actions. Justice Healy, now serving on the Quebec Court of Appeal,[48] wrote after *Daviault*:

> If there is proven harm done by a person, but no proof of a voluntary act or fault in the ordinary sense, does it follow that there is nothing but innocence in such conduct? Perhaps. But might there not be some notion of moral guilt in such conduct that is relevant to the concept of criminal responsibility? Perhaps.[49]

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47 *Brown, supra* note 2 at 26.

48 When the article was published, Justice Healy was part of the Quebec Bar and affiliated with McGill University, Faculty of Law.

49 Patrick Healy, "Another Round on Intoxication" part of the "Criminal Reports Forum on Daviault: Extreme Intoxication Akin to Automatism Defence to Sexual Assault" (1995) 33 CR (4th) 269.

The passage questions whether legal innocence always implies moral innocence in cases where harm occurs without proof of a voluntary act or fault. While the absence of these elements may suggest no criminal liability, the author raises the possibility that moral guilt could still exist. Even if someone is not legally at fault, their actions might carry moral significance, particularly if harm resulted from recklessness or negligence. This challenges the strict legal view of responsibility and suggests that moral culpability could still be relevant in assessing criminal liability.

Professor Michelle Lawrence expresses similar principles, despite addressing the old section 33.1.[50] She explains that extreme intoxication is inherently dangerous and produces physical states that the reasonable person should know to avoid.[51] It is not unexpected that others can be at risk when one is not in control of their actions, and that risk can translate into a threat to interfere with the bodily integrity of another when someone has reached that level of intoxication.[52] With this understanding of choice, the accused's involuntary actions can still be culpable. Liability arises if they stem from a voluntary act with a foreseeable risk of violent loss of control. At the heart of the intuition that a person who becomes voluntarily intoxicated is criminally responsible for the foreseeable consequences of that intoxication is the view that involuntary conduct can sometimes be traced back to voluntary culpable conduct. A core principle of criminal law is that no one can be convicted for conduct that is not voluntary; if they were not in control of their actions at the time of the offence, they cannot be found guilty.[53] This principle was central to the Court's reasoning in *The Queen v King*.[54] In this case the plaintiff, Mr. King, drove his car while under the influence of sodium pentothal, a sedative administered during a dental procedure. He argued that the drug impaired his ability to voluntarily control his actions, leading to a collision with a parked car. The Court avoided the complex distinction between general and specific intent and focused instead on voluntariness as a foundational element of criminal liability, emphasizing the need for both a willing mind and free will. The Court ruled that Mr. King had not committed a voluntary act when driving and rejected the Crown's argument that his earlier decision to take the drug was enough to establish a guilty mind.[55]

Voluntariness as a cornerstone of criminal liability is significant; however, the bright-line rule should be adjusted to account for situations where an individual's initial decisions could reasonably be expected to result in impaired control. The tracing principle provides a useful framework for considering whether an accused's prior actions make them sufficiently blameworthy to justify punishment. For example, courts could examine whether the accused took reasonable precautions or acted recklessly before the crime occurred. Rather than

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50 Michelle Lawrence, "Voluntary Intoxication and the Charter: Revisiting the Constitutionality of Section 33.1 of the Criminal Code" (2017) 40:3 Man LJ 391.

51 *Ibid* at 421.

52 *Ibid.*

53 *R v Stone*, 1999 CanLII 688 at para 37 (SCC) [*Stone*]; *R v Luedecke*, 2008 ONCA 716 at para 53 [*Luedecke*]; *Daviault*, *supra* note 2 at 73–76; *Brown*, *supra* note 2.

54 *The Queen v King*, 1962 CanLII 16 (SCC) [*King*].

55 See also Frances E Chapman, "*Sullivan.* Specific and General Intent be Damned: Volition Missing and Mens *Rea* Incomplete" (2020) 63 CR (7th) 164 at 4.

focusing solely on voluntariness at the moment of the offence, a broader interpretation allows for an inquiry into the accused's pre-crime conduct, enabling a more nuanced and just assessment of culpability.

Investigating the blameworthiness of the voluntary acts prior to the crime could justify whether the accused's involuntary actions are worthy of criminal punishment. An accused as a reasonable person could be found criminally liable if they either consumed an intoxicant knowing they could lose violent control and consumed it anyways; or similarly, if they did not think that intoxication could lead to a loss of violent control. Case law has recognized the relevance of the accused's prior conduct in assessing whether their crimes were truly involuntary. In *R v Jiang,*[56] a driver fell asleep at the wheel of her vehicle and hit two children, killing one and seriously injuring the other. An expert testified that an undiagnosed disorder caused the sleep episode which caused the collision. The driver was acquitted because her actions were involuntary and unforeseeable at the time the offence was committed. However, the Court acknowledged that while Ms. Jiang's actions were involuntary, the outcome would have been different had there been evidence that she knew of the risks created by the sleep disorder.[57] If there was foreseeable risk of danger, the accused nevertheless chose to operate a vehicle, and their involuntary actions caused harm, they would be held accountable.

Similar reasoning was applied in the Scottish case of *Finegan v Heywood.*[58] There, the defendant was charged with impaired driving and appealed under the defence of automatism, claiming he was sleepwalking. The appeal was dismissed because the defendant knew from previous experience that his sleepwalking was induced by consuming alcohol. In those circumstances, automatism was a foreseeable consequence of intoxication. There are many other ways of proving that the accused knew that consuming an intoxicant could have criminal consequences. For instance, courts could consider the individual's previous history of offences and personal experience with intoxication. One compelling example would be where the accused had a history of convictions relating to intoxication that should have made them aware of the link between their intoxication and criminal behaviour.[59]

Defence counsel often provides evidence of a "Jekyll and Hyde change in behaviour" from accuseds who have consumed dangerous drugs.[60] Consequently, courts may have recourse to the accused's record to evaluate how foreseeable it was that this particular individual would act in a violent way if they became extremely intoxicated."[61] Taking these factors into consideration, this could prove that the accused was aware of the potential risks of extreme intoxication and the resulting harm to others. The results from extreme intoxication would therefore be foreseeable, holding the accused culpable for the involuntary action of the offence.

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56 *R v Jiang,* 2007 BCCA 270 [*Jiang*].

57 *Ibid* at para 17.

58 *Finegan v Heywood*, 2000 HCJT 444.

59 House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 44-1, No 35 (31 October 2022) at 11:31 (Michele Jules).

60 *Ibid* at 11:32.

61 *Ibid.*

However, it is crucial to approach a history of convictions related to intoxication with care. Past offences may stem from underlying addictions which are recognized as complex health conditions rather than solely matters of personal choice. Courts should ensure that reliance on past convictions does not unfairly prejudice the accused or reinforce stereotypes about addiction. Instead, the focus should remain on whether the accused's prior experiences provided them with sufficient awareness of the potential link between intoxication and criminal behaviour, without penalizing them simply for their history.

If there was no known risk or previous relevant history of culpable actions, then the accused should not be found guilty. To facilitate tracing involuntary acts back to voluntary culpable acts, Parliament could establish an intoxication limit. Establishing such a limit would inform the public that ingesting an intoxicant could lead to a loss of control, which could potentially lead to actions that could harm others. The limit would make it clear that beyond a certain level of intoxication, it would be reasonably foreseeable that a person could lose control and become violent.

C. Intoxication and Violence

Much research and literature has studied the correlation between alcohol and illicit drug use and violent behaviour.[62] The literature demonstrates a link between intoxication and heightened levels of violence such as assaults, sexual assaults, and domestic violence. Internationally, substance use and violence has revealed a similar pattern. The United Kingdom reported that two-thirds of domestic assault incidents that were reported to law enforcement involved people under the influence of alcohol.[63] In the United States, forty percent of all reported incidents of domestic violence involved the presence of alcohol in the accused's system prior to the offence.[64] In Australia, domestic violence was reported to be two times more likely to involve physical violence when alcohol was present.[65] Furthermore, studies have shown that the combination of multiple intoxicants may increase the incidence of violence in comparison to the use of alcohol alone.[66] A study examining intoxication and combined substances found a significantly stronger relationship between violence and the use of multiple substances.[67]

The effects of alcohol on the body have also been thoroughly studied. Alcohol's effect of promoting or influencing a person to engage in certain actions or behaviours that the individual would not normally participate in while sober, is well-known. Even moderate levels of alcohol consumption are known to cause motor, verbal, perceptual, and cognitive impairments, which could lead to violence.[68] Some immediate effects of substance use can include altered consciousness, impaired memory, disinhibition, euphoria, inattention,

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62 Aaron A Duke et al, "Alcohol, Drugs, and Violence: A Meta-Meta Analysis" (2018) 8:2 Psychology of Violence at 238.

63 Kajol Sontate et al, "Alcohol, Aggression, and Violence: From Public Health to Neuroscience" (2021) 12 Frontiers in Psychology at 2.

64 *Ibid.*

65 *Ibid.*

66 Duke et al, *supra* note 62 at 243.

67 *Ibid* at 238.

68 Sontate et al, *supra* note 63 at 3.

and altered judgement.[69] These symptoms appear in leading criminal cases involving the accused being charged with offences of violence who have raised the defence of automatism.[70]

While not everyone will experience the same type of effects when consuming alcohol or taking drugs, there is nevertheless strong evidence supporting a link between intoxication and violence. Therefore, it is reasonable to conclude that becoming intoxicated could potentially make substance users unpredictable and dangerous. Canadian laws relating to impaired driving are premised on public knowledge about the link between alcohol and motor vehicle accidents. Similarly, Parliament should set intoxication limits based on published research and educate the public on the risks that intoxication can lead to foreseeable violence.

D. Alcohol and Drug Limits and the Public's Knowledge of Impaired Driving

Parliament's approach to regulating impaired driving provides a suitable model for addressing self-induced intoxication leading to extreme violence. For impaired driving, Parliament has established a national standard or limit of blood alcohol concentration (BAC) for individuals who plan to drink alcohol and then drive.[71] If an individual caught driving any type of motor vehicle has a BAC of 80 mg of alcohol per 100 mL of blood or more, criminal charges can be laid.[72] Parliament has also established blood drug concentrations (BDC) to regulate psychoactive substances use as it relates to impaired driving.[73] The federal and provincial governments along with organizations such as Mothers Against Drunk Driving (MADD) have done an effective and efficient job of educating the public about the dangers of alcohol and drug use while driving.

MADD reached millions of Canadians through public service announcements (PSAs) aired from 2021 to 2022, and broadcasters aired national public television campaigns more than 109,000 times.[74] MADD also initiated programs to educate students from grades four to twelve about the danger and effects of mixing alcohol, cannabis, and other substances.[75] Additionally, MADD completed national surveys on the behaviours of driving after alcohol, cannabis, and illicit drug consumption.[76] With these education programs and PSAs reaching millions of people across the country, any reasonable person would be aware of and understand the potential risks of impaired driving. A survey of nearly 9,500 students who participated in

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69 Sarah Hardey et al, "How Do Drugs and Alcohol Affect the Brain and Central Nervous System?" (7 February 2024), online: <americanaddictioncenters.org/health-complications-addiction/central-nervous-system> [perma.cc/9F7T-9TTK].

70 See *R v Bouchard-Lebrun* 2011 SCC 58 [*Bouchard*]; *Brown, supra* note 2; *Sullivan, supra* note 21; *Chan, supra* note 20; *Daviault, supra* note 2.

71 MADD Canada, "Impaired Driving Laws" (2018), online: <madd.ca/pages/impaired-driving/stopping-impaired-driving/impaired-driving-laws/> [perma.cc/5UCH-VQLW].

72 Government of Canada, "Impaired Driving Laws" (3 March 2022), online: <justice.gc.ca/eng/cj-jp/sidl-rlcfa/> [perma.cc/C662-MFL5].

73 *Ibid.*

74 MADD Canada, "MADD Canada – Annual Report 2021-2022" (2023), online (pdf): <madd.ca/pages/wp-content/uploads/2023/05/MADD-Canada_Annual-Report-2021_2022.pdf> [perma.cc/NT9W-C5F4] at 11.

75 *Ibid* at 8.

76 *Ibid* at 5.

the 2020-2021 School Program highlights its impact: 83% and 81% said they were not at all likely to ride with someone who had used cannabis or alcohol within two hours of driving, while 83% were very likely to plan a safe way home, and 95% were likely or very likely to step in to prevent impaired driving.[77] These results demonstrate how MADD Canada's initiatives are empowering young people to make safer choices and take action to keep roads safe.

The same reasoning can be applied to automatism and the foreseeability of harm. If Parliament set limits for intoxicants, along with including awareness campaigns to combat violence, the general public would become aware of the correlation between intoxication and violence, similar to that of impaired driving. Limits could also be set for mixing intoxicants. After all, if consumption of one intoxicant can put a person at risk of losing control and becoming violent, it is reasonable to assume that combining substances could potentiate the effects of the intoxicant. The old version of section 33.1 recognized this: using and mixing intoxicants can lead to automatism and violence.[78] Under the New Section 33.1, the law requires individuals to recognize that consuming an intoxicant may lead to violence. Setting an intoxication limit would put a reasonable person on notice of this possibility and spread awareness that would make it easier for the Crown to prove that consuming an intoxicant could reasonably lead to violence. In setting legal limits, as well as implementing comprehensive educational campaigns and prevention programs, this approach aims to inform individuals about the risks associated with intoxication. By increasing public understanding of the connection between intoxication and violence, these measures would reinforce the legal framework and assist the Crown in proving that a reasonable person could foresee violent consequences from consuming intoxicants.

E. The Limits Surrounding Cannabis

Among the drugs that are regulated under impaired driving laws, cannabis was one of the only substances listed as having a more lenient limit.[79] This refers to higher allowable BDCs for tetrahydrocannabinol ("THC")—the principal psychoactive chemical in cannabis—before impairment is presumed, and range within which impairment must be proven. This is reflective of how socially acceptable the drug has become since it was legalized in 2018. Cannabis is a commonly used substance, both medically and recreationally, with over 200 million people consuming it annually worldwide.[80] With cannabis becoming legalized in many countries, the harmful effects of cannabis primarily focus on the health effects of the user. The issue of individual behavioral changes resulting in violence and harm to others does not receive the same attention.

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77 MADD Canada, "MADD Canada – Youth Education Program Report 2020-2021" (2021), online (pdf): <madd.ca/pages/wp-content/uploads/2021/01/MADD-Canada-Youth-Education-Impact-Report-2019_2020.pdf> [perma.cc/VSD3-8YZA].

78 *Brown, supra* note 2 at para 148.

79 *Blood Drug Concentration Regulations*, SOR/2018-148, online: <gazette.gc.ca/rp-pr/p2/2018/2018-07-11/html/sor-dors148-eng.html> [perma.cc/7XKS-R4G9].

80 Laura Dellazizzo et al, "Violence and Cannabis Use: A Focused Review of a Forgotten Aspect in the Era of Liberalizing Cannabis" (2020) 11 Frontiers in Psychiatry at 2.

This is concerning as global studies show that there is a 45 percent increase in the risk of domestic violence when using cannabis.[81] Animal studies have also found that THC produces complex effects on aggression.[82] Animal studies using smaller doses of THC have reported less emergence of aggression, whereas studies using higher doses and more chronic exposure have led to increased aggressiveness.[83] Additionally, an American survey found that cannabis use was associated with a doubling of domestic violence in the United States.[84] Extrapolating these results suggests a relationship between cannabis use and aggressive behavior.

The effects of THC can include a sense of euphoria, heightened sensory perception and increased appetite. These pleasant sensations, however, are not universal. Some people will experience anxiety, fear, distrust, or panic.[85] When taking a large dose, the individual may also experience psychosis which can include dissociation and hallucinations.[86] In some cases, this leads the person who has consumed the drug to reach a state of automatism.

Briefly, in *R v Bouchard-Lebrun,* the SCC held that psychosis induced solely by voluntary intoxication does not meet the criteria for the defence of not criminally responsible by reason of mental disorder under section 16 of the *Criminal Code*.[87] The Court distinguished between mental disorders arising from internal factors, like psychiatric conditions, and temporary states caused by external factors, such as drug use. The Court ruled that substance-induced psychosis does not meet the criteria for a mental disorder. Emphasizing accountability, the Court found that individuals must bear responsibility for the foreseeable consequences of their voluntary actions, including consuming substances that impair judgment. The Court maintained that voluntary intoxication does not absolve accountability, while recognizing that psychosis diminishes rational capacity. This reflects the broader legal and moral expectation that individuals exercise self-control and avoid creating risks that could lead to harm to others.[88]

Furthermore, Parliament has established a blood drug concentration ("BDC") that sets a standard for impaired driving. Criminal charges can be laid if someone's BDC is 5 nanograms of THC per ml of blood.[89] While it is difficult to establish a set intoxication limit leading to violence, the impaired driving limits tells us that it becomes a more serious offence if THC BDC is above 5 nanograms per ml of blood. The implication is that it intensifies the effects and can lead to a greater loss of control. With studies consistently showing a link between

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81 *Ibid* at 3.

82 *Ibid* at 4.

83 *Ibid* at 5.

84 Alex Berenson "Marijuana is More Dangerous Than You Think" (2019) 116:2 Missouri Medicine 88 at 89.

85 National Institute on Drug Abuse, "Cannabis (Maijuana)" (July 2020), online: <nida.nih.gov/publications/research-reports/marijuana/what-are-marijuana-effects> [perma.cc/AL8Y-3H7W].

86 *Ibid.*

87 *Bouchard*, *supra* note 70; *Criminal Code*, *supra* note 9, s 16.

88 See Michelle Lawrence & Simon N Verdun-Jones, "Blurred Lines of Intoxication and Insanity: An Examination of the Treatment at Law of Accused Persons Found to Have Committed Criminal Acts While in States of Substance-associated Psychosis, Where Intoxication was Involuntary" (2016) 93:3 Can B Rev 571.

89 *Blood Drug Concentration Regulations, supra* note 79.

cannabis use and heightened levels of violence with increasing amounts consumed, Parliament should establish a BDC limit where possible loss of control could result in harming others.

F. Varying Effects of Intoxication on Individuals

The effects of intoxication vary greatly from individual to individual depending on the person's age, weight, and gender. BAC can be estimated by measuring an individual's weight in relation to the amount of alcohol they have consumed. For instance, generally, two to three "standard" drinks will result in a BAC range of 0.01 percent to 0.07 percent.[90] Someone who weighs 100 pounds and has two "standard" drinks will have an estimated BAC of 0.06 percent, whereas someone who weighs 190 pounds after two "standard" drinks will have an estimated BAC of 0.04 percent, both experiencing the effects of being relaxed and having lowered inhibitions.[91]

Using BAC levels, Parliament established intoxication limits for impaired driving to promote public safety, provide knowledge and guidelines to the public, create a deterrence for individuals, and enforce responsibility. Establishing these legal limits reinforces the very important ideas of legal and social responsibility. Therefore, it would be prudent for Parliament to create an intoxication limit and release guidelines for alcohol and specific drugs based on consumption and bodily effects.

G. Establishing an Intoxication Limit for Automatism

Given the effects of intoxication and the warnings and regulations established for impaired driving, Parliament should establish intoxication limits for automatism when one commits violence. With established limits, Parliament would create measures to guide laws and ultimately further educate the general public about safe behaviour when using intoxicants. In cases involving automatism, the Crown would consider whether someone should have understood that they might reach a level of intoxication resulting in automatism before ingesting substances. They would also consider if the accused took reasonable precautions in order to avoid potential harm to others.

In line with the regulatory provisions for impaired driving, one option for Parliament is limiting the availability of the defence of automatism to people whose consumption of intoxicants is below a certain limit. If the level of intoxication of those involved in violent acts is measured, this evidence could be used in court for cases involving automatism. This approach would be similar to the identified blood concentrations to regulate alcohol and psychoactive substances with impaired driving. This baseline could then be used as part of an individual's defence or prosecution in cases involving voluntary intoxication.

Several institutions have outlined similar BAC levels with corresponding predictable

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90 Hayley Hudson, "Blood Alcohol Content" (5 November 2024), online: <alcoholrehabguide.org/alcohol/blood-alcohol-content/> [perma.cc/BWA2-FL6V].

91 *Ibid.*

behaviours and effects on the body.[92] Reaching a BAC of 0.25 percent can produce some of the effects that are seen when someone has reached a state of automatism. At 0.25 percent an individual is in a stupor and is severely impaired in all psychological, sensory, and mental functions; the individual will have little comprehension of the self and their environment, and are at a high risk of losing consciousness.[93]

Therefore, Parliament should adopt corresponding intoxication levels for psychoactive substances, like those for impaired driving laws. The regulations of impaired driving identify ten specific drugs of concern,[94] including commonly abused substances that are prevalent and linked to impairment.[95] Parliament's approach to impaired driving regulations provides a solid foundation for narrowing the challenging landscape of drug and alcohol combinations. By prioritizing the regulation of these substances, Parliament already acknowledged their significant impact on public safety in impaired driving cases. Researchers and policymakers can use this list as a practical baseline for further analysis, such as understanding the pharmacological interactions of these drugs with alcohol. This can illuminate critical patterns of impairment.

There is an increased risk of harm when an individual is in a state of automatism, so Parliament should set strict blood concentration limits in an effort to mitigate this harm. Such a law would recognize the importance of public safety and condemn actions that interfere with individuals' ability to feel secure. Consequently, if driving under the influence of these drugs is illegal, committing violence in a state of automatism should also be illegal. Establishing an intoxication limit for reaching a state of automatism would provide clarity for the courts on what a reasonable person should be expected to know before becoming intoxicated. Ultimately, considering the connection between intoxication and harm to others, the risk of violence is possible and therefore, foreseeable. This foreseeability of risk raises significant questions about the reasoning and treatment of intoxication in relation to legal responsibility, particularly in violent offences.

H. Challenging the Court's Distinction of Responsibility in Violent Offences

The Court in *Brown* distinguishes extreme intoxication from impaired driving offences by arguing that intoxication is central to the wrongful act in impaired driving, but merely

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92 Various institutions have outlined blood alcohol concentration (BAC) levels with corresponding effects on the body. This includes the including the University of Notre Dame, the University of Wisconsin and Drug and Alcohol Services South Australia. See University of Notre Dame, "Blood Alcohol Concentration" (2024), online: <mcwell.nd.edu/your-well-being/physical-well-being/alcohol/blood-alcohol-concentration/> [perma.cc/5MWH-S866]; University of Wisconsin – Eau Claire, "Blood and Alcohol Content Predictable Effects" (2024), online (pdf): <publicwebuploads.uewec.edu/documents/BAC-chart-in-table-format.pdf> [perma.cc/2GVA-F7BX]; Government of South Australia, "Blood and Alcohol Concentration" (2014), online: <sahealth.sa.gov.au/wps/wcm/connect/Public%20Content/SA%20Health%20Internet/Conditions/Alcohol/Blood%20Alcohol%20Concentration%20BAC%20and%20the%20effects%20of%20alcohol> [perma.cc/7UCK-ZT5V].

93 *Ibid.*

94 *Blood Drug Concentration Regulations, supra* note 79.

95 See Hardey et al, *supra* note 69.

incidental in violent offences like assault.[96] In impaired driving offences, intoxication is integral because it transforms lawful and benign conduct, such as driving, into a criminal act by impairing the ability to drive safely.

By contrast, in violent offences like assault, the Court held that intoxication is not a core component of the offence. The key wrongful act of assault lies in the intentional application of force or threats against another person. This remains true regardless of whether the accused is intoxicated. In this context, intoxication is considered incidental; it may provide context for why the offence occurred but is not necessary to establish the elements of the crime. However, this distinction can be challenged by focusing on the foreseeable consequences of voluntary intoxication, rather than its role as a formal element of the offence. The key issue becomes not whether intoxication is central to the legal definition of the offence, but whether it significantly contributes to the resulting harm.

Though discussing the old version of secion 33.1, Professors Plaxton and Mathen discuss that traditional legal principles require voluntariness and fault for an offence to exist, and in the absence of these elements, the defendant's behavior cannot be understood as a conventional prohibited act.[97] They suggest that the prohibited act in such cases is not the conduct itself but rather its consequences.[98] Moreover, the prohibited act is not entirely erased - it is instead treated as a "simulacrum" of a crime, meaning it would have been criminal if committed by a voluntary actor with the requisite fault.[99] This reasoning reinforces the argument that liability should not be abandoned in cases of automatism, but should instead be traced back to an earlier fault: the defendant's voluntary decision to consume intoxicants to a dangerous degree. By shifting the focus to the foreseeability of harm resulting from reckless intoxication, the law can maintain a coherent framework for liability while preserving the fundamental principle that fault must underlie criminal responsibility.

I. Awareness of Intoxication Leading to Violence

One criticism of the New Section 33.1 is that it will be difficult to prove that a reasonable person would have known that consuming an intoxicant could lead to loss of self-control and violence. Moreover, even if there is some awareness among ordinary people that there may be a correlation between intoxication and heightened levels of violence, they may be unaware that reaching a particular level of intoxication could lead to harm to others. The research that supports such a link shows there is still a gap in the public's general awareness that intoxication can possibly lead to violence. In these circumstances, Parliament must step in to educate the public. Parliament has already taken some steps toward educating the public about concerns surrounding intoxication; for instance, the Public Awareness of Alcohol-Related Harms Survey outlines the harms that could be caused by intoxication, but only focuses on the harms

96 *Brown, supra* note 2 at para 78.
97 Michael Plaxton & Carissima Mathen, "What's Right with Section 33.1" (2021) 25:3 Can Crim L Rev 255.
98 *Ibid* at 271.
99 *Ibid.*

related to one's own health.[100] On the other hand, the Canadian Centre for Substance Use and Abuse issued a recent report outlining the health concerns of intoxication as well as the social impacts of intoxication leading to violence.[101] Additionally, the National Anti-Drug Strategy, launched in 2007, aims to reduce drug-related harm and promote safer communities through prevention, treatment, enforcement, and public awareness.[102] Ultimately, Parliament needs to address the harms of intoxicated automatism, and one way to do this is to establish public guidelines.

J. Addressing One Argument Against Setting an Intoxication Limit

The biggest difference and most significant argument against setting limits for intoxicants that lead to violence, as compared to alcohol consumption, is that most impaired driving offences occur when drivers are caught in that very moment and tested on the spot. In comparison with instances involving violence, time can pass after an act of violence before the accused is detained by police and their intoxication level is tested. The longer the delay in testing alcohol and drug concentration levels, the harder it will be to get an accurate measurement of how intoxicated the accused was when they committed the crime.

Despite this, there could nevertheless be enough evidence to formulate a reasonable measurement. When called to investigate violence, police should always collect evidence about how much of an intoxicant the accused has consumed. They can also gather evidence relevant to the accused's level of intoxication, such as their weight, behaviour, and history of intoxication. This was precisely what occurred in *Daviault*: the evidence demonstrated that the accused had consumed 7 or 8 bottles of beer and 35 ounces of brandy before sexually assaulting the victim.[103] The evidence gathered by police can be paired with an expert opinion interpreting the significance of that evidence. In *Daviault,* a pharmacologist testified that a man of Mr. Daviault's age, weight and height who had consumed that much alcohol would have put Mr. Daviault's blood alcohol level between 400 and 600 milligrams per 100 milliliters of blood.[104] The expert asserted that an individual with that level of intoxication in the blood stream could suffer "l'amnésie-automatisme," also known as a "blackout."[105] Someone in this state is not aware of their actions as they can lose contact with reality and normal functioning.[106] Therefore, even if the investigation of violent offences occurs at a different time than the investigation of impaired driving, evidence about the quantity of an intoxicant that the accused has consumed could provide evidence for a reasonable estimate of BAC.

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100 Government of Canada, "Public Awareness of Alcohol-related Harms Survey 2023" (19 January 2024), online: <health-infobase.canada.ca/alcohol-related-harms-survey/> [perma.cc/844W-496D].

101 Canadian Centre on Substance Use and Addiction, "Canada's Guidance on Alcohol and Health: Final Report" (January 2023), online (pdf): <ccsa.ca/sites/default/files/2023-01/CCSA_Canadas_Guidance_on_Alcohol_and_Health_Final_Report_en.pdf> [perma.cc/H7KN-28UE].

102 Government of Canada, "Evaluation of the National Anti-Drug Strategy" (13 May 2022), online: <justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2018/nads-sna/eilp-epji.html> [perma.cc/MY35-L2ZN].

103 *Daviault, supra* note 2 at 105.

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

A similar approach could be adopted with cases involving intoxicated violence. It may be difficult to determine an appropriate scope for this, such as how expert evidence would approach backtracking the time between the report made to police and the violent incident itself. However, it is worth Parliament considering similar guidelines for instances of intoxicated violence. Making this a reality could help ensure that more calls are being made to the police, contributing to fewer cases of assault, or other violent acts going unreported. However, it would also place a responsibility on the police to promptly test the accused's level of intoxication. It may be beneficial to adopt an approach similar to procedures used in domestic violence cases under section 320.31(4) which deals with impaired driving offences and timely testing of intoxication levels.[107] Introducing similar measures could strengthen how intoxication-related violence is addressed.

K. Domestic Violence

Establishing legal limits for dangerous levels of intoxication will not, in itself, eliminate the complex issue of intoxication-related domestic violence. However, it could serve as a valuable tool alongside other preventative measures, such as public awareness campaigns, educational programs, and community support initiatives aimed at reducing the incidence of domestic violence. These combined efforts could help challenge societal norms that tolerate or excuse violent behavior when intoxication is involved, promote a culture of accountability, and encourage both victims and bystanders to report incidents.

Despite these potential benefits, challenges would remain, particularly regarding the timely reporting of domestic violence incidents involving intoxication. Setting clear legal intoxication limits could help shift societal perceptions by emphasizing the seriousness of intoxicated violence and reinforcing the idea that intoxication is not an acceptable excuse for violent behavior. This shift in perception could, over time, encourage more immediate reporting and a stronger legal response.

A particularly effective legal measure could be the adoption of a backtracking mechanism similar to section 320.31(4) of the *Criminal Code*, which is currently used in impaired driving cases. This provision allows law enforcement to estimate a person's BAC at the time of an alleged offence, even if the testing occurs hours later. By applying this approach to domestic violence cases, authorities could still hold perpetrators accountable even if there is a delay in reporting or testing. This is especially important in domestic violence situations, where immediate reporting is often not possible due to the dynamics of abuse and control within the household.

Incorporating such a mechanism into domestic violence law could strengthen prosecutions by providing objective evidence of intoxication at the time of the offence. Furthermore, when combined with an examination of the accused's voluntary actions leading up to the crime, including any prior history of domestic violence, previous offences, and personal experiences with intoxication, this approach could paint a comprehensive picture of culpability. Courts could assess whether the individual knowingly engaged in risky behaviors, such as excessive intoxication, that contributed to the violent incident, thereby reinforcing personal accountability.

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107 *Criminal Code, supra* note 9, s 320.31(4).

Additionally, setting a defined BAC limit for dangerous intoxication in the context of domestic violence would emphasize the critical importance of prompt reporting. It would also create an expectation for law enforcement to prioritize testing the accused's intoxication level as quickly as possible to preserve vital evidence.

L. The Operation of Testing Intoxication Limits

Setting an intoxication limit would necessitate that the accused undergo a sobriety test to objectively measure their level of impairment at the time of the alleged offence. This process ensures that any claims of intoxication can be substantiated with concrete evidence. To effectively implement such a system, intoxication levels should be tested under specific conditions: (1) when there is credible evidence suggesting that intoxicants—such as alcohol, prescription drugs, or illicit substances—played a role in the violent behavior or (2) when there is observable evidence of automatism, which refers to actions performed without conscious control upon the arrival of law enforcement at the crime scene. In both scenarios, timely police intervention is crucial to accurately assess the state of the accused.

Police can gather evidence of intoxication through several methods. First, officers can assess the accused's visible physical and cognitive state at the scene, such as slurred speech, unsteady movement, or erratic behavior. Second, the presence of intoxicating substances at the scene can support the claim of intoxication, such as open containers of alcohol, drug paraphernalia, or prescription medications. Third, establishing the quantity of substances consumed can provide a more precise understanding of the accused's level of impairment. This might involve gathering witness statements, surveillance footage, or receipts from establishments where the accused may have consumed intoxicants.

In situations where there is a delay in reporting the crime or when law enforcement arrives significantly after the incident, determining the exact level of intoxication becomes more challenging. The accused's body may have metabolized some of the substances, making immediate sobriety tests less accurate. However, while difficult, it is not impossible to establish the accused's intoxication level. In these cases, evidence regarding the quantity and type of substances consumed becomes particularly important. Additionally, expert testimony may reconstruct probable BAC and BDC levels at the time of the crime based on consumption patterns and timing.

Further, the investigation can be supplemented by examining the accused's history and behavioral patterns, particularly any documented tendencies or prior incidents involving intoxication. This background information, if known to the police, can assist in constructing a narrative of foreseeable intoxication, suggesting that the accused either knew or should have known that consuming certain substances would lead to a loss of control or violent behavior.

CONCLUSION: THE NEED TO REFORM THE NEW SECTION 33.1

The law governing intoxicated violence in a state of automatism must be overhauled. As seen in *Brown*, those accused can be absolved of criminal responsibility when they have voluntarily intoxicated themselves and subsequently engage in involuntary violent acts. A future challenge to the constitutionality of the New Section 33.1 could potentially infringe sections 7 and 11(d) of the *Charter*. Despite potential *Charter* infringements, these can

likely be justified under section 1, as Justice Kasirer suggested in *Brown*. The New Section 33.1 effectively balances public safety with the accused's rights by requiring foreseeability and narrowing liability to individuals who anticipated the risks of extreme intoxication leading to violence. This approach protects section 7 and section 11(d) rights by convicting only those who negligently self-intoxicate, while preserving a defence for unforeseeable reactions. By integrating the proposed approach of setting permissible levels of intoxicants and incorporating a presumption modeled on section 445.1(3) of the *Criminal Code*, the law can effectively provide accountability for irresponsible consumption of intoxicants and regulate intoxicated violence. Like impaired driving, intoxicated violence poses a threat to public safety that warrants considerable attention. The foreseeable risk of harm, in both impaired driving and intoxicated violence, is regulated in an attempt to mitigate damage and impose criminal consequences for those who voluntarily enter a state of automatism. Although not every instance of surpassing intoxication levels will lead to motor vehicle accidents causing injury to others, the implementation of regulations will result in an increased level of safety for all.

Not every instance of intoxication leads to violence but there is a distinct correlation between the two. Government intervention, as demonstrated in the regulations surrounding impaired driving, is justified when the foreseeable risk of harm materializes into a societal concern. The more intoxicated one becomes, the greater the loss of control and unpredictability of one's actions, potentially leading to violence. Thus, Parliament should establish limits for a certain level of intoxication leading to a foreseeable risk of loss of control and a resulting harm to others. However, if the accused's reactions were unforeseeable, they may be able to use a limited defence. Ultimately, it is essential to consider blameworthiness and criminal responsibility in addressing both intoxicated driving and intoxicated violence. An intoxication limit would do this by holding individuals accountable for their actions when they knowingly engage in irresponsible consumption of intoxicants. It would ensure accountability for individuals' reckless actions when they should have been aware and considered the risks.

Therefore, using both the concept of tracing and establishing an intoxication limit, it is morally justifiable to hold someone responsible for the violent act that results from an accused acting in a state of automatism. If an individual's acts of violence can be traced back to blameworthy, voluntary consumption of an intoxicant, they should be held criminally responsible for their subsequent involuntary actions. The establishment of intoxication limits would aid courts in deciding whether the voluntary intoxication warrants criminal punishment. With clear limits, courts could hold individuals accountable for their actions as the consequence of intoxication was foreseeable. Thus, it becomes reasonable to expect individuals to have known better before voluntarily self-intoxicating. If someone willingly becomes intoxicated and it was foreseeable that reaching a certain limit could alter their behaviour and consciousness, which could result in harm to others, they should be found guilty.

The New Section 33.1 should be modified to better address intoxicated violence. The defence of extreme intoxication akin to automatism should only be available if the level of intoxicants of the accused's blood is below a statutory limit. If a violent act was committed when the accused's intoxication level was above the established limit, the accused's action would be presumed to be voluntary, unless evidence suggests otherwise. The accused would be acquitted if they could prove that they were too intoxicated to control their actions, and a violent reaction at that intoxication level was an unforeseeable consequence. This modification to section 33.1, accompanied by

a public education campaign, should improve the public's awareness of intoxicated violence. Extensive public awareness and the addition of clearly set intoxication laws in place, would foster a deeper understanding of the dangers associated with intoxication, and subsequently cultivate safer behavior surrounding the ingestion of intoxicants.

Such reform is urgently needed. The recent change to section 33.1 requires that the Crown must prove the foreseeability of violence as a result of intoxication to benefit from the presumption of voluntariness. Consequently, in contrast to the previous provision, Parliament has essentially broadened the availability of the defence of extreme intoxication at the expense of public safety. Further, it has potentially rendered it more difficult for the Crown to benefit from the presumption of voluntariness by requiring it to prove foreseeable loss of control and violence. Setting permissible levels of intoxicants combined with a presumption modeled on section 445.1(3) will alleviate these difficulties.

Finally, through the principle of tracing, courts could assess how blameworthy the accused's prior voluntary actions were. With the addition of established intoxication limits, the accused could not be held as blameless, as they would have committed a violent action while voluntarily exceeding the threshold of intoxication. Willingly placing oneself into a foreseeable, uncontrollable state of automatism and disregarding the potential risk of harm to others by reaching a certain level of intoxication is a blameworthy act that warrants criminal responsibility.

ARTICLE

VILLAINS OR VICTIMS? ANALYZING THE CANADA REVENUE AGENCY'S ROLE IN COUNTERING MONEY LAUNDERING AND TERRORIST FINANCING OFFENCES IN CANADIAN CHARITIES

Emilio Abiusi *

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ABSTRACT

This paper addresses the role of Canadian charities in the global fight against money laundering and terrorist financing. It highlights how Canadian charities with altruistic motives can suffer as victims both from abuse by bad actors and from the unintended consequences of disproportionate regulation. This paper suggests that Canada's anti-money laundering and anti-terrorist financing regime should evolve to treat charities as co-collaborators in the global fight against terrorist financing instead of villainous vehicles for terrorist entities.

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INTRODUCTION

When does a charity cease to be charitable? In Canada, the answer is when a charity stops operating for its valid charitable purpose. A charity's status may be revoked if the regulator finds that a charity has been corrupted by a bad actor for money laundering or terrorist financing purposes. A charity may be abused for terrorist financing when a terrorist or terrorist organization uses a charity to raise or move funds, provide logistical support, encourage or facilitate terrorist recruitment, or otherwise support terrorists or terrorist organizations and operations.[1] At that moment the charity is no longer operating for its legitimate purpose. In the eyes of the state, the charity has become a villain which must be stopped at all costs.

I. THE *MAC V CANADA* CASE

This drama recently played out in *Muslim Association of Canada v Attorney General of Canada* ("*MAC v Canada*").[2] In that case, the Muslim Association of Canada ("MAC") challenged a Canada Revenue Agency ("CRA") audit of an Islamic charity due to allegations that the charity had been supporting terrorist entities. MAC is Canada's largest grassroots Islamic charity serving more than 150,000 members of the Canadian Muslim community in cities across Canada.[3] It is a robust organization which operates many mosques, community centres, and schools. As a registered charity, MAC relies on donations to fund its operations and programs. In return, MAC may issue tax receipts to its donors. Being a registered charity is essential to MAC's ongoing operations and its organizational development.

The CRA had been auditing MAC since 2015 to determine if its charitable status should be revoked. As the regulator of charities in Canada, the CRA is mandated to ensure that registered charities meet required standards, and in recent years, its mandate has expanded to ensure that terrorist actors do not abuse charities.[4]

The CRA runs these specialized terrorist financing audits through its Risk Assessment Division ("RAD"), which has been set up as part of Canada's international commitments to aid the fight against money laundering and terrorist financing. The RAD was concerned that recent changes to MAC's finances evinced a risk that MAC had been used by terrorist groups for

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1 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Paris, France: FATF, 2023) at 65.

2 *Muslim Association of Canada v Canada (AG),* 2023 ONSC 5171 [*MAC v Canada*]. Dismissal affirmed on appeal 2024 ONCA 541. While the trial judge's decision was affirmed on appeal the ONCA reminded both the CRA and the courts at para 28 that: "in considering an objection to an assessment or a notice of intent to revoke charitable status, and in vacating, confirming, or varying it, the CRA has an obligation to consider, not only whether the decision respects *Charter* rights, but the relevant values underlying such rights," citing *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)* 2023 SCC 31 at para 66. This is a notable paragraph as the jurisprudence around *Charter* values and what they require from administrative actors in regard to religious organizations is in its nascency.

3 *Ibid* at para 6.

4 Department of Finance Canada, *Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime Strategy 2023-2026* (Ottawa: Department of Finance Canada, 2023) at 23–24 [Department of Finance Canada, *Canada's AML and ATF Strategy*].

financing purposes. The CRA pointed to the following indicia of risk to justify auditing MAC:

1. MAC received more than $4.5 million in donations from foreign sources between 2012 and 2014;
2. A foreign donor donated both to MAC and to another organization called the Union of Good which the United States Department of the Treasury designated as an organization "created by Hamas leadership to transfer funds to the terrorist organization…";
3. MAC and the Muslim Brotherhood, ostensibly a foreign political party, had a public connection;
4. MAC's assets grew from $16 million to $47 million between 2009-2014, particularly in real estate; and
5. MAC conducted fundraising at its events for the *International Relief Fund for the Afflicted and Needy* ("IRFAN"), a listed terrorist entity.[5]

At the Ontario Superior Court of Justice, MAC argued that the RAD's decision to audit the charity breached its rights under sections 2(a), 2(b), 2(d) and 15 of the *Charter of Rights and Freedoms* (the "*Charter*").[6] In particular, MAC asserted that the RAD had a discriminatory anti-Islamic bias. Since 2008, RAD has completed 39 audits. 14 of the audits resulted in a revocation of charitable status, 12 of which were Islamic organizations.[7]

In considering the question of discrimination, Justice Koehnen, wrestled with the fact that both the RAD and MAC could not point to specific evidence to either prove or disprove MAC's involvement with terrorist entities.[8] Neither party could identify a bright line rule in Canada's anti-terrorist financing regime indicating which charitable actions were valid but risky, and which actions stepped over the line into terrorist financing. The Court ultimately allowed the audit to continue, finding the issues to be moot due to the principle of prematurity. However, the Court was sympathetic to the perceived discrimination, writing in *obiter*:

> I ask myself whether a Christian or Jewish charity would have its charitable status revoked for similar infractions or whether they would receive some sort of guideline, warning, reprimand or other sanction short of revocation of charitable status.[9]

The Court points to an inherent issue with the RAD's process. When risk factors for terrorist financing are present, a charity is not given the benefit of the doubt. The RAD engages in an antagonistic auditing process which treats the charity like a villain when in reality, charities may likely be the victims.

This paper analyzes Canada's regulatory regime for charities and asks why it has taken an antagonistic approach. Part II considers the global discourse on the unique risk factors for

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5 *MAC v Canada*, *supra* note 2 at para 32.
6 *Ibid* at para 10.
7 *Ibid* at para 14.
8 *Ibid* at para 61.
9 *Ibid* at para 55.

charities regarding anti-money laundering and anti-terrorist financing. Part III considers how Canada has approached the liability of charities in this area. Part IV considers a more collaborative approach to Canadian charity regulation.

Ultimately, charities should be recognized as victims of corruption instead of villains to be punished. A collaborative approach between regulator and charity could serve Canada's international commitments to anti-money laundering ("AML") and anti-terrorist financing ("ATF") and remedy any potential discriminatory effects those regimes may have.

II. THE GLOBAL RISKS OF ABUSE IN CHARITIES

Canada's approach to AML and ATF is part of a larger global push to ensure charities are not being abused by bad actors. Starting in 2008, reports from the Financial Action Task Force ("FATF") and the Organization for Economic Co-operation and Development ("OECD") have revealed that the abuse of charities globally was becoming more organized and sophisticated.[10] Canada is a member of both FATF and the OECD and has endeavoured to bring Canadian law in line with their recommendations.[11]

A. How Charities are Abused by Bad Actors

Charities and non-governmental organizations ("NGOs") have been globally recognized as being at high risk for abuse because of their pro-social projects.[12] The fear inherit in AML and ATF regimes may evince a concern that many charities are being set up as vehicles for terrorist entities to operate inconspicuously. While this undoubtedly does occur, the vast majority of charities operate in good faith; however, they may find themselves unwittingly co-opted by bad actors. Charities are at a higher risk of abuse for a number of key reasons.

First, charities enjoy public trust. This trust grants charities access to significant cash flow, especially in the case of a charitable foundation whose purpose is to raise and distribute funds.[13] The public trust granted to charities has resulted in less suspicion of their financial practices due to their altruistic purposes.[14]

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10 Organization for Economic Co-operation and Development, *Report on Abuse of Charities for Money-Laundering and Tax Evasion* (Paris, France: OECD Centre for Tax Policy and Administration, 2009).

11 As a brief note, there are differences between charities, NGOs, and non-profits. Different sources will sometimes refer to all three. For clarity, the FATF's definition of a non-profit organization ("NPO"), drawn from *Combating the Abuse of Non-Profit Organisations (Recommendation 8)* (Paris, France: FATF, 2015) is a helpful catch-all: NPO refers to a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works". In this paper, I focus on the risks for charities specifically but will sometimes use NPO when the source uses it.

12 Organization For Economic Co-operation and Development, *Money Laundering and Terrorist Financing Awareness Handbook for Tax Examiners and Tax Auditors* (Paris, France: OECD, 2019) at 23.

13 Financial Action Task Force, *supra* note 1 at 60.

14 Samantha Bricknell et al, *Money Laundering and Terrorism Financing Risks to Australian Non-profit Organisations*, Research and Public Policy Series 114 (Canberra, Australia: Australian Institute of Criminology, 2011) at 9.

Second, certain charities have global networks through their operations networks or through partners in foreign countries. This global presence allows for easy movement of funds and services.[15] Charities that operate in high-risk jurisdictions often execute their humanitarian mission through local partners, which are not always directly supervised by the charity.[16] Depending on the risk of the country where the charity operates, terrorist organizations may infiltrate on-the-ground operations to misuse humanitarian funds and services.[17]

Third, charities have a significant cash flow. In general, there is little room for savings and investments since charities typically spend close to 100 percent of their revenue on their charitable mission. A charity's income is made up of a complex web of donations from many different sources. Donations can be anonymous, casual, and conditional. Because of budgetary constraints, charities often under-invest in internal administration and regulatory compliance programs leaving an easier pathway for bad actors to abuse the system.[18] For example, an anonymous donor may donate to a charitable foundation with a specific request that it be used for the furtherance of another organization's mission. That third party organization may be a terrorist group or terrorist affiliated.

Lastly, bad actors can set up an original shell or sham charity whose only goal is the furtherance of terrorist financing or money laundering. As charities have presumptive trust from the communities in which they operate, these charities may exist undisturbed, gain funds from donors, and funnel them to bad actors with little societal oversight.[19] For example, the Canadian non-profit IRFAN was found to have funnelled over 14 million dollars to support Hamas from 2005 to 2009. The CRA revoked their charitable status in 2011 after accounting failures which led to the discovery of ties to terrorist organization Hamas.[20] IRFAN continued to operate until 2014 when Canada registered it as a listed terrorist entity.[21]

The risk charities face is best summed up by Samantha Bricknell, an Australian criminologist, who writes:

> [the sector's] ultimate vulnerability lies with its social role and the inherent trust it holds with the larger community. Embedding operations into the activities of an organisation that commands responsibility and trustworthiness is the ideal cover for criminal activities…Funds collected on the pretext of charitable use can then be re-routed to the intended recipients, or divided between charitable and terrorist support.

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15 Financial Action Task Force, *supra* note 1.

16 Bricknell et al, *supra* note 14 at 9.

17 Financial Action Task Force, *supra* note 1 at 60.

18 Bricknell et al, *supra* note 14 at 9.

19 Organization for Economic Co-operation and Development, *supra* note 12 at 23.

20 Mark Blumberg, "International Relief Fund for the Afflicted and Needy Canada (IRFAN-Canada) Has Status Revoked)", *Blumbergs Canadian Charity Law* (11 April 2011) online: <canadiancharitylaw.ca/blog/international_relief_fund_for_the_afflicted_and_needy_canada_irfan-canada_h/> [perma.cc/GAX2-NMHS].

21 *Regulations Amending the Regulations Establishing a List of Entities,* SOR/2014-97.

> The latter course can act to reinforce terrorist operations, by cultivating sympathies and developing recruitment grounds for the next cohort of militants.[22]

B. The Risks of Charities Regulation

Despite the risks inherent to charities, the global push to close the gap on charity abuse comes with risks to legitimate charitable operations. This can be most significantly observed when charities are caught in a wave of bank de-risking. In the United Kingdom, banks have stopped offering financial services to charities whose operations are high risk after they received pressure from the global community to combat money laundering and terrorist financing.[23] AML and ATF initiatives change the risk calculus for banks and other financial organizations which charities rely on to fulfill their social mission. The result is that charities which are at the greatest risk for abuse based on the severe need they are meeting are also at the greatest risk of being denied access to banking and other financial services.

A report by The Washington Post found that United States-based charities which provide humanitarian aid in high-risk jurisdictions regularly face issues accessing funds from their banks to pay for the services being provided overseas.[24] This phenomenon is not restricted to a small group. The report cited research conducted by the Bill and Melinda Gates Foundation, which found that at least 5,875 of the estimated 8,665 United States charities that work overseas have been adversely affected by banking behaviour aimed at disrupting terrorism.[25]

In Canada, Islamic charities have been under the microscope for over a decade, even apart from the RAD's mandate to combat money laundering and terrorist financing. One mosque in Ottawa had its charitable status revoked in 2018 because it failed the CRA's public benefit test. In the eyes of the CRA, it "allowed its resources to be used for activities that promote hate and intolerance." The CRA' s determination was based in part on the fact that the mosque hosted four controversial speakers who made derogatory remarks about women, LGBTQ2S+ individuals, and Jewish people. After an appeal process with the CRA, the mosque's charitable status was restored in 2023.[26] The wrongful application of the CRA's regulatory mandate removed the organization's charitable status for five years, which hampered its socially beneficial operations.

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22 Bricknell et al, *supra* note 14 at 12.

23 Anna Tims, "Banks accused of putting lives at risk as charity accounts are shut without notice", *The Guardian* (8 May 2017), online: <theguardian.com/money/2017/may/08/banks-charity-accounts-shut-without-notice-money-laundering> [perma.cc/AD73-EFPB]; Shafik Mandhai, "HSBC bank cuts off services to Muslim charity", *Aljazeera* (4 January 2016) online: <aljazeera.com/economy/2016/1/4/hsbc-bank-cuts-off-services-to-muslim-charity> [perma.cc/9WTV-7FQR]; Miles Brignall, "Charities and churches left in financial disarray after Barclays shuts accounts", *The Guardian* (4 December 2023) online: <theguardian.com/money/2023/dec/04/charities-and-churches-left-in-financial-disarray-after-barclays-shut-accounts> [perma.cc/PZ9S-XDCA].

24 Rob Kuznia, "Scrutiny over terrorism funding hampers charitable work in ravaged countries", *The Washington Post* (19 April 2017), online: <washingtonpost.com/national/scrutiny-over-terrorism-funding-hampers-charitable-work-in-ravaged-countries/2017/04/18/146a585a-1305-11e7-9e4f-09aa75d3ec57_story.html> [perma.cc/F5DK-K6QQ].

25 *Ibid*.

26 Sarah Kester, "Ottawa mosque has charity status restored", *CBC* (25 July 2023) online: <cbc.ca/news/canada/ottawa/assalam-mosque-ottawa-charity-appeal-1.6914323> [perma.cc/ENZ2-JJLG].

C. A Balancing Act for Charities Regulators

A full-bore approach to charity regulation is not without its consequences to legitimate charitable activity. Charities are subject to two forms of risk: risk from being abused by bad actors and risk of being hampered by regulation itself. In light of these risks, the FATF passed recommendation eight, which is a guiding principle for FATF parties as they establish AML/ATF regimes. Recommendation eight reads:

> Countries should identify the organisations which fall within the FATF definition of non-profit organisations (NPOs) and assess their terrorist financing risks. *Countries should have in place focused, proportionate and risk-based measures, without unduly disrupting or discouraging legitimate NPO activities*, in line with the risk-based approach.
>
> The purpose of these measures is to protect such NPOs from terrorist financing abuse, including: (a) by terrorist organisations posing as legitimate entities; (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.[27]

Recommendation eight recognizes that an overzealous regulatory scheme villainizes the activities of legitimate charities, which is harmful for society. In commenting on recommendation eight, the FATF highlights the vital role charities play globally, specifically highlighting the importance of charities in providing essential services in "high-risk areas and conflict zones."[28] When FATF speaks about charities it does so as if they are collaborators in the fight against global money laundering and terrorist financing.

While Canada's regulatory regime has implemented recommendation eight, the regime's success can be judged on how well it has incorporated the balancing principle. So far, Canada's published AML/ATF guidance takes a less sympathetic approach to charities than one might hope. The *Updated Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada* (2023) ranked charities and NPOs at high risk for terrorist financing, along with casinos, securities dealers, and legal professionals.[29] Canadian charities operating overseas are at the highest risk of abuse, as well as charities which raise funds in Canada to be sent overseas to high-risk areas.[30] The Government of Canada reports that the majority of significant terrorist organizations have operated through registered charities.[31] This assessment makes no mention of the value charities bring to Canadian society or a desire from the federal government to ensure that legitimate charities can pursue their humanitarian ends.

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27 Financial Action Task Force, *supra* note 1 [emphasis added].

28 *Ibid* at 60.

29 Department of Finance Canada, *Updated Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada* (Ottawa: Department of Finance Canada, 2023) at 45.

30 *Ibid* at 76.

31 *Ibid* at 77.

Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime Strategy 2023-2026 lists three pillars for Canada's AML/ATF regime:

1. Policy and coordination;
2. Prevention and detection (which includes compliance programs); and
3. Investigation and disruption.

A key question for policy makers is what the appropriate level of regulatory burden to impose on charitable organizations is.[32] Charities operate on tiny margins. Ideally, the charity's revenue will almost entirely go to the facilitation of its program. This leaves little left over for investing in internal control mechanisms.[33] Regulatory compliance programs are difficult to justify investing in when charities struggle to pay their staff. It is especially difficult for small to medium-sized organizations to justify compliance investment.[34] Thus, a regulatory balancing act is essential as there is a risk that increased regulation will demand over-compliance from organizations.[35] Over-compliance may lead to fatigue and frustration both with the cost of instituting compliance programs and the general frustration of jumping through red tape. The problem may only become more apparent if charity audits continue to be few and far between. Too much regulation without the risk of an audit can incentivize charities to simply ignore compliance altogether.[36]

While compliance is designed to reduce the need for overbroad enforcement, the paradox is that more regulation, without more enforcement, may result in less compliance.

III. THE UNIQUENESS OF CHARITIES AND THEIR LIABILITY

The non-profit sector is an essential part of Canada's corporate landscape. In 2022, the non-profit sector contributed $216.5 billion in economic activity, equivalent to 8.2 percent of Canada's gross domestic product.[37] Canadian charities are subject to both regulatory and criminal liability. It is because of this trust that abuse of charities by bad actors is morally reprehensible to society, justifying the need for the imposition of criminal liability beyond simple regulatory liability. Charities need to be aware of the liability facing them, or, like MAC, they will be unprepared when the state turns its gaze onto them.

Unlike for-profit corporations which are subject to a range of pecuniary penalties for regulatory breaches, regulatory liability for charities is generally limited to the revocation of charitable status. When considering liability under the *Criminal Code* ("the *Code*"),

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32 Department of Finance Canada, *Canada's AML and ATF Strategy*, *supra* note 4 at 7.

33 Bricknell et al, *supra* note 14 at 26.

34 Christine Petrovits, Catherine Shakespeare & Aimee Shih, "The Causes and Consequences of Internal Control Problems in Nonprofit Organizations" (2011) 86:1 Accounting Rev 325.

35 John Boscariol & Gerry Ferguson, "Compliance Programs, Risk Assessments, and Due Diligence" in Gerry Ferguson, ed, *Global Corruption: Its Regulation Under International Conventions, US, UK, and Canadian Law and Practice*, 4th ed (Victoria, British Columbia: University of Victoria Libraries, 2022) vol 2 at 789.

36 *Ibid*.

37 Statistics Canada, *National Insights into Non-profit Organizations, Canadian Survey on Business Conditions, 2023* (Ottawa: Statistics Canada, 2024).

the principles of corporate criminal liability apply to charities in the same way as they apply to for-profit corporations.[38]

A. Regulatory Liability

The *Income Tax Act* ("*ITA*") empowers the CRA to function as Canada's regulator of charities.[39] In addition to ensuring that a charity devotes its resources exclusively to furthering its charitable purposes, the CRA's charities directorate has specific powers through the RAD to audit charities suspected of being abused by terrorist groups.

Under section 149.1(4.1)(f) of the *ITA*, if a registered charity accepts a gift from a foreign state deemed by the Governor in Council to be a supporter of terrorism the CRA may revoke its charity status. Additionally, the Government of Canada has passed the *Charities Registration (Security Information) Act* which allows the express revocation or denial of charitable status through the courts if the charity is connected with terrorism.[40] Though this act came into force in 2001 as a response to the 9/11 terrorist attack, it does not appear that it has ever been used.

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* was passed to implement the preventative measures required by Canada's international commitments to fight against money laundering and terrorist financing.[41] The act allows intergovernmental disclosure of suspected proceeds of crime or terrorist financing risk to the CRA.

In total, Canada's regulatory liability for charities is focused on the revocation of charitable status instead of pecuniary offences. When the Governor in Council determines that a charity is a listed terrorist entity, the revocation of its charitable status is quick without a remedy on appeal.[42]

B. Criminal Liability

Moral remedies for the corruption of charities are the purview of the criminal law. The definition of "organization" under section 2 of the *Code* includes:

1. A public body, body corporate, society, company, firm, partnership, trade union or municipality, or
2. An association of persons…

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38 RSC 1985, c C-46 [*Criminal Code*].

39 RSC, 1985, c 1 (5th Supp).

40 SC 2001, c 41, s 113.

41 SC 2000, c 17, s 36.

42 This response occurred when the CRA revoked the charitable status of both the World Tamil Movement and International Relief Fund for the Afflicted and Needy. See generally Public Safety Canada, "Currently listed entities" (last modified 20 February 2025), online: <publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx> [perma.cc/3XH2-NYX6].

The broad definition specifically applies to societies and grassroots organizations which have yet to be officially incorporated (and thus not subject to regulatory oversight).[43]

A charity can become a party to crimes committed under its auspices if a senior officer of the charity is negligent in preventing the crime.[44] For example, if a grant lead at a charitable foundation designs a novel grant without ensuring the grant money was not from the proceeds of crime, the charity may be found to have been an unwitting participant in criminal activity. This is most likely the case when a charity has been abused by internal bad actors.

A charity can also be liable when a senior officer directs the charity to do something illegal, such as money laundering under section 462.3(1) of the *Code*.[45] For example, such a situation would arise if a grant lead at a foundation sent funds overseas to a terrorist entity listed under section 83.01(1) of the *Code*. These forms of liability apply equally to both charitable organizations (which operate programs) and charitable foundations (which fund operations). The risk factors will vary based on the unique activities of the charitable organization.

Canadian charities may also be found directly liable for terrorism offences under sections 83.02, 83.03, and 83.04 of the *Code* (financing of terrorism charges). To date, there have been no criminal charges brought against charities directly; instead, the Crown has opted to bring charges against individuals.

Canadian charities should also be aware of criminal liability under the *Corruption of Foreign Public Officials Act*.[46] In 2013, the Government of Canada amended this act to apply to charities under international guidance on the risk factors of charities. Canadian charities may be liable under section 3 for bribing a foreign official to facilitate charitable programs or donations and under section 4 for failing to keep proper books. Though there have been no charities prosecuted under this act, Canadian charities doing international aid work in high-risk areas should be wary of their potential liability.

R v Thambaithurai was the first sentencing under section 83.03 of the *Code*.[47] This case concerned an individual who raised money to support the World Tamil Movement—a charity which sent funds to the Liberation Tigers of Tamil Eelam. The World Tamil Movement is a now listed terrorist entity but was not at the time of the proceeding. The Crown had the chance to prosecute the charity but chose to focus its action against the individual. The reason for this may have been one of principle, rather than one of law. In law, charities do not have immunity due to their special status as altruistic organizations. As Justice Rosenberg of the Ontario Court of Appeal wrote regarding the criminal liability of the non-profit corporation in *R v Church of Scientology of Toronto:*

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43 Such as non-profit organizations designated under a provincial or federal act which includes charities. For the purposes of this paper, I will focus on the liability of charities and not digress into the liability of non-profit societies. Often in the literature, these organizations are conflated. I point out these differences where applicable.

44 *Criminal Code, supra* note 38 s 22.1.

45 *Ibid* s 22.2.

46 SC 1998, c. 34.

47 *R v Thambaithurai* 2010 BCSC 1949 at para 9. See also *R v Thambaithurai,* 2011 BCCA 137.

> To leave these organizations outside the purview of the criminal law would be intolerable…I can see no rational basis for adopting a different test for criminal liability, in the case of non-profit corporations solely because they do not have shareholders or because any profits are used to promote the objects of the corporation rather than to enrich the shareholders personally. The need for regulation of the conduct of the corporation through the criminal law is the same…the identification doctrine applies.[48]

Although *Church of Scientology* is still good law in Canada, it is not commonly applied as very few charities have faced criminal prosecutions. Canadian court decisions illustrate the conclusion that, in general, the Government of Canada will more readily revoke charitable status via regulatory means and rarely pursue criminal charges against charities themselves.

Starr v Houlden ("*Starr*") is a prime illustration of the government's hesitancy to impose criminal liability on a charity itself.[49] In *Starr*, the president of a charity was alleged to have improperly utilized charitable funds to influence a politician. Instead of prosecuting the charity, the province of Ontario initiated a number of investigations into Ms. Starr for her actions. The Supreme Court of Canada found Ontario's investigation essentially amounted to a criminal investigation.[50] Importantly, the investigation focused on Ms. Starr's actions, rather than the actions of the charity. This is notably different than how for-profit corporations are treated when faced with criminal culpability.

R v Metron Construction Corporation ("*Metron*") provides a standard example of the Government of Canada's approach to corporate criminal liability.[51] *Metron* was a criminal prosecution of a construction company for criminal negligence causing death. Three workers and a site supervisor fell to their deaths because of the accused company's failure to implement proper safety standards. The accused company pleaded guilty, and the proceedings concerned arguments on the appropriate pecuniary sentence to be imposed on the company. There were concurrent regulatory proceedings against the director of the company under Ontario's workplace health and safety regime.[52] However, the Crown dropped the criminal charges against the director of the company, though he was still liable to certain regulatory penalties, but pursued the criminal charges against the corporation.

In the context of charities, why are criminal charges pursued against the individuals, while in the for-profit context, criminal charges are more likely to be pursued against the company? While the answer likely turns on the facts known to prosecutors, the difference in treatment likely also has to do with where the moral culpability—and money—lies. Charities are not

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48 *R v Church of Scientology of Toronto*, 1997 CanLII 16226 (ONCA), [*Church of Scientology*] is a case in which a charity utilized its resources to secure privileged government employment and then breached the trust of that employment by disclosing information to the charity.

49 *Starr v Houlden,* 1990 CanLII 112 (SCC) [*Starr*].

50 *Ibid*. The question before the Court was focused on the federalism implications of the Province's investigation. The majority of the Court found that the provincial inquiry was in pith and substance a substitute police investigation into Ms. Starr, which properly should have brought by the Crown pursuant to the federal criminal law powers.

51 *R v Metron Construction Corp,* 2013 ONCA 541 [*Metron*].

52 *Ibid* at paras 24–25.

individually as pecunious as for-profit corporations and so criminal financial penalties may be seen as not worth the effort. Additionally, the Crown may simply find it distasteful to prosecute a charitable organization. Unless a pattern of corruption can be seen throughout the charity, the Crown is more than willing to prosecute the individual bad apple and leave the charity intact.

It is more likely that individuals commit section 380(1) fraud against charities, which while bad, does not evince a broader concern about money laundering and terrorist financing. *R v Motayne*, for example, concerned a senior employee at a Toronto-based charity who defrauded her employer of close to one million dollars over several years.[53] As the charity's chief financial officer, she had exclusive control over the charity's payroll and used her position of trust to take advantage of the charity. She was sentenced to six years and six months in jail and her appeals to the Ontario Court of Appeal and the Supreme Court of Canada were dismissed.[54] Similarly in *R v Dunkers,* the appellant—a bookkeeper at a non-profit organization—used her position of trust to defraud the organization of approximately $200,000.[55] The losses resulting from her theft forced the organization to shut down operations. She was convicted and her appeal was dismissed.

Cases of criminal fraud against charities often correspond to society's idea of what a charity is. A charity is fundamentally an altruistic organization, which may become an unwitting victim of crimes committed under its purview. Notably, for-profit companies do not share this presumption. Prosecuting a charitable organization itself would be to make the organization a joint perpetrator in the crime.

C. The Issue with the Canadian Approach

Despite the amount of liability faced by Canadian charities, there are no requirements imposed by legislation to implement AML or ATF compliance programs.[56] Though the Government of Canada has identified the risk of corruption in the non-profit sector, specifically the risk of terrorist financing, the most recent initiative does not provide guidance on compliance.[57]

Without guidance, Canadian for-profit companies must rely on the court's determination of a reasonable compliance program from the probation order in *R v Niko Resources Ltd*, which relates specifically to guidance under the *Corruption of Foreign Public Officials Act*.[58]

Canadian charities do not benefit from this minimal judicial guidance. Charities need specific guidance which considers their altruistic missions. A water charity which raises funds in Canada to build wells through a partner in Mali, for example, needs guidance to ensure that it is not accidentally supporting an on-the-ground organization with ties to a terrorist organization.

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53 *R v Motayne,* 2022 ONCA 701.

54 *Ibid.*

55 *R v Dunkers,* 2018 BCCA 363.

56 Boscariol & Ferguson, *supra* note 35 at 792.

57 Department of Finance Canada, *supra* note 4 at 18.

58 *R v Niko Resources Ltd*, (2011) 101 WCB (2d) 118, 2011 CarswellAlta 2521.

So far, the Government of Canada has created a short checklist for charities to avoid terrorist abuse.[59] This checklist is cursory and does not provide specific guidance on how to accomplish the tasks it set out. As a such, charities are generally left on their own, attempting to comply with a regime they do not understand. If the Government of Canada approached charities as partners in combatting AML and ATF, perhaps the MAC's ordeal could have been avoided.

D. The United Kingdom's Approach

Unlike Canada, where the CRA wears multiple hats, the United Kingdom has created a separate organization called the Charities Commission ("the Commission") to regulate charities. Since 2013, the Commission has published a robust compliance toolkit to keep charities safe from corruption. The Commission has taken a distinctly supportive approach. Instead of placing charities on notice of this risk they face, the Commission's correspondence uses the language of support and protection for charities. The title of the Commission's AML/ATF compliance toolkit is *Protecting charities from harm*. Instead of framing charities which have risk factors as villains who need to be prosecuted, the United Kingdom's approach treats them as victims of crime, who need to be protected. Following the toolkit will aid United Kingdom-based charities in avoiding liability when an offence has an applicable due diligence defence.[60] Importantly, the compliance toolkit prevents charities from being taken advantage of in the first place.

The United Kingdom has recently passed the new *Economic Crime and Corporate Transparency Act* ("*ECCTA*") which applies to large charities as well as for-profit corporations.[61] The act makes the United Kingdom's approach to corporate criminal liability more akin to Canada's, as under this scheme, a company may be corporately liable for the actions of their senior managers. Additionally, the *ECCTA* created a new strict liability offence of "Failure to Prevent Fraud."[62] Under this offence, a large charity will incur criminal liability if an employee, agent, subsidiary, or other person performing services on behalf of the organization commits a fraud offence (including AML/ATF offences) intending to benefit the organization. The offence only applies to large organizations (i.e., one with a turnover greater than £35 million, has a balance sheet total of over £18 million, or over 250 employees).[63] Interestingly, the offence is one of strict liability. The organization does not need to have knowledge of the fraud to be

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59 Canada Revenue Agency, "Checklist: How to protect your charity against terrorist abuse" (last modified 20 August 2024), online: <canada.ca/en/revenue-agency/services/charities-giving/charities/educating-charities-terrorist-abuse/checklist-protect-charity-against-terrorist.html> [perma.cc/22DD-NK6H].

60 Charity Commission for England and Wales, UK and Whales Charities Commission, "Protecting charities from harm: compliance toolkit" (3 September 2013), online <gov.uk/government/collections/protecting-charities-from-harm-compliance-toolkit> [perma.cc/TBS7-J7CN].

61 *Economic Crime and Corporate Transparency Act 2023* (UK), c 56 [*ECCTA*].

62 *Ibid* at s 199–206.

63 *Ibid.*

held liable for it. The only defence is one of reasonable prevention procedures.[64]

The offence of failing to prevent fraud will automatically put pressure on large charities to establish compliance regimes and organizational procedures to mitigate the chance of fraud occurring, hopefully stopping corruption before it occurs. This is possible only because the Commission has provided sufficient guidance for charities to avoid liability in the first place. Essentially, the offence makes large organizations liable for failing to collaborate with the United Kingdom's government to combat fraud, reinforcing the partnership nature of the United Kingdom's AML and ATF regimes.

IV. COLLABORATIVE REGULATION

To date, there have been very few actionable accounts of charities being used for money laundering or terrorist financing around the world. The leading paper which first raised the vulnerability of the non-profit sector in Australia conceded that while the propensity for abuse by terrorist organizations is a threat, the evidence indicated that the actual exploitation of non-profits for money laundering and terrorist financing is much lower than what has been alleged.[65] In 2011, there had only been two prosecutions in Australia for money laundering and terrorist financing.[66] Similarly, in Singapore a string of money laundering cases pushed the Singaporean Commissioner of Charities, Desmond Chin, to release a toolkit for charities to protect themselves from abuse.[67] While Mr. Chin stated that the Singaporean non-profit sector was at risk of abuse, he also recognized that "to date, there has been no indication of foreign sources of funding flowing into Singapore via the local charity sector to support domestic terrorism-related activities" and that there was "no indication of funds raised by these charities being transmitted to fund terrorism-related activities abroad."[68]

In Canada, there have been 14 charities which have had their charitable status revoked by RAD since 2008 due to suspected terrorist financing. No criminal charges relating to terrorist

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64 *Ibid;* See also Home Office, "Economic Crime and Corporate Transparency Act 2023: Guidance to organisations on the offence of failure to prevent fraud" (6 November 2024), online: <gov.uk/government/publications/offence-of-failure-to-prevent-fraud-introduced-by-eccta/economic-crime-and-corporate-transparency-act-2023-guidance-to-organisations-on-the-offence-of-failure-to-prevent-fraud-accessible-version#contents> [perma.cc/XK22-GD44].

65 Bricknell et al, *supra* note 14 at 3, 50.

66 *Ibid* at 57.

67 Singapore Ministry of Culture, Community and Youth, *Terrorist Financing Risk Mitigation Toolkit for Charities* (Singapore: MCCY, 2022); Samuel Devaraj, "Billion-dollar money laundering case: Charities urged to review donor records from Jan 2019", *The Straits Times* (last modified 13 November 2023), online: <straitstimes.com/singapore/courts-crime/billion-dollar-money-laundering-case-charities-urged-to-review-donor-records-from-jan-2019> [perma.cc/48VE-LYBY].

68 Theresa Tan, "No indication of funds flowing into Singapore via charities to support terrorism: Commissioner of Charities", *The Straits Times* (last updated 24 December 2023), online: <straitstimes.com/singapore/no-indication-of-funds-flowing-into-s-pore-via-charities-to-support-terrorism-commissioner-of-charities> [perma.cc/VRC8-26JL].

financing have been laid, however.[69] If charities and non-profits are at such high risk of abuse, and indeed Canada has at least fourteen cases where a government audit has found significant enough risk to deny charitable status, why is there a lack of criminal prosecutions? One possible explanation is that the regulatory schemes are working as intended. Given the small number of charities identified as being abused (14/86,000 or 0.016 percent), the Government of Canada might consider the revocation of charitable status a sufficient deterrent. Put another way, the current regulation may already act as a proper deterrent for money laundering and terrorist financing—a shield preventing abuse from occurring instead of a sword to punish abuse after it happens. Perhaps, however, this is too optimistic an answer.

A more compelling account may lie in the nature of the charity itself. A charity is a type of organization which fundamentally trades on trust. Governments do not want to run roughshod over the charitable enterprise. Charities provide immense value to society. As such, governments have endeavoured to create regulatory regimes which balance protecting the ability of charities to perform their social function from a position of trust, with a requirement to properly regulate the sector to respond to the legitimate risk of abuse.[70] Governments may view a highly publicized criminal prosecution of a charity as potentially damaging to the public's trust in the sector as a whole. In light of this hesitancy, the Canadian government may benefit from switching tactics and pursuing trust generation and compliance by reframing their relationships with charities. Charities should be invited to collaborate with the federal government in its AML and ATF efforts.

A. Charities as Collaborators in AML/ATF

While the Government of Canada is aware of the burden regulation can place on charitable organizations, it has yet to embrace charities as partners in the fight against corruption. Neglecting charities in this fight is a missed opportunity. In 2023, there were approximately 86,000 registered charities in Canada accounting for $304 billion in total revenue and total expenditures of $281 billion.[71] Such a sizeable industry should be viewed as a collaborator for Canada's AML/ATF goals.

There is a societal expectation that charities act for altruistic purposes.[72] Charities are allowed to give tax receipts because, in general, the value of an individual donating to a charity will provide more benefits to a society than simply paying tax. In a sense, charities are already collaborating with the state to pursue social goals. Seventy-five percent of Canadian charities are small organizations with four or fewer staff members.[73] Opaque or overwhelming regulatory requirements would crush many of these ill-equipped grassroots organizations.

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69 Jim Bronskill, "Canada Revenue Agency's Targeting of Muslim charities amounts to discrimination, says civil liberties groups", *CBC* (9 June 2011), online: <cbc.ca/news/politics/targeting-muslim-charities-1.6059432> [perma.cc/CG7F-5FBZ].

70 Financial Action Task Force, *supra* note 1.

71 Mark Blumberg, "Key statistics on Canada's charity and non-profit sector 2023", *Blumbergs Canadian Charity Law* (13 January 2023) online: <canadiancharitylaw.ca/blog/key-statistics-on-canadas-charity-and-non-profit-sector-2023/> [perma.cc/6C7V-H4VP].

72 Bricknell et al, *supra* note 14.

73 Statistics Canada, *supra* note 37 at 3.

Some charities (about 1.3 percent) in Canada are sophisticated organizations with over 100 staff members.[74] These organizations have the administrative depth to properly implement robust compliance programs. Alternatively, well-designed, easily implemented compliance programs would be a boon for all charitable organizations and the Government of Canada would gain strong new partners in the global fight against money laundering and terrorist financing.

B. Towards a Modern Charities Regulator

Charities must be free to exercise their social function while being responsible to protect themselves from abuse.[75] Regulatory language and government documents should not seek to frame the charitable organization as an enemy. Charities are at risk of being abused by bad actors. The vast majority of charities are not themselves the bad actors. Put another way, while there is some risk that bad actors may design sham, burner, or shell charities to facilitate criminal activity, there is a far greater risk that innocent charities will fall victim to abuse by bad actors.[76]

Instead of positioning itself in opposition to the charity—as in the case of *MAC v Canada*—the Canadian government should establish a regulatory regime which seeks to protect charities from abuse by bad actors by supporting good faith charities. Such an approach will encourage charities to seek assistance from government regulators instead of fearing regulation. Charities should view compliance programs as a benefit to, instead of a burden on, their activities. Such a shift is only possible if the federal government begins seeing charities as collaborators rather than opponents. To make this pivot, the Government of Canada should consider the following initiatives:

1. Create an AML/ATF compliance toolkit for charities.

First, the federal government should devote resources to creating robust compliance toolkits for charities. These toolkits should take into consideration the different risks faced by charitable organizations, charitable foundations, and charities working overseas. The federal government can take inspiration from the toolkits put out by the United Kingdom and Singapore.[77] More attention should be given to charities at high risk for corruption, particularly those that have substantial overseas operations and work with numerous non-Canadian partners.

2. Encourage charities to establish sources of wealth checks as part of a due diligence process.

Though unexpected donations are often a blessing for Canadian charities, all charities should be wary of donations received without clarity as to the source of funds. Large one-time donations, anonymous donations with conditions, and donations over a certain amount are at particular

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74 *Ibid*.

75 Bricknell et al, *supra* note 14 at 3; Financial Action Task Force, *supra* note 1 at 63; Organization for Economic Co-operation and Development, *supra* note 10.

76 Obviously corrupt charities are often accompanied by clear risk indicators, which regulators can turn their intention towards. See generally Organization for Economic Co-operation and Development, *supra* note 10.

77 Singapore Ministry of Culture, Community and Youth, *supra* note 67; Charity Commission for England and Wales, *supra* note 60.

risk. Singapore has implemented a requirement for charities to check donations made by new or unknown donors in for more than $20,000.[78] This requirement would not unduly hamper smaller charities as they mostly receive smaller donations from established funders.

3. Canada's largest charities should be subject to greater liability.

The Government of Canada should consider adopting a strict liability failure to prevent fraud offences, similar to the United Kingdom's newly established offence in the *ECCTA*. Like the *ECCTA*, it should only apply to the largest Canadian organizations. Of Canada's 86,000 registered charities only about one percent would meet the definition of a large organization.[79] Large charities are more at risk of abuse than small charities as it is easier to launder a million dollars through a $50 million organization than in a $2 million organization. Large charities both have the expertise and resources to establish bespoke due diligence programs and to sustain penalties assigned to them. Establishing such an offence would encourage Canada's largest charities to partner with the government in its fight against money laundering and terrorist financing.

4. The Government of Canada should establish a unique charity commission.

Given the immense scale of Canada's charitable sectors and the unique challenges that come from operating within it, it is about time to provide more resources to regulate charities nationwide. A unique commission would be able to assist grassroots charities in gaining their footing and established charities in performing their due diligence. Like the United Kingdom, Australia, and Singapore commissions, a Canadian Charity Commission would have the expertise to help charities succeed in many ways, including keeping safe from abuse by bad actors. A unique commission with a mandate to support charities—instead of to investigate and punish—would go a long way in understanding charities as both victims of abuse and collaborators in the remedy.

C. *MAC v Canada* Revisited

Reframing the charity as a victim of abuse and a collaborator in a solution may have resulted in a different outcome in *MAC v Canada*. Of the five indicia leading the RAD to audit the MAC, a simple conversation may have explained away two of them. Firstly, the decision acknowledged that there was a difference between the Muslim Brotherhood of Egypt as a political party (which would have been an improper charitable association) and the Muslim Brotherhood as a religious and philosophical movement (which is a valid charitable association).[80] The decision also acknowledged that RAD did not assess the fundraising scale for the terrorist organization IRFAN. No information was provided by RAD alleging that the fundraising was part of MAC's operations, the actions of a senior officer, or the rogue actions of a single individual.[81]

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78 *Tan*, *supra* note 68.

79 *ECCTA*, *supra* note 61.

80 *MAC v Canada*, *supra* note 2 at paras 33–34.

81 *Ibid* at para 56.

If the federal government had seen MAC as a collaborator, a well-resourced charities commission could have reached out to MAC before an audit, alerting them to the risk factors identified and requesting preliminary clarity. MAC could then have been given a copy of a compliance toolkit and been informed that dealing with IRFAN after it was labelled a terrorist organization was prohibited. MAC would then have been given the option: comply with the suggestions or face an audit from the CRA. Currently, the CRA has the power and resources to revoke charitable status, but it does not have the resources to help charities protect themselves from abuse.

Moving from an antagonistic system, where the regulator's role is to punish the charity, towards a supportive system where the regulator assists charities in protecting themselves from abusive actors may even provide the solution to the *Charter* questions raised by the *MAC v Canada* case. Positive support for religious organizations would not be characterized as discriminatory. Ultimately, a supportive system—which sees charities as victims, instead of villains—will increase trust in the charitable sector as a whole.

CONCLUSION

Charities trade on trust. It is trust which grants charities their special place in society. Charities do their work because society trusts them to do that work for the benefit of the community. While some may say that regulation improperly prohibits charities from flexibly doing their essential work, proper regulatory oversight can increase society-wide trust in charities overall. Given the altruistic nature of charities, the federal government and the courts should view them as partners with the state in the global fight against money laundering and terrorist financing. Instead of villainizing the charity, the state should invite charities to partner with them in countering corrupt practices.

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