



David Asper Centre for Constitutional Rights  
UNIVERSITY OF TORONTO

# Asper Centre OUTLOOK Newsletter

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# The SCC Upholds Bill C-92 but Leaves the Question of a s. 35 Right to Self-Government for Another Day

By Ariana Zunino, Navya Sheth, Shelah Kwok, and Delaney Cullin

*The Supreme Court of Canada's finding that Bill C-92 is constitutional is a welcome step forward for the recognition of Indigenous self-government rights. However, the Court's unwillingness to address if there is a s. 35 right of self-government for child and family services leaves the future of the right unstable.*



## Background on Bill C-92 & the Quebec Court of Appeal Decision

In June 2019, Parliament passed [\*An Act Respecting First Nations, Inuit and Métis Children, Youth and Families \(Bill C-92\)\*](#).

Bill C-92 formally recognizes the inherent Aboriginal right of self-government, including jurisdiction over child and family services. It establishes mechanisms through which Indigenous communities can exercise authority, either by enacting their own laws or through agreements negotiated with federal and provincial governments.

Shortly after the bill's passing, the Attorney General of Quebec submitted the following reference question to the Quebec Court of Appeal (QCCA): Is [Bill C-92] *ultra vires* the jurisdiction of the Parliament of Canada under the Constitution of Canada?

The [QCCA](#) held that s. 35 of the *Constitution Act*, 1982, includes a generic right of self-government that encompasses child and family services, based on the evidence that these powers are part of the traditional values and practices of Indigenous peoples. The court specified that this right could be regulated by the federal government if the infringement could be justified under the Sparrow framework.

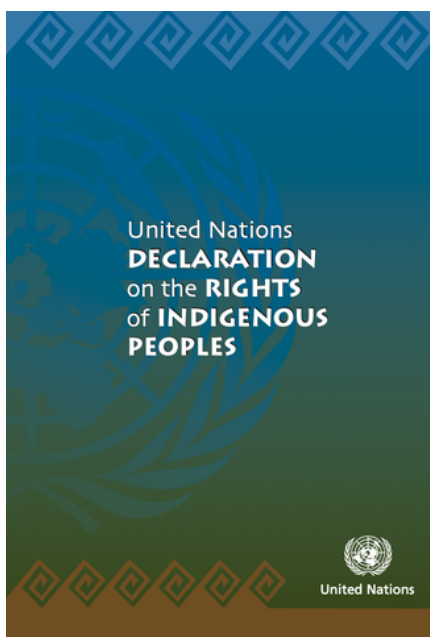
However, the QCCA struck down ss. 21 and 22(3) of Bill C-92, which gave Indigenous laws the force of federal law and used the doctrine of paramountcy to make them immune to provincial override. The court held that this amounted to a unilateral amendment of s. 35 because it unconstitutionally extended the doctrine of paramountcy from ss. 91-2 to s. 35.

The Attorney General of Quebec appealed, arguing that s. 35 did not contain a right to self-government and that Bill C-92 as a whole was *ultra vires* Parliament's authority. The Attorney General of Canada cross-appealed on the issue of ss. 21 and 22(3), arguing that they merely incorporated Indigenous laws by reference and thus were a valid use of the doctrine paramountcy.

## Summary of the Supreme Court of Canada's Decision

In a unanimous decision, the [Supreme Court of Canada](#) (SCC) held that Bill C-92 in its entirety is *intra vires* Parliament's authority, falling squarely within the federal government's s. 91(24) legislative jurisdiction over "Indians, and Lands reserved for the Indians." Looking at the language used in Bill C-92 and the legal and practical effects of the Act, the SCC found that the pith and substance of Bill C-92 relates to the protection of the well-being of Indigenous children, youth, and families, and broadly, reconciliation with Indigenous peoples.

The SCC began its reasoning by emphasizing the importance of reconciliation with Indigenous peoples. It highlighted the important role played by the [United Nations Declaration on the Rights of Indigenous Peoples](#) ("UNDRIP"), which recognizes Indigenous peoples inherent right to self-determination, including a right of self-government, and specifically responsibility over the well-being of Indigenous children. The Court further highlighted how Bill C-92 contributes to the Truth and Reconciliation Commission's fourth and forty-third calls to action – respectively, enacting child welfare legislation that establishes standards for apprehension of Indigenous children and implementing *UNDRIP* as a framework. The Court also detailed the history of assimilation of Indigenous children with residential schools and the Sixties Scoop, and their ongoing effects today in the child welfare system. The overrepresentation of Indigenous children in the child welfare system – making up 7.7% of Canadians under 15, but 52.2% of children under 15 in foster care in private homes – as "quite simply staggering" (at para 11).





#### **TRC Call to Action No. 4**

We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:

- i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.
- ii. Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.
- iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.

In its pith and substance analysis, the SCC discussed Bill C-92's preamble and provisions, Hansard and committee minutes, as well as the Act's legal and practical effects. Regarding the Act's legal effects, the Court indicated that Bill C-92 engages the honour of the Crown. The Court held that Bill C-92 represented a promise to recognize Indigenous peoples' right of self-government in relation to child and family services.

The Court held that this promise is subject to the honour of the Crown and the duty to act diligently to fulfill Crown promises, and that the Crown must take a broad approach to recognizing the right and implementing it. This recognition provides Indigenous groups with a constitutional bargaining chip by which to support their negotiations under Bill C-92. Notably, this recognition marks the first instance where the SCC has imposed such an obligation on a modern statute.

The Attorney General of Quebec had further argued that the pith and substance of ss. 1 to 17 interfered with the provincial public service, which should be independent from the federal government. The Court rejected this argument, holding that because Bill C-92 falls under federal jurisdiction, it can be binding on provincial governments. They stated there is a double aspect with respect to child welfare for Indigenous children, and that the federal government can legislate over Indigenous child welfare. The Court also noted the national standards articulated in Bill C-92 do not regulate all aspects of Indigenous child welfare, and that the provisions complement current provincial standards. It held that these standards only incidentally affect the provinces' powers, and that that did not impact the constitutional validity of the legislation.

The Attorney General of Quebec also submitted that ss. 21 and 22(3) of Bill C-92 altered the architecture of the Constitution. These sections give laws made by Indigenous groups under Bill C-92 the same force as federal law, and paramountcy over provincial laws when there is a conflict or inconsistency. These provisions had been struck down by the QCCA but reinstated by the SCC. It held s. 21 was validly enacted under s. 91(24) as an incorporation by reference provision, and that s. 22(3) only reiterated the doctrine of federal paramountcy – that provisions of valid federal law will prevail over conflicting provincial ones.

The Asper Centre intervened before the Court, arguing that it would be appropriate for the Court to reconsider its previous decisions on self-government, given the inconsistency of prior decisions (such as [R. v. Van der Peet](#) and [R. v. Pamajewon](#)) with the purpose of s. 35 the sociohistorical shift in acknowledgment of harms to Indigenous Peoples, and the right of Indigenous Peoples to be self-determining. However, the SCC declined to consider this submission, choosing not to make any findings on s. 35.

In the [Faculty of Law's Snap Panel](#) on the decision, Professor John Borrows, Loveland Chair in Indigenous Law, noted that the Court's focus on federalism ignores the revitalization of Indigenous Law within s. 35(1). The Court's assertion that Parliament can act *as if* inherent sovereignty exists within First Nations drew attention from Borrows, who argued that mere acknowledgment through statute falls short. He cautioned that without explicit protections embedded in section 35(1), subsequent administrations could readily revoke the rights established by Bill C-92.



Picture of Snap Panelists, including:

- Professor Brenda Cossman, Associate Dean, Research (Chair)
- Professor John Borrows, The Loveland Chair in Indigenous Law
- Professor Jean-Christophe Bédard Rubin
- Cheryl Milne, Executive Director, David Asper Centre for Constitutional Rights
- Professor David Schneiderman
- Professor Richard Stacey

## Impact on Indigenous Rights Going Forward

The Court's decision to not undertake an analysis of whether an Aboriginal right of self-government over child welfare exists or to explicitly affirm the QCCA's finding that this right exists has left the door open for a future challenge on this right. While the decision clarifies that Parliament is free to recognize an inherent and generic Aboriginal right to self-government over child and family services, this recognition offers less stability than if the right was affirmed and protected under s. 35(1), as the right is contingent upon legislative affirmation, which could be repealed in the future.

However, the Court's decision provides some guidance on what factors might play a role in a s. 35(1) analysis. In its decision, the Court noted that factors such as Parliament's affirmation of the right's existence and the importance of child welfare to cultural continuity are relevant when assessing if the right is integral to a distinctive culture and the continuity practicing the right.

Professor Borrows raised concerns with the Court's emphasis on "cultural continuity" echoing past criticisms of the *Van der Peet* and *Pamajewon* precedents. Professor Borrows warns that if another case challenging s.35(1) rights were to arise, the Bill C-92 decision could reinforce a narrow focus on identity and culture, potentially hindering or denying Aboriginal rights. Borrows takes issue with the court's failure to clearly signal that s.35(1) pertains to the rights of distinct Nations as self-governing peoples, not just as cultures. He asserts that "what is protected by s.35(1) rights are the existing Aboriginal treaty rights of the Aboriginal Peoples of Canada. It's not solely about cultural or identity aspects; it's about the Peoples themselves. Nations possess political rights that extend beyond mere cultural and identity considerations."

Cheryl Milne, Executive Director of the Asper Centre, also discussed her concerns with the decision at the *Snap Panel*. Milne noted that some First Nations have already implemented the Act and entered into coordination agreements with provinces and the federal government. Provinces like BC and Ontario have also begun to implement parts of the Act into provincial Youth and Family Services Acts. Despite this, Milne cautions that "there is a fine line between jurisdiction, and offloading" - while Indigenous groups now have jurisdiction over child and family services, they still require resources and infrastructure to ensure sustainable self-government. Milne noted that Bill C-92 does not offer a "quick fix" for the trauma that First Nations child and family agencies deal with daily, and these agencies require sufficient support in order to effectively practice their own self-governance.

## Conclusion

The Court's decision signifies a positive immediate step forward toward the recognition of Indigenous self-government rights. However, the Court's choice to not address any s. 35(1) related concerns has left the constitutional foundation of these rights uncertain.

**Ariana Zunino, Navya Sheth, Shelah Kwok, and Delaney Cullin** are 1L and 2L JD Candidates at the Faculty of Law and members of the Asper Centre's Indigenous Rights working group.

# 2023 SCC Year In Review

By Jaerin Kim

In 2023, the Supreme Court of Canada (SCC) decided a total of 31 cases, which include a sizable number of constitutional law cases. This article presents a selection of SCC cases that dealt with topics concerning constitutional law, ranging from federalism, language rights, to mandatory minimum sentences. The case summaries are categorized into two sections: federalism and *Charter* rights.

## Federalism

***Reference re Impact Assessment Act*, [2023 SCC 23](#)**

Enacted in 2019 by the Parliament, the *Impact Assessment Act* (IAA) established a complex information gathering and regulatory scheme for federal environmental assessments in Canada. The SCC unanimously agreed that the portion of the IAA addressing environmental matters on federal lands or outside of Canada is constitutionally valid. However, the SCC split 5–2 in its opinion on the IAA’s scheme for “designated projects.” Writing for the majority, Chief Justice Wagner found that the designated project scheme is *ultra vires* for two reasons. First, it is not in pith and substance directed at regulating “effects within federal jurisdiction” as defined in the IAA because these effects do not drive the scheme’s decision-making functions. Second, the defined term “effects within federal jurisdiction” is overbroad and goes beyond the federal legislative jurisdiction.

***Murray-Hall v Québec (Attorney General)*, [2023 SCC 10](#)**

In this case, the SCC unanimously ruled that Quebec’s *Cannabis Regulation Act*, which imposes a ban on possessing and cultivating cannabis plants for personal purposes, is constitutional. Mr. Murray-Hall brought an action to the Quebec Superior Court, alleging that sections 5 and 10 of the Act fell within the federal criminal law power and were thus *ultra vires*. He also argued that the provisions were of no effect under the doctrine of federal paramountcy. While the Superior Court agreed with the first argument and declared the Act to be unconstitutional, the decision was reversed on appeal. The SCC upheld the decision of the Appeal Court for two reasons. First, sections 5 and 10 of the Act are constitutionally valid exercises of Quebec legislative power under sections 92(13) and (16) of the *Constitution Act*. While the prohibitions are similar to those set out under the federal criminal law power, the SCC reasoned that this could be explained by the double aspect doctrine. Secondly, the provisions are operative under the paramountcy doctrine because they do not frustrate the purpose of the federal legislation.



## Charter Rights

### ***Canadian Council for Refugees v Canada (Citizenship and Immigration)*, [2023 SCC 17](#)**

In 2002, Canada and the United States concluded a bilateral treaty known as the *Safe Third Country Agreement* (STCA). This rule mandates refugee claimants to seek protection in whichever of the two countries they first enter. The applicants, including individual refugee claimants and public interest litigants, brought a case against this rule, arguing that the STCA violates the right to liberty and security of the person as refugee claimants in the US are often imprisoned in deplorable conditions. Additionally, they alleged that the rule violates equality rights under section 15 of the *Charter*, as gender-based claims of women claimants are more likely to be denied in the US than in Canada. The SCC unanimously held that the regulations designating the United States as a safe third country do not infringe on refugee claimants' rights to liberty and security of the person. Writing for the court, Justice Kasirer argued that the impugned legislative scheme in the instant case is not overbroad, as there is no basis to infer that the arrangements between Canada and the US are fundamentally unfair. Nor did he hold that the scheme is grossly disproportionate, as the Canadian legislative scheme provides safety valves that guard against risks of refoulement. However, as for the claim based on

section 15 of the *Charter*, Justice Kasirer held that it should be remitted to the Federal Court, given the profound seriousness of the matter, size and complexity of the record, and conflicting affidavit evidence.

### ***Hansman v Neufeld*, [2023 SCC 14](#)**

This case concerned British Columbia's "Sexual Orientation and Gender Identity 123" (SOGI 123), which implemented a curriculum to teach children about sexual orientation and gender identity. Mr. Neufeld, a public school board trustee in BC, made online posts condemning SOGI 123. After Mr. Hansman, the President of BC Teacher's Union, publically called out Mr. Neufeld's remarks on multiple occasions, Mr. Neufeld sued him for defamation. In response, Mr. Hansman relied on BC's *Protection of Public Participation Act* and argued that Mr. Neufeld had launched a "strategic lawsuit against public participation" (SLAPP) to silence him from speaking on issues of public importance. The SCC allowed the appeal of Mr. Hansman, finding that the trial court had rightfully dismissed Mr. Neufeld's defamation suit. Writing for the majority, Justice Karakatsanis found that the public interest in protecting Mr. Hansman's speech outweighed the public interest in remedying Mr. Neufeld's reputational harm. She also agreed with the judge that Mr. Neufeld had suffered limited harm, given that he won the re-election a year later while continuing to express his views amid adverse public reaction.

***Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, [2023 SCC 31](#)**

The appellants in this case were five parents who are non-rights holders under section 23 of the *Charter*, meaning that they were not entitled to education in the minority language. They applied to the Minister of Education, Culture and Employment of the Northwest Territories for their children's admission to a French first language program. Despite the recommendation of the *Commission Scolaire Francophone des Territoires du Nord-Ouest* (CSFTNO) for admission, the Minister denied the application on the grounds that the parents did not meet the conditions established by the ministerial directive. Following the parents' application for judicial review, the SCC allowed the appeal, holding that the Minister failed to meaningfully consider section 23 of the *Charter* in making the decision. Writing for the unanimous court, Justice Côté found that the *Doré* framework applies not only where an administrative decision directly infringes *Charter* rights but also where it simply engages a *Charter* value. Based on this principle, the values underlying section 23 of the *Charter* were not only relevant to the Minister's decision but also limited by the decision, as the admission of children of non-rights holders into French first language schools would have contributed to the development of the Francophone community in the Northwest Territories.

***R v Hills*, [2023 SCC 2](#)**

In this case, the SCC ruled that the four-year mandatory minimum sentence for discharging a non-restricted firearm at a house is unconstitutional. The accused, Mr. Hills, had fired several shots at a parked car and residential home in an inebriated state. Mr. Hills pleaded guilty to four offences but also challenged the constitutionality of section 244.2(3)(b) of the *Criminal Code*. He argued that a four-year mandatory minimum sentence for intentionally discharging a non-restricted firearm into or at a house is a cruel and unusual punishment that infringes on section 12 of the *Charter*. In doing so, Mr. Hills relied on a reasonable hypothetical where a discharged firearm is incapable of penetrating a typical wall and thus is unlikely to pose a threat. The SCC agreed with Mr. Hills' submission and allowed his appeal. Writing for the majority, Justice Martin held that the scenario presented by Mr. Hills is reasonably foreseeable. Next, she found that the mandated sentence is grossly disproportionate in this scenario, given the low moral blameworthiness and risk of harm. It was thus held that the four-year mandatory minimum sentence violates section 12 of the *Charter* and is not saved under section 1 of the *Charter*.



### ***R v Hilbach*, [2023 SCC 3](#)**

Contradictorily to its decision in *Hills*, the SCC in *Hilbach* ruled that the mandatory minimum sentences set out in section 344(1)(a)(i) are constitutional and do not constitute cruel and unusual punishment. Mr. Hilbach, an Indigenous 19-year-old, had robbed a convenience store and pleaded guilty to robbery using a firearm contrary to section 344(1)(a)(i) of the *Criminal Code*. However, he brought a constitutional challenge under section 12 of the *Charter* to the mandatory minimum sentence, alleging that it was grossly disproportionate given his identity and the circumstances of his offence. In a separate case, Mr. Zwozdesky sought to challenge the minimum of four years imprisonment previously imposed by section 344(1)(a.1), where an ordinary firearm is used. In deciding the case, the SCC applied the framework devised in *Hills* to determine the constitutionality of a mandatory minimum sentence under section 12 of the *Charter*. First, in determining a fit and proportionate sentence for the offence, the court ruled that mandatory minimum sentence is a fit and proportionate sentence for both cases. Secondly, in determining the disproportionality of the sentence, the court ruled that a five-year term of imprisonment would not have been grossly disproportionate in Mr. Hilbach's case, as it is not so wide and not totally out of sync with sentencing norms for an offence of this nature. As for the hypotheticals raised by Mr. Zwozdesky, the court also ruled that the mandatory minimum is not grossly disproportionate in these scenarios.

### ***R v McGregor*, [2023 SCC 4](#)**

In this case, the SCC ruled that Canadian military investigators did not violate the *Charter* while investigating a Canadian soldier's criminal activity abroad. The appellant was a Canadian soldier stationed in the United States. Upon reasonable grounds, the Canadian Forces National Investigation Service obtained a US warrant to search the appellant's home. This subsequently led to the seizing of the appellant's electronic devices and his eventual conviction of voyeurism, possession of a device for surreptitious interception of private communications, sexual assault and disgraceful conduct. The accused then appealed the decision to the SCC, arguing that the evidence should have been excluded under section 8 of the *Charter* and that the *Charter* applies to the Investigation Service as laid out in *Hape*. The SCC held that the accused's *Charter* rights have not been infringed by the investigator's conduct. Writing for the majority, Justice Côté found that the search of the appellant's home was authorized by law and carried out in a reasonable manner, thus making it reasonable within the meaning of section 8 of the *Charter*. Since the court found that a *Charter* violation did not occur, dealing with the issue of extraterritoriality was considered unnecessary. As such, the SCC's decision on *Hape* was not revisited.



***R v McColman*, [2023 SCC 8](#)**

In this case, the SCC established that police do not have the authority to conduct random sobriety stops on private property. Mr. McColman was followed by police and subsequently arrested at his parents' driveway upon two breathalyzer tests. The Crown argued that section 48(1) of Ontario's *Highway Traffic Act* (HTA) provided lawful authority for the random sobriety stop. This argument was rejected by the SCC. Writing for the unanimous court, Justices Wagner and O'Bonsawin first considered whether Mr. McColman was a "driver" within the meaning of the HTA when the sobriety stop was conducted. As Mr. McColman was not on a highway when he stopped, they found that he was not a driver within the meaning of the HTA, regardless of whether he had care and control of the vehicle. Thus, the stop was considered unlawful detention under Section 9 of the *Charter*. Nonetheless, the court found that the evidence obtained from the unlawful police stop should not have been excluded under section 24(2) of the *Charter*. While the unlawful police stop constituted an intrusion on Mr. McColman's rights, the evidence collected by the police was crucial to the Crown's case, and thus in line with the truth-seeking function of the criminal trial process.

***R v Zacharias*, [2023 SCC 30](#)**

In line with *McColman*, the SCC in *Zacharias* declined to exclude evidence obtained in breach of an accused's rights in a drug trafficking case. Mr. Zacharias was pulled over in a traffic stop by the police, who discovered a large quantity of cannabis in his truck. He was consequently arrested for possession for trafficking, handcuffed and driven to a police detachment. At trial, Mr. Zacharias alleged that his rights under sections 8 and 9 of the *Charter* have been violated, and thus the drug evidence seized by the police should be excluded under section 24(2) of the *Charter*. The SCC dismissed his appeal. Justices Rowe and O'Bonsawin held that while the arrest and search constituted breaches under sections 8 and 9 of the *Charter*, the additional consequential breaches did not raise the seriousness of the state conduct. Justice Côté agreed with this finding and found that the arresting officer's failure to meet the reasonable suspicion standard was minuscule and only moderately impacted Mr. Zacharias. Thus, it was found that the evidence should not be excluded from the trial under section 24(2) of the *Charter*, and the conviction was upheld.

**Jaerin Kim** is a 1L JD Candidate at the Faculty of Law and the Asper Centre's Work Study student for the 2023-24 academic year.





# Canada (Attorney General) v Power:

## Asper Centre Intervenes Against Claim for Absolute Crown Immunity

By Jarren Fefer

On December 7, 2023, the Asper Centre intervened before the Supreme Court of Canada in [Canada \(Attorney General\) v Power](#). Megan Stephens from Meghan Stephens Law and Neil Abraham from Olthuis van Ert represented the Asper Centre in this intervention.

In *Power*, the Federal Government asked the Court to clarify its decision in [Mackin v New Brunswick \(Minister of Finance\)](#), specifically on whether *Charter* damages are an available remedy under s. 24(1) of the *Charter*. The Asper Centre intervened to address the issue of what the appropriate framework for awarding damages under s. 24(1) of the *Charter* caused by legislation that is declared unconstitutional.

### Background

The Respondent, Mr. Joseph Power, applied for a record suspension in 2013 to continue working in his current profession. Two pieces of legislation had amended the *Criminal Records Act* making Mr. Power permanently ineligible for a record suspension. The two pieces of legislation had retrospective application. Failing to secure a record suspension, Mr. Power lost his job and was unable to secure a new one in his chosen profession.

After Mr. Power lost his job, the provisions in the two pieces of legislation that provided retrospective application were declared unconstitutional. In light of that ruling, Mr. Power sued the federal government, alleging that the adoption and application of the provisions enabling retrospective application were clearly wrong, made in bad faith, and abuse of government power. Mr. Power petitioned the court for damages under s. 24(1) of the *Charter*.



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Before the trial, Canada requested a determination of whether the Crown could ever be held liable in damages for legislation that is later declared unconstitutional. The Court of the King's Bench of New Brunswick held that the Crown may be liable. The Court of Appeal of New Brunswick upheld the application judge's decision.

### **The Asper Centre's Intervention at the Supreme Court of Canada**

The Asper Centre's intervention at the Supreme Court of Canada focused on two issues. First, that s. 24(1), properly interpreted, does not bar remedial damages for harms suffered by an individual due to the existence of a law that violates the Charter. Second, [\*Canada \(Attorney General\) v Ward\*](#) provides the necessary proportionate approach for assessing s. 24(1) damages for harms caused by the existence and operation of an unconstitutional law.

In its submission outlining how s. 24(1) does not bar *Charter* damages, the Asper Centre advocated that the broad wording of s. 24(1) ought to be read purposively, giving the Court significant latitude in deciding what is an appropriate and just remedy. The Asper Centre argued that, if Canada's narrow interpretation of s. 24(1) were to be followed, the availability of Charter damages would depend on an inquiry of why the legislature acted in the way that it did rather than focusing on the tangible consequences on rights-holders.

In its submission that *Ward* offers a proportionate approach, the Asper Centre argued that the four-part test outlined in *Ward* sets out significant hurdles for claimants to prove, and that Canada's bright-line alternative composed of objective factors would prioritize state interests over individual rights without constitutional justification. For example, subsuming the "clearly wrong" into the "bad faith" category would diminish the scope of issues a prospective claimant could bring, because legislation that is "clearly wrong" may still be pursued in good faith. Further, the Asper Centre directly challenged Canada's assertion that the spectre of monetary damages would chill Parliament's willingness to legislate.

Overall, the Asper Centre argued that the Supreme Court of Canada had a variety of authorities that had already decided the issue of whether Charter damages should be available to prospective claimants. The requisite change circumstances that justify a departure from established precedent was, in the Asper Centre view, not made out.

To read the Asper Centre's factum in full, click [here](#).

**Jarren Fefer** is a 2L JD Candidate at the Faculty of Law and the Asper Centre's part-time Clinic student.

# Ontario English Catholic Teachers Association v Ontario (Attorney General): No More Wage Increase Cap for Ontario Public Employees

By Jaerin Kim

On February 12, 2024, the Ontario Court of Appeal (ONCA) released its decision in [Ontario English Catholic Teachers' Association v. Ontario \(Attorney General\)](#) ("OECTA"), which dealt with the constitutionality of Bill 124. In a split decision, the ONCA struck down the province's wage restraint law, finding that it violated section 2(d) of the *Charter of Rights and Freedoms* ("Charter") by limiting the collective bargaining rights of unionized workers. As the [Ontario government](#) decided not to appeal the decision and instead repealed the legislation in its entirety, this decision marked the official end of Bill 124 in Ontario. This article examines the background of Bill 124, the ONCA decision, and its future implications on union rights in Ontario.



## Bill 124

[Bill 124](#) ("Protecting a Sustainable Public Sector for Future Generations Act") was passed in 2019 in Ontario. Enacted to ensure the stability of the province's fiscal situation and sustainability of public services, the Act established different three-year moderation periods for employees in the broader public sector. During these periods, a 1% cap per year was imposed on salary and compensation rate increases. Consequently, the Act impacted the wages of over 700,000 public sector employees in Ontario, including teachers, nurses, and other civil employees. In particular, the Act was said to disproportionately affect [women](#), who predominantly hold many of the affected positions in health care, social services, and education.

In 2022, ten labour organizations and unions brought applications to challenge the constitutionality of Bill 124, arguing that it infringes section 2(d) of the *Charter* by deterring meaningful collective bargaining. At trial court, Justice Koehnen of the Ontario Superior Court of Justice granted the applications, finding that the Act violated the respondents' freedom of association and that this violation was not saved by section 1 of the *Charter*. However, he did not accept the arguments that the Act violated the respondents' section 2(b) or 15 rights. The Crown appealed the trial court's decision on three grounds. Firstly, the court's decision is contrary to the decisions of the Supreme Court and appellate courts that have found similar wage restraint legislation to be constitutional. Secondly, the court has erred in its analysis by interpreting the right to freedom of association as a substantive right, contrary to the Supreme Court's reading it as a procedural right. Thirdly, the court has erred in its application of section 1 of the *Charter* by failing to recognize the pressing need to address the deficit through control of public sector wages and compensation.

### **ONCA Decision**

The ONCA upheld the trial court's decision that Bill 124 is unconstitutional. To determine whether the Act constituted a breach of an employee's freedom of association under section 2(d) of the *Charter*, the court applied a two-stage test: first, assessing whether the subject matter of the legislation is of significant importance to collective bargaining, and second, examining whether the legislation preserves a process of good faith negotiation and consultation between employers and unionized employees.

Writing for the majority, Justice Favreau first found that the Act affects a matter of central importance to collective bargaining, namely wages. Next, regarding the second stage of the test, she found that the Act significantly impacted the respondents' ability to participate in good faith collective bargaining and consultation. The Ontario government failed to engage in collective bargaining or consultation before passing the Act. The Act itself also significantly limits the areas of potential negotiation for collective bargaining and does not match other collective agreements negotiated in the public sector in the same time period. Having found that the Act violates section 2(d) of the *Charter*, Justice Favreau subsequently found that the violation is not saved by section 1 of the *Charter*. While the purpose of the Act constituted a pressing and substantial objective, it was not rationally connected to the Act as sectors that did not exclusively depend on the government for funding were affected by the Act. Furthermore, the government failed to establish that the Act minimally impairs the employees' rights, namely through the failure to allow exemptions from the Act. That being said, Justice Favreau noted that the Act is only unconstitutional in so far as it applies to the employees represented by unions, as the rights protected by section 2(d) of the *Charter* do not apply in the same way to non-represented employees.

In the dissent, Justice Hourigan disagreed with the majority and held that there had been no violation of section 2(d) of the *Charter*. Focusing on the importance of separation of powers, he noted that the Act did not substantially interfere with collective bargaining, as unions continued to strike



and collectively bargain under the Act. Justice Hourigan also criticized the trial court's section 1 analysis as "built on legal errors and palpable and overriding factual errors," arguing that its generous views on public policy made it nearly impossible for Ontario to meet the standards. Based on these findings, Justice Hourigan found that even if there had been a breach, it is a reasonable limit and justifiable under section 1 of the *Charter*.

### Going Forward: Future Implications of OECTA

ONCA's decision in OECTA marks a critical juncture in the province's wage restraint for public employees. To begin with, Bill 124 has officially been abolished. The Ontario government decided not to appeal the decision and instead introduced regulations to exempt non-unionized and non-associated workers from Bill 124 until it is repealed. This has resulted in a domino effect on arbitrators' decisions, as [some arbitrators](#) have already awarded additional wage increases in a series of retroactive pay decisions for certain public sector workers, primarily based on the "re-opener" provisions in particular collective agreements. As the effects of the OECTA decision begin to unpack, similar arbitral decisions are expected to roll out in the near future, along with public sector unions' continued attempt to seek retroactive remedies. According to AMAPCEO, the [Ontario Public Service](#) (OPS) is expected to complete the work on applying the remedy regarding retroactive pay by the end of April 2024.

At the same time, the majority decision in OECTA has created a guideline for future wage restraint legislation in Ontario. This guideline includes several hallmarks that Justice Favreau outlined, including negotiation, consultation, a narrow focus on wages, and meaningful exemptions. Given the binding nature of ONCA decisions in Ontario, future Ontario governments wishing to enact wage restraint legislation will be required to follow this guideline.

Despite the gravity of OECTA, it should be noted that there are still multiple hurdles for public employees in Ontario to go through. To begin with, the federal *Expenditure Restraint Act*, which was adopted in the wake of the 2008 financial crisis, is still good law. This means that the OECTA decision would not be able to preclude future wage restraint legislation completely. Furthermore, while many public employees will benefit from a remedy regarding retroactive pay, those who do not have re-opener clauses under their collective agreements may not be entitled to the same benefits. This status quo thus may give rise to further litigation disputes over remedies. Nonetheless, it is indisputable that OECTA has established itself as a landmark decision that provided Ontario public sector employees with their long-awaited wage increase.

**Jaerin Kim** is a 1L JD Candidate at the Faculty of Law and the Asper Centre's Work Study student for the 2023-24 academic year.



# Law Students Supporting Environmental Rights and Climate Action in Ontario

**By Hannah West, Carson Cook,  
and Eva Boghosian**



In recent years there have been a number of significant advances in environmental law in Canada. However, there has been a notable lack of public legal education on the new decisions and the existing mechanisms that community advocates can utilize to fight for action on the environment. In Ontario, this issue was recently made worse by the provincial government removing key funding for public education on environmental rights.

Our working group seeks to help address this issue by creating an accessible handbook which will outline the state of environmental law in Ontario and highlight legal mechanisms that community groups can use in their environmental advocacy. It will also highlight ways that environmental law in Canada can be improved in the future.

The Environmental Rights Working Group (formally the Climate Justice Working Group) was formed in 2022. During its first year students completed research memorandum and plain language chapters on a number of subjects including climate change



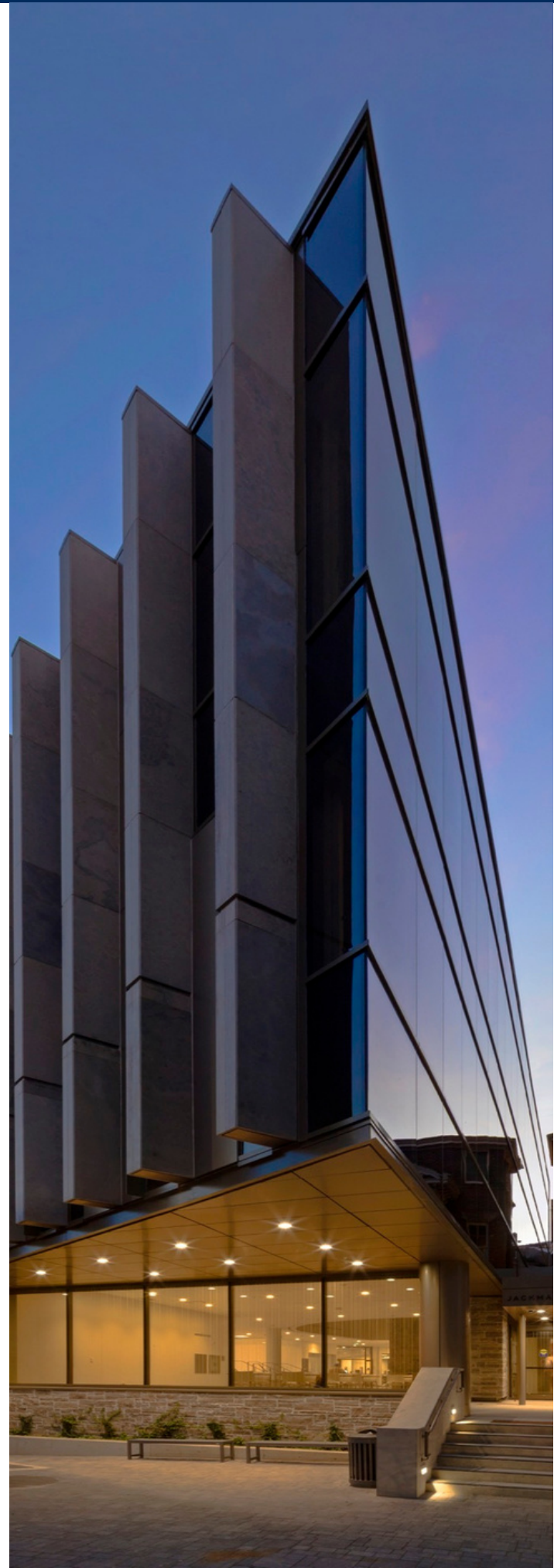
Charter challenges, the Ontario Environmental Bill of Rights, and nuisance law. This year, students completed the research for the handbook focusing on the interaction between Indigenous rights/knowledge and environment law, while also considering proposals for law reform.

During the summer of 2024 the students' work will be reviewed by experts in the field, including the Canadian Environmental Law Association and Ecojustice. The guidebook will then be made public on the Asper Centre's website and distributed to interested community members.

Alongside aiming to produce a plain language guide that is actually useful to community members and activists in the field, the leaders of the working group wanted to create a useful learning experience for the first year students who worked on this project. To that end, all the working group members were asked to write a legal memo and given feedback about the quality and style of their work. Additionally, the first year students were given the opportunity to develop their plain language writing skills, which is not a skill that is often taught to students in law school. Finally, we wanted to impart on students the importance of building collective power, which is essential for climate action to occur. The Environmental Rights Working Group has been one small way in which we, as law students, are building power within ourselves, amongst each other, and within our Toronto community.

**Hannah West, Carson Cook, and Eva Boghosian**

are 2L JD Candidates at the Faculty of Law and co-leaders of the Asper Centre's Environmental Rights student working group.



# Are the New Amendments to our Bail System Constitutionally Sound? An Update from the Bail Reform Student Working Group

By Brynne Dalmao, Kailyn Johnson,  
and Joel Seifert

Across Canada, there is growing public concern about rising crime rates and the efficacy of the bail system. High-profile cases of violence committed by those out on parole, probation, or bail have flamed public fury and cries for reform. In 2023, numerous municipalities declared gender-based violence and intimate partner violence an epidemic.

In this context, the federal government unveiled Bill C-48 *An Act to Amend the Criminal Code (Bail Reform)*. The Bill added and strengthened reverse onus provisions in the *Criminal Code* whereby some classes of accused would be required to show why they should be granted bail rather than the prosecution showing why the accused must be detained. Amongst these amendments to the *Criminal Code* is a change to s.515(6)(b.1), designed to “broaden the existing reverse onus regime for victims of intimate partner violence (IPV)”.

The Bill progressed rapidly through both the House of Commons and the Senate. *An Act to Amend the Criminal Code (Bail Reform)* received Royal Assent on December 5, 2023, and came into force on January 4, 2024.



In response to Bill C-48, the working group had originally intended to prepare submissions for Parliament. However, review of the Bill moved rapidly through Parliament, progressing from the Second Reading in the House to Committee Review in the Senate in only three days. Changing directions, the group partnered with a community organization to provide legal research support by investigating the constitutionality of the reverse onus provisions – both in terms of case law analysis and in terms of academic commentary on the topic. Section 11(e) of the *Canadian Charter of Rights and Freedoms* states that “Any person charged with an offence has the right not to be denied reasonable bail without just cause”. The Act’s new reverse onus clauses are in tension with this *Charter* right.

In the fall term, the working group summarized pertinent 11(e) case law, carefully monitored the progress of the Bill, and observed the responses of community legal organizations. This groundwork paved the way for work in the following term.

During the winter term, the working group prepared an academic commentary paper focused on the impact of reverse onus provisions on accused persons, their communities, and the detention system generally. They found there is limited evidence that increased rates of pre-trial detention meaningfully decreases public safety risks. Furthermore, academic research has confirmed that reverse onuses generally increase the likelihood of false guilty pleas. Additionally, when more people are held in detention before trial, the system becomes increasingly overwhelmed, worsening the conditions for accused persons being held in custody.

The working group’s academic commentary paper further evaluated the hypothesis that in cases of intimate partner violence, reverse onus provisions will protect the safety of the complainant, their children, and the wider community. These provisions, the commentary observed, can disproportionately impact marginalized communities and the evidence supporting the efficacy of reverse onus provisions is not consistent.

The working group is currently preparing a case law brief, examining how the courts have assessed the constitutionality of reverse onus provisions, as required by section 11(e) of the *Canadian Charter of Rights and Freedoms*.

The working group leaders been impressed by the quality of work produced by the 1L students, and with how engaged they have been with this important and timely topic. Not only have the students prepared an excellent work product for a community organization contemplating a constitutional challenge of the new bail law, but they have had the opportunity to engage with challenging and nuanced research questions to develop their research and writing skills.

**Brynne Dalmao, Kailyn Johnson, and Joel Seifert** are 2L JD Candidates at the Faculty of Law and the current co-leaders of the Asper Centre’s Bail Reform student working group.

# Responding to 2SLGBTQI Hate in Canada

By Daniel Kiesman



Canada has seen a significant increase in hate directed at 2SLGBTQI individuals, especially targeting the trans community. Protests against 2SLGBTQI-inclusive school curriculums and policies gripped various cities across Canada in September 2023. Politicians have embraced these anti-2SLGBTQI sentiments as wedge issues. The Governments in Alberta and Saskatchewan have considered legislation which limits the use of preferred names in schools and restricts access to gender affirm medical procedures.

In an increasingly hostile environment, speaking out against 2SLGBTQI hate can be a powerful and necessary tool. Activists, organizations, and allies are calling out these views for what they are: homophobic, transphobic, and hateful. In *Hansman v Neufeld*, the Supreme Court found that there was a public interest in protecting the free speech of a teacher who had spoken out against transphobic commentary by a schoolboard trustee. The decision, which examined legislation on strategic lawsuits against public participation (anti-SLAPP), offers a strong shield against defamation suits targeting 2SLGBTQI defenders.

Building off the Court's decision in *Hansman*, the Asper Centre partnered with Egale, Canada's leading 2SLGBTQI advocacy group to create the "Responding to 2SLGBTQI Hate" working group. The working group is comprised of 8 1L students and is led by upper year students Jarren Fefer, Emma Davies, and Daniel Kiesman. The working group aims to provide a practical guide to defamation and anti-SLAPP law for 2SLGBTQI defenders with the ultimate goal of providing a publicly accessible toolkit explaining anti-SLAPP legislation and how it may be used by a 2SLGBTQI defenders. Ultimately, the toolkit will function both as a public legal education tool as well as provide legal material, including template pleadings, which 2SLGBTQI defenders can use as a cost-effective resource when confronted with a SLAPP defamation lawsuit.

In the fall term, the working group focused its efforts on understanding the emerging field of anti-SLAPP law. Anti-SLAPP legislation has raised new legal issues. In *Hansman*, which built off of two other recent cases of the Supreme Court of Canada, the Court explained how the anti-SLAPP legislation is to function and outlined the burden on the moving and responding parties in an anti-SLAPP motion. Since delving into this emerging field, the working group composed memoranda outlining the key aspects of anti-SLAPP law. In the winter term the working group focused its efforts on distilling the law on anti-SLAPP motions into public legal education material. This is a crucial step in ensuring the toolkit is an insightful but accessible resource for 2SLGBTQI defenders.

Now, more than ever, it is critically important that 2SLGBTQI individuals, organizations, and allies are empowered to call out transphobia, homophobia, and other forms of anti-2SLGBTQI hate. By explaining the basics of anti-SLAPP motions, this toolkit can serve as an empowering tool to for 2SLGBTQI defenders. With a better grasp of anti-SLAPP law, individuals, organizations, and allies can call out 2SLGBTQI hate without fear of being silenced by the spectre of defamation lawsuits aimed at silencing 2SLGBTQI defenders.

**Daniel Kiesman** is a 2L JD Candidate at the Faculty of Law and co-leader of the Asper Centre's Responding to 2LGBTQI Hate student working group.



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