David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

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Supreme Court Grapples with Applying the Charter to Self-Governing Indigenous Community

By Navya Sheth and Akash Jain

One of the most pressing questions about the relationship between Indigenous peoples and Canadian law is the effect of the Charter on Indigenous governments. In Dickson v Vuntut Gwitchin 2024 SCC 10, the Supreme Court of Canada weighed in on this issue. The variance between approaches in the 4-2-1 split decision highlights that the path forward is contentious and far from certain.

The Vuntut Gwitchin First Nation ("VGFN") is a self-governing Indigenous community in the Yukon. In 1993, it concluded land claim and self-government agreements with the federal and Yukon governments. In accordance with the self-government agreement, the VGFN adopted its own constitution, which provides various electoral rules for internal band elections. One of the rules is that all Chiefs and Councillors must reside on the VGFN's settlement land or relocate there within 14 days of election.

Cindy Dickson is a VGFN citizen who lives in Whitehorse, approximately 800 kilometers away from the settlement land, and is unable to relocate due to her son's medical needs. She wanted to run for election as a VGFN Councillor, but could not due to the residency requirement. She challenged the residency requirement under s. 15(1) of the Charter.

The two key questions before the court were:
(1) whether the Charter applied to VGFN, and
(2) if so, what was the effect of s. 25 [the provision of the Charter that offers protection for Aboriginal rights]?

Charter Applicability

The court split three ways on Charter applicability. All three decisions applied the *Eldridge* test for s. 32(1), which suggests that an entity can be subject to the Charter either (1) as a whole because it is government by nature or there is a significant degree of government control, or (2) for particular activities, if those are sufficiently governmental in nature.

Kasirer and Jamal JJ, for the majority, found that the Charter applied to Indigenous governments as either "government by nature" or due to governmental activity. The focus of their reasons was on the first branch; they found that VGFN met the *Godbout* factors and thus was a "government by nature." Specifically, the VGFN government was elected by eligible voters of the VGFN and are democratically accountable to their constituents; had general taxing powers that are materially indistinguishable from those of Parliament or the provinces; could make, administer, and enforce coercive laws that are binding on VGFN citizens and on the public generally within its settlement land; and derives at least some of its lawmaking authority from Parliament, as it is recognized as a legal entity under the federal implementing legislation. They concluded that "the Charter applies to the VGFN's residency requirement only insofar as that requirement flows from an exercise of statutory power under s. 91(24) of the Constitution Act, 1867" and declined to comment on the applicability of the Charter to an inherent right of self-government.

Martin and O'Bonsawin JJ, dissenting in part, agreed with the majority that VGFN was a "government by nature," but took a more expansive approach to the interpretation of s. 32(1). They disagreed with the majority's focus on the delegation of lawmaking authority, commenting that the existing s. 32(1) jurisprudence was not directly applicable to the unique historical and legal position of Indigenous governments and that the majority's emphasis on delegated power "gives insufficient weight to the VGFN's independent governmental nature."

Instead, they held that s. 32(1) is directed at the relationship between the governed and those who govern and should include all entities that are "essentially governmental in nature," regardless of their connection to formal federal or provincial government structures. Martin and O'Bonsawin JJ focused on the "matters within the authority" element of s. 32(1). In their view, because Indigenous governments exercise powers over this "legislative field," they are caught by the provision "regardless of whether Indigenous self-government is affirmed or recognized by a statute, is based on a treaty term, or is grounded in an inherent Aboriginal right to self-government." Under this approach, the Charter applies to VGFN as it is an "inherently governmental" entity whose "extensive catalogue of lawmaking powers touches on 'matters within the authority' of Parliament and the provincial legislatures."

Finally, Rowe J, also dissenting in part, found that the Charter does not apply to self-governing Indigenous nations. In his view, the text, history, and jurisprudence indicated that entities need to exhibit a "significant connection" to either the provincial/territorial or federal governments to fall within s. 32(1). Applying it to Indigenous governments would be inconsistent with the "nature, status and purpose of Indigenous self-government" and the objectives of reconciliation and self-determination. He held that the arrangements between VGFN and the federal/Yukon governments do not satisfy the significant connection necessary to bring either the government or the residency requirement within the scope of s. 32(1), though left open the possibility that other activities may have such a connection.

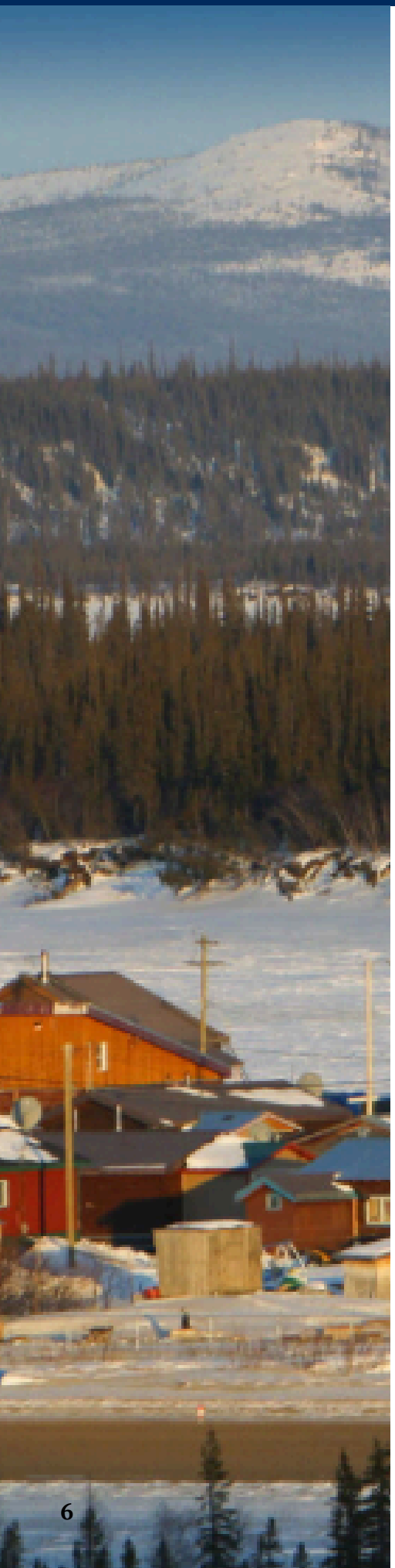
Section 25 of Charter

Dickson marks the first time the Supreme Court of Canada considered the full application and effect of s. 25 of the Charter, which provides that Charter rights cannot "abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada." While Dickson provides useful guidance, the bench was largely divided on how s. 25 ought to be interpreted.

Previous jurisprudence regarded s. 25 as either a "shield" or "interpretive prism." Kasirer and Jamal JJ., writing for the majority, held that there is merit in both perspectives. According to the majority, s. 25 can be said to have a shielding effect because it affords primacy to Aboriginal, treaty, or "other rights or freedoms", but a right within the scope of s. 25 is only prioritized after an interpretive exercise exposes a "real and irreconcilable" conflict between the individual, Charter right and the collective, Indigenous right. In this sense, s. 25 will sometimes function as a "pop up shield," while, in other circumstances, it will only have an interpretive role. Because s. 25 does not serve as an impermeable shield, the majority maintains that some understanding of the Charter right is needed to determine whether s. 25 is engaged.

The majority outlined a four-stage framework that animates the s. 25 analysis. First, the Charter claimant must show that the impugned conduct prima facie breached an individual Charter right. The analysis proceeds in the same fashion regardless of the identity of the Charter claimant. That said, according to Kasirer and Jamal JJ., when the Charter claimant is a member of the First Nation at issue, "courts should proceed cautiously to avoid unnecessarily or unwittingly imposing incompatible ideas or legal principles upon the distinctive Indigenous legal system." Second, the party seeking to invoke s. 25 must satisfy the Court that the impugned conduct is a right, or exercise of a right, protected under s. 25. For the majority, "other rights and freedoms" under s. 25 are limited to those that protect "Indigenous difference," "understood as interests connected to cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process." Third, the Court must be satisfied that there exists an irreconcilable conflict. Fourth, the Court will consider any applicable limits to the collective interest relied on.

In the case at bar, the majority held that (1) Ms. Dickson's s. 15(1) Charter right was prima facie breached by the residency requirement; (2) the residency requirement is the exercise of an "other right" (the right to set criteria for membership in the VGFN's governing body), which protects Indigenous difference (preserving leaders' connection to the land); (3) Ms. Dickson's individual Charter right and VGFN's s. 25 rights are irreconcilably in conflict; and (4) no applicable limits exist. As a result, the majority upheld the residency requirement.



Martin and O'Bonsawin JJ., dissenting in part, disagreed with the majority's conceptualization of s. 25. According to Martin and O'Bonsawin JJ., s. 25 intended to operate as an interpretive prism. Martin and O'Bonsawin JJ. also took issue with the majority's notion of "Indigenous difference," which they contended was "too broad and d[id] not serve a meaningful filtering function at the rights recognition stage." Instead, Martin and O'Bonsawin JJ. argued that rights captured under s. 25 must be "limited to those that are truly unique to Indigenous peoples because they are Indigenous." In other words, the rights must be "intrinsically linked to the distinctive, collective, and cultural identity of an Indigenous community." Martin and O'Bonsawin JJ. also feared that the majority's approach will lead to Charter-free zones in which minorities are not adequately safeguarded from the actions of their own governments. Overall, Martin and O'Bonsawin JJ. concluded that the residency requirement did not fall within the ambit of s. 25 and, even if it did, under the majority's framework, the residency requirement is not necessary to the maintenance of the VGFN's distinctive culture.

Rowe J., dissenting in part, maintained that the VGFN constitution is not subject to the Charter and it was therefore unnecessary to consider arguments pertaining to s. 25. However, in obiter, Rowe J. expressed concern with the approaches advocated by his colleagues, contending that they erroneously "engage the courts in a role of permanent oversight of Indigenous self-government," which is not what s. 25 envisaged.

Conclusion

Ultimately, the decision in Dickson is a classically Canadian compromise: it acknowledges Indigenous governments, but keeps them anchored in delegated power and continues to give Canadian courts a supervisory role over them. Only time will tell how this tension unfolds in the subsequent jurisprudence.

However, many open questions remain. Kasirer and Jamal JJ's emphasis on delegated power means that the interaction between the Charter and potential inherent self-government rights is still unclear. Moreover, the degree of delegation necessary for applicability is uncertain: if a self-government agreement was not legislatively enacted, would that be sufficient to sever the link for the purposes of Charter scrutiny?

Navya Sheth *and* ***Akash Jain*** *are 3L JD students at the Faculty of Law*

Growing the Asper Centre's Research and Policy Mission

By Rob De Luca

In January, 2025, I had the privilege of joining the Asper Centre as its inaugural Research Associate. The Centre is a unique institution in Canada. In addition to being a site of collaboration for world class law students, lawyers, and scholars, the Centre has been able to combine constitutional law research, policy, advocacy, and teaching into a joint enterprise, with the aim of protecting and promoting constitutional rights. Within this enterprise, and in concert with the Centre's manifold efforts, I will be leading policy projects that build upon the past work of the Centre, and the Centre's student working groups.

For instance, we are currently developing a project that will attempt to survey the constitutional harms that flow from Charter-violating legislation via a criminal law case study, with an eye to institutional reforms that might prevent or mitigate these harms. An important aim of this project will be to illustrate how the harms of rights-violating legislation often expand well beyond the parties to a final legal dispute.

We are also working on a project that will monitor and respond to the federal government's long-awaited policing and border services oversight body, the Public Complaints and Review Commission.

The Centre has been active on the issue of police oversight reform, including by providing submissions on the issue to parliamentary committees (2021, 2023), and via its upcoming guidebook on police accountability mechanisms. The monitoring and response project is an opportunity to continue these efforts. Finally, we are working on a project that engages the federal government's consultations on a national strategy to advance environmental justice and address environmental racism, alongside efforts to provide support to environmental non-profits working on these issues.

On a more personal note, I am looking forward to carrying forward these projects and everything else with the Centre's many contributors. I have had the good fortune of being involved in education, in diverse contexts, both prior to and during my legal career. Education and constitutional law – and especially the branch of constitutional law devoted to rights protection – are united in that they are, or at least can be, both a reflection of our highest commitments and an occasion to improve upon those commitments. It is important work. I am grateful for the generous support of David Asper, and the hard and successful work of Cheryl Milne and Tal Schreier, that has made the opportunity possible.

Rob De Luca *is a Research Associate at the David Asper Centre for Constitutional Rights. He has previously worked as a lawyer at the Canadian Civil Liberties Association and as a labour lawyer in private practice, among other things. He holds a JD from Stanford Law School and a PhD in political science from the University of Texas at Austin.*

2024 SCC Year In Review

By Taoran Li

In 2024, the Supreme Court of Canada (SCC) released a total of 44 judgments, which included a sizable number of constitutional law cases. This article presents a selection of the SCC's decisions that dealt with topics concerning constitutional law. The legal questions tackled range from whether the Charter applies to public school boards to whether the enactment of section 35(1) of the Constitution Act, 1982 creates a new cause of action for treaty breaches. The SCC case summaries are categorized into three sections: Federalism, Aboriginal Law, and *Charter* Rights.

Federalism Cases

***Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5**

This decision deals with the constitutional validity of federal legislation regarding Indigenous jurisdiction over child and family services, namely An Act Respecting First Nations, Inuit and Métis Children, Youth and Families (Bill C-92) which formally recognizes the inherent Aboriginal right of self-government, including jurisdiction over child and family services and establishes mechanisms through which Indigenous communities can exercise authority, either by enacting their own laws or through agreements negotiated with federal and provincial governments.

The 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.

***Sanis Health Inc. v. British Columbia*, 2024 SCC 40**

In this decision, the SCC determined that multiple Canadian governments can join in a single class action in one province and before one province's superior court without unconstitutionally sacrificing their autonomy or sovereignty.

Section 11 of the Opioid Damages and Health Care Costs Recovery Act ("ORA") allows British Columbia to bring an action on behalf of multiple governments for harm caused by opioids.

The SCC concluded that section 11 of the ORA is within the authority of the province of British Columbia. The pith and substance of section 11 does not deal with substantive rights, but is the creation of a procedural mechanism for the application of the ORA to the existing opioid-related proceeding. It is meaningfully connected to the province of British Columbia, respects the legislative sovereignty of other governments in Canada and is properly classified under section 92(14) of the Constitution Act, 1867 which grants the provinces the authority to legislate in relation to the administration of justice in the province.

Aboriginal Law Cases

***Québec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39**

The Government of Canada, the Government of Quebec and Pekuakamiulnuatsh Takuhikan, a band council that represents the Pekuakamiulnuatsh First Nation, entered into agreements to establish and maintain an Indigenous police force in the community of Mashteuiatsh in Quebec. However, between 2013 and 2017, Canada and Quebec knew that funding under the tripartite agreements was insufficient to meet the SPM's needs but they refused to negotiate funding. Pekuakamiulnuatsh Takuhikan repeatedly agreed to renewal to maintain the SPM, sinking into a further deficit, rather than reverting to a non-Indigenous police service.

The SCC established that the honour of the Crown can apply to certain Crown contracts with Indigenous peoples. In this instance, it held that the Quebec's refusal to renegotiate its financial contribution when the agreements were renewed was in breach of the obligation to act in a manner consistent with the honour of the Crown and not in keeping with the principle of good faith, a source of private law obligations set out in article 1375 of the Civil Code of Québec, which requires parties to conduct themselves in good faith in the performance of a contract.

***Shot Both Sides v. Canada*, 2024 SCC 12**

Treaty No. 7, entered between the Crown and the Blackfoot Confederacy in 1877, established Blood Tribe Reserve No. 148. The size was to be set by the Treaty land entitlement (LTE) based on a prescribed formula.

The Blood Tribe, a member of the Blackfoot Confederacy commenced an action in 1980 alleging breaches of the Crown's fiduciary duty, fraudulent concealment, and negligence, and sought declaratory relief and damages for breach of contract arising from the Crown's failure to fulfil the TLE according to the prescribed formula. However, the TLE Claim was discoverable as early as 1971 with the consequence that the claim is statute-barred by operation of the applicable six-year limitation period.

The Supreme Court rejected the Blood Tribe's argument that their claim was not statute-barred because the enactment of section 35(1) of the Constitution Act, 1982 created a new cause of action for treaty breaches. The SCC held section 35(1) did not create a cause of action for breach of treaty rights as treaty rights flow from the treaty, not the Constitution, and treaties are enforceable upon execution and give rise to actionable duties under the common law. Accordingly, the Blood Tribe's TLE Claim was enforceable at common law and actionable prior to the coming into force of section 35(1). In spite of this, the Court concluded that declaratory relief is warranted given the longevity and magnitude of the Crown's dishonorable conduct towards the Blood Tribe.

Charter Rights Cases

***R. v. Bykovets*, 2024 SCC 6**

Is a request by the state for an IP address a "search" under s. 8 of the *Charter*?

The Calgary Police Services contacted a third-party payment processing company to obtain the IP addresses used for fraudulent online purchases from a liquor store. The processing company managed the liquor store's online sales. The police then obtained an order from the court compelling the addresses' Internet service provider to disclose the name and residential address of the customer for each IP address and used this information to execute search warrants at their residences. Mr. Bykovets, charged with the offences relating to the fraudulent online purchases, alleged the police's request to obtain the IP addresses from the processing company violated his right against unreasonable search and seizure under s. 8 of the *Charter*.

The SCC concluded an IP address attracts a reasonable expectation of privacy as it is the crucial link between an Internet user and their online activity. Accordingly, a request by the state for an IP address is a search under s. 8 of the *Charter*. Mr. Bykovet's convictions were set aside and a new trial was ordered.

***Canada (Attorney General) v. Power*, 2024 SCC 26**

In this appeal, the SCC clarified that the state may be required to pay damages for making unconstitutional legislation if it is clearly unconstitutional, was made in bad faith or an abuse of power.

Two pieces of retrospective legislation enacted in 2010 and 2012 rendered Mr. Power permanently ineligible for a record suspension, which would have allowed him to continue working. The two pieces of legislation were later declared unconstitutional and Mr. Power subsequently sued the federal government for damages under s. 24(1) of the *Charter* for breach of his rights caused by the enactment of the legislation.

The SCC held the state is not entitled to an absolute immunity from liability for damages when it enacts unconstitutional legislation that infringes *Charter* rights. An absolute immunity fails to properly reconcile the constitutional principles that protect legislative autonomy, such as parliamentary sovereignty and parliamentary privilege, and the principles that require the government be held accountable for infringing *Charter* rights, such as constitutionality and the rule of law. Instead, the state may be liable for *Charter* damages if the legislation is clearly unconstitutional or was in bad faith or an abuse of power.

***Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13**

In this case, the SCC did not consider the exclusion of casino managers from Quebec's labour relations regime infringed the managers' guarantee of freedom of association protected by s 2(d) of the *Charter*, which, in the labour context, guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals.

Under the relevant framework, the SCC considered the claim involved activities protected under s 2(d) of the *Charter*, including the right to form an association with sufficient independence from the employer, to make collective representations to the employer, and to have those representations considered in good faith. However, it was determined at the second step that the purpose of the exclusion was not to interfere with the managers' rights to associate, but to distinguish between management and operations in organizational hierarchies, to avoid placing managers in a situation of conflict of interest, and to give employers confidence that managers would represent their interests, while protecting the distinctive common interests of employees.

***York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22**

This appeal involves a workplace privacy issue regarding two elementary school teachers represented by the Elementary Teachers' Federation of Ontario, against their employer, the Ontario public school board. The two teachers recorded their private communications regarding workplace concerns on a personal file left open on a workplace computer which was obtained by the school principal who had entered the classroom of one of the teachers. The private communications then formed the basis for the school board to issue written reprimands.

The SCC decided that Ontario public school board teachers are protected by s. 8 of the *Charter* in the workplace, as the boards are inherently governmental for the purposes of section 32 of the *Charter*. It ruled that the decision at first instance by the arbitrator must be set aside as the teachers' *Charter* rights should have been considered in the arbitration process.

Taoran Li *is an LLM candidate at the Faculty of Law and the Asper Centre's Work Study student for the 2024-25 academic year.*

Update on the Constitutional Challenge to the Federal Voting Age

By Kabir Singh Dhillon, Julia Ford, and Bjorn Wagenpfeil

Does a minimum voting age violate the Constitution?

The David Asper Centre for Constitutional Rights is representing a number of highly engaged young people from across Canada who, together with Justice for Children and Youth ("JFCY"), are challenging the constitutionality of s. 3 of the Canada Elections Act ("CEA"), which sets the federal voting age at 18. They are challenging s. 3 of the CEA on the ground that it violates their *Charter* rights under s. 3 ("Democratic rights"), s. 2(b) ("Freedom of expression"), and s. 15(1) ("Equality rights").

They argue that the exclusion of young people from the franchise exacerbates their political exclusion because Parliamentarians, in making decisions that affect youth, are not accountable to young people and have no incentive to listen to their concerns. This is the first *Charter* challenge where the Asper Centre has acted as counsel to the named parties.

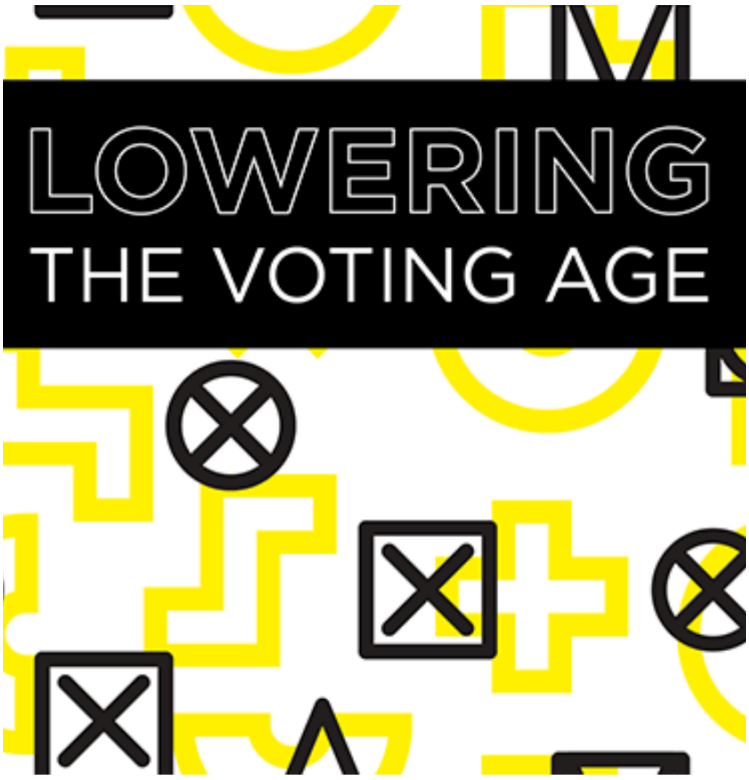
Section 3 of the *Charter*, the voting rights provision, contains no minimum age and states that:

"Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

This broad language protects the voting rights of all citizens--regardless of their age or capacity. The Applicants argue that on its face, the minimum voting age contained in the CEA violates s.3 of the *Charter* and that the onus lies with the Government to justify this infringement.

The group of young individuals further argues that because the right to vote is a fundamental form of political expression, which falls within the protected core of s. 2(b) of the *Charter* and that the minimum voting age in the CEA violates this right and should be struck down. Additionally, they argue that the CEA infringes on their equality rights under s.15(1) because it excludes them from the franchise for no reason other than their age, which is an enumerated ground.

Finally, the Applicants reference Canada's obligations under international law under the United Nations Convention on the Rights of the Child ("UNCRC"). They argue that Canada, on the international stage, has endorsed young people's right to participate in decisions that affect them.



The Asper Centre is representing the named Applicants in this case which is currently before the Ontario Superior Court of Justice. The Asper Centre's Clinic Students are involved with all procedural aspects of this case, including filing submissions, motions, drafting factums, and securing expert evidence to put before the courts.

A large part of developing the factual record in the case has involved legislative research on the history of the franchise in Canada and at the provincial and municipal level going as far back as before Confederation. This factual background reveals the exclusionary motivations behind the drafting of the current statute. Anchoring the case in a historical analysis also links the current challenge being brought by youth to the struggles of various disenfranchised groups and suffragists throughout history.

Developing a factual record in this case also requires the submission of expert evidence from leading social scientists. Over the last few months, the Asper Centre consulted experts in the fields of history, electoral policy, sociology, and democracy to submit their academic and scientific research to support the Court in upcoming hearings. The Government of Canada has recently put forward their evidence from experts supporting their position in this case, and both sides will now proceed with reply affidavits and cross-examination of expert witnesses.

The expert reports in this case deal directly with social science evidence analyzing the history of the Canadian franchise, voter turnout of various age groups in Canada over time, and the experiences of other countries where the voting age is lower than 18. These jurisdictions include, for example, Austria, Scotland, Wales, Malta, Brazil, Argentina, among others.

The preponderance of this evidence in these expert reports shows that many of the fears cited about younger voters do not bear out in practice. On the contrary, there is data to support the conclusion that lowering the voting age may increase voter turnout rates for the overall Canadian electorate and thereby strengthen our democracy.

It is noteworthy that this challenge to the federal voting age is not a legal fight brought in isolation. Several campaigns have been active over the last decade across Canadian provinces to advocate for lowering provincial voting ages. Youth have also been advocating within political parties to gain traction at party conventions and get the issue of youth representation on party platforms prior to general elections.

We are proud to support youth in the exercise of their democratic rights and their freedom of expression. The Asper Centre will continue to advocate for the equality rights guaranteed by the Charter are realized for all members of our society.

Kabir Singh Dhillon (2L), Julia Ford (2L), Bjorn Wagenpfeil (3L) *are JD students at the Faculty of Law and were the Asper Centre's Clinic students in Fall 2025 and were involved with the voting age challenge.*

Surveying the Interpretation and Implementation of Historic Treaties:

The Supreme Court's Guidance in Restoule

By Daniel B. Jolic

In *Ontario (Attorney General) v Restoule*, 2024 SCC 27, the Supreme Court of Canada ("the Court") provided guidance on the interpretation of historic treaties and Crown duties in implementing them, while also pointing to important considerations for a court's standard of review and limitations considerations concerning historic treaties.

The Court was tasked with examining the Crown's breach of promises to the Anishinaabe of the upper Great Lakes under the Robinson Treaties of 1850 (Robinson-Huron Treaty and Robinson-Superior Treaty). Under the treaties, the Anishinaabe ceded their territories in exchange for, among other promises, an annual payment in perpetuity, which was to be increased over time under certain circumstances as per the treaties' Augmentation Clause.

The interpretation of this clause and remedies for its breach were at the heart of this case, as the annuities have been frozen at a "shocking $4 per person, after the first and only increase was made in 1875" to this day.

As an extension of this key issue, the Court grappled with six matters, being:

(1) the interpretation of historic treaties;
(2) the standard of review to utilize for the trial judge's interpretation of the Robinson Treaties;
(3) the proper interpretation of the Augmentation Clause in the Robinson Treaties;
(4) limitation periods for claims under the Robinson Treaties;
(5) the nature and the content of the Crown's obligation to implement the Augmentation Clause; and
(6) the appropriate remedy for the Crown failing to implement the Augmentation Clause.

Interpretation of Historic Treaties

Firstly, the Court reviewed the principles for interpreting historic treaties. The Court affirmed that treaties are *sui generis* agreements intended to advance reconciliation, because the Crown's assertion of sovereignty gave rise to solemn promises between the Crown and Aboriginal peoples.

Furthermore, the Court discussed how treaty rights must be interpreted under the honour of the Crown, under which "servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[1]

The Court then outlined the difference between historic and modern treaties: historic treaties were brief, negotiated quickly, and intended to record oral promises made by the Crown to Indigenous signatories, who usually required translation and did not have the benefit of legal advice. On the other hand, modern treaties are the product of lengthy negotiations between well-resourced and sophisticated parties.

Finally, the Court reiterated the principles governing the interpretation of historic treaties from *R v Marshall*, [1999] 3 SCR 456, noting that, "…because a court must consider both the words of a treaty and the historical and cultural context, it is useful to approach treaty interpretation in two steps. At the first step, the court focuses on the words of the treaty clause at issue and identifies the range of possible interpretations. At the second step, the court considers those interpretations against the treaty's historical and cultural backdrop."[2]

Standard of Review for the Interpretation of Treaties

The Court emphasized that findings of historical fact underpinning the interpretation of historic treaties are reviewable under a standard of palpable and overriding error. This is because of need to limit the number, length, and cost of appeals, to promote the autonomy and integrity of trial proceedings, and to recognize the expertise and advantageous position of the trial judge who has reviewed the evidence.

However, since treaty rights are constitutionally protected and warrant that a court be given a broad scope to intervene on these issues, the Court held that the standard of review for treaty interpretation is correctness. The Court underscored this holding due to two significant reasons. Firstly, treaty rights are protected under s. 35(1) of the Constitution Act, 1982, and "are nation-to-nation agreements that engage the constitutional principle of the honour of the Crown." Secondly, treaty interpretation has significant precedential value because it concerns enduring, multi-generational compacts.

[1] *Ontario (Attorney General) v Restoule*,2024 SCC 27 [Restoule] at para 71.
[2] Ibid at para 80.

Interpretation of the Augmentation Clause in the Robinson Treaties

The trial judge identified two ambiguities in the Augmentation Clause: firstly, whether the perpetual annuity would be given to individuals or a collective; and secondly, how to calculate the productivity of a territory and if and when increases in the annuity are triggered.

On the first point, the Court determined that the annuity should be interpretated as being perpetually payable to "Chiefs and their Tribes" that increases if economic conditions are met, and which is subject to a "soft cap" of $4 per person that can be increased if the Crown exercises its discretion ("as Her Majesty may be graciously pleased to order").[3] This reference to $4 does not create separate payments to individuals; rather, it limits the amount by which the annuity can be increased. However, if the treaty population increases, it recognizes that total annuity population might grow.

On the second point, the Court determined that historically, "Robinson does not appear to have expected that significant revenues would be generated from the territory" and that at the time of signing the Treaty, "the Province was broke" and it would not have made sense that Robinson promised the Anishinaabe "an unlimited collective annuity, while at the same time limiting individual payments."[4]

Therefore, the Augmentation Clause should be interpreted as allowing for a "fixed annuity, with discretion for the Crown to increase the annuity beyond a 'soft cap' if economic conditions improved."[5] This obliges the Crown to "increase the annuity up to $4 when the economic circumstances warrant" with the annuity being a "'soft cap' beyond which further increases are discretionary."[6]

When determining whether to go beyond the "soft cap", the Crown must consider factors such as: the number of treaty beneficiaries and their needs; the benefits the Crown has received from the territory and its expenses during the relevant timeframe; the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada; and the principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise to share in the wealth of the land if it proved profitable.

[3] Ibid at para 145.
[4] Ibid at paras 186-187.
[5] Ibid at para 195.
[6] Ibid at para 196.

Limitations Periods for Claims under Treaties

The Court affirmed that the action is not an action on the case, nor is it an action of account. As such, it not statute-barred by the 1990 Limitations Act.

The Court stated that a claim for a breach of an Aboriginal treaty is not an action on the case for three reasons. Firstly, Ontario was seeking to use an action on the case as a basket clause to capture a claim not expressly mentioned in limitations legislation, like a breach of treaty, which the Court says should not "be interpreted so broadly as to capture all personal actions not specifically enumerated" in Ontario's limitations legislation.[7] Secondly, in the 2002 amendments to Ontario's limitations legislation, Aboriginal and treaty rights were explicitly excluded from limitations periods. Finally, treaty claims are not actions in the nature of tort or contract, which derive from the law of trespass, as does an action on the case. They are sui generis agreements that involve constitutional rights, which engage public law issues.

The Court further held that the plaintiffs' claim for equitable compensation does not amount to an action of account within Ontario's limitations legislation. Actions of account arose in 13th century England as a way for landowners "who had rented out manors to bailiffs to compel them to account for the rents and profits derived from the property." The action was "used at common law against a person who was required to render an account to another because of a fiduciary relationship."[8] While the relationship between the Crown and Indigenous peoples is fiduciary, there is no specific obligation or precedent case to bring the plaintiffs' claims within the scope of an action of account, nor does the Augmentation Clause require the Crown to account for the proceeds from the ceded territories to the treaty beneficiaries.

[7] Ibid at para 208.
[8] Ibid at para 214.

Crown's Obligation to Implement the Augmentation Clause in the Robinson Treaties

The Court confirmed that the honour of the Crown is not a cause of action in itself, but guides how obligations that attract it should be fulfilled, and gives rise to different duties in different circumstances. While ad hoc fiduciary duties arise as a matter of private law and require loyalty to the beneficiary and can occur between the Crown and Indigenous peoples when the Crown undertakes to exercise its discretionary control over a legal or substantial practical interest in the best interests of the beneficiary, sui generis fiduciary duties are unique to the Crown-Indigenous relationship, flow from the honour of the Crown, and permit the Crown to balance competing interests.

In this case, the Court held that neither an *ad hoc* nor *sui generis* fiduciary duty arises.

An *ad hoc* fiduciary duty requires:

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiaries;

(2) a defined class of beneficiaries vulnerable to the fiduciary's control; and

(3) a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

Here, the Court held that the threshold was not met which would establish an undertaking by the Crown to act in the best interests of the Huron and Superior plaintiffs because the Crown never undertook to forsake the interests of all others in favour of the Huron and Superior plaintiffs when discharging its obligations under the Augmentation Clause. In addition, the Augmentation Clause expresses that the Crown will "deal liberally and justly with all Her subjects," which does not meet the rare threshold of upholding loyalty to a particular person or group.

A *sui generis* fiduciary duty arises where there is:
(1) a specific or cognizable Aboriginal interest; and
(2) a Crown undertaking of discretionary control over that interest.

It does not exist at large, but only in relation to specific or cognizable Aboriginal interests.

The Court held that this threshold was not met for the plaintiffs' treaty right under the Augmentation Clause, because it "arises from the exercise of the Crown's executive treaty-making function… and would not exist had the Crown not exercised its treaty-making powers to that effect."[9]

[9] Ibid at para 237.

Furthermore, the Crown held that this threshold was not met in relation to the plaintiffs' pre-existing interest in the ceded land, because "neither the treaty text nor the context in which the Robinson Treaties were signed provide any evidence that the Crown would 'administer the land on behalf of the Treaties' beneficiaries.'"[10]

Nonetheless, the Court held that the Crown has a duty to diligently implement the Augmentation Clause.

It expanded this duty to mean that the Crown is required "to act in an honourable and timely way to pursue the purpose behind the treaty promise… this requires the Crown to pay an amount, subject to review by the courts, to compensate the Superior plaintiffs for its past breach of the Augmentation Clause, which… is a breach of… the duty of diligent implementation and of the treaty itself."[11] In other words, the Crown should "seek to perform the obligation in a way that pursues the purpose behind the promise."[12]

This acknowledgement would mean that an increase to the annuity is required, as recognized by the Crown through their settlement with the Huron plaintiffs of $10 billion for past breaches of the augmentation promise. As such, both the Huron and Superior plaintiffs are entitled to a remedy for this breach.

Whitesand First Nation Chief Lawrence Wanakamik, right, shakes hands with Harley Schachter, lawyer for Red Rock and Whitesand First Nations of Robinson Superior treaty territory, after the Supreme Court decision.

[10] Ibid at para 246.
[11] Ibid at para 253.
[12] Ibid at para 258.

Appropriate Remedy for Failing to Implement the Robinson Treaties' Augmentation Clause

The Court held that "a declaration clarifying the rights and obligations of the parties is an appropriate remedy in this case, as it will inform both the future implementation of the Robinson Treaties and clarify the nature of the past breach." Furthermore, given the Crown's breach of the Augmentation Clause for almost a century and a half, a declaration alone is insufficient to restore the Crown's honour, and redress must be provided.

In providing redress, the Crown should consider the nature and severity of the breaches, the number of Anishinaabe and their needs, the benefits the Crown has received from the ceded territories and its expenses over time, the wider needs of other Indigenous populations and the non-Indigenous populations of Ontario and Canada, and the principles and requirements flowing from the honour of the Crown, including its duty to diligently implement its sacred promise under the treaty to share in the wealth of the land if it proved profitable.

With respect to the Superior plaintiffs who have not yet reached a settlement, the Crown stated that the Crown should negotiate with the Superior plaintiffs to come to an agreement, as negotiation and agreement outside the courts have better potential to renew the treaty relationship, advance reconciliation, and restore the honour of the Crown."

Failing this, however, the Court held that the Crown should exercise its discretion and set an amount in compensation within six months of the release of this case.

While this occurred with the Crown offering compensation to the Superior plaintiffs of $3.6 billion, the amount was swiftly rejected by the Superior plaintiffs and a court review of the offer will take place in Thunder Bay in early June.[13]

[13] Kiki Paterson, "Robinson Superior Treaty Annuity Case to Return to Court After Six Months of Negotiations" (7 February 2025), online (news) <https://www.trentarthur.ca/news/robinson-superior-treaty-annuity-case-to-return-to-court-after-six-months-of-negotiations> [/web/20250313040907/https://www.trentarthur.ca/news/robinson-superior-treaty-annuity-case-to-return-to-court-after-six-months-of-negotiations].

Conclusion

With Restoule decided and negotiations between the Crown and Superior plaintiffs stalled, the case will return to the trial court for further deliberation in the coming months. Nonetheless, it offers acute guidance on the interpretation of historical treaties, standard of review for the interpretation of treaties, the fiduciary duties of the Crown in the execution of treaties, limitations periods for claims brought under historic treaties, and remedies that the Crown may be liable for in the event of a breach of treaty guarantees.

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The Future of Climate Change Accountability:
Mathur Challenges Ontario's Emissions Target

By Maya Hribar

In a decision issued on October 17, 2024, the Ontario Court of Appeal set aside a lower court's decision which had rejected a constitutional challenge brought by seven young Ontarians to the Ontario government's emissions target.

The challenge seeks a declaration that Ontario's greenhouse gas (GHG) emissions target violates ss. 7 and 15 of the Canadian Charter of Rights and Freedoms ("the Charter") and an order directing Ontario to set a science-based target that is consistent with Ontario's share of GHG emissions and revise its climate change plan in accordance with international standards.

By remitting the application to the Superior Court for reconsideration, the Ontario Court of Appeal's decision in Mathur v. Ontario 2024 ONCA 762 ("Mathur") affirms that *Charter* challenges to climate change legislation are not necessarily claims for positive rights. This approach ensures that future challenges receive judicial consideration and allows courts to hold governments accountable by reviewing their actions for *Charter* compliance.

Judgment from the Ontario Superior Court of Justice

The Ontario Superior Court of Justice found Ontario's GHG emission target did not violate ss. 7 and 15 of the Charter.

Under s. 3(1) of the Cap and Trade Cancellation Act, 2018, S.O. 2018, c. 13 ("CTCA"), Ontario adopted a GHG reduction target calling for a 30% reduction in GHG emissions from 2005 levels by 2030. The applicants argued Ontario is in breach of s. 7 of the Charter as it was authorizing and creating a level of emissions that will lead to serious adverse consequences and put the lives of Ontarians at risk. The applicants also argued Ontario is in breach of s. 15(1) of the Charter because it distinctly encumbers young people and future generations who will endure most of the impacts of climate change.

The Superior Court characterised the challenge as a positive rights case. It found that by failing to produce a target that would further reduce greenhouse gas emissions, Ontario is contributing to an increase in the risk of death. However, no finding on whether positive obligations should be imposed under section 7 occurred as the Court concluded that any deprivation to life or security of the person is not contrary to the principles of fundamental justice.

Regarding s. 15 of the Charter, the Court found that these rights have not been violated as the disproportionate impact on youth and future generations is caused by climate change, not the target, and the distinction is based on a temporal distinction which is not an enumerated or analogous ground. This is a temporal distinction as the effects of climate change will be experienced by all age groups in the future.

Judgment from the Ontario Court of Appeal

The Ontario Court of Appeal allowed the appeal by the applicants and remitted the application for a new hearing, but declined to decide the issues and orders sought as it was "not well placed" to do so.

The Court of Appeal found that the application judge erred in her analysis by framing this case as a positive rights claim. Instead, the Court found that the application did not seek to impose on Ontario any new positive obligations to combat climate change. By enacting the CTCA, Ontario voluntarily assumed a positive statutory obligation to combat climate change. The Court of Appeal distinguished between positive obligations and statutory obligations, the latter applying where the state chooses to legislate.

The relevant question is therefore whether Ontario's alleged failure to comply with its statutory obligation violated the appellants' *Charter* rights.

Regarding s. 7 of the *Charter*, the Court of Appeal noted the application judge's finding that Ontario is contributing to an increase in the risk of death and in the risks disproportionately faced by the appellants and others with respect to the security of the person. Accordingly, the application judge's incorrect framing affected her consideration of whether the s. 7 deprivations were in accordance with the principles of fundamental justice.

Regarding s. 15 of the *Charter*, the Court of Appeal found that the application judge failed to address whether there was a link or nexus between the impact of the target and the disproportionate impact based on a protected ground. Instead, the application judge should have considered whether Ontario, by setting a target that falls severely short of the scientific consensus of what target is required, committed itself to a level of greenhouse gas emissions that will create or contribute to a disproportionate impact on the basis of an enumerated or analogous ground.

The Court of Appeal left it open to the parties to include further issues in their applications, specifically s. 1 of the *Charter* which justifies infringement and limits of Charter rights. This is important as Ontario may be able to justify any infringement of the ss. 7 and 15 *Charter* rights, resulting in the court upholding the lower target.

Mathur's Impact Going Forward

Although the Court of Appeal declined to decide the issues, the decision to permit and examine the challenges is a significant win for youth climate activists. Not only is climate change and its effects no longer deniable, but climate change action taken by governments is also not entirely immunized from judicial scrutiny.

The fight for climate activists is not over yet. We will await the next decision and see what the future holds for environmental *Charter* litigation.

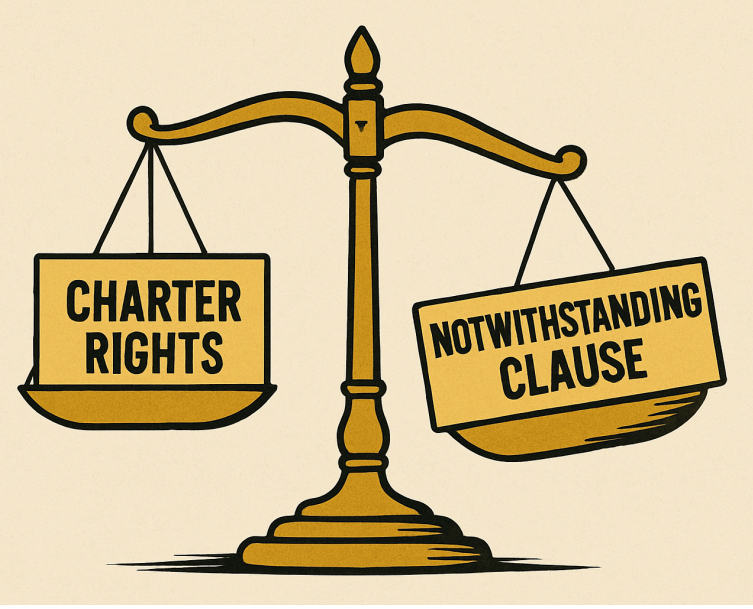
Maya Hribar *is a 2L JD Candidate at the Faculty of Law and was an Asper Centre work-study student in 2024-2025.*

A Principled Approach to the Notwithstanding Clause?

By Emma Farrell, Ben Beiles, Amanda Currie and Aidan Carli

Since its creation in 1982, section 33 of the Charter of Rights and Freedoms, otherwise known as the Notwithstanding Clause, has been the subject of heated debate.

Throughout the last decade, provincial governments have increasingly relied on the notwithstanding clause to enact *Charter*-infringing legislation. Namely, section 33 has been used to target many marginalized and disenfranchised communities from religious minorities in Quebec to gender diverse youth in Saskatchewan. In response to this alarming rise in improper invocations of section 33, our working group is developing a proposal to constrain the use of the notwithstanding clause.



During the fall term, the working group members conducted extensive research to substantiate proposals for constraints. We did not seek to create constraints that rendered the notwithstanding clause impotent or unusable. Rather, the overarching direction of this initial research was to determine the circumstances in which section 33 could be used in a manner that respects its important role in the Canadian constitutional framework. The working group members drafted detailed research memoranda on topics including the existing proposals for legislative constraints and the various perspectives on the clause's genesis, purpose, and justification.

During the winter term, the working group focused its efforts on distilling the fall term research down into two main proposals: a proportional supermajority and granting standing for *Charter* challenges.

Both proposals seek to constrain the use of the notwithstanding clause procedurally, rather than substantively. Both proposals seek to make a unique contribution to the breadth of existing scholarship and political debates on constraining the use of the notwithstanding clause.

Our first proposal is a variant of a traditional supermajority requirement but, instead of imposing the typical yet arbitrary ⅔ or ¾ threshold, we hope to find a number or formula for a supermajority that better reflects the actual majority of the electorate.

The working group members will propose 2-3 thresholds based on recent voting patterns such that the legislature would represent a proportional majority of voters. This aligns with the scholarship which sees the notwithstanding clause as being justified by democratic legitimacy and parliamentary supremacy.

The second proposal involves legislation that would give individuals standing to challenge legislation despite the invocation of the notwithstanding clause.

The group members will identify ways that the legislature can bind itself and the judiciary to allow rights-holders to bring *Charter* claims even before the notwithstanding clause expires. Remedies for these challenges would likely be limited to declaratory relief, but such relief reflects the notion that the notwithstanding clause should involve some dialogue between courts and the legislature.

Currently, the working group members are working to fully substantiate each of these proposals in greater detail. Later this month, members will present their findings to the working group leaders, faculty, and Asper Centre staff as part of a preliminary round-table discussion about the viability of the two constraints. We hope to later present these proposals at a larger workshop or round-table discussion in the 2025 fall term that would bring together faculty members and other legal scholars. The workshop would help build out the proposals with the eye to create model legislation in the future so that legislatures could commit themselves to constraining their use of the notwithstanding clause.

Emma Farrell, Ben Beiles, Amanda Currie and Aidan Carli *are 2L JD Candidates at the Faculty of Law and the co-leaders of the Asper Centre's Notwithstanding Clause Working Group.*

Strategies for Improving Court Interventions:
A Working Group Update

By Katherine Shackleton, Navya Sheth, Akash Jain and Sakina Hasnain

On March 7, 2025, the Asper Centre gathered a group of over 20 lawyers and organizations who frequently represent interveners — often at the Supreme Court of Canada — to discuss the impact of court interventions and strategies for improving it. The Roundtable represented the culmination of a year of work by the Asper Centre's Student Working Group on Interventions.

In the fall term, students conducted in-depth research and prepared a memorandum that provided background context for the Roundtable participants. The memorandum described the role of interveners, drawing on the Rules of the Supreme Court, the recent *McGregor* decision, and academic literature. Particular focus was placed on whether or not interveners could and have adduced new evidence and raised other issues for the Court.

To examine trends in interventions, students reviewed all Supreme Court of Canada decisions rendered between 2020 and 2024. Nearly 70% of these decisions included interveners.

Notably, there has been an uptick in interveners in cases involving Indigenous legal issues, including non-Indigenous interveners.

The most common interveners were federal and provincial Attorney Generals, constituting approximately 20% of cases surveyed.

The memorandum provided a springboard for discussion at the Roundtable event.

The Working Group began as a response to the Supreme Court's restrictive approach to allowing interventions in recent cases, particularly *Kloubakov* and *Wilson*. It aimed to draw on jurisprudence, academic commentary, and practitioner experience to chart changes in the approaches of interveners and the courts' attitudes in response. In particular, research focused on the granting of leave to intervene, time and space allotted for oral and written arguments, and the influence of interveners on decisions.

The Roundtable was extremely successful in generating productive discussion about the current state of intervention. Practitioners offered insights about the timelines and expectations placed on interveners, which can unduly burden under-resourced groups that work with marginalized clients. Also of note was a discussion about the challenges with "new evidence" and the possibility of intervention at the trial level as a solution, as well as the difficulties of doing so.

The next step for the Working Group is to generate a "What We Heard" report on the takeaways from the Roundtable. The report will elucidate the primary issues discussed in the Roundtable and canvass the various recommendations proposed by Roundtable participants. In addition to drawing on anecdotal experiences, the report will also highlight trends from the current literature on interveners. The report will be circulated to lawyers, legal academics, and judges with the goal of enhancing understanding and providing solutions on how to improve the intervention process for lawyers and courts alike.

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