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Opsis Airport Services Inc. v. Quebec (Attorney General): A New Dawn for Interjurisdictional Immunity?

By Romina Hajizadeh

Introduction

Once considered a doctrine in decline, interjurisdictional immunity (IJI) could be making its comeback. The Supreme Court of Canada's recent decision in *Opsis* affirms the doctrine's key role in Canadian federalism, despite its apparent incompatibility with cooperative federalism. This article seeks to provide a brief review of IJI's highs and lows, while shedding light on potential implications and remaining questions sparked by the doctrine's recent resurgence in Canadian law.

Interjurisdictional Immunity: The Framework

In Canadian federalism, there are three ways in which a law that encroaches beyond its applicable jurisdiction can be challenged: (1) through arguments that the law is invalid via a pith and substance analysis; (2) that the law is inoperative through the doctrine of federal paramountcy; or (3) that the law is inapplicable to an extra-jurisdictional matter.[1] IJI aligns with the third pathway – the doctrine exists to "insulate the activities of one level of government from the other."[2]

The federal and provincial governments both have respective areas of exclusive jurisdiction, enumerated in sections 91 and 92 of the *Constitution Act, 1867*. In theory, IJI may be triggered if either government enacts legislation that encroaches on the protected core of the other level of government's power, if that act also unacceptably interferes with that core. The protected core consists of the "basic, minimum and unassailable content" of the power in question.[3] In line with this, the protected core must be delineated – a broad or extensive power will not qualify.[4] Further, it is not enough for the act to merely affect the object of either a provincial or federal undertaking. To invoke IJI, the act must impair the core or undertaking.[5] When IJI is successfully invoked, the law is "read down" so that it is no longer applicable to the protected core of the other level of government's power. Through this method of constitutional interpretation, the law is not rendered invalid nor struck down – rather, its application is simply limited.

A Brief History: A Doctrine in Decline?

Many scholars identify IJI's origins in early 20th century case law concerning federally incorporated companies and federally regulated undertakings.[6] The Supreme Court of Canada first set out a test for the doctrine in *Bell Canada*.[7] The *Bell Canada* test required that a law had to affect a vital or essential part of the other jurisdiction's undertaking for IJI to be used. There, the court expressly clarified that the law did not have to go as far as "impairing or paralyzing it" to invoke the doctrine.[8] Ten years later, the Court re-evaluated the test in *Canadian Western Bank*, finding that the *Bell Canada* framework overextended the doctrine. *Canadian Western Bank* reaffirmed what we all thought we knew about IJI until this past year: that the doctrine is limited in scope, as its broad use would be inconsistent with flexible federalism. The Court stated a preference for other doctrines that advance cooperative federalism and work against watertight distinctions between federal and provincial orders of government, including pith and substance, double aspect, and federal paramountcy.[9]

To understand this aversion to IJI, particularly with regards to its relationship with cooperative federalism, it is helpful to clarify what cooperative federalism exactly is and why these two concepts often clash. Cooperative federalism is a legal principle that allows us to approach the division of powers with an eye for balancing both federal and provincial interests. It encourages courts to, where possible, interpret laws to enable "the operation of statutes enacted by governments at both levels."[10] Whereas IJI leans more towards embracing a "rigid, watertight compartments" approach to the division of powers, cooperative federalism seeks to relax these divisions in favour of "constitutional creativity and cooperative flexibility."[11]

From Decline to Revival: *Opsis*

Since *Canadian Western Bank* in 2007, many considered the law settled around IJI – that it would only be invoked in limited circumstances, if at all. Beyond appearing opposed to cooperative federalism, many also argued that the doctrine was simply redundant. After all, if the federal Parliament wants to protect a core area of its exclusive jurisdiction, it can enact legislation on that matter and simply invoke the doctrine of federal paramountcy afterwards. While there isn't a parallel paramountcy doctrine for the provinces, IJI has historically only ever been successfully invoked to protect areas of exclusive federal jurisdiction.

This year, the Supreme Court decided to recast the discourse surrounding IJI in *Opsis Airport Services Inc v Quebec (Attorney General).*[12] The case concerned two appeals challenging Quebec's *Private Security Act* (*PSA*), which required the appellants to hold a license to carry on a private security activity.[13] Both appellants operated private security services – one for airports and the other for the international marine transportation sector, both of which fall within Parliament's exclusive jurisdiction over aeronautics (falling under the Peace, Order and Good Government power in s. 91) and Navigation and Shipping (s. 91(10)). The Supreme Court unanimously declared the entirety of the PSA constitutionally inapplicable to both appellants through the IJI framework.[14]

The Court employed the existing IJI framework under *Canadian Western Bank* in assessing the appellants' claims. In doing so, they found that the *PSA* intruded on the core of the exclusive federal powers in question. While the aeronautics claim was covered by precedent identifying airport security at the core of that power, the Court also held that even with no precedent available for the other appellant, the security of marine facilities and their operations was also located at the core of the navigation and shipping power. The Court then found that both laws impaired these exclusive areas of federal jurisdiction. They found that the *PSA* endowed Quebec's *Bureau de la sécurité privée* with powers to suspend, cancel or refuse to renew an agent license, as well as the power to issue directives to agency license holders, together establishing impairment by effectively allowing the provincial Bureau to have the final say on security activities for airports and international ports, both matters of exclusive federal jurisdiction.

Although Opsis may have been the highest profile IJI case this year, it doesn't stand alone. Last year, the Ontario Court of Appeal invoked the doctrine in *Halton (Regional Municipality) v. Canadian National Railway Company* (a summary of which is available in our Cross-Canada Appellate Summaries resource).[15] That case ruled that municipal by-laws preventing the construction of a Canadian National Railway intermodal hub unacceptably intruded upon the core of the federal government's exclusive jurisdiction over interprovincial railways. Similarly, this year the British Columbia Court of Appeal also addressed the doctrine in *Canadian National Railway Company v. British Columbia (Environmental Management Act)*, finding BC's *Environmental Management Act* did not impair the core of the appellants' powers as federally regulated interprovincial undertakings.[16]

Implications and Remaining Questions

Perhaps the biggest takeaway from *Opsis* is that IJI is likely not going anywhere. The Court affirmed the "essential role" this doctrine plays in Canadian federalism.[17] IJI "balances the need for intergovernmental flexibility with the need for predictable results."[18]

Aside from re-affirming IJI's relevance, the decision also confirms that, even without precedent previously identifying a "core," the doctrine can still be successfully invoked. This is a slight shift from the Court's prior stance that the doctrine should be "reserved for situations already covered by precedent."[19] The case also showcases how IJI may be invoked if a law presents a "potential for impairment," even if the impairment has not yet occurred.[20] Finally, the Court's choice to consider IJI arguments before resorting to the doctrine of federal paramountcy presents further support for the doctrine's place in Canadian federalism, as well as its relevance to parties in future litigation.

Some questions remain post-*Opsis*, including whether the doctrine will ever be successfully invoked to protect an exclusive area of provincial jurisdiction. In outlining IJI, the Court reiterated its application to "either federal or provincial" heads of power; however, the doctrine has yet to be successfully applied by the Court in favour of a province.[21] It is possible that the broadening of the doctrine in *Opsis*, alongside the Court's re-assertion of its prominence in Canadian federalism, may open up more opportunities for the doctrine to be used to protect the core of an exclusive area of provincial jurisdiction.

Finally, uncertainty continues to surround how IJI's status in Canadian constitutional law will continue to impact the principles of cooperative federalism. In an era where both the federal government and provinces are increasingly looking to grow our economy through legislation such as the *Building Canada Act*,[22] it will be interesting to what (if any) role IJI and cooperative federalism will have to play.

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1. Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thompson Reuters) at § 15:16.
2. Centre for Constitutional Studies, "Interjurisdictional Immunity" (4 July 2019), online: https://www.constitutionalstudies.ca/2019/07/interjurisdictional-immunity/.
3. *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, 1988 CanLII 81 (SCC) at para 254 [*Bell Canada*].
4. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.
5. *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*].
6. Carissima Mathen and Patrick Macklem, eds, *Canadian Constitutional Law*, 6th ed (Toronto: Emond, 2022) at 250.
7. *Bell Canada*, *supra* note 3.
8. *Ibid* at para 316.
9. *Canadian Western Bank*, *supra* note 5 at para 42.
10. *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at para 85.
11. *Fédération des producteurs de volailles du Québec v Pelland*, 2005 SCC 20 at para 15.
12. 2025 SCC 17 [*Opsis*].
13. *Ibid* at para 20.
14. *Ibid* at para 85.
15. 2024 ONCA 174.
16. 2025 BCCA 156.
17. *Opsis*, *supra* note 12 at para 34.
18. *Ibid*, quoting *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 58.
19. *Canadian Western Bank*, *supra* note 5 at para 77
20. *Opsis*, *supra* note 12 at para 74.
21. *Ibid* at para 32.
22. *Building Canada Act*, SC 2025, c 2, s 4.

Taking Stock of Declarations of Constitutional Invalidity and the Asper Centre's Submissions on Bill C-16, the Protecting Victims Act

By Rob De Luca

On October 31, 2025, the Supreme Court of Canada decided one of its most controversial decisions in recent years, *R v Senneville*.[1] In *Senneville*, the Court struck down one-year mandatory minimum penalties of imprisonment for possessing and accessing child pornography, based upon a reasonable hypothetical situation (i.e., that the one-year punishment would be grossly disproportionate if applied to a reasonable hypothetical accused 18-year-old in possession of material involving the hypothetical accused's friend's 17-year-old girlfriend).

National news headlines and deeply divided Court aside, the legal result in *Senneville* was not particularly surprising. Beginning with its landmark decision in *Nur*, the Supreme Court of Canada has issued six decisions in roughly ten years declaring one or more mandatory minimum sentence provisions unconstitutional.[2] In that same time, Courts of Appeal have similarly declared over a dozen additional mandatory minimum sentences unconstitutional.[3] While the Court has been clear that mandatory minimums do not *per se* violate the *Charter*, this run of appellate decisions has been made possible by Parliament's reluctance to take up the Court's 2016 guidance with respect to bringing constitutionally suspect mandatory minimums into compliance with the *Charter*: either narrow the scope of criminal offences attracting a mandatory minimum punishment or build in a "safety valve" that would prevent the minimum punishment when the punishment would offend the *Charter*.[4]

This state of affairs has now changed. On December 9, 2025, the government tabled Bill C-16 (short-titled the Protecting Victims Act). The bill includes provisions that would enact a limited safety valve for most mandatory minimums, alongside several additional high-profile criminal law reforms. Unfortunately, the government's proposals would take an especially narrow and constitutionally questionable approach to the issue of mandatory minimums. For this and other reasons, the Asper Centre has submitted a brief to the House's Standing Committee on Justice and Human Rights speaking to the bill.

The Centre's submissions were informed by an ongoing research project that examines a constitutional problem directly revisited in *Senneville*: whether the Canadian constitutional system is living up to its implied promise that individuals are to be safeguarded against the application of unconstitutional laws. The above-referenced decisions, and Parliament's delay in pursuing either of the approaches set forth in *Lloyd*, inform our preliminary conclusion that our constitutional system can be doing a better job of preventing unconstitutional legislation from being passed or from remaining "on the books" for too long. This evidence also informs our preliminary conclusion that our constitutional system can do a better job of adequately remedying rights-holders who are harmed by the passage of legislation later declared to be unconstitutional.

Our submissions on Bill C-16 focused on three overarching concerns. First, while Bill C-16 has been framed as introducing a safety valve to comply with judicial guidance, the safety valve is illusory. The bill creates a universal minimum of imprisonment for all offences with mandatory minimums and then provides for a limited discretion to vary the *term* of imprisonment in cases where the minimum sentence would constitute cruel and unusual punishment (save for certain offences). Among other things, we are concerned that this scheme does not do justice to *Lloyd* and more recent jurisprudence that has focused upon the need to allow for "lesser sentences" as required, including sentences lesser than a term of imprisonment.[5] Accordingly, we contend that, absent substantial revision, Bill C-16's safety valve scheme will ensure the same kind of provision-by-provision section 12 litigation that has plagued the courts since the proliferation of mandatory minimum sentences roughly twenty years ago, and in ways that are likely to diminish confidence in public institutions.

Second, our submissions object to Bill C-16's attempts to revisit and effectively undo the Supreme Court of Canada's landmark s. 11(b) decision, R v Jordan.[6] Bill C-16 would undo Jordan's imposition of presumptive deadlines with respect to trial delay by restricting judicial discretion to determine the appropriate remedy for trial delay within control of the Crown (i.e., a stay of proceedings) and by attempting to deem certain days as irrelevant to the s. 11(b) trial delay inquiry. In our submissions, we contend that Parliament's attempt to narrow the Charter's broad grant of judicial remedial discretion will undermine not only the remedial design of R v Jordan – a design intended to cure the "culture of complacency" that had arisen from the prior case-by-case approach to trial delay – but also the courts' necessary and central role in fashioning just and appropriate remedies for Charter breaches.

These substantial concerns aside, our brief includes an overarching statement of support for the government's stated commitment to passing legislation that complies with the *Charter*. Given the increasing calls on the government to invoke the notwithstanding clause on both the issue of mandatory minimum sentencing and trial delay, our submissions also ask Parliament to place guardrails on any use of the notwithstanding clause. The present controversy over *Senneville* illustrates the need for such guardrails. More aggressive approaches to mandatory minimums would see Parliament take the unprecedented step, via an invocation of the notwithstanding clause, of insulating numerous provisions of the *Criminal Code* from being declared inoperative. The invocation would thereby deny the centuries-old protection against cruel and unusual punishment for scores of individuals facing sentencing decisions. We submit that if the clause is ever invoked to insulate legislation with respect to punishment or treatment the courts deem "so excessive as to outrage the standards of decency"[7] (and we submit it should never be), it should be reserved for the narrowest of circumstances – a narrowness that speaks to the need for robust legislative scrutiny and guardrails for any invocation of the notwithstanding clause.

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1. 2025 SCC 33.
2. *R v Nur*, 2015 SCC 15, *R v Lloyd*, 2016 SCC 13, *R v Boudreault*, 2018 SCC 58, *R v Hills*, 2023 SCC 2, *R v Bertrand Marchand*, 2023 SCC 26, and *Senneville*.
3. The provisions in issue are *Criminal Code*, ss. 99(2)(a), 103(2)(a), 151(a)-(b), 151(1.1)(a)-(b), 163.1(2)-(3), 163.1(4)(b), 271(a), 272(2)(a.2), 286.1(2)(a), 286.2(2), 286.3(2), and 380(1.1).
4. See *Lloyd* at paras 35 – 36.
5. See especially *Bertrand Marchand* at paras 108 and 130 and *Senneville* at paras 7, 108, and 113.
6. 2016 SCC 27.
7. See, e.g., *Lloyd* at para 24.

2025 in Review: Constitutional Litigation at the Supreme Court

By Daniel Minden

In 2025, the Supreme Court of Canada (SCC) released 46 appeal judgements. This article presents a selection of SCC decisions that turned on constitutional law issues. No federalism cases are presented here given the separate article devoted to *Opsis Airport Services Inc. v. Quebec (Attorney General).*

Aboriginal rights

Saskatchewan (Environment) v. Métis Nation – Saskatchewan, 2025 SCC 4

In this case, the Supreme Court of Canada held that even though some similarities existed between three applications brought by the Métis Nation – Saskatchewan (MNS) against Saskatchewan between 1994 and 2021, there was no breach of process. In 2021, Saskatchewan granted uranium exploration permits to an energy company within territory over which the MNS asserts Aboriginal title and rights. The MNS brought an application seeking a declaration that Saskatchewan had breached its duty to consult with the MNS. Saskatchewan brought a motion to strike portions of the MNS application, contending that an abuse of process had arisen because the impugned portions of the MNS's 2021 application raised the same issues argued by the MNS in 1994 and 2020 proceedings.

Here, the Supreme Court of Canada ruled that "the fact that there are two or more ongoing legal proceedings which involve the same, or similar, parties or legal issues, is in itself not sufficient for an abuse of process." Rather, the analysis needs to focus on "whether allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice." Here, the Court found no abuse of process. The MNS's 2021 litigation targeted Saskatchewan's 2010 *First Nation and Métis Consultation Policy Framework* which stated that Saskatchewan "does not accept" assertions that Aboriginal title continues to exist with respect to lands or resources in Saskatchewan. A Saskatchewan Court of King's Bench decision on the matter was pending at the time of the Supreme Court's judgement in this case. Further, the MNS's 1994 litigation sought a declaration of Aboriginal title and Aboriginal harvesting rights over land in Saskatchewan, but this action was stayed. The actions were not duplicative. The Court concluded by noting that while abuse of process is "possible" in proceedings involving Indigenous litigants, the "unique context of litigation to vindicate Aboriginal rights must always be borne in mind, both as to whether an abuse of process exists," and appropriate orders. The Court added that "Court procedures should facilitate, not impede, the just resolution of Aboriginal claims."

Charter cases

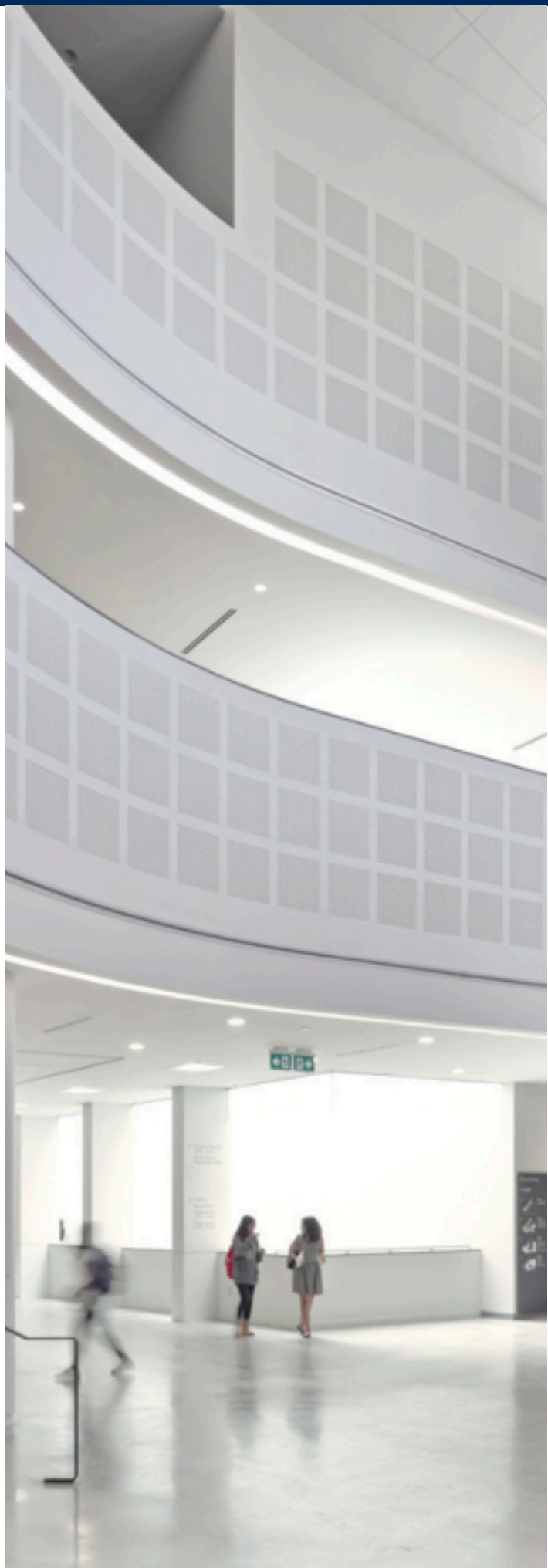
Ontario (Attorney General) v. Working Families Coalition (Canada) Inc., 2025 SCC 5
In this decision, the Supreme Court ruled that Section 37.10.1(2) of *Ontario's Election Finances Act* was unconstitutional under s. 3 of the *Charter* and could not be saved by s. 1. The impugned provision limits the amount that third parties can spend on political advertising in the 12 months before a provincial election period, whereas the *Act* imposed no spending limits on political parties except for the six-month period directly preceding the election period.

The majority reaffirmed that s. 3 is about more than the "bare right to place a ballot in a box," and includes an "egalitarian model of elections" which aims to achieve a "balance in the political discourse, such that no one participant in the electoral system can exert undue influence." The Court found that although some spending limits may accord with this objective, limits that "restrict rather than promote citizens' access to diverse information and views may violate their right to meaningfully participate in the political process." Although the Court affirmed that s. 3 does not require equal treatment of all participants, it does require that no actor receive a "disproportionate voice" in the discourse. The impugned provision created an "absolute disproportionality" in the political discourse, undermining voters' rights to "an informed vote and to meaningful participation in the electoral process." The provision failed the minimal impairment stage of the *Oakes* analysis because the "length of the limit far surpasses what is reasonably necessary to protect the integrity of the election process, or the primary role of political parties."

John Howard Society of Saskatchewan v. Saskatchewan (Attorney General), 2025 SCC 6

In this case, the Supreme Court ruled that s. 68 of Saskatchewan's *Correctional Services Regulations* (CSR) is unconstitutional. The provision states that the applicable standard of proof in inmate disciplinary proceedings is a balance of probabilities. This standard of proof applies to the adjudication of "major disciplinary offences," which can include the sanctions of disciplinary segregation for up to 10 days and loss of up to 15 days of earned remissions.

The Court found that s. 68 infringes s. 7 of the *Charter*, given the fundamental principle of justice that persons charged with an offence must be proven guilty beyond a reasonable doubt before they are punished with imprisonment. The Court also found that s. 68 infringes s. 11(d). Notably, the Court overturned its decision in *R v Shubley*, [1990] 1 S.C.R. 3, which held that inmate disciplinary proceedings in which disciplinary segregation and loss of earned remission are possible sanctions do not engage s. 11. The Court explained the reversal, stating that *Shubley* rested on a "formalistic method of interpretation that has since been consistently eschewed." In particular, the Court stated that the *Shubley* court formalistically adhered to the criminal law's distinction between a *sentence* of imprisonment and the *conditions* of imprisonment. The Court held that subsequent *Charter* jurisprudence had attenuated the distinction and compelled a purposive interpretation of the *Charter* that gives "effective protection to the underlying interests that the *Charter* right at issue is intended to serve." As a result, disciplinary segregation and loss of earned remission were found to be forms of imprisonment, and s. 68 of the CSR infringed s. 11. S. 7 was also infringed because proceedings involving "major disciplinary offences" under the CSR involve (a) involve an accusation of moral wrongdoing, and (b) potential imposition of severe liberty-depriving consequences. S. 68 failed the *Oakes* test at the minimal impairment stage.



R. v. Kloubakov, 2025 SCC 25

In this decision, the Supreme Court of Canada upheld the constitutionality of ss. 286.2 and 286.3 of the *Protection of Communities and Exploited Persons Act* ("PCEPA"), which respectively criminalize receiving a material benefit from sexual services, and procuring a person to offer or provide sexual services for consideration. Two accused persons worked as drivers in an escort business and were charged in 2019 with criminal offences including under these two provisions. The trial judge held that these offences infringed s. 7 of the *Charter* because they prohibited the safety measures contemplated by the Court in *Bedford* and therefore ordered a stay of proceedings. The Court of Appeal found no s. 7 infringement.

The appellants argued that the offences continue to place sex workers in danger by preventing them from protecting their safety when selling sexual services, and that this infringes their security of the person. However, the Court rejected this argument, finding that both offences permit sex workers to take the safety measures contemplated in *Bedford*, such as hiring drivers, bodyguards, and operating safe houses. Therefore, "neither offence engages sex workers' security of the person on this basis." The Court declined to address in detail the possibility that the law infringes the 'life' or 'liberty' interests under s. 7. Finding no violation, there was no need to apply s. 1.

R. v. Wilson, 2025 SCC 32

In this decision, the Supreme Court was asked to determine whether the *Good Samaritan Drug Overdose Act* , which provides immunity from charges of possession to so-called Good Samaritans who call 9-1-1 in the event of a drug overdose, also provides immunity from arrest. The Supreme Court arrived at this conclusion by interpreting the *Act* in its context and Parliament's purpose. The Court also held that s. 495 of the *Criminal Code* does not provide a lawful basis for arrest where the only grounds for that arrest are an offence to which a person is immune. On the facts of this case, the Court held that Wilson was illegally arrested and suffered a breach of his s. 9 rights, and the search incident to his arrest was a breach of his s. 8 rights.

The Court was also asked to decide whether evidence obtained incident to an arrest of a Good Samaritan for simple possession should be excluded under s. 24(2) of the *Charter*. Applying the three-part *Grant* analysis for the exclusion of evidence, the Court found that, given the seriousness of the *Charter* breach and the impact on Wilson's *Charter*-protected interests, the evidence of illegal firearms discovered in the search incident to Wilson's arrest must be excluded.

Attorney General of Quebec v. Senneville, 2025 SCC 33
In this decision, the Supreme Court of Canada found that mandatory minimum sentences of one year's imprisonment for the offences of possession of child pornography and accessing child pornography were unconstitutional under s. 12 of the *Charter*. The Court ruled that a mandatory minimum sentence with a broad application covering a wide range of circumstances may be "constitutionally vulnerable" because it leaves no choice but to impose a grossly disproportionate sentence on either the accused or reasonably foreseeable offenders. Regarding the latter category, the Court defended the practice of considering reasonably foreseeable scenarios to determine the constitutionality of mandatory minimums. The Court held that the "possibility of using reasonably foreseeable scenarios in the analysis under s. 12 of the *Charter* is essential to the rule of law," because without such a possibility, the "judiciary's capacity to ensure effective constitutional review would be undermined."

The Court applied the two-stage inquiry for determining whether a mandatory minimum sentence complies with s. 12 of the *Charter*. First, the Court determined a fit and proportionate sentence for a "reasonably foreseeable" offender: an 18-year-old who received a "sext" from his 17-year-old girlfriend. The Court found that an appropriate sentence would be conditional discharge. Second, the Court compared the sentence determined at the first stage and the mandatory minimum, and determined that the disparity was so high that it met the standard of gross disproportionality. Applying *Hills*, the Court considered three "crucial components" in the comparative analysis, these being the "scope and reach of the offence," the "effects of the penalty on the offender," and the "penalty, including the balance struck by its objectives." The Court ruled that Parliament "may wish to maintain minimum sentences" in a *Charter*-compliant manner. Parliament could do so by limiting the scope of the mandatory minimum to certain conduct or building a safety valve that would allow judges to exempt outlier offenders.

Daniel Minden is a 1L JD candidate at the Faculty of Law and a Research and Communications Assistant with the Asper Centre for the 2025-26 academic year.

An Update on the Constitutional Challenge to the Federal Voting Age

By Hannah Beltran, Cherry Zhang, and Nattalie Chow

The David Asper Centre for Constitutional Rights and Justice for Children and Youth ("JFCY") are representing youth from across Canada in a constitutional challenge to the federal voting age. Section 3 of the *Canada Elections Act* ("*CEA*") sets the federal voting age at 18. The youth submitted an application to challenge s. 3 of the *CEA* on the ground that it violates their s. 3 (democratic rights), s. 2(b) (freedom of expression), and s. 15(1) (equality rights) *Charter* rights.

The Asper Centre's previous clinic students developed a factual record based on legislative research on the history of the franchise at the federal, provincial, and municipal levels. They also consulted with social science experts to submit academic and scientific research as part of the factual record.

Building on the work of previous clinic students, last term's clinic students worked on preparing for the cross examination of expert witnesses. Expert witnesses included social science experts on democracies and voting rights from across the world, as well as Canadian civil servants. Clinic students reviewed the evidence and affidavits from both sides. The evidence showed historical reasons for the current voting age, youth and parents' efforts to lower the voting age for elections across Canada in recent decades, reviews of other jurisdictions with voting ages under 18, and reports on youth democratic engagement.

Clinic students worked with JFCY to draft questions for expert witnesses and developed strategies to present the evidence in a way that aligned with the Applicant's theory of the case. In preparation for cross-examination of the Respondent's expert witnesses, clinic students learned how to critically analyze expert witness evidence and conclusions, as well as create a series of questions that would minimize, show problems with, and/or limit the usefulness of an expert witness's evidence. The cross examination questions developed by clinic students challenged the methodology, presumptions, and conclusions in the Respondent's expert evidence. These questions revealed the growing support for lowering the voting age among Canadians, the lack of causation between countries with "democratic excellence" and voting at 18, as well as the fact that many concerns regarding lowering the voting age fail to account for youth perspectives.

Clinic students also continued legislative research on the voting age in the United Kingdom, where the government has introduced a bill to lower the voting age to 16 for elections for the United Kingdom Parliament and all local elections in England and Northern Ireland. This is intended to show that there is no longer a reason to insist on a federal voting age at 18.

The next step is to draft written submissions for the constitutional challenge. The Asper Centre will continue to advocate for democratic rights, freedom of expression, and equality rights for all.

Hannah Beltran (3L), Natallie Chow (3L), and Cherry Zhang (2L) are JD students at the Faculty of Law. The three writers were students in the Asper Centre's Clinic Program during fall 2025 and were involved in the voting age challenge.

Quebec (Attorney General) v. Kanyinda

The Supreme Court Recognizes the Importance of Intersectional Analysis in s. 15 Claims

By Alexis Hunt

On March 6, 2026, the Supreme Court of Canada released its judgment in the latest major equality case, *Quebec v. Kanyinda*. Ms. Kanyinda was, at the time of her application, a single mother refugee claimant. She was found ineligible for Quebec's subsidized daycare program because her refugee claim had yet to be decided. She applied for a declaration that the exclusion of refugee claimants from the program was discriminatory on the grounds of sex, and immigration status.[1]

Although Ms. Kanyinda was unsuccessful at the Superior Court of Québec, the Court of Appeal agreed with her that the exclusion discriminated on the ground of sex. Ms. Kanyinda was ultimately successful at the Supreme Court, with Karakatsanis J writing for the majority, Wagner CJ and Rowe J concurring in separate opinions, and Côté J dissenting on every issue.

There is much to like in *Kanyinda*, but in my view the Court's disagreements about the approach highlight a fundamental flaw in the analogous grounds test established in *Corbiere*.[2] These disagreements risk muddying further development of the jurisprudence. To illustrate these concerns, I will discuss the approaches to section 15 in *Kanyinda* across three areas of discussion: (1) the overall approach to section 15, (2) the use of intersectional analysis, and (3) the Court's responses to the proposed new analogous ground.

Sharma Did Not Change the Test

Perhaps the most significant aspect of the decision is Karakatsanis J walking back from her dissenting opinion in *R. v. Sharma*, in which she criticized the majority for enacting a 'wholesale revision' to the law of s. 15 of the *Charter*, although the majority claimed they were merely clarifying several aspects of the *Andrews* test.[3] Her concerns were echoed by both academics and litigators, with many seeing *Sharma* as a significant regression in rights protection.

My personal opinion had been that *Sharma* was not necessarily so devastating, and was better understood as being decided largely on the facts. Karakatsanis J echoed this interpretation in *Kanyinda*, now agreeing with the *Sharma* majority's position that they were not changing the law.[4]

The détente between members of the court since *Sharma* is reminiscent of *Law*, where in which a Supreme Court that had been divided for several years came to the realize that perhaps they disagreed on less than they had initially thought.[5] Unlike in *Law*, however, the *Kanyinda* court did not go on to revise the test. Section 15 jurisprudence has arguably entered, if perhaps retroactively, its longest-ever era of stability, with the test remaining effectively unchanged since 2015.[6]

Intersectional Analysis Recognized, but Lacking Clarity

Close on the heels of the test itself is the recognition by eight justices of the importance of intersectional analysis in evaluating claims under s. 15.

Karakatsanis J, endorsed by Wagner CJ,[7] accepted that a distinction can be established at the first step when the law disproportionately impacts a "subgroup" of the protected class, acknowledging the importance of an analysis based on intersecting identities.[8] She offered little guidance, however, as to what sorts of intersectional subgroups might be appropriate for use at step one. She also acknowledged the importance of intersectional analysis at step two, and used intersectional analysis to find that Ms. Kanyinda had met the *Andrews* test on the ground of sex.[9]

Rowe J criticized Karakatsanis J's approach, claiming that it allowed for protection of unprotected grounds—in this case, refugee claimant status—by "hybridizing" them with a protected one.[10] Nonetheless, he—perhaps surprisingly, to some—accepted the presence of a distinction based on sex.[11] He also saw value in an intersectional analysis at both step two of the *Andrews* test and the balancing stage of the *Oakes* test.[12]

Côté J extended Rowe J's critique, laying out an almost mathematical analysis and arguing that the regulation has not, in fact, created or worsened a distinction based on sex.[13] She extended her analysis also to the second step, holding that a law that leaves the claimant's situations unchanged does not reinforce, perpetuate, or exacerbating exacerbate a disadvantage.[14] She also found that the evidence was lacking at the first step and that, due to an available tax credit, the actual impact on refugee claimant women was small enough to render the distinction non-discriminatory.[15]

While Côté J's analysis has many shortcomings, and will probably be criticized for having shades of the "mirror comparator group" analysis rejected in *Whithler*,[16] her core logical analysis is difficult to refute. Moreover, it applies equally to Rowe J's first-step analysis, despite him not explicitly relying on intersectionality. However, even Côté J would have accepted the intersectional analysis had it been based on an intersecting analogous ground,[17] which brings me to the third area of discussion.

Majority Declines to Analyze New Grounds

Despite the proposed analogous ground of refugee status being fully argued at every level of proceedings, the majority declined to analyze the claim because they were able to decide the case based on sex.[18] This is no doubt frustrating to Ms. Kanyinda and observers hoping for an expansion of s. 15, and continues a trend of a Supreme Court of minimizing or avoiding s. 15 analysis when cases are decided on other grounds.

Côté J, however, undertook the analysis and rejected the claim for a variety of reasons. Although she raised concerns with whether refugee claimants were vulnerable specifically based on their legal status,[19] her principal grounds were that, as a temporary status, refugee claimant status was not immutable as required by *Corbiere*, and that the Court lacked evidence about the ramifications of the new analogous ground on other areas of law, particularly the immigration program itself.[20] Rowe J, for his part, agreed with both the majority that it was unnecessary to analyze the new ground, and with Côté J that the immutability test in *Corbiere* was not met.[21]

Wagner CJ would have recognized the new proposed ground of refugee claimant status and decided the appeal on that basis.[22] He focused substantially on human dignity and found that refugee claimant status was, in a contextual analysis, sufficiently immutable to meet the *Corbiere* requirement.[23] The Chief Justice relied on early jurisprudence to evaluate the question of an analogous ground specifically in context of the law at issue.[24] This contextual approach was, however, rejected by McLachlin and Bastarache JJ (as the later–Chief Justice then was) in *Corbiere*, who preferred to reserve contextual analysis based on the legal regime for the discrimination step of the test.[25]

Although the majority and Rowe J did not explain their reasons for declining to analyze the proposed analogous ground, Côté J said the quiet part out loud. Her concern for the consequences of recognizing a new analogous ground is based on the new kinds of claims it that it would enable—or, in other words, that a new analogous ground would be an almost-legislative decision with attendant policy consequences. The dissenting opinions in the subsequent case *R. v. Singer* confirm the importance of these concerns in the common-law context, where the Court properly has a law-making function.[26] In the constitutional context, however, such concerns reveal that the Court is departing from a purely interpretive role with respect to the *Charter*. While such a role may sometimes be necessary,[27] it should be avoided whenever possible and clearly remains a significant obstacle in s. 15 jurisprudence.

The Role of Legal Context in Recognizing Analogous Grounds

None of the justices engaged in a deeper analysis of the potential implications of the Chief Justice's reliance on *Turpin*, but in my view, they deserve a look. In *Turpin*, as in *Andrews*, the question of whether a distinction was founded on an analogous ground was considered an integral part of the discrimination step of the test. Writing for a unanimous Court, Wilson J held that the question of whether or not a ground should be recognized as analogous required consideration of both in context of the law subject to challenge and the larger social, political, and legal context.[28] In *Law*, the *Court* endorsed *Turpin*'s contextual approach to recognizing analogous grounds, however, the Court also split the question of whether the alleged ground is analogous out into a separate step.[29] This step was later merged into the distinction step in *Kapp*, although the Court stated explicitly that it was not intending to thereby change the analysis.[30]

Corbiere was decided between *Law* and *Kapp*, so that the question of recognizing a new analogous ground was considered at the second of a then–three step *Andrews* test. The question that divided the Court was effectively whether the context of the case should be considered at that second step. The majority answered no, relying on *Law* to find an alternative explanation for *Turpin*—despite *Law*'s explicit endorsement of *Turpin* in this respect.[31] Although "legislative context" remains an explicit—if controversial—aspect of the discrimination step,[32] the concerns made explicit by Côté J reflect that the law-specific context may not play a strong enough role at the discrimination step to control unforeseen consequences of an analogous ground being recognized.

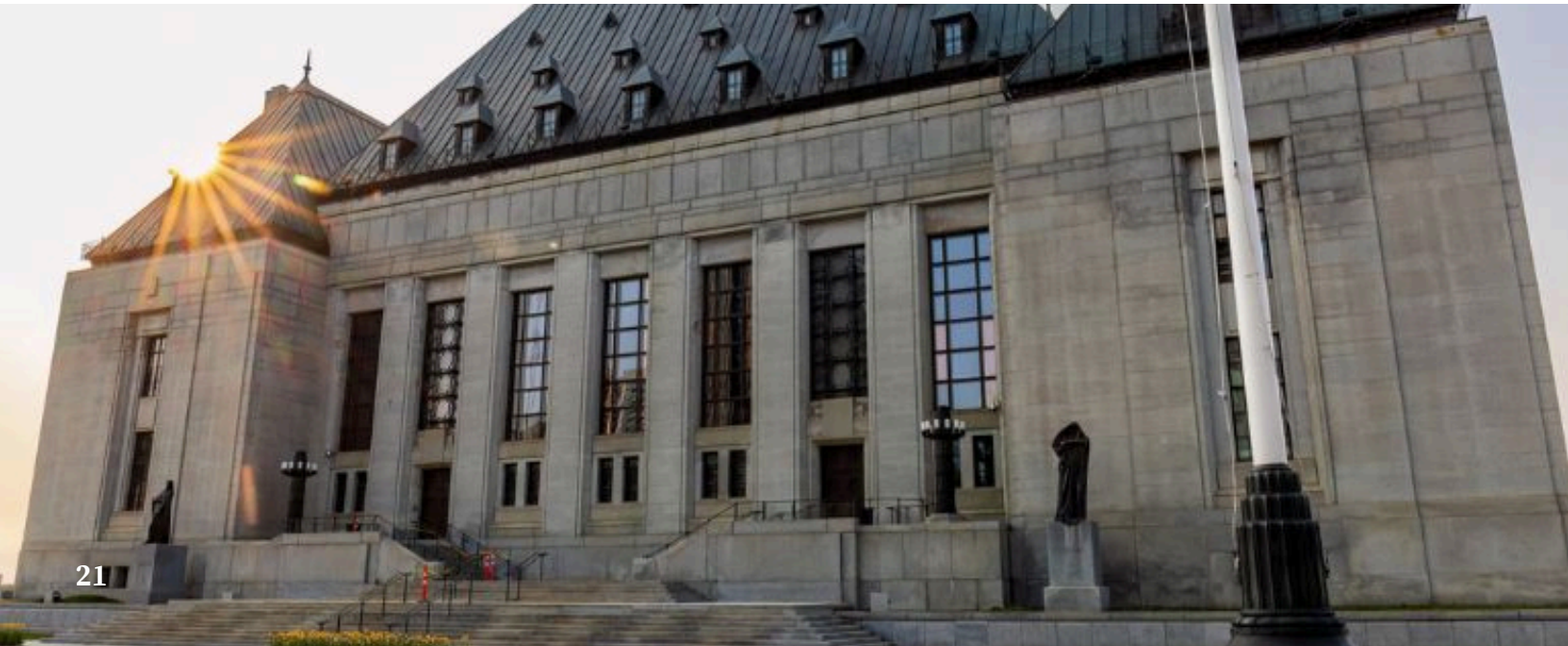
These concerns are made manifest by Wagner CJ's application of legislative context to recognize a new analogous ground, without recognition of its consequences. Although his analysis was contextual to Québec's social benefits scheme, if it were followed using the *Corbiere* approach, then the recognition of a new analogous ground *would* automatically extend to all other contexts as Côté J—and by inference the rest of the Court—fears.[33]

But his findings would not support such a broad expansion of s. 15, nor should they. Given that his findings were based on the specific legislative context, they would not properly be binding precedent in a different legislative context. This reflects the approach of *Turpin*, where the court held that province of residence is not a ground of discrimination with respect to criminal procedure, but left undecided its recognition it in other contexts.[34] The need for context is particularly salient given the inherently different context between a law *making use of* a legal status, as in this case, and the law *creating* it, as would be the case in a challenge to any aspect of immigration law. The important thing is not that refugee status could *never* be an analogous ground in the context of immigration law, but only that the court would not be pre-deciding the question by recognizing it in a different context. Add to this the weak justification for *Corbiere*'s departure from *Turpin*—and the stretch required to reach the conclusion that Aboriginality-residence" is somehow not an inherently contextual ground[35]—and it is high time that the Court overturn *Corbiere*.

In addition to allowing the law of s. 15 to evolve more incrementally, a properly contextual approach to analogous grounds would address the critiques of intersectionality analysis in this case, by allowing the identification of intersectional subgroups as contextual analogous grounds. Such grounds may be based on the legislative context, but they could also be based on the specific intersectionality at issue. For instance, if a particular ethnic community discriminated amongst its members on the basis of eye colour, it ought to be possible to establish discrimination against an intersection of ethnicity and eye colour, even if eye colour remains, at large, an unprotected ground.

The Asper Centre's Role

The importance of intersectional analysis was argued by the Asper Centre in *Kanyinda*, jointly with the National Association for Women and Law, and its factum was twice cited by the majority.[36] The Court also heard arguments on intersectionality in the upcoming case *Quebec v. Luamba*, a constitutional challenge to the validity of common-law and statutory rules in Québec authorizing suspicion-less stops of drivers, although intersectionality is not a core issue in that case.



I was part of the team of clinical students working on *Luamba* for the Asper Centre, along with Katherine Getler and Delaney Cullin. The factum deadline came earlier than expected, leading to a thrilling six weeks of research and drafting under the supervision of Megan Savard, Constitutional Litigator in Residence, who also made the Centre's oral arguments. The Centre's submissions focused on the importance of a contextual analysis to capture the social reality and self-reinforcing nature of racial profiling by police, the importance of substantive equality as the animating norm of s. 15, and the need for *Charter* analysis in the recognition of common law police powers. The Court has since released its decision in *Singer*, where in which Martin J's analysis of the ancillary powers doctrine largely aligns with the Centre's submissions in *Luamba*.[37] We hope that these arguments will find purchase with the rest of the court in *Luamba*.

Alexis Hunt is a 2L candidate at the Faculty of Law for a JD with a Certificate in Aboriginal Legal Studies. In Fall 2025, she was a clinical student with the Centre, working on *Luamba v. Quebec* and the Voting Rights Challenge. In the 2025–2026 academic year, she also co-leads a Student Working Group on Accessible Sex Education. After graduation, she will article as a clerk at the Ontario Superior Court in Toronto.

1. *Quebec v. Kanyinda*, 2026 SCC 7 at paras 1–5 [*Kanyinda*].
2. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) [*Corbiere*].
3. *R v. Sharma*, 2022 SCC 39, at paras 32–33, 205–206 [*Sharma*]; Andrews v. Law Society of British Columbia, 1989 CanLII 2 (SCC) [*Andrews*].
4. *Kanyinda* at paras 57–59.
5. *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) [*Law*]. In the "equality trilogy" of *Miron v. Trudel*, 1995 CanLII 97 (SCC), *Egan v. Canada*, 1995 CanLII 98 (SCC), and *Thibaudeau v. Canada*, 1995 CanLII 99 (SCC), the Court was generally split three ways on the proper approach to section 15. Over the following years, the Court was often able to decide cases unanimously without addressing the disagreements. See, for instance, *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC) at para 62.
6. See *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras 19–20; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25; *Kanyinda* at para 48.
7. *Kanyinda* at para 208.
8. *Kanyinda* at paras 41–43.
9. *Kanyinda* at paras 63, 72, 82–93.
10. *Kanyinda* at paras 150–153.
11. *Kanyinda* at paras 137–139.
12. *Kanyinda* at paras 155–158; *R. v. Oakes*, 1986 CanLII 46 (SCC).
13. *Kanyinda* at paras 286–288, 298.
14. *Kanyinda* at paras 288, 326.
15. *Kanyinda* at para 316–323, 328.
16. *Withler v. Canada (Attorney General)*, 2011 SCC 12 (CanLII) at para 2. C.f. *Kanyinda* at para 298.
17. *Kanyinda* at para 291.
18. *Kanyinda* at paras 17, 213.
19. *Kanyinda* at paras 362–369.
20. *Kanyinda* at paras 346, 371–391.
21. *Kanyinda* at para 119.
22. *Kanyinda* at paras 208, 216.
23. *Kanyinda* at paras 220–223, 228.
24. *Kanyinda* at para 228, citing *Andrews*, *R. v. Turpin*, 1989 CanLII 98 (SCC) [*Turpin*], and *Law*.
25. *Corbiere* at paras 8–11. See also *ibid* at paras 60–62, 125.
26. *R. v. Singer*, 2026 SCC 8 at paras 194–195, O'Bonsawin and Moreau JJ, dissenting, 262–268, 288 Martin J, dissenting [*Singer*].
27. See e.g. *R. v. Jordan*, 2016 SCC 27, where the Court found that a presumptive ceiling was necessary to give full effect to the right to a timely trial
28. *Turpin* at 1331–1333, *Andrews* at 152. For why *Turpin* was precedential in this respect, see the text accompanying note 35.
29. *Law* at paras 23, 29, 88.
30. *R. v. Kapp*, 2008 SCC 41 at para 17.
31. *Corbiere* at para 9, *Law* at para 29.
32. See e.g. *Kanyinda* at para 65.
33. *Kanyinda* at paras 228, 384–390; *Corbiere* at para 9.
34. *Turpin* at 1334.
35. *Corbiere* at para 14.
36. *Kanyinda* at paras 47, 63.
37. *Singer* at paras 252–290.

Charter Issues in Artificial Intelligence and Policing

An update from the Asper Centre and Future of Law Lab Working Group

By Tyler Lee and Sarah Walker

The age of Artificial Intelligence (AI) is upon us, and legal institutions must keep up.

The last few years has seen unprecedented levels of advancement in AI technology. Use cases have been developed in practically every area of modern life. In the legal universe, police services nationwide are increasingly harnessing AI-driven investigative methods. AI-powered technology — such as facial recognition and data scraping, in its many forms — vastly expands police capacity to monitor and investigate Canadian citizens. Law enforcement purports to leverage AI for good: to keep communities safe, borders protected, and justice served. However, the use of AI in the policing context simultaneously raises critical *Charter* issues.

Working in conjunction with the Future of Law Lab, the Working Group is developing a report that delves into the vast normative and legal consequences of AI monitoring in the police context.

During the fall semester, the Working Group conducted extensive research on the current understanding of several *Charter* provisions as they relate to AI technology. We sought to understand how the *Charter* was responding to technological advancements, and whether jurisprudence was already undertaking the challenge of evaluating the *Charter* consequences of AI technologies. Working Group members drafted detailed memoranda on the theoretical harms of over-surveillance, the current technologies used in policing, and the existing *Charter* frameworks for claims under ss. 2, 8, 9, and 15(1). We found that AI is already being used in several policing contexts. Police forces are already using the technology to assist in obtaining search warrants[1] and creating databases of faces from public repositories.[2]

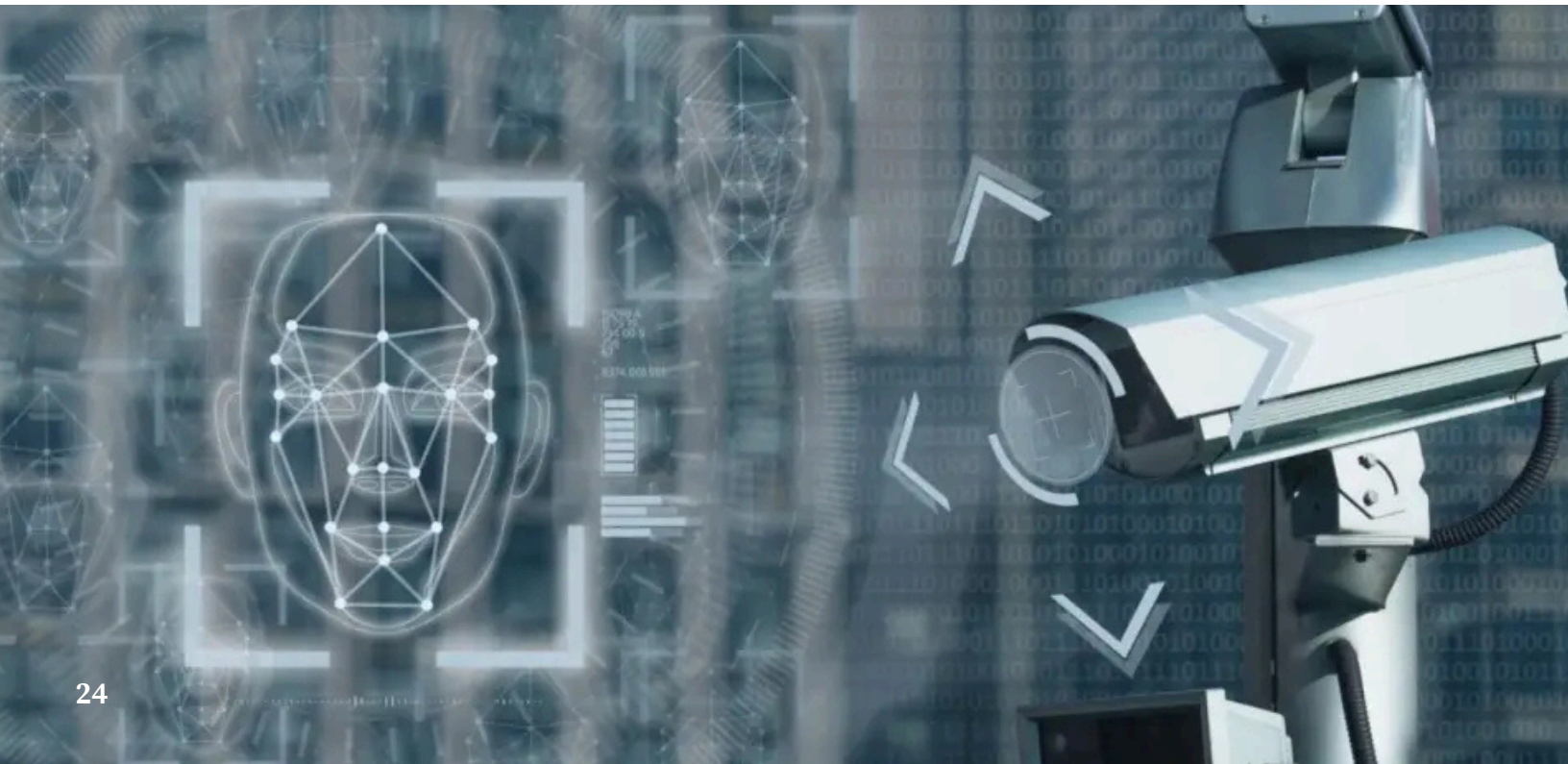
During the winter term, the Working Group is focusing on distilling its research into a report outlining the key issues. The report will highlight four key *Charter* issues associated with AI monitoring in the police context. First, we hypothesize that the chilling effects of data scraping and continuous monitoring implicate the fundamental freedoms protected by s. 2 of the *Charter*, particularly the freedoms of expression and association. Second, we contend that AI-powered monitoring is being used in certain contexts which raises significant questions related to the s. 8 right to unreasonable search and seizure. Third, we propose that the underdeveloped s. 9 *Charter* right against arbitrary detainment is implicated by AI-generated grounds for detainment. Finally, we will assess whether the generation of AI-powered inferences in predictive policing contexts is vulnerable to bias. We are exploring how this bias can lead to adverse impact discrimination, contrary to s. 15 of the *Charter*.

Ultimately, these findings will support several proposals with the goal of guiding policies surrounding AI policing techniques, ensuring the fairness and legitimacy of the justice system.

The Working Group is currently working to substantiate these hypotheses in further detail. Later this month, members will finalize the report. We hope to present these proposals to members of the legislature or to policy analysts later. These presentations would help raise awareness, with the hope that criminal justice institutions can commit to *Charter*-compliant uses of AI technology.

Tyler Lee and Oscar Judelson-Kelly are 2L JD Candidates at the Faculty of Law and the co-leaders of the Asper Centre's Working Group on AI, Predictive Policing, and the Charter. **Sarah Walker** is a 1L JD Candidate at the Faculty of Law and a member of the Working Group.

1. *R v Dawood*, 2024 ONSC 3918.
2. *Clearview AI Inc v Alberta (Information and Privacy Commissioner)*, 2025 ABKB 287.



Law Students Examining Environmental Protection and the Duty to Consult

By Hanaya Akbari, Romina Hajizadeh, Andrew Peters, and Erica Walter

In recent years, Canadians have become increasingly concerned with the country's economic growth. In response, the federal, Ontario, and British Columbia governments have recently enacted a series of bills aimed at stimulating economic growth by accelerating regulatory approvals for designated projects. These laws have been the source of great controversy. On one hand, many praise them for reducing barriers to major projects that will support the Canadian economy. On the other hand, many criticize these laws for potentially circumventing regulatory safeguards designed to protect the environment, as well as to uphold the duty to consult and accommodate Indigenous peoples.

Our Asper Centre Working Group examines these new laws enacted by the Federal, Ontario and British Columbia governments aimed at ramping up economic growth. In particular, we are concerned with the potential effects these laws may have on the duty to consult and accommodate Indigenous people, as well as on environmental protection in Canada.

To facilitate our research, we divided our Working Group into three sub-groups, each focused on a particular law. All groups have done research examining the constitutional implications of the laws, examining federalism, *Charter* and s. 35 implications, while incorporating Indigenous legal perspectives into our research.

Parliament's Bill C-5

In the winter term of 2026, the Student Working Group for Bill C-5 examined the constitutional implications of Canada's *Building Canada Act*. This project brought together law students to analyze how the federal bill specifically may affect environmental regulations, Indigenous rights, and *Charter* protections. It also seeks to understand various perspectives on the federal bill, including a variety of Indigenous perspectives.

Students conducted legal research analyzing federalism, sections 7 and 15 of the *Charter*, section 35 of the *Constitution Act, 1982*. They are also conducting research on the current Bill C-5 and Bill 5 litigation, which was brought by nine First Nations groups in Ontario. Further, they are researching the newly formed Indigenous Advisory Council, which will support the federal government by ensuring adequate partnership with and perspectives are incorporated into the implementation of projects under Bill C-5.

The final product will be a plain language blog post in collaboration with the Bill 5 group, which will serve as a public education document.

Ontario's Bill C-5

The Student Working Group for Bill 5 examined the legal and constitutional implications of Ontario's *Protect Ontario by Unleashing our Economy Act, 2025* ("Bill 5"). The research brought students together to analyze the bill as an omnibus statute that simultaneously enacts, amends, and repeals provisions across multiple areas of Ontario law, including environmental regulation, resource extraction, and executive decision-making. In particular, students examined Bill 5's creation of the *Special Economic Zones Act, 2025*, its replacement of the *Endangered Species Act, 2007*, with the *Species Conservation Act, 2025*, and its amendments to other statutes, including the *Mining Act*. Alongside the legislative analysis, the group considered the public law questions arising from Bill 5. Key considerations included the duty to consult Indigenous communities during the legislative process and the potential for legal challenges under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms.*

This March, the group has closely followed the ongoing *Alderville First Nation et al* litigation concerning Bill C-5 and Bill 5 and is working towards further research on how Anishinaabe law and Indigenous legal orders will inform the submissions advanced in this challenge. The group is also continuing to study Bill 5's implications "on the ground", particularly in relation to the Ring of Fire region. This includes research on Indigenous communities in the region and on species that may be affected by accelerated development. This year, the final product will be a blog post(s) in collaboration with the Bill C-5 group, which will serve as a public education resource.

British Columbia's Bill C-15

The Student Working Group for Bill 15 examined the constitutional implications of British Columbia's *Infrastructure Projects Act* ("Bill 15"). The project brought together law students to analyze how the legislation may affect environmental regulation, Indigenous rights, and *Charter* protections in the context of large infrastructure projects.

Students conducted legal research and prepared memoranda analyzing the *Act* through several constitutional frameworks, including federalism, sections 7 and 15 of the *Charter*, and section 35 of the *Constitution Act, 1982*. Particular attention was given to the broad discretionary powers the *Act* grants to the Minister of Infrastructure and the Lieutenant Governor in Council to designate projects as "provincially significant," enabling them to access expedited regulatory and environmental assessment processes.

The Working Group also examined concerns raised by Indigenous leaders and environmental organizations that the legislation may weaken environmental safeguards and was not co-developed with First Nations despite British Columbia's commitments under the *Declaration on the Rights of Indigenous Peoples Act*.

In addition to analyzing the statutory framework, students explored how executive decisions made under the *Act* could give rise to *Charter* challenges. The research focused on whether fast-tracking infrastructure projects could engage section 7 security of the person interests by increasing exposure to environmental risks, and whether such decisions could disproportionately affect Indigenous communities, raising potential section 15 equality concerns.

Hanaya Akbari, Romina Hajizadeh, Andrew Peters, and Erica Walter are 2L students at the Faculty of Law and co-leaders of the Asper Centre's Working Group on Indigenous Rights, Environmental Protection, and the Duty to Consult. The Working Group is also supported by its Faculty Advisor, **Professor John Borrows.**

Government Action and the Charter: Administrative Law Considerations of Bill C-5 and B.C. Bill 15

By Ethan Tucker, Elyse Eckenswiller, and Romina Hajizadeh

Introduction

In 2025, the federal government, Ontario, and British Columbia introduced legislation to fast-track major infrastructure projects.[1] Throughout the 2025-2026 academic year, our David Asper Centre for Constitutional Rights student working group has followed the legal, political, and social response to Federal *Bill C-5*, Ontario *Bill 5*, and B.C. *Bill 15* to better understand the constitutional questions and concerns surrounding this legislation.

There has been a significant amount of public discourse on these bills, and rightfully so – the implementation of major project legislation raises important questions on environmental impacts, Indigenous rights, and government accountability. As such, our working group has conducted research on the possible constitutional infringements under both the *Charter of Rights and Freedoms* as well as Aboriginal rights under s. 35 of the *1982 Constitution Act*.

While both pieces of legislation may be subject to constitutional scrutiny, *Charter* implications are also likely to arise from executive action taken under it, rather than solely from the statute's text alone. As such, this article focuses on an area of the law less covered in the public discourse surrounding these laws: administrative law.

To better understand the administrative law questions, this article provides a case study into Federal Bill C-15 and B.C. Bill 15 by providing an overview of both bills, relevant *Charter* sections, and relevant administrative law frameworks.

Overview of Bill C-5 and Bill 15

1. Federal Bill C-5: The *One Canadian Economy Act*

Bill C-5, *The One Canadian Economy Act* ("Federal Act") is a combination of two statutes established to remove federal barriers to interprovincial trade and accelerate infrastructure project approval. The Federal Act establishes a framework for the government to determine what infrastructure projects are in the national interest of Canada. For projects that pass this framework, they become categorized as "projects of national interest" ("PONIs"). Once designated as a PONI, the government is supposed to conduct its approval process aligned with the mindset of gaining approval. To facilitate a fast-tracked approval process, the Federal Act establishes the Major Projects Office, serving as the singular and primary point of contact for streamlining PONIs. Thus, the Federal Act is a transition from a multi-ministry approval process to a streamlined, expedited approval process for projects with the goal of developing Canada's natural resources and strengthening the national economy.

2. British Columbia Bill 15: The *Infrastructure Projects Act*

Bill 15, the *Infrastructure Projects Act*, S.B.C. 2025, c. 13 ("BC Act"), establishes a statutory framework through which the province of British Columbia may identify, prioritize, and expedite the development of provincially significant infrastructure projects. British Columbia's legislation seeks to centralize coordination authority in the Minister of Infrastructure and the Lieutenant Governor in Council, enabling the province to accelerate the planning, permitting, and completion of selected infrastructure projects deemed to be in the public interest. The BC Act fully repeals the former *Significant Projects Streamlining Act* and amends 11 other provincial statutes to substantially expand the scope of provincial executive authority over infrastructure development, including projects undertaken by non-government proponents.

Central to the Act is the power of the Lieutenant Governor in Council, on the recommendation of the Minister, to designate specific infrastructure projects or classes of projects as "designated infrastructure projects" by regulation. Once designated, projects may benefit from a suite of streamlining mechanisms, including the use of qualified professional certifications in place of certain regulatory approvals, mandatory prioritization of provincial permitting processes, and the application of an expedited environmental assessment regime under a newly added Part 7.1 of the *Environmental Assessment Act*. The Act also authorizes the modification or exemption of certain requirements in provincial and local government land-use and planning legislation, subject to regulatory conditions and specified limits, in order to remove constraints on designated projects.

Applicability of the Charter

At the most direct level, legislation itself constitutes government action and is therefore subject to Charter review.

Where a statute mandates or authorizes conduct that necessarily infringes *Charter* rights, it may be challenged on its face. In *Chaoulli v Quebec (Attorney General)*, for example, the Supreme Court held that Quebec legislation prohibiting private health insurance foreseeably caused excessive wait times and increased risks to life and health, amounting to a deprivation of life and security of the person under s. 7 of the *Charter*.[2]

By contrast, the Federal Act and BC Act do not, on their faces, directly deprive individuals of liberty or security of the person. Instead, both establish frameworks that enable executive actors to designate infrastructure projects and apply accelerated regulatory processes. Thus, both Acts' most significant *Charter* implications are therefore unlikely to arise from the text of the Acts alone. Rather, they are more likely to emerge from specific exercises of discretion under the Acts.

Administrative Law Implications

While we find that both Bill C-5 and Bill 15 contain potential constitutional frailties in and of themselves, there is a much stronger likelihood that they pose challenges to Canadian civil liberties through administrative decision-making. This portion of the article focuses on the relevant administrative law frameworks that may become critical in litigation related to each bill in the future.

Background – The Relevant Frameworks

In Canadian administrative law, there are two primary ways to challenge a decision on judicial review: firstly, through alleging that a breach of procedural fairness occurred (i.e., how the decision was made), and second, through alleging that the substance of the decision is not reasonable or correct (i.e., the decision itself is problematic according to the applicable standard of review). Our contributions here focus on the second avenue: challenges to substantive decisions.

Any substantive review analysis by a court will answer two key questions: first, what the applicable standard of review is, and second, whether the administrative decision accords with that applicable standard of review. There are two key standards of review: reasonableness, which is the standard in approximately 90% of judicial review cases, and correctness.[3]

For our purposes, two unique substantive review frameworks in administrative law are of critical importance: firstly, the framework for reviewing administrative decisions that engage the *Charter*, also known as the *Doré* framework, and secondly, the framework for the duty to consult and accommodate. These frameworks, alongside their relevance to these Acts, are described below.

1. The *Charter – Doré*

When a discretionary decision by an administrative decision maker engages the *Charter*, this is typically reviewed pursuant to the framework set out in *Doré v Barreau du Québec*.[4] The framework proceeds as follows: first, courts must determine whether a *Charter* protection is engaged by the administrative decision; second, courts must consider whether the decision maker has proportionately balanced the *Charter* protections and the administrative body's objectives.

Whether or not the laws themselves engage the *Charter*, there is absolutely a possibility that the Minister's actions pursuant to the laws and other discretionary actions could engage the *Charter* in this case.

Recent substantive review jurisprudence re-affirms that not all administrative law decisions engaging the *Charter* will be reviewed under *Doré*, however. In *York Region District School Board v Elementary Teachers' Federation of Ontario*, the Supreme Court clarified that on judicial review, the question "of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis" is a constitutional question requiring a single determinate answer, attracting correctness review.[5] Correctness review is more stringent than reasonableness review, which often makes it more attractive for claimants in judicial review proceedings. It requires the courts to find the only right answer in light of the law and facts.

Should any discretionary decisions engaging the *Charter* be subject to judicial review in the future, it will be interesting to see whether courts will apply *Doré* or correctness, and what results flow from those reviews. Should *Doré* apply, claimants will likely have a harder time succeeding on judicial review, as it is a more deferential standard than correctness. However, if claimants are able to frame their claims as pertaining to whether a *Charter* right arises and its scope, they may be able to attract correctness review, a more favourable and stringent standard than *Doré*'s robust reasonableness.

2. The Duty to Consult and Accommodate

The administrative law framework for the duty to consult and accommodate provides another pathway for litigants to potentially challenge discretionary actions under these laws.

The duty to consult and accommodate stems from s. 35 of the *Constitution Act, 1982*, and is engaged by the test laid out in *Haida Nation v British Columbia (Minister of Forests)*.[6] There is a duty to consult when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal rights or title, and there is contemplated Crown conduct that may adversely affect an Aboriginal claim or right. The nature of the duty necessarily varies with the situation. All else equal, the richness of required consultation increases with the strength of the *prima facie* claim and the seriousness of the impact posed by Crown action.

In administrative law, there is a bifurcated approach to substantive review and the duty to consult and accommodate. The existence and scope of the s. 35 rights themselves, regardless of if there is a duty to consult and accommodate, are reviewed for correctness.[7] The actual adequacy of any consultation, however, is reviewable for reasonableness.

The bifurcated approach goes beyond choosing the standard of review. Since the decisions in *Peguis First Nation v Canada (Attorney General)*[8] and *Roseau River First Nation v Canada (Attorney General)*,[9] the courts have been separately assessing the sufficiency of the duty to consult and accommodate, on the one hand, and the reasonableness of the administrative decision, on the other. This leaves open the possibility that claimants could potentially make out a claim in administrative law even if the duty to consult and accommodate was fulfilled, and vice versa. That said, the courts have yet to rule on a case where an unreasonable decision nevertheless had sufficient consultation – typically, if a decision fails in administrative law, it will also fail in the duty to consult and accommodate.

Conclusion

Bills C-5, 5, and 15 represent significant expansions of executive discretion over infrastructure development in Canada. While our working group is dedicated to considering the immediate constitutional implications of these statutes, this article brings to the fore another critical area of potential litigation related to administrative law. Beyond potential constitutional challenges, this article demonstrates how litigation could arise regarding discretionary decisions made pursuant to these laws.

We anticipate that administrative law claims under these laws will be anything but straightforward, given how each legislation intersects both with the *Charter* and s. 35 rights. In this article, we have outlined the various possibilities that could arise under substantive review challenges of these laws. Claims related to the *Charter* could engage two potential standards of reviews – most likely *Doré*'s robust reasonableness, although correctness remains available in light of *York District*. Claims related to the duty to consult and accommodate will likely be assessed through a bifurcated approach by the courts, potentially increasing chances of success for claimants as discretionary action will be scrutinized under both administrative and constitutional law frameworks.

Ethan Tucker and Elyse Eckenswiller are 1L JD candidates at the Faculty of Law and members of the Asper Centre's Working Group on Indigenous Rights, Environmental Protection, and the Duty to Consult. **Romina Hajizadeh** is a 2L JD candidate and co-leader of the Working Group.

1. Bill C-5, *An Act to enact the Free Trade and Labour Mobility in Canada Act and the Building Canada Act*, 1st Sess, 45th Parl, 2025 (assented to 26 June 2025); Bill 5, *Protect Ontario by Unleashing our Economy Act, 2025*, 1st Sess, 44th Parl, Ontario, 2025; Bill 15, *Infrastructure Projects Act*, 1st Sess, 43rd Parl, British Columbia, 2025.
2. 2005 SCC 35.
3. Andrew Green, "How Important are the Groundbreaking Cases in Administrative Law?" (2023) UTLJ 73:4, 426 at 441.
4. 2012 SCC 12 [*Doré*].
5. 2024 SCC 22 at para 63 [*York District*].
6. 2004 SCC 73.
7. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 55.
8. 2021 FC 990.
9. 2023 FCA 163.

Protecting Students' Access to Sexual Education: A Working Group Update

By Raveena Grewal, Lynn Hu, and Hope Mahood

In October 2024, the Alberta government enacted three bills targeting Alberta's gender-diverse and 2SLGBTQIA+ communities. Bill 27, now the *Education Amendment Act*, introduced a parental opt-in model for sex education. This means that Alberta students will presumptively not receive sex education or learn about the 2SLGBTQIA+ community unless the school receives explicit consent from their parents. The policy disproportionally affects girls as well as gender-diverse and 2SLGBTQIA+ youth. In response to this, the Asper Centre's Accessible Sex Education student working group partnered with Egale Canada, Canada's leading legal advocacy organization for 2SLGBTQIA+ people and issues. The students have worked with Egale to develop potential constitutional arguments under section 15 of the *Charter* to challenge the constitutionality of the *Education Amendment Act*.

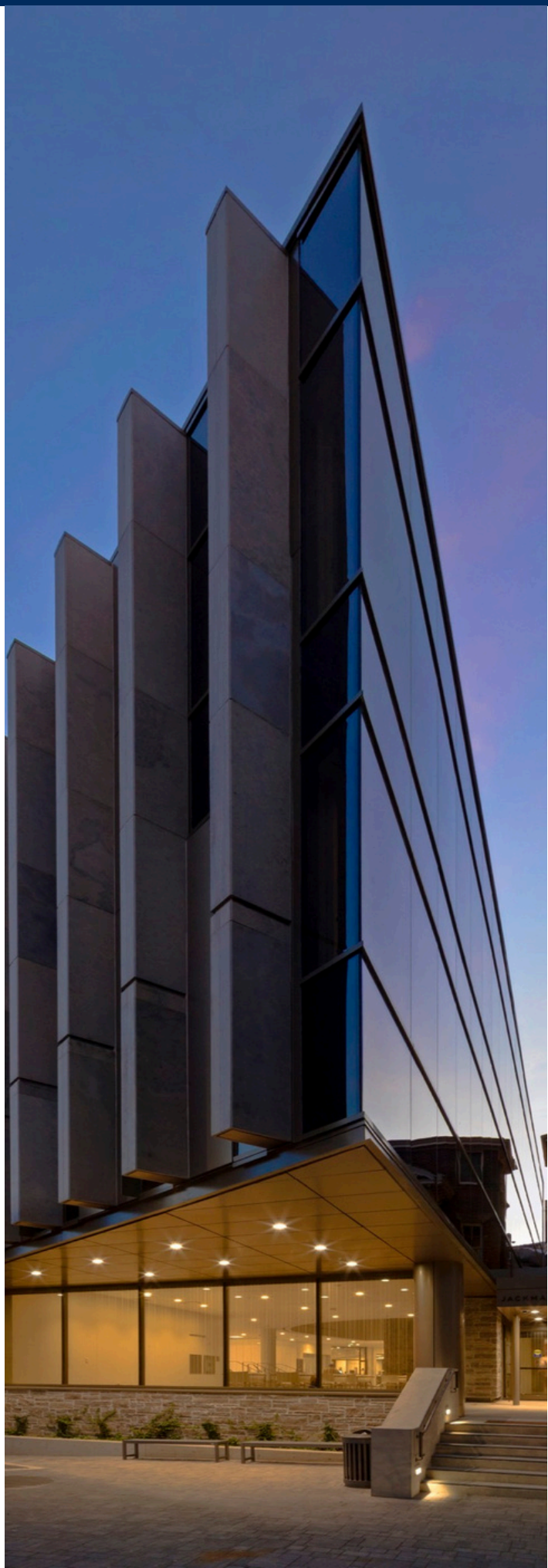
Then, in November 2025, Alberta invoked the notwithstanding clause (section 33 of the *Charter*) to shield all three bills from legal challenges. Despite this alarming development, the Accessible Sex Education working group members continued researching potential legal challenges to Alberta's legislation. The working group's strategy took inspiration from the ongoing case *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan et al.* In *UR Pride*, Egale is seeking a declaration that the Government of Saskatchewan violated 2SLGBTQIA+ youth's *Charter* rights, despite section 33 shielding the impugned legislation. Accessible Sex Education working group members are similarly developing an argument that Alberta's legislation violates the *Charter* rights of girls, gender-diverse and 2SLGBTQIA+ youth, despite the invocation of section 33.

The Asper Centre's Executive Director, Cheryl Milne, provides an overview of equality rights to members of the Working Group on Accessible Sex Education on October 15, 2025.

In the fall term, students conducted research on case law concerning sex education, children's rights, and section 15(1) of the *Charter*. This research aimed to consider how leading precedents could assist in forming legal arguments to challenge the *Education Amendment Act*. There is no recognized *Charter* obligation for governments to maintain specific policies or statutes regarding sex education, so students focused on drawing analogies with other existing positive rights obligations. Students also determined how the legislation could be framed in terms of non-freestanding positive rights or negative rights obligations. To support these potential arguments, students also researched Canadian courts' current understanding of the rights of children, particularly under the mature minor doctrine, and other case law regarding comprehensive sex education. The students' research culminated in a memorandum for Egale summarizing relevant jurisprudence and outlining potential legal arguments.

This term, students will produce a literature review to support the high evidentiary burden required by the 15(1) test outlined in *R v Sharma*. This test requires the claimant to demonstrate that the impugned law or state action: (1) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The working group's literature review will focus on how the new opt-in regime restricts access to sex education and how reduced sex education delivery stands to negatively impact women, gender-diverse and queer people.

Lynn Hu and Hope Mahood are 2L students at the Faculty of Law and leaders of the Asper Centre's Working Group on Accessible Sex Education. **Raveena Grewal** is a 1L student at the Faculty of Law and a member of the Working Group.



Encampments and the Charter: A Working Group Update

By Tillie Burlock and Kenzie Pilling

Across Canada, municipal and provincial governments, as well as private landowners, have turned to the courts to resolve issues regarding housing encampments. Over the course of the past decade and increasingly so in the aftermath of the COVID-19 pandemic, cities and towns across the country have seen a dramatic increase in the number of housing encampments in both public and private spaces. As a result, the court system has seen a rise in requests for injunctions to remove – and to protect – housing encampments throughout the country.

The Asper Centre, in collaboration with the Canadian Civil Liberties Association (CCLA), sought to explore this expanding area of Canadian jurisprudence and investigate how courts across the country were trending in their treatment of such claims.

In the fall semester, Asper Centre working group members dedicated their research to building out an Encampment Litigation Database. The project seeks to create a comprehensive, publicly accessible, and searchable database of Canadian jurisprudence in relation to housing encampments. Working group members explored the jurisprudence in the provinces of British Columbia, Ontario and Quebec, narrowing in on the time-frame from January 1, 2020 to November 1, 2025. Working group members took note of how the courts addressed issues such as shelter availability, relevant municipal by-laws and statutory provisions, and the *Canadian Charter of Rights and Freedoms* (specifically sections 7, 15 and 2).

With the start of the winter semester, the working group continued its investigative efforts by looking farther into the jurisprudential past. After the provinces assigned to group members were swapped around, they continued the search for appropriate cases with developments related to encampments and *Charter* rights.

In response to the relatively sparse results from the first semester's efforts, members searched a larger window of time, as they expanded the search to include cases decided from January 2008 to December 2019. However, this has not yielded richer results given that, as of March 16th, 2026, working group members have recorded and taken notes on less than half the number of cases they had in the prior semester.

Nonetheless, an increase in the difficulty of finding these cases can itself be a finding worth analyzing, as it raises questions worthy of answering – such as whether there were fewer court decisions regarding encampments from 2008 to 2019 due to a lower number of encampments, or simply because there were fewer cases considered by a court.

Turning to what comes next, future research endeavours may include investigating jurisprudence on protest encampments more specifically, attempting to visualize the jurisprudence using maps or other tangible expressions of findings, and more. Further, with the Supreme Court considering the notwithstanding clause this month, more directions of research may reveal themselves soon.

During summer 2026, an Asper Centre Summer Fellow will continue to work on this project in collaboration with the CCLA, under the supervision of Harini Sivalingam, Director of the CCLA's Equality Program.

Tillie Burlock and Kenzie Pilling are 1L students at the Faculty of Law and members of the Asper Centre's Working Group on Encampments and the Charter.

R v Singer and the future of the ancillary powers doctrine

By Delaney Cullin

In March, the Supreme Court in *R v Singer* again weighed in on the controversial ancillary powers doctrine. The decision signals a commitment to a more *Charter*-compliant approach. This case arose after Wayne Singer, a man in Saskatchewan, was arrested for impaired driving. RCMP officers made the arrest after receiving a complaint that Mr. Singer appeared to be driving under the influence. Acting on that complaint, the RCMP officers located Mr. Singer's vehicle on a private driveway, walked towards it and found him asleep. Then, the officers opened the door to wake Mr. Singer and noticed the smell of alcohol. At issue in *R v Singer* was whether the officers violated Mr. Singer's s. 8 *Charter* right to be free from unreasonable search and seizure by doing so.

While the main argument advanced by Crown counsel concerned the scope of the doctrine of implied license to knock, the Crown argued in the alternative before the Supreme Court that the Court could recognize a new common law police power to enter private property to conduct an investigation through the ancillary powers doctrine. Though the Court split 5-3-1, all justices agreed that no new common law police power could be recognized, and that Mr. Singer's s. 8 *Charter* rights had been violated by police.

A brief history of the ancillary powers doctrine

Through its lifespan, the ancillary powers doctrine has been subject to substantial debate. Imported from the UK decision of *Waterfield* in the pre-Charter case *Dedman v The Queen*, courts are empowered to recognize police powers when police conduct "falls within the general scope of a statutory or common law police duty" (interpreted as the duties to preserve the peace, prevent crime, and protect life and property), and when that conduct involves a justifiable exercise of police powers associated with that duty, having regard to whether it is reasonably necessary.[1] Through this test, the Supreme Court has recognized fundamental police powers such as the ability to conduct roadside stops (*Dedman*), and to conduct investigative detentions (*R v Mann*).[2] In other decisions, the ancillary powers doctrine is deployed in a more case-specific manner.[3]

Judicial critiques of this doctrine have focused on its uncomfortable fit with the *Charter* and with the courts' appropriate role as guardians of the constitution.[4] Given that the *Waterfield* test is a pre-*Charter* test, courts have emphasized that the analysis should be conducted with a mind to *Charter* values, but powers developed under it are not subjected to the *Oakes* analysis.[5] Moreover, because the tests for ss. 8 and 9 rights (those in respect of which the ancillary powers doctrine is most commonly invoked) in part require that the impugned police conduct is lawful, deriving a new power from this doctrine can render a detention non-arbitrary, or a search reasonable, regardless of the fact that no lawful authority for their conduct existed at the time it occurred.[6] In one test, the ancillary powers doctrine justifies police action, saves their conduct from having violated *Charter* rights, and creates a power that officers across the country will be able to deploy in the future.

These concerns featured heavily in the Supreme Court's early decisions on the ancillary powers doctrine. In post-*Dedman* jurisprudence on the ancillary powers doctrine, the Supreme Court often referenced Dickson C.J.'s dissent in *Dedman*:

"The fact that police officers could be described as acting within the general scope of their duties to investigate crime cannot empower them to violate the law whenever such conduct could be justified by the public interest in law enforcement. Any such principle would be nothing short of a fiat for illegality on the part of the police whenever the benefit of police action appeared to outweigh the infringement of an individual's rights."[7]

Justices in subsequent decisions would characterize the expansion of common law police powers as "forgetting [courts'] role as guardians of our fundamental liberties",[8] "[sidestepping] inconvenient Charter rights",[9] "[turning] the country's legal system upside down",[10] failing to give paramountcy to individual liberties,[11] and as an "[inappropriate] exercise of judicial power"[12] that would "shortcut the justification process and leave the Court to frame the common law rule … without the full benefit of the dialogue and discussion that would have taken place had Parliament acted and been required to justify its action."[13]

In a concurrence in *Clayton*, Binnie J. proposed first determining whether a common law police power exists under the ancillary powers doctrine before then subjecting that power to a separate *Oakes* analysis. This approach was not taken up by the Court. In *Kang-Brown* – a 4-2-2-1 decision regarding the existence of a common law police power to use sniffer dogs – Binnie J. wrote that the Court had "crossed the Rubicon"[14] and should "proceed incrementally…rather than try to re-cross the Rubicon to retrieve the fallen flag of the *Dedman* dissent."[15]

Data illustrate the extent to which the Supreme Court has been willing to recognize new powers for police. In an analysis of all decided cases on the ancillary powers doctrine, Jochelson et al. (2020) found that the Supreme Court decided to create a new common law police power in five of nine cases where they were asked to do so between 1985 and 2002.[16] However, between 2002 and 2017, the Court created the requested new power every time.[17]

The Court's last ancillary powers case, *Fleming v Ontario (Attorney General)*, broke this trend. In a unanimous decision, the Supreme Court rejected the Ontario Attorney General's request for a new common law police power to arrest an individual to protect them from breach of the peace by others. The Court took a strong position by emphasizing that the effectiveness of a purported police power could not be the determining factor, characterizing this as a "recipe for a police state." Still, Skolnik and MacDonnell (2021) argued that *Fleming* was a fluke based on exceptionally intrusive police conduct.[18] *Singer* arrives in this context.

The majority's decision in *Singer*

The Crown in *Singer* sought recognition of a new common law police power to enter onto private property to investigate potential impaired driving. To find that the officers' conduct violated s. 8, the Court had ruled out the possibility that the ancillary powers doctrine could justify this power. All justices agreed such a power was not justified.

The majority decision, written by Jamal J., engaged with this question only briefly, and disposed of the question primarily on procedural grounds. At trial, Crown counsel had not argued that the Court should recognize a new common law police power. Because the issue of a new common law police power had not been raised before appeal, Jamal J. declined to recognize a new power here.

At the same time, the majority created cause for concern among critics of the ancillary powers doctrine. Jamal J. suggested that had a proper evidentiary basis existed, the Court would have had no difficulty finding that the officer's conduct could be characterized as a safety search – established under the ancillary powers doctrine in *R v MacDonald* – which allows for searches when it is "reasonably necessary to eliminate an imminent threat to … safety."[19] Even in the absence of evidence before the Court, the majority commented that the danger of impaired driving would create objective grounds to believe Mr. Singer posed a safety threat.[20] While accepting Fleming's concerns about the need to proceed cautiously and only to fill legislative gaps, the majority skirted the question of whether any absence of a police power is necessarily a gap that needs to be filled, instead focusing on the availability of existing powers that could have justified their conduct.

Martin J's dissent in Singer

The dissenting justices reasons took a far more critical approach, going beyond *Fleming* to propose a new, more *Charter*-friendly approach to the ancillary powers doctrine.[21] In Martin J.'s view, "while the ancillary power doctrine may have "crossed the Rubicon" into acceptability," so have criticisms of the doctrine.[22] Not only does Martin J. cite persistent academic opposition to the doctrine, her dissent provides one of the Supreme Court's most decisive critiques of the ancillary powers doctrine since before *Kang-Brown.* Martin J.'s dissent expressed concerns over four problems associated with the ancillary powers doctrine: the rule of law, the traditional role of courts as guardians of constitutional rights, the limits of judicial law-making, and disproportionate impacts on racialized groups and marginalized populations.[23]

With respect to the rule of law, Martin J. focused on the principle that individuals should know the scope of the powers of public officials in advance.[24] Yet, the ancillary powers doctrine skirts this principle by allowing for *ex post facto* creation of police powers.[25] At the same time, Martin J. highlights that the doctrine also prevents police officers from being fully informed about the scope of their powers. This could potentially encourage officers to act outside the scope of their powers if they believe that doing so is necessary, since a court may very well agree with their decision later on.

Speaking on the role of courts as guardians of the Constitution, Martin J. writes that with the ancillary powers doctrine, "the common law ceases to be a shield for individual rights and becomes a tool for actively restricting them."[26] Martin J. emphasized this point by analogy to private common law doctrines, where the common law is expanded to protect individual rights, rather than to derogate from them.[27] The ancillary powers doctrine permits state action in a manner very different than the *Oakes* analysis, or the admission of evidence obtained through *Charter*-violating conduct. By finding an ancillary police power, courts deny that a right existed in the first place. Such decisions are not based on a policy choice made by a democratically elected legislature, but by the court's own analysis, which in most cases will be based on the facts of a specific case rather than a more fulsome consideration of a law's potential impacts.[28] Creation of an ancillary power is not simply a message from the court that the legislature should fill the gap identified.[29] Because courts require a compelling reason to depart from their own precedent, Martin J. points out that it will be more difficult for courts to abandon a court-created police power that creates unintended consequences than it would be for the legislature to abandon a police power that it has created.[30]

Martin J. takes further aim at the vague "*Charter* scrutiny" approach, under which *Charter* values are considered in the ancillary powers doctrine but not subjected to a full *Oakes* analysis.[31] Echoing Binnie J.'s concerns in *Clayton* about the ancillary powers doctrine's failure to give paramountcy to *Charter* rights, Martin J. writes that conflating the creation and justification of a power into one test may diminish the centrality or importance of common law police powers.[32] Instead, Martin J. advocated for a cautious approach that would only create new police powers when there was truly a legislative gap (as opposed to a deliberate decision not to provide for a power) and would hesitate to create a new power when the conditions for a pre-existing power are not met.[33] She further suggested that the ancillary powers doctrine should include consideration of a pressing and substantial objective, rational connection, minimal impairment, and proportionality.[34] Applying this proposed approach to the facts in *Singer*, Martin J. was not satisfied that the proposed power was *Charter*-compliant given the strong privacy interests individuals have in their homes.[35]

Importantly, while past decisions had acknowledged that the potential for police abuses of power (including disproportionate applications to racialized people) in the ancillary powers doctrine,[36] both dissents place concern for marginalized communities as a necessary consideration in any analysis given research about the extent and impact of arbitrary police conduct on racialized groups.[37] The dissenting justices' concerns arise even without s. 15 of the *Charter* being raised. Even when there is no allegation that the common law police power is being applied disproportionately in a given case, Martin J. and O'Bonsawin and Moreau JJ.'s dissents (together with past jurisprudence in this area) are clear that disproportionate impact of police conduct on racialized people is a factor that courts should consider when deciding on the creation of a new police power.

The future of the ancillary powers doctrine

In *Singer*, the majority decision does not significantly engage with concerns about the ancillary powers doctrine, and in some ways signals the majority's willingness to create a common law power on a proper record. However, the dissenting opinions suggest that concerns about the ancillary powers doctrine remain alive and well at the Supreme Court. The dissenting justices signal a commitment to the caution illustrated in *Fleming* and a resurgence of earlier concerns about the role of the *Charter* in the ancillary powers doctrine.

The David Asper Centre intervened on this question in *Luamba* this past January.[38] The Court will have the opportunity to address how it should approach a purported common law police power to conduct groundless traffic stops, which the respondents argue violates s. 15 by enabling racial profiling. Of particular relevance to this analysis will be O'Bonsawin, Moreau, and Martin JJ.'s assertions that the impact of common law police powers on marginalized communities must be considered in the ancillary powers doctrine.

Delaney Cullin is a 3L JD candidate at the Faculty of Law.

1. *Dedman v The Queen*, 1985 CanLII 41 (SCC) [*Dedman*]; *Fleming v Ontario*, 2019 SCC 45 [*Fleming*] at paras 46, 69; *R v Waterfield*, [1964] 1 Q.B. 164, [1963] 3 All E.R. 659 [*Waterfield*].
2. *Dedman*, supra note 1; *R v Mann*, 2004 SCC 52 [*Mann*].
3. See e.g. *R v Clayton*, 2007 SCC 32 [*Clayton*] at para 41; *R v MacKenzie*, 2013 SCC 50 [*MacKenzie*] at para 32.
4. For further discussion, see James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31:1 Queen's LJ 1; Richard Jochelson, "Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference" (2009) 13:2 Review of Constitutional Studies 209; Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012) 57 Supreme Court Law Review 57.
5. See e.g. *Clayton*, *supra* note 3 at paras 78–9.
6. *R v Singer*, 2026 SCC 8 [*Singer*] at para 255.
7. *Dedman*, *supra* note 1 at 15.
8. *R v Wong*, 1990 CarswellOnt 58, 1990 CanLII 56 (SCC) at para 36.
9. *R v Orbanski*, 2005 SCC 37 [*Orbanski*] at para 70.
10. *Ibid*.
11. *Clayton*, supra note 3 at para 78.
12. *R v Kang-Brown*, 2008 SCC 18 [*Kang-Brown*] at para 11.
13. *Ibid* at para 14.
14. *Kang-Brown*, *supra* note 11 at para 22.
15. *Ibid* at para 51.
16. Richard Jochelson et al, "Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged Charter" (2020) 28 Critical Criminology 107 [Jochelson et al.] at 116.
17. *Ibid*.
18. Terry Skolnik & Vanessa MacDonnell, "Policing Arbitrariness: Fleming v Ontario and the Ancillary Powers Doctrine" (2021) 100:8 The Supreme Court Law Rev 187 [Skolnik & MacDonnell].
19. *Singer*, *supra* note 6 at para 100.
20. *Ibid* at paras 9–10, 104.
21. O'Bonsawin and Moreau JJ., joined by Karakatsanis J., wrote separate reasons on the scope of the implied license to knock doctrine, but were in agreement with Martin J.'s analysis on the ancillary powers doctrine: *Singer*, *supra* note 6 at para 127.
22. *Ibid* at para 252.
23. *Ibid* at para 253.
24. *Ibid* at para 255.
25. *Ibid* at para 256.
26. *Singer*, *supra* note 6 at para 260.
27. *Ibid* at para 261.
28. *Ibid* at paras 263–264.
29. *Ibid* at para 268.
30. *Ibid* at para 265.
31. Ibid at paras 271–273.
32. *Ibid* at paras 278–279.
33. *Ibid* at paras 286–287.
34. *Ibid* at para 290.
35. *Singer*, *supra* note 6 at para 293.
36. See e.g. *R v Golden*, 2001 SCC 83; *R v Saeed*, 2016 SCC 24; *R v Simpson*, 1993 CanLII 3379 (ON CA).
37. *Singer*, *supra* note 6 at paras 198, 269.
38. *Attorney General of Quebec v Joseph-Christopher Luamba, et al.*, Supreme Court File No. 41605.

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