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The Violence of Gaza Undertaken in the Name of Proportionality

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I am indebted to Dean Martin Phillipson of the College of Law for the very kind invitation to take up the visitorship as I am to him, his colleagues and students at the College of Law for making my stay in Saskatoon so intellectually rewarding. My appreciations also extend to Samantha Dorish, Maxwell Lee and Ethan Lin of the *Saskatchewan Law Review* for their excellent assistance in shepherding this article through to publication. The article is based on the lecture delivered at the College of Law on February 10, 2025, although it has been possible to include some materials occurring after that date.

I. Introduction

It is a particular honour for me to be delivering the annual lecture that recognizes Ariel F. Sallows, a man who, by all accounts, was "not an average citizen" for the life he lived beyond his career as a corporate lawyer in and city solicitor for Saskatoon.[1] We do know that he travelled widely, that he was given to certain eccentricities, and that he died at some point in 1984. The visiting professorship that bears his name, and which I am most fortunate to hold in this academic year, is the first endowed chair of human rights at any tertiary institution within Canada—what a remarkable legacy for this most private of men about whom we still know so little.

I have chosen as the topic of my lecture a matter of the most pressing urgency and surely on the minds of most of us as I speak: it is to do with the response of Israel to the shocking turn of events that occurred within its territory on the fateful morning of October 7, 2023. On that very day, Israel informed the Security Council of the "extensive terrorist attack on the civilian population" that had taken place a matter of hours earlier, "in the midst of Simchat Torah, when Israelis were on their way to synagogue to celebrate with their communities and families."[2] For Israel, there could be no tolerance of any "moral equivalence between those defending against this terrorism and those perpetrating it" and "no option other than zero tolerance for Hamas' war crimes and genocidal agenda."[3] Its military response involved an aerial bombardment of Gaza, together with a ground invasion fully realized on October 28, 2023.[4] A ceasefire was reached between the parties in January 2025, some fifteen months after the bombardment had begun,[5] but hostilities then resumed again in March 2025 following the repeated refusal of Hamas to return some of the hostages that had been seized in October 2023.[6] A further ceasefire was then concluded in October 2025, marked by thousands making their way back to their respective localities as well as hostages reuniting with their families.[7]

The focus of my interest in this lecture, then, is international humanitarian law: that aspect of public international law that governs the conduct of hostilities and dates back, at least in terms of its modern incarnation, to the 1864 Geneva *Convention for the Amelioration of the Condition of the Wounded in*

1 All biographical details have been obtained from Richard W Hiebert, "The Sallows & Boyd Building: 100 Years of History", *SaskToday* (7 March 2012), online: <sasktoday.ca> [perma.cc/4EXB-8Z7B].

2 *Identical letters dated 7 October 2023 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council*, UNSC, UN Doc S/2023/742 at 1.

3 *Ibid* at 2.

4 Patrick Kingsley & Ronen Bergman, "For Hours, a Deliberate Shroud of Secrecy Hid an Invasion", *The New York Times* (31 October 2023) A6.

5 Patrick Kingsley, "An Ambiguous Reprieve Is Tenuous, Temporary and Fraught", *The New York Times* (16 January 2025) A8. See also Steven Erlanger, "As Cease-Fire Takes Hold in Gaza, a Behind-the-Scenes Fight Heats Up", *The New York Times* (21 January 2025) A6. To be sure, there had been an earlier attempt in this direction (see Aaron Boxerman, Hiba Yazbek & Jason Horowitz, "Israel and Hamas Agree on a Pause and a First Swap", *The New York Times* (24 November 2023) A1).

6 Patrick Kingsley et al, "Israel Renews Gaza Attack in Collapse of Cease-Fire", *The New York Times* (19 March 2025) A1 [Kingsley et al, "Israel Renews Gaza Attack"].

7 Liam Stack, Aaron Boxerman & Bilal Shbair, "Thousands Trek North to Ruins of Gaza City as a Truce Takes Hold", *The New York Times* (11 October 2025) A1. See also David Remnick, "A New Middle East?", *The New Yorker* (27 October 2025) 9.

Armies in the Field.[8] It is therefore decidedly not the question of genocide which has excited much reflection and commentary internationally and has formed the basis of the application made by the Republic of South Africa to the International Court of Justice in December 2023 concerning Israel's obligations under the 1948 United Nations *Convention on the Prevention and Punishment of the Crime of Genocide*.[9] That, of course, is a hugely significant and important question for consideration,[10] but it will not detain us to any great degree or effect today—and nor should it detract from the applicability and relevance of international humanitarian law on and after October 7, 2023. We should recall, and we should recall rather forcefully, that the protection of so-called "fundamental values" within the international system does not or should not compromise the application of other norms within the system that are not accorded that same status or designation.[11] This is so even though political and public attention has the habit of transfixing itself on certain rules to the seeming exclusion of all others. As a further example of this phenomenon in action, we might recall the headlong devotion awarded to the prohibition of torture during the global war on terror, when that was but a fraction of the overall commitments contained in the four Geneva Conventions of August 1949[12] and their two Additional Protocols of June 1977.[13]

In matter of fact, in the penultimate paragraph of the order indicating provisional measures issued by the International Court of Justice in January 2024, the Court emphasized that "all parties to the

8 22 August 1864, 129 CTS 361 [1864 *Geneva Convention*]. The thematic of "amelioration" captures the essential ethos of this domain of normative activity as regulating the effects of warfare rather than taking a stand against the legality of warfare itself (for further discussion, see Sir Adam Roberts, "Foundational Myths in the Laws of War: the 1863 Lieber Code and the 1864 *Geneva Convention*" (2019) 20:1 Melbourne J Intl L 158).

9 9 December 1948, 78 UNTS 277 [*Genocide Convention*]. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Order of 26 January 2024, [2024] ICJ Rep 3 [*South Africa v Israel*]. Three substantive orders have been indicated by the International Court of Justice: the first on January 26, 2024 (*ibid*); the second in terms of a modification to the first and issued on March 28, 2024 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Order of 28 March 2024, [2024] ICJ Rep 513); and the third also by way of modification and issued on May 24, 2024 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Order of 24 May 2024, [2024] ICJ Rep 649).

10 The *Genocide Convention* (*supra* note 9) does not restrict the crime of genocide either to the condition of war (or armed conflict) or to peace (for further discussion, see William A Schabas, *Genocide in International Law: The Crime of Crimes*, 3rd ed (Cambridge: Cambridge University Press, 2025) at 81). See also Schabas (*ibid*) at 43.

11 "Fundamental values" is the term used by the International Court of Justice to refer to the ambitions of the *Genocide Convention* (*South Africa v Israel*, *supra* note 9 at 26, para 66). In an earlier advisory opinion, the Court had said that the request submitted to it did not raise "the question of the character of the humanitarian law which would apply to the use of nuclear weapons" and that, therefore, there was "no need for the Court to pronounce on this matter" (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at 258, para 83 [*Nuclear Weapons Advisory Opinion*]).

12 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 [*Geneva Convention I*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 [*Geneva Convention II*]; *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 [*Geneva Convention III*]; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 [*Geneva Convention IV*].

13 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [*Additional Protocol I*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 [*Additional Protocol II*].

conflict in the Gaza Strip are bound by international humanitarian law,"[14] and so, it is that aspect of public international law that shall inform our various deliberations this evening. More specifically, my intention is to turn to the principle of proportionality within that context and consider what the law demands by it, what it was actually designed to do, and how it has tended to work in practice. In Part II of this lecture, we shall commence by considering the articulation of proportionality as a legal proposition, arriving as it did rather late in the day with the adoption of the *Additional Protocol I* in June 1977. Part III of the lecture will then unpack and open up for exploration one of the organizing assumptions behind the principle of proportionality as stated therein: that of the civilian population itself. Here, we shall trace the invisibility, then the visibility, and finally, the divisibility of the civilian population as relayed through various humanitarian instruments through time, and what they forebode for the meaning of proportionality in international humanitarian law more generally. In Part IV of the lecture, the idea will be to turn to two considerations that should help us understand more fully how proportionality is meant to be measured in practice: first, by way of comparing the metric within the *jus ad bellum* with that of the *jus in bello* and, then, by turning to the infrastructure designed to inform its work under the *jus in bello*. Finally, in Part V, we shall conclude by testing some of these ideas in respect of the violence occurring in Gaza after October 2023 to assess how this configures, or does not configure, with the principle of proportionality as generally understood in international humanitarian law.

II. A Primer on the Principle of Proportionality

The principle of proportionality received its first conventional expression in the form of *Additional Protocol I*, which was adopted in June 1977, at the same time as *Additional Protocol II*—which made no equivalent mention of said principle.[15] Given its centrality to the "humanitarian" dimension of the law, this might seem to be a fantastically late development in the overall scheme of things, but let it be said that the enunciation has generally been regarded as "the first reasonably explicit codification

14 *South Africa v Israel*, *supra* note 9 at 30, para 85. The Court also emphasized that "[i]t is gravely concerned about the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release" (*ibid*). The Court had earlier observed in its Order that Israel had submitted "that the appropriate legal framework for the conflict in Gaza is that of international humanitarian law and not the Genocide Convention" (*ibid* at 18, para 40). See also the Separate Opinion of Judge *ad hoc* Barak ("[i]n my view, the appropriate legal framework for analysing the situation in Gaza is International Humanitarian Law (IHL) — and not the Genocide Convention" *ibid* at 69, para 26).

15 See Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law*, vol 2: Practice (Cambridge: Cambridge University Press, 2005) at 297–98 [Henckaerts & Doswald-Beck, vol 2: Practice]. Yoram Dinstein regards this as one of the "[e]mbarrassing lacunae" of *Additional Protocol II* (*Non-International Armed Conflicts in International Law*, 2nd ed (Cambridge: Cambridge University Press, 2021) at 182 [Dinstein, *Non-International Armed Conflicts*]). See also Michael Bothe, Karl Josef Partsch & Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed (Leiden/Boston: Martinus Nijhoff Publishers, 2013) at 780. For a more agnostic position on the matter, see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012) at 349.

of the rule,"[16] so that *Additional Protocol I* is better understood as not positing an altogether new law but, rather, as crafting a statement as to law already deemed to be in existence by virtue of custom.[17] How much the underpinning practice and *opinio juris sive necessitatis* bear this out is naturally a vital methodological point for enquiry,[18] as is the precise moment or timing of the formation of that custom.[19]

Be this as it may, according to Article 51(4) of *Additional Protocol I*, indiscriminate attacks are outlawed,[20] with Article 51(5)(b) providing that these can include "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[21] This formulation contains the modern statement of the principle of proportionality and it appears at other points in *Additional Protocol I* in respect of precautions to be taken by those who plan or decide upon an attack to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated,"[22] and where "an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[23] The refrain also features as one of the grave breaches itemized under Article 85(3) of *Additional Protocol I*.[24]

16 Lieutenant Colonel William J Fenrick, "The Rule of Proportionality and Protocol I in Conventional Warfare" (1982) 98 Mil L Rev 91 at 95 [Fenrick, "The Rule of Proportionality"]. See also Bothe, Partsch & Solf, *supra* note 15 ("the first concrete codification of the principle of proportionality as it applies to collateral civilian casualties" at 350).

17 Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law*, vol 1: Rules (Cambridge: Cambridge University Press, 2005) at 46 [Henckaerts & Doswald-Beck, vol 1: Rules]. It is worth pointing out that proportionality has been identified as one of three "general principles" on the conduct of hostilities applicable to the natural environment (*ibid* at 143). See also Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (New York: Columbia University Press, 1980) at 45. But see Yoram Dinstein, "The Principle of Proportionality" [Dinstein, "Principle of Proportionality"] in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper & Gro Nystuen, eds, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) 72 at 74.

18 See especially Henckaerts & Doswald-Beck, vol 2: Practice, *supra* note 15 at 335.

19 Although this is not a sustained concern of Henckaerts & Doswald-Beck (see Henckaerts & Doswald-Beck, vol 1: Rules, *supra* note 17; Henckaerts & Doswald-Beck, vol 2: Practice, *supra* note 15).

20 *Additional Protocol I*, *supra* note 13, art 51(4).

21 *Ibid*, art 51(5)(b). This appears alongside "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects" (*ibid*, art 51(5)(a)). That Article 51(5) of *Additional Protocol I* commences with the phrase "[a]mong others" suggests that these two iterations are not intended to be exhaustive explication of what constitutes an indiscriminate attack (*ibid*, art 51(5)).

22 *Ibid*, art 57(2)(a)(iii).

23 *Ibid*, art 57(2)(b).

24 *Ibid* ("launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)," art 85(3)(b)).

It will immediately be appreciated that proportionality is not named as such in any of these provisions;[25] still less is it announced anywhere as a "principle"[26] or even as a "rule."[27] And, yet, it is this formulation—this very formulation—that appears as Rule 14 in the 2005 International Committee of the Red Cross ("ICRC") Study on Customary International Humanitarian Law on "proportionality in attack," which regards the customary rule as one applicable in both international and non-international armed conflicts.[28] The question, then, arises as to the actual roots and historical provenance of the principle, as it is possible that the work of proportionality was achieved through other refrains within this sub-discipline of public international law. For example, William V. O'Brien has suggested that proportionality operates as an aspect of military necessity in the sense that it "precludes acts which cause great military suffering without a corresponding military utility."[29] According to this logic, proportionality assumes a presiding and even all-encompassing importance for any military campaign via the dictates of military necessity, one that would extend to "combat operations between combatants on a battlefield devoid of civilians."[30] Proportionality is thus being acclaimed in the absence

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25 Apparently, this was at the instigation of some Eastern European and Third World delegations during the drafting process of *Additional Protocol I* on account of the fact that any such codification "was contrary to the providing of immunity from attack to civilians and civilian objects," which was assured elsewhere in *Additional Protocol I* (W Hays Parks, "Air War and the Law of War" (1990) 32 AFL Rev 1 at 171). "[F]or this reason, neither 'proportion,' 'proportionate,' nor 'proportionality' appears in Protocol I" (*ibid*). See also Amichai Cohen, "The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives" (2009) 35 Rutgers L Record 23 at 27, n 37.

26 Proportionality is referred to as a "principle" in Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 3rd ed (Cambridge: Cambridge University Press, 2022) at 209–10, and Henri Meyrowitz, "The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977" (1994) 34:299 Intl Rev Red Cross 98 at 109. Throughout this contribution, I adopt the language of "principle" as opposed to "rule," for while equally binding as norms of international humanitarian law, the descriptor "principle" acknowledges that there is some discretion afforded to the respective addressee. See also Amichai Cohen & David Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions and Procedures* (Oxford: Oxford University Press, 2021) at 4. Most usefully, Enzo Cannizzaro has observed how a "changing balance of interests requires unusual capacities for a legal rule, in particular the capacity to adapt its content to the specific features of every single case: a property at odds with the structured theoretical character of legal rules" (Enzo Cannizzaro, "Proportionality in the Law of Armed Conflict" [Cannizzaro, "Proportionality in Armed Conflict"] in Andrew Clapham & Paola Gaeta, eds, *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014) 332 at 333).

27 For proportionality as a "rule," see Fenrick, "The Rule of Proportionality", *supra* note 16. See also Jeremy Rabkin, "Proportionality in Perspective: Historical Light on the Law of Armed Conflict" (2015) 16:2 San Diego Intl LJ 263 at 266. See also Parks, *supra* note 25 at 170.

28 See Henckaerts & Doswald-Beck, vol 1: Rules, *supra* note 17 ("[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited" at 46). The Study follows an identical structure and reasoning to that contained in *Additional Protocol I*: indiscriminate attacks are prohibited under Rule 11 (*ibid* at 37), and the same formulation appearing for Rule 14 is repeated with respect to Rule 18 on the assessment of the effects of attacks (*ibid* at 58) and with respect to Rule 19 on control during the execution of attacks (*ibid* at 60). See also James Kilcup, "Proportionality in Customary International Law: An Argument Against Aspirational Laws of War" (2016) 17:1 Chicago J Intl L 244. That said, as far as its adumbration of war crimes goes, the 1998 *Rome Statute of the International Criminal Court* itemizes, among its "[o]ther serious violations of the laws and customs applicable in international armed conflict," the "[i]ntentionally launching [of] an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" (17 July 1998, 2187 UNTS 3, art 8(2)(b)(iv)) [1998 *Rome Statute*]). No similar provision is made for non-international armed conflicts, in either Article 8(2)(c) or Article 8(2)(e) of the 1998 *Rome Statute* (*ibid*). See also Rogier Bartels, "Dealing with the Principle of Proportionality in Armed Conflicts in Retrospect: The Application of the Principle in International Criminal Trials" (2013) 46:2 Israel LR 271.

29 William V O'Brien, "The Meaning of 'Military Necessity' in International Law" (1957) 1 World Polity 109 at 149.

30 Parks, *supra* note 25 at 170.

of being so named or so represented, though it will be noted that the approach very much relies on the plenary relevance of military necessity, which is rather difficult to sustain today compared to times previous, to times gone by.[31]

It is perhaps worth returning at this point to and reflecting upon the St. Petersburg *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes in Weight* of December 1868 (hereafter the "Declaration").[32] That instrument is notable for the renunciation of "any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances," as well as its specification of the principle of unnecessary suffering, the rationale upon which the prohibition was promulgated.[33] However, as the preambular recitals to the Declaration make clear, "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy,"[34] and that "for this purpose it is sufficient to disable the greatest possible number of men."[35] Nowhere does the Declaration announce the principle of proportionality in terms, but its logic seems apparent from the content therein as it proceeds to proclaim that the accepted object of warfare "would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."[36] There is undoubtedly a calculation of sorts operating in this formulation with the language of excess engaged, but the Declaration is not usually summoned as a point of authority in discussions concerning proportionality. This is presumably because there was no intention to affix any limit on the number of enemy forces assailed during hostilities (after all, the Declaration does make plain that "it is sufficient to disable the greatest

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31 See e.g. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, ed by Board of Officers (Washington: Government Printing Office, 1898) [*General Orders*]. Article 14 of the *General Orders* provided (with some circularity) that "[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war" (*ibid* at 7). And, according to Article 15 (*ibid* at 7–8):

> Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God. [emphasis in original]

32 11 December 1868, 138 CTS 297 [*Declaration of St Petersburg*].

33 Hans-Peter Gasser, "A Look at the Declaration of St. Petersburg of 1868" (1993) 33:297 Intl Rev Red Cross 511 at 514–15. See also Janina Dill & Henry Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption" (2012) 26:3 Ethics & Intl Affairs 311 at 321.

34 *Declaration of St Petersburg*, *supra* note 32.

35 *Ibid*.

36 *Ibid*. See also Michael Newton & Larry May, *Proportionality in International Law* (Oxford: Oxford University Press, 2014) ("the idea that superfluous and unnecessary suffering are to be prohibited constitutes only the most minimal part of what *jus in bello* proportionality has meant" at 72).

possible number of men");[37] the ambition of the Declaration, rather, was on the administration of permissible *injury* to enemy forces in the course of combat,[38] with the decision taken that the explosive projectiles in question had somehow overstepped *that* particular mark.

On the approach to *Additional Protocol I*, one realizes that there are two framing devices used to bring the principle of proportionality alive and invest it with some meaning: Article 51 itself appears in Part IV of the Protocol, which deals with the civilian population and appears under the rubric of "protection of the civilian population."[39] The relevant provision in our sights—Article 51(5)(b)—appears soon after Article 48, which announces the "basic rule" of distinction that "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[40] One is struck by the robustness of the language that is used therein; the enhanced rhetoric of the command ("shall at all times") is immediately repeated and reinforced ("shall direct their operations only against military objectives"). This is the first framing device, very much concerning the civilian population, which we will turn to in greater detail in the next section.

Less explicit, but no less real, is the second framing device: Article 51(5)(b) goes on to address "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof,"[41] with the implication that the attack in question must have already satisfied the basic rule of distinction set out in Article 48. In other words, "proportionality is postulated upon the principle of distinction,"[42] as posited in Article 48 and then, as defined further in terms of what constitutes a military objective in accordance with Article 52(2) of *Additional Protocol I*:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[43]

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37 *Declaration of St Petersburg*, *supra* note 32. See also Newton & May, *supra* note 36 at 4. See also Dinstein, "Principle of Proportionality", *supra* note 17.

38 This is a point the International Court of Justice emphasized in *Nuclear Weapons Advisory Opinion*, *supra* note 11 ("humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve military objectives" at 257, para 78).

39 *Additional Protocol I*, *supra* note 13, art 51.

40 *Ibid*, art 48.

41 *Ibid*, art 51(5)(b). "Attacks" are defined as "acts of violence against the adversary, whether in offence or in defence" (*ibid*, art 49(1)).

42 Françoise J Hampson, "Proportionality and Necessity in the Gulf Conflict" (1992) 86 Am Society Intl L Proceedings 45 at 46. See also Bernard L Brown, "The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification" (1976) 10:1 Cornell Intl LJ 134 ("a military act cannot be proportionate unless there is some military necessity for the operation in the first place" at 136); Joseph Holland, "Military Objective and Collateral Damage: Their Relationship and Dynamics" (2004) 7 YB Intl Human L 35. Dinstein considers that proportionality is "an add-on to distinction" (Dinstein, "Principle of Proportionality", *supra* note 17 at 74).

43 *Additional Protocol I*, *supra* note 13, art 52(2); Bothe, Partsch & Solf, *supra* note 15 at 347.

That relation with the chosen military objective is central to any understanding of proportionality within international humanitarian law: proportionality itself is not engaged when "[t]he civilian population as such, as well as individual civilians" are made "the object of attack" as this practice has already been forbidden by virtue of Article 51(2).[44] Proportionality thus helped institutionalize a law of and for excess in relation to the destruction, capture or neutralization of any military objective; it serves as a necessary mechanism for comprehending and computing the scope of incidental injury following through from an attack (otherwise known colloquially by the term of "collateral damage").[45]

Structurally, it could be said that there is a discrete chronological ordering of the principles at work for combatants in the Declaration (where the principle of distinction forms the context for the operation of the principle of unnecessary suffering) and for civilians in *Additional Protocol I* (where the principle of distinction forms the context for the operation of the principle of proportionality). Furthermore, a step further back in time reveals traces of this line of thinking that came to inform the 1923 *Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare*[46]—never formally adopted, of course, but useful for present deliberations even so.[47] There had been in these *Hague Draft Rules* a "division of the theatre of war into two parts,"[48] with Article 24(3) concerning the "bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces,"[49] and Article 24(4) dealing with "the immediate neighbourhood of the operations of land forces."[50] The reason for this division was that, with respect to the former context, where military objectives were so situated "that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment,"[51] as opposed to the latter context (where the *Hague Draft Rules* provided that "the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to

44 *Additional Protocol I*, *supra* note 13 ("[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited," art 51(2)).

45 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 4th ed (Cambridge: Cambridge University Press, 2022) at 173 [Dinstein, *Conduct of Hostilities*]. Note, though, the observation of Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994) ("[c]ollateral damage was a useful, ambiguous way of describing [damage incidental to artillery bombardments of military targets]: a technical-sounding term of art, suggestive of value-free science; but at the same time speaking plainly to those who were willing to get the message that this damage was not useless" at 202).

46 19 February 1923, Cmd 2201 [*Hague Draft Rules*].

47 Judith Gail Gardam regards the *Hague Draft Rules* as making "a significant contribution to the development of the modern rule of proportionality" (Judith Gail Gardam, "Proportionality and Force in International Law" (1993) 87:3 AJIL 391 at 400). See also Dinstein, *Conduct of Hostilities*, *supra* note 45 at 169.

48 Heinz Marcus Hanke, "The 1923 Hague Rules of Air Warfare—A Contribution to the Development of International Law Protecting Civilians from Air Attack" (1993) 33:292 Intl Rev Red Cross 12 at 27.

49 *Ibid* at 17, citing *Hague Draft Rules*, *supra* note 46, art 24(3).

50 Hanke, *supra* note 48 at 18, citing *Hague Draft Rules*, *supra* note 46, art 24(4).

51 Hanke, *supra* note 48 at 17, citing *Hague Draft Rules*, *supra* note 46, art 24(3). Hanke is of the view that "[c]onscious negligence" was governed by "the so-called proportionality principle," which "was not expressly mentioned" in Article 24(3), possibly because the absolute prohibition on indiscriminate bombardment in that provision "also applied to conscious negligence" (*supra* note 48 at 26).

the danger thus caused to the civilian population").[52] Some of this reasoning percolated through to the 1956 ICRC *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*,[53] although, perhaps rather tellingly, these too never officially saw the light of day.[54]

It is now time to focus a little more intently on what Article 51(5)(b) of *Additional Protocol I* itself requires. The provision involves a direction to High Contracting Parties of the Protocol to weigh or balance two marked considerations: that of the "concrete and direct military advantage anticipated" from striking any military objective against the incidental loss of civilian life projected to ensue from the attack,[55] whatever that might be deemed to be.[56] So it is this balancing of considerations that is at the heart of what proportionality demands according to the law,[57] and it is only by bringing these two considerations into the same orbit of being that one can then make the required assessment of whether the expected incidental loss of civilian life is "excessive" in the sense used in Article 51(5)(b). Beyond that, *Additional Protocol I* really gives us not a flicker more of guidance.

52 Hanke, *supra* note 48 at 18, citing *Hague Draft Rules*, *supra* note 46, art 24(4). Hanke considers that, "probably unintentionally," proportionality "was mentioned only in the provision dealing with attack in the combat zone"—i.e. Article 24(4) (*supra* note 48 at 27). For Gardam, it is this provision that marked "the introduction of proportionality" (*supra* note 47 at 400). See also Christiane Wilke & Helyeh Doutaghi, "Legal Technologies: Conceptualizing the Legacy of the 1923 *Hague Rules of Aerial* Warfare" (2024) 37:1 Leiden J Intl L 88 at 97–98. See also J M Spaight, who argues that, in this part of the provision, "stress is properly laid upon the necessary relation between the importance of the military concentration and the responsibility of the bombing air force for resultant damage to civilians" (*Air Power and War Rights* (London: Longmans, Green and Co., 1924) at 215).

53 ICRC, September 1956 [1956 *Draft Rules*]. I am thinking in particular of Article 8(b) on precautions to be taken in the planning of attacks, which specified that the person responsible for ordering or launching an attack "is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated" (*ibid*, art 8(b)).

54 While alert readers will be sensitive to the evidential value of these developments for any customary rule, it has been observed that:

> [The] debate [concerning whether or not the rule of proportionality was a customary rule of law applicable in armed conflicts] is pointless because whether or not proportionality is formally embodied in customary law, it is a logically necessary part of any decision making process which attempts to reconcile humanitarian imperatives and military requirements during armed conflict. The reconciliation requirement is widely recognized.

William J Fenrick, "Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives" (2009) 27:2 Windsor YB Access Just 271 at 277. See also Bothe, Partsch & Solf, *supra* note 15 ("[t]he principle of proportionality is inherent both in the principles of necessity and humanity upon which the law of armed conflict is based" at 350).

55 Hampson has written that "the balancing factor is the incidental loss of civilian life and damage to civilian property caused by the *attack*, not by the choice of target. An argument based on cumulative effects involves balancing competing considerations; it is not of a threshold type" (*supra* note 42 at 51 [emphasis in original]).

56 This has been regarded as "proportionality *stricto sensu*" by Amichai Cohen & Yuval Shany (Amichai Cohen & Yuval Shany, "A Development of Modest Proportions: The Application of the Principle of Proportionality in the *Targeted Killings* Case" (2007) 5:2 J Intl Crim Justice 310 at 316).

57 It has been reliably said of *Additional Protocol I* that "the nature of [the] proportionality requirement" is that it involves "a balance to be struck" (as opposed to the definition of a military objective, which "require[s] a standard to be met") (Hampson, *supra* note 42 at 49). Also, "[w]hat proportionality challenges is the balance between that [military] advantage and the harm suffered by civilians from the attack" (*ibid* at 46).

At first glance, one may form the view that Article 51(5)(b) presents "a reasonable and sensible yardstick"[58] against any temptation to destroy, capture, or neutralize a given military objective without any care as to consequence or let as to execution. On closer inspection, however, the provision empanels together two rather unruly propositions—the incidental loss of human life that is *expected* and the concrete and direct military advantage that is *anticipated* from the attack—into some semblance of an equation designed to compute whether the incidental loss of human life should be regarded as excessive or not.[59] Read in a less charitable light, the formulation emerges as a compound of problematic predicates of "dissimilar considerations" one could say,[60] neither shedding any clarifying light on the other,[61] but only a loose sense of what is intended overall: "[a]s the two sides of the equation cannot be quantified," it has been contended, "it seems that only an obvious imbalance can be considered 'disproportionate' or 'excessive.'"[62]

That said, it was the sealing into place of some mechanism at all that eventually carried the day, with the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) admitting that "the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation."[63] And it was the steady tease of hypotheticals that helped make it so: during the deliberations for *Additional Protocol I*, Canada had, for example, expressed concern for the situation where "a single civilian near a major military objective whose presence might deter an attack,"[64] whereas the United Kingdom was of the view that "it was difficult to visualize an attacker who would not carry out an assault upon an entrenched adversary because of the presence of one or two civilians."[65] Many decades hence, let us recall that President Emeritus Aharon Barak, in the *Targeted Killings* case before the High Court of Justice of

58 Yoram Dinstein, "The Laws of War in the Air" (1981) 11 Israel YB Human Rights 41 at 59. See also Steven Erlanger, "Civilian Dead Not Sole Issue in Law of War", *The New York Times* (14 December 2023) ("it is a matter of determining whether, at the moment the decision to launch any attack is made, the expected military advantage outweighs the expected harm to civilians once feasible measures are taken to reduce it" A1, A15).

59 Richard Baxter was of the opinion that the formulation involved "comparing two things for which there is no standard of comparison" (see R R Baxter, "Criteria of the Prohibition of Weapons in International Law" in Horst Ehmke et al, eds, *Festschrift für Ulrich Scheuner* (Berlin: Duncker & Humblot, 1973) 41 at 46).

60 Therefore, the resulting assessment is "not an exact science" (Dinstein, *Conduct of Hostilities*, *supra* note 45 at 182). For Cohen and Zlotogorski, these are "two cumulative conditions" (*supra* note 26 at 4). For Cannizzaro, "the balance must be struck among interests of equal rank" (Cannizzaro, "Proportionality in Armed Conflict", *supra* note 26 at 335). Further, these are "two competing and equally ranking rights" (*ibid* at 336).

61 There is a remark to the effect that, at the Diplomatic Conference which produced the Additional Protocols, "criticism was directed particularly at the imprecise wording and terminology" in this provision (see Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC & Martinus Nijhoff Publishers, 1987) at 625). Hays Parks has remarked that "[b]y American domestic law standards, the concept of proportionality as contained in Protocol I would be constitutionally void for vagueness" (*supra* note 25 at 173).

62 Bothe, Partsch & Solf, *supra* note 15 at 351, n 30. These authors admitted anon that "[d]espite the impossibility of quantifying the factors of the equation, a plain and manifest breach of the rule will be recognizable" (*ibid* at 352).

63 Sandoz, Swinarski & Zimmermann, *supra* note 61 at 626. However, the text does go on to state that "[i]n such situations the interests of the civilian population should prevail" (*ibid*).

64 Howard S Levie, ed, *Protection of War Victims: Protocol I to the Geneva Conventions* (New York: Oceana Publications, 1980) vol 3 at 134.

65 *Ibid* at 140. For further consideration of this debate, consider Brown, *supra* note 42 at 138–40.

Israel in December 2006, invoked the "ordinary case of a combatant or terrorist sniper who is shooting at soldiers or civilians from the balcony of his home. Shooting at him will be proportionate," he reasoned, "even if as a result an innocent civilian who lives next to him or who passes innocently next to his home is hurt. This is not the case if the house is bombed from the air and dozens of residents and passers-by are hurt,"[66] he intoned.

For President Emeritus Barak, "[t]he difficult cases are those that lie in the area between the extreme examples,"[67] and there is no doubt that, with its equation readily in tow, *Additional Protocol I* hoped to break the deadlock on the hard cases, imparting forward the logic sourced from the extreme examples we encountered just moments ago. We might therefore regard the concept of a "military objective" as constituting something of a permissible or enabling function for attacking forces, but evidently that does not or can not entail a green light to untold or endless killing. This is where the principle of proportionality was meant to come into its own and radiate singularity of purpose: its controlling or restraining function acting as a break on the freedom to ruin, with Article 52(2) envisaging a range of possibilities for military objectives (note the spectrum intimated by their "total or partial destruction, capture or neutralization"[68] in a suggestive doff to the broader framework presented in *Additional Protocol I*). Taking all of this on board, it should be clear that the principle of proportionality was not designed to protect against *all* loss of civilian life; it was not even animated by the prevention of incidental loss of civilian life.[69] Its prescription is, in point of fact, against *excessive* incidental civilian losses,[70] and the latitude afforded to the attacking State in the first instance in making this calculation—we shall say more on this as the argument evolves—suggests that we are more in the remit of a "principle" rather than a "rule."[71]

III. The Civilian Population: From Invisibility to Divisibility

For the second component of my lecture, it is important to return in greater detail to the other framing device summoned for the principle of proportionality, namely, the civilian population itself. Oddly for international humanitarian law, no civilian population is mentioned in the targeting rules contained in one of the earliest iterations of the law, that of the *Regulations concerning the Laws and*

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66 *The Public Committee Against Torture in Israel v Government of Israel* (2006), HCJ 769/02 at para 46, [2006] 2 Israel L Reports 459 (Israel, High Court of Justice) [*Committee Against Torture v Israel*]. See also Kristen E Eichensehr, "On Target? The Israeli Supreme Court and the Expansion of Targeted Killings" (2007) 116:8 Yale LJ 1873 at 1879.

67 *Committee Against Torture v Israel*, *supra* note 66 at para 46.

68 *Additional Protocol I*, *supra* note 13, art 52(2).

69 Dinstein, *Conduct of Hostilities*, *supra* note 45 at 176–77.

70 Sandoz, Swinarski & Zimmermann use "extensive" (*supra* note 61 at 626); for Article 8(2)(b)(iv) of the 1998 *Rome Statute*, it is "clearly excessive" (*supra* note 28). See Dinstein, *Conduct of Hostilities*, *supra* note 45 ("it is not certain what the introduction of the additional adverb 'clearly' accomplishes here" at 179). Dinstein also distinguishes between "accidental" and "incidental" losses (*ibid* at 173).

71 See the discussion accompanying note 26.

Customs of War on Land (the "*Hague Regulations*") annexed to *Convention (IV) Respecting the Laws and Customs of War on Land* of October 1907; all we are given in the coolly detached language of Article 25 of the *Hague Regulations* is that "[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."[72] Who can imagine entire towns, villages, dwellings, or buildings existing *without* an accompanying civilian population, without a civilian complement? Where was the civilian—and where was the civilian population—in the mind's eye of the authors of those *Hague Regulations* when they chose to utter those words? We might therefore be disposed to remark that the civilian population was invisible in this aspect of the *Hague Regulations,*[73] or, perhaps better, that it was *rendered* invisible by those Regulations, as the reader is invited instead to fasten upon the operative word of the core provision and ask what it meant to be "undefended."[74]

There is no question that the textual representations have changed and have changed significantly in the intervening period: for starters, the principle of proportionality articulated in *Additional Protocol I* appears in a provision, Article 51, that, as its heading suggests, is explicitly devoted to the "protection of the civilian population."[75] Who or what, then, is the civilian population? According to Article 50 of *Additional Protocol I,* "[t]he civilian population comprises all persons who are civilians,"[76] as defined elsewhere in *Additional Protocol I.*[77] Let it be recalled, too, that Article 48 announces the basic rule of distinction "[i]n order to ensure respect for and protection of the civilian population and civilian objects,"[78] so the entire tonality is different from what had greeted us previously in the *Hague Regulations.* The civilian population is no longer elided or, perhaps, shielded from view. If these words are to be believed, the civilian population is (or should be) at the front and centre of any reckoning, of any decision-making process.

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72 *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, 205 CTS 277, art 25 (entered into force 26 January 1910). Article 25 is one of the three rules on targeting in the *Hague Regulations*: the others are Article 26 (on warnings) and Article 27 (on the sparing, "as far as possible, [of] buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes") (*ibid*, arts 26–27).

73 *Ibid*, art 25. To be sure, the "inhabitants" of an unoccupied territory are mentioned in Article 2 of the *Hague Regulations* (*ibid*, art 2); they emerge again in Article 39 in the context of armistices ("what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other") (*ibid*, art 39); and, then, in the context of occupied territory (*ibid*, arts 44–45, 52). Inhabitants also feature in the preamble, in the fifth recital ("these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants"), and the eighth recital (the Martens Clause) (*ibid*, Preamble). And there are other terms—"individuals," "private persons," "family" and "population"—also in use in "[t]his complex landscape" (see Elizabeth Salmón, "Who Is a Protected Civilian?" in Andrew Clapham, Paola Gaeta & Marco Sassòli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) 1135 at 1137).

74 See also Chris af Jochnick & Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War" (1994) 35:1 Harv Intl LJ 49 at 72. For the useful background behind this rule, see Spaight, *supra* note 52 at 196.

75 *Additional Protocol I*, *supra* note 13, art 51.

76 *Ibid*, art 50(2).

77 *Ibid* ("[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian" (art 50(1)).

78 *Ibid*, art 48.

Charting the evolution of the civilian and civilian population from this point of invisibility is an exercise that has been persuasively undertaken by Amanda Alexander, who has concluded that "when the First World War began, the laws of war contained no concept of a civilian population distinguished from the military and deserving of protection on that ground alone."[79] It was "[o]nce the civilian population was thus established as a target"[80] during that set of hostilities that it began to feature in legal form,[81] with the *Hague Draft Rules* providing early and distinct signs in this direction ("indiscriminate bombardment of the civilian population" was prohibited by way of Article 24(3),[82] while Article 24(4) considered the justification of bombardment of a military concentration "having regard to the danger thus caused to the civilian population").[83] Then, of course, came the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* in August 1949 (the "Convention"),[84] which accorded the same headline status and attention to civilian persons as it did for the more historically grounded idioms of prisoners of war (*Geneva Convention III*),[85] the wounded, sick, and shipwrecked members of armed forces at sea (*Geneva Convention II*),[86] and the wounded and sick in armed forces in the field (*Geneva Convention I*).[87]

Much of the commentary around the Convention has sought to highlight the "struggles to root the protection of civilians in a common identifiable ground,"[88] or even its "many restrictions,"[89] possibly

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79 Amanda Alexander, "The Genesis of the Civilian" (2007) 20:2 Leiden J Intl L 359 at 365. Relatedly, note how Best regards "[c]ollateral damage" as a "First World War concept" that was "found to be immensely useful in the Second World War" (*supra* note 45 at 202).

80 Alexander, *supra* note 79 at 360.

81 *Ibid*.

82 "General Report of the Commission of Jurists at the Hague" (1923) 17:4 AJIL 242 at 250.

83 *Ibid*; Alexander, *supra* note 79 ("the Rules mark the point when the traditional structure of international law began to fade away and the contemporary system, centred on the civilian, began to emerge" at 360).

84 *Geneva Convention IV*, *supra* note 12. There had been an attempt to provide protection for enemy civilians on the territory of a belligerent and civilians in the power of the enemy in occupied territories with the "Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who on Territory Belonging to or Occupied by A Belligerent," recommended by the XVth International Red Cross Conference at Tokyo in October 1934, but this did not advance to the final stage (see International Humanitarian Law Databases, "Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent. Tokyo, 1934." (last visited 14 May 2026), online: <ihl-databases.icrc.org> [perma.cc/4TRC-DN8S]).

85 *Geneva Convention III*, *supra* note 12.

86 *Geneva Convention II*, *supra* note 12.

87 *Geneva Convention I*, *supra* note 12 (coming forward from the 1864 *Geneva Convention*, see *supra* note 8). See also Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (Sydney: Maitland Publications Pty. Ltd., 1954) at 684; David G Burwell, "Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949" (1973) 14:1 Va J Intl L 123 at 125. Although common Article 3 in all four Conventions did address itself to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause"—a provision directed to civilians and to members of the civilian population even if not by name (see *Geneva Convention I*, *supra* note 12, art 3; *Geneva Convention II, supra* note 12, art 3; *Geneva Convention III*, *supra* note 12, art 3; *Geneva Convention IV*, *supra* note 12, art 3). See also Jann K Kleffner, "The Beneficiaries of the Rights Stemming from Common Article 3" in Clapham, Gaeta & Sassòli, *supra* note 73 at 433 ("[w]hile [c]ommon Article 3 does not mention, let alone define, the notion of 'civilian', the notion is a consequence of the implicit juxtaposition in [c]ommon Article 3 of those persons who are 'members of the armed forces' and those who are not" at 436).

88 Helen M Kinsella, *The Image Before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca, NY: Cornell University Press, 2011) at 116.

89 Jean S Pictet, "The New Geneva Conventions for the Protection of War Victims" (1951) 45:3 AJIL 462 at 475.

typified by the decision to present "protected persons" as the overarching categorization for the Convention ("those who, at a given moment and in any manner whatsoever, find themselves, in cases of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals").[90] In fairness, the civilian population belonging to an occupied territory does in fact make an appearance in the Convention some four times,[91] together with the civilian population of the occupying power,[92] but the wait had to be extended until *Additional Protocol I* for formal definitions of civilians and the civilian population to be stapled firmly into place.[93]

These references to the civilian population aside, what should be equally commanding of our attention about the Convention is that there are various moments where it was thought fitting to disassemble the civilian population into some of its respective parts: in other words, not to treat it as a singular and indivisible proposition for the entirety of the Convention.[94] This first becomes apparent in Article 14, which provides that "after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven."[95] Then, Article 16 states that "[t]he wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect."[96] And, according to Article 17, "[t]he Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas."[97] Granted, the supposed bite of that provision ("shall endeavour to conclude") does not inspire any great confidence, but that is in

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90 *Geneva Convention IV*, *supra* note 12, art 4(1). Article 4 does, however, state its deference to Article 13: "[t]he provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war" (*ibid*, art 13). For further discussion, see Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions* (Oxford: Oxford University Press, 2022) at 53–97.

91 See *Geneva Convention IV*, *supra* note 12: Article 55 (where "the requirements of the civilian population" must be taken into account in the requisition of foodstuffs, articles, or medical supplies available in the occupied territory (art 55(2)); Article 57 (on the making of "suitable arrangements" for the care and treatment of patients and for the needs of the civilian population for hospital accommodation upon the requisition of civilian hospitals (art 57(1)); and further in Article 57 (on the prohibition of requisitioning material and stores of civilian hospitals "so along as they are necessary for the needs of the civilian population" (art 57(2)); and Article 63 (regarding the treatment of activities and personnel of special organizations of a non-military character "for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues" (art 63(2)).

92 *Ibid* ("[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies" (art 49(6)).

93 *Additional Protocol I*, *supra* note 13. Reliant as it is on the definition of civilian population appearing in the 1956 *Draft Rules* (which, also, were never formally adopted): "the civilian population consists of all persons not belonging to one or other of the following categories: (a) Members of the armed forces, or of their auxiliary or complementary organizations; (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting" (*supra* note 53, art 4). Importantly, the 1956 *Draft Rules* were devised to apply to international and non-international armed conflicts alike (*ibid*, art 2(b)). See also Josef L Kunz, "The 1956 Draft Rules of the International Committee of the Red Cross at the New Delhi Conference" (1959) 53:1 AJIL 132.

94 Stone, *supra* note 87 at 687.

95 *Geneva Convention IV*, *supra* note 12, art 14(1).

96 *Ibid*, art 16(1).

97 *Ibid*, art 17.

many ways beside the point due to the pattern emerging from the Convention that all members of the civilian population could not be treated the same for all purposes, and that there was a felt need to tailor the protections of the Convention accordingly.[98]

To my mind, the most pronounced manifestation of this phenomenon occurs in Article 23 of the Convention which provides (amongst other things) that:

> [e]ach High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.[99]

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98 See *ibid.* For other provisions in this vein (*Geneva Convention IV*, *supra* note 12):

> Article 20(1): Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, shall be respected and protected.
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> Article 21: Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.
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> Article 24(1): The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.
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> Article 38: With the exception of special measures authorized by the present Convention, in particular by Articles 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:
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> 1) They shall be enabled to receive the individual or collective relief that may be sent to them.
> 2) They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
> 3) They shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.
> 4) If they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.
> 5) Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.
>
> Article 50(5): The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.
>
> Article 82(2): Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them.
>
> Article 89(5): Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.
>
> Article 132(2): The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

99 *Ibid*, art 23(1).

Here, within a single provision of the Convention, we see the differential opening up in the arrangements made for humanitarian consignments "to save certain categories of civilian from the unfortunate consequences of the blockade," with the *Commentary to Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (1958) reflecting that "the categories in question being the most vulnerable and most worthy of protection and assistance."[100]

So, it will be observed from the first sentence of Article 23 that "free passage" is assured "of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party" to "civilians of another High Contracting Party, even if the latter is its adversary,"[101] whereas the second sentence confines the "free passage of all consignments of essential foodstuffs, clothing and tonics" to those intended "for children under fifteen, expectant mothers and maternity cases."[102] The Convention, having continued the tradition of extending protection to "fresh categories of war victims,"[103] thought it apposite to variegate the protections within this constituency depending on perceived degrees of vulnerability or, as it is put elsewhere in the *Commentary to Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, "weakness"[104] or the "weaker categories of the civilian population."[105] We might then contend that the invisibility of the civilian population in the *Hague Regulations* has gradually been supplanted by its increasing visibility—but, also, as *Geneva Convention IV* has made plain on more than one occasion, and as *Additional Protocol I*[106] and *Additional Protocol II*[107] have shown in their respective provisions, its divisibility, anchoring and modifying of laws for those deemed "particularly deserving of protection."[108]

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100 Oscar M Uhler et al, *Commentary to Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958) at 179. See also Sandoz, Swinarski & Zimmermann, *supra* note 61 at 652, 1456.

101 *Geneva Convention IV*, *supra* note 12, art 23(1).

102 *Ibid*. See also Uhler et al, which observed that the "distinction is based on military considerations" and that consignments of medical and hospital stores and objects necessary for religious worship "cannot be a means of reinforcing the war economy and can therefore be sent to the civilian population as a whole" (*supra* note 100 at 180). But see Dinstein, *Conduct of Hostilities*, where the author remarks that Article 23 is "drastically limited in scope," since "[t]here is patently no requirement of letting through supplies of food and clothing to the civilian population in its totality" (*supra* note 45 at 291).

103 Pictet, *supra* note 89 at 462.

104 Uhler et al, *supra* note 100 at 122 (in respect of Article 14).

105 *Ibid* at 140 (in respect of Article 17).

106 See *Additional Protocol I*, where Article 76 refers to the protection of women, and Article 77 references the protection of children (*supra* note 13, arts 76–77). Although it should be observed that not all references made to the population are to the *civilian* population. Article 55(1), for instance, prohibits "the use of methods or means of warfare which are intended or may be expected to cause [widespread, long-term, and severe] damage to the natural environment and thereby to prejudice the health or survival of the population" (*ibid*, art 55(1)). According to Sandoz, Swinarski & Zimmermann, "[the] omission [of the qualifying adjective 'civilian'] is deliberate; it serves to emphasize the fact that damage caused to the environment may continue for a long time and affect the whole population without any distinction" (*supra* note 61 at 663). Further, the "population" also features in *Additional Protocol I*: Article 59(2)(c) on non-defended localities, Article 60(3)(c) on demilitarized zones, and Article 85(4)(a) on repression of breaches in the context of belligerent occupation (*supra* note 13, arts 59(2)(c), 60(3)(c), 85(4)(a)).

107 Article 13(1) of *Additional Protocol II* provides that "[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations" (*supra* note 13, art 13(1)). But see Article 4(3) on fundamental guarantees for children (*ibid*, art 4(3)) and Article 6(4) on penal prosecutions (removing the death penalty on persons who were under the age of eighteen years at the time of the offence and prohibiting its use against pregnant women and mothers of young children) (*ibid*, art 6(4)).

108 Uhler et al, *supra* note 100 at 126.

IV. Some Thoughts on Proportionality in Practice

In this, the penultimate section of our analysis, some thought does need to be given to two operational challenges concerning the principle of proportionality and how it is or should be put into practice. The first of these concerns the difference in proportionality applied as a matter of international humanitarian law as opposed to its function under the *jus ad bellum*; it shall be argued that, once it is recognized that there are multiple iterations of proportionality within the discipline of public international law,[109] or that proportionality can be said to operate at different levels or contexts, there is some utility in the juxtaposition of these contexts so as to better understand what computations are intended in a given situation. The second concern relates to the infrastructure that has been designed or developed to facilitate the task of proportionality within international humanitarian law—that effectively allows the facts on the ground to be harnessed toward some kind of conclusion, some kind of closure. This is not made all that explicit by international humanitarian law it must be said, but it is useful even so to have some sense of the manner in which the actions, argumentation, and evidence of States is thus adjudicated.

First: turning to proportionality under international humanitarian law as opposed to the *jus ad bellum*, where the study in contrasts will hopefully cast a shard of clarification as to the task ahead of us.[110] A preliminary rider should be made, though, that, within international humanitarian law, proportionality is not encountered with respect to targeting decisions and to targeting decisions alone: it also possesses an important history in the regulation of belligerent reprisals, where it measures the response that is taken against some "preceding illegality, not to such future illegal acts as the reprisal may (or may not) prevent."[111] So, in marking out its function in this way, Frits Kalshoven has been eager to underscore the flexibility involved in that calculation, arguing that "proportionality in this context means the absence of obvious disproportionality, as opposed to strict proportionality."[112] Less about precision (hence "strict proportionality") and more about some mechanism of accountability for the response eventually taken against the preceding (and, indeed, precipitating) illegality, a "certain freedom of appreciation" is accorded to belligerents by virtue of the institution of belligerent reprisals,[113] with

109 On this point, see especially Newton & May, *supra* note 36 at 33 (on "a multiplicity of meanings"). See also, generally, Thomas M Franck, "On Proportionality of Countermeasures in International Law" (2008) 102:4 AJIL 715 at 718–19 (writing of "The Proportionality Universe").

110 Proportionality is, indeed, "an imperfect tool" (see Michael A Newton, "Reframing the Proportionality Principle" (2018) 51:3 Vand J Transnat'l L 867 at 873). See also Geoff Corn, "The Disproportionate Confusion About Proportionality" (26 October 2023), online (blog): <sites.duke.edu> [perma.cc/DX7R-P8YX].

111 Frits Kalshoven, *Belligerent Reprisals*, 2nd ed (Leiden/Boston: Martinus Nijhoff Publishers, 2005) at 341.

112 *Ibid* at 341–42.

113 *Ibid* at 342. See also Rule 145 of the ICRC Study on Customary International Humanitarian Law (Henckaerts & Doswald-Beck, vol 1: Rules, *supra* note 17 ("[r]eprisal action must be proportionate to the violation it aims to stop" at 517)).

proportionality said to introduce a "requirement of reasonableness" into the overall reckoning.[114] It is for this reason that it has been maintained that "the weigh scales to be used" in the measurement of proportionality in this context are thus "completely different."[115]

In terms of the laws of the *jus ad bellum*, these are a logically prior series of postulates that address the circumstances of when a state can initiate force internationally (e.g., in accordance with their inherent right of self-defence or, perhaps, pursuant to some right of humanitarian intervention). They are, in a sense, the laws applicable immediately prior to the occurrence of an (international) armed conflict as it were and include the principles of necessity and proportionality. These principles have conditioned the lawful exercise of the right to self-defence ever since they were set down by U.S. Secretary of State Daniel Webster during the famous *Caroline* correspondence of 1838 to 1842.[116] In *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* in June 1986, the International Court of Justice in fact referred to them as "the canons of necessity and proportionality,"[117] and, a decade or so later, in July 1996, in its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the Court concluded that "[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law."[118]

It was in a letter dated April 1841 that Secretary Webster articulated his formulation for the right of self-defence, where he stipulated that, first and foremost, "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" would need to be demonstrated by the self-defending State,[119] and, then, that "the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[120] Secretary Webster insisted that "nothing unreasonable or excessive" was to be done by way of self-defence,[121] words essentially directed at the overall scale of the response—in other words, the quantum of violence when viewed in

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114 Kalshoven, *supra* note 111 at 342.

115 Dinstein, *Conduct of Hostilities*, *supra* note 45 at 345.

116 Necessity and proportionality have indeed been stated to be "general principles of international law, with differing applications" (see Judith Gardam, "Necessity and Proportionality in *jus ad bellum* and *jus in bello*" in Laurence Boisson de Chazournes & Philippe Sands, eds, *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999) 275 at 275). See also Christopher Greenwood, "Self-Defence and the Conduct of International Armed Conflict" [Greenwood, "Self-Defence"] in Yoram Dinstein & Mala Tabory, eds, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1989) 273 at 273–74.

117 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14 at 122, para 237 [*Nicaragua v United States of America*].

118 *Nuclear Weapons Advisory Opinion*, *supra* note 11 at 245, para 41.

119 William R Manning, *Diplomatic Correspondence of the United States: Canadian Relations, 1784-1860*, vol 3: 1836-1845; Document Nos 1193-1853 (Washington: Carnegie Endowment for International Peace, 1943) at 145. For an excellent electronic resource of selected items from this correspondence, see the Avalon Project at Yale Law School, "The Webster-Ashburton Treaty 1842 and Associated Documents" (last visited 14 May 2026), online: <avalon.law.yale.edu> [perma.cc/DZ72-8DZ7].

120 Manning, *supra* note 119 at 145. For further discussion, see Michael Wood, "The Caroline Incident—1837" in Tom Ruys, Olivier Corten & Alexandra Hofer, eds, *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press, 2018) 5 at 8.

121 Manning, *supra* note 119 at 145.

its totality.[122] At least, this seems to be the same sense shared by Lord Ashburton, Secretary Webster's interlocutor in the correspondence as it drew to its close, when he engaged with this aspect of the framework set forth by Secretary Webster in a letter from July 1842:

> Some importance is attached to the attack having been made in the night and the vessel having been set on fire and floated down the falls of the river, and it is insinuated rather than asserted that there was carelessness as to the lives of the persons on board…The time of night was purposely selected as most likely to ensure the execution with the least loss of life, and it is expressly stated that, the strength of the current not permitting the vessel to be carried off, and it being necessary to destroy her by fire, she was drawn into the stream for the express purpose of preventing injury to persons or property of the inhabitants at Schlosser.[123]

Note in this excerpted passage Lord Ashburton's emphasis on "the attack" itself, on the very manner of its "execution," on "the least loss of life" suffered in consequence of the action taken and on the damage to the *Caroline*, fundamentally, on the holistic representation of what Great Britain did and what it implicitly did not do on that evening of December 29, 1837. We might also venture from what was said in the correspondence that, whereas the "necessity" of the action focused on the conditions regarding the initiation of the operation,[124] "proportionality" awaited to be adjudged right at the end of things—in other words, once the operation was all over, when all was said and done.[125] This, at least,

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122 But see Ian Brownlie, who was of the view that "the verbal formulas expressing the requirement in Webster's Note and elsewhere leave many problems unsolved" (Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963) at 261). See also the observation of Olivier Corten: "[P]roportionality invariably implies comparing the military action justified by self-defence with its essential objective, which is to repel an attack that is underway. Proportionality must not, however, be reduced to a simple comparison of the material damage caused" (Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, 2nd ed (Oxford: Hart Publishing, 2021) at 486).

123 Manning, *supra* note 119 at 769. This contribution has been described as an "ingenious reply" for Lord Ashburton was "able neatly to fit the facts into that framework of law prepared by Webster" (see RY Jennings, "The Caroline and McLeod Cases" (1938) 32:1 AJIL 82 at 89).

124 For, according to Secretary Webster, "[i]t will be for…[Her Majesty's Government] to show, also, that the…necessity of the moment authorized [the local authorities of Canada] to enter the territories of the United States at all" (see Manning, *supra* note 119 at 145).

125 But see the position of Rosalyn Higgins on the *Caroline* incident—which "does not really carry matters [on proportionality] much further forward" (Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 231).

is the prevailing interpretation to come forward from this exchange within the correspondence,[126] but it should be recalled that the principles were being fashioned in the context of an isolated and confined incident on the part of Great Britain.[127]

In terms of more recent impressions of the function of the principle of proportionality as far as the *jus ad bellum* is concerned, Christine Gray has written that "[p]roportionality relates to the size, duration, and target of the response," while admitting that "these factors are also relevant to necessity."[128] For Yoram Dinstein, it is "an approximation of the dimensions and effects of the response vis-à-vis the attack,"[129] so the essence seems to relate to the *extent* of force all told, and to the fact that it is the extent of force that is put into question by this metric.[130] And, for Thomas Franck, "the principle of proportionality imposes an inescapable constraint on the level of permitted force."[131] We might reasonably term this as "macroscopic proportionality" in view of the scale of calibrations thus envisaged,[132] following on from the articulated relation between the principles of necessity and proportionality,[133] and the supposed timing of assessment for each of these principles.[134] The relevant

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126 And so, Oscar Schachter has written that "[g]overnments, by and large, observe the requirement [of proportionality] when they are faced with isolated frontier attacks or naval incidents. The 'defending' state under attack generally limits itself to force proportionate to the attack; it does not bomb cities or launch an invasion. We tend to see such restraint generally as political or prudential, but that does not detract from its legal relevance" (Oscar Schachter, "The Right of States to Use Armed Force" (1984) 82:5 Mich L Rev 1620 at 1637).

127 Higgins, *supra* note 125 (distinguishing the situation of "when the armed attack is a sustained one, requiring prolonged and multiple responses" at 231). In the context of the discussion of the *Caroline* correspondence, there has also been reference to "an incidental transgression of…frontiers" (see DW Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958) at 60).

128 Christine Gray, *International Law and the Use of Force*, 4th ed (Oxford: Oxford University Press, 2018) at 159. In the *Caroline* conception, however, the function of necessity was to "authorize" force in the first instance; "proportionality" was to secure the legality of the action assuming the satisfaction of the principle of necessity. That said, in his formulation of April 1841, Secretary Webster did write that "the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it" (see Manning, *supra* note 119 at 145).

129 Yoram Dinstein, "Remarks on 'Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity'" (1992) 86 Am Society Intl L Proceedings 54 [Dinstein, "Remarks on Implementing Limitations on the Use of Force"] (though not applicable to "a full-fledged war of self-defense" in contrast to what are called defensive armed reprisals, where "their legality must be appraised by an *a posteriori* evaluation of the magnitude of force used by the state invoking self-defence as compared to that of the original armed attack" at 57). See also Yoram Dinstein, *War, Aggression and Self-Defence*, 6th ed (Cambridge: Cambridge University Press, 2017) at 251.

130 See Chris O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (Oxford: Oxford University Press, 2021) ("proportionality governs *how much* force is permissible" at 98).

131 Franck, *supra* note 109 at 720.

132 Terminologies tend to—and do, indeed—differ on this, for this has been referred to as "strategic proportionality" or the "strategic sense of proportionality" (see Ruth Wedgwood, "Proportionality and Necessity in American National Security Decision Making" (1992) 86 Am Society Intl L Proceedings 58 at 59) as against the "tactical doctrine," where "proportionality requires that a fighting force seek to minimize the number of civilian casualties, consistent with the need to accomplish an assigned military mission in the minimum length of time and with minimum friendly casualties" (*ibid*). To similar effect is Greenwood, "Self-Defence", *supra* note 116 at 279.

133 See *supra* notes 119–21.

134 See *supra* notes 124–25.

considerations therefore seem to speak to the quantitative evaluation of force,[135] and help explain some of the discussions surrounding Operation Desert Storm in January and February 1991—on whether the right of self-defence would have extended to cover the removal of President Saddam Hussein of Iraq from power beyond the rightful restoration of sovereignty to Kuwait.[136]

With these much more prolonged and complex operations, it is noticeable, though, how proportionality under the *jus ad bellum* has assumed something more of a qualitative dimension as well: writing in the wake of Operation Desert Storm, for instance, Judith Gardam has contended that proportionality "remains relevant throughout the conflict"[137]—a sure indication of the ongoing significance of quantitative (or what I have described here as macroscopic) proportionality. However, she did not stop there, for, in her view, proportionality also entails the making of a series of assessments at regular intervals during the operation itself:

> A state cannot assess proportionality at the time it is deciding on the appropriate response to an armed attack and then dispense with it. In the [G]ulf [C]onflict… many of the decisions involving the application of proportionality would have been taken at the planning stage of the campaign. The decision to use massive aerial bombardment before the ground attack, the decision to attack targets in Iraq and the actual choice of these targets—all involved consideration of whether the actions were justified to achieve the legal result, the withdrawal of Iraq from Kuwait. The need to assess proportionality, however, would not have ended there. Each time targets were selected, for example, the relationship between the destruction of the target or targets and the scope of collective self-defense would have required assessment.[138]

135 Assuming this was indeed achievable. R. R. Baxter registered his concern for proportionality under the *jus ad bellum*:

> Even if it were possible to state the rule of proportionality with some precision, it would still be a very difficult rule to apply, calling as it does for judgment, which is more of a political and a military character than of a legal character, about what action is called for to deal with the armed attack. The Security Council and the General Assembly have never attempted this task in the past, and it is doubtful whether they could be persuaded to do so in future.

RR Baxter, "The Legal Consequences of the Unlawful Use of Force under the Charter" (1968) 62 Am Society Intl L Proceedings 68 at 74.

136 Assuming, of course, that the operation was underwritten by the right of (individual and collective) self-defence rather than an authorization from the Security Council, which does seem to have occurred in Resolution 678 of November 29, 1990 (see Dinstein, "Remarks on Implementing Limitations on the Use of Force", *supra* note 129 at 56). For further discussion, see Christopher Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law" (1992) 55:2 Mod L Rev 153 at 165–67. See also David Kretzmer, "The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*" (2013) 24:1 Eur J Intl L 235 at 240. The reminder should be entered that that function of self-defence "is to preserve or restore the legal *status quo*, and not to take on a remedial or repressive character in order to enforce legal rights" (see Bowett, *supra* note 127 at 11).

137 Gardam, *supra* note 47 at 404.

138 *Ibid*.

To be clear, this analysis is without prejudice to the simultaneous application of international humanitarian law on targeting decisions (to which we shall return again shortly),[139] but there is no doubt about the *qualitative* hold intended for the principle of proportionality on this rendering, on the faithful dissection of each of the particulars of a given military campaign, including the geographic scope of the overall engagement.[140] We might adduce that there are hints of this reasoning afoot in some of the jurisprudence too—in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* in June 1986,[141] in *Case Concerning Oil Platforms* in November 2003,[142] and then again in *Case Concerning Armed Activities on the Territory of the Congo* in December 2005, where the International Court of Justice could not fail to observe "that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end."[143] In this exercise, it does seem to be a vital question determining where the work of the principle of necessity begins and where it ends—and how it actually coheres with the work intended for the principle of proportionality as posited under the *jus ad bellum*.

139 *Ibid* ("[i]n some cases, no doubt, the choice of targets raised questions as to whether the principle of proportionality in the law of armed conflict had been complied with"). See also James A Green & Christopher PM Waters, "Military Targeting in the Context of Self-Defence Actions" (2015) 84:1 Nordic J Intl L 3. I take note of Enzo Cannizzaro's observation that "legal scholarship tends to draw a clear-cut distinction between two different ways in which proportionality limits the use of armed force"—that of the *jus ad bellum* and the *jus in bello*—while admitting that the distinction between these "two notions" of proportionality "tends to blur in practice" (see Enzo Cannizzaro, "Contextualizing Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War" (2006) 88:864 Intl Rev Red Cross 779 at 781).

140 Or so maintains Greenwood, "Self-Defence", *supra* note 116 ("[t]he use of force in an area remote from the attack would be difficult to bring within the scope of self-defence" at 277). Note, too, the position of Schachter (*supra* note 126 at 1637–38):

> Geography may also be a significant factor in determining proportionality. An isolated attack in one place — say, in a disputed territorial zone — would not normally warrant a defensive action deep into the territory of the attacking state. However, the situation may change when a series of attacks in one area leads to the conclusion that defense requires a counterattack against the "source" of the attack on a scale that would deter future attacks.

In an interesting turn, when Schachter considers the question of counter-intervention in the event of civil war—or, more specifically, on "placing limits on counter-intervention" in this context—he regards the territorial limitation ("counter-intervention should be limited to the territory of the state where the civil war takes place") as separate and distinct from any operation of the principle of proportionality (which "calls for limits on the technological level of weapons used in a counter-intervention") (*ibid* at 1643–44).

141 See *Nicaragua v United States of America*, *supra* note 117 at 122, para 237, where the Court said:

> Whether or not the assistance to the *contras* might meet the criterion of proportionality, the Court cannot regard the United States activities … i.e., those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid.

142 Where the International Court of Justice said that "[t]he United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence" (see *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, [2003] ICJ Rep 161 at 187, para 51).

143 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of The Congo v Uganda)*, [2005] ICJ Rep 168 at 223, para 147.

Even assuming for a moment that these calibrations for qualitative and quantitative proportionality can ever be properly or fully made,[144] the discussion is nevertheless instructive for present purposes in distinguishing how the calculus of proportionality is designed to operate according to the terms of Article 51(5)(b) of *Additional Protocol I*,[145] and the much more granular computation implicated thereby. It is this that I wish to call *microscopic proportionality*, as the metric takes its essential cue from the identification and, then, the total or partial destruction, capture, or neutralization of a military objective—that repertoire of possibilities mentioned in Article 52(2) of *Additional Protocol I*[146]—which could well serve as a reminder to States to minimize the incidental loss of civilian life as they weigh in on their final decisions.[147] A relation is therefore established between the military objective in an extant set of hostilities and the consequence of its targeting, an order apart from what has just been laid bare for the *jus ad bellum*. And so, on this iteration of things, Dinstein has written as follows:

> [The] measurement of proportionality is linked to a concrete military operation. It has nothing to do with crunching cumulative numbers of civilian casualties or destruction on both sides of the aisle throughout the [armed conflict]. There is, therefore, no point in tallying how many civilians got killed or wounded — and what damage was inflicted on civilian objects — in the course of the armed conflict as a whole.[148]

This would be an outright denial of the rather specific balancing act projected by Article 51(5)(b) of *Additional Protocol I*,[149] and accepted as Rule 14 of the ICRC Study on Customary International Humanitarian Law.[150]

It is noticeable that the final report from an international meeting of thirty experts convened by the Université Laval and the ICRC in Quebec in June 2016 on proportionality and the conduct of hostilities[151] is littered with references to "attacks against military objectives,"[152] or to "a particular

144 In her analysis, Gardam remarks at one point that "the important issue of whether the coalition forces' response to Iraq's invasion of Kuwait was proportional has hardly been discussed" (*supra* note 47 at 392). This is so, but it is worth asking *why* it is so, for any diligent assessor would need a full tally of the force used (quantitative proportionality) and/or a full report card (qualitative proportionality).

145 *Additional Protocol I*, *supra* note 13, art 51(5)(b).

146 *Ibid*, art 52(2).

147 Dinstein, in fact, referred to "a targeting process" as "[a] crucial requirement, in addition to proper identification of a lawful target, is observing the principle of proportionality in assessing the collateral damage to civilians/civilian objects expected from an attack" (*Conduct of Hostilities*, *supra* note 45 at 175). See also Dinstein (*ibid*) at 119.

148 *Ibid* at 177–78. See also Dinstein (*ibid*) ("in that assessment, the expected collateral damage is balanced against the military advantage anticipated from the attack" at 345).

149 *Additional Protocol I*, *supra* note 13, art 51(5)(b).

150 Henckaerts & Doswald-Beck, vol 1: Rules, *supra* note 17 at 46.

151 Laurent Gisel, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law* (Geneva: ICRC/Université Laval, 2016).

152 *Ibid* at 5, 20. See also Dinstein, *Conduct of Hostilities*, *supra* note 45 ("the concrete and direct military advantage anticipated from an attack against a lawful target" at 181).

attack" against which proportionality is to be measured,[153] to the fact that "mental injury was not intended to be part of the assessment of the proportionality of *an* attack,"[154] to "the proportionality of *the* attack,"[155] to "where *the* attack is not expected to cause any civilian death, injury or damage outside the object to be attacked,"[156] and to the economic losses "tied to *a* particular attack and the destruction of a specific object."[157] We gain a keen appreciation of the necessary refinement of focus entailed by proportionality when invoked in this context, although it is true that the aspect of "definite military advantage"[158] contained in Article 52(2) holds meaning only insofar as one can account for "the significance of the attack's contribution to the objectives of the campaign strategy"[159]—to the *war aim*, if it can be so called.[160] That refinement of focus is spelt out in terms of the identification of individual targets:

> A type of evaluation [that] has the disadvantage…that it does not require either the cumulative effects of attacks on a particular type of target or the long-term effects on the civilian population to be taken into account. The principle of proportionality does not appear to fill that gap, since the balancing factor is the incidental loss of civilian life and damage to civilian property caused by the *attack*, not by the choice of target.[161]

All of this to the good, but now to our second and equally demanding operational concern: who gets to make the call on what is proportionate and what, ultimately, falls short of microscopic proportionality? What infrastructure (or set of infrastructures) exists within international humanitarian law to ensure that these normative arrangements are upheld at appropriate moments of an armed conflict?

In terms of the broader picture presented by *Additional Protocol I*, it is undeniable that there is a steady succession of legal questions therein—the process of identification of military objectives, to take one example; the taking of necessary precautions, to take just another—that must realistically be engaged by the belligerent party or parties in the first instance: it is they who will invariably need

153 Gisel, *supra* note 151 at 30, 36.

154 *Ibid* at 35 [emphasis added].

155 *Ibid* at 37 [emphasis added].

156 *Ibid* at 40 [emphasis added].

157 *Ibid* at 42 [emphasis added]. See also Gisel (*ibid*) ("the possibility of linking economic losses or displacement to a specific attack was seen as a key criterion").

158 *Additional Protocol I*, *supra* note 13, art 52(2).

159 Gisel, *supra* note 151 at 29. See also reference to an "overall plan" (*ibid* at 20).

160 But see *ibid* ("[t]he availability of replacement command posts was also said to diminish the advantage, except if the attack was part of an overall plan to take down all such command posts (in which case the cumulative harm to the civilian population caused by all these attacks would have to be considered)" at 20).

161 Hampson, *supra* note 42 at 50–51 [emphasis in original].

to determine whether their actions comport with conventional (and customary) humanitarian law.[162] It is they who will decide whether to move ahead with a suggested or planned action, to modify it in some way or to abandon it altogether in light of the totality of considerations set forth by international humanitarian law. And proportionality is an inescapable part of that complex; it cannot be suspended or even wished away as Article 51 of *Additional Protocol I* "indicates that proportionality is to be considered as only one piece, albeit perhaps the most prominent piece, of an interconnected mosaic of protections for the civilian population."[163]

However, the matter surely cannot be allowed to rest there—that is, on the satisfaction or the say-so of the attacking State,[164] as this would amount to an entire subversion of international humanitarian law and of the international legal process more generally.[165] It is for this reason that Enzo Cannizzaro has written of the difference between "objective proportionality" and "subjective proportionality" for plainly, he argued, "[t]here would be no use in requiring a state to consider humanitarian interests in the pursuit of its military objectives if the balance of interests could be struck according to the state's subjective perception."[166] Some mechanism for objective evaluation is therefore essential to ensuring the integrity and upkeep of the rule of law,[167] but what this is or may be is not at all apparent—at least, not immediately—from any committed reading of *Additional Protocol I*. There is no equivalent provision, for instance, to Article IX of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of December 1948,[168] concluded a matter of months before the Geneva Conventions themselves,[169] for the referral of "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment" of conventional law to the International Court

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162 Article 91 of *Additional Protocol I* does not hold back on this: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces" (*supra* note 13, art 91).

163 Newton, *supra* note 110 at 880.

164 To coin a phrase from Article 49(1) of *Additional Protocol I* (*supra* note 13, art 49(1)), which regards "attacks" as "acts of violence against the adversary, whether in offence or in defence."

165 It is this evaluation of claims that are made that seems to me to be essential in moving forward: see Antonio Cassese, "On Some Merits of the Israeli Judgment on Targeted Killings" (2007) 5:2 J Intl Crim Justice 339 ("[h]ow can one lay down well-defined standards for evaluating *ex post facto* the proportionate or disproportionate nature of damage caused to innocent civilians?" at 341). See also Newton & May, *supra* note 36 ("[p]roportionality functions as a tool for contemporaneous decision-making as well as an evaluative framework for the *post hoc* assessment of often-controversial decisions" at 33).

166 Cannizzaro "Proportionality in Armed Conflict", *supra* note 26 at 337.

167 This evaluation is not free from difficulty, though, in Cannizzaro's view (*ibid* at 340–41):

> A standard which requires states to adopt the best available practice is more easily complied with by states which possess the necessary technology. Yet it might seem inappropriate to assume that proportionality imposes conditions that cannot be complied with symmetrically by all belligerents. In order to be realistic, proportionality must impose requirements that can be met by every single state engaged in military action, and it should be based on a reasonable balance between the aim to protect civilians and the need to avoid exposure to excessive risk of military personnel.

168 *Genocide Convention*, *supra* note 9, art IX.

169 *Geneva Conventions I* to *IV* (*supra* note 12), all of which were adopted on August 12, 1949.

of Justice,[170] and that position has not changed with the adoption of *Additional Protocol I* in June 1977. Regularized interventions by an international court were simply not endorsed or envisaged as part of the institutional infrastructure of the Conventions going forward.[171]

Importantly, the Geneva Conventions provide, as their very first common article, that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention[s] in all circumstances,"[172] with a similar, overarching statement appearing much more recently in *Additional Protocol I*.[173] The High Contracting Parties to the Conventions and to *Additional Protocol I* as a whole (and not just the parties to any particular conflict) are thus engaged from the moment of the outbreak of hostilities, and while some doubt has been cast on the precise scope of this obligation,[174] the *Commentary to Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* insists that "[t]he proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally."[175] As for the *Commentary to Additional Protocol I*, it is the understanding that "each Party to humanitarian law instruments should examine the wide range of diplomatic or legal measures which can be taken to ensure respect for that law"[176]—and in turn, discharge their obligation to "respect and to ensure respect" for the laws contained in *Additional Protocol I*.[177] In point of fact, Article 89 of *Additional Protocol I* goes on to specify that "[i]n situations

170 *Genocide Convention*, *supra* note 9, art IX.

171 Though some attention was afforded to this point during the negotiation of the Geneva Conventions, with the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims adopting a resolution recommending that parties "endeavour to agree" to refer their disputes to the International Court of Justice (see Raymund T Yingling & Robert W Ginnane, "The Geneva Conventions of 1949" (1952) 46:3 AJIL 393 at 398).

172 See e.g. *Geneva Convention I*, *supra* note 12, art 1. Note, though, that in *Nicaragua v United States of America*, the International Court of Justice was of the view that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression" (see *Nicaragua v United States of America*, *supra* note 117 at 114, para 220). For critical engagement of this approach, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989) at 27–29.

173 See *Additional Protocol I*, *supra* note 13 ("[t]he High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances," art 1(1)). See also Rule 139 of the ICRC Study in Henckaerts & Doswald-Beck, vol 1: Rules, *supra* note 17 ("[e]ach party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control" at 495).

174 See especially Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit" (1999) 2 YB Intl Human L 3.

175 Uhler et al, *supra* note 100 at 16.

176 Sandoz, Swinarski & Zimmermann, *supra* note 61 at 37 (noting that "[l]eaving aside any bilateral or multilateral measures taken by States, which rarely become known, it should be pointed out that the organized international community has frequently and emphatically manifested its concern that humanitarian law should be respected" (see *ibid* at 36)). See also Knut Dörmann & Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations" (2014) 96:895/896 Intl Rev Red Cross 707 at 724.

177 See *Additional Protocol I*, *supra* note 13, art 1(1).

of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."[178]

On these terms, the High Contracting Parties therefore seem to assume the major share of active responsibilities for upholding the commitments of the Conventions and *Additional Protocol I*, and this may not seem altogether out of place in the decentralized international legal order where "[p]eer-group approval should not be underestimated as a counterweight to baser instincts and interests."[179] Indeed, Franck has observed how an "incipient, creative jurying process at work"[180] amongst States in the context of threats and uses of force "is no cause for pessimism,"[181] and we might have to expect something similar in respect of the operationalization of international humanitarian law.[182] But how are States, as High Contracting Parties to the Geneva Conventions and Additional Protocols,[183] to make their various appraisals of proportionality known? How *do* High Contracting Parties make their appraisals of proportionality known?

A word of caution may be in order at this point of proceedings as the fact that a belligerent State has not attracted the public censure or criticism from their peers for any behavioural lapses or transgressions is not to be read as conclusive evidence that no such censure or criticism has occurred in any shape or form. Much diplomatic traffic occurs behind closed doors or in the hushed privacy shared between chancelleries,[184] so it cannot be gainsaid what has transpired and what has not transpired from exchanges known to the public space. Bilateral communications are not always made into political spectacle or theatre.

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178 *Ibid*, art 89. A difference is intended between "grave breaches" and "serious violations" as Article 90 of *Additional Protocol I* (on the International Fact-Finding Commission) refers to "any facts alleged to be a grave breach as defined in the Conventions and this Protocol *or other serious violation of the Conventions or of this Protocol*" (see *ibid*, art 90(2)(c)(i) [emphasis added]).

179 Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002) at 187.

180 *Ibid*.

181 *Ibid*.

182 To be sure, Franck (*ibid* at 67–68) writes the following of a "quasi-jury":

> [C]onsisting of the United Nations' principal political organs—the Security Council and General Assembly—and its judicial organ (the ICJ). These, of course, in their appreciation of the facts are influenced by the global information network through which public opinion is informed and manifested. To these "quasi-jurors" a state taking countermeasures in self-defense must demonstrate that it has identified correctly the place from which it was attacked, that the authorities in that place deliberately, knowingly or recklessly permitted the attack to occur, and that the victim's response is proportionate, carefully calibrated to minimize casualties among the innocent, and concomitant with regard for the independence and territorial integrity of the state against which action is taken.

183 Note, however, that Rule 139 of the ICRC Study on Customary International Humanitarian Law stipulates that "[e]ach party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control" (see Henckaerts & Doswald-Beck, vol 1: Rules, *supra* note 17 at 495).

184 See especially Sir Daniel Bethlehem, "The Secret Life of International Law" (2012) 1:1 Cambridge J Intl & Comp L 23. For an excellent and detailed relation of such activity during the hostilities in Gaza, see David D Kirkpatrick, "The Enabler", *The New Yorker* (27 July 2026) 27.

At the same time, for any State to meaningfully undertake an analysis of the proportionality of others requires a dedicated and sustained following of information and especially of consequences, and some aspects of the public debate on this matter have inspired less confidence than others. To take one propitious example: the British Defence Secretary Grant Shapps was pointedly asked on national television in November 2023 whether he thought Israel had "gone too far in its response to the horror of what happened?"[185] His reply: "The UK believes strongly that Israel must act within international humanitarian law."[186] One can only marvel at how a *jus ad bellum* question was answered by reference to the entirely separate predicate of international humanitarian law—all the more reason for us to make the distinction between macroscopic proportionality and microscopic proportionality—but if politicians do choose to enter the legal fray in this way, they really should be prepared to give a better account of themselves and answer rather than deflect what has been asked of them. By his response to that question, is the Defence Secretary to be taken as saying that the United Kingdom does not believe that Israel must comply with the *jus ad bellum*, the law of the United Nations Charter? Why then make reference to international humanitarian law and only international humanitarian law in response to *that* question? Or was he thereby conceding that the United Kingdom believed that Israel was not acting in accordance with international humanitarian law? Why, then, make the statement that the United Kingdom "believes strongly" that Israel should act lawfully? Could it ever have been—and was it ever—otherwise?

To indulge some of the other practice, in May 2025, some seventeen months after the above exchange, David Lammy, the British Secretary of State for Foreign Affairs, made a statement to the House of Commons in which he argued that "the planned displacement of so many Gazans is morally unjustifiable, wholly disproportionate and utterly counter-productive" as "this is not the way to bring the hostages safely home."[187] The connection of the planned displacement as part of the response to October 2023, and its disproportionality in securing the endgame in the view of the United Kingdom, suggests that we are here in the grip of proportionality under the laws of the *jus ad bellum* (or macroscopic proportionality).[188] This statement occurred a day after a joint statement had been issued by Prime Minister Keir Starmer (United Kingdom), President Emmanuel Macron (France), and Prime Minister Mark Carney (Canada) in which they collectively stated that "Israel suffered a heinous attack on October 7. We have always supported Israel's right to defend Israelis against terrorism. But this escalation is wholly disproportionate."[189] This is not that distinct from what had been said by

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185 BBC, "Sunday with Laura Kuenssberg" (12 November 2023) at 00h:16m:36s, online (video): <youtube.com> [perma.cc/2LLB-9SHV].

186 *Ibid* at 00h:16m:48s.

187 David Lammy, "Israel and the Occupied Palestinian Territories: Foreign Secretary Statement, 20 May 2025" (Foreign Secretary Statement to the House of Commons on the Situation in Israel and the Occupied Palestinian Territories, 20 May 2025), online: <gov.uk/government/speeches> [perma.cc/3SVF-5PYL]. His statement was regarded as "Britain's strongest condemnation of Israel" since hostilities commenced in October 2023 (Steven Swinford, Alistair Dawber & Samer Al-Atrush, "UK Ready to Sanction Top Israelis Over 'Intolerable' Gaza Offensive", *The Times* [London] (21 May 2025) 1).

188 The fact that this came a paragraph after Foreign Secretary Lammy's claim that his Government "has always backed Israel's right to defend itself" confirms this (see Lammy, *supra* note 187).

189 Prime Minister's Office, 10 Downing Street & The Right Honourable Sir Keir Starmer KCB KC MP, Press Release, "Joint Statement from the Leaders of the United Kingdom, France and Canada on the Situation in Gaza and the West Bank" (19 May 2025), online: <gov.uk/government/news/> [perma.cc/5JB2-EFYZ].

Foreign Secretary Lammy, but it is the only time in the entire statement that proportionality was to surface and, once again, it would appear to be in the context of proportionality under the laws of the *jus ad bellum*.

Yet, there is no question of the handle these leaders had on international humanitarian law more generally, as their statement opened with the following two trenchant paragraphs:

> We strongly oppose the expansion of Israel's military operations in Gaza. The level of human suffering in Gaza is intolerable. Yesterday's announcement that Israel will allow a basic quantity of food into Gaza is wholly inadequate. We call on the Israeli Government to stop its military operations in Gaza and immediately allow humanitarian aid to enter Gaza. This must include engaging with the UN to ensure a return to delivery of aid in line with humanitarian principles. We call on Hamas to release immediately the remaining hostages they have so cruelly held since 7 October 2023.
>
> The Israeli Government's denial of essential humanitarian assistance to the civilian population is unacceptable and risks breaching International Humanitarian Law. We condemn the abhorrent language used recently by members of the Israeli Government, threatening that, in their despair at the destruction of Gaza, civilians will start to relocate. Permanent forced displacement is a breach of international humanitarian law.[190]

What is one to make of the relative silence in this statement to proportionality under international humanitarian law—relative that is, to the invocation of proportionality under the laws of the *jus ad bellum*? And relative, too, the understanding of "humanitarian principles" that these three leaders evidently relate? What place for proportionality—for microscopic proportionality—alongside the provision of essential humanitarian assistance to the civilian population and permanent forced displacement in the very vocal disapprobation made of Israel?

V. Proportionality and Operation Swords of Iron

To the final part of this lecture—and some thoughts on the application of the principle of proportionality as we have understood it in the above analysis with respect to the targeting decisions taken during Operation Swords of Iron, the "uncompromising war" declared by the Government of Israel in response to October 7, 2023 in order to "destroy Hamas's military capabilities and topple its regime

190 *Ibid*. See also James Shotter & David Sheppard, "Israel Warned on Risk of 'Pariah State' Status: Blockade Criticism Mounts with UK Freezing Trade Talks in Protest at Gaza Conflict", *Financial Times* [London] (21 May 2025) 6.

in the Gaza Strip."[191] Here, the overwhelming impression prior to the ceasefire made effective on January 19, 2025,[192] fixated upon the sustained intensity of the military response of Israel,[193] which had involved nearly 30,000 munitions into Gaza in the first seven weeks of hostilities—"more than in the next eight months combined"[194]—with more than 7,000 targets hit during the first nineteen days of action.[195] And then there were the inescapably high casualty levels: at one point, the Hamas-run health ministry set its running death toll at 47,283,[196] but that figure went on to surpass 60,000,[197] and, at the close of hostilities, it was said to be upward of 71,660.[198]

Speaking to his nation soon after the ground operation had got underway in October 2023, and reaching for the explanatory power of precedent, Israeli Prime Minister Benjamin Netanyahu said this:

> In 1944, the Royal Air Force bombed the Gestapo headquarters in Copenhagen — a perfectly legitimate target…But the British pilots missed and instead of the Gestapo headquarters, they hit a children's hospital nearby. And I think 84 children were harmed and burned to death. That is not a war crime. That is not something you blame Britain for doing.[199]

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191 Or so it is put on the record of The Knesset, "Swords of Iron War" (last visited 10 April 2026), online: <main.knesset.gov.il> [perma.cc/QA4G-VVG9] ("[i]n the first weeks, the warfare focused on thousands of strikes by the Israel Air Force against terrorist targets in the Gaza Strip").

192 Patrick Kingsley, "An Ambiguous Reprieve is Tenuous, Temporary and Fraught", *The New York Times* (16 January 2025) A8. However, hostilities resumed again in March 2025 (see Kingsley et al, "Israel Renews Gaza Attack", *supra* note 6).

193 See also Lauren Leatherby, "Big Bombs in Urban Areas Raise Civilian Toll in Gaza", *The New York Times* (26 November 2023) A1; "Destruction in Gaza", *The Economist* [London] (21 October 2023) 18.

194 According to Patrick Kingsley et al, "Israel Loosened Limits on Strikes, Multiplying Risks to Gaza Civilians", *The New York Times* (27 December 2024) A7 [Kingsley et al, "Israel Loosened Limits on Strikes"].

195 Patrick Kingsley, "How Israelis Justify Scale of Airstrikes", *The New York Times* (26 October 2023) A1. Here, Kingsley describes the bombing campaign as "one of the most intense of the 21st century" (*ibid*).

196 This is the figure available at the time of the lecture (see Agence France Presse, "Health Ministry in Hamas-Run Gaza Says War Death Toll At 47,283", *Barron's* (23 January 2025), online: <barrons.com> [perma.cc/EA8J-CQ8H]). In a separate rendering, around the same time, the Gaza Government Information Office claimed that the death toll had reached 61,709, inclusive of those missing and presumed dead (see "Deaths From Israel's Attacks on Gaza Close to 62,000 as Missing Added", *Al Jazeera* (3 February 2025), online: <aljazeera.com> [perma.cc/5MKW-ZW8D]).

197 By the time of the ceasefire of October 2025, the figure was put at 68,229—again by the Hamas-run Health Ministry (see Sean Seddon, Wahiba Ahmed & Anna Foster, "'Fatal Combination' of Disease, Injuries and Famine in Gaza is Generational Crisis, WHO Tells BBC", *BBC News* (21 October 2025), online: <bbc.co.uk> [perma.cc/87QE-Y653]). See also Lydia Polgreen, "What Happened in Gaza Might Be Even Worse Than We Think", *The New York Times* (26 October 2025) SR7.

198 And apparently regarded by Israel's military as "broadly accurate": Emma Graham-Harrison, "Israeli Military Accepts 70,000 Death Toll from War in Gaza is Accurate", *The Guardian* [London] (31 January 2026) 9.

199 Quoted in Michael Crowley & Edward Wong, "Israelis Invoking Toll of U.S. Wars as Moral Shield", *The New York Times* (8 November 2023) A8.

Prime Minister Netanyahu relied on Operation Carthage from the Second World War to forge his abiding message for his audience,[200] to furnish a convenient parallel for what was occurring in the present. Setting aside the complexity of human error involved in that earlier incident,[201] the compartmentalization of violence and its requisite consequences in this way does seem to be precisely what microscopic proportionality entails and what it is in fact demanding. And Israel, as a party to the Geneva Conventions but to neither of the Additional Protocols,[202] understands this, because in late December 2023, it admitted that two strikes undertaken on the Al Maghazi neighbourhood of Gaza had also hit "additional buildings" near preordained targets, "which likely caused unintended harm to additional uninvolved civilians."[203] Israel expressed regret for the development in which dozens were reported to have been killed.[204] The concern here related not just to the scale or extent of hostile activity but to an improper choice of weaponry[205] and the use of 2,000-pound bombs in densely populated areas.[206] Importantly, microscopic proportionality requires precisely this order of tally; it is definitively not a comparison of the ratio of killed combatants and killed civilians to hostilities recently or long since passed.[207] It involves a drawing down from global aggregates produced at the outset of this section and insists upon a certain intimacy with the violence committed in respect of each and every target—a movement from the general to the granularities of the particular.

The context in which these figures have arisen is not in any event in any doubt: shaken by the extensive horrors of October 7, 2023, Israel set to vastly expand its compass of targets to pursue not only senior Hamas commanders, arms depots, and rocket launchers that were the focus of earlier campaigns, but now, also to the lowest-ranking fighters of the organization.[208] This was consonant with the stated aim of Israel's response.[209] And, to that end, within hours of the attack, Israel's military leadership had provided the authority to risk killing up to twenty civilians with each target, in a departure from

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200 Operation Carthage had in fact occurred on March 21, 1945—not in 1944 (see Damien Hare, "Operation Carthage: Technology May Advance, But the Friction of War Remains" (11 July 2019), online: <sldinfo.com> [perma.cc/9PWR-2DM8]). Furthermore, it involved a school and not a hospital in which some 86 children and 18 adults are believed to have perished (*ibid*). But see Klaus Velschow, "The Bombing of the Shellhus" (29 October 2013), online: <milhist.dk> [perma.cc/C5BX-J5BX] (reporting the death of 123 civilians of whom 87 were children). This became the subject of a Danish film, *The Shadow in My Eye* (Prague, CZ: Miso Film, 2021).

201 See Hare (*supra* note 200) who observes that "[f]or all its accuracy, Operation Carthage demonstrated a problem that remains no less relevant now – that high explosives, once committed to a target, can kill and maim indiscriminately."

202 Part of the evidence adduced for Rule 14 of the ICRC Study of Customary International Humanitarian Law derives from Israel's Law of War Booklet and its Manual on the Laws of War (see Henckaerts & Doswald-Beck, vol 2: Practice, *supra* note 15 at 301–02).

203 In a statement from the Israel Defense Forces, see Aaron Boxerman, Isabel Kershner & Thomas Fuller, "Israel Admitting Fault in 2 Strikes Hitting Civilians", *The New York Times* (29 December 2023) A1.

204 *Ibid*.

205 *Ibid* (reporting on photographs "show[ing] a gray concrete building gaping with dark holes where rooms used to be").

206 *Ibid*. See also Robin Stein et al, "One of Israel's Most Destructive Bombs, Dropped in So-Called Safe Areas", *The New York Times* (17 January 2024) A6.

207 This comparison of the ratio of harms is erroneously advocated for by Mark Regev, a spokesman for the Israeli Government (see Crowley & Wong, *supra* note 199 at A8).

208 Kingsley et al, "Israel Loosened Limits on Strikes", *supra* note 194 at A1.

209 The Knesset, *supra* note 191.

previous practice.[210] We can add to this the testimony of six intelligence officers who have described the use of Lavender, an AI system deployed for accelerated targeted selection in that campaign,[211] so perhaps it is small wonder why the figures are where they are—and why the accumulations are so especially forbidding. After all, Hamas has been described as "a paramilitary movement dispersed among the civilian population like needles in a haystack. It can be destroyed, if at all, only by burning the entire haystack. Yet every sprig of straw in the haystack is a human life."[212]

In the remaining moments of this lecture, it is not my intention to apply the framework on microscopic proportionality to each set of facts on the ground, at least as they have been generally accepted or understood. That shall have to be left for another occasion. Rather, my thought as we set to that exercise is that we should be alert to any phenomena or patterns emerging from the bigger picture of human casualties all told. And I say this fully aware of the sensitivity of statistics made available in the extreme circumstances of warfare (here, for example, I have made reference to those that have been presented by the Palestinian Ministry of Health).[213] However, in an important intervention published in *The Lancet* in January 2025, a study indicated that the death toll in Gaza during the first nine months of hostilities was about 41 per cent higher than the numbers disseminated by the Palestinian Ministry of Health;[214] that is an alarming fact if it is true, but it speaks to the compound challenges against securing the accuracy of figures in real time when hostilities are involved. That, at least, is one take on accounting for the discrepancy.[215]

More disturbing still is the finding in the study that women, children, and people over the age of 65 accounted for a staggering 59.1 per cent of deaths "due to traumatic injury."[216] It will be recalled that these three constituencies—women, children, and those aged 65 or older—coincide with "certain categories of civilian" deemed the most vulnerable by *Geneva Convention IV*,[217] and which necessitated the divisibility of the civilian population described earlier in my analysis. That, in turn, does prompt the question of whether there may be realities not borne by proportionality analysis—by microscopic

210 Kingsley et al, "Israel Loosened Limits on Strikes", *supra* note 194 ("[i]n previous conflicts with Hamas, many Israeli strikes were approved only after officers concluded that no civilians would be hurt. Sometimes, officers could risk killing up to five civilians and only rarely did the limit rise to 10 or above, though the actual death toll was sometimes much higher" at A1).

211 Yuval Abraham, "'Lavender': The AI Machine Directing Israel's Bombing Spree in Gaza", *+972 Magazine* (3 April 2024), online: <972mag.com> [perma.cc/V37B-DLE3].

212 Jonathan Sumption, "A Question of Intent", *The New Statesman* [London] 153:5823 (16 July 2025) 20 at 22. Sumption regards "the rule which requires proportionality in warfare" as "the most important" of all of the rules of international humanitarian law (*ibid*). Sumption continues: "The destruction of Hamas is probably unachievable by any amount of violence, but it is certainly unachievable without a grossly disproportionate effect on human life" (*ibid*).

213 See Agence France Presse, *supra* note 196; Seddon, Ahmed & Foster, *supra* note 197. See also Graham-Harrison, *supra* note 198.

214 Zeina Jamaluddine et al, "Traumatic Injury Mortality in the Gaza Strip from Oct 7, 2023, to June 30, 2024: A Capture-Recapture Analysis", (2025) 405:10477 The Lancet 469 at 469, 474. All data contained therein are based on Palestinian Ministry of Health hospital lists, a Ministry of Health online survey, and social media obituaries (*ibid* at 469).

215 *Contra* Patrick Sawer, "Gaza Death Toll 'Inflated to Demonise Israeli Forces'", *The Sunday Telegraph* [London] (15 December 2024) 5.

216 Jamaluddine et al, *supra* note 214 at 474.

217 Uhler et al, *supra* note 100 at 125–26; *Geneva Convention IV*, *supra* note 12.

proportionality itself—in any mechanical application of the metric as currently structured.[218] The recurring narrative of the loss of children's lives, whether in Copenhagen during the Second World War or in the Gaza of today, provides one such flashpoint,[219] but microscopic proportionality would seem to preach the formal equality of the lost lives of each and every civilian. Does this stand to reason? Does it redeem the ethos of the Geneva Conventions and Additional Protocols when read in their entirety? Or, in the register of *Additional Protocol I*,[220] is the "civilian life" of the child really to be counted the same as that of a life half-lived or that lived to the full? Or has the time not come for us to ask what, despite all of its apparent virtues and essential functionality, has proportionality made obscure?

218 For a sympathetic nod in this direction, see Dinstein, *Conduct of Hostilities*, *supra* note 45 at 184–85.

219 This was very much on the mind of Dinstein: ("children may weigh more than adults: a score of adults in a pub cannot be equated with a score of toddlers in a kindergarten" *ibid* at 184). See further Catherine Philp, "Gaza is Becoming a Graveyard for Children, Warns UN Chief", *The Times* [London] (7 November 2023) 1.

220 See the text accompanying note 21, for discussion on "civilian life."

Case Commentaries

John Howard Society of Saskatchewan v Saskatchewan (Attorney General): Protecting Against Unconstitutional Functional Imprisonment

Veronica Dirk-Pothier*

I. Introduction

John Howard Society of Saskatchewan v Saskatchewan (Attorney General)[1] is a split decision issued by the Supreme Court of Canada. The decision concerns the constitutionality of s. 68 of *The Correctional Services Regulations*[2] of Saskatchewan, which prescribed the use of a balance of probabilities as the standard of proof in inmate disciplinary proceedings ("IDP"), including for major disciplinary offences, where disciplinary segregation or a loss of earned remission are potential sanctions.[3]

The Supreme Court has widely recognized that the presumption of innocence afforded in s. 11(d) of the *Canadian Charter of Rights and Freedoms*[4] requires guilt be proven beyond a reasonable doubt.[5] Section 11 is engaged when someone is charged with an offence and the proceedings are either criminal in nature or result in true penal consequences, such as imprisonment.[6] In *R v Shubley*,[7] the Supreme Court held that disciplinary segregation and a loss of earned remission are not true penal

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1 2025 SCC 6 [*John Howard Society of Saskatchewan*].

2 2013, RRS c C-39.2 Reg 1 [*Regulations*].

3 *John Howard Society of Saskatchewan*, *supra* note 1 at para 3.

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

5 *John Howard Society of Saskatchewan*, *supra* note 1 at para 2.

6 *Ibid* at para 27. This test is found in *R v Wigglesworth*, 1987 CanLII 41 (SCC) at 559–61.

7 [1990] 1 SCR 3, 1990 CanLII 149 (SCC) [*Shubley*].

consequences and therefore, do not engage s. 11.[8] The Supreme Court has also recognized that s. 7 of the *Charter* protects the presumption of innocence where s. 11 may not apply, and in some proceedings, this may require proof beyond a reasonable doubt.[9]

This case arose when the John Howard Society of Saskatchewan, a non-profit organization that assists people interacting with the criminal justice system, was granted public interest standing to challenge s. 68 of the *Regulations* for violating s. 7 of the *Charter.* The application and appeal were dismissed, as both the Court of Queen's Bench for Saskatchewan (as it then was) and Court of Appeal for Saskatchewan, who were constrained by the ruling in *Shubley*, found that the nature of IDPs and the severity of the potential sanctions did not require a higher standard of proof.[10]

II. Supreme Court of Canada Decision

The central issues at the Supreme Court were whether s. 68 of the *Regulations* infringes ss. 11(d) or 7 of the *Charter*, and if so, whether it can be saved under s. 1 of the *Charter*.[11] The issue of s. 11(d) was allowed as a new constitutional issue raised on appeal.[12] *Shubley* maintained a formalistic distinction between a *sentence* of imprisonment as a true penal consequence rather than imprisonment as a *concept*.[13] The majority found this distinction, that narrowed the true penal consequence test, needed to be overturned to fulfill the liberty-protecting purpose of s. 11.[14] The majority concluded that a functional, rather than formalistic, approach to understanding imprisonment classifies segregation and loss of earned remission as forms of imprisonment.[15] Disciplinary segregation and a loss of earned remission are functionally imprisonment due to the restriction of the individual's freedom of movement and human interaction, and the effect of extending someone's period of incarceration.[16] Section 68 of the *Regulations* infringes s. 11(d) of the *Charter* as it allows major disciplinary offences, where someone may be subjected to true penal consequences, to be decided on a balance of probabilities.[17]

The majority concluded in the alternative, that s. 68 of the *Regulations* also infringes the presumption of innocence afforded by s. 7 of the *Charter*. Section 7 requires proof beyond a reasonable doubt when the proceedings accuse an individual of moral wrongdoing and can impose severe liberty-depriving consequences.[18] Major disciplinary offence proceedings accuse an individual of moral wrongdoing as

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8 *John Howard Society of Saskatchewan*, *supra* note 1 at para 38, citing *Shubley*, *supra* note 7 at 21–23.

9 *John Howard Society of Saskatchewan*, *supra* note 1 at para 2.

10 *Ibid* at para 4.

11 *Ibid* at para 20.

12 *Ibid* at paras 21–26.

13 *Ibid* at para 39.

14 *Ibid*.

15 *Ibid* at paras 30–31.

16 *Ibid* at para 48.

17 *Ibid* at para 79.

18 *Ibid* at para 84. The majority determined this test through reviewing jurisprudence in *R v Pearson*, 1992 CanLII 52 (SCC).

they signal moral and social disapproval of the action.[19] Further, the potential sanctions of disciplinary segregation and a loss of earned remission for major disciplinary offences are severe liberty-depriving consequences.[20]

The majority noted that s. 68 of the *Regulations'* objective of promoting efficient IDP resolutions is a pressing and substantial objective, but it is not minimally impairing as a less-infringing *Charter*-compliant alternative is available.[21] For instance, federal penitentiaries already require the use of a beyond a reasonable doubt standard and IDPs are not excessively burdened by the heightened standard of proof.[22] The majority concluded that the infringement of ss. 11(d) and 7 was not justified under s. 1 of the *Charter*. To the extent that s. 68 of *Regulations* allows a lower standard of proof than beyond a reasonable doubt when someone is exposed to disciplinary segregation or loss of earned remission, it is inconsistent with the *Charter* and is declared to be of no force or effect.[23]

III. The Dissent

The dissent involved a thorough examination of all the legal issues in the case and diverged from the majority on several of the issues. Most notably, the dissent disagreed with overturning *Shubley* as the majority relied on pre-*Shubley* jurisprudence, which did not prevent the majority in *Shubley* from reaching its conclusion.[24] The dissent also disagreed that disciplinary segregation or loss of earned remission constitutes true penal consequences as the sanctions are an administrative decision to promote compliance and not to redress a public wrong, impose punishment, or promote denunciation.[25] Further, the dissent disagreed that the standard of proof used in federal penitentiaries was informative to the proportionality test and stated the majority failed to consider the province's power to administer its own prison system.[26]

19 *John Howard Society of Saskatchewan*, *supra* note 1 at paras 89–90.

20 *Ibid*.

21 *Ibid* at paras 94–96.

22 *Ibid* at para 96.

23 *Ibid* at paras 98–99.

24 *Ibid* at para 200.

25 *Ibid* at paras 226, 239.

26 *Ibid* at para 292.

IV. Commentary

This decision serves to strengthen the rights of those incarcerated and establish that functional imprisonment may attract *Charter* protection, thus helping to protect against unconstitutional prison conditions. The increased standard of proof may also help promote procedural fairness in IDPs as incarcerated individuals are already disadvantaged due to power imbalances within prisons and barriers to representation. Further, as solitary confinement has been linked to severe health consequences, including an increased risk of suicide,[27] it is important for the mechanism that allows for segregation to require a higher standard of proof to limit arbitrary segregations.

The dissent raises an important concern of protecting *stare decisis*; however, in keeping with a formalist interpretation, the dissent "ignores how understandings of legal concepts must adapt in light of varying social contexts."[28] The dissent correctly noted the majority's reliance on pre-*Shubley* jurisprudence, which recognized a potential to depart from a formalistic distinction between a sentence and conditions of imprisonment. However, the majority found that subsequent case law further advanced this approach to the point that *Shubley*'s preservation of this inflexible distinction now rests on eroded legal principles. As social and legal change is often slow and incremental, it is important to recognize that while there may be a pre-existing understanding of a legal approach, that approach can subsequently grow and be recontextualized to Canada's evolving legal and social landscape. Further, contrary to the dissent, the majority's reference to the federal penitentiary standard does not disregard provincial independence but is merely an example of a more minimally impairing process. This example demonstrates Saskatchewan was not using the least harmful means of achieving its objective given that a readily available alternative operates in federal penitentiaries.

The dissent also took issue with the majority's reliance on cases involving severe segregation when, in the present matter, the application judge found that those subjected to disciplinary segregation are generally confined to their own cells and may still have access to their cellmates, television, and natural light.[29] However, the majority noted that these are standard practices, not mandated conditions.[30] Those in disciplinary segregation are only guaranteed one hour outside of their cell a day.[31]

The rights and remaining liberty of those in prison should not be left vulnerable due to disciplinary segregation's standard practices being viewed as less severe than other forms of segregation. Rather than relying on common practice for the treatment of incarcerated individuals, the majority's decision mandates protection from functional imprisonment unless an offence is proved beyond a reasonable doubt.

27 See Diane Kelsall, "Cruel and Usual Punishment: Solitary Confinement in Canadian Prisons" (2014) 186:18 Can CMAJ 1345 at 1345.

28 *John Howard Society of Saskatchewan*, *supra* note 1 at para 36.

29 *Ibid* at para 195.

30 *Ibid* at para 12.

31 *Ibid*.

Unfinished Business: Delay and Deficient Accounting as Grounds for Estate Executors' Removal

Skyler Gagne*

I. Introduction

In estate litigation, courts must remain exceptionally sensitive to respecting testamentary instruments and the intentions expressed therein, especially with regard to the testator's choice of executor.[1] However, pressing circumstances may arise in which the court may interfere with the testator's wishes in the interest of protecting their beneficiaries. An example of such circumstances was recently illustrated in *Graves v Nagy*.[2] In this case, the Court of Appeal for Saskatchewan upheld an order for the removal of two executors responsible for their mother's estate.[3]

In her will, Blanche Marie Therese Nagy named two of her children, Jo-Ann Graves and Dennis Nagy, as the co-executors of her estate, and named seven of her children as beneficiaries.[4] Blanche died in 2012; Jo-Ann and Dennis did not apply for probate until 2021, marking more than an eight-year delay in commencing the administration of their mother's estate.[5] Unsatisfied and increasingly concerned with the management of the estate and its accounts,[6] the remaining beneficiaries filed applications to receive a full documentation of accounting and remove Dennis and Jo-Ann as executors.[7]

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1 See e.g. *Re Weil*, 1961 CanLII 157 (ONCA).

2 2024 SKCA 17 [*Graves* CA].

3 *Ibid* at para 3.

4 *Ibid* at para 1. Jo-Ann was named as one of the seven original beneficiaries, but Dennis was not. However, their brother Tim—who was a beneficiary—died in 2017. Upon Tim's passing, Dennis became a pro-rata beneficiary, receiving a portion of what Tim was entitled to under Blanche's will (see *ibid*).

5 *Ibid* at para 4.

6 *Ibid* at paras 5–6, 9, 12.

7 *Ibid* at para 12.

The Chambers judge acknowledged that interfering with a testator's express wishes is not a decision to be taken lightly,[8] but ultimately found that the remaining siblings had satisfied the high bar of establishing that the removal of the co-executors was in their best interests as beneficiaries.[9]

II. The Decision

On appeal, much of the decision turned on three considerations: (1) whether the Chambers judge erred in his application of legislative provisions[10] (namely, trustees' duties[11] and conflicts of interest[12] under *The Trustee Act*, as well as the removal of executors pursuant to *The Administration of Estates Act*[13]); (2) whether Blanche's intentions were held in proper regard;[14] and (3) whether it is appropriate to remove executors when an estate is "nearing completion."[15]

The Court of Appeal for Saskatchewan found that the Chambers judge committed a minor error in interpreting s. 14.1 of the *AEA* as imposing a statutory expectation that probate applications will be made within 60 days.[16] The decision could not be overturned on this basis, as delay was only one factor of several considered in the removal of the co-executors.[17] The Court held that the Chambers judge was entitled to find that the executors had not acted in a "reasonable and prudent manner"[18] based on his joint assessment of the delay and the failure to maintain proper accounting.[19]

Additionally, the Court held that Jo-Ann and Dennis could both be removed for conflicts of interest. Dennis' conflict was readily apparent, as he continued to live on a section of Blanche's property rent-free, but both Dennis and Jo-Ann were conflicted due to their failure to file the estate's taxes.[20] This neglected duty would likely give rise to further litigation and expenses, the financial burden of which would potentially be shouldered by the estate instead of Dennis and Jo-Ann themselves, thus resulting in conflict.[21]

8 *Nagy v Graves*, 2022 SKKB 257 at para 39 [*Graves* KB].
9 *Ibid* at para 40; *Graves* CA, *supra* note 2 at para 25.
10 *Graves* CA, *supra* note 2 at paras 26, 31, 33, 37.
11 *The Trustee Act, 2009*, SS 2009, c T-23.01, s 7.
12 *Ibid*, s 9.
13 SS 1998, c A-4.1, s 14.1 [*AEA*].
14 *Graves* CA, *supra* note 2 at para 26.
15 *Ibid*.
16 *Ibid* at paras 33–34.
17 *Ibid* at para 34.
18 *AEA*, *supra* note 13, s 14.1(1)(a)(iii).
19 *Graves* CA, *supra* note 2 at para 34.
20 *Ibid* at paras 40–41.
21 *Ibid*. See also *ibid* at para 39, citing *Graves* KB, *supra* note 8 at para 38.

While the intentions of the testator must always be contemplated when considering the removal of executors, the Court ruled that the welfare of the beneficiaries must also govern to some degree.[22] Therefore, the Chambers judge was found not to have erred in considering the wishes of the beneficiaries in deciding to remove the co-executors.[23]

Finally, the Court was not satisfied that there was "little to be done to settle the estate" even though the estate's largest asset—Blanche's land—had been sold.[24] The Chambers judge was rightfully concerned, according to the Court, with complications arising in the future administration of the estate given the inevitable consequences of past mismanagement, particularly the liability and penalties associated with failing to file estate taxes for several years.[25]

III. Commentary

It is remarkably uncommon for courts to interfere with the express wishes of testators, especially with regard to their choice of executor(s).[26] Where such interference is necessary, it may be highly instructive for future executors and testators alike to take note of what circumstances could put their intentions—or even their estates—in jeopardy.

In this case, the Court of Appeal for Saskatchewan was required to interpret the meanings of a number of provisions across the *AEA* and *The Trustee Act* and determine how they may interact to warrant the removal of estate executors in spite of a testator's clear intentions. *Graves v Nagy* illustrates the effects of ss. 7 and 9 of *The Trustee Act* on the Saskatchewan courts' construal of delays in estate proceedings when determining whether an executor has acted reasonably under the scope of s. 14.1(1)(a) of the *AEA*. A minor delay in applying for probate is unlikely to constitute unreasonable or imprudent behaviour on its own; however, delay can be considered in tandem with evidence of other conduct contrary to the obligations imposed upon a trustee as the basis for an executor's removal. Conversely, delayed probate applications may be viewed as reasonable or appropriate where the facts and evidence indicate to the courts that the delay is in accordance with a trustee's duties per *The Trustee Act*.[27]

Importantly, this case also indicates how Saskatchewan courts might assess whether an estate is "nearing completion" when considering whether it is appropriate to remove an executor in future cases. In most circumstances, the administration of an estate may indeed be approaching completion by the time the vast majority of the assets have been distributed, at which time the court may decline to remove an executor under s. 14.1 of the *AEA*. However, where the history of the estate's management

22 *Graves* CA, *supra* note 2 at para 50.

23 *Ibid* at para 51.

24 *Ibid* at para 53.

25 *Ibid* at paras 54–55.

26 Ian Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed (December 2025) at ch 8, § 8.12, online: (QL) LexisNexis Canada.

27 *Graves* CA, *supra* note 2 at para 33.

indicates, for example, that reconciling the estate's accounts may be particularly time-consuming or that future litigation may ensue, it is unlikely that the court will find the estate to be substantially settled and may still remove its executor(s).[28]

In sum, *Graves v Nagy* clearly indicates that executors in Saskatchewan are expected to manage estates carefully and appropriately balance decedents' wishes with the interests of beneficiaries.

28 See *ibid* at para 53.

R v Wright: Clarifying the Constitutionality of and Requirements for Mandatory Alcohol Screening

Ashley King*

I. Introduction

The "mandatory alcohol screening" provision in s. 320.27(2) of the *Criminal Code*[1] came into force in 2018,[2] allowing peace officers to demand a preliminary breath sample from a driver who is lawfully stopped, without the need for a "reasonable suspicion" concerning alcohol consumption. In *R v Wright*,[3] the Court of Appeal for Saskatchewan examined the constitutionality of s. 320.27(2) for the first time of any senior appellate court.[4] Justice Kalmakoff, writing for himself and Justice Tholl, held that while the provision breached ss. 8, 9, and 10(b) of the *Canadian Charter of Rights and Freedoms*,[5] it was saved by s. 1. Justice Drennan issued a strong dissent, finding the violation of s. 8 could not be saved by s. 1. Additionally, the Court clarified the meaning of "in his or her possession" and "immediately provide" within s. 320.27(2). Lastly, the Court confirmed when the evidentiary presumption in s. 320.31(1) of the *Criminal Code* is engaged.

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1 RSC 1985, c C-46.

2 The provision was added by *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, SC 2018, c 21, s 15.

3 2025 SKCA 52 [*Wright*], leave to appeal to SCC refused, 2026 CanLII 252 [*Wright* SCC].

4 *Wright*, *supra* note 3 at para 39. Though, the Court acknowledged there were some trial court and summary conviction appeal court decisions finding s. 320.27(2) to be constitutionally compliant (see *ibid* at paras 39–42).

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

II. Background

While driving, Mr. Wright was stopped at a police check stop and the officer made a demand, pursuant to s. 320.27(2) of the *Criminal Code*, for a breath sample. After the demand, roughly six minutes elapsed to account for Mr. Wright's smoking and for the officer to retrieve the approved screening device ("ASD").[6] Mr. Wright provided a breath sample into the ASD, produced a "fail" result, and was subsequently arrested and taken to the police station.[7] After speaking to counsel, Mr. Wright provided two breath samples into an approved instrument, both showing his blood alcohol concentration exceeded the legal limit.[8] Consequently, Mr. Wright was charged with impaired operation of a conveyance, contrary to s. 320.14(1)(b) of the *Criminal Code*.[9]

A Certificate of Qualified Technician ("CQT") along with a Notice of Intention to Produce the certificate in evidence were served on Mr. Wright that morning.[10] Additionally, two Certificates of an Analyst (Alcohol Standard) ("CAs") were completed, both bearing electronic signatures, and a notice of intention to tender the CAs in evidence was provided to Mr. Wright fifteen days before the trial began.[11]

At trial, Mr. Wright argued the results of the breath sample analyses should be excluded from evidence on the basis that the breath samples were obtained in violation of his rights under ss. 7, 8, 9, and 10(b) of the *Charter*. Moreover, he alleged the Crown had not provided reasonable notice of its intention to tender the CAs into evidence, and the CAs were improperly signed.[12] The trial judge rejected each of these arguments and found Mr. Wright guilty.[13] Mr. Wright raised the same arguments at his summary conviction appeal, which were similarly rejected.[14]

III. Issues

Mr. Wright raised the same arguments again before the Court of Appeal for Saskatchewan, which were summarized as follows:[15]

(1) Is s. 320.27(2) of the *Criminal Code* unconstitutional?

6 *Wright*, *supra* note 3 at paras 5–6.
7 *Ibid* at para 6.
8 *Ibid* at para 11.
9 *Ibid* at para 1.
10 *Ibid* at para 11.
11 *Ibid* at paras 12–13.
12 *Ibid* at para 15.
13 *Ibid* at para 16.
14 *Ibid* at paras 17–20.
15 *Ibid* at para 22.

(2) Did the police comply with the requirements of s. 320.27(2) in obtaining the screening breath sample?

(3) Was there a violation of Mr. Wright's right to counsel?

(4) Was the Crown entitled to rely on the presumption in s. 320.31(1) of the *Criminal Code*?

Pursuant to s. 839 of the *Criminal Code*, Mr. Wright required leave from the Court to appeal. The Court found leave should be granted for all but the third issue, but ultimately concluded the appeal should be dismissed in its entirety.[16]

IV. Constitutionality of Section 320.27(2)

Although Mr. Wright advanced *Charter* arguments respecting ss. 7, 8, 9, and 10(b), the Court of Appeal for Saskatchewan focused its analysis on s. 8. There was sufficient overlap between s. 7 and the other rights at issue to render a s. 7 analysis superfluous.[17] With respect to ss. 9 and 10(b), the Court found s. 320.27(2) was sufficiently similar to its predecessor roadside screening provisions that there was no reason to depart from the well-settled precedent that although both sections of the *Charter* are violated, the limits are justified under s. 1.[18]

The Court then thoroughly analyzed whether s. 320.27(2) of the *Criminal Code* violates s. 8 of the *Charter*. After outlining the test for s. 8 generally, the Court examined *Goodwin v British Columbia (Superintendent of Motor Vehicles)*,[19] a Supreme Court of Canada case considering a roadside screening regulatory regime in the context of s. 8. The Court of Appeal for Saskatchewan confirmed that the four-part test set out in *Goodwin*—for assessing whether a search-authorizing law complies with s. 8—is applicable to the analysis of whether s. 320.27(2) complies with s. 8 of the *Charter*.[20] Applying the *Goodwin* framework, the Court found the purpose of the legislative scheme and the potential for judicial oversight weighed in favour of the law's reasonableness,[21] whereas the absence of a reasonable suspicion requirement and the potential for unreliable ASD results weighed against reasonableness.[22] Overall, the Court noted it was "a close call" but that s. 320.27(2) ultimately infringes s. 8 of the *Charter*.[23]

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16 *Ibid* at para 189.

17 *Ibid* at paras 32–33.

18 *Ibid* at paras 35–36. The Court noted that the only major difference was the absence of a reasonable suspicion requirement, which was best addressed under s. 8 (*ibid* at para 35).

19 2015 SCC 46 [*Goodwin*].

20 *Wright*, *supra* note 3 at para 55. The four considerations are as follows: (i) the purpose of the legislative scheme; (ii) the nature of the legislative scheme; (iii) the mechanism employed and the degree of its potential intrusiveness; and (iv) the availability of judicial supervision (*ibid* at para 49, citing *Goodwin*, *supra* note 19 at para 57).

21 *Wright*, *supra* note 3 at paras 61, 85.

22 *Ibid* at paras 71, 79.

23 *Ibid* at para 86.

In finding a s. 8 *Charter* breach, the Court turned to the s. 1 *Oakes* test.[24] The Court readily found the legislative objective was of sufficient importance and there was a rational connection between the objective and the means chosen.[25] The Court relied on the Crown's expert evidence, accepted by the trial judge, that other, less rights-intrusive measures were likely not more effective than mandatory alcohol screening, meaning s. 320.27(2) is minimally impairing.[26] Lastly, the Court found the benefits of deterring impaired driving outweigh the costs of infringing s. 8 rights using a brief, non-intrusive method.[27] The Court concluded that s. 320.27(2) is a justified limit on s. 8 *Charter* rights and is thus constitutional.[28]

Drennan J.A. agreed that s. 320.27(2) violated s. 8, but, unlike the majority, she found the lack of judicial oversight to be "a key concern in this case."[29] Moreover, she found the violation was not saved by s. 1 as the Crown's evidence was insufficient to demonstrate that the provision is minimally impairing[30] and the deleterious effects outweighed the salutary effects.[31]

V. Immediacy and Possession Requirements of Section 320.27(2)

The Court then analyzed whether the search complied with the requirements of s. 320.27(2), specifically whether the officer had an ASD "in his or her possession" and whether the sample was "immediately provide[d]." Mr. Wright argued that the words "in his or her possession" required the officer to physically have the ASD in hand when the demand is made, and the word "immediately" meant that any delay in administering the test would breach the requirement.[32] After interpreting the provision, the Court rejected these arguments.

First, the possession requirement does not require that the officer be physically holding the ASD when making the demand. Rather, the requirement will generally be satisfied where the officer knows an ASD is present at the scene and can readily access and use the device.[33] As the officer readily retrieved the ASD from a nearby officer after making the demand, the possession requirement was met in this case.

24 *Ibid* at paras 90–91, citing *R v Oakes*, 1986 CanLII 46 (SCC).

25 *Wright*, *supra* note 3 at paras 93, 96.

26 *Ibid* at paras 100–01.

27 *Ibid* at paras 104–05.

28 *Ibid* at paras 106–07.

29 *Ibid* at para 196.

30 *Ibid* at paras 204, 209.

31 *Ibid* at para 213.

32 *Ibid* at para 110.

33 *Ibid* at para 127.

Second, the Court held the word "immediately" does not mean "instantaneously," and short delays attributable to the operation of the ASD, concerns about the reliability of the ASD result, or urgent situations relating to safety are permissible. The five-minute delay to account for Mr. Wright's smoking and the approximate minute delay in retrieving the ASD device therefore did not breach the immediacy requirement. Accordingly, the requirements of s. 320.27(2) were met and the search was conducted in a reasonable manner.

VI. Presumption in Section 320.31(1)

Section 320.31(1) of the *Criminal Code* provides that where there is proof the instrument was properly calibrated and operated, the breath sample analyses are conclusive proof of the accused's blood alcohol concentration at the time of the test. Pursuant to s. 320.32(1), the Crown can tender certificates, rather than having the analyst or technician testify, to establish the calibration and operation of the approved instruments. Pursuant to s. 320.34, applications relating to these certificates must be filed at least 30 days before the application is heard, and the hearing must be held at least 30 days before the trial.[34]

Mr. Wright argued the CAs should not be admitted into evidence because he had not been given "reasonable notice" as required by s. 320.32(2), which he contended was at least 61 days based on the application timeline, and the signatures must be handwritten to be valid. Without the CAs, Mr. Wright argued that the presumption in s. 320.31(1) could not be invoked.

The Court rejected each argument. First, the Court found that an interpretation of "reasonable notice" requiring a minimum of 61 days' notice would be inconsistent with the principles of statutory interpretation.[35] Second, a digital signature has the same legal force as a handwritten signature in the context of CAs.[36] Lastly, the Court held that the Crown need not tender CAs as evidence, as a CQT alone is sufficient to engage the presumption in s. 320.31(1).[37]

VII. Conclusion

Wright provides a thorough and insightful analysis of the mandatory alcohol screening provision introduced by s. 320.27(2) of the *Criminal Code*. Of primary importance, the Court concluded the provision is constitutionally compliant. Given Drennan J.A.'s strong dissent on this point and in subsequent cases addressing the same issue,[38] it is unsurprising Mr. Wright sought leave to appeal to

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34 See also *ibid* at paras 138–40.

35 *Ibid* at paras 179–85. Notably, the Court did not determine whether the notice given in the circumstances was reasonable, as this would be a question of fact (*ibid* at para 177).

36 *Ibid* at paras 186–87.

37 *Ibid* at para 172.

38 See e.g. *R v Westgard*, 2025 SKCA 53 at para 86.

the Supreme Court of Canada. However, the Supreme Court recently refused leave to appeal in this case.[39] In light of Drennan J.A.'s dissent, the considerable public attention surrounding mandatory alcohol screening laws, and the important constitutional rights engaged by the provision, the Supreme Court's refusal to weigh in is notable. It may be that the Court of Appeal for Saskatchewan was correct in its analysis and conclusion, or perhaps the Supreme Court is awaiting a more apposite case before addressing the issue. Unless or until the Supreme Court does decide to intervene, though, *Wright* will likely continue serving as a valuable precedent for courts across Canada engaging with s. 320.27(2).

39 *Wright* SCC, *supra* note 3.

Resolving Ambiguity: Drafting Errors and Dueling Interpretations at the Court of Appeal for Saskatchewan

Maxwell Lee*

The Court of Appeal for Saskatchewan's decision in *101011333 Saskatchewan Ltd v Vern's Pizza*[1] signals the end of a long-standing franchise pizza restaurant in Saskatoon; the cause of death being a drafting error in a contract. This decision not only espouses the value of properly drafted contracts but also exemplifies the courts' ability to navigate a unique factual matrix while upholding accepted principles of contract interpretation. Justice Caldwell, writing for a unanimous Court, affirmed the summary judgment[2] of Justice Tomka who adeptly handled the "unusual analytical position of determining what word [the parties] would have inserted" into the contract.[3]

I. Background

The complex series of events resulting in this litigation spanned several years. The appellant franchisee (the "Franchisee") entered into an agreement with the respondent franchisor (the "Franchisor") when it acquired two restaurant locations from a previous franchisee that included the assignment of two leases for restaurant locations on the east side of Saskatoon.[4] Each location had been accompanied by its own franchise agreement; however, upon the assignment, the new Franchisee and the Franchisor executed only one franchise agreement (the "Franchise Agreement"). They failed to make appropriate amendments to this agreement which was typically used for single-location franchises. In 2016, the Franchisee failed to renew its lease for one of the locations, and shortly thereafter, the Franchisor notified it that the closure of one location would result in a termination of the Franchise Agreement.[5] The Franchisee continued operation of the remaining location while the parties made

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1 2025 SKCA 115 [*Vern's Pizza*].

2 *Vern's Pizza Company Limited v 101011333 Saskatchewan Ltd*, 2024 SKKB 147 [*Judgment*].

3 *Vern's Pizza*, *supra* note 1 at para 19.

4 *Ibid* at paras 2, 11.

5 *Ibid* at para 14.

several unsuccessful attempts to reconcile the issue.[6] Eventually, the Franchisor applied for summary judgment claiming that the Franchisee had been "passing itself off as a *Vern's Pizza* restaurant" and sought damages as well as declaratory and injunctive relief.[7]

The clause at the centre of the interpretive task ("Clause 3") set out the terms of the Franchise Agreement and included the following phrase: "for so long as the Franchisee shall have a good and valid Lease of the premises civically designated as [*address of the premises to be used as the restaurant*]."[8] Neither party filled in the restaurant addresses when executing the Franchise Agreement, and both acknowledged that they should have done so.[9] The interpretive exercise of Tomka J. in the *Judgment* revolved around Clause 3, with the Franchisee arguing that had the two addresses been inserted, they would have been separated by the disjunctive "or" rather than the conjunctive "and" as argued by the Franchisor.[10] The Franchisor's interpretation prevailed and the Franchisee appealed.[11]

II. The Appeal

The Franchisee advanced three grounds of appeal, two of which go hand-in-hand and will be the focus of this comment: it submitted that Tomka J. misinterpreted the Franchise Agreement and misapplied the doctrines of implied term and *contra proferentem*.[12] The Franchisee advanced four arguments to show Tomka J. erred in determining the Franchise Agreement was terminated because Clause 3 required both restaurants to be operated. It argued this determination:

(a) was not consistent with the ordinary and grammatical sense of the words of the Agreement;

(b) was not supported by the circumstances surrounding contract formation;

(c) failed to account for the reasonable expectations of the parties at the time of contract formation; and

(d) gave rise to commercial absurdity.[13]

Caldwell J.A. did not find merit in any of these arguments and affirmed the reasoning of the *Judgment* in its entirety.[14]

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6 For example, the Franchisor offered assistance in finding an alternate location on the east side of Saskatoon for the operation of the second restaurant (*ibid* at para 38).

7 *Ibid* at para 2 [emphasis in original].

8 *Ibid* at para 3 [emphasis and bracketed drafting note in original].

9 *Ibid* at para 4.

10 *Ibid* at para 19.

11 *Ibid* at para 1.

12 *Ibid* at para 9.

13 *Ibid* at para 17.

14 *Ibid* at para 89.

Tomka J. was required to look at the wording of Clause 3 in the context of the entire Franchise Agreement and the circumstances surrounding its formation.[15] However, unlike a typical exercise of contract interpretation, the task here was not to determine the ordinary and grammatical meaning of the contract but rather to determine the mutual intention of the parties behind inadvertently excluded words.[16] The *Judgment* and the decision of Caldwell J.A. examined vast amounts of evidence pertaining to the circumstances surrounding the formation of the Franchise Agreement.[17]

The Franchisee argued that because the Franchise Agreement was not amended to apply to more than one location, it therefore only required the operation of *one* of the two locations.[18] For example, throughout the agreement, the word "restaurant" only appeared in the singular.[19] In opposition, the Franchisor identified the "continuous operation clause" in the agreement which designated a franchise area.[20] The Franchisor's interpretation won on this point, as the word "franchise" in the "continuous operation clause" was determined to mean "a right to sell a company's product in a particular area using the company's name," and nothing else in the agreement suggested the word referred to a specific restaurant location.[21]

The Franchisee's argument regarding the reasonable expectations of the parties also failed. It was determined in the *Judgment* that because both restaurants were assigned from a previous franchisee, "both parties were of the view and expected that the status quo would be in place well into the future."[22] On appeal, the Franchisee argued that allowing termination of the agreement upon closure of one location would result in commercial absurdity as it would be more beneficial to both parties to have at least one location in operation.[23] It contended both parties would have expected profits to be maximized through efficiencies realized after the closure of one restaurant, which would be far better for the Franchisor than having its brand entirely absent from the market.[24] Caldwell J.A. describes this argument as "a non sequitur in the context of a franchising arrangement," as there is nothing preventing the Franchisor from finding a new franchisee for the area and it is unlikely the parties would have intended (at the time of contract formation) that the closure of one location would actually maximize revenues.[25]

Finally, the Franchisee's submissions that Tomka J. erred by failing to consider the doctrines of implied term and *contra proferentem* were addressed. The doctrine of implied term is one tool at the disposal of a court to resolve ambiguity in contractual language where "'the presumed intentions of the parties…

15 *Ibid* at para 20.

16 *Ibid* at para 19.

17 *Ibid* at paras 45–61.

18 *Ibid* at para 22.

19 *Ibid* at para 23.

20 *Ibid* at para 26.

21 *Ibid* at paras 26–28.

22 *Ibid* at para 32, citing *Judgment*, *supra* note 2 at para 71.

23 *Vern's Pizza*, *supra* note 1 at paras 33–34.

24 *Ibid* at para 36.

25 *Ibid*.

[are] necessary to give business efficacy to a contract.'"[26] The Franchisee's argument that Tomka J. failed to invite "business efficacy"[27] into the Franchise Agreement asked not only for an adoption of the Franchisee's interpretation of the contract, but also its concept of business efficacy. However, the doctrine of implied term is applicable only if ambiguity in the contract cannot be resolved by other means.[28] Similarly, *contra proferentem* (the "rule of last resort") asks the interpreter of a contract to "construe the contract against its drafter" in situations where ambiguity cannot be resolved.[29] Having resolved the ambiguity, Caldwell J.A. concluded neither doctrine was applicable as the contract could be unambiguously interpreted.[30]

III. Commentary

Vern's Pizza is an example of how the basic rules of contract interpretation can be employed with precision to resolve ambiguity when two parties should have, but did not, resolve a drafting error. Both parties in this dispute acknowledged they *should* have amended the agreement. Coupling this with their sustained attempts at reconciliation only complicated the interpretive exercise. The affirmation of the reasoning in the *Judgment* exemplifies the contextual and principled approach to contract interpretation.

26 *Ibid* at para 69, citing *Double N Earthmovers Ltd v Edmonton (City)*, 2007 SCC 3 at para 30.

27 *Vern's Pizza, supra* note 1 at para 66.

28 *Ibid* at paras 66–70.

29 *Ibid* at para 73, citing Geoff R Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis, 2020) at 103.

30 *Vern's Pizza*, *supra* note 1 at paras 71, 74.

Saskatchewan Indian Gaming Authority v Pasap: Contractual Interpretation and Differing Opinions on the Meaning of Precedential Value

Maxwell Lee*

In February of 2025, the Court of Appeal for Saskatchewan issued its decision in *Saskatchewan Indian Gaming Authority v Pasap*,[1] a case that garnered media attention for the large sum awarded in damages to Mr. Chadwick Pasap.[2] As stated by Justice McCreary, writing for the majority, this appeal demonstrates how these specific "facts have the potential to generate a significant damages award."[3] Although the total damages awarded were indeed significant, and the decision as a whole provides a thorough analysis of many employment law issues, this case comment will focus instead on how the majority and dissenting opinions diverged in their respective approaches to contractual interpretation. Justice Barrington-Foote, who wrote the dissenting opinion, disagreed with the majority on the nature of the contract itself, which in turn, would have necessitated a different standard of review and the application of different interpretive principles. Analysing this point alone, this case comment hopes to expose an important question about the circumstances under which a contract should be considered a standard form contract and what is meant by precedential value in the context of contractual interpretation.

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1 2025 SKCA 15 [*Pasap*].

2 Jeremy Warren, "The house loses again: Court dismisses SIGA's appeal of $1.2M awarded to wrongfully fired worker", *CBC News* (18 February 2025), online: <cbc.ca/news/canada> [perma.cc/R3T9-LJGR].

3 *Pasap*, *supra* note 1 at para 1.

I. Background to the Appeal

Chadwick Pasap was employed as a manager at a casino operated by the Saskatchewan Indian Gaming Authority ("SIGA").[4] In 2012, he was told that if he did not resign, he would be dismissed for alleged misconduct.[5] After this, he suffered a medical event which he argued rendered him "totally and permanently disabled."[6] At the Court of Queen's Bench for Saskatchewan,[7] the trial judge first had to determine whether Mr. Pasap was wrongfully dismissed.[8] Having determined that he was, the trial judge then had to decide what the appropriate notice period would have been, what Mr. Pasap's damages were during that period, whether he would have been entitled to disability benefits as a result of the medical event, and what damages he is entitled to.[9] Much of the trial judge's reasoning relied on an interpretation of the disability plan ("Disability Plan"), which is part of a group insurance policy provided to SIGA employees, and terms within that plan; specifically the meaning of "total disability" and "totally disabled."[10] Mr. Pasap was ultimately awarded damages of $1,216,764.25 for loss of long-term disability benefits, $25,000 in moral damages, $25,000 in punitive damages, and costs under Column III.[11]

II. The Appeal

Of the many issues raised by SIGA on appeal, the alleged errors that the trial judge made in her interpretation of the Disability Plan, and key terms within that plan, are the most salient for this comment. SIGA sought to characterize these errors as errors of law, thereby attracting a correctness standard of review, by arguing that the Disability Plan constituted a standard form contract.[12] SIGA also took specific issue with the trial judge's finding that Mr. Pasap was "totally disabled" during two relevant periods: the own occupation ("OwnOcc") and the any occupation ("AnyOcc") periods.[13]

The majority opinion first discusses the standard of review for issues of contractual interpretation, an accepted framework to which Barrington-Foote J.A. took no issue in his dissenting opinion. The presumptive standard of review for issues of contractual interpretation is palpable and overriding error as established by a line of Supreme Court of Canada jurisprudence. In *Sattva Capital Corp v Creston*

4 *Ibid* at para 2.
5 *Ibid* at para 8.
6 *Ibid* at para 2.
7 *Pasap v Saskatchewan Indian Gaming Authority*, 2022 SKQB 200.
8 *Pasap*, *supra* note 1 at para 8.
9 *Ibid* at para 7.
10 *Ibid* at paras 14–20.
11 *Ibid* at para 21.
12 *Ibid* at para 26.
13 *Ibid* at para 6.

Moly Corp,[14] the Supreme Court explained that this presumption exists because contractual interpretation considers the words of a contract in light of the factual matrix that exists between the relevant parties.[15] An exception that rebuts the presumptive standard of review was subsequently established in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*.[16] When a contract is deemed to be a standard form contract, it is logical to apply a correctness standard of review because "the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process."[17]

McCreary J.A.'s opinion usefully outlines the factors established in *Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial)*[18] which assist in determining whether a contract is a standard form contract or not. If there is: a form that is substantially identical and capable of standardized use by multiple different parties; no party-specific factual matrix probative to the issue of contract interpretation; and the contract has been or will be entered into repeatedly, then, a court may find that a standard form contract exists.[19] Importantly, the principal factor among these three that will expose a question of law is that of precedential value because in a standard form contract, "the law and the facts are the same each time the…language is interpreted."[20] Precedential value in this context is described to encapsulate a balancing of the potential for "multiple, subsequent uses of the same contract language by different or even the same parties" on one hand, and the interpretation's respective value as law invoked by "principles such as *stare decisis*" on the other.[21]

With this foundation laid, the crux of the various issues on appeal centred on whether the Disability Plan is a standard form contract. In contending that it is *not*, Mr. Pasap sought to draw analogy between this case and a decision by the Court of Appeal for Ontario in *Jakab v Clean Harbors Canada, Inc*.[22] In *Jakab*, the Court was asked whether certain types of standard form contracts used within a *single organization* could have the requisite precedential value to attract correctness review.[23] This is the same question underlying the central issue in this appeal applied to contracts that provide disability benefits between a single employer and its employees.[24] Unfortunately, just as happened in *Jakab*, this appeal did not result in an answer to this question primarily because the majority decided that even

14 2014 SCC 53 [*Sattva*].

15 *Pasap*, *supra* note 1 at para 32, citing *Sattva*, *supra* note 14 at para 50.

16 2016 SCC 37 [*Ledcor*].

17 *Pasap*, *supra* note 1 at para 34, citing *Ledcor*, *supra* note 16 at para 24.

18 2021 SKCA 36 [*Mosten*].

19 *Pasap*, *supra* note 1 at para 35.

20 *Ibid* at para 37.

21 *Ibid* at para 38, citing *Mosten*, *supra* note 18 at paras 40-42.

22 2023 ONCA 377 [*Jakab*].

23 *Pasap*, *supra* note 1 at para 42, citing *Jakab*, *supra* note 22 at para 10.

24 *Ibid* at para 45.

when applying a correctness standard, the trial judge did not err in the ways suggested by SIGA.[25] McCreary J.A. also opined that it was not appropriate to answer this question "given the paucity of the evidentiary record…and the fact that the insurer…[was] not a party to the litigation."[26]

There is still some useful, albeit brief, reasoning in the majority decision that engages the factors from *Mosten*. McCreary J.A. suggests that the Disability Plan was intended for multiple uses by SIGA, as certain provisions point to customization of the plan for SIGA's unique needs.[27] As an example of this, she points to a clause which differentiates between employees that are either "status" or "non-status" pursuant to the *Indian Act*.[28] Finally, McCreary J.A. states that "without deciding that the Disability Plan *cannot* be a standard form contract," there is no evidence that the Disability Plan was a standard form contract used by organizations other than SIGA.[29]

III. The Dissenting Opinion

Barrington-Foote J.A. prefaces his dissenting opinion by showing that full-time SIGA employees, being those to whom the benefit package (and by extension the Disability Plan) is provided, represent a "substantial cohort"[30] and that this sizeable number of individuals is obligated to participate in this plan as part of their employment.[31] He then shows that all three conditions from *Mosten* are met and that the "terms at issue constitute identical contract language that is not only capable of but has been used in a standardized fashion in the agreement that applies to [many] SIGA employees."[32] The central question underlying the issue of contractual interpretation is also reframed by Barrington-Foote J.A. when he suggests that what is relevant is not whether terms within the Disability Plan differ from other insurance policies provided by the same *insurer*, but whether terms applicable to *all SIGA employees* are the same.[33]

As a result of this reframing, a key point of difference between the majority and dissenting opinions becomes what the true meaning of precedential value is in this context. Barrington-Foote J.A. suggests that the necessary precedential value is not only created by the repeated use of the same language by the same parties (a strict application of *Mosten* consistent with the majority), but also by "multiple

25 *Ibid* at para 46.
26 *Ibid*.
27 *Ibid* at para 43.
28 *Ibid*; RSC 1985, c I-5.
29 *Pasap*, *supra* note 1 at para 44 [emphasis added].
30 *Ibid* at para 156.
31 *Ibid* at para 157.
32 *Ibid*.
33 *Ibid* at para 158.

different uses of the same language by one employer and many of its employees."[34] This point appears to refer specifically to the majority's observation that the Disability Plan has different definitions for the same terms depending on whether an employee is *status* or *non-status*.

Having reframed the central question and arguably allowing for far more context to be imparted into the meaning of precedential value, Barrington-Foote J.A. acknowledges the reference to the line of jurisprudence concerning *Jakab*. He notes that because the contracts at issue in those cases concerned a small number of high-level executives, the analogy argued by Mr. Pasap is far less persuasive because the Disability Plan is a much different type of contract applicable to the "substantial cohort" of SIGA employees already referenced. Finally, he found that all three *Mosten* conditions could be satisfied by the evidence and would have therefore found that the Disability Plan is a standard form contract.[35]

Ultimately, Barrington-Foote J.A. agreed with the majority that Mr. Pasap was totally disabled during the OwnOcc Period but disagreed on other points, including the trial judge's interpretation of several other terms and provisions.[36] Many of the errors found by Barrington-Foote J.A. are a result of the trial judge applying (or rather not applying) the appropriate principles of contractual interpretation stemming from an incorrect determination on the very nature of the Disability Plan itself. He would have remitted these issues to the Court of King's Bench.[37]

IV. Commentary

While the reasoning and analysis in both opinions is thorough and worth reading, the narrow scope of this case comment revolves around the seemingly simple threshold question that determines the nature of a contract subject to appeal on grounds of interpretation. The answer to this question ultimately determined the outcome of this appeal; but perhaps more importantly is the fact that *how* the question was answered appears to be far from simple. If the presumptive standard of review and the exceptions that rebut that presumption in the arena of contractual interpretation is generally agreed upon, one must then ask how and within what parameters *precedential value* should be defined. The majority seems to draw a brighter line in this regard by treating the customization of a contract, and its inapplicability to third parties, as factors that all but put a stop to its precedential value. Barrington-Foote J.A.'s opinion, on the other hand, encourages a reviewing court to impart more context into the analysis, and in so doing, may actually embrace more thoroughly the idea that precedential value is *the* guiding factor when answering the threshold question in exercises of contractual interpretation. Not only does his opinion take into account the scale and diversity of modern employers (thereby valuing context), but it also encourages more robust analysis of that context for use by courts going forward. For now, the majority's approach answers this question, and it will be up to future litigators to choose whether they can, or should, persuade a court with Barrington-Foote J.A.'s reasoning.

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34 *Ibid*.

35 *Ibid* at para 159.

36 *Ibid* at paras 160–61.

37 *Ibid* at para 230.

Chippewas of Saugeen First Nation v South Bruce Peninsula (Town): The Defence of *Bona Fide* Purchasers for Value in the Realm of Indigenous Land Claims

Robbie Lee-Phillipson*

I. Introduction

Chippewas of Saugeen First Nation v South Bruce Peninsula (Town)[1] is a 2024 decision of the Court of Appeal for Ontario where, for the first time in Canadian history, the Court held that an Indigenous land interest was sufficient to outweigh the interests of a third-party *bona fide* purchaser for value.[2] The respondent, Chippewas of Saugeen First Nation (the "Saugeen"), asserted that approximately 1.4 miles of beach coastline, known as *Chi-Gmiinh* (the "Disputed Beach"), had been improperly excluded from Saugeen Indian Reserve No. 29 (the "Reserve").[3] Saugeen sought a declaration that the Disputed Beach forms part of their Reserve and that no third parties should have any interest in the land, and also claimed damages for breaches of the honour of the Crown and its fiduciary duties.[4] At trial, Justice Vella found that the Provincial Land Surveyor, Charles Rankin, who had surveyed the boundaries of the Reserve in 1855, had "fixed the northern terminus of the eastern boundary" of the Reserve approximately 1.4 miles south of where it was intended to be located.[5] As a result, the Saugeen people were, from then on, deprived of part of their Reserve territory. The trial judge also found that the Crown had acted dishonourably in breaching their fiduciary duty to the Saugeen by failing to adequately demarcate or preserve the Saugeen's unceded territory in its entirety.[6]

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1 2024 ONCA 884 [*Chippewas of Saugeen*].

2 *Ibid* at para 235.

3 *Ibid* at paras 1–2.

4 *Ibid* at para 1.

5 *Chippewas of Saugeen First Nation v Town of South Bruce Peninsula et al.*, 2023 ONSC 2056 at paras 204, 368 [*Trial Decision*].

6 *Ibid* at para 20.

II. The Decision at the Court of Appeal for Ontario

The appellants, including the Attorney General of Ontario, the town of South Bruce Peninsula, and two third-party landowners, appealed the decision of Vella J., stating the trial judge had "misinterpreted the Treaty, misapprehended the *bona fide* purchaser for value defence, and erred by dispossessing landowners as a remedy for the Crown's breach and dishonourable conduct."[7] Regarding the first claim, Ontario alleged that the trial judge erred in law by choosing an interpretation of the Treaty that was overly favourable to Saugeen rather than choosing an interpretation that better satisfied the interests of both Saugeen and the Crown.[8] Furthermore, the appellants also alleged that the trial judge erred in giving excessive weight to the text of the Treaty.[9] On this point, the Court of Appeal held that the trial judge applied the correct principles of treaty interpretation by choosing, from among the possible interpretations, the one that best reconciles the interests of the First Nation and the Crown.[10] The Court relied on the Supreme Court of Canada decision in *Ontario (Attorney General) v Restoule*,[11] which explained that "[t]reaties should be liberally construed, and ambiguities or doubtful expressions should be resolved in favour of the Indigenous signatories."[12]

The Court also upheld the trial judge's decision to deny the *bona fide* purchaser defence, stating that this decision would not adversely affect non-party landowners. The Court explained that the claim by Saugeen was "not as geographically broad" as the appellants were contending, and no further expansion of the claim area would be required to give effect to the Treaty partners' original intention that the Disputed Beach be included as part of the Reserve.[13] As a result, non-party landowners would not be affected; only the interests of the named third-party landowners would be superseded, on the balance of equities, by the Saugeen's Treaty interests.[14]

III. Commentary

Historically, the *bona fide* purchaser for value defence was held to be an absolute defence to expropriation based on the principles of the Torrens system, with the English Court of Appeal holding that "[t]he plea of purchaser for valuable consideration without notice is an absolute, unqualified, unanswerable defence."[15] This interpretation of the law remained the prevailing *status quo* in Canada

7 *Chippewas of Saugeen*, *supra* note 1 at para 3.

8 *Ibid* at para 71.

9 *Ibid* at para 71.

10 *Ibid* at para 77.

11 2024 SCC 27.

12 *Ibid* at paras 78–79.

13 *Chippewas of Saugeen*, *supra* note 1 at para 166.

14 *Ibid* at paras 166, 239.

15 *Pilcher v Rawlins* (1872), LR 7 Ch App 259 at 268 (Eng CA).

until 2000, when the Court of Appeal for Ontario in *Chippewas of Sarnia Band v Canada (Attorney General)*[16] suggested that the *bona fide* purchaser for value defence might not be absolute when faced with a superior Aboriginal title claim.[17] Specifically, the Court in *Chippewas of Sarnia* stated:

> [W]e accept that…the need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers…should be considered on a *case-by-case basis*. It may well be that where the denial of the aboriginal right is substantial or egregious, a rigid application of the good faith purchaser for value defence would constitute an unwarranted denial of a fundamental right.[18]

While the Court's ruling in *Chippewas of Sarnia* opened the door for a potential challenge to the *bona fide* purchaser for value defence, it was not until the Trial Decision of Vella J. in 2023 that this defence was successfully argued. In her decision, Vella J. explained that:

> It seems to me that true reconciliation should not automatically mean that the First Nation must sacrifice their right to their established interest in reserve land in order to preserve the *status quo*. The *status quo* is, perhaps, what has created such discord as between Indigenous peoples and non-Indigenous Canadians in the first place…. [I]n this case, change in the *status quo* is required to achieve justice and is the right step towards reconciliation.[19]

In upholding the Trial Decision, the Court of Appeal reaffirmed its reasoning in *Chippewas of Sarnia*, explaining that in cases of competing interests between First Nations and *bona fide* purchasers for value, the courts must make their decisions on a case-by-case basis.[20] Furthermore, the Court elaborated that "when an Indigenous land interest is competing against later acquired legal rights, it is incumbent on the court to weigh the equities and specifically to consider the conscionability of upholding the legal rights of the *bona fide* purchaser in the circumstances."[21]

In *Chippewas of Sarnia*, it was found that the equities clearly favoured the private landowners given that the First Nation had accepted the terms of the land surrender over the claim area that was occupied by over two thousand different individuals, organizations and businesses.[22] In contrast, in *Chippewas of Saugeen*, the equities more clearly favoured Saugeen who had a "constitutionally protected Treaty right to exclusive possession of its reserve territory"[23] that had never been surrendered, as compared

16 2000 CanLII 16991 (ONCA) [*Chippewas of Sarnia*].

17 *Ibid* at para 309.

18 *Ibid* [emphasis added].

19 *Trial Decision*, *supra* note 5 at paras 692–93.

20 *Chippewas of Saugeen*, *supra* note 1 at paras 236–39.

21 *Ibid* at para 239.

22 *Chippewas of Sarnia*, *supra* note 16 at para 1.

23 *Chippewas of Saugeen*, *supra* note 1 at para 240, citing *Trial Decision*, *supra* note 5 at para 593.

to the interests of the two individual land owners who had "primarily a commercial interest in the beach, which they used as a parking lot for tourists."[24] As a result, the Court upheld the decision of Vella J., definitively affirming that the *bona fide* purchaser for value defence is not absolute, and setting the precedent that, when equity favours such a decision, Indigenous rights to land can, and will, outweigh the rights of a *bona fide* purchaser for value.

24 *Chippewas of Saugeen*, *supra* note 1 at para 240.

A Change is a Change: The Implications of Disclosure Practices Resulting from the Supreme Court of Canada's Interpretation of "Material Change" in *Lundin Mining Corp v Markowich*

Ethan Lin*

In *Lundin Mining Corp v Markowich*, the Supreme Court of Canada rendered a decision in what the Court described as "perhaps the most difficult area of securities law."[1] By an overwhelming 6-1 majority, the Court dismissed Lundin Mining Corporation's ("Lundin Mining" or the "Company") appeal over the Court of Appeal for Ontario's interpretation of "material change" and application of the test for leave under s. 138.8(1) of the *Securities Act* (the "Act").[2] In dismissing the appeal, Justice Jamal, writing for the majority, builds upon established jurisprudence and provides further guidance on the elusive distinction between "material fact" and "material change," thereby illuminating the disclosure obligations that the Act imposes upon reporting issuers, and furthermore, implicating current disclosure practices. Additionally, the Court provides clarity on the test for leave pursuant to s. 138.8(1) of the Act.

I. The Facts

Lundin Mining is a reporting issuer under Ontario's *Securities Act*.[3] In October 2017, the Company detected pit wall instability at its premier open pit mine which, a few days later, caused a localized rockslide, requiring the Company to temporarily shut down a portion of the mine and reduce the mine's annual production forecast by 20 per cent for the next year.[4] Lundin Mining did not disclose

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1 2025 SCC 39 at para 1 [*Lundin Mining* SCC].

2 *Ibid* at para 29; RSO 1990, c S.5, s 138.8(1).

3 See *Securities Act*, *supra* note 2, s 1(1) "reporting issuer". A reporting issuer is a person or company who has issued or is proposing to issue a security to the public and has filed a prospectus with the Ontario Securities Commission (see *ibid*, ss 1(1) "issuer", "Director", "Commission", 53(1)).

4 *Lundin Mining* SCC, *supra* note 1 at paras 3, 11–12.

the pit wall instability or rockslide (the "Events") to investors immediately—but rather disclosed the Events a month later—as part of its regular, periodic updates.[5] Within a day after disclosure, the Company's share price dropped 16 per cent.[6]

Subsequently, Markowich, an investor who had purchased Lundin Mining's shares—after the Events occurred but before they were disclosed—commenced a proposed class proceeding against Lundin Mining and its management. He alleged that each of the Events resulted in a "material change" under the Act[7] and, by failing to disclose their occurrence immediately, Lundin Mining contravened its obligations under the Act—a statutory cause of action pursuant to s. 138.3(4).[8] Accordingly, Markowich brought motions under s. 138.8(1) of the *Securities Act*[9] to be granted leave to pursue the statutory cause of action and s. 2(2) of the *Class Proceedings Act, 1992*[10] for certification of the proposed class proceeding.

To obtain leave, a plaintiff must establish that they brought the action in good faith and that they have a reasonable possibility of succeeding at trial.[11] The *Securities Act* defines a "material fact" as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities,"[12] and "material change" as "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer."[13] Material facts only have to be disclosed periodically[14] whereas material changes must be disclosed immediately.[15] Thus, the primary issue at dispute is whether the Events were material changes as alleged, which should have been disclosed immediately, or material facts, which did not need to be disclosed until Lundin Mining's next periodic disclosure.

5 *Ibid* at para 13.

6 *Ibid* at paras 3, 15.

7 See *Securities Act*, *supra* note 2, s 1(1) "material change" (a).

8 *Ibid*, s 138.3(4).

9 *Ibid*, s 138.8(1).

10 SO 1992, c 6, s 2(2).

11 *Securities Act*, *supra* note 2, s 138.8(1).

12 *Ibid*, s 1(1) "material fact".

13 *Ibid*, s 1(1) "material change" (a)(i).

14 See e.g. *ibid*, ss 77(1), 78(1).

15 *Ibid*, ss 75(1), (2).

II. Procedural history

At the Ontario Superior Court of Justice, the motion judge, Justice Glustein, declined to grant both motions.[16] Glustein J. determined that neither Event resulted in a change in the mining company's business, operations, or capital.[17] Therefore, there was no reasonable possibility that Markowich could establish that either Event resulted in a material change.[18]

The Court of Appeal for Ontario unanimously overturned the decisions of Glustein J., granting Markowich leave to pursue the statutory cause of action and referred the decision to certify the class proceeding back to the lower court.[19] Justice Favreau held that the lower court erred in law by interpreting material change too narrowly and consequently applied a more generous interpretation.[20] Favreau J.A. concluded that, based on the uncontested evidence that the Events impacted Lundin Mining's phasing of the mine and reduced its next annual production forecast, it was plausible that the Events resulted in a material change.[21]

III. The decision of the Supreme Court of Canada

The majority dismissed Lundin Mining's appeal and affirmed the Court of Appeal for Ontario's conclusion that the motion judge erred by adopting restrictive definitions of "change," "business," "operations," and "capital."[22] Firstly, Jamal J. reasoned that the Legislature intentionally left these terms undefined to facilitate a flexible and contextual application of the Act to a wide range of industries and corporate structures. Rather than being predefined, these statutory terms acquire meaning *after* they have been applied to specific facts.[23]

Secondly, the Court reaffirmed its jurisprudence on the test for leave under s. 138.8(1) of the Act. Citing the Court's prior decisions in *Theratechnologies Inc v 121851 Canada Inc.*[24] and *Canadian Imperial Bank of Commerce v Green*,[25] Jamal J. restates that the decision to grant leave, predicated on whether the motion judge is satisfied that the plaintiff has a reasonable possibility of success, is to be settled by a plausible analysis of the relevant provisions, along with credible evidence to

16 *Lundin Mining* SCC, *supra* note 1 at para 20; *Markowich v Lundin Mining Corporation*, 2022 ONSC 81 at para 278 [*Lundin Mining* ONSC].

17 *Lundin Mining* ONSC, *supra* note 16 at paras 171–90.

18 *Ibid* at paras 191–93.

19 *Markowich v Lundin Mining Corporation*, 2023 ONCA 359 at para 8 [*Lundin Mining* ONCA].

20 *Lundin Mining* SCC, *supra* note 1 at paras 26–28; *Lundin Mining* ONCA, *supra* note 19 at para 7. For Favreau J.A.'s lengthy analysis on interpreting these words, see *Lundin Mining* ONCA, *supra* note 19 at paras 51–85.

21 *Lundin Mining* ONCA, *supra* note 19 at paras 87–89.

22 *Lundin Mining* SCC, *supra* note 1 at paras 6, 63.

23 *Ibid*.

24 2015 SCC 18 [*Theratechnologies*].

25 2015 SCC 60 [*Green*].

support the claim.[26] This analysis entails a plausible application of the law to the facts adduced by credible evidence, while accounting for the limited availability of evidence a plaintiff may possess on a motion for leave. It does not entail plausible statutory interpretation as statutory interpretation must be conducted in accordance with the modern principle regardless of whether it is at a trial on the action's merits or on a motion for leave.[27]

The uncontested evidence indicated that the Events could have resulted in a "change" due to their impact on Lundin Mining's operations at the mine. Additionally, it was also uncontested that there was a reasonable possibility that the Events could be proven to be "material" at a trial given the drop in Lundin Mining's share price after the Events were disclosed. Hence, the plausible analysis revealed that the action had a reasonable or realistic chance of succeeding at trial.[28]

IV. Commentary

This decision by the Supreme Court of Canada renders some much-needed guidance on a highly contentious issue within securities legislation—the distinction between a material fact and a material change.[29] The Court emphasizes that this distinction must be guided by the prevailing purposes of proper disclosure, which is "the heart and soul of the securities regulations across Canada."[30] Proper disclosure prevents informational asymmetry between reporting issuers and investors, which is essential to the integrity of the securities system and the public interest, and promotes efficiency in capital markets by directing capital to deserving public companies.[31]

Derived from its statutory definition, material change requires the coinciding presence of two components to give rise to timely disclosure obligations: change and materiality.[32] This is a two-step inquiry. First, a change in any one of the issuer's business, operations, or capital is sufficient to establish that a change has occurred. Second, the change must be material such that it "would reasonably be expected to have a significant effect on the market price or value of the securities."[33] In other words, the determination of a change is qualitative since an event can be a change regardless of the magnitude of its impact, but to constitute a "material change," magnitude—a quantitative analysis—becomes relevant as it informs materiality.[34] This is a highly contextual question of mixed fact and law without

26 *Lundin Mining* SCC, *supra* note 1 at para 7, citing *Theratechnologies*, *supra* note 24 at para 39 & *Green*, *supra* note 25 at para 121.

27 *Lundin Mining* SCC, *supra* note 1 at para 7.

28 *Ibid* at paras 8, 122.

29 See e.g. *ibid* at para 47 where Jamal J. notes the discourse over this issue which has been described a "conundrum" that sometimes causes "considerable uncertainty" and "considerable confusion."

30 *Ibid* at para 35, citing *Kerr v Danier Leather Inc*, 2007 SCC 44 at para 64.

31 *Lundin Mining* SCC, *supra* note 1 at paras 35–37.

32 *Ibid* at para 44.

33 *Ibid*. See also *Securities Act*, *supra* note 2, s 1(1) "material change" (a)(i).

34 *Lundin Mining* SCC, *supra* note 1 at para 77.

any bright-line test.[35] While jurisprudence on the distinction between material fact and material change may be helpful, the sole method of properly determining whether an event is a material change and, specifically, whether a change is material, is to apply judgment and common sense to the unique circumstance of each case.[36]

Thus, given its inherent flexibility, change must not be defined restrictively and without its context; as the statutory definition demands, it must be interpreted in reference to the issuer's business, operations, or capital and the purpose of continuous disclosure obligations.[37] Consequently, these terms—business, operations, and capital—must be understood in their ordinary commercial meaning and assessed holistically rather than individually to enable the disclosure requirements of the regime to be applied flexibly and broadly across a wide range of industries and business structures.[38] With this guidance, the Court asserts that the materiality of a change will be obvious to issuers who are well-positioned to make this assessment "given their industry knowledge and intimate familiarity with their business, operations, and capital."[39]

In adopting this interpretative approach, the Supreme Court of Canada rejected the "manager-friendly standard"[40] of disclosure practices that emerged through a line of jurisprudence developed from the Ontario Superior Court of Justice's *obiter* in *Green v Canadian Imperial Bank of Commerce*.[41] This standard, which requires immediate disclosure only if the material change is "important and substantial" or a "significant disruption and interference" to the company's business,[42] is deemed to be inconsistent with the statutory definition of "material change" and mistaken as a matter of policy.[43] Instead, Jamal J. endorses the broader, "investor friendly"[44] standard, which requires immediate disclosure of any material change—that is, any change in business, operations, or capital that is material—and asserts that this is the proper disclosure standard demanded by the Act as it aligns with the statutory definition of "material change" and the core purpose of alleviating information asymmetry between issuers and investors.[45] By this decision, issuers currently operating under broader disclosure standards must revise their practices or otherwise risk non-compliance with their disclosure obligations under the Act.

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35 *Ibid* at paras 47, 97.

36 *Ibid* at para 97. See e.g. jurisprudence on the different disclosure obligations for material facts compared to material changes (*ibid* at paras 38–42), the static nature of material facts and dynamic nature of material changes (*ibid* at paras 48–49), the scope of their statutory definitions (*ibid* at para 50), whether they can result from internal or external factors (*ibid* at paras 51–58), and the extent of negotiations and internal deliberations (*ibid* at paras 59–62).

37 *Ibid* at paras 64, 72.

38 *Ibid* at paras 91–95.

39 *Ibid* at para 78.

40 *Ibid* at para 79.

41 2012 ONSC 3637 at paras 25, 28.

42 *Lundin Mining* SCC, *supra* note 1 at para 79.

43 *Ibid* at paras 80–84.

44 *Ibid* at para 79.

45 *Ibid* at paras 85–87.

Barking up the Wrong Statute: A Warning from *Loucks v Regina Humane Society Inc* when Applying for a Preservation Order under The Enforcement of Money Judgments Act

Treyton Pernitsky*

I. Introduction

In *Loucks v Regina Humane Society Inc*,[1] Justice Danyliuk dealt solely with the issue of whether or not to grant a preservation order under s. 5 of *The Enforcement of Money Judgments Act*.[2] This case involved Gordon Loucks (the "Plaintiff") and the defendant, Regina Humane Society Inc. (the "Humane Society"). The Plaintiff sought a preservation order to prevent the Humane Society from dealing with or disposing of twenty-one dogs that were seized from him.[3] Danyliuk J. dismissed the Plaintiff's application in its entirety,[4] finding that this was not a situation where a preservation order was being used to prevent the frustration of judgment enforcement due to the disposal or dissipation of assets during litigation.[5]

Broadly, *Loucks* is a cautionary decision. It reinforces that preservation orders are legal tools for preventing the dissipation of exigible assets in the context of judgment enforcement, not mechanisms for recovering disputed property. *Loucks* contains three lessons: (1) plead the proper remedy at the outset; (2) move promptly when seeking preservation orders; and (3) recognize that preservation orders are not designed to be used strategically or to resolve disputes arising from regulatory seizure or property possession.

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1 2025 SKKB 28 [*Loucks*].

2 *Ibid* at para 15; SS 2010, c E-9.22 [*EMJA*].

3 *Loucks*, *supra* note 1 at para 3.

4 *Ibid* at paras 4, 16, 71.

5 *Ibid* at para 23.

II. The Decision

As noted above, the sole question in *Loucks* was whether to grant a preservation order under the *EMJA*.[6] In dismissing the application, Danyliuk J. first discussed jurisdiction and whether the Plaintiff was correct to bring this application under s. 5 of the *EMJA*.[7] Ultimately, Danyliuk J. concluded that he lacked jurisdiction to grant a preservation order.[8]

A significant doctrinal takeaway from this jurisdictional analysis is the interpretation of s. 5(9) of the *EMJA*, which has not received much prior judicial comment. In particular, Danyliuk J. emphasized s. 5(9)(a), which states that the court may grant a preservation order against the defendant, with *respect to property of the defendant*.[9] This provision is significant in *Loucks*, as the Plaintiff asserted that the dogs were not the Humane Society's property but rather his own property.[10] Consequently, the Plaintiff's claim fell outside of the jurisdiction of the *EMJA*: s. 5(9)(a) could not be satisfied because the dogs were the Plaintiff's property.[11]

Justice Danyliuk also identified further jurisdictional issues in *Loucks*. Notably, Danyliuk J. found that this application was a misuse of the *EMJA*, which is intended for "controlling enforcement in debtor-creditor relationships. It neither applies to nor supplants the 'ordinary' injunction mechanisms that continue to exist."[12] Danyliuk J. concluded that the Plaintiff should have advanced an application under Rule 6-41 or Rules 6-44 and 6-45 of *The King's Bench Rules*,[13] not under the *EMJA*.[14]

Despite his conclusion that the Court lacked jurisdiction, Danyliuk J. proceeded to apply the test for granting a preservation order under the *EMJA*.[15] Regarding the first step of the test, under s. 5(5)(a), Danyliuk J. identified that the legislation and authorities establish a low threshold at this stage, as an applicant only needs to demonstrate that they have a recognized cause of action that is not groundless.[16] While there were concerns with the causes of action in the Plaintiff's statement of claim, Danyliuk J. found that the claim survived this low threshold.[17]

6 *Ibid* at para 15.

7 *Ibid* at para 19.

8 *Ibid* at para 25.

9 *Ibid* at para 26; *EMJA*, *supra* note 2, s 5(9)(a).

10 *Loucks*, *supra* note 1 at paras 14, 27.

11 *Ibid* at para 28.

12 *Ibid* at para 34.

13 Saskatchewan, *The King's Bench Rules*, rr 6-41, 6-44–6-45.

14 *Loucks*, *supra* note 1 at para 36.

15 *Ibid* at paras 43–44.

16 *Ibid* at paras 46–47, citing *Saskatchewan Crop Insurance Corporation v Avramenko*, 2014 SKQB 96 at para 21 [*Avramenko*], *Grant Thornton Alger Inc v Jorgensen*, 2013 SKQB 250 at para 23 [*Jorgensen*], and *Arslan v Şekerbank T.A.Ş.*, 2016 SKCA 77 at paras 81–87.

17 *Loucks*, *supra* note 1 at paras 48–49.

At the second step, engaging s. 5(5)(b), Danyliuk J. recognized that plaintiffs must lead evidence to establish, on a *prima facie* basis, that enforcement of the judgment would be wholly or partially ineffective if the preservation order is not granted.[18] Upon reviewing the evidence before him, Danyliuk J. concluded that there was nothing that suggested the Humane Society would not be able to satisfy a potential judgment.[19] Therefore, the Plaintiff did not meet the onus under s. 5(5)(b).[20]

Third, Danyliuk J. considered the requirement under s. 5(5)(c) that actions for preservation orders be prosecuted without delay.[21] Danyliuk J. commented that preservation orders are dealt with in the "emergency department" of the law and that plaintiffs must "move swiftly" and bring their application on "an urgent basis, often *ex parte*."[22] In *Loucks*, the Plaintiff did not bring his application until two months after the alleged wrongful acts by the Humane Society had occurred.[23] This unexplained delay, in combination with the Plaintiff's failure to file an affidavit stating that the action will be pursued without delay, led Danyliuk J. to conclude that this branch of the test was also not satisfied.[24]

Finally, Danyliuk J. reviewed s. 5(7), which, in the absence of undue hardship, requires a plaintiff to provide security to the court when obtaining a preservation order.[25] Based on the Plaintiff's lack of explanation regarding an appropriate amount of security (despite being in the unique position to comment on the value of the dogs, as their owner), combined with evidence of the high costs expended by the Humane Society, the Plaintiff also did not satisfy s. 5(7).[26]

III. Commentary

Justice Danyliuk's dismissal of the application for a preservation order in *Loucks* is significant both substantively, by offering judicial comment on a court's jurisdiction in relation to s 5 of the *EMJA*, and practically, by warning counsel who may be tempted to use the *EMJA* as a way to preserve property when more appropriate injunction routes are available.

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18 *Ibid* at paras 50–57, citing *Jorgensen*, *supra* note 16 at paras 28–29 and *Avramenko*, *supra* note 16 at para 30. See also *Lawless v Avalerion Corp*, 2021 SKQB 185 at para 41 [*Lawless*]; *Alliance Pulse Processors Inc v Hudson Bay Port Company*, 2016 SKQB 307 at para 8; and *Yorkton (City) v Mi-Sask Industries Ltd*, 2021 SKCA 43 at paras 53–56.

19 *Loucks*, *supra* note 1 at para 58.

20 *Ibid* at para 59.

21 *Ibid* at para 60.

22 *Ibid* at para 61.

23 *Ibid* at paras 13, 62.

24 *Ibid* at para 63.

25 *Ibid* at para 65; *EMJA*, *supra* note 2, s 5(7).

26 *Loucks*, *supra* note 1 at paras 66–69. See generally *2055190 Ontario Ltd v Zhao*, 2018 SKCA 66 [*Zhao*]; *Custom Foundations Ltd v Welcome Homes Ltd*, 2017 SKQB 148; and *Taylor v Heritage Roofing & Exteriors Inc*, 2014 SKQB 85.

The central contribution of *Loucks* is Danyliuk J.'s jurisdictional holding. Subsection 5(9)(a) authorizes preservation orders only in relation to *property of the defendant*. The Plaintiff's claim that the dogs were his property created an immediate barrier, as a plaintiff cannot use an *EMJA* preservation order to freeze *their own property* in the hands of another.

Loucks is also consistent with the treatment of the second and third prongs of s. 5(5) as meaningful barriers to obtaining preservation orders.[27] Danyliuk J.'s application of these steps affirms that preservation orders under the *EMJA* demand evidentiary substance while being pursued without delay. Likewise, Danyliuk J.'s treatment of s. 5(7) sends a strong message that arbitrary security proposals will not suffice. This aspect of the decision reinforces the need for plaintiffs to meaningfully estimate the potential financial impact of a preservation order on a defendant.[28] An unwillingness to give security may undermine a preservation order application, which is a theme seen in previous jurisprudence.[29]

Ultimately, *Loucks* contributes to a growing body of Saskatchewan jurisprudence clarifying that preservation orders are exceptional and reserved for genuine risks to the enforceability of money judgments. They are not to be used for strategic purposes or purposes outside the scope of the *EMJA*. In this way, *Loucks* reinforces that preservation orders are a tightly confined tool and that Saskatchewan courts will not allow creative pleadings to expand their scope beyond the legislature's clear policy choices.

27 See *Riben v Riben*, 2023 SKKB 217 at paras 109–16. See also *Lawless*, *supra* note 18 at paras 37–62.

28 See *Zhao*, *supra* note 26 at para 153.

29 See *Patrick 1703 Condominium Corporation v First Degree Developments LTD*, 2023 SKKB 151 at paras 36–37.

Book Notes

Essential Work, Disposable Workers: Migration, Capitalism and Class

By Mostafa Henaway. Halifax & Winnipeg: Fernwood Publishing, 2023. 224 pp., $27.00 pb.

In *Essential Work, Disposable Workers*, Mostafa Henaway draws on extensive research from various countries and worker programs and his own personal experience with grassroots organizing of temporary, migrant workers, to argue for a new way to combat capitalism through intersectional labour organizing. The book focuses on the ways that race, gender, and class intersect in the struggle for workers' rights and calls for greater focus on the needs of workers, worker-led organizing, and community presence for success in achieving justice for all workers (at 189). This book displays the problems with labour organizing and the difficulties with the traditional methods of organizing in the face of temporary foreign worker programs championed by neoliberal countries such as the United States and Canada. These programs create a vulnerable, precarious workforce which is exploited and abused, while simultaneously being essential for global capitalism.

To begin, the author outlines the historic neoliberal policies that laid the foundation for international capitalist systems that promised development, but instead, created labour-exporting states which are exploited for the benefit of the Global North, such as the International Monetary Fund structural adjustment programs (at 31). It focuses specifically on the Philippines, Mexico, Guinea, and Egypt as examples of these states. The author then discusses the militarization of borders and examines how the fears expressed about the border are often focused on keeping a large, exploitable workforce available, and thus requires barriers to permanent residence and citizenship to keep workers in precarious, vulnerable positions (at 40–41). Immigration models which maintain the structures of exploitation include Canada's temporary foreign worker program, and the *kafala* system, which is "essentially a privatized form of migration where a *kafeel* directly sponsors a migrant, is responsible for the migrant and can terminate employment and thus the visa needed to remain" (at 53). This creates conditions for rampant abuse and forms the basis of a type of structural power that does away with the basic tenets of the relationship between capital and labour.

Chapter 5 (at 62) transitions the discussion from the history and structures which reinforce temporary, precarious work, and moves to defining temporary foreign workers and the temporary agencies that facilitate their work (*ibid*). These workers are treated as disposable despite the centrality of their work and existence to the economy (*ibid*). This characterization allows temporary foreign workers to undermine workers organizing, which leads to the inequalities witnessed today (at 73).

In Chapters 6 through 8, the author highlights the dependence of global capitalism and many economies on migrant labour in the following industries: food processing and farming, agribusiness, and the service sector. Monopolization pressures smaller businesses to keep prices low and productivity high, which necessitates cheap labour (at 75–77). Chapter 7 (at 91) discusses neoliberal logistics. These logistics refer to the phenomenon where there is a need for increased speed in the distribution of goods. This increase in speed necessitates access to critical infrastructure provided in larger urban centres. Therefore, employers cannot outsource the hubs to countries with cheaper labour because they lack the infrastructure. However, employers still face pressures to lower costs and therefore "in-source" migrant labour (at 93–94). Next, Chapter 8 (at 102) discusses the rise of gig work and how it is tied to temporary foreign workers' precarity and vulnerability. The workers have no power, and they are often considered as a threat to unions in other industries. There are also continued questions about whether people who take on gig work are considered "independent contractors" and this is used as an avenue to block them from the protections of labour legislation (at 106–07).

Lastly, Chapters 9 through 12 outline the various ways that temporary foreign workers have organized. These stories give inspiring examples of leaders and workers that are fighting for change. The author reflects on how these leaders have been innovative in their organizing. Most notably, the author discusses the difference between traditional unions and worker centres. Worker centres, despite having fewer resources than unions, have become the most successful at organizing migrant workers and other low-income workers (at 117). The author attributes this success to the physical presence of these centres in communities and their flexibility (*ibid*). The worker centres use a variety of tactics and handle a variety of issues while focusing on the needs of the workers and encouraging leadership that is culturally and materially relevant to migrant workers' lives (at 144).

Spurred by the Covid-19 pandemic, which labelled many migrant workers essential, while continuing to treat them as disposable, this book is a thought-provoking piece that considers the changes necessary to both the law and the labour movement to adapt to the changes and needs of the workforce. It highlights the inherent contradiction in neoliberal policies and capitalism as a whole: the quest for infinite profits for the few, in a world with finite resources. The author states: "[c]apitalism will always need to racialize and lower the value of certain groups of humans in its own quest for profit" (at 187). As noted by the author, there has been an erosion of the balance between capital and labour that marked post-WWII years, as women and migrants remained excluded from the labour force and thus ripe for exploitation (at 64). This current state of the workforce limits access to the rights afforded by labour legislation and results in arbitrary abuses of power. In particular, the author calls upon the political left to acknowledge these changes and work towards solutions while providing real-life examples of how they have organized (at 189–92). There is emphasis on being visible and present in the communities of temporary foreign workers and acknowledging that issues of racism and sexism need to be tackled in tandem with immigration and labour issues in order to successfully organize temporary foreign workers, and by extension, strengthen the labour movement across Canada and fight against inequalities.

– Amber Adams

Screening Out: HIV testing and the Canadian Immigration Experience

By Laura Bisaillon. Vancouver: UBC Press, 2022. 283 pp., $32.95 pb.

Screening Out examines the Canadian immigration system, with specific attention to how the medical and legal aspects of this bureaucracy operate (at 8). The body of the book, divided into three chapters, argues that Canada's HIV-specific policies and mandatory testing in immigration medical examinations are problematic for applicants with HIV (at 5). The author draws from observations, qualitative interviews, and literature to tell the stories of people with HIV who have interacted with the Canadian immigration system against the backdrop of the social and legal realities of the system.

Chapter 1 introduces the social organization of the immigration process when an applicant has HIV. This chapter provides an overview of the immigration process, including the legal framework surrounding the process and the immigration application and hearing. It outlines the extensive work involved in immigration and refugee applications, and the added complexity and effort required by applicants with HIV. After the first immigration medical examination, the application process diverges for applicants with HIV as they then endure additional forms of institutional scrutiny than those without HIV (at 40–41). Applicants who are not applying as a refugee or sponsored by family may be deemed medically inadmissible through "excessive demand," in which the system finds the cost of their care will be higher than the average health cost (at 45). However, those not subject to this exclusion still worry that their HIV status may impact their application (at 45–46).

Chapter 1 also examines the applicants' struggles in the immigration system, including physically demanding work, such as procuring and protecting documents, high financial costs, inaccessible information, and dealing with vulnerability and anxiety. The stories of several individuals highlight the impact of the immigration system "othering" those with HIV. For instance, applicants begin to understand themselves through the lens of financial and economic reasoning used in the immigration system (at 61). However, as the book outlines, those with HIV face unique barriers to employment (at 68–69), which positions those with HIV against the immigration system's understanding of a "good" immigrant as someone hardworking and independent (at 76).

Chapter 2 sets out the social organization of medical examinations for applicants with HIV by examining the practices within the framework that allows applicants with HIV to be treated differently and prejudicially in the Canadian immigration system (at 31–32). This chapter details the medical examination process, including meetings with immigration doctors and medical officers, who evaluate applicants' medical files submitted by immigration doctors (at 121). The author also outlines the development of HIV-specific immigration policies and advocacy groups' work to address prejudicial policies. HIV-specific policies can have grave consequences on someone's health. For instance, the policy that excludes applicants who are already taking antiretroviral medication may discourage individuals from taking their medicine to increase their chance of success in the immigration process (at 137–38).

Chapter 2 also discusses the role of immigration doctors as viewed by applicants and by the doctors themselves. Immigration doctors may not understand the crucial role they play in the lives of people wanting to immigrate, and may instead, see themselves following the rules provided by the legal framework of Canada's immigration process (at 111). The immigration doctors interviewed repeatedly emphasized they are fact finders rather than decision-makers (at 111–12). However, as medical files are used in later-stage decision-making by medical officers, the author argues it is important to recognize the significant role immigration doctors have in the immigration process (at 111). The chapter shares participants' experiences with HIV testing in medical examinations, which demonstrate the significant issues with medical care and services for applicants with HIV (at 146). For instance, the author advances that immigration doctors' frantic schedules and working in the interests of Canadian immigration services create difficulties for applicants with HIV (at 101, 105).

Chapter 3 demonstrates how the care offered by immigration doctors is socially organized for those with HIV and the manner in which HIV-specific policies create additional burdens and harms for applicants (at 32–33). The author argues that the Canadian immigration system is designed well for those working within the system who can utilize the system as a lucrative endeavour, such as those with a medical or law degree, or bureaucratic and private sector consultants (at 161). However, it is the organization of the medical program which produces problems for applicants in medical examinations (at 162). The author argues that the immigration medical examination is organized to serve documentation rather than therapeutic purposes (at 206). Furthermore, HIV-specific policies promote the interests of the state and go beyond what is supported by science (at 175).

Chapter 3 also surveys people's concerns with immigration doctors, including being given their diagnoses around others or feeling like they are on a transactional assembly line. Further, this chapter examines the impacts of being denied immigration due to HIV status, such as not having access to effective medications that are available in Canada (at 165). The author argues that current HIV-specific practices in the immigration system infringe medical confidentiality and informed consent (at 196, 203). The author also describes that the effect of HIV policies can vary depending on the country the applicant is emigrating from, including unequal medical enquiries and unequal access to necessary testing to begin the immigration process (at 211).

The concluding chapter outlines the ways the medical inadmissibility system precludes the Canadian immigration system from fulfilling its numerous legal, demographic, political, social, and humanistic obligations. The author affirms changes to HIV-specific practices in the immigration system are both warranted and justified (at 227). The author suggests changing the inner workings of the medico-legal administrative practices that regulate the medical inadmissibility system and dismantling the current organization of the system's inner workings (at 227–28). The author concludes that current immigration doctor practices conflict with professional and ethical practices (at 228). The author also notes that stopping mandatory HIV testing is not enough to stop prejudicial effects and that it is necessary to remove the immigration medical examination to create a pivotal departure from the historical practices which situate immigration doctors to breach ethical and professional duties (at 228). The author further concludes that *Screening Out* may help people confront and end institutional practices that are embedded with prejudice and perpetuate the systemic diminishing and discrediting of people with HIV (at 233–34).

Screening Out provides the reader with a comprehensive understanding of the Canadian immigration system and how its processes impact applicants with HIV. The book is catered towards both general and scholarly readers and will be of relevance to those interested in immigration and human rights. The narrative driven form of the book keeps the reader engaged and highlights the lived experience of applicants, which reinforces the book's theme of emphasizing preserving humanity in a bureaucratic system.

– Veronica Dirk-Pothier

Unravelling MAiD in Canada: Euthanasia and Assisted Suicide as Medical Care

Edited by Ramona Coelho, K Sonu Gaind & Trudo Lemmens. Montreal: McGill-Queen's University Press, 2025. 552 pp., $39.95 pb.

In *Unravelling MAiD in Canada: Euthanasia and Assisted Suicide as Medical Care*, the editors bring together contributions from many authors who have varying perspectives on the issue of Medical Assistance in Dying ("MAID") in Canada. The contributing authors and editors come from diverse professional backgrounds, including family medicine, psychiatry, bioethics, criminal law, Indigenous governance, and constitutional law. The first three chapters are concerned with the evolution of the MAID framework in Canada. The book then moves to an analysis of MAID's impact on patient care in Chapters 4 to 10. The following Chapters 11 to 13 focus on the proposed expansion to MAID that would allow those with mental illness to qualify for the program. Finally, the book concludes with an analysis of the application of MAID to those who request it in advance and whether mature minors should be able to access MAID.

Unravelling MAiD in Canada begins with an introduction to MAID and how it emerged in Canada. MAID emerged in Canada as an exception to the aiding and abetting provisions in the *Criminal Code* following the landmark 2015 decision by the Supreme Court of Canada in *Carter v Canada (Attorney General)* (2015 SCC 5) (at 3). The editors assert that several factors, including "poverty, disability, mental health, and barriers of access to care" may put Canadians at risk of a premature death through MAID (at 4). Notably, Ramona Coelho and Trudo Lemmens are concerned about how it appears that the expansion of MAID is motivated by political commitments and not cautious policymaking (at 28). Evidence obtained through interviews of Senate representatives suggests that political will was a driving force behind the expansion of MAID to include those "whose sole underlying condition was mental illness" (at 33). Coelho and Lemmens also argue that the emphasis on protecting disabled people from a wrongful death has shifted throughout the years to claiming it is discrimination to prevent people from ending their lives with MAID (at 38). This shifting emphasis has turned MAID from an exceptional service designed to alleviate suffering into a right to a publicly funded death (at 39). K. Sonu Gaind, the author of Chapter Two, is particularly critical of the lack of input from the Canadian Psychiatric Association about suicidal individuals receiving euthanasia (at 72) and its failure to provide caution about the suicide risk associated with individuals who suffer from mental illness (at 89). The first part of the book concludes with the statement that "assisted dying meets none of the characteristics of health procedures" (at 108).

In Chapter 4, Lemmens and Mary J. Shariff suggest that medical professionals are being directed and compelled to end the lives of patients even if there are treatments available to alleviate patient suffering (at 115). There is a concern that MAID is altering foundational principles of the practice of medicine, such as the duty to provide care that is in the patient's best interests (at 115). Doctors who are against MAID, regardless of their reasons for this opposition, may still be required to refer patients for this service. Coelho, the author of Chapter 5, argues that this a violation of the ethical integrity of both the medical profession and individual doctors (at 153). Chapter 6 contrasts MAID with palliative care and argues that MAID is not merely an extension of palliative care (at 171). The author, Leonie Herx, also notes that there is pressure on palliative care practitioners to participate in MAID, even when that participation goes against the central purpose of palliative care (at 177). Chapter 8 is written by Gabrielle Peters, a disabled woman who is strongly against MAID. She concludes her chapter with the following words: "When the belief that to be disabled is to be less human, when 'better dead than disabled' is common opinion and ableism goes entirely unexamined, the only effective safeguard is to make it illegal to kill us" (at 257). Chapter 9, authored by Graydon Nicholas and written from an Indigenous perspective, argues that the introduction of MAID risks exploiting Indigenous Peoples who are systematically disadvantaged and neglected (at 286).

Chapters 11 through 13 critique allowing MAID for "persons whose sole underlying condition is a mental illness" (at 330). Arguments against offering MAID for those suffering from a mental illness include violating the *Universal Declaration of Human Rights* and perpetuating negative stereotypes about mental illness (at 333–334). To date, no Canadian court has examined whether the *Canadian Charter of Rights and Freedoms* requires MAID to be provided to those suffering from mental illnesses (at 381). As well, provinces have the jurisdiction to create regulations around MAID, so it is possible that a province could prevent the application of MAID in certain situations in the future (at 383). Even if the current sunset clause preventing the applicability of MAID to mental health expires, concerns about using MAID in cases of mental health will not disappear even though it has been decriminalized (at 401). Finally, Chapter 13 discusses the applicability of scientific evidence to the discussion of MAID for mental illness and how there has been a lack of consideration of the existing evidence to date (at 444).

Chapters 14 and 15 consider other MAID issues. The former chapter considers MAID by advance request and presents the argument that this policy would violate the foundational principles of consent. The decision about whether to die would be left to third-party decision makers and not the individual suffering (at 467). The latter chapter considers the application of MAID to mature minors and how this would diminish the role of a parent (at 476) and raise the risk of suicide in Canadian teenagers (at 483).

Unravelling MAiD in Canada is an extensive and interprofessional inquiry into the controversial topic that is Medical Assistance in Dying. The differing perspectives of various stakeholders, each with a different personal and professional background, are useful in identifying problems with the current and future MAID framework. While there is no easy answer to many of the questions posed by this book, it begs the reader to think deeply about the many competing interests involved. Ultimately, Canada must ensure that compassion remains the guiding principle of the law, so that in seeking to ease suffering, we do not become too eager to end it.

– Aidan Gatzke

Gender-Based Violence in Canadian Politics in the #MeToo Era

Edited by Tracey Raney and Cheryl N Collier. Toronto, Buffalo, London: University of Toronto Press, 2024. 320 pp., $36.95 pb.

Gender-Based Violence in Canadian Politics in the #MeToo Era represents the first investigation into instances and effects of gender-based violence in politics ("GBV-P") in the Canadian context. The book is comprised of contributions by numerous authors from diverse backgrounds, providing an intersectional, comprehensive, and well-rounded discussion of GBV-P and its insidious effects across the country. Editors Tracey Raney and Cheryl N. Collier introduce the book by presenting three primary research questions that the volume sets out to answer: "How have political actors in Canada experienced GBV-P? What does the prevalence of GBV-P tell us about the state of democracy in Canada and the goal of increasing women's representation in the public sphere? What does the Canadian case tell us about how GBV-P should be tackled globally?" (at 3–4). While the GBV-P phenomenon has been well-documented in other countries, the editors posit that Canada, despite its status as a longstanding and established democracy, is not immune to the proliferation of GBV-P within its borders (at 4). They call for solutions to be implemented urgently in order to address the threat that GBV-P poses to gender equality and democracy across the nation's broad political landscape (*ibid*).

Part One: Violence against Women in Politics on Social Media in Canada examines the increasingly common appearance of GBV-P in online forums, which the editors describe as being "the new democratic frontier of political discourse" (at 13). Chapter 1, "Online Violence against Women in Politics: Canada in a Comparative Perspective," by Gabrielle Bardall and Chris Tenove, utilizes a comparative analysis framework to assess the extent to which patterns of GBV-P in Canada align with those that appear globally (at 25). In Chapter 2, "Digital Dangers: Theorizing Online Violence against Politicians," authors Angelia Wagner and Tayler Young propose that scholars must employ intersectional frameworks to fully understand the driving forces behind, and the effects of, abusive discourse in online political discussions (at 47–48, 58). Chapter 3, "Ringing an Early Alarm Bell: Image-Based Sexual Violence against Political Actors" by Dianne Lalonde, explores the role of image-based sexual violence ("IBSV"), including the dispersal of explicit images and "deepfake" content online, in attempting to silence and exclude women and other marginalized groups in politics (at 65–66, 74).

Part Two: Violence against Women in Politics Reporting in Canadian Mainstream Media focuses more specifically on print and large-scale online newspapers' reporting on GBV-P in Canada (at 14). Authors Melanee Thomas and Scott Pruysers analyze the effects on non-political actors' self-perceptions and political interests after witnessing psychological GBV-P events in the news in Chapter 4, "Psychological Violence, Media Effects, Counter-Speech, and Political Attitudes." In Chapter 5, "Gender-Based Violence towards Political Women: Did Print News Coverage Shift after #MeToo?," Elizabeth Goodyear-Grant considers whether the media coverage of abuse and violence against women in politics has shifted over time (at 109), finding that since the birth of the #MeToo movement in 2017, GBV-P is now seen as a systemic issue as opposed to a "string of isolated incidents" (at 121). Chapter 6, "Gender-Based Violence, Humour, and Frontier Masculinity in Alberta Political Cartoons" by Rissa Reist, discusses how "hostile humour" in political cartoons contributes to the normalization of violence against women in the political sphere, with a particular focus on female politicians (at 131).

Part Three: Experiences of Violence against Women in Politics adopts a broader lens to examine the varied experiences of women across different political spaces throughout Canada (at 15). In Chapter 7, "Blurred Lines: Boundaries and Consequences for Indigenous Women in Politics in the Era of #MeToo," authors Rebecca Major and Cynthia Niioo-bineh-seh-kwe Stirbys provide their unique experiences and perspectives on bureaucracy and politics as Indigenous women, noting that "[t]he institutionalization of Indigenous women's roles in the Canadian context created a situation where a person's very existence is a political act" (at 151). Chapter 8, "Who Calls Foul? Gender-Based Violence on the Municipal Campaign Trail" by Kate Graham, explores GBV-P in the context of municipal politics (at 172). Using London, Ontario City Councillor Virginia Ridley's 2018 re-election campaign as a case study, Graham discusses the use of targeted GBV-P attacks on women on the campaign trail, the lack of accountability for those who perpetrate these attacks, and the chilling effect these incidents have on women's political participation. In Chapter 9, "The Dark Side of Working in Politics: A Study of MP Staff in Canada," author Meagan Cloutier investigates the gendered harassment experienced by female staffers working for members of Parliament as well as the policies in place to prevent and address such harassment (at 188).

Part Four: Assessing "Solutions" to Violence against Women in Politics in Canada looks to evaluate the policies and actions designed to challenge and reduce GBV-P in politics following the rise of the #MeToo movement (at 15–16). Chapter 10, "Just Bad Apples? Political Accountability and Canadian MPs Accused of Gender-Based Violence" by Bailey Gerrits, analyzes whether #MeToo represented a turning point in increasing political accountability for GBV-P at the federal level in Canada (at 211), finding that accountability measures have not substantially improved as they continually fail to address systemic issues that enable GBV-P (at 222). In Chapter 11, "Can MP Anti-harassment Training Combat Gender-Based Violence in the House of Commons? A Comparative Analysis of Canada and the United Kingdom," author Louise Cockram examines anti-harassment training for members of Parliament in both the Canadian and U.K. contexts (at 229), finding that both programs fail to highlight the roles of racism and GBV-P in perpetuating political violence, and that party control influences the efficacy of training in both countries (at 239–40). Chapter 12, "Fixing the Upper House: A Gender and Intersectional Analysis of the Canadian Senate's 2021 Harassment and Violence Prevention Policy" by editor Tracey Raney, discusses the Senate of Canada's struggle to overcome serious deficiencies in its workplace violence policies. Raney posits that this reflects the staying power of "white, heteronormative, and hegemonically masculine norms and rules" even in an institution where today, women and men are nearly equally represented (at 258). Finally, editors Cheryl N. Collier and Tracey Raney conduct a comparative analysis of legislatures' sexual harassment policies across the Canadian provinces and territories in Chapter 13, "Provincial and Territorial Legislature-Based Sexual Harassment Policies for Elected Members: Variation in Approaches but Commonality in Ineffectiveness," finding notable discrepancies across jurisdictions that represent "a patchwork of approaches to the problem of GBV-P" (at 278).

In their conclusion, the editors remark on how widespread of a problem GBV-P remains in Canada, its effects on democracy within the nation, and how difficult it may be to overcome given that it is deeply engrained in the norms of our political framework (at 285). Nonetheless, the editors make suggestions that could enable future change based on the findings of the books' many authors, and they conclude the volume by welcoming further research on the topic. Ultimately, *Gender-Based Violence in Canadian Politics in the #MeToo Era* serves as a thoughtful first foray into the realm of gendered political violence in our nation, and offers a meaningful starting point from which any group—from laypeople to legislatures—may seek to effect change.

– Skyler Gagne

Banning Transgender Conversion Practices: A Legal and Policy Analysis

By Florence Ashley. Vancouver, BC: UBC Press, 2022. 249 pp., $32.95 pb.

Banning Transgender Conversion Practices: A Legal and Policy Analysis was written and published within the historical context of Bill C-4, which came into force in Canada on January 7, 2022 (at ix). The author employs a trans-centric approach to discuss the realities of conversion practices and encourages the widespread legal regulation of them. Written from the perspective of a Canadian transfeminine scholar, jurist, and bioethicist, this book aims to contribute to policy-making and scholarly literature by defining, interpreting, and analyzing bans on conversion practices and legislation related thereto.

This book is comprised of seven substantive chapters and also includes an introduction, conclusion, and appendix. Chapters 1 and 2 provide an overview of the topic by defining conversion practices and delineating the scope of bans. The author builds on this foundation in Chapter 3, where they analyse the diversity of bans globally. Next, Chapter 4 considers political and constitutional arguments to oppose bans. Chapter 5 provides an in-depth and detailed analysis of the benefits and limitations of legislative bans. Building on some of the limitations identified in Chapter 5, Chapter 6 examines "reasons why existing bans fail to thoroughly alter professional practice" (at 21). The ideas and analyses set out in Chapters 1 to 6 culminate in the final chapter, where the author suggests model legislation that would most effectively allow for regulation of bans. The Appendix consists of statements and excerpts from various professional organizations who oppose conversion practices.

In Chapter 1, the author defines conversion practices. The goal of this chapter is to answer the following questions: "what are conversion practices and do they include the corrective approach, which aims at preventing youth from growing up trans?" (at 22). The author suggests that defining conversion practices exclusively by their focus on changing gender identity, instead of also focusing on how they target behaviour, leads to an underestimate of their harmful effects (at 25). In order to account for the limitations imposed by defining conversion practices on the sole basis of changes to gender identity, the author suggests the following definition: "Trans conversion practices refer to sustained efforts to promote gender identities that are aligned with the person's sex assigned at birth and/or to discourage behaviors associated with a gender other than the person's sex assigned at birth" (at 26). Utilizing this definition, the author concludes that the corrective approach is a conversion practice (at 30).

Chapter 2 addresses the scope of bans, utilizing Ontario's Bill 77 as an example (at 33). Focusing on the principles of statutory interpretation, the author examines the legislative history and social context of Bill 77 to conclude that, "under a proper interpretation, bans on conversion practices extend far enough to encompass practices bearing the psychopathologizing animus of the corrective approach" (at 34). While the author acknowledges that different jurisdictions will need to engage with different interpretive difficulties, they suggest that many of the considerations inherent under Bill 77 would apply as the social, moral, and clinical concerns underlying its enactment "spread far beyond [Ontario's] borders" (at 52).

In Chapter 3, the author considers bans on conversion practices worldwide (at 53). By engaging in a comparative analysis and examining the similarities and differences in legislation banning conversion practices across the globe, the author aims to predict how the conclusions in Chapter 2 may be applied in different jurisdictions (*ibid*). Differences in types of sanctions (e.g., disciplinary, penal, hybrid, and so forth) and differences in whom the legislation targets (e.g., licensed professionals only versus all practitioners regardless of licensure) were identified as areas which may impact the scope and enforceability of legislative bans (at 70). However, these differences also influence the effectiveness of legislative bans in discouraging conversion practices (*ibid*). The author suggests that the most concerning aspect of many bans is the tendency to limit them to licensed professionals, thereby significantly limiting their scope (*ibid*).

In Chapter 4, the author considers the argument that bans are contrary to constitutional rights and freedoms (at 71). Specifically, "[m]any proponents of conversion practices have claimed that bans violate therapists' freedom of expression, are so overbroad as to run afoul of constitutional protections, and violate patients' autonomy and/or families' freedom of religion" (*ibid*). While the author acknowledges that considerations will vary by jurisdiction, they conclude that bans on conversion practices will generally withstand constitutional scrutiny (*ibid*). Specifically, the author relies on the fact that there is no constitutional right to harm others (at 102). Furthermore, neither individuals nor their parents have an inherent right to recruit others to engage in harmful and unethical practices (*ibid*). Finally, the author suggests that "[a]llegations of overbreadth are overstated," as "no subgroup may be clearly identified that is not harmed by conversion practices" (*ibid*).

Chapter 5 examines the benefits and limitations of bans (at 103). Specifically, the author aims to determine "how desirable bans are from the standpoint of trans communities" (*ibid*). The author suggests that bans have impacts far beyond their pedagogical and material effects (at 105). Cultural changes can be spurred by the symbolic functions of laws, which can lead to improvements in mental health throughout the trans community (*ibid*). Furthermore, bans lead to changes in professional practices as they remind practitioners of their obligations and motivate disciplinary bodies to enforce these obligations (at 104–05). Several limitations are also identified, including bans being limited to minors (at 108), insufficiently detailed wording to allow practitioners to understand the scope of bans (at 110), and professional resentment that may occur when practitioners feel as though the legislature is unduly interfering with their professional discretion (at 113–14). Ultimately, the author concludes that many of the limitations can be adequately addressed through astute drafting of legislation (at 118).

In Chapter 6, the author addresses why current bans fail to thoroughly alter professional practice (at 21). They emphasize the need to "supplement bans with initiatives that intervene in professional culture" (at 119). Clear professional guidelines (at 120) and increased education about the harms of conversion practices (at 124, 128) were suggested as means of changing professional culture.

Finally, in Chapter 7, the author proposes model legislation that they suggest would most effectively allow for the regulation of bans (at 130). The "model law is intended to assist legislators and policy-makers who wish to prohibit conversion practices in their jurisdiction" (at 133). The author suggests that this model legislation improves on existing bans in two key ways (*ibid*). First, by defining conversion practices in a clear and detailed manner, the model law ensures that both professionals and the public are able to understand what practices are prohibited (*ibid*). "Second, it targets a wide range of practices that go beyond offering and advertising conversion practices" (*ibid*).

Banning Transgender Conversion Practices: A Legal and Policy Analysis is an invaluable resource for policymakers, legal professionals, and advocates working to protect transgender rights. The author's thorough analysis offers a compelling argument for why banning conversion practices is not only a moral imperative, but a legal necessity. By providing a clear roadmap for reform, the author ensures that readers leave with a deeper understanding of the legal landscape surrounding transgender rights and the urgent need for reforms.

– Tayler Hemsing

The Life and Death of Freedom of Expression

By Richard Moon. Toronto: University of Toronto Press, 2024. 358 pp., $48.95 pb.

The Life and Death of Freedom of Expression, written by Richard Moon, is an informative and contemporary exploration of the freedom of expression in Canada. Drawing from Canadian and American jurisprudence, Moon offers insight into and criticisms of how s. 2(b) of the *Charter* (or the First Amendment in the American context) is applied to various issues. In doing so, Moon demonstrates the tension between freedom of expression and constitutional adjudication (at 5). Permeating each chapter is a concern for how this freedom is changing, and is changed by, the increasing prevalence of the internet and social media.

Chapter 1 canvasses the theoretical foundations of the freedom of expression. Moon begins by discussing the three primary foundations of this freedom: truth and knowledge; democracy; and autonomy and self-realization. However, Moon contends that underlying these accounts is a recognition that human agency and identity are developed through "communicative interaction" with others (at 20, 32). Recognizing the social character of the freedom of expression dissolves dichotomies between whether the freedom is an intrinsic right or an instrument for social good (at 36–37).

In Chapter 2, Moon outlines the two-step structure followed by courts when adjudicating freedom of expression claims: infringement under s. 2(b), followed by justification under s. 1 of the *Charter* (at 47). However, Moon notes that the broad scope afforded to expression means the Supreme Court of Canada is generally quick to recognize a breach of s. 2(b), leaving the substantial analysis for s. 1 (at 49, 60). To Moon, the court's task under the s. 1 analysis is not to balance competing individual interests, but rather to determine when the speech's harm, through manipulation or incitement, outweighs its value and is thus no longer deserving of protection (at 62).

In the remaining chapters, Moon shifts from general doctrine to specific application. Chapter 3 critically examines the nature and scope of commercial and political advertising. Canadian courts have consistently held that commercial and political advertising, although protected by s. 2(b), do not fall within its core and thus can be more easily restricted under s. 1 (at 94–95, 112). According to Moon, the courts' discounted view of commercial speech and political advertising represents a concern that the domination of public discourse compromises judgment (at 97–98, 115–16). Moon notes that these issues may be exacerbated online and effective regulation is difficult (at 119–20).

Chapter 4 offers an introductory account of the regulation of hate speech. Drawing on Supreme Court of Canada jurisprudence, Moon discusses the constitutionality of criminal and human rights legislation that regulates hate speech (at 136, 141). Perhaps a bit too ambitiously, Moon attempts to outline how intimidation and harassment, insults, bullying, and homophobic speech fit within the hate speech framework, offering only a superficial account of each. According to Moon, the "new hate speech" is against religious groups and beliefs, in which members of a religious group are believed to hold dangerous beliefs (at 161). Throughout the chapter, Moon highlights how the internet, and social media platforms in particular, are "potent vehicle[s] for the promotion and reinforcement of hateful views" and provide unique challenges for regulation (at 155).

In Chapter 5, Moon discusses blasphemy, obscenity, and pornography. Though the ban on blasphemous libel has been repealed in Canada, Moon is confident it would have been struck down under ss. 2(a) or 2(b) of the *Charter* based on comparative jurisprudence from America (at 176). With respect to the ban on obscene material, Moon notes the Supreme Court in *R v Butler* (1992 CanLII 124 (SCC)) shifted their focus to pornography as attitudes towards sex became more progressive (at 192). Moreover, the Supreme Court inserted a feminist reading on the ban, focusing on the systemic and harmful effects that pornography has on women in particular (at 193). Moon concludes by highlighting the potential for over-enforcement of the ban due to the Supreme Court's vague standard of obscenity, and under-enforcement due to the sheer volume and type of sexual material in circulation, especially online (at 209–10).

Chapter 6 discusses access to state property and other platforms for the purposes of communicating. Moon demonstrates how Canadian courts have developed a framework for examining communicative access claims to state-owned property that is substantially similar to the American public forum doctrine (at 212). To Moon, this development "was inevitable" (*ibid*). Moon then examines particular forms of expression in public spaces, including street demonstrations, leafletting, and protest camps, noting the courts have consistently found limits on these types of expressions are justified when the expression is incompatible with the ordinary use of the property (at 230–32). Moon ends the chapter by examining cases dealing with whether the state, in not supporting or subsidizing certain expression, can be considered to be suppressing speech, thereby transforming a positive rights claim into a negative one (at 247, 254).

In Chapter 7, Moon explores how compelled speech intrudes on one's right, under s. 2(b), to not speak. Moon explains that compelled expression is not wrong because others may mistakenly believe the individual holds those views, but rather because it is an invasion of one's self when forced to express views contrary to one's own (at 261–62). These concerns are lessened in the context of commercial or corporate expression, where the courts are more willing to justify compelled speech (such as product warnings) in order to balance communicative power (at 264, 266). Additionally, Moon discusses the different approaches to compelled access of certain types of media, including the press, broadcast media, and social media (at 286, 296, 298). While newspapers cannot be required to publish stories or statements, the courts have upheld greater regulation of broadcasters and social media platforms (at 286).

The concluding chapter asks whether the freedom of expression has a future given the increasing prevalence of the internet and social media. Though the internet allows access to more voices than ever before, the sheer volume of material means that people can really only view a small portion of what is available (at 302). Moreover, Moon laments the harmful effects that microtargeting of ads, narrow exposure to only like-minded people, and disagreement on the reliability of sources of information may have (at 302–03). Indeed, Moon notes "[t]he principal threat to public discourse may no longer be censorship…but rather the spread of disinformation" (at 303–04). Traditional legal responses may be inadequate in addressing the changing communicative landscape (at 306). Instead, Moon advocates for legislative responses to this "crisis" despite being skeptical of their potential effectiveness (at 312).

The Life and Death of Freedom of Expression provides a useful introduction to various facets of a fundamental Canadian freedom. Moreover, for those interested in judicial engagement with freedom of expression, Moon thoroughly canvasses leading judicial cases on these topics, weaving his opinions and criticisms throughout. Thus, Moon integrates doctrine, application, and opinion in a way that fosters a deeper understanding of and engagement with the freedom of expression. As each chapter focuses on a different aspect or issue, the book presents a nuanced and thorough understanding of how complex and important this freedom truly is, especially in a highly digitalized era.

– Ashley King

The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies

Edited by Peter L Biro. Montreal & Kingston: McGill-Queen's University Press, 2024. 470 pp., $39.95 pb.

This collection of essays was compiled in anticipation of the 40th anniversary of the Canadian *Charter of Rights and Freedoms* and explores one of the *Charter's* more unique and controversial provisions: s. 33, otherwise known as the notwithstanding clause ("NWC"). The book includes a broad and diverse range of opinions and perspectives that include analyses of the technical components of the NWC, opinions both supporting and opposing the NWC, unique regional perspectives, and other innovative and timely contributions. The essays are from both legal and political scholars and seek to explain not only the evolution of the NWC over the past forty years, but also how the clause might and/or should function in the future.

Part I provides historical context and outlines prominent debates that have surrounded the NWC since its inception. Thomas S. Axworthy begins by describing the "historic Canadian compromise" that resulted in s. 33 being inserted into the *Charter*. This shows that the NWC was the "last piece of the compromise puzzle" (at 37) between the federal government, who prioritized minority education and language rights (at 36) and the provinces who demanded the "Alberta amending formula" (at 34). Kristopher E.G. Kinsinger then surveys the most prominent debates surrounding the NWC over the past forty years (at 49), and situates many of the other contributors within the broader discourse surrounding the clause (at 49, 55).

The contributors in Part II offer a "robust statement of [the NWC's] role, purpose, and operation" (at 67) by highlighting structural and operational features of the NWC. In Chapter 3, Dwight Newman discusses his coordinate approach to rights protections. He contends that the NWC provides a legally accessible mechanism within the Canadian Constitution (at 69). He shows how the clause is justified through its ability to facilitate "ongoing coordinate approaches to rights protection and fulfillment, maintaining the particularly significant value of democratic participation […], and offering a mechanism for the protection of diverse identities within Canada" (at 86). In Chapter 4, Grégoire Webber performs an analysis that provides a technical explanation of the NWC's structural and operational intricacies that ultimately seeks to understand what the NWC achieves (i.e., its legal effect) (at 93).

Judicial review is the focus of Part III. Robert Leckey begins with an overview of how the NWC necessitates certain legislative choices (at 111) that ultimately define the scope of judicial review. These choices include deciding what is protected through the use of the NWC, the identity and number of *Charter* provisions from which protection is granted, and the timing and relationship to litigation chosen by either invoking the NWC pre-emptively, or doing so after losing a *Charter* challenge (at 111–112). Other essays in this Part debate both when and if judicial review is permissible subsequent to the invocation of the NWC. Geoffrey Sigalet, for example, proposes that courts should not review laws invoking the NWC because it is prohibited by the legal effect of the clause (at 168). This is supported by both legal and political reasons that substantive judicial review should be rejected when s. 33 is invoked (at 171–75).

Part IV focuses on Quebec, the province which has invoked the NWC more than any other provinces. Included are two essays in support of the NWC and two in opposition of its use. This commentary looks not only to Quebec's history of using the clause, but also to contemporary debates surrounding recent invocations of s. 33 in Bills 21 and 96. Benoît Pelletier supports the NWC in Chapter 9 and argues that it allows for the "intrinsic diversity of a federalist state" (at 210); a proposition that he contends is especially important for Quebec (at 205). He provides further support for this argument by debunking common myths about the NWC, including that its invocation has a high political price and that using it is an implicit admission of the denial of rights or freedoms (at 214). Guillaume Rousseau and François Côté bolster support for s. 33 in Chapter 10 by suggesting that Quebec law provides for a unique conception of the clause which they call the "Distinctive Quebec Theory" (at 231). This theory is closely linked to national identity and social justice and can function to promote human rights, affirm parliamentary sovereignty (at 234, 240), as well as being used as a shield to protect Quebec's distinct legal tradition (at 243).

In opposition of the NWC, Marion Sandilands provides a rebuttal to Rousseau and Côté in Chapter 11 by contending that Quebec's distinctive culture can be protected without derogating human rights charters (at 253). In Chapter 12, Jonathan Montpetit also rebuts Rousseau and Côté but finds support for his argument by showing that Bills 21 and 96 also override the *Quebec Charter* which he suggests marginalizes Quebec's long-standing tradition of liberal constitutionalism (at 272).

Part V concludes the collection with essays that focus on legitimacy, justification, and democracy. This Part contains perhaps the most diverse range of essays in the book. These include Tsvi Kahana's contention in Chapter 13 that the pre-emptive use of the NWC cannot be justified and that Quebec's use of the clause in Bill 96 is "tyrannical" (at 290). Other essays in this Part use the NWC to frame analyses of other sections of the *Charter*. For example, Mary Eberts argues that the relationship between s. 33 and s. 28 of the *Charter* shows that the latter is rights-conferring and not merely interpretive (at 355). Cara Faith Zwibel discusses how the exclusion of s. 3 democratic rights from the NWC's reach justifies an expansive understanding of democratic rights within the *Charter* more generally (at 365). The book concludes with important discussions on democratic accountability and civil discourse. Caitlin Salvino suggests that the democratic accountability safeguards which are often used to justify the NWC are "ill-suited" to the unique vulnerability of minority groups (at 402). Finally, Sabreena Delhon wraps-up the collection by drawing attention to the necessity of an electorate who is equipped to hold government accountable if and when they choose to invoke the NWC (at 419).

This note is capable of mentioning only a handful of the essays in this collection. Of course, this book will prove an invaluable resource for those with an existing knowledge or interest in constitutional law and politics. Additionally, given its thorough and diverse account of the past forty years of constitutional discourse in this country, the essays in this book can also serve as a starting point for those looking to expand their political and legal knowledge and explore a truly unique aspect of Canadian constitutionalism.

– Maxwell Lee

Rights and Parliamentary Systems in Canada and Beyond

Edited by Emmett Macfarlane. Toronto: University of Toronto Press, 2025. 292 pp., $39.95 pb.

Rights and Parliamentary Systems in Canada and Beyond is a collection of essays edited by Emmett Macfarlane. It pays homage to Janet Hiebert, who made significant contributions to foundational constitutional scholarship in Canada. Hiebert was among the first to comprehensively assess the role of Parliament under what was, at the time, the new *Charter of Rights and Freedoms* (at 4, 7). This note is only capable of surveying a few of the book's twelve Chapters that are written by political and legal scholars.

In Chapter 1, Grégoire Webber asks why the implementation of bills of rights leaves specifications for those rights largely undefined (at 20). Webber answers this question by positing that "progressive measures" fill these gaps and that law is one such progressive measure (at 19, 21). In giving various rights and freedoms "legal life," (at 23) both positive and negative rights necessitate being realized and secured by law.

Minh Do discusses legislative rights review in Chapter 2 and notes that much of the existing scholarship in this area has not considered Aboriginal rights (at 32). In asking whether legislative rights review would be an effective "check" on the Executive's approach to Aboriginal rights, Do concludes that it would not (at 32–33). Instead, s. 35 Aboriginal rights should "be understood as delineating jurisdictional authority," which would result in any attempt to limit those rights through unilateral executive action being *ultra vires* (at 33).

Judicial review in the context of administrative law is the focus of Chapter 3. G. Elizabeth Bergman suggests that the prevalence of dialogue theory and judicial activism in scholarship on s. 1 needs to be expanded to include administrative decision makers (at 51, 54). Traditional theories, Bergman opines, focus exclusively on judiciary-Parliament interactions (at 54) and, by ignoring administrative decision makers, much is left unexplained in the relationship between the judiciary and other governing branches (at 64).

The contribution of Brendan Dell and Mark S. Harding in Chapter 5 asks if Parliament, through the Trudeau-era use of *Charter* statements, has begun "governing like judges" (at 98–99, 110). The authors' impetus for addressing this lies in a concern that *Charter* statements have "become a mechanism that promises the possibility of coordinate construction but in practice reinforces judicial interpretative finality over the meaning of rights" (at 101). In reviewing three specific uses of these statements, the authors conclude that there is a lack of "independent consideration of *Charter* rights" (at 110) in Parliament, suggesting judicial values and processes may have become internalized (at 111). If only the Supreme Court's views of the *Charter* are considered in policy-making, judicial supremacy may be reinforced, thus limiting the exploration of diverse policy options (at 110–11).

A discussion of Parliament's role under the *Charter* cannot be complete without mentioning the s. 33 notwithstanding clause (the "NWC") and Andrew McDougall provides just such mention in Chapter 6. McDougall describes the NWC as a tool that allows for cultural pluralism in a multinational state (at 117). The NWC understood in this way protects democratic values (at 119), and its use in Quebec is likely preventing another unity crisis (at 128) that otherwise could have occurred given the shifting political climate in Quebec in the early 2000s (at 122).

In Chapter 10, Troy Riddell reviews the role that Parliament and courts play in defining the scope of police powers. Riddell notes that although judicial interpretation has dominated this field, the relationship is more nuanced than one might think (at 195). Riddell identifies many examples where Parliament has acted on its own initiative in defining police powers and not necessarily followed judicial guidance (*ibid*). In concluding, Riddell proposes that Canada should adopt a process for introducing and defining powers through a code similar to how the process occurs in England (*ibid*).

Brendan Dell and Kate Puddister engage in a unique case study of legislative rights review during the Harper government in Chapter 11. They examine that government's reform of criminal sentencing through the imposition of several mandatory minimum sentence provisions (at 217). These provisions represented an approach that limited judicial discretion in sentencing and risked conflicting with various *Charter* rights (*ibid*). The lesson from this case study is that what Dell and Puddister label as the "weak function of parliamentary rights review" that exists in Canada is not an effective restraint against governments that insist on legislating with little regard to *Charter* rights (at 231).

In addition to the Chapters surveyed above, this collection contains essays on a number of other unique subjects including the role of third parties in election advertising and pre-election spending (Chapters 8 and 9), "rights talk" in the context of the COVID-19 pandemic (Chapter 7), Parliament's prerogative power in the context of human rights and the decision to go to war (Chapter 4), and is rounded out by an essay co-authored by Janet Hiebert and Chris McCorkindale who, in Chapter 12, look at Scotland's unique approach to legislative rights review.

Overall, *Rights and Parliamentary Systems in Canada and Beyond* provides a range of diverse perspectives. While not all Chapters focus exclusively on legal issues, the collection as a whole is worth reading for anyone interested in how political and legal actors interact in Canada's unique form of Parliamentary democracy. The collection not only explores how the previous forty years have shaped our political and legal culture but also offers insightful speculation on what the next forty years may have in store.

– Maxwell Lee

The Serviceberry: Abundance and Reciprocity in the Natural World

By Robin Wall Kimmerer. New York: Scribner, 2024. 105 pp., $25.00 hc.

In her newest book, *The Serviceberry*, Indigenous botanist and author of *Braiding Sweetgrass*, Robin Wall Kimmerer, provides a thought-provoking and poetic insight into the principles of gift economies. Kimmerer draws on both her Indigenous heritage and her connection with the natural world to deliver a powerful message about the need for reciprocity, interconnectedness, and gratitude in our society. In a world where the economy so often focuses on ideas of scarcity, competition, and the hoarding of resources, Kimmerer proposes integrating the principles of natural law as a way of achieving an economic mosaic, "where wealth and security come from the quality of your relationships, not from the illusion of self-sufficiency" (at 72).

In the first chapter of her book, Kimmerer opens by discussing the analogy of the serviceberry. As she stands in her neighbour's field, picking serviceberries, Kimmerer marvels at the fact that these berries are pure gifts from the land; not only to her and her neighbours, but also to the birds who pick the berries alongside her. She describes how both she and the birds have done nothing to deserve these berries, having not laboured or paid for them in any way (at 2). They are purely a gift. Kimmerer explains that in her Anishinaabe worldview, it is not just fruits that are understood as gifts, but all sustenance that the land provides, with one life being given to support another (at 8). Having received these gifts, we have a responsibility to respond with gratitude and with reciprocity: "Gratitude and reciprocity are the currency of a gift economy, and they have the remarkable property of multiplying with every exchange, their energy concentrating as they pass from hand to hand, a truly renewable resource" (at 14). Kimmerer explains that in a gift economy, this reciprocity goes far beyond a bilateral exchange that creates an obligation for payment. Rather, reciprocity focuses on keeping the gift in motion, so that it will continue to grow, just as the gift of the berries continue to move through the ecosystem after they are picked by the birds (at 14–15).

In Chapter 3, Kimmerer shifts her discussion to focus on the purpose of an economy and how the typical model of a market economy continues to fall short. She explains that rather than defining economics as "decision making in the face of scarcity," it should instead be framed as how people provide for and organize themselves to sustain life (at 30). It is here where Kimmerer provides the example of the Brazilian hunter living in the rainforest. This hunter brings a sizeable kill home to his community. The anthropologists observing them ask him how he plans to store the meat, given that it is far too much for his family to eat all at once (at 31). This question confuses the hunter, who instead of attempting to store the meat, sends out an invitation to all the families in his community, who feast together until all of the meat is consumed (at 32). The anthropologists view this behaviour as "maladaptive" given the scarcity that exists in the forest. In response however, the hunter answers: "[s]tore my meat? I store my meat in the belly of my brother" (at 32). Kimmerer uses this example to further explain the innerworkings of a gift economy; one where gratitude and reciprocity replace the need for storing and hoarding resources. By focusing on abundance, rather than scarcity, these gift economies are able to provide for the whole community, through cooperation and interconnectedness, rather than through competition.

In Chapter 5, Kimmerer provides her views on the "[t]ragedy of the [c]ommons," explaining that the idea that shared property will always eventually be ruined by human selfishness is only a myth (at 59). In response, she discusses the resource management plans that existed in the Haudenosaunee Confederacy long before the arrival of European settlers. According to Kimmerer, these plans were based on a mutual understanding that the land that provides for all parties should be "regarded as One Dish, which Mother Earth has filled with everything that we need to live. It is seen as a gift and therefore shared in common" (at 61). Here, Kimmerer also describes the ancient Indigenous legal principles of the "Honorable Harvest," which were created to discourage rampant consumption and to ensure that Mother Earth's dish always remains full (at 62). These guidelines include taking only what you need, harvesting in ways that minimize harm, giving thanks for what has been given, and giving gifts in reciprocity (at 64–65). The final principle of the Honorable Harvest that Kimmerer includes is to "[s]ustain the ones who sustain you and the Earth will last forever" (at 65). This model for shared property and collaboration is one that Kimmerer maintains must be integrated into our current system if we are to heal the damage that has been done by market economies.

In the final chapter, Kimmerer explains that market economies will not disappear overnight, but that it is our responsibility to begin to integrate the principles of gift economies into our society as a means to begin to effect change in that direction: "The gap edges, or ecotones, where two ecosystems, the new and the old, meet, are among the most diverse and productive of ecosystems, full of berries and birds. There are species that live in neither the new nor the old, but at the edges. This is the home of the Cedar Waxwings and the realm of the Serviceberries" (at 101–02). The market economy and the Western legal tradition is not something that can be completely changed overnight. That being said, through a legally pluralistic approach, there is a real possibility that the traditional Indigenous principles of gratitude, reciprocity, and interconnectedness could be reintegrated into our society in a way that could bring healing to the natural world.

The Serviceberry can and should serve as a valuable resource for any legal professional or scholar looking to expose themselves to the principles of Indigenous Natural law in relation to property and the economy. Kimmerer provides a wide range of beautifully crafted stories, analogies, and lessons that perfectly come together to propose a new model for personal property: one built not on scarcity and greed, but instead on the traditional principles of gratitude, interconnectedness, and reciprocity.

While these ideas might not take hold overnight, Kimmerer argues that through a mosaic approach, we, as a society, can begin to integrate these teachings into our existing frameworks, to begin to progress towards a better future.

– Robbie Lee-Phillipson

Challenging Borders: Contingencies and Consequences

Edited by Paul McKenzie-Jones, Sheila McManus, & Julie Young. Athabasca: AU Press, 2025. 232 pp., $37.99 pb.

Challenging Borders is a collection of works first presented at a 2019 conference in Lethbridge, Alberta, titled *The Line Crossed Us: New Directions in Critical Border Studies* (at *ix*). The conference brought together academics, artists, and activists to reimagine borders and their meanings (at 1). The Introduction, "Pushing Boundaries," states that the book "challenges the sense of permanence" that often characterizes borders and nationalism (*ibid*).

The book is divided into two parts. Part 1 is "Visualizing Borders," while Part 2 is "Cuttings and Crossings." Each part contains four articles that are grouped thematically (at 2). Part 1 reflects on borders and their consequences by examining creative and theoretical perspectives (at 2–3). Part 2 explores North America's borders in both modern and historical contexts (at 4).

In Chapter 1, "Toward a Decolonial Archive: A Reflection on the Operationalization Process of Critical Transborder Documentary Production Practice," Ramón Resendiz and Rosalva Resendiz discuss the development of their documentary film *El Muro | The Wall* (2017), which explores the contested lands and history of South Texas and Northern Mexico where Indigenous resistance continues to influence that region's landscape (at 2). This work aims to reflect on colonial erasures that uphold settler-colonial worldviews through research, media, and storytelling (at 15). The authors' central argument is that modern settler-colonial societies rely on stories and ideas, or "imaginaries," that render settlement normal and natural. However, those narratives often depend on the erasure of Indigenous presence, knowledge, and experiences (*ibid*).

In Chapter 2, "Working the Border: Interdisciplinary Encounters Across Intellectual, Material, and Political Boundaries," geographer Leslie Gross-Wyrtzen and artist Heather Parrish demonstrate how art can challenge the perception that borders are fixed and settled (at 2), as "art can bring invisible border structures into view, offering opportunities for critical reconsideration and, where necessary, resistance" (at 36). These authors demonstrate that studying borders involves understanding their complexity and fluidity, and that interdisciplinary collaboration sheds light on this complexity but also presents challenges when integrating diverse approaches (at 3, 46–47). Overall, this chapter explores the use of geography and art to produce a new conceptualization that conveys both the belonging and division that borders create (at 36).

In Chapter 3, "The Line Crossed Us? Remapping the Geo-body of a Nation: How Young People in Finland Understand Shifting Borders," geographer Chloe Wells examines the long-term effects of a nation's border being forcibly altered by observing how teenagers in Finland perceive their country's borders after Finland lost territory to Russia during World War II (at 3, 54). Wells discusses the concept of "territorial phantom pains" that individuals or groups may experience in relation to former national territories (at 54, 60) and how "spatial socialization" influences people's sense of belonging to a specific territory (at 61). Overall, this work is thought-provoking, especially considering the ongoing war in Ukraine (at 70–72).

The final chapter of Part 1, "From Lines in the Sand to the Wave/Particle Duality: A Quantum Imaginary for Critical Border Studies," political scientist Michael PA Murphy proposes a possible solution for the field of border studies, where "researchers are engaged in either macroscopic analyses that focus on overarching concepts like sovereignty and territory or microscopic studies of localized, lived experiences of borders" (at 3). Instead, Murphy finds that applying quantum theory redefines borders as dual rather than binary (at 3). In this work, Murphy highlights how three concepts from quantum social theory—wave/particle duality, social wavefunction, and measurement—can assist in understanding various theoretical approaches to studying borders (at 86).

Chapter 5, "Sinixt Existence in 'Extinction': Identity, Place, and Belonging in the Canada-US Borderlands," features anthropologist Lori Barkley, matriarch Marilyn James, and activist Lou Stone, who explore the effects of the 1846 decision to establish the Canada-United States border along the forty-ninth parallel (at 4). In particular, these authors examine the impact on the Sinixt people, who were declared "extinct" by the Canadian government, and whose traditional territory was split between British Columbia and Washington (at 103). This chapter also offers a critical overview of the Sinixt peoples' efforts to challenge their proclaimed "extinction" and their struggle through the Canadian legal system to secure Aboriginal rights and title (at 109–112).

In Chapter 6, "Seeking Safe Harbour: Indigenous Refugees and the Making of Canada's Numbered Treaties," historian Ryan Hall contends that we must examine Canada's political motives behind the Numbered Treaties "within a framework of Indigenous peoples being displaced within their own homelands and forced to cross a settler-imposed border within them" (at 4). Hall argues that American Indigenous refugees were central to establishing the Numbered Treaties and settler society in western Canada (at 130). Hall elucidates this through a detailed background of the history leading up to Treaty 7.

Feminist scholar Claudia Donoso's "Keeping Them Vulnerable: Female Applicants and the Biopolitics of Asylum in Texas," the penultimate chapter of the book, examines how the lawful act of crossing the border before seeking asylum has been criminalized through "biopower" in the United States' border policies (at 5, 156). It also explores how this biopower regulates and dehumanizes female asylum seekers from Central America (at 5, 151) who are fleeing gang-related violence but are nevertheless turned away at the United States border (at 153).

The final chapter of the book, "Experiences at the New Canadian-US Frontier: 'I Just Assume That No Laws Exist…,'" features discussions by communications scholar Evan Light, political scientist

Sarah Naumes, and sociologist Aliya Amarshi on how border-crossing practices have entered the digital era, now functioning as a complex system of surveillance and documentation that influences decisions on who can cross (at 5). The authors' main argument is that border-crossing systems need to be rehumanized through greater oversight and transparency regarding policies and expectations (at 193).

Lastly, *Challenging Borders* includes an afterword by Anne McNevin, "On Being Unsettled: Discomfort and Noninnocence in Border Studies," which is based on her talk at the 2019 conference in Lethbridge (at 5). The afterword discusses how this collection was assembled through a conference that was necessarily uncomfortable, where efforts were made to challenge disciplinary boundaries while also reinforcing certain types of knowledge about borders (at 6, 202).

Although the book is not strictly a legal work, *Challenging Borders* addresses some prominent legal issues and offers new perspectives and interpretations. This book is insightful in its analysis of how borders and the legal system have impacted Indigenous peoples in Canada. Overall, *Challenging Borders* is a thought-provoking collection that examines how borders shape the world and influence people. However, since each piece in the collection is relatively brief, it may leave the reader with several unanswered questions. Some pieces made assumptions or overlooked alternative viewpoints, which leaves room for skepticism of the authors' conclusions. Nonetheless, it is a valuable collection that presents alternative perspectives on how to view borders and the issues they create.

– Treyton Pernitsky

Legal Ethics and the Attorney General: A Canadian Analysis

By Andrew Flavelle Martin. Toronto: University of Toronto Press, 2025. 288 pp., $55.00 hc.

Andrew Flavelle Martin's book, *Legal Ethics and the Attorney General: A Canadian Analysis*, is aptly named because it explains why legal ethics are applicable to provincial and federal Attorneys General in Canada. Although the Attorney General is assisted by public service lawyers such as the Deputy Attorney General, Martin focuses his discussion squarely on the Attorney General (at 15–17). In Chapter 1, Martin determines that "the Attorney General necessarily practices law, insofar as they serve as the Law Officer for Cabinet, provide legal advice to the Crown and the heads of ministries and agencies, and conduct all litigation for the Crown" (at 9). The Attorney General is therefore bound by the law of lawyering including the duties of loyalty, integrity, competence, civility, non-interference with fair trial rights, and encouraging respect for the administration of justice (at 10–14). The client of an Attorney General is "the Crown…as an organizational client," and Martin argues that the legislature is also a client (at 14–15). Martin adopts the "two hats" model that separates the role of Attorney General from any other roles such as Minister of Justice (at 17–21). Despite separate roles, Martin asserts that "it will be difficult for the Attorney General to argue that conduct in any of their public roles should not be subject to the law of lawyering" (at 21).

Part I, containing Chapters 2, 3, and 4, elaborates on the complexity of the role of Attorney General as a lawyer. Chapter 2 discusses the duty to encourage respect for the administration of justice and analyzes various real examples such as the apparent misconduct by federal Attorney General Peter MacKay whose comments insinuated wrongdoing on the part of Chief Justice McLachlin (at 42–49). As the examples demonstrate, not only must statements by an Attorney General criticizing the justice system be *bona fide* and accurate, but the Attorney General must also hold other members of government to the same standard (at 57–59).

Chapter 3 identifies issues with Attorneys General being cross appointed to two (or more) roles. As Quebec Premier Maurice Duplessis demonstrates (at 60–65, 69–70), Premiers cross appointing themselves as Attorney General will struggle to uphold their ethical obligations because of lack of impartiality, conflicts of interest, and the intense workload of both Premier and Attorney General (at 65–67). Cross-appointed Attorneys General may struggle to competently handle their work as a lawyer and the work of a separate Cabinet role, while an Attorney General simultaneously serving as minister for policing creates the risk of having self-investigatory powers for police infractions (at 77).

Chapter 4 links the lawyer rules on withdrawal to the resignation of an Attorney General. Attorneys General can be easily removed from their position, but the Attorney General's resignation is limited by requiring good cause and reasonable notice (at 78–79). Mandatory resignation is required "where Cabinet interferes, or attempts to interfere, in the conduct of a criminal trial or appeal" or "where the Attorney General advises Cabinet that a proposed bill or action would be unconstitutional and Cabinet rejects that advice" (at 79). Confidentiality applies even after resignation, aside from the typical exceptions to privilege and confidentiality and statements made under parliamentary privilege (at 82–86). Resignation, or the threat of it, may even be warranted when it would encourage respect for the administration of justice (at 86–91, 93).

Part II, including Chapters 5, 6, and 7, addresses how Attorneys General are to be held accountable for misconduct. Chapter 5 explains how the Attorney General, as a licensed lawyer and member of a Law Society, is subject to law society discipline. Due to parliamentary privilege, "the Attorney General will also be immune… for any statements made within the legislature" (at 105). Outside of the legislature, *Krieger v Law Society of Alberta* (2002 SCC 65 [*Krieger*]) "suggests that the Attorney General is generally subject to law society discipline but immune for prosecutorial discretion absent bad faith" (at 105). After analyzing policy arguments for and against legislated Attorney General immunity against disciplinary proceedings, Martin concludes that immunity should be limited to "prosecutorial and policy functions absent bad faith, and for anything said in the legislature" (at 119).

Although *Askin v Law Society of British Columbia* (2013 BCCA 233) and *Krieger* suggest Attorneys General without law licences are not engaging in the unlicensed practice of law, Martin argues in Chapter 6 that Attorneys General are sufficiently practising law and should be required by legislation to already be licensed lawyers or be automatically deemed "a member of the corresponding law society so long as they remain Attorney General" (at 136). Hence, as a member of the law society, then the Attorney General is subject to law society discipline just like other lawyer members. However, because these Attorneys General are inexperienced in the practice of law, they will need to "fulfill their duty of competence" by relying on the advice from their legal counsel (at 136).

Chapter 7 explores different means of holding Attorneys General accountable aside from law society discipline. This can include parliamentary accountability, which is when consequences are "imposed on the Attorney General by, or in, the legislative assembly (or House of Commons) as a legislator or as a member of Cabinet" (at 143), even for "breaches of lawyers' ethics or codes" (at 148). The Speaker can stop misconduct occurring within the legislature, such as prohibiting statements that do not encourage the administration of justice (at 149). Legislators' and Cabinet codes of conduct can be used to enforce the law of lawyering on the Attorney General, and lastly, the Attorney General can be pressured to resign or be removed from Cabinet for misconduct (at 150–51). These responses are available when the Attorney General's misconduct is otherwise protected by parliamentary privilege.

Chapter 8 concludes the book by reiterating that Attorney General is a distinct role from any other Cabinet responsibilities and should be held accountable as a lawyer. That accountability is best carried out through law society discipline and parliamentary accountability (at 156). Martin also discusses recommendations such as clearly splitting the role of Attorney General from Minister of Justice (at 157–58) and revising legislation and law society rules to provide clear expectations for lawyers in public office and the Attorney General (at 159–160). Lastly, Attorneys General may need to hold themselves accountable through principled resignation or refusing the office entirely (at 161–62, 165).

In conclusion, *Legal Ethics and the Attorney General: A Canadian Analysis* explores how legal ethics applicable to lawyers are applicable to the Attorney General. Overall, it is very well written and is both thorough and compelling. Martin admits to being "romantic and idealistic" (at 4) and sets high standards for the Attorney General that could be criticized as being too idealistic, which is something that Martin Bryant's foreword touches on (at xix). However, this high standard gives a strong foundation for future commentators to analyze. Regardless, Attorneys General and their staff who read the book will benefit from a better understanding of the role of Attorney General and the importance of their ethical conduct. While the role of Attorney General is primarily appealing to individuals within the political realm, lawyers and non-lawyers, especially those in public media, will benefit from understanding the ethical obligations of an Attorney General so that they can also hold Attorneys General accountable for misconduct as a lawyer.

– Joshua Rybchuk

What Women Represent: The Impact of Women in Parliament

By Erica Rayment. Montreal & Kingston: McGill-Queen's University Press, 2024. 252 pp., $34.95 pb.

What Women Represent: The Impact of Women in Parliament is author Erica Rayment's study of the true importance of women's representation in Parliament and how women's voices in Parliament can influence the function and decisions of government. By using a new framework to better understand how women's representation in Parliament manifests, Rayment conducts an extensive analysis of decades of parliamentary speeches and debates to determine who contributes to the discussion and protection of women's rights in Parliament. Amidst an era of increased feminist movements and calls for greater representation of women, *What Women Represent* is the first of its kind, using empirical observations to demonstrate the impact and importance of women representatives in Canada's Parliament.

Part 1 introduces the reader to Rayment's framework that is utilized for the empirical studies in the following chapters. The framework expands previous approaches to the substantive representation of women in Parliament by including parliamentary speech, policy advocacy, and policy outcomes (at 28). This new framework, described as a "conceptual disaggregation," recognizes how these elements of substantive representation do not stand in isolation, as parliamentary speeches can be acts of advocacy, and advocacy can influence policy outcomes (at 45). Rayment also introduces the reader to critical actors, individuals who act as "surrogate representatives" for women by promoting women's interests over other representational obligations, which in turn can influence others to act on behalf of women (at 33). Canada's institutional constraints as a Westminster parliamentary system, a system which emphasizes party solidarity and can suppress the power of individual Members of Parliament ("MPs"), are better addressed by this proposed framework (at 36–37).

In Part 2, Rayment conducts a large-scale examination of parliamentary speeches to discover which groups and individuals are driving Parliament's discussions about women. Rayment's methods involve an analysis of parliamentary speeches mentioning women from 1968 to 2015, and identifying which individuals and groups tend to mention women in parliamentary speech (at 50–51). The empirical study shows that gender is the largest indicator of an MP's probability to represent women in parliamentary speech, with women being more likely than their male counterparts to do so (at 60, 76). Rayment also examines trends in groups other than gender, finding that, for the most part, party affiliation does not change the number of speeches made about women (at 70). The Conservative Party of Canada unexpectedly stands out as the party that has given the most speeches mentioning women (at 70, 76, 78). The analysis shows how women as a whole are more likely to speak about women in Parliament, regardless of party affiliation (at 78).

Part 3 builds upon the findings in Part 2 by examining the content of parliamentary speeches about women to identify which specific policy issues concerning women were addressed by MPs. Rayment's analysis shows how the major topics mentioned in parliamentary speeches about women can be categorized into twelve groups: abortion, childcare, employment, Indigenous women, International Women's Day, marriage, pay equity, program funding, rights, status, violence against women, and women's health (at 85). The findings on party affiliation from the previous chapter are further developed, as the data shows Conservative MPs are more likely to address women's issues related to "the stereotypically masculine sphere of the economy and on topics related to traditional family values and gender roles" (at 104). MPs from leftist and centrist parties tend to have greater focus on issues that center on women's social and economic equality (at 102–03). While gender affects how likely someone is to make speeches about women, party affiliation affects the content of these speeches (at 105).

Part 4 examines periods with increased attention to women in parliamentary debate to understand what contributed to these spikes in attention. Results from the previous studies show increased parliamentary mentions of women in the 34th and 39th Parliaments (at 107). These findings, when taken with the historical context, reveal that the large number of speeches about women in these Parliaments were as a direct response to government policy initiatives involving women's interests or as an attempt to influence the government to act (at 129). The study of these two Parliaments also reveals that representation of women is not limited to debate on legislation concerning women's interests, but also includes representation through opposition motions, oral question periods, and parliamentary committees (at 130–31).

Part 5 undertakes a case study of the Mulroney government's effort in the 34th Parliament to recriminalize abortion and identifies the critical actors responsible for preventing the passage of this bill. Bill C-43 faced pushback in the House of Commons from women representatives in the majority and opposition parties alike (at 142–43). While Conservative female representatives ultimately voted in favour of the bill, Rayment highlights Barbara McDougall's attempt to defend women's rights within Cabinet to demonstrate that the quantitative women's representation alone is not sufficient for the substantive representation of women—women's representation in key positions and roles is also critical (at 140, 152–53). The bill's defeat in the Senate is attributed to three female Conservative Senators voting against the bill, making them critical actors who prioritized women's rights over other considerations (at 145, 148). Rayment uses this case study to show how substantive representation does not always involve proactive initiatives to further women's rights, but it also involves defensive protection against regressive parliamentary policies (at 153).

Part 6 examines the Harper government's push to weaken Status of Women Canada and the response and actions of critical actors in the 39th Parliament to fight against the government's erosive policies. The difficulties faced by critical actors during this time are contrasted with those in the 34th Parliament, as opposition to the Harper government's actions could not be limited to focus on a single piece of legislation and instead required alternative methods to influence government policy (at 158–59). The win achieved in this instance is attributed to opposition MPs, who utilized opposition motions, persistent advocacy during question periods, and parliamentary committees (at 159). This case study challenges the conception that opposition MPs cannot meaningfully influence government policy, showing how the critical actors in the 39th Parliament utilized external pressure on a Conservative minority government to force them to roll back on their initial regressive policies (at 171–72). The conceptual disaggregation and critical actor framework demonstrates how female opposition MPs affected policy through substantive representation of women across multiple channels, proving that women representatives have the ability to effect change despite holding positions that are perceived to hold less impact (at 175–76).

What Women Represent uses empirical evidence in a novel analytical framework to show the reader how women representatives in government are crucial to ensuring meaningful activism and amplification of women's interests in Parliament. Rayment proves that substantive representation also involves defensive action against government policies that undermine women's rights and interests. Overall, *What Women Represent* is an enlightening read that provides readers with a better understanding of how women's voices in Parliament effect change.

– Sahejdeep Toor

Legal Rights and Moral Rights

By Matthew H Kramer. Cambridge: Cambridge University Press, 2025. 84 pp., $80.95 hc.

Legal Rights and Moral Rights is one Element within the Cambridge Elements Philosophy of Law Series. The author, Matthew H. Kramer, is a professor of legal and political philosophy within the University of Cambridge Faculty of Law. Kramer offers a succinct account of the general nature of legal and moral rights, the conditions under which those rights are held, and the justificatory foundations underlying their assignment. The book is organized into four chapters addressing the Hohfeldian analytical framework, the holding of claim-rights, the moral justifications for assignments of legal rights, and a brief conclusion.

Kramer begins by outlining Wesley Hohfeld's framework for analyzing legal relationships. The Hohfeldian framework is conventionally represented as a two-row, four-column table comprised of four entitlements—a claim-right, liberty, power, and immunity—each positioned above four correlates—a duty, no-right, liability, and disability.

Table 1: Hohfeldian table of legal positions (at 1)

claim-right	liberty	power	immunity
duty	no-right	liability	disability

A given entitlement has a "logical relationship of correlativity" with its below correlate that creates a "relationship of biconditional entailment" (*ibid*). As Kramer explains, if party A has a claim-right to be paid by party B, party B then has a correlative duty to pay party A (*ibid*).

Kramer highlights the diagonal relationship between the top and bottom elements of the Hohfeldian schema that creates a negation (at 2–3). Each proposition is a negation of the other, with each only able to be true if the other is false (at n 2). Party A having a legal *duty* to pay Party B is a negation of Party A having a legal *liberty* to not pay Party B (at 2). Similarly, an *immunity* is the negation of a *liability*, as you cannot be both liable and immune with respect to the same act (at 3). Hohfeld also emphasizes that although there is a biconditional entailment between the two positions in each column, this entailment does not exist between entitlements (at 4). This clarifies the language of rights (at 4). Legal claim-rights, liberties, powers, and immunities are conceptually distinct even though they are often grouped together in legal analysis (*ibid*). However, entitlements may give rise to one another in practice. The exercise of a legal liberty is often informed by the existence of a legal claim-right, and some liberties presuppose immunities that prevent their extinguishment (at 4–6).

Chapter two considers the conditions under which claim-rights are held. A claim right, Kramer notes, is an entitlement held by one party that correlates with a duty imposed on another party to act, or refrain from acting, in a particular way (at 6–7). The chapter examines two competing models of right-holding, the *Interest Theory* and the *Will Theory*. Each theory offers a differing account of the necessary and sufficient conditions for holding a claim-right. The theories are as follows:

The Interest Theory:

> Individually necessary and jointly sufficient for the holding of a claim-right by *X* are (1) the fact that the duty correlative to the claim-right deontically and inherently protects some aspect of *X*'s situation that on balance is typically beneficial for a being like *X*, and (2) the fact that *X* is a member of the class of potential holders of claim-rights (at 7).

The Will Theory:

> Both necessary and sufficient for *X*'s holding of a claim-right correlative to some specified duty is that *X* is competent and authorized to control the existence and enforcement of that duty (at 11).

Kramer's discussion highlights the divergence between the theories regarding the kinds of rights that are recognized (at 11). A notable critique of the Will Theory arises from cases where a victim is murdered or rendered comatose (at 13). The victim is incompetent to exercise any Hohfeldian powers at either the post-violation or post-judgment stages, and therefore the Will Theory implies that such attacks do not violate the victim's legal or moral claim rights (at 12–13). Kramer identifies this criticism, along with others, including an example involving minimum wage legislation (at 14–15), as illustrative of weaknesses in Will Theorists' positions (at 13). Kramer concludes chapter two by adopting a capacious view of who can hold claim-rights. In his account, potential right-holders include most non-human animals, human collectives, all currently living individuals, many deceased persons, and all future generations (at 36).

Chapter three considers some of the central methodologies for justifying the distribution of legal entitlements (at 36). Kramer considers various theories of justice; however, he engages most with the conceptions of John Rawls (at 37). Rawls's account of justice rests on two complex principles (at 40). The first principle requires that each person be accorded the greatest possible set of civil and political entitlements that are consistent with everyone else receiving that same set (*ibid*). The second principle provides that inequalities arising in the entitlements of the first principle are only permitted insofar as they benefit the least advantaged people of society (*ibid*). The first principle is fully egalitarian, while the second permits conditional inequality (*ibid*). Kramer notes the conflict between Rawls's framework and other contemporary conceptions such as prioritarianism, sufficientarianism, and forms of egalitarianism and libertarianism (*ibid*). Rawls's conception of distributive justice was criticized by Ronald Dworkin on the ground that it failed to address situations where a system of governance overlooks relevant differences among people when distributing rights and duties (at 46).

However, Kramer notes that Rawls could have responded to this criticism easily by expanding the wording of his definition to cover these circumstances (*ibid*). Therefore, Dworkin's criticism does not expose a genuine inadequacy of Rawls's theory (*ibid*).

Kramer also introduces the distinction between value-independence and value-dependence (at 46-47). A value independent theory is one whose justificatory reasoning does not draw on ethical values (at 47). Although value-independence theorists are uncommon, Kramer discusses Hillel Steiner as an example (at 49), before turning to theorists such as Rawls and Dworkin (*ibid*), and Joseph Raz and Tom Campbell who adopt value dependent frameworks (at 51–52). Kramer ultimately takes the position, contrary to Steiner, that an adequate analysis of justice requires ethical considerations supported by principles of political morality (at 60). He rejects constructivism while, similarly to Rawls and Dworkin, postulating his approach in the fundamental moral principle that interests of various parties should be legally protected through the assignment of legal claim-rights and other legal entitlements (at 61).

Overall, *Legal Rights and Moral Rights* offers an engaging and concise account of leading philosophical approaches to rights and provides an explanation on how legal and moral rights are structured, held, and justified.

– Josh Wiebe