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BAR WARNS OTTAWA NEW TAX LAW THAT COMPELS LAWYERS TO REPORT CLIENT INFO TO STATE UNCONSTITUTIONAL

By Cristin Schmitz
(Originally published on *Law360 Canada*, formerly, *The Lawyer's Daily*,

A decades-old constitutional conflict over federal efforts to draft lawyers as state agents in the war against money laundering is heating up again, with the Federation of Law Societies of Canada (FLSC) and the Canadian Bar Association (CBA) arguing that new *Income Tax Act* (ITA) information disclosure provisions that will compel lawyers to report to the state about clients' trust accounts next year violate constitutional principles that the Supreme Court of Canada has repeatedly ruled protect solicitor-client privilege and lawyers' duty of loyalty to their clients.

The bar and Ottawa continue to fundamentally disagree over the constitutionality of the ITA reporting requirements for client trusts enacted last December — as well as about the notifiable and reportable transactions proposed in draft legislation last November — despite more than four years of representations to the federal government by the umbrella group for Canada's 14 legal regulators and the 37,000-member CBA.

The stage could be set, therefore, for a possible court challenge by the bar to the new trust reporting obligations, unless Ottawa and the federation/CBA find common ground during discussions about accompanying *Income Tax Act* regulations that are expected in 2023.

The CBA's president, Steeves Bujold, a civil litigator with Montreal's McCarthy Tétrault, told *The Lawyer's Daily* he believes a rapprochement is likely, given a one-year delay before the trust reporting provisions come into effect and the association's "very productive and open-minded discussion with all the officials of the government so far."

"We still have current discussions [with the government] about the regulations

that will come supporting this piece of legislation, and we're confident that we will in 2023 come to a successful resolution," Bujold explained. "If it's not the case, we'll evaluate our options later this year, closer to the time limit at which this law will come into effect."

Bujold emphasized that the bar association supports the federal government's goals of fighting abusive tax avoidance, money laundering and other illegal activities.

However, Canadians can be assured that the bar will continue to stand up vigorously for their clients' constitutionally protected rights to solicitor-client privilege/professional secrecy and an independent bar — even if litigation is eventually required, Bujold said.

"Canadians can be assured that the bar will continue to stand up vigorously for their clients' constitutionally protected rights to solicitor-client privilege/professional secrecy and an independent bar — even if litigation is eventually required, Bujold said.

"You can not only be confident, you can be certain of that," he said. "It's one of our main missions, and that's what our members are expecting from us."

For its part, the Department of Finance said the new reporting obligations for trusts in Bill C-32, which apply for taxation years that end after December 2023, deliver on the Liberal government's "commitment to increase transparency on the beneficial ownership of trusts, in line with Canada's international commitments to increase transparency of beneficial ownership and to keep pace with peer countries. The bill makes clear that information related to solicitor-client privilege does not need to be disclosed."

Legal regulators and the bar contend the reporting obligations for trust accounts, which Ottawa says will help the Canada Revenue Agency (CRA) assess the tax liability of trusts and their beneficiaries, are unconstitutional or likely unconstitutional. The groups are also raising constitutional concerns about

the government's proposal to require "advisers" to report notifiable tax transactions (i.e. tax avoidance transactions and other transactions of interest) and to expand disclosure obligations for "reportable" tax transactions (i.e. avoidance transactions under GAAR, with specified hallmarks).

The trust reporting amendments **received royal assent** Dec. 15, 2022, as part of the Liberal government's 172-page omnibus Bill C-32, which implemented diverse measures from the Nov. 3, 2022 fall economic statement and the April 7, 2022 federal budget.

According to Justice Minister David Lametti's "Charter statement" to Parliament, certifying Bill C-32's consistency with the Charter, requiring clients' trust information to be passed on to the state "potentially engages" privacy interests protected by Charter's s. 8 — the provision which secures everyone against "unreasonable search or seizure."

But Lametti certified he did not detect "any potential effects that could constitute an unreasonable interference with privacy as protected by s. 8 of the Charter."

He laid out in three sentences the "considerations" that support the compliance of the ITA's amendments with s. 8 of the Charter: "The purpose of the measure is to improve the collection of relevant information to help the Canada Revenue Agency assess the tax liability for trusts and its beneficiaries. In the regulatory and administrative contexts, privacy expectations are reduced. Powers to compel the production of information for the administration of the Income Tax Act, which is based upon a self-assessment system, have been upheld as reasonable under section 8."

(The practice at the Department of Justice is for the minister to certify legislation as Charter-compliant if it meets what a court has described as a **"weak" standard**, i.e. is there any "credible" argument that is capable of being successfully argued in good faith before the courts, even if there is a "very high" or "almost certain" risk (defined as 81-100 per cent) of a successful court challenge, except at the "far end" of this range.)

The government's legal reasoning did not convince the CBA and the FLSC, which conveyed their concerns and objections to Bill C-32 to the federal government and both Houses of Parliament in writing, as well as during talks with officials of the Department of Finance and Department of Justice, including during consultations on draft legislation emanating from Budget 2018 and Budget 2021.

The ITA exempts lawyers' general, or pooled, trust accounts from the new trust reporting requirements but does not exempt trust accounts held separately for a particular client or clients. However, the bar contends that all trust accounts held by legal professionals should be exempted from the obligation to report to the CRA.

"The federation is surprised that the Charter statement does not mention, let alone engage in any robust analysis of the implications of the trust reporting provisions for solicitor-client privilege within the context of s. 8 of the Charter," FLSC president Jill Perry, a managing lawyer with the Nova Scotia Legal Aid Commission, wrote Nov. 29 to Sen. Percy Mockler, the chair of the Senate's National Finance Committee.

Perry called the justice minister's conclusion that the amendments are constitutionally compliant "clearly contrary" to the Supreme Court of Canada's decision in *Canada (Attorney General) v. Chambre des Notaires du Québec*, 2016 SCC 20.

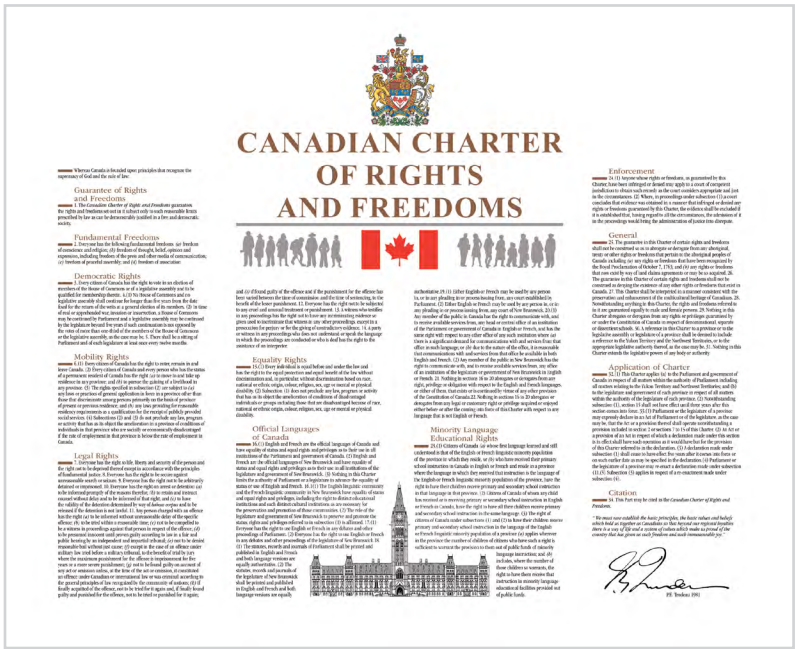
In a decision co-written by now-Chief Justice Richard Wagner, the top court declared in *Chambre des Notaires* that professional secrecy is "a civil right of supreme importance in the Canadian justice system" which must "remain as close to absolute as possible."

The Supreme Court went on to unanimously strike down — as against notaries and lawyers in their capacity as legal advisers — the CRA's sweeping regulatory power to require "any person" to provide information or documents for any purpose related to the ITA administration, and also s. 232(1) of the ITA which purported to exclude the accounting records of lawyers and notaries from the shield of solicitor-client privilege. While five of the seven judges who ruled have since departed from the top court, it seems unlikely that this robust approach will be watered down. Notably, Supreme Court Justice Mahmud Jamal, who joined the court in 2021 after a distinguished career as a civil and constitutional appellate

litigator with Toronto's Osler, Hoskin & Harcourt, represented the CBA in its intervention in support of solicitor-client privilege in the *Chambre des Notaires* case. After judgment was handed down, he told *The Lawyer's Daily* "Canada remains the leading jurisdiction in the common law world protecting solicitor-client privilege."

"In the income tax context, this should all but shut down the practice of issuing requirements against lawyers — but this should also be the result in other regulated contexts," he predicted at the time. "The decisions are crystal clear that regulatory demands against lawyers for their clients' information are deeply problematic, and **may often be unconstitutional.**"

According to the federation's Nov. 21 submission to the Commons Standing Committee on Finance, *"Chambre des Notaires* is unambiguous: any compelled disclosure of information that identifies a legal professional's client, even if just by name, breaches that client's right to solicitor-client privilege. Further, the Supreme Court has held that information protected by solicitor-client privilege may be ordered disclosed only where 'absolutely necessary', a test the court has described to be 'as restrictive a test as may be formulated short of an absolute prohibition in every cases.' The Supreme Court has also held that any legislative provisions that interfere with solicitor-client privilege more than 'absolutely necessary' will be found to be unconstitutional."


CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In reaching its conclusion in *Chambre de Notaires*, the federation said the Supreme Court "cited defects in the legislation that also exist in Bill C-32. An inappropriate burden is placed solely on the legal professional to safeguard a client's right to solicitor-client privilege (paras. 53-57); and compelling disclosure of the information being sought is not absolutely necessary as required to justify any infringement on solicitor-client privilege (paras. 58-61)."

"Given the existence of the same defects in Bill C-32, the provisions on trust reporting as they apply to the trust accounts of legal professionals would breach" Charter s. 8, Perry wrote Mockler Nov. 29.

The federation noted that the Supreme Court has ruled that both basic personal information (names, addresses etc.) and accounting information may be privileged. "At the very least, the requirement to file returns for separate trust accounts creates uncertainty about what could be included in a return without violating solicitor-client privilege," the federation said in its Nov. 21 submission to the House of Commons Standing Committee on Finance.

"At worst, the positive obligation to file a return for a separate trust account creates a real threat to privileged information. The amendments also do nothing to address the conflict that the reporting obligation will create between the duty of loyalty that legal professionals owe to their clients and the requirement to report trust account information to the CRA."

Writing Nov. 22 to Deputy Prime Minister and Finance Minister Chrystia Freeland, who sponsored Bill C-32, Bujold said the bar association believes the provisions, as drafted, "would not withstand constitutional scrutiny" in the light of Supreme Court of Canada jurisprudence.

"The requirements to disclose information are substantially the same as the government's previous attempt to subject lawyers to the FINTRAC regime," the CBA said, noting C*anada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, "clearly ruled this was not allowed."

In the *Federation of Law Societies of Canada* decision (then-litigator Mahmud Jamal represented the intervener Canadian Civil Liberties Association), the Supreme Court ruled 7-0 that 2008 federal regulations requiring financial intermediaries to verify clients' identities, and record and retain their information for scrutiny by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), as well as statutory provisions from 2000 authorizing the federal agency to search offices and computers and seize information during compliance audits, were **unconstitutional** as they applied to Canadian lawyers and law firms, including Quebec notaries.

Yet the CBA said the new reporting obligations to the CRA, on a broad group of trusts, will require annual tax returns disclosing the identity of all trustees, beneficiaries and settlors of the trusts, and each person with the ability to exert control over trustee decisions.

In that regard, ITA s. 150(1.4) states "for greater certainty, subsections (1.1) to (1.3) do not require the disclosure of information that is subject to solicitor-client privilege."

However, the CBA said that Bill C-32's exemption for lawyers' general trust accounts (which the bar considers ambiguous in scope) "is inadequate, impractical and risks placing lawyers in a conflict of interest with their clients."

The bar association said that Parliament's failure to exempt client-specific trust accounts would, in some circumstances, require a lawyer to disclose, among other things, the client's name and the amount received.

"This disclosure would violate the client's reasonable expectation of confidentiality in connection with their dealings with lawyers," the CBA said. Moreover, lawyers could face a conflict of interest as the lawyer's obligation to file a return "may conflict" with the duty of confidentiality owed to the client, as well as make it difficult for a lawyer to give unbiased advice on the scope of the client's privilege.

In addition, the reporting obligations for client-specific trusts impose unreasonable reporting burdens on lawyers (with limited benefit to the CRA), the CBA said, noting the obligations will be "especially problematic" for real estate lawyers. The association pointed out, for example, that it is common for lawyers to receive deposits from hundreds of purchasers in a single condominium development.

"Bill C-32 could require law firms to file tens of thousands of returns per year on account of condo projects alone," the CBA said. "This would be financially and administratively onerous and impractical, both for law firms and the CRA. It could ultimately result in higher purchase prices (counter to the government's objective of increasing affordable housing) because of higher transaction costs related to the reporting obligation."

The CBA recommended s.150 be amended to specifically exempt from the filing obligation any trust account maintained by a lawyer or notary in accordance with the rules of professional conduct governing them, including trust accounts maintained for particular clients.

With respect to the government's proposals on reporting obligations to the CRA for "advisers" — including lawyers, accountants and other third-party advisers — who assist clients with "reportable" transactions and "notifiable" transactions, the CBA said the ITA confirms that a lawyer-adviser is not required to disclose any privileged information.

However, the association said the exception is too narrow in that it applies only to lawyers, even though solicitor-client privileged information is commonly shared with accountants and other third-party advisers who work closely with lawyers in giving tax advice.

The bar urged that the ITA's exception for solicitor-client privileged information be amended to specify, "for greater clarity," that the information reporting requirements do not apply to any information in respect of which the person subject to the reporting obligation (not limited to a lawyer), on reasonable grounds, believes solicitor-client privilege applies.

The CBA said excluding solicitor-client privileged information from the reporting measures would not hinder the effectiveness of the ITA's rules, noting individuals and corporations already have disclosure obligations under FINTRAC and other beneficial ownership registry requirements. The association asserted it is more effective for the CRA to obtain such information directly.

"Compelling the disclosure of solicitor-client privileged information, under threat of penalty, by persons who validly possess the information is unconstitutional as it undermines a fundamental aspect of our legal system and ultimately the public's confidence in its ability to obtain comprehensive legal advice," the CBA said. "Solicitor-client privilege is a quasi-constitutional right and is fundamental to the rule of law and the proper administration of justice. It will be vigorously defended by the legal profession and justice system stakeholders."

UNIVERSITY OF WINDSOR LAUNCHES TRANSNATIONAL ARTS AND ENTERTAINMENT LAW CLINIC

By Amanda Jerome (Originally published on *Law360 Canada*, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

The University of Windsor's Faculty of Law has launched a Transnational Arts and Entertainment Law Clinic to "fill a vital gap and provide a much-needed resource" to the creative community. The clinic, which is a collaboration with the University of Detroit Mercy's (UDM) Arts and Entertainment Law Clinic, will provide students with "unique synergies between the institutions."

According to a press release, issued Jan. 17, this term, the clinic will "focus on developing local and cross-border community events to provide legal information."

The inspiration for this initiative came from the founding director's own experience working with creative industries in Detroit. Dr. Shanthi Senthe, an assistant professor of law, told The Lawyer's Daily that through her pro bono work with independent film companies, she noted many "commercially driven" issues going unmet.

> "[…C]reative entrepreneurs lack access to justice.

"There are gaps in business strategy, understanding financial literacy, access to credit, misappropriation of funds, any sort of breach of contract," she explained, noting that creative entrepreneurs lack access to justice.

"My students started asking me questions, and I had the opportunity to develop a curriculum around the needs of the creative economy within Windsor," she said, noting that UDM's clinic was also an inspiration.

While UDM's clinic has been in operation for a couple of years, the University of Windsor's program is only a couple of weeks old, launching at the beginning of 2023, so they are still "creating the infrastructure," Senthe explained.

"I want my students to be able to provide legal information to the creative community in Windsor, and we're going to structure the challenges around that particular sector," she said, noting that the students could end up working with filmmakers, musicians, artists and authors.

"We are so beautifully situated because of our proximity to Detroit," she added, emphasizing the amount of cross-border trade.

Senthe noted that artists go "back and forth" over the border and needed to know "the rules that navigate each jurisdiction."

"And when I say artists, I also mean people within the social media space, influencers, fashion designers," she said, stressing that "that particular group of people also require legal services that are accessible."

"I don't know of any other law school that offers that particular focus, or focuses on that need," she added.

Senthe hopes students' main takeaway from the clinic is the "experiential learning component."

"It's enhanced by dealing with real life situations," she said, noting that students are "able to focus their legal skills, or gain legal skills, using pragmatic moments that assist creative entrepreneurs."

"They're able to provide information that otherwise may not be available to the client or to the community. And they're also able to interact with non-lawyers, they're able to understand a particular niche industry that they may not have access to in the classroom. They're able to enhance their advocacy skills," she added.

Senthe noted that a "large number" of students applied to participate in the clinic. So much so that she had to increase the clinic size from five students to eight.

"A lot of them have a background in film, [or they were] musicians before law school. So, they are already driven, they're already passionate about this area of law," she added.

Sarika Navanathan, a second-year law student at the University of Windsor, "looks forward to exploring the unique complexities of entrepreneurship through the law."

"As both a law student and musician, this clinic is the perfect opportunity to merge my legal and artistic backgrounds to meet the needs of artists and entrepreneurs in the community," she said in a statement.

While the clinic is geared towards those in creative industries, Senthe noted that there will also be an emphasis on providing access to justice for racialized communities as well. All the independent film

companies she assists are Black-owned, she explained.

Senthe would like the legal profession to know that the clinic will be "creating community events that provide legal information to stakeholders within the creative economy" and she would "love to collaborate" with legal practitioners.

"My big ask would be for private practitioners, who are experts in copyright issues or IP, [to be] a guest lecturer," she said, noting that people who are "interested in contributing their expertise, or their knowledge are always welcome."

"At the end of the day, we're in a very fast-paced environment, and I want to engage with people who are actually on the front line," she added.

ONE LESS-TRAVELLED PARALEGAL PATHWAY

By Michelle Lomazzo (Originally published on *Law360 Canada*, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

I've previously written about the inspiring skill sets of paralegals across Ontario and the numerous unique practice areas. One area that is less common for paralegals to appear is in statutory accident benefits schedule (SABS) appeals before the Licence Appeal Tribunal (LAT).

I discussed this practice area with Gerri Camus, a well-respected Toronto paralegal who has seriously mastered her craft as a legal advocate in automobile accident benefits, including LAT. She represents her clients before the LAT, which is an independent, quasi-judicial agency and is one of 13 tribunals at Tribunals Ontario. Largely, the LAT adjudicates applications and resolves disputes for compensation claims.

Gerri has a successful background in both medicine, specifically nursing, and in business management. Her strong and varied background, in addition to her life experience and a solid reliable mentor, provided her with the essential skills to manage her own legal practice in SABS, including appeals and case management conference hearings.

How did Gerri discover this unique practice area? Was it by chance or design? In Gerri's case, it was by chance. She had been primarily litigating in small claims court when she happened to be chatting with a senior paralegal member who worked with a lawyer in the field of statutory accident benefits. This senior paralegal shared her opinion with Gerri that focusing in the SABS area of practice would be a good fit for her existing skill set and Gerri started along that path with a good mentor.

Gerri suggests that new paralegals wishing to enter the field of SABS advocacy follow one of two paths to acquire the knowledge and experience required to

competently advocate for their clients and to ensure success in this area of practice: one, work for a paralegal or a lawyer focusing on this area of law to learn the ropes, or if you're entrepreneurial, are sufficiently capitalized, self-motivated and a quick learner, hang your own shingle and work hard to develop a name for yourself, as long as you have a mentor you can count on. Consider job shadowing with someone who does SABS or agree to work with a personal injury firm, so you can learn the ropes.

It's important to understand that your clients in this field of practice lean on you and look to you for step-by-step guidance. They are often in a bad place, vulnerable and injured, sometimes both physically and psychologically, and they come to you as a SABS legal practitioner for your knowledge and expertise. Success in this area of law requires not only skill but empathy and patience, with many claims taking on average between two and four years. Clients need assistance filling out forms and navigating the process, as well as legal representation at hearings. If you're not empathetic or patient, Gerri says you are doing your clients a huge disservice. Given their injuries, they need this from you as much as your expertise. If you're looking for quick results, this area of practice will not be a good fit for you.

“ Success in this area of law requires not only skill but empathy and patience, with many claims taking on average between two and four years.

It's important to understand that you must have financial "staying power", since it may be years before you are paid as payment is primarily by contingency. You will need significant financial resources, and a background in business or as an entrepreneur will help you be successful. Gerri says this cannot be understated. In her case, her medical background was additionally helpful because it assisted in understanding her client's medical situations. If you don't have a background in medicine, you can educate yourself with medical terminology courses. Gerri emphasized that not unlike any new business, a paralegal practice usually needs a good two to five years to get off the ground.

Gerri's tips for success are to stay informed and up-to-date. Like many areas of practice, the laws change and there's always new case law. It's important to remain current and over time, you will become more proficient and more discerning with clients. Gerri also recommends networking.

It is the best way to meet others in your area of practice and to share useful ideas and knowledge.

Are paralegals needed in this area of practice? Absolutely. Paralegals can establish a personally rewarding and financially successful practice in SABS, while at the same time enhancing access to justice.

Gerri is not only a dynamo paralegal sole practitioner, she is also the vice-president and co-founder of the Women's Paralegal Association of Ontario, a not-for-profit association dedicated to advancing issues and causes relevant to women in the paralegal profession, as well offering as mentorship and support. They offer innovation and education within a reputable support network for women and have over 1,000 members.

Michelle Lomazzo was elected a paralegal bencher of the Law Society of Ontario in 2019. She has worked as an injured worker advocate for several years in Windsor, Ont. Through her legal services practice, ***Lomazzo Workers Compensation Appeals Professional Corporation,*** *she specializes in workers compensation appeals before the Workplace Safety and Insurance Board (WSIB) and regularly appears before the Workplace Safety and Insurance Appeals Tribunal (WSIAT).*

LEXISNEXIS CANADA STUDENT ESSAY CONTEST: ADVOCATING FOR ANIMALS

By Altamush Saeed, Kirsten Dika, and Jessica Tselepy

LexisNexis Canada recently ran a contest asking students to describe an area of Canadian law they'd like to change to make the lives of animals better. Below are the three winning entries, authored by Altamush Saeed (1st place), Kirsten Dika (2nd place), and Jessica Tselepy (3rd place). Congratulations to the winners!

ALTAMUSH SAEED: ANIMAL PROTECTION IN NATURAL DISASTERS

What was our share in the sinning,

That we must share the doom?

What had we done, our Masters,

That you sold us onto Hell

-- The Horses by Katherine Lee Bates [1]

1 *Katherine Lee Bates, "The Horses", online: https://www.poetry.com/poem/24904/the-horses.*

With over 69% of biodiversity loss reported from 1968-2018, followed by over 25 water-related disasters in the U.S. alone post-2018, the combined animal deaths due to Hurricane Michael and Florence (both occurring in 2018) were 5.5 million, out of which 3.4 million were chickens and 5,500 pigs, many of which drowned and caused the CAFO manure pits to overflow and pollute waterways.[2]

However, the livestock animal death toll is a global phenomenon instead of just one in the U.S. or Canada. For example, the ongoing Kenyan drought since 2016 has led to the deaths of several animals.[3] Kenya wildlife officials counted the deaths of various species between February and October 2022 and found that the drought has killed 512 wildebeest, 381 zebras, 205 elephants, 49 Grevy's zebras, 51 buffalo, 12 giraffes, eight reticulated animals, and four Massai animals. Similarly, in Pakistan, the 2022 floods, which at one point had drowned one third of the country, led to the deaths of over a million livestock animals. Pakistan, like Kenya, also faces yearly droughts, and countless livestock animals die annually. [4]

In 2021, Following British Columbia's flooding and mudslides caused by excessive rain, about 700,000 animals perished. As of right now, according to the B.C. Ministry of Agriculture, 420 dairy cows, 12,000 piglets, and 628,000 birds have perished. A further 110 beehives were destroyed, which resulted in the death of three million bees[5].

On the legal end, we need an international farmed animal protection instrument that may act as an adaptation measure to advocate for global animal protection during disasters. What that measure looks like can be informed by recent legal developments in the U.S. Farmed Animal Natural disaster policy framework. These laws include the Pets Act, the Paw Act, the in-session Prepared Act, and the

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2 Almond et. al (ed.), WWF Living Planet Report 2022 – Building a naturepositive society (2022), online: https://www.wwf.org.uk/sites/default/files/2022-10/lpr_2022_full_report.pdf. See also Animal Welfare Institute, In Natural Disasters, Farm Animals Forsaken (2018), online: https://awionline.org/awi-quarterly/winter-2018/natural-disasters-farm-animals-forsaken. And see USGS, "Historical Flooding" (February 28, 2019), online: https://www.usgs.gov/mission-areas/water-resources/science/historical-flooding ; all hurricanes in this table were declared by the US government

3 Reuters, "Kenyan drought leads to mass animal deaths as compensation for climate-related losses becomes a COP27 topic", ABC News (November 4, 2022), online: https://www.abc.net.au/news/2022-11-05/hundreds-of-elephants-animals-die-in-kenya-drought/101619978. (November 4, 2022), online: https://www.abc.net.au/news/2022-11-05/hundreds-of-elephants-animals-die-in-kenya-drought/101619978.

4 Khalid Rahim, "Brief History of Disasters and Its Management in Pakistan", HilalEnglish, online: https://www.hilal.gov.pk/eng-article/detail/Mzk-0MA==.html; CDP, 2022 Pakistan Floods, online: https://disasterphilanthropy.org/disasters/2022-pakistan-floods/.

5 Jemima Webber, "700,000 Farm Animals Die In British Columbia Floods, Death Toll Expected To Rise", Plant Based News (December 6, 2021), online: https://plantbasednews.org/news/environment/farm-animals-die-british-columbia-floods/#:~:text=Nearly200%2C000animalshavelost-theirlivesin,weredestroyedkillingandestimatedthreemillionbees

> “On the legal end, we need an international farmed animal protection instrument that may act as an adaptation measure to advocate for global animal protection during disasters.

Industrial Agriculture Accountability Act. Canada lacks an effective framework like the one in the U.S. [6]

While we venture towards an international instrument, many countries that yet lack a national farmed animal disaster protection policy can learn from the U.S. framework, including Canada, and perhaps, soon, Canada may become one of the animal protection leaders in natural disasters.

KIRSTEN DIKA: THE ANIMAL AGRICULTURE INDUSTRY

There are currently no legally binding standards for the way animals on farms are treated in Canada. In cases of disease outbreak, such as covid-19 or avian flu, thousands of animals are “depopulated” on farms, and industry-accepted methods set out by the National Farm Animal Care Council (NFACC) include gassing, electrocution, and blunt force trauma. This includes healthy animals when backlog occurs due to human workers being infected, such as in the case of covid-19. Because these methods are guidelines only, there is concern that Canadian farms will turn to even more egregious methods used in the United States, such as VSD, otherwise known as “ventilation shutdown”, in which animals are literally cooked to death when ventilation is sealed off in barns; animals die a slow and agonizing death from heat and steam exposure.

Leaving the animal agriculture industry to regulate itself is dangerous and unethical. Current industry standard practices are cruel, archaic, and contrary to what the majority of Canadians would find acceptable treatment of any animal. Canada needs strong protection laws for farmed animals, and public

6 *S.4205 - 117th Congress (2021-2022): PAW Act, S.4205, 117th Cong. (2022), online: https://www.congress.gov/bill/117th-congress/senate-bill/4205. See also H.R.1442 - 117th Congress (2021-2022): Prepared Act, H.R.1442, 117th Cong. (2021), online: https://www.congress.gov/bill/117th-congress/house-bill/1442. And see S.5138 - 117th Congress (2021-2022): Industrial Agriculture Accountability Act of 2022, S.5138, 117th Cong. (2022), online: https://www.congress.gov/bill/117th-congress/senate-bill/5138*

and property law are good places to start. To adequately protect animals in Canada, including farmed animals, a clear, comprehensive Animal Charter of Rights needs to be established (and enforced), in which animals' intrinsic worth and sentience are recognized. Countries around the world are recognizing animals as sentient beings with inherent rights, including in Scotland with its independent Animal Welfare Commission, which considers legislative routes to protect the welfare of sentient animals. It is time for new law and reform.

Another major piece of the puzzle is dismantling the doctrine of animals as property in Canada. "What's this thing", my property professor said, pointing to an image of a huge whale in our first-year property law class. "What are the property rights at play here?" Later, the same professor (and most of the class) laughed as she showed images of cows stuck in fences, referring to them as unfeeling, inanimate objects, the discussion completely lacking recognition of the individual animals' pain, dehydration, or distress. Animals as property is deeply entrenched in modern thinking and is incompatible with recognizing and respecting animals' innate rights. Under the law, a beloved four-legged family member is treated no differently than a lamp or TV stand, and it's even worse for farmed animals, who are often considered en masse and as commodities, their intrinsic worth and individuality ignored. An Animal Charter of Rights would support the transition away from legally classifying animals as property.

> "Leaving the animal agriculture industry to regulate itself is dangerous and unethical.

The need for animal protection law creation and reform in Canada couldn't be greater. The law must change to recognize the personhood of animals and do away with the outdated notions of the past. It must also work to ensure animal laws are taken seriously and enforced when broken. Animal rights advocacy is my greatest focus while I learn the law over the next three years and will continue to be so when I am a practicing lawyer.

JESSICA TSELEPY: THE INHERENT FLAWS OF SELF-REGULATION IN GOVERNING NON-HUMAN ANIMAL BASED RESEARCH IN CANADA

Author's Note: My approach to this short article is informed both from being a member of an institutional animal care and use committee (or animal ethic committee in Australia), as well as from the insights of Professor Paul Locke into the IACUC models in North America for the Lewis & Clark LL.M. (Animal Law) program. The thoughts so expressed represent my own individual opinion and are affiliated with no institution.

Decentralization of power can provide many virtues for governance structures. Simultaneously, regulation that is excessively reliant on custom and practice is exposed to serious vulnerabilities. One such example of the vulnerabilities suffered by a largely decentralised system is the oversight of non-human animals used in research in Canada. In Canada, institutional animal care and use committees (IACUCs) self-regulate[7]. I posit that the use of self-regulatory models in the scientific use of non-human animals has resulted in a reinforced difficulty in holding infringers of welfare standards to account and in transitioning away from this inherently harmful practice.

The roots of this issue are grounded in Canada's legislative context. Canada has no federal legislation governing animal-based research.[8] Further, under the division of powers in the Canadian Constitution, particularly sections 92(13) and (16), all matters concerning civil rights and property fall under provincial jurisdiction. Research is characterised as falling within the realm of property, and the provinces have, therefore, historically had jurisdiction over research matters.

While legislation is no panacea to the plethora of issues facing non-human animals in today's world, the tool is unique in its capacity to deliver sanctions for cruel behaviours. For instance, legislation such as the Canadian *Criminal Code*[9] can be effective in bringing sanctions against prohibited acts. Instead of such enforcement measures being made available, the use of non-human animals has fallen not to provincial

7 *G. Griffin & P. Locke, "Comparison of the Canadian and US laws, regulations, policies, and systems of oversight for animals in research" (2016) ILAR journal, 57(3), 271-284 at 271. (2016) ILAR journal, 57(3), 271-284 at 271.*
8 *G. Griffin & P. Locke, "Comparison of the Canadian and US laws, regulations, policies, and systems of oversight for animals in research" (2016) ILAR journal, 57(3), 271-284 at 272.(2016) ILAR journal, 57(3), 271-284 at 272.*
9 *For instance, s 444–447 broadly protect non-human animals against cruelty in Canada.*

legislation, but instead largely to the Canadian Council on Animal Care's (CCAC) *Guide to the Care and Use of Experimental Animals.*[10] Compliance with the guidelines is largely unenforceable. [11]

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A tangible improvement to the Canadian law concerning the use of non-human animals in research would be the oversight of research facilities by a dedicated third-party organization, which has non-human animal welfare as its top priority. Such an organisation should be empowered by new provincial legislation to enforce any non-compliance with recognised non-human animal welfare standards (which may include CCAC standards, or more independent standards as developed by the third-party entity itself).

The immediate benefits of this proposal would lie in separating the oversight function from the research institutions that have an active interest in continuing the use of non-human animals. The long-term benefits, most importantly, are for the non-human animals themselves: a more objective assessment of institutional compliance with welfare standards and improved legislative enforcement tools can lead to not only the better treatment of the non-human animals currently held, but may ultimately incentivise the transition away from the destructive use of sentient, feeling beings in the name of science.

10 E.D. Olfert, B.M. Cross & A.A. McWilliam, CCAC guide to the care and use of experimental animals (1993).
11 Canadian Council on Animal Care, "Animals Used in Science: Canadian Legislation and Policies" (2022), online: https://ccac.ca/en/animals-used-in-science/canadian-legislation-and-policies/.

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