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# Bill 245 – Significant Changes Coming to Ontario's *Succession Law Reform Act*

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In April 2021, Bill 245, also known as the *Accelerating Access to Justice Act, 2021*, received Royal Assent. Bill 245 was initially introduced in February of 2021 by the office of the Attorney General of Ontario in an effort to modernize what had become in some ways an outdated system, and to introduce meaningful changes that better reflect the realities of life in Ontario and the way that most residents organize their affairs in the 2020s. Schedule 9 to Bill 245 provides for significant updates to the *Succession Law Reform Act*, RSO 1990, c S. 26 (the "**SLRA**"), as briefly summarized below, which come into effect in 2022.

Remote Will Execution in Counterpart Made Permanent

The SLRA and the *Substitute Decisions Act, 1992*, SO 1992, c 30 (the "**SDA**") both speak to the requirement that planning documents be signed in "the presence of" two witnesses. This has historically required witnesses to be in the physical presence of the testator/grantor and one another, and for all three individuals to sign the same original copy of the document.

Abiding by in-person witnessing requirements under the SLRA and SDA became a challenge in light of the safety issues posed by the COVID-19 pandemic. This led to emergency Orders in Council that allowed solicitors to assist clients in the remote execution of wills and powers of attorney through the use of audiovisual communication technology and the execution and witnessing of wills, powers of attorney, and codicils in counterpart, with two or more identical copies of the will or power of attorney together comprising the complete original document.

The provisions permitting the remote execution and witnessing of planning documents and the execution of such documents in counterpart are being made permanent through updates to the SLRA and the SDA.

Section 4 of the SLRA now reads as follows:

> 4 (1) In this section, "audio-visual communication technology" means any electronic method of communication which allows participants to see, hear and communicate with one another in real time.
>
> (2) Subject to subsection (3) and to sections 5 and 6, a will is not valid unless,
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> > (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;

(b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and

(c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

(3) A requirement in clause (2) (b) or (c) that witnesses be in the presence of the testator or in one another's presence for the making or acknowledgment of a signature on a will or for the subscribing of a will may be satisfied through the use of audio-visual communication technology, if,

(a) at least one person who acts as a witness is a licensee within the meaning of the Law Society Act at the time;

(b) the making or acknowledgment of the signature and the subscribing of the will are contemporaneous; and

(c) the requirements specified by the regulations made under subsection (7), if any, are met.

(4) For the purposes of clause (3) (b), signatures and subscriptions required to be made under clause (2) (b) or (c) may, subject to any requirements specified by the regulations made under subsection (7), be made by signing or subscribing complete, identical copies of the will in counterpart, which shall together constitute the will.

(5) For the purposes of subsection (4), copies of a will are identical even if there are minor, non-substantive differences in format or layout between the copies.

The update to section 4 of the SLRA is already effective and is deemed to have come into force April 7, 2020. Notably, while the circulation of the same copy of a will or power of attorney was previously permitted, the SLRA speaks only to the opportunity to virtually execute and witness such documents in counterpart. As was the case under the emergency Orders, one of the witnesses must be a licensee of the Law Society of Ontario.

The permanence of virtual witnessing provisions for wills has the potential to increase access to justice while preserving necessary safeguards in the will execution process. These amendments are expected to provide Ontarians improved access to legal assistance in their estate and incapacity planning, regardless of where in the province they may be located.

Ontario Will No Longer Be a Strict Compliance Jurisdiction

Ontario has been one of the few remaining strict compliance jurisdictions in Canada. If a will is not entirely compliant with the formal requirements set out under the SLRA, it is not a valid will. As a result, some documents clearly intended by the deceased to function as a will have failed to be effective.

Strict compliance prevents courts from validating documents that express a testamentary intention if they do not adhere to the execution requirements set out under the SLRA. In some cases, this results in intestacies that benefit individuals other than those that the deceased may have intended (and expressed a written intention) to benefit.

Under a new section 21.1 of the SLRA, courts will have the authority to declare a will to be valid notwithstanding non-compliance with certain requirements under the Act. This change will apply only to the estates of persons who die after January 1, 2022. While, these developments may not yet be in effect, they may nevertheless impact the validity of wills that are being made now, giving rise to a new set of considerations to keep in mind as these legislative amendments formally take effect next year.

Section 21.1 of the SLRA will read as follows:

> 21.1 (1) If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made.

In the past, we have seen technicalities prevent what was clearly intended to be a will from functioning as one from a legal perspective. However, the new section 21.1 will provide the courts with a mechanism to allow the intentions of individuals who may not be aware of the formal requirements for a valid will to be honoured.

Wills Will No Longer Be Revoked By Marriage

Section 15(a) of the SLRA states that a will is revoked by marriage, subject to section 16. Pursuant to section 16 of the Act, marriage has the effect of revoking a will, except in limited circumstances, including where the will is made in contemplation of marriage or the testator’s spouse elects to take under the will that is otherwise revoked by marriage.

Many individuals are unaware that marriage automatically revokes a will, including in circumstances where the person marries while no longer possessing testamentary capacity and unable to make a new will after marriage. This can lead to disputes regarding the validity of a marriage and other claims by beneficiaries under a will made prior to marriage following death. Sections 15(a) and 16 of the SLRA may also leave individuals, especially older individuals, vulnerable to predatory marriages.

Sections 15(a) and 16 are being repealed, thereby eliminating the automatic revocation of wills as a consequence of marriage. These amendments come into force on January 1, 2022.

Schedule 9 to Bill 245 is, in part, aimed at protecting vulnerable elders against predatory marriages. These changes will prevent the automatic revocation of wills when this may not be what is intended by the testator, without restricting his or her ability to make a new will after marriage if the individual retains the requisite mental capacity to do so. A surviving married spouse may nevertheless be able to pursue relief under Part V of the SLRA and/or the *Family Law Act*, RSO 1990 c. F3, if not adequately provided for under the predeceasing spouse's estate plan.

Divorced and Separated Spouses to be Treated More Consistently

Section 17(2) of the SLRA sets out that, unless a contrary intention appears in the will, where a marriage is terminated by divorce or declared a nullity, a devise or bequest to a former spouse, an appointment of a former spouse as estate trustee, and the conferring of a general or special power on a former spouse, are revoked, and the will is construed as if the former spouse had predeceased the testator. This provision does not currently include reference to separated spouses.

Many couples never obtain a formal divorce following separation and may not take steps to update their wills following separation. After death, surviving separated spouses often benefit in a manner that the deceased may not have intended and their estate plan may be inconsistent with conflicting legal and/or moral support obligations at the time of death.

Upcoming amendments to the SLRA address the gap in treatment between divorced spouses and separated spouses. New subsection 17(3) will mirror subsection 17(2) to restrict the estate-related rights of separated spouses, with necessary modification. A new subsection 17(4) will describe a spouse as being "separated" from the testator for the purposes of the SLRA where:

- the couple have lived separate and apart for three years as a result of a breakdown of the marriage; or
- their rights on the breakdown of the marriage have been addressed by way of a separation agreement, court order, or family arbitration award; and
- at the time of the testator's death, they were living separate and apart as a result of marriage breakdown (to avoid application to circumstances of reconciliation).

New section 43.1 of the SLRA will also eliminate a separated spouse's entitlements on intestacy. Section 43.1 will read as follows:

> 43.1 (1) Any provision in this Part that provides for the entitlement of a person's spouse to any of the person's property does not apply with respect to the spouse if the spouses are separated at the time of the person's death, as determined under subsection (2).

(2) A spouse is considered to be separated from the deceased person at the time of the person's death for the purposes of subsection (1), if,

(a) before the person's death,

(i) they lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death,

(ii) they entered into an agreement that is a valid separation agreement under Part IV of the Family Law Act,

(iii) a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage, or

(iv) a family arbitration award was made under the Arbitration Act, 1991 with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; and

(b) at the time of the person's death, they were living separate and apart as a result of the breakdown of their marriage.

These amendments will not come into force until January 1, 2022.

The updated rights of separated spouses will, in most cases, result in a more appropriate treatment of separated spouses who do not take the step of obtaining a formal divorce.

Conclusion

There is significant potential of the amendments introduced under Schedule 9 to Bill 245 to facilitate access to justice and to assist Ontario families in addressing the death of a loved one. We welcome these progressive developments and commend the Attorney General's office for taking these significant steps in the modernization of our estates legislation.

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# Cruelty and Corporate Reputation: An argument for reverse piercing of the corporate veil

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## (i) Introduction

In *Quebec (Attorney General) v. 9147-0732 Québec inc.*, the Supreme Court of Canada unanimously agreed that s. 12 of the *Canadian Charter of Rights and Freedoms* does not protect corporations from cruel and unusual punishment or treatment. The crux of the matter centered on whether the word "cruel" could apply beyond human beings to corporations. The Court ruled that "cruel" denotes human pain and suffering, either physical or mental.[2] A corporation, as a non-human entity, cannot be subject to human pain or suffering. In other words, the legal fiction of a corporation benefitting from legal personhood does not mean that the corporation can be subject to cruelty. Therefore, the Court ruled that cruel and unusual punishment cannot apply to corporations given their inability to feel human pain or suffering.

We agree with the Supreme Court. In this paper, we make two arguments in relation to the evolution of the law. First, we argue that there may be exceptions where it is appropriate to pierce the corporate veil to ensure just treatment. Secondly, from a philosophical perspective, corporate reputations are the "new new" of corporate governance. For example, scholars argue that corporations should attempt to secure strong reputations in diversity in order to help lower their cost of capital, secure top talent, and grow revenue.[3] While our courts recognize the new role of corporate reputation in governance, in the same breath, the courts say that corporations cannot suffer. As corporations evolve and develop a social conscience recognized in governance, perhaps corporate law needs to evolve as well.

## (ii) Background

In this case, at first instance 9147-0732 Québec inc. was found guilty before the Court of Québec for carrying out construction work without a proper licence, contrary to the provisions of the *Building Act*.[4] The Court of Québec imposed a mandatory minimum fine, as mandated under the *Building Act*, against 9147-0732 Québec inc. totalling $30,843.[5] The corporation appealed,

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[2] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 14 [*9147-0732 Québec inc*].

[3] Chris Brummer & Leo Strine, "Duty and Diversity" (forthcoming 2022) 75 *Vand L Rev* 1 at 39; Todd L Archibald & Kenneth Jull, *Profiting From Risk Management and Compliance* (Toronto: Thomson Reuters, 2021), Chapter 3 "Behavioral Theory, Gender and Diversity".

[4] *Building* Act, CQLR 2020, c B-1.1.

[5] *9147-0732 Québec inc, supra* note 1 at para 54.

challenging the mandatory minimum fine as unconstitutional under s. 12 of the *Charter*, which protects against cruel and unusual punishment.[6]

In ordinary circumstances, a corporation cannot suffer or be subject to treatment amounting to cruel and unusual, as such suffering is a very human notion. Sylvia Rich, for example, argues that it is impossible for a state to criminally punish corporations because "1) suffering is a component of successfully imposed punishment; 2) corporations cannot suffer; 3) ergo, corporations cannot be punished."[7] Rich writes that part of punishment is to impose suffering, as otherwise there would be no justification to impose "hard treatment" under either a retributive or deterrence theory of punishment, as such punishment applies to individuals.[8] She further argues that though emotional states generally can be imputed onto corporations through those individual members of the corporation, imputation is not possible in the realm of punishment. This is because while the corporation can be fined, and fines may cause suffering to those individuals behind the corporation, "the suffering of individuals who are not named in the punishment cannot be used as evidence that the punishment worked…[it] cannot suffer directly, prior to the involvement of individual agents."[9] Since Rich argues that punishment must be experienced directly, and cannot flow from others' suffering, its members' suffering is not connected to punishing the specific corporation itself for its transgressions.[10] Thus, corporations are not subject to suffering and thus cannot be themselves subject to cruel and unusual punishment based on such suffering.

However, Justices Brown and Rowe, writing for the majority in *Quebec (Attorney General) v. 9147-0732*, seem to leave the door open when they write that under s. 12 of the *Charter*, "excessive fines (which a corporation *can* sustain), without more, are not unconstitutional."[11] While Justices Brown and Rowe go on to rely on the *R. v. Boudreault* standard that for s. 12 to be triggered, fines must be incredibly excessive so as to be indecent and "abhorrent or intolerable", and that each are anchored in human dignity,[12] their language begs the question about whether there could be any circumstance in which excessive fines against a corporation may violate human dignity.

Of course, we agree that corporations cannot be themselves subject to cruel and unusual punishment, because a legal person is a legal fiction – an inanimate entity incapable of suffering itself. However, it is worth exploring specifically whether an excessive fine can ever rise to the level of cruel and unusual punishment to those *behind* the corporation, who are indeed physical human persons capable of suffering due to cruel and unusual treatment.

This possibility was explored by Justice Bélanger, writing for the majority at the Court of Appeal of Québec in the appellate level case, *9147-0732 Québec inc. c. Directeur des poursuites*

[6] *Ibid* at para 55.
[7] Sylvia Rich, "Corporate Criminals and Punishment Theory" (February 2016) 29:97 Can JL & Juris 1 at 8.
[8] *Ibid* at 10.
[9] *Ibid.*
[10] *Ibid* at 11.
[11] *9147-0732 Québec inc, supra* note 1 at para 17 [emphasis added].
[12] *Ibid.*

*criminelles et pénales*. Justice Bélanger pointed out that there could be circumstances where the legal person is not affected by the excessive fines in a cruel and unusual way, but the people behind the organization are affected in a cruel and unusual way. Justice Bélanger writes that for physical persons who do not benefit from a distinct legal personality from the corporation when the corporation is fined, but are directly affected by a disproportionately high fine which has been imposed on their organization, the juridical guarantee of s. 12 should apply.[13]

Drawing upon Rich's argument, if a corporation is being fined and the people behind the corporation are suffering acutely by a punishment that is not even meant to target them or cause them suffering, then such punishment may be found cruel and unusual against those behind the corporation. The question then becomes whether, and how, cruel and unusual punishment can be attributed to those behind the corporation in such a circumstance, since corporations and the human persons behind it are legally considered separate entities. In other words, a fine levied upon a corporation is not a fine levied on the people behind the corporation, which bars standing to those behind the corporate veil.

The type of situation that Justice Bélanger described, one where the fine was cruel and unusual to the people behind the corporation, was not the specific question put before the Supreme Court in *Quebec (Attorney General) v. 9147-0732 Québec inc*. The corporation 9147-0732 Québec inc. was fined a relatively modest fine of $30,843, making it extremely unlikely that such a fee would rise to the level of cruel and unusual to the people behind the corporation or rise to the level of harming public interest. However, to build upon Justice Bélanger's observation, a blanket statement barring s. 12's applicability to corporations might be ill-advised. Such a bright-line rule would preclude all physical persons, in every circumstance, from the standing required to vindicate their claims under s. 12 when they suffer because of a disproportionately high criminal fine levied on the corporation for which they work. Such situations may include when the corporate veil is pierced to find personal liability. There ought to be some room left for s. 12 to apply to corporations, specifically the people behind them, in certain, narrow circumstances.

### (iii) Reverse Piercing of the Corporate Veil

What type of treatment affecting the individuals behind the corporation would rise to such a level as to merit the benefit of s. 12 protection? We propose that s. 12 should apply to smaller, closely held corporations where an excessive fine might have severe consequences for the physical persons behind the corporation. These persons would not have any recourse under such a situation, since after the Supreme Court's ruling the company would rightly not be able to raise a cruel and unusual punishment argument, and the physical persons are not themselves charged. Each factor results in these physical persons not having proper standing to pursue recourse.

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[13] *9147-0732 Québec inc c Directeur des poursuites criminelles et pénales*, 2019 QCCA 373 at para 120, [2019] JQ no 1443.

One might protest, asking how this would work given it is a well-established principle that a corporation is a moral person, legally distinct from those physical persons who are behind the corporate veil. We draw upon our courts' ability to pierce the corporate veil, and suggest that in certain cases where a punishment levied on a corporation might as well be a punishment levied on the people behind the corporation – because the corporation and the people behind it are so tightly entwined in terms of size, management, and funding – then courts should pierce the corporate veil to determine whether the punishment was cruel and unusual to those behind the corporation. As Justice Carole J. Brown wrote in *Choc v. Hudbay Minerals Inc.*,

> Ontario courts have recognized three circumstances in which separate legal personality can be disregarded and the corporate veil can be pierced: (a) where the corporation is 'completely dominated and controlled and being used as a shield for fraudulent or improper conduct; …(b) where the corporation has acted as the authorized agent of its controllers, corporate or human… and (c) where a statute or contract requires it.[14]

In *Yaiguaie v. Chevron Corporation*,[15] the Ontario Court of Appeal affirmed that corporate separateness is the governing rule subject to the exception where the corporate form is being abused to the point that the corporation is not a truly separate corporation and is being used to facilitate fraudulent or improper conduct. The Supreme Court of Canada denied leave to appeal in *Chevron*.[16]

Nichols and Khimji conducted empirical analysis of the veil-piercing cases in an article entitled "Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study".[17] The article divides the veil-piercing cases into types and then analyses the results in terms of relative success. Important for white collar crime and regulatory violations is the empirical finding that there was a statistically significant relationship between the identity of the party seeking to pierce the corporate veil and whether the veil was actually pierced. Government entities were the most successful with their claims (with a success rate of 45.76%) whereas shareholder, corporation, and related corporation piercing claims were the least successful.

If it is appropriate to pierce the corporate veil to do justice on behalf of a government regulator, the mirror situation should also be considered by way of a reverse piercing argument. Imagine, for example, a large corporation which has created shell companies to hide assets offshore to evade taxes, hide incoming funds, pay bribes, or for other purposes contrary to criminal or regulatory law. If the corporation is being used to facilitate fraudulent or improper conduct, the Chevron test gives regulators the ability to pierce the corporate veil in order to associate shell companies with the parent company.

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[14] *Choc v Hudbay Minerals*, 2013 ONSC 1414 at para 45, 116 OR (3d) 674 [*Hudbay*].

[15] *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 423 DLR (4th) 68 [*Yajguaje*].

[16] *Daniel Carlos Lusitande Yaiguaje et al v Chevron Corporation et al,* 2019 CanLII 25908 (SCC). See also Peter Spiro, "Piercing the Corporate Veil in Reverse: Comment on Yaiguaje v Chevron Corporation" (2019), 62 Can Bus LJ 232.

[17] Mohamed F. Khimji & Christopher C. Nicholls, "Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study" ( 2015) 41:1 Queens LJ 207.

Now, imagine a family-run construction business comprised of three people. The family has poured all their life savings into ensuring the business gets off the ground and becomes viable. As newcomers to the construction and business worlds, the family members are relatively unsophisticated businesspeople. The company becomes caught up in a quasi-criminal or regulatory offense and gets fined $1,000,000, a fine which represents the loss of life savings that each family member poured into the corporation for its launch.

If there is a bright-line rule that bars the physical persons behind corporations from bringing a claim under s. 12 for this fine levied against the corporation, then these physical persons may not have an ability to challenge the fine in court – despite the fact that the fine may be disproportionate to the regulatory offense committed and may in fact rise to the level of cruel and unusual punishment against those few persons who closely hold the family-run corporation. Unlike what the Supreme Court asserts,[18] a corporation cannot always sustain such excessive fines when they are smaller and closely held – indeed, the people behind a corporation sometimes certainly cannot.

This situation is not a theoretical one; similar cases have been contemplated by courts in Canada, which have exposed the complexity of corporate sentencing when the corporation, as a legal fiction, is treated separately from the people behind it. In the recent case of *R. v. D&J Insley & Sons Contracting Ltd.*, Justice Nick Devlin reviewed a trial judge's sentencing decision in a case where a family-held and family-run lumber company, after a freak accident and for the first time in a century of operation, found itself guilty of charges under the *Occupational Health & Safety Act*.[19] The sentencing judge granted the Crown's recommended sentence of a $105,000 fine (which was understood as a symbolic fine the corporation could not afford to pay), victim fine surcharge, and a 12-month probation order.[20] The trial judge asserted that she was sentencing D&J Insley, the company, and not Mr. Insley, the physical person and the CEO of the corporation at the time of the accident.[21] However, the trial judge appointed Mr. Insley as the representative of the corporation mandated to carry out the probationary terms sentenced; in doing so, she recognized that the effect "is akin to piercing the corporate veil", while making Mr. Insley personally liable for the sentence imposed on the company.[22] Justice Devlin, on his review of the trial judge's decision, writes that "this is a classic piercing of the corporate veil…functionally bind[ing] Mr. Insley to probation, <u>despite him never having been charged, tried, or convicted</u>."[23]

This case is a good illustration of our argument: D&J Insley was a closely held corporation, and the trial judge effectively pierced the corporate veil to make Mr. Insley responsible, in his personal capacity, for the probation penalty given to the corporation. While Justice Devlin overturns the decision in this case, he also finds that a trial judge, under common law, may

[18] *9147-0732 Québec inc*, *supra* note 1 at para 17.
[19] *R v D&J Insley & Sons Contracting Ltd,* 2020 ABQB 11 at para 1, 160 WCB (2d) 432 [*D&J Isley*].
[20] *Ibid* at para 13.
[21] *Ibid* at para 16.
[22] *Ibid* at para 18
[23] *Ibid* at para 28 [emphasis added].

pierce the corporate veil when determining a sentence or a regulatory penalty. This leaves open the possibility that the corporate veil may be pierced in certain situations which mirror Mr. Insley's situation. If there is a circumstance where Mr. Insley or someone like him could be personally responsible for a regulatory penalty imposed on a corporation, when they themselves have never been charged or stood trial, should he or she not have standing to challenge that penalty as cruel and unusual as it applies to him or her?

Allowing a reverse-pierce would allow the physical persons to go to court, so that the persons can argue that even though the business operates in a corporate form, the composition is really only the three people who cannot sustain such a disproportionate fine. This reverse-pierce of the corporate veil would allow the physical persons behind the corporation to have standing to make the argument that the fine is cruel and unusual treatment *for them*, the physical persons, even as the fine was directed towards the corporation.

A counter argument to explore is that economic harm resulting from punishment never rises to the level of cruel and unusual. Yet, economic harm can rise to the level of cruel and unusual punishment *to an individual*. If a punishment is so disproportionate that it rises to the level of destroying a person's life savings such that they are literally destitute, that punishment arguably has vast harmful effects on that person's mental health, physical health, and family well-being – thus, extending to levy punishment on persons past the offending individual.

The Supreme Court seems to agree with this line of reasoning: in *Boudreault*, the Supreme Court specified that if a surcharge or fine could be rightly classified as "punishment," or that the state action "(1) . . . is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) . . . is imposed in furtherance of the purpose and principles of sentencing, or (3) . . . has a significant impact on an offender's liberty or security interests";[24] and that the punishment rose to the level of being abhorrent or intolerable or offensive to societal standards of decency, then economic sanctions may rise to the level of cruel and unusual.[25] The Court is careful to specify that the "cruel and unusual" element is a high bar to meet. If the person can show that the punishment is disproportionate such that it wipes out their savings in response to a relatively innocuous crime, then this punishment may be found cruel and unusual as applied to that person.

*Quebec (Attorney General) v. 9147-0732* should be interpreted as leaving the door open to harsh economic treatment rising to the level of triggering s. 12 protection. While the Court does specify that s. 12 does not apply to corporations and thus cannot protect corporations from high economic penalties,[26] the Court also draws on *Boudreault* to clarify that surcharge punishments can violate s. 12 of the *Charter* when that penalty causes certain harms to

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[24] *R v Boudreault*, 2018 SCC 58 at para 39, [2018] 3 SCR 599 [*Boudreault*], citing *R v KRJ*, 2016 SCC 31 at para 41, [2016] 1 SCR 906 [*KRJ*].
[25] *Ibid* at para 45.
[26] *9147-0732 Québec inc*, *supra* note 1 at para 67.

individuals.[27] Specifically, *Boudreault* identifies four economic harms which could trigger s. 12 protections, including "disproportionate financial consequences suffered by the indigent; threat of detention and/or imprisonment; threat of provincial collections efforts; and *de facto* indefinite criminal sanctions." In the situation of penalties levied against small and closely held corporations, which stand to negatively affect those individuals behind the corporation, it is possible that a penalty which depletes an individual's savings could rise to the level of disproportionate financial consequences suffered by an indigent person, and thus attract s. 12 protection.

(iv) Corporate Governance and Reputation

Corporate reputations are the "new new" of corporate governance. While courts recognize the new role of corporate reputation in governance, in the same breath courts say that corporations cannot suffer. As corporations evolve and develop a social conscience recognized in governance, perhaps corporate sentencing law needs to evolve as well.

Earlier we cited Brummer and Strine's opinion that "it is plausible that a third business case for diversity—that of reputational enhancement in light of an increasingly diverse world—is most compelling for corporate directors and managers. According to this view, many investors, customers, and employees value diversity greatly, so much so that it informs their behaviors. Corporations should thus attempt to secure strong reputations in diversity in order to help lower their cost of capital, secure top talent, and grow revenue."[28]

We share this view as applied to Canadian jurisprudence.

We propose that the Supreme Court in *Peoples Department Stores Inc. (Trustee of) v. Wise* was simply recognizing the new reality that the best interests of the corporation must take into account reputational effects and the costs of litigation. The Supreme Court decision of *BCE Inc. v. 1976 Debentureholders*[29] confirmed that interpretation of *Peoples.* For that reason, although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders such as employees, suppliers, creditors, consumers, governments, and the environment.

This is not a new paradigm of governance, but rather a recognition within the governance paradigm of the importance of corporate reputation to the long-term best interests of the corporation.[30] There are multiple examples of reputational harm to companies ensnared in corporate wrongdoing. Enron, VW, Wells Fargo, Loblaws, Lac-Megantic, British Petroleum, Boeing 737 Max 8, Facebook. The list goes on.

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[27] *Ibid* at para 66.
[28] Brummer & Strine, *supra* note 2.
[29] [2008] 3 S.C.R. 560, 2008 SCC 69.
[30] Archibald & Jull, *supra* note 3, Chapter 4 "Governance of the Corporation".

In recent business history, especially since the global financial crisis of the 2000s, there have been cases of corporate decline and failure. The cases of Enron and Worldcom, for example, failed due to factors ranging from sheer lack of managerial or leadership competence to poor management and other issues. Scholars have drawn a link between a lack of emotional intelligence and corporate decline:

> Some of these issues hinge squarely on critical lack of emotional intelligence with regard to individuals' behavior and performance detrimental to corporate excellence. In this changing world, characterized by advancements in information and communications technology (ICT), marketing competitiveness, and narrow profit margins, elements of trustworthiness, passion, empathy, discipline, vision and service-orientation are skills seriously lacking in some people put in positions of corporate responsibility which often leaves the doors and windows open for corporate decline.[31]

The recognition of corporate reputation in some ways paints a picture of corporations as almost human. Indeed, the advertising of many companies draws on human like comparisons to evoke a bonding process with consumers. Sixteen years ago, Spike Jonze directed a quirky little ad for Ikea that quickly became a classic of modern advertising. "Lamp 1" played on your heartstrings, while amping up the melodrama of an old lamp being tossed onto the street by its owner. By the end of the spot, you actually felt sorry for the lamp—until Swedish actor Jonas Fornander wanders onscreen and admonishes the viewer for being so easily manipulated.

"Many of you feel bad for this lamp," he says in one of the great rug-pulls in ad history. "That is because you're crazy. It has no feelings, and the new one is much better."[32]The genius was in how it so quickly was able to establish an emotional connection between the viewer and a lamp, then hilariously douse it all, with actor Jonas Fornander dropping a truth bomb."[33]

Ikea Canada decided to resurrect the story for a sequel, while putting a modern twist on the sad little lamp's end. Made with agency Rethink Canada and directed by Mark Zibert, "Lamp 2" picks up where the original left off, but instead of the landfill, we get a serving of responsible consumerism when a little girl finds another use for our hero. Earnest optimism replaces the original wisecrack, but we still get Fornander dropping back in, this time to remind us that it is not crazy to reuse things. The change in tone and messaging reflects how our attitudes and behavior have evolved over the last decade and a half. Responsible consumerism has gone far beyond companies such as Patagonia to major corporations like P&G, Unilever, and Ikea which have begun talking more about waste. This focus on smart consumption is moving from the

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[31] John Nkeobuna & Nnah Ugoani, "Role of Emotional Intelligence in Corporate Decline and Successful Turnaround Strategy in This Changing World" (2020) 6:3 Intl J of Econ & Bus Admin 116-126.
[32] Tim Nudd, "Ikea's Excellent Sequel to 'Lamp' Flips the Script on an Ad That Didn't Age Well" (10 September 2018), online: Muse by Clio <https://musebycl.io/advertising/ikea-made-sequel-lamp-flipping-script-ad-didnt-age-well>.
[33] Jeff Beer, "Check Out Ikea's smart sequel to Spike Jonze's classic 2002 lamp ad" (10 September 2018), online: Fast Company <https://www.fastcompany.com/90234381/check-out-ikeas-smart-sequel-to-spike-jonzes-classic-2002-lamp-ad>.

fringes to a more significant part of how brands and people think about their ongoing relationships with. All that, and the little red lamp finally had a happy ending.[34]

Corporate image advertising is sometimes used to counter negative perceptions, but also to bolster a company's existing positive image. For example, British Petroleum (BP) was found to use corporate image advertising to make the case that the company operates in a safe way. Such ads counter the horrendously negative publicity received by the company after the 2010 Gulf of Mexico oil spill.[35]

If a corporation can have emotional intelligence, and if corporate images can evoke powerful emotional reactions, is it not a logical extension that those same corporations could "suffer" from a cruel and unusual sentence that would damage that very corporate reputation? This is an issue that goes far beyond the narrow constitutional argument about whether a corporation can argue that it has been subjected to cruel and unusual punishment. We need to start thinking about new corporate roles, and maybe even new corporate paradigms.

The model enshrined in s. 122(1.1) of the *Canada Business Corporations Act*[36] does not create voting or other rights in the various stakeholders identified in *BCE*. Some reformers have suggested that this corporate democratic model ought to be followed. U.S. Senator Elizabeth Warren identified other stakeholders, including consumers, workers, creditors, neighbors, students and introduced legislation that would empower corporate employees to elect at least 40% of the directors on their corporation's board.[37] Others conceptualize the corporation as a separate legal entity that itself serves as a nexus of contracts.[38] It is time to start an academic and political debate about new models of governance.

(v) Conclusion

In this paper, we have explored the scope of how s. 12 of the *Charter*, protecting against cruel and unusual punishment, may apply to corporations in certain narrow circumstances. Our analysis follows recent jurisprudence from the Supreme Court of Canada which specified that corporations cannot benefit from s. 12 protection because corporations cannot suffer. Only humans are capable of suffering. We agree with the Supreme Court that, under the current legal paradigm, corporations are incapable of suffering; but we also argue that humans behind small and closely held corporations are capable of suffering due to disproportionate corporate criminal or regulatory penalties. To deny humans standing under s. 12 in such cases would be unjust.

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[34] *Ibid*.
[35] Karen A Loveland, Katherine Taken Smith & Murphy Smith, "An Examination of Corporate Image Advertising in the Oil and Gas Industry" (9 July 2019). Oil, Gas & Energy Quarterly, online: https://ssrn.com/abstract=3415750 .
[36] RSC 1985, c. C-44.
[37] Nikolas Bowie, "Corporate Personhood v. Corporate Statehood" (2019) 132 Harv L Rev 2009 at 2040.
[38] David Gindis, "The Nexus Paradox: Legal Personality and the Theory of the Firm" (May 1, 2013) (published PhD thesis, University of Hertfordshire), at 170–85, cited in Bryan P. Magee, "Impersonal Personhood: Crafting a Coherent Theory of the Corporate Entity" (2019) 104 Cornell L Rev 497.

To this end, we have argued that in certain exceptional situations, courts should pierce the corporate veil to ensure that criminal or regulatory sanctions against corporations are not disproportionate in their effects to those behind the corporation. We have argued that this is just from a philosophical perspective. Since *Peoples* and *BCE*, corporate reputations have emerged as the "new new" of corporate governance. Society now expects more social awareness from our corporations, and, indeed, imputes human responsibility on corporations towards a variety of stakeholders. Since punishment stands to affect corporate reputation and thus potentially the livelihood of those behind the corporate veil, corporations (and specifically, those behind them in closely held corporations) are capable of suffering due to corporate criminal and regulatory sanctions.

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## Federal Court of Appeal Affirms Site-Blocking Order in Teksavvy Case

**Bruna Kalinoski, Andrew McIntosh and Raffi Dergalstanian, Bereskin & Parr LLP**

Fast and anonymous distribution of content online has made site-blocking orders a well-liked tool worldwide to combat piracy on the Internet. Several foreign jurisdictions across the globe have availed such orders,[1] both judicially and administratively, to block sites which facilitate copyright infringement by distributing artistic copyrighted content as their predominant activity. In *Teksavvy Solutions Inc v. Bell Media Inc*.,[2] Canada's Federal Court of Appeal affirmed the first-ever site-blocking order granted by a motion judge, showing that these orders are no maverick in Canadian courts either.

This recent development in Canadian copyright law and the law of equitable remedies picked up on the groundwork laid by the Supreme Court of Canada in its landmark ruling in *Google Inc. v. Equustek Solutions Inc.*,[3] which made de-indexing orders available in Canada. The Court was also guided by UK jurisprudence which sets out a series of factors that UK courts have found appropriate to consider in order to determine whether site-blocking orders are warranted in any given circumstance.[4]

The Federal Court of Appeal released its much-awaited decision in *Teksavvy* on May 26, 2021, unanimously affirming the site-blocking order (the "Order") issued by Justice Gleeson of the Federal Court against Teksavvy and a number of other Canadian Internet Service Providers (ISPs). The Order required the ISPs to block their customers from accessing certain websites. Effectively, the Order prevented the ISPs' customers from accessing infringing content streamed through illicit websites at goldtv.biz and goldtv.ca.

In the underlying copyright infringement action, three Canadian broadcasting companies who either owned the Canadian rights to transmit the programming in question or were exclusive licensees of those rights sued two unidentified defendants for operating websites whose predominant activity was to provide their subscribers access to copyrighted programming content over the Internet.

On appeal, the panel of the Federal Court of Appeal addressed the issues of (i) the jurisdiction of the Federal Court to grant the Order; (ii) the relevance of freedom of expression with respect

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[1] Site-blocking orders are available in Argentina, Australia, Austria, Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Iceland, India, Indonesia, Ireland, Italy, Malaysia, Mexico, Norway, Portugal, Russia, Singapore, South Korea, Sweden, Spain, Thailand, Turkey, and UK.
[2] *Teksavvy Solutions Inc v Bell Media Inc*, 2021 FCA 100 [*Teksavvy*].
[3] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34.
[4] *Teksavvy, supra* note 2 at para. 74, citing *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch); *Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658; *Cartier International AG v. British Telecommunications plc*, [2018] UKSC 28.

to that Order; and 3) the requirements for an injunction and whether the Order was just and equitable in the circumstances.

1. *The Jurisdiction of the Federal Court to Grant the Order*

In the motion below before Justice Gleeson, Teksavvy submitted that granting the site-blocking order was outside of the court's jurisdiction. Justice Gleeson disagreed and concluded that sections 4 and 44 of the *Federal Courts Act*[5] provide the Federal Court with unlimited power to grant equitable injunctive relief—save for any statutory restrictions prescribing otherwise. This conclusion followed the Supreme Court of Canada's landmark decision in *Google Inc v Equustek Solutions Inc.,*[6] where it was held that orders for de-indexing search results from Google on a global basis were likewise within the jurisdiction of the courts to grant. Justice Gleeson also referenced that sub-section 34(1) of the *Copyright Act*[7]entitles copyright owners to all remedies that may be conferred by law for an infringement of their rights, and the Order was one of the remedies available to address copyright infringement.

On appeal, Teksavvy argued that several provisions of the *Copyright Act* and the *Telecommunications Act*[8] exclude site-blocking orders from the scope of the injunctive remedies that can be issued by the courts. The *Copyright Act* does not provide for site-blocking orders, and so Parliament's intent was to avail only limited types of remedy to copyright owners against ISPs.[9] The *Telecommunications Act*, in turn, contemplates net neutrality, with section 36 prohibiting ISPs from restraining or unduly controlling content transmitted to their users. Teksavvy argued that the order sought would violate this provision, as any exceptions to net neutrality must be approved by the Canadian Radio-television and Telecommunications Commission (CRTC) according to a prescribed process.

The Federal Court of Appeal rejected both Teksavvy's arguments. First, the Court held that, in the common law, there are precedential examples of remedies having been awarded that are not specifically mentioned in the *Copyright Act*, such as Norwich Orders, Mareva injunctions, and punitive damages.[10] Second, the Court found that the purpose of section 36 is to prohibit Canadian carriers, which may include an ISP, from having influence or power over the meaning or purpose of telecommunications carried by it for the public. Consequently, complying with a court ordered injunction would not interfere with the legislative purpose, since it is the ISPs' ultimate activity that is being controlled or influenced by the Order, not the content of programming.[11]

[5] RSC 1985, c F-7.
[6] *Teksavvy, supra* note 2 at para. 19, citing *Google Inc v Equustek Solutions Inc*, *supra* note 3 at para. 23.
[7] RSC 1985, c C-42.
[8] SC 1993, c 38.
[9] *Teksavvy, supra* note 2 at para. 28.
[10] *Ibid* at para. 31.
[11] *Ibid*.

2. *Freedom of Expression*

The argument on appeal that the site-blocking order impaired freedom of expression rights[12] was also rejected by the appellate court. The Court held that ISPs being required to block certain websites, and their customers being prevented from accessing those illegal websites do not amount to unduly curbing free speech rights. As an ISP, Teksavvy is a common carrier that does not engage in any expressive activity and presumably does not give any preference to one website over another based on their content.[13] While the ISPs' customers could have an expressive interest that is implicated by the Order, the balance of convenience exercise that is engaged as part of an injunction request sufficiently addresses this concern and no separate *Charter* rights analysis is required. The appellate court held that this is clear from the Supreme Court of Canada's decision in *Equustek*, where the majority of the Court did not engage in any separate *Charter* rights analysis.[14]

3. *Whether the Order was Just and Equitable*

The Court found no error in Justice Gleeson's conclusion that the requirements for an injunction had been met, and considered the Order was just and equitable in the circumstances. A strong *prima facie* case of copyright infringement had been made against the defendants, and the copyright owners would suffer irreparable harm, absent the Order, owing to the ongoing infringement carried out by unknown defendants.

With respect to the balance of convenience analysis, the Court concluded that Justice Gleeson did not fetter his discretion and did not err by relying on factors from UK jurisprudence. He correctly articulated the fundamental question to be addressed on the motion—whether the injunction was just and equitable in the circumstances—and, recognizing that the order sought was unprecedented in Canada, he appropriately gleaned and considered pertinent factors from the UK jurisprudence as "inspiration". The UK jurisprudence offered specific guidance setting out a series of relevant factors to be considered when determining whether a site-blocking order is warranted in any given circumstance.

4. *Concluding Remarks*

There are several noteworthy aspects of this decision. It affirms the availability of site-blocking orders aimed at combating copyright infringement by illicit websites, servers, and services. Further, it shows that the courts may issue dynamic orders which can be updated to reflect the circumvention efforts used by defendants after the order has already been made, as well as the particular circumstances of the infringement such as to avoid over blocking. Additionally, this decision permits "live" orders that are operative during ongoing broadcasts.

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[12] *Canadian Charter of Rights and* Freedoms, s 2(b), Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[13] *Teksavvy, supra* note 2 at para. 50.
[14] *Ibid* at para. 53.

While the order here applied to streamed TV programming, it appears that such orders could also be available in respect to other copyrighted works, as the decision was not content dependent.

This decision is also significant because it addresses arguments predicated on net neutrality and freedom of expression in relation to site-blocking orders. In this respect, the Canadian courts are joining the courts of other countries which have similarly rejected these arguments, including courts in Mexico, India, the European Union, and the United Kingdom.

Toronto Law Journal

# A Failed Exercise: Franchisor Denied Injunction

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## Introduction

In *Greco Franchising Inc. v. Franco Milito et al.* 2021 ONSC 3950 ("***Greco***"), the Court analyzed the impact that the Covid-19 pandemic has had on businesses, particularly the personal fitness industries, in the context of a dispute regarding the parties rights and obligations contained in the franchise agreement. Greco Franchising Inc. (the "**Franchisor**"), a fitness studio franchisor, sought an injunction against the corporate franchisee defendant (the "**Franchisee**") to prevent it from operating a new fitness studio.

## Background Facts

The Franchisor operated numerous fitness studios under their "Greco System" with the franchise operated by the Franchisee in Ottawa/Kanata being one of the most successful. The franchise agreement (the "**Agreement**") was set to expire on September 8, 2021.

Like all fitness studios and gyms, the Franchisee's location was, and all other Greco System locations were, closed, throughout much of the Covid-19 pandemic. In response to these closures, the Franchisor created an on-line at home program called Greco Method at Home ("**GMAH**"), which Greco offered directly to gym members. The Franchisor received monthly payments for GMAH directly from members and then split the net revenues with franchisees equally, after deducting the franchise fees payable by franchisees. Greco System franchisees, including the Franchisee, were not allowed to offer any programs directly to their own members.

The Franchisor, recognizing that GMAH created fundamental changes to the franchise arrangement, drafted an amended franchise agreement, which the Franchisee refused to sign. The parties entered into negotiations to resolve their dispute; however, no agreement was reached by the parties.

On December 8, 2020, the Franchisee advised its members that it would cease operating as a Greco System franchise and would commence operating under the name TG Athletics. All of the Franchisee's members who had been enrolled in GMAH cancelled their membership with the Franchisor. On January 8, 2021, the Franchisee sent a letter to the Franchisor purporting to terminate the Agreement alleging fundamental breaches, which it argued frustrated and repudiated the Agreement. The Franchisee alleged four specific breaches:

(1) That GMAH encroached on the Franchisee's exclusive territory;

(2) The Franchisor unilaterally setting the price and taking control of the Franchisee's clients was contrary to the Agreement, which stipulated that the Franchisor could only set maximum prices;

(3) The Franchisor unilaterally changing the payment procedures so that payments received directly from clients meant it was being paid prior to the Franchisee, thereby affecting the Franchisee's cash flow; and

(4) The Franchisor was offering/promoting services on the internet while not permitting the Franchisee to do so.

Ultimately, when permitted to do so by the Ontario government, the Franchisee opened TG Athletics to its members. The Franchisor took the position that the Agreement was still in force and the Franchisee was in breach of in term non-competition clause set forth in the Agreement.

The Test for an Interlocutory Injunction

To obtain an interlocutory injunction, the Franchisor was required to meet the three-part test outlined in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 SCR 311, which consisted of proving:

(1) There is a serious question to be tried (or, in certain circumstances, the plaintiff has a strong prima facie case);

(2) Irreparable harm will be suffered if the injunction is not granted; and

(3) The balance of convenience favours granting the injunction.

Lack of a *Prima Facie* Case

The Court held that in this instance the Franchisor was required to establish it had a strong *prima facie* case, for the following reasons: (A) an injunction would likely render moot some of the issues in dispute since it would be impossible to have the issues brought to trial before the Agreement expired in September 2021; and (B) an injunction would close the Franchisee's fitness studio yet again, after over a year of other closures, and the impact on their livelihood was evident.

It was clear to the Court that opening TG Athletics was in contravention of the Agreement. The Court however believed the Franchisee had raised a serious issue to be tried as to whether GMAH and the financial re-structuring of the program resulted in a breach of the Agreement. That the Franchisee also had a serious issue to be tried thus undermined the Franchisor's argument that it had a strong *prima facie* case.

Irreparable Harm to the Franchisee

The irreparable harm and balance of convenience factors were analyzed together and the Court believed that harm would come to both parties. In respect of the Franchisee, an injunction would put it out of business and eliminate any possibility for the Franchisor to be compensated for any claims in the action. In respect of the Franchisor, much of the damage to its goodwill, reputation and membership allegiance had likely already occurred, since the Franchisee's Greco System studio had already closed and had been rebranded, which harm could be compensated by damages. For the remaining harm related to the competition created by the Franchise's operation of TG Athletics for the remainder of the term of the Agreement, the Court noted that the Franchisor was prepared to allow the Franchisee to operate a fitness studio in the present location, which the Court interpreted as meaning that the Franchisee likely accepted that some competition from the Franchisee was inevitable.

The Court also considered the harm other persons affected by the dispute may suffer, including the impact on the livelihood of TG Athletics' 21 employees and 190 paying members. Further, a court-ordered closure of a fitness studio during a pandemic, for non-health related reasons, would create very poor optics for the public. Ultimately, the Court denied the interlocutory injunction.

Final Decision and Practice Takeaways

There are a number of takeaways from this decision on the relevance of the Covid-19 pandemic to future court decisions. In respect of the impact of the COVID-19 pandemic, throughout the analysis, the Honourable Justice Hackland remained aware of and sensitive to the impact of Covid-19 on the fitness industry, even going so far as to state that he took "notice of the fact that the Covid-19 pandemic has been particularly hard on the personal fitness industry." This statement, together with the fact that the Court was cognizant of the fact that an injunction would prevent the Franchisee from operating after over a year of other closures, seems to indicate that courts are sensitive to the serious negative consequences the pandemic has had on business, and as a result, the courts may be wary to render decisions that are likely to create further hardships. The decision also seems to indicate that the courts are concerned with the public perception of their decisions in the context of the overall administration of justice.

In respect of the legal test for an interlocutory injunction, the *Greco* decision underlies the importance of the party seeking the relief to come to court with "clean hands" and to ensure that the harm was not capable of being compensated by monetary damages.