



APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

ARTICLES

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Juliana Dalley

Feasting Judicial Convergence: Reconciling Legal Perspectives through the Potlatch Complex

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Tourism and Forestry Tenure on Crown Land: A Time for Change

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Speak Softly and Carry a Sealed Warrant: Building the International Criminal Court's Legitimacy in the Wake of Sudan

Kai Sheffield



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The 2012/13 *Appeal* Editorial Board would like to thank the University of Victoria Faculty of Law for its ongoing financial and institutional support. We would also like to give special thanks to Professors Michael M'Gonigle and Neil Campbell for their guidance in the production of this volume of *Appeal*.



The *Appeal* Editorial Board wishes to congratulate
Joseph Marcus,

winner of the
**2013 McCarthy Tétrault Law Journal Prize
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This writing prize, established in 2011, recognizes a student whose published work demonstrates excellence in legal scholarship and writing. The recipient of the prize is chosen each year by members of the Faculty of Law at the University of Victoria.

PREFACE

by Rachel Corder and Dana Phillips

A student law journal offers a rare and important venue for burgeoning legal minds. As law students, we are consistently asked to reflect upon current legal developments and cutting edge critiques, but are rarely given the chance to share our ideas, and our hard work, with the wider legal community. With this in mind, the 2012/13 *Appeal* Editorial Board seized upon every opportunity to strengthen the quality and reputation of the University of Victoria's law journal.

Our amazing Editorial Board worked tirelessly this year to increase readership, fully transition to open access, and promote *Appeal's* fundraising events and volunteer involvement. Looking inwards, we endeavoured to improve many of our internal processes. Given the tight timelines and yearly turnover of the Board, *Appeal* has a steep learning curve and can feel like a mad dash to the finish. We wanted to ensure that the work and wisdom acquired by each Board carries forward, allowing future students to launch new initiatives.

This year *Appeal* received our highest number of submissions to date, representing law schools from across North America. While this can make for a lengthy selection process, the level of interest and the quality of the submissions make the effort entirely worthwhile. We are forever thankful to the Board for persevering through countless rounds of paper reviews, and surviving our epic six-hour Saturday paper selection meeting—also known as the three-meal potluck. Our hope is that the number of submissions can grow with each passing year; having too many excellent papers to choose from is a problem that we are happy to have.

A special undertaking of this year's Board was to compile alumni data in the hopes that we can strengthen the relationship between those who share the common bond of serving on *Appeal*. It is our hope that as *Appeal* celebrates its 20th anniversary next year, we can come together as an academic community and celebrate the achievements in scholarship over the last two decades, and the dedication of those who have encouraged and supported them.

We could not have produced this law journal alone. We would like to thank the University of Victoria Faculty of Law for its constant and continued support. In particular, Erin Hallett and Dean Donna Greschner provided much assistance and encouragement to *Appeal*, despite their busy schedules. We also want to thank our patrons and sponsors, whose ongoing financial support ensures *Appeal's* future viability. To all of those who have given to *Appeal*, thank you for investing in academic excellence and providing us with a forum in which to showcase exceptional student work in the Canadian legal community.

Likewise, without the input of our many external reviewers, *Appeal* would not be possible. We rely on the expertise and professional opinion of our reviewers to guide our authors and editors to create articulate, well-written, and strongly reasoned articles that reflect current law. Our gratefulness to the reviewers who donate their time and expertise to *Appeal* cannot be overstated.

As for the papers we have ultimately chosen to publish, we are truly thrilled with the breadth and quality of analysis they provide on a wide range of timely legal issues. We would like to acknowledge the efforts of all of our authors, who worked so hard to improve their papers throughout the editing process (even in the course of world travel), often with transformative results.

Serving as the *Appeal* Editors-in-Chief this year has been both a privilege and a joy. While the publishing process is fraught with highs and lows, the rewards of promoting excellent student scholarship are well worth the trouble.

We hope you enjoy Volume 18 of *Appeal*.

ARTICLE

“ONE FAMILY, ONE JUDGE”: TOWARDS A NEW MODEL FOR ACCESS TO JUSTICE FOR FAMILIES FACING VIOLENCE IN BC

By Juliana Dalley*

CITED: (2013) 18 Appeal 3-19

INTRODUCTION

Spouses and children victimized by domestic violence face exceptional barriers in access to family justice in British Columbia (BC).¹ A multifaceted socio-legal problem, domestic violence implicates criminal, civil, and family law simultaneously. Thus, in taking steps to ensure her safety and the safety of her children, a battered woman may become implicated in multiple, concurrent legal proceedings taking place in different jurisdictional spheres.² Reporting an incident of violence to the police can trigger a prosecution in provincial criminal court, a custody dispute in provincial or Supreme Court, divorce and matrimonial property proceedings in Supreme Court, and child protection proceedings in provincial court.³ These proceedings are driven by fundamentally different concerns, will likely be handled by different lawyers, and will be heard by different judges. The confusion and overlap that result from this fragmentation can create gaps in safety planning, lead to conflicting court orders, and can enable the offender to exercise control by manipulating the court process. Such fragmentation can lead to continued violence and, in the worst of circumstances, to tragedy.⁴

* Juliana Dalley is a third-year JD student at the University of British Columbia. She would like to acknowledge and thank Professor Susan Boyd for her thoughtful comments on an earlier draft of this paper. She would also like to thank the *Appeal* Board, including her editor, Cynthia Khoo, and her external reviewer, for challenging her to strengthen the arguments raised in this paper.

1 This paper uses the terms “family violence”, “domestic abuse”, and “domestic violence” to include physical and sexual violence, as well as emotional and financial abuse, perpetrated by an intimate partner or parent.

2 This paper invokes gendered language to reflect the fact that family violence is a gendered phenomenon, with over 80 percent of survivors of family violence being women: *Statistics Canada, Family Violence in Canada: A Statistical Profile* (2009), online: <<http://www.statcan.gc.ca>> at 5. However, this is not to suggest that women in heterosexual relationships are the only victims of domestic violence or to diminish the significance of the barriers to access to justice faced by same-sex couples experiencing violence, but rather to reflect the systemic, gendered nature of the harm occasioned by family violence. Indeed, more research on violence in same-sex relationships is needed to understand the causes of such violence and how it might be reduced: Jessica Stanley et al, “Intimate Violence in Male Same-Sex Relationships” (2006) 21:1 *Journal of Family Violence* 31 at 31.

3 See *Family Relations Act*, RSBC 1996 c 128; *Divorce Act*, RSC 1985, c 3; *Child, Family and Community Service Act*, RSBC 1996, c 46.

4 The murder of 6-year-old Christian Lee, his mother Sunny Park, and his maternal grandparents by Peter Lee in 2007 is one well-known example, and will be discussed in further detail in Part II of this paper. See Mary Ellen Turpel-Lafond, *Honouring Christian Lee — No Private Matter: Protecting Children Living with Domestic Violence* (Victoria: BC Representative for Children and Youth, 2009).

Spouses and children who experience domestic violence face both substantive and procedural legal barriers in accessing family justice. These barriers must be seen as interrelated. Therefore, eliminating them necessitates coordinated, systemic law reform. After an extensive community consultation process, BC recently introduced a new piece of family law legislation that attempts to alleviate some of the substantive legal barriers to family justice in the context of family violence.⁵ Although this legislation represents important steps in addressing these problems, without reform of the system in which this new law will be administered, these changes will not effectively address some of the underlying structural barriers faced by survivors of domestic violence. I argue that the implementation of an integrated domestic violence court (IDVC) system would help to address some of the structural barriers faced by survivors of domestic violence in navigating the court system.⁶ The IDVC is a specialized court where one judge decides almost all legal matters relating to one family, that arise in the context of family violence, whether they are family, civil, or criminal proceedings. This structure renders the court system more accessible to survivors of violence while reducing the opportunity for information gaps, conflicting orders, and other barriers to arise. These changes may go some way towards improving access to justice; however, it would be incorrect to suggest that legal change alone can end family violence. This paper acknowledges the systemic causes of family violence as rooted in structural inequalities created by patriarchy that break down along lines of gender, but also of race, class, age, sexuality, and other facets of social identity.⁷ Ending family violence therefore necessitates community-based support and advocacy alongside deeper social changes that remedy structural inequalities facing women and other marginalized groups.

I begin by discussing historical trends in domestic violence law reform, both inside and outside Canada, and the emergence of the IDVC in other jurisdictions as a solution to structural problems in access to justice for victims of domestic violence. I then analyze how adopting the IDVC model in BC would address some of these barriers, focusing on the issues of protection orders, custody, and access. While noting that issues of constitutionality and respect for the diversity of Canadian families, including indigenous families, must be recognized and accommodated in any court structure, this paper concludes that implementing IDVCs in BC would increase the availability and effectiveness of family law remedies to survivors of domestic violence, with the overall result of improving the safety of families. IDVCs, if structured appropriately and with regard to issues of constitutionality and diversity, represent a potential model for law reform in BC.

5 Bill 16, *Family Law Act*, 4th Sess, 39th Leg, British Columbia, 2011 (assented to 24 November 2011), SBC 2011, c 25. Bill 16 was introduced on November 14, 2011, into the BC Legislative Assembly and received Royal Assent on November 24, 2011. It will come into force in March, 2013. I discuss these reforms in Part II of this paper.

6 The barriers associated with access to family justice cannot be fully understood without mention of the erosion of access to legal aid in family law proceedings over the last several years in BC. Although the issue of access to legal aid is beyond the scope of this paper, it must be recognized as one of the many interlocking structural barriers that weakens access to justice for survivors of family violence: see Alison Brewin, *Legal Aid Denied: Women and the Cuts to Legal Services in BC* (Canadian Centre for Policy Alternatives and West Coast LEAF, 2004).

7 This paper draws on both feminist and sociological theories of family violence. Common to both theories is the premise that violence is a means of exercising power and control. While structural inequalities such as class, age, race, ethnicity, and sexuality all impact how power and control are exercised, feminist theory helps to explain how these inequalities affect men and women differently in the context of family violence: see Kristin Anderson, "Gender, Status and Domestic Violence: An Integration of Feminist and Family Violence Approaches" (1997) 59:3 *Journal of Marriage and the Family* 655.

I. THE ORIGINS OF THE IDVC

A. Domestic Violence Law Reform in the Twentieth Century

The emergence of specialized domestic violence courts in the 1990s can be seen as the culmination of decades of activism by women's advocates and allies to transform societal discourses on domestic violence. The western legal tradition has a long history of toleration, and outright complicity, in spousal abuse; as the family was considered to be deeply "private," as opposed to "public," western states treated such abuse as a private matter that did not concern the state or broader society.⁸ By the 1980s, women's advocates and allies had successfully convinced states of the need to treat domestic violence like other crimes. However, these gains were in tension with movements against the over-incarceration of groups, including racialized and indigenous people, who were overrepresented in the criminal justice system.⁹

This activism nevertheless had profound effects in the criminal justice sphere in North America. In 1994, the United States federal government passed the *Violence Against Women Act* ("VAWA"), which offered funding to states that introduced new legislative and enforcement measures to combat domestic violence.¹⁰ In Canada, several provinces introduced new law enforcement practices, including mandatory arrest, charging, and prosecution policies.¹¹ Eventually, specialized domestic violence criminal courts emerged in both Canada and the United States, following the specialized justice trend in dealing with mental health and poverty-related crimes. These courts attempted to address the difficulties in achieving positive results within the traditional court system and have seen some success in improving safety, reducing recidivism, and promoting the perception that domestic violence is taken seriously by the justice system.¹² Some research has even suggested that specialized criminal court procedures could help reconcile the goal of criminalizing domestic violence with that of promoting alternative, rehabilitative justice for Aboriginal families by offering access to culturally grounded treatment and counselling services aimed at breaking cycles of intergenerational violence.¹³

Legislatures also struggled to reform the family justice system to better reflect the challenges of handling disputes where family violence is the underlying issue. In the 1980s and 1990s, some Canadian jurisdictions introduced legislation to improve access to civil legal remedies for domestic violence, such as emergency protection orders. These laws were intended to be more comprehensive, easier, faster, and less costly for women

⁸ Deborah Epstein, "Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System" (1999) 11:3 *Yale JL & Feminism* 4 at 10.

⁹ Jane Ursel, *Report on Domestic Violence Policies and their Impact on Aboriginal People* (2001), online: Research & Education for Solutions to Violence & Abuse (RESOLVE) <<http://www.umonitoba.ca/resolve/research/research%20day/AJL.pdf>> at 1.

¹⁰ Anat Maytal, "Specialized Domestic Violence Courts: Are they Worth the Trouble in Massachusetts?" (2008) 18:1 *Public Interest L Rev* at 197-198.

¹¹ See e.g. Jane Ursel and Christine Hagyard, "The Winnipeg Family Violence Court" in Jane Ursel, Leslie M. Tutty and Janice leMaistre, eds, *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books, 2008) at 96.

¹² *Ibid* at 104, 117-118.

¹³ Ursel, *supra* note 9 at 3. Ursel's research focused on outcomes from the Winnipeg Family Violence Court in Manitoba, a specialized domestic violence criminal court established in the 1990s. In her report, she recommends expanding alternative sentencing frameworks for Aboriginal offenders permitted by section 718.2(e) of the *Criminal Code*, RSC 1985, c C-46.

to access than previously available remedies.¹⁴ Some provinces also reformed their custody and guardianship laws in the late 1990s to take into account the importance of considering family violence when structuring parenting orders, reflecting growing recognition of the significant negative impacts of violence on child development even where the children involved were not directly subjected to violence.¹⁵ Finally, some provinces entered into agreements to transfer authority for child and family services to Aboriginal communities, moving closer to restoration of their inherent responsibility for family support and child protection.¹⁶ Since family violence is one of the factors that can trigger child protection proceedings, the greater involvement of Aboriginal communities in child welfare represented an important step towards dealing with family violence more holistically.

However, there were still gaps in the legal system for battered spouses in obtaining family justice remedies after these reforms were implemented. For example, studies showed that civil protection orders were not always as easy to obtain, nor as effective, as hoped; similarly, in the family law realm, some judges continued to order access or even joint custody of children in the absence of full information about the history of the parties.¹⁷ This state of affairs can put both the battered spouse and the child's safety at risk by allowing the abusive parent to continue victimizing the family on the pretext of access.¹⁸ Thus, governments and advocates began searching for ways to improve the handling of domestic violence in the family law sphere, as well as enhance coordination between the family and criminal justice spheres.

Following the approach taken by specialized criminal courts, IDVCs emerged in the United States. They proceeded from the view that the “one family/one judge” model could provide more informed judicial decision-making, greater consistency in court orders, and greater accessibility for survivors of violence.¹⁹ The District of Columbia established one of the first IDVCs in 1996, with several other jurisdictions following suit.²⁰ As of January 2011, sixty New York counties, covering 90 percent of the state’s residents, offer IDVC services.²¹ In contrast, only one jurisdiction in Canada offers an urban IDVC; this court, established in Toronto in 2010, will be discussed in detail at Part I(C) of this paper.

14 Karen Busby, Jennifer Kosha & Wanda Wiegers, “Civil Domestic Violence Legislation in the Prairie Provinces: A Comparative Legal Analysis,” in Jane Ursel, Leslie M. Tutty and Janice leMaistre, eds, *What’s Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books, 2008) at 198.

15 BC was not among this first wave of provinces to amend its custody law: Peter Jaffe, Claire Crooks & Nick Bala, “Domestic Violence and Child Custody Disputes: The Need for a New Framework for the Family Court,” in Jane Ursel, Leslie M. Tutty and Janice leMaistre, eds, *What’s Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books, 2008) at 256. BC’s recent amendment of its parenting and guardianship law will be discussed in Part II.

16 Office of the Auditor General of British Columbia, *Management of Aboriginal Child Protection Services* (2008), online: Office of the Auditor General of British Columbia <<http://www.bcauditor.com/pubs/2008/report3/management-aboriginal-child-protection-services>> at 20.

17 Jane Ursel, Leslie Tutty & Janice LeMaistre, “The Justice System Response to Domestic Violence” in Jane Ursel, Leslie M. Tutty and Janice leMaistre, eds, *What’s Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books, 2008) at 14-15.

18 *Ibid.*

19 “Integrated Domestic Violence Courts: Overview,” online: New York State Courts, Office of Policy and Planning <http://www.nycourts.gov/courts/problem_solving/idv/home.shtml> [“Integrated Domestic Violence Courts: Overview (New York)’].

20 Emily Sack, *Creating A Domestic Violence Court: Guidelines and Best Practices* (San Francisco: Family Violence Prevention Fund, 2002) at 55.

21 “Integrated Domestic Violence Courts: Overview (New York),” *supra* note 19.

B. What Is an IDVC?

While there are several variants on the general model, a typical integrated court includes several common features. Many of these relate to the handling of matters inside the courtroom. One central feature is the establishment of a dedicated courtroom for each proceeding related to a single family, which is presided over by a single judge. This is the major innovation of the IDVC model. It reduces information gaps and diminishes the potential for offenders to manipulate the court process to extend control over their former partners and children by allowing one judge to gain comprehensive information on a particular family and insight into their circumstances.²² Depending on the jurisdiction, a single judge may make most or all of the orders that are necessary to address the family's legal issues, including granting orders of protection, imposing bail conditions and sentences, providing for spousal and/or child support, and structuring parenting arrangements.²³ The presiding judge hears each proceeding sequentially in order to keep matters distinct, and ensure that the correct evidentiary and procedural rules relevant to each type of proceeding are applied. Furthermore, the judge can monitor the offender's compliance with her or his orders through mandatory review appearances, which enhances accountability of the offender and increases the survivor's safety. Lastly, specialized judicial training in both operational legal matters and in the dynamics of domestic violence, including its impact on children, enhances the judge's ability to adjudicate family violence-related conflicts effectively.²⁴

Another set of features relates to the provision of support outside the courtroom. The provision of comprehensive services and resources for families through the IDVC is a common feature, which can improve accessibility for survivors of violence.²⁵ A designated resource coordinator may make referrals to community resources for the family and may work with a victim advocate to ensure that the family receives coordinated services, including crisis assistance, counselling, legal assistance, and services for children.²⁶ Advocates provide support both inside and outside of the courtroom. This support is crucial in ensuring that the client is informed of the process at all times, which in turn promotes her safety and her ability to obtain remedies in the justice system.²⁷ Advocates can assist in filing court documents, attend the relevant proceedings with the client, and help her develop and maintain an effective safety plan throughout the process.²⁸ Meanwhile, the resource coordinator may also make referrals for the offender to take part in counselling, treatment programs, and parenting classes, and can monitor and report on his compliance to the presiding judge.²⁹ Integrated courts in the United States have focused not only on streamlining court procedures for survivors of violence, but have also adopted a more holistic approach to court-based problem-solving. This approach seeks to address the root problems of domestic violence, and provides solutions that promote the safety and well-being of families.

22 Carolyn Schwarz, "Unified Family Courts: A Saving Grace for Victims of Domestic Violence" (2004) 42:2 Fam Ct Rev 304 at 306.

23 Centre for Court Innovation, "Fact Sheet: Integrated Domestic Violence Courts: Key Principles," online: Centre for Court Innovation <<http://www.courtinnovation.org>> at 1.

24 *Ibid* at 3.

25 See e.g. Sack, *supra* note 20 at 9-10; see also Schwarz, *supra* note 22 at 306 (discussing the Unified Family Court, a type of IDVC that handles some, but not all, criminal matters).

26 Centre for Court Innovation, *supra* note 23 at 2.

27 Sack, *supra* note 20 at 9-10.

28 *Ibid*.

29 Centre for Court Innovation, *supra* note 23 at 2.

C. The IDVC in Canada

Building on the American model, Ontario established Canada's first IDVC in June 2011 in Toronto. The Toronto court was developed through consultation with Crown Counsel, judges, criminal and family law lawyers, victim advocates, police, probation officers, parenting skills providers, and a number of community organizations.³⁰ Its goals were to promote informed, consistent adjudication conducted with knowledge of the dynamics of domestic violence; to eradicate conflicting civil and criminal orders within families; to connect court users to community services and resources; and to increase efficiency in the use of court resources.³¹ The Toronto court's founders consulted with judges and staff from the Integrated Court in Buffalo, New York, and ultimately adapted the American model to suit differences in Canada's constitutional and judicial system.³² As such, the court is part of the Ontario Court of Justice (Provincial Court) and, as of March 16, 2012, handles "all matters relating to the criminal and family cases, including short trials."³³ However, the court cannot adjudicate divorce, matrimonial property, or child protection proceedings.³⁴ Similarly to courts in the United States, matters are not merged but are heard in sequence, with different evidentiary and legal standards applied as is appropriate to each particular proceeding.

The Toronto court's problem-solving approach to family violence appears to have both advantages and disadvantages for survivors of family violence. In the view of one of the court's presiding judges, the court's structure helps protect family members from further violence by allowing them to obtain court recognition of agreements more easily and expediently because of the increased coordination between proceedings.³⁵ For example, if the parties, through lawyers, reach an agreement on contact or access, any criminal bail orders or peace bonds in place can be appropriately modified without delay by the presiding judge, thereby reducing confusion and conflict.³⁶ However, the emphasis on dispute resolution and reaching agreements will not always be appropriate in the circumstances and could, conversely, allow for the offender to exercise control over family members.³⁷ Furthermore, participants are no longer required to consent in order to participate in the Court. The removal of the requirement for offender consent may improve the safety and autonomy of battered spouses, but adopting a problem-solving approach in the absence of the battered spouse's consent may also lead to further

30 Geraldine Waldman, *The What and Why of the Proposed Domestic Violence Court*, online: Family Lawyers Association of Ontario <http://flao.org/wp-content/uploads/2011/03/Integrated_Domestic_Violence.pdf> at 2.

31 *Ibid* at 3-4.

32 *Ibid* at 2.

33 Practice Direction regarding the IDVC at 311 Jarvis Street, Toronto (signed February 28, 2012 by Annemarie E Bonkalo, Chief Justice, and Faith Finnestad, Regional Senior Justice, Toronto, Ontario Court of Justice), online: Ontario Court of Justice <<http://www.ontariocourts.ca/ocj/legal-professionals/practice-directions/integrated-domestic-violence-court/>>. Originally, consent from the victim and offender was required to transfer the proceedings to the IDVC.

34 Divorce and matrimonial property division are not handled because they are under the jurisdiction of the Superior Court of Justice: see *Divorce Act*, *supra* note 3, ss 2-3. It is not clear why child protection cases are not handled by the Toronto integrated court, as child protection is within the jurisdiction of the Ontario Court of Justice under the *Child and Family Services Act*, RSO 1990 c 11, s 3. One possible explanation is that child protection was excluded from the pilot project's mandate given its focus on dispute resolution: "Integrated Domestic Violence Court: Overview," online: Ontario Court of Justice <<http://www.ontariocourts.ca/ocj/integrated-domestic-violence-court/overview/>> ["Integrated Domestic Violence Court: Overview (Ontario)"].

35 Brahm Siegel, "Ontario's IDVC Safeguards Women's Rights" (December 12, 2011), online: Huffington Post Canada <<http://www.huffingtonpost.ca>>.

36 *Ibid*.

37 Nancy ver Steegh, "Differentiating Types of Domestic Violence and Implications for Child Custody" (2005) 65:1 La L Rev 1379 at 1403-1404.

victimization if the offender is able to manipulate the process. Finally, it is not clear whether Toronto's problem-solving IDVC provides access to specialized programming and services for marginalized groups such as indigenous and immigrant women and same-sex families, which could diminish access to the court and the services that it offers.³⁸

Toronto's IDVC is currently being evaluated and no results have been released yet. This paper therefore looks to research from other jurisdictions to determine whether the IDVC might serve as a model for reform in BC. While some general conclusions may be drawn from other jurisdictions, these findings must be scrutinized in light of particular factors relevant to law reform in BC, including court structures, Aboriginal self-government, and the province's cultural and linguistic diversity.

D. Outcomes of IDVC Implementation

While there are several lenses through which one might examine the outcomes of implementing IDVCs, the focus of this paper is on access to the family justice system for family members facing violence. Although there is limited empirical evidence on family justice outcomes in IDVCs, the available evidence suggests that integrated courts are seeing some level of success in achieving their mandates of enhancing safety and increasing the accessibility of family justice remedies.³⁹ However, access and underutilization have been problematic in some jurisdictions, pointing to the need for strong case identification procedures and increased public awareness of the courts. Moreover, since there is little to no information on the impact of IDVCs on access to justice for marginalized groups, there are some limitations to relying on this data as a model for BC without further research due to the province's multicultural context.⁴⁰

Initial evidence from the Coordinated Domestic Violence Intake Centre in Washington, DC reflected a 50 percent increase in the number of applications for civil protective orders over a six-month period after the establishment of the Intake Centre as well as a substantial increase in the entry of child support awards in domestic violence cases.⁴¹ In 2001, approximately 300 new petitions for civil protection orders were filed in the DC court each month, reflecting a high caseload for this court.⁴² On the other hand, when success rates of applications for civil protective orders in New York's IDVCs were recently compared to success rates in traditional civil/family court, there was no statistically significant difference in outcomes: an applicant had an equal chance of obtaining an order in either court.⁴³ Although this appears to be a discouraging finding, it does suggest that concerns about judicial bias against offenders in IDVC are not substantiated. Moreover, examining the substance of the orders in question might have revealed that the orders in IDVCs are better crafted to reflect the circumstances of each family.

³⁸ In addition to cultural barriers, lack of confidence communicating in English can be a significant barrier to accessing the court system. The BC Representative for Children and Youth notes that “[w]ithout the availability of someone who can speak the language of an immigrant woman, a program or service will not be able to meet its goals of doing all it can to assist her.” Turpel-Lafond, *supra* note 4 at 62.

³⁹ Many stakeholders have called for better information gathering and tracking in order to better evaluate IDVCs: Sack, *supra* note 20 at 16-17.

⁴⁰ In 2006, 27.5 percent of British Columbians were foreign-born: Statistics Canada, *Canadian Demographics at a Glance* (2008), online: Statistics Canada <<http://www.stats-can.gc.ca>> at 45.

⁴¹ Epstein, *supra* note 8 at 32.

⁴² Sack, *supra* note 20 at 55.

⁴³ Erika Rickard, “Civil Protective Orders in Integrated Domestic Violence Court: An Empirical Study” (2010) unpublished, archived at Digital Access to Scholarship at Harvard, online: <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:4772900>> at 9-10.

Although the established court systems in New York and DC see high rates of utilization, some more recently established courts have experienced underutilization. For example, a pilot IDVC established in the London borough of Croydon, in the United Kingdom, was accessed by only 5 families, whose matters comprised 17 hearings, over the course of its first year.⁴⁴ Researchers determined that this was due in part to restrictive and misunderstood eligibility criteria, and a lack of awareness and understanding of the role of the court.⁴⁵ While the data set was too limited for systematic analysis of outcomes, interviews with court users revealed that parties felt positively about the concept of the court. Despite some court users having reservations about how their own cases had been handled, most fully endorsed the idea of the court and appreciated the benefits intended for survivors of domestic violence.⁴⁶ While the researchers did note several serious shortcomings of the Croydon IDVC, including limited access to advocates and offender treatment programs, they observed some advantages, including greater access to special protective procedures for victims, greater availability of witness protection workers, and expedited resolution of cases through the use of anti-delay measures.⁴⁷

Although there are limitations to relying on data from other jurisdictions, including differences in our legal systems and issues with respect to family diversity in BC, there is an empirical basis for the establishment of IDVCs in BC that translates in spite of these differences. Thus, we can nevertheless learn from experiences in other jurisdictions. The American and British IDVCs tell us that IDVCs must be structured with victims in mind; access to advocacy services, information, and other forms of victim and family support appear to be crucial to the success of an IDVC.

II. THE IDVC AS A MODEL FOR REFORM IN BC

A. The Situation in BC: Family Law Reform in Context

BC's recent passage of the new *Family Law Act* represents the culmination of a long process of community consultation on family law reform in the province.⁴⁸ Taking the experiences of other jurisdictions into account, this paper suggests that the implementation of an IDVC would complement the legislative changes that have already been introduced in BC and would reflect concerns raised by the community at the consultation stage. Though it may prove impossible to implement the IDVC model in its ideal form because of federalism and jurisdictional concerns, the procedural innovation offered by the IDVC would, alongside existing legislative reforms, address more holistically the concerns identified by community organizations and service providers, thereby creating a system that is better designed to handle legal disputes arising from family violence.

To provide a sense of context around the new *Family Law Act*, this paper will track the process of family law reform in BC, particularly in the area of family violence. This process began when the Family Justice Working Group was asked to report to the

⁴⁴ The evaluators recommended that the Court's eligibility criteria, which required concurrent, ongoing civil and criminal proceedings, be relaxed to allow civil cases to remain eligible for the duration of the civil order, rather than only up until the date that the final order is made in order to enable the IDVC to handle breaches: Marianne Hester, Julia Pearce & Nicole Westmarland, *Early Evaluation of the Integrated Domestic Violence Court, Croydon* (UK: Ministry of Justice, 2008) at 34.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at 30.

⁴⁷ *Ibid* at 17, 22-23, 39.

⁴⁸ "White Paper on *Family Relations Act* Reform: Proposals for a new Family Law Act" (July 2010), online: Ministry of the Attorney General <<http://www.ag.gov.bc.ca/>> at 8-9 ("White Paper").

Justice Review Task Force on directions for family justice reform in the early 2000s.⁴⁹ This report, published in 2005, found that the family law system as a whole would have to change substantially to respond to the dynamics of family violence by shifting towards a more accessible system geared towards consensus-based dispute resolution.⁵⁰ In reflecting on access to family justice services, the Working Group suggested that it would be “critical” to provide a needs-assessment to parties at the point of access, where trained front line workers could identify safety concerns and provide referrals to families in crisis.⁵¹ In their vision, “high-conflict” families, identified through this needs-assessment process, would be administratively earmarked and assigned to a judge who would hear all subsequent applications in the case.⁵²

The Working Group further recommended that BC establish a Unified Family Court System, as most other provinces have done. Unification addresses the problem of divided, overlapping jurisdiction, where some family law issues are dealt with in superior court while others are dealt with in provincial court. This Unified Family Court would be staffed by a specialized judiciary, which would receive additional training in family dynamics, child development, gender bias, and family violence, among other areas.⁵³ Although the IDVC model was not specifically examined by the Working Group, its recommendations reflect many of the characteristics of IDVCs, including integrated service provision; an assigned judge to rule on all of one family’s proceedings and subsequent applications; and a specialized, trained judiciary.⁵⁴ These reforms were animated by the goals of achieving greater sensitivity in decision-making and reducing barriers for high-needs families.⁵⁵

Following the report, in 2006, the BC Ministry of the Attorney General announced an official consultative review of the *Family Relations Act*, which had not been substantially revised since its original enactment in 1978.⁵⁶ Its goals were to modernize the *Family Relations Act* to keep pace with changing social values, including perspectives on family violence, and with research reflecting the impact of family violence on children.⁵⁷ A Discussion Paper centering exclusively on the issue of family violence was prepared, reflecting a commitment to some of the Working Group’s recommendations on family violence.⁵⁸ However, the scope of the consultative review was limited to the *Family Relations Act* only, and it therefore did not touch on reforming the wider system in which BC’s family law is applied and administered.

Others, including community-based groups and advocates, called for reform of the system in which family violence cases are handled in BC.⁵⁹ Significantly, in the wake

49 Family Justice Working Group, *A New Justice System for Families and Children* (2005), online: BC Justice Review Task Force <www.bcjustricereview.org> at 5.

50 *Ibid* at 6.

51 *Ibid* at 34-35.

52 *Ibid* at 115.

53 *Ibid* at 102.

54 *Ibid* at 115, 119.

55 *Ibid* at 34-35.

56 “*Family Relations Act Review: Background and Context*” (February 2007), online: Ministry of the Attorney General, Judicial Services Branch <<http://www.ag.gov.bc.ca/legislation/pdf/Chapter1-Background.pdf>> at 1. See also White Paper, *supra* note 48 at i.

57 *Ibid*.

58 “*Family Relations Act Review: Family Violence*” (April 2007), online: Ministry of the Attorney General, Judicial Services Branch <<http://www.ag.gov.bc.ca/legislation/pdf/Chapter9-FamilyViolence.pdf>>.

59 See e.g. West Coast LEAF, “Submission of West Coast Women’s Legal Education and Action Fund (West Coast LEAF) to the Ministry of the Attorney General Justice Services Branch Civil and Family Law Policy Office: *Family Relations Act Review: Phase III Discussion Papers*” (December 2007), online: West Coast LEAF <www.westcoastleaf.org> at 5-6. See also Turpel-Lafond, *supra* note 4 at 1-2.

of the murders of 6-year old Christian Lee, his mother Sunny Park, and her parents by Christian's father, Peter Lee, the BC Representative for Children and Youth undertook a report to determine if there were any systemic failures that permitted these murders to take place.⁶⁰ The Representative's overall finding was that the lack of a system-wide domestic violence response across criminal law, child welfare law, and family justice sectors, and the absence of a thorough and fully informed assessment of the risk of harm and lethality posed by Peter Lee, placed Christian and his family in grave danger without an adequate safety plan in place.⁶¹

The Representative identified several specific junctures where the presence of an IDVC could have helped prevent these acts of extreme violence from occurring. In concluding that the system had indeed failed Christian, the Representative recommended that the Ministry of the Attorney General review and enact necessary changes to improve the administration of justice in criminal and family matters involving domestic violence.⁶² To this end, the Representative recommended establishing specialized domestic violence courts to handle criminal domestic violence matters and amending the *Family Relations Act* to define domestic violence and to specify how it might be considered in the context of the relationships between the parties.⁶³

While the White Paper put forward for review by the Ministry of the Attorney General in 2010 reflected some of these concerns, the wider system in which these new laws would be applied and administered was never considered for reform.⁶⁴ Although some community organizations pointed out that even the most progressive legislation would be meaningless if it were inaccessible to women,⁶⁵ the scope of the review remained limited to the legislative framework. Thus, in accordance with largely positive feedback from the community on the substance of the proposed changes, Bill 16 was introduced in the Legislative Assembly and became law on November 24, 2012. It will come into force in its entirety on March 18, 2013.⁶⁶ I will discuss some significant legislative changes involving the availability of remedies in family violence disputes, and will discuss where IDVCs may play a role in enhancing their accessibility and effectiveness.

i. Civil Protection Orders

The *Family Law Act* introduces new civil protective legislation. When the relevant provisions come into force, an applicant ("the at-risk family member") will be able to obtain a protection order against another family member if they demonstrate, on a balance of probabilities, that family violence against them is "likely to occur."⁶⁷ In turn, family violence is defined quite broadly in the Act. It includes not only attempted or actual physical or sexual abuse but also psychological or emotional abuse of a family member, including "unreasonable restrictions on personal or financial autonomy."⁶⁸ These changes represent positive steps for domestic violence law reform in BC. However, there is a possibility that, given this broad legislative scope, BC courts will follow other

⁶⁰ Turpel-Laford, *supra* note 4 at 5.

⁶¹ *Ibid* at 3.

⁶² *Ibid* at 58-59.

⁶³ *Ibid*.

⁶⁴ "White Paper," *supra* note 48 at i-iii.

⁶⁵ See e.g. West Coast LEAF, "Response to the White Paper on *Family Relations Act* Reform: Submission to the Ministry of Attorney General Justice Services Branch, Civil and Family Law Policy Office" (October 2010), online: West Coast LEAF <<http://www.westcoastleaf.org>> at 1.

⁶⁶ BC OIC 386 / 2012, BC Reg 131/2012, deposited June 19, 2012.

⁶⁷ Bill 16, *supra* note 5, s 183.

⁶⁸ *Ibid*, s 1.

jurisdictions by narrowing the focus of the inquiry to specific acts or incidents instead of looking at the entire context of the relationship between the parties. For example, in jurisdictions such as Saskatchewan and Alberta, in order to obtain an emergency order without notice, a family member must demonstrate a “high level of seriousness or urgency.”⁶⁹ In applying this test, judges have limited their focus to discrete, isolated incidents of threats or physical violence rather than taking account of the cumulative effect of past violence or ongoing controlling conduct of the offender.⁷⁰ The courts’ refusal to engage in a more contextual risk assessment is a significant barrier for survivors of violence as this type of violence is typical of many battering relationships and can escalate in severity without intervention.⁷¹ However, an IDVC could address the limitations that survivors of violence in other provinces have experienced in accessing civil protective orders. An IDVC may be more likely to grant a needed protective order by putting the entire history of the parties’ relationship before a single judge who has specialized training in understanding the dynamics of domestic violence. This would enhance the accessibility of these progressive legislative provisions. Heightened coordination between the criminal justice system and the family justice system could also result in better enforcement of these orders.

ii. Parenting Arrangements

The *Family Law Act* also introduces much-needed changes to its parenting and guardianship provisions. Canadian courts have long struggled with applying the “best interests of the child” test in parenting disputes where domestic violence is an underlying factor.⁷² This arises from the inconsistency between the notion, on one hand, that a continued relationship with both parents is generally in the best interests of the child and, on the other hand, a concern for the safety of family members experiencing violence.⁷³ Under the new framework, the best interests of the child are the only criteria in making a parenting or guardianship order, and such an order is not in the best interests of a child unless it protects the child’s physical, psychological, and emotional safety, security, and well-being to the greatest extent possible.⁷⁴ Furthermore, the best interests of a child are determined under the new law with reference to the impact of family violence on the child’s safety, security or well-being; the ability of the person responsible for family violence to care for the child; the appropriateness of arrangements requiring the child’s guardians to cooperate; risks to the safety of the child; and any civil or criminal proceedings relevant to the safety of the child.⁷⁵ Equality-seeking organizations have applauded these provisions for recognizing the negative impacts of family violence on children.⁷⁶

While these legislative changes are an improvement from the previous *Family Relations Act*, which reflected the ambivalence and lack of understanding of domestic violence present in the 1970s and early 1980s, they will not offer the greatest protection to

⁶⁹ Busby, Koshan and Wiegers, *supra* note 14 at 209.

⁷⁰ *Ibid* at 209-210.

⁷¹ Ver Steegh, *supra* note 37 at 1388.

⁷² Jaffe, Crooks and Bala, *supra* note 15 at 255. See also Joan Meier, “Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining Solutions” (2003) 11:2 Am U J Gender Soc Pol'y & L at 676, for discussion of the American context.

⁷³ *Ibid* at 255.

⁷⁴ Bill 16, *supra* note 5, ss 37(1), 37(3).

⁷⁵ Bill 16, *supra* note 5, ss 37(2)(g), (h), (i), (j).

⁷⁶ West Coast LEAF, *supra* note 65 at 3. It should be noted that, while it expressed support for the provisions, West Coast LEAF did further recommend that the threat of deportation be included in the definition of family violence, and that a presumption that violence does not support a child’s safety, security, and well-being be included.

families unless judges are made aware of all the relevant facts regarding the family's circumstances. The implementation of an IDVC system alongside these reforms would enhance the ability of survivors to obtain the benefit of these progressive provisions in the context of an inaccessible legal system. Additionally, without the knowledge of possible bail orders or peace bonds prohibiting contact, a family court judge may still neglect to structure a parenting order to minimize the opportunity for the offender to have contact with his former partner. In so doing, the fragmentation between the criminal and civil processes may still place women and children in danger by enabling the offender to exercise control over the court process.

B. IDVCs Increase Safety of Families

In light of the above findings, while provincial law reform has given some strong direction to the courts in managing disputes involving domestic violence, survivors of violence may still face difficulty in obtaining safety-related remedies. In the absence of full information about the relationship between the parties, a judge may still make inappropriate or insufficient orders for the protection of battered family members. On the other hand, much research on IDVCs suggests that they can increase the safety of family members throughout their involvement with the justice system; the following sections will present this research and illustrate its findings. The court system is rendered all the more important in protecting women and children because the most lethal time for a woman (and her children) is just before, during, and just after separation, and it is at this time that she will likely access the justice system most intensively.⁷⁷ Several functions of the IDVC promote safety and would complement BC's recent family law reforms that support a similar goal.

i. Information-Sharing

The information-sharing function of the integrated court maximizes the justice system's ability to protect family members. As Emily Sack recommends, best practice requires an integrated information-sharing system across civil and criminal cases to provide the most information possible to judges when making decisions, to allow for follow-up on compliance and violations, and to help to keep victims informed.⁷⁸ Indeed, the BC Representative for Children and Youth explained in her report on the death of Christian Lee that because the child protection, family, and criminal justice systems had functioned independently of one another and did not share information effectively, several opportunities for meaningful intervention were lost.⁷⁹ For example, even though Peter Lee's bail order prohibited contact with Christian's mother, there was no order in place prohibiting contact with Christian. Christian's father used the pretext of access to Christian to continue to intimidate, harass, and stalk Christian's mother, Sunny Park. Before her murder, Sunny advised the Ministry of Children and Family Development (MCFD) and her husband's bail supervisor that she was afraid of her husband and wanted Christian listed as a no-contact person; when contacted by Peter Lee's bail supervisor, however, the MCFD refused to recommend that Christian's name be added to the order.⁸⁰ Finally, Sunny advised her family lawyer of her husband's threatening behaviour, and her lawyer advised her to stay away from the family home.⁸¹ Although

⁷⁷ Battered women are five times more likely to be murdered while trying to separate from their abusive partners: Grace Kerr and Peter Jaffe, "Legal and Clinical Issues in Child Custody Disputes Involving Domestic Violence" (1999) 17 CFLQ 1.

⁷⁸ Sack, *supra* note 20 at 15.

⁷⁹ Turpel-Lafond, *supra* note 4 at 3.

⁸⁰ *Ibid* at 24, 35, 59-60.

⁸¹ *Ibid* at 28.

Sunny subsequently filed for divorce and applied for a protection order, the police were not informed of this order and therefore could not provide effective protection and enforcement.⁸² The conflicting information given to Sunny by different parties likely contributed to her confusion about what to do, which resulted in her not having an effective safety plan.

The Representative concluded that “had there had been a coordinated system linking the efforts made by criminal justice, child protection and family justice professionals, each would have had the benefit of all available information.”⁸³ This would have ensured that Sunny was not given conflicting information, and would have helped these agencies and service providers to assist Sunny in developing an adequate safety plan.⁸⁴ The IDVC’s centralization of services, personnel, and information reduces the potential for these kinds of oversights to occur. This centralized structure would also facilitate the enforcement of protection orders granted under the new *Family Law Act*, in accordance with new provisions that allow for a police officer, having reasonable and probable grounds to believe that a person has contravened a term of a protective order, to take action to enforce the order, using reasonable force if necessary.⁸⁵ Some have called enforcement the “Achilles’ heel” of the civil protective order process, because without enforcement, a civil protective order offers little protection and may even lead the victim to have a false sense of security.⁸⁶ However, information-sharing between agencies would facilitate enforcement of the statutory scheme, thereby enhancing its effectiveness.

ii. Consistency in Orders

The IDVC also reduces the opportunity for conflicting orders to arise between criminal and family court. Conflicting orders are not only a source of confusion but pose a substantial safety risk for survivors of domestic violence. For example, an offender may be awarded access to the children in family court even though no-contact and no-go orders have been imposed in criminal proceedings. The *Family Law Act* partly addresses the problem of conflicting orders by providing for supremacy of safety-related orders over other types of orders under section 189.⁸⁷ However, this does not sufficiently address the problems that can result when orders are not made with full information about all ongoing legal proceedings. While section 189(2) tells the parties which order is legally enforceable, there is no jurisdiction to vary orders made under the *Criminal Code*. Thus, this change does not fully resolve the issue of conflicting bail orders, peace bond terms, or terms of a conditional sentence.

The suspension of orders that are not directly related to safety could also have negative impacts where these orders are important, in an indirect way, to maintaining safety. For example, suspension of a conflicting parenting order and child or spousal support order could jeopardize the victim’s financial security. As a battered woman may experience significant financial dependency on her abuser, a child or spousal support order can be her “key to freedom” and security by ensuring that she does not need to return to her abuser for financial reasons.⁸⁸ Furthermore, there is always the risk that battered spouses without legal representation will be confused by conflicting orders, and will not understand their rights. Similarly, an offender may not understand, or may claim he did

⁸² *Ibid.*

⁸³ *Ibid* at 34.

⁸⁴ *Ibid* at 34.

⁸⁵ Bill 16, *supra* note 5, s 188(2).

⁸⁶ Epstein, *supra* note 8 at 12.

⁸⁷ Bill 16, *supra* note 5, s 189.

⁸⁸ Epstein, *supra* note 8 at 11.

not understand, his obligations in circumstances where orders made in two different proceedings conflict. Having one judge make all necessary orders reduces confusion and enhances safety. This, in turn, allows families access to the advantages of the criminal court, including mandated treatment programs funded by the government, and incarceration where necessary. These features function in tandem with civil/family court, where the judge can make orders with a view to the best interests of the child, which could include provision of support for the child's mother.

iii. Judicial Specialization

Having judges trained in the dynamics of domestic violence is central to the IDVC's potential to empower survivors of family violence. Specialized judges can adjudicate disputes from a safety-based, problem-solving perspective with a view to making appropriate orders for each family. For example, IDVC judges could be trained to recognize different types of violence in relationships, which would assist them in making the appropriate orders. Nancy ver Steegh points out that custody decisions have traditionally been based on the "fiction that families with a history of domestic violence are all alike."⁸⁹ Rather, she demonstrates that the motivation behind the violence—whether it is part of a pattern of escalating coercion and control, or whether it involves situational, isolated incidents of conflict—matter a great deal in custody determinations.⁹⁰ While consensual dispute resolution processes and orders to attend parenting courses may be appropriate for couples experiencing situational violence, such processes can be dangerous where coercion and control are present in the relationship.⁹¹ The statutory framework now present in the *Family Law Act* is a good starting point. Nevertheless, in order to best protect survivors of violence, it will be necessary for judges to understand the nuances of family violence and their bearing on the application of family law.

With special training, judges will be able to apply the law in a more holistic manner with a view to making all necessary orders to promote the children's best interests, to ensure safety, and to promote offender accountability. This matters because the *Family Law Act* does not direct judges in how to structure parenting orders to protect, to the greatest extent possible, the child's physical, psychological, and emotional safety, security, and well-being.⁹² However, a specialized judge, with full knowledge of the circumstances of the family and with proper training, might be better able to craft parenting orders that reduce the potential for renewed violence while maintaining the parent-child relationship where appropriate. Since families are at a heightened risk of violence during access visits, eliminating contact between spouses through carefully structured pick-up and drop-off plans can protect the mother while maintaining the parent-child relationship.⁹³

C. Should IDVCs Be Implemented in BC?

Despite the many advantages of implementing IDVCs in BC, several practical and normative problems should be noted. First, creating a court with the necessary jurisdiction to handle all of the functions of an effective IDVC would be a significant challenge given the structure of Canadian federalism and issues concerning Aboriginal self-government. At the moment, BC is one of only three provinces without a Unified Family Court, meaning that some matters are dealt with in provincial court while other

⁸⁹ Ver Steegh, *supra* note 37 at 1379.

⁹⁰ *Ibid* at 1379-1380.

⁹¹ *Ibid* at 1403-1404, citing Michael Johnson & Janel Leone, "The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey" (2005) 26:3 *Journal of Family Issues* 322 at 347.

⁹² Bill 16, *supra* note 5, s 37(3).

⁹³ Epstein, *supra* note 8 at 11.

matters may only be addressed at the BC Supreme Court. This is because under the constitutional division of powers, the federal government has jurisdiction over divorce while the provinces have jurisdiction over civil and private matters arising in the province.⁹⁴ Moreover, section 96 of the *Constitution Act, 1867* has been interpreted to prevent either a province or Canada from giving jurisdiction over divorce or matrimonial property to a provincially appointed judge.⁹⁵ As such, when the Working Group called for the implementation of Unified Family Courts in BC, as described in Part II(A) of this paper, they recommended placing all matters under the jurisdiction of the BC Supreme Court. This recommendation was not followed and the jurisdictional split thus continues under the new *Family Law Act*.⁹⁶

A significant disadvantage of following the superior court model in implementing an IDVC is that it would preclude concurrent criminal proceedings from being pursued summarily.⁹⁷ Adopting such a model would thus limit the scope of an integrated court considerably. Ontario's IDVC was therefore established as a part of the Ontario provincial court system.⁹⁸ While provincial courts have the advantage of being more accessible to unrepresented litigants, they have the disadvantage of being unable to adjudicate divorce proceedings or make orders with respect to property. Even after the *Family Law Act* reforms, custody determinations in the context of divorce will still be governed by the problematic "friendly parent" rule and the principle that a child should have "as much contact with each spouse as is consistent with his or her best interests."⁹⁹ This can lead to inappropriate and dangerous custody orders if a mother, trying to protect her children by denying access to an abusive father, is deemed an "unfriendly parent." Yet, an IDVC established at the provincial level in BC would be unable to adjudicate divorce proceedings. It would therefore be difficult to achieve the plenary criminal and family jurisdiction that makes many of the American IDVCs so effective.

Another problem with implementing integrated courts concerns creating a structure that respects the autonomy of indigenous communities while offering protection to indigenous women and children. This issue would presumably arise in the area of child protection. Whenever the authorities are made aware of family violence involving children, there is the potential for the MCFD to become involved. Indeed, researchers observed a slight increase in the number of government reports to local child protection authorities when the IDVC was implemented in Washington, DC.¹⁰⁰ The possibility of increased MCFD involvement in BC raises troubling questions about family autonomy, and the loss of identity and community.¹⁰¹ Since evidence suggests that Aboriginal families experience violence at higher rates¹⁰² due to the legacies of colonialism and residential schools, any shift towards an integrated court model must ensure sensitivity to this complex dynamic.

⁹⁴ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, ss 91(26), 92(13), 92(16).

⁹⁵ Family Justice Working Group, *supra* note 49 at 86.

⁹⁶ Bill 16, *supra* note 5, ss 192-193.

⁹⁷ The *Criminal Code* classifies offences by their severity and, consequently, the sanctions attached to them. Hybrid offences, such as assault, may be pursued either summarily or by indictment, depending on the circumstances. Indictable offences usually carry more severe penalties: see e.g. s 266 of the *Criminal Code*, RSC 1985, c C-46. Accused persons can, in most cases, elect that their trials be held in provincial court: *Ibid*, s 554.

⁹⁸ See "Integrated Domestic Violence Courts: Overview (Ontario)," *supra* note 34. The lack of legislative reform of federal divorce law, and the constitutional inability of a provincial integrated court to adjudicate divorces, leaves a significant legislative gap for families.

⁹⁹ *Divorce Act*, *supra* note 3, s 16(10).

¹⁰⁰ Epstein, *supra* note 8 at 34-35.

¹⁰¹ Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30 Osgoode Hall LJ 375 at 388-418.

¹⁰² See Statistics Canada, *Family Violence in Canada: A Statistical Profile* (2011), online: Statistics Canada <<http://www.statcan.gc.ca>> at 11.

One possibility may involve, through the coordinated service provision function of the IDVC, connecting at-risk families with parenting assistance through Aboriginal agencies as an alternative to protection or apprehension proceedings wherever possible. If this were not possible in a given case, child protection matters could be dealt with holistically in an IDVC with the involvement of Aboriginal agencies and communities.¹⁰³ However, it is important that the system is structured such that women are not deterred by the fear of child apprehension from seeking to protect their families by accessing the family justice system. Thus, great sensitivity and potentially policy reform on the part of the MCFD may be necessary to ensure that an integrated court promotes holistic solutions and does not become a tool of further marginalization through child apprehension.

Finally, other scholars have raised theoretical and normative critiques of the concept of IDVCs. For example, Elizabeth MacDowell contends that blaming fragmentation for the problems associated with adjudication of family disputes where violence is an underlying factor constitutes a misdiagnosis altogether.¹⁰⁴ Moreover, she argues that the consolidation of decision-making power in civil and criminal law into one body is not preferable given their fundamentally different purposes and characters.¹⁰⁵ She suggests that instead of trying to address the problems of conflicting orders and the under-informed victim programmatically by creating integrated courts, these issues should be addressed systematically by reforming the existing systems to offer multiple layers of protection to victims.¹⁰⁶ She correctly suggests that the legislative frameworks bear much of the responsibility. Indeed, the absence of statutory provisions relating to family violence in parenting law (as in the *Divorce Act*) is a significant legislative gap that legislatures must take steps to address, as BC has recently done.¹⁰⁷

However, statutory reform alone will not address the broader barriers to access to family justice that are created when a victim must engage with multiple, uncoordinated systems at once. Indeed, it is the very fact that the purposes and natures of criminal law and civil/family law are so different that calls for greater integration to bring about a more victim-centred approach to dealing with domestic violence in the courts. As Epstein has suggested, a law is “only as good as the system that delivers on its promises.”¹⁰⁸ MacDowell’s critique misses the bigger picture of victim safety when one considers the information-sharing and centralizing functions of the IDVC structure as a whole. This feature is, arguably, its most important innovation. Ultimately, BC can learn from critiques of the shortcomings of the integrated court model in other jurisdictions to create a well-crafted IDVC that reflects the particular circumstances of families facing violence in British Columbia. The available evidence suggests that IDVCs might even be better able to reflect the experiences of racialized and otherwise marginalized families, including indigenous families who face overrepresentation in the criminal justice and child welfare systems, through a more holistic and therapeutic style of jurisprudence.¹⁰⁹

¹⁰³ Child protection proceedings are within the jurisdiction of provincial court: *Child, Family and Community Service Act*, *supra* note 3, s 1.

¹⁰⁴ Elizabeth MacDowell, “When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism” (2011) 20 Tex J Women & L 95 at 110-111.

¹⁰⁵ *Ibid* at 97-99.

¹⁰⁶ *Ibid* at 111, 129.

¹⁰⁷ Bill 16, *supra* note 5, ss 37-38.

¹⁰⁸ Epstein, *supra* note 8 at 4.

¹⁰⁹ Ursel, *supra* note 9 at 3.

CONCLUSION

Over the past decade, BC has seen significant changes in domestic violence law reform. Driven by changing social values, including a deeper understanding of the personal and social harm caused by violence against women and children, and by particular tragedies, such as the deaths of Christian Lee and his family, BC has attempted to make its family law more receptive to the unique struggles of families facing violence. While important legislative changes have been made, these changes will not be as effective as possible without reform of the system in which they are administered and applied. As such, the implementation of IDVCs—in which all of a family's proceedings are consolidated and presided over by one judge with specialized training in domestic violence—would enhance the accessibility of family law remedies to victims of domestic violence. Despite the existence of practical challenges and normative critiques of the integrated court model, such courts would ultimately enhance the safety of women and children during family breakdown by promoting information-sharing and access to needed community services for families in crisis. As such, they appear to be a positive model for reform in BC as the province ushers in a paradigm shift in mediating family law disputes. However, implementation of this model must be attentive to unique circumstances facing Aboriginal families and other marginalized communities so that the IDVC does not become a tool of further oppression. Finally, it is crucial to recognize that legal reform alone will not end family violence. Rather, deeper, systemic change will be required to promote equality and thereby reduce family violence in BC and in Canada.

ARTICLE

FEASTING JUDICIAL CONVERGENCE: RECONCILING LEGAL PERSPECTIVES THROUGH THE POTLATCH COMPLEX

By Mark Ebert*

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INTRODUCTION

The following article is an initial formulation attempting to illustrate a potential trans-systemic approach to Aboriginal rights based on an equitable balance and convergence of the perspectives, legal systems, and traditions of the numerous Aboriginal peoples in Canada and the Eurocentric common law perspective, system, and tradition.¹ The inspiration for both this article and the larger project is drawn from John Borrows' challenge to create a Canadian law that is truly indigenous in its origins and application by acknowledging the traditional and contemporary place of Aboriginal law among (and not subsumed to) Canada's legal traditions.² This article will explore the convergence of the practice or institution commonly known to outsiders as 'potlatching' and common law judicial decision-making in Aboriginal rights claims. Again, this is an initial formulation that I hope, similar to Borrows, represents an invitation for those interested and more knowledgeable in this topic to join.³ I begin with an overview of the potlatch system⁴ among some coastal British Columbia First Nations peoples, paying particular attention to its role in decision-making and its role within the wider cultural meshwork in which Eurocentric boxes like politics, economics, and law are intertwined and interwoven in the lives and interactions of people. This overview will then lead into a discussion of convergence and my fledgling proposal regarding the coastal potlatch system and common law judicial decision-making.

Before continuing, some qualifications are in order to ensure clarity. First, by suggesting the convergence of the potlatch system and common law judicial decision-making, I am *not* equating the former institution with the court of the common law. While some have made this parallel, as will be noted below, I focus on the potlatch system as a significant historic and contemporary legal and political arena for many coastal First Nations peoples.

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1 This article is one facet of a larger research project aimed at formulating a potential trans-systemic legal framework for Aboriginal rights.

2 *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 11, 15, 21 [Borrows, *Indigenous Constitution*].

3 *Ibid* at 10.

4 I will explain my reasons behind using "potlatch system" below.

Second, while I talk about the ‘potlatch’ system of the First Nations peoples of coastal British Columbia, I do not imply that there is a pan-indigenous system or collective. There are important variations in both the potlatch systems and cultural meshworks in the region.⁵ My hope here is to attempt to develop a general framework that, as alluded to, particular peoples and those with more intimate and comprehensive knowledge of them can elaborate. As I will discuss below, it is because I am seeking to develop a general framework that I have chosen to refer to the gatherings focused on here as ‘potlatch systems’, recognizing that a distinction is often made with the practice of ‘feasts’, to allow for flexibility within this cultural variation. That being said, much of my discussion draws on the ethnographic literature regarding the Tsimshian peoples generally (though there are important variations within that collective), reflecting the prominence of court cases involving them in the development of the Supreme Court of Canada’s (SCC) doctrine of Aboriginal rights.

The following discussion is an attempt at developing a procedural mechanism such that, on a case-by-case, nation-by-nation basis, the Court can more readily account for and apply distinct Aboriginal perspectives and laws. The Court itself has held that the scope and content of Aboriginal rights “must be determined on a case-by-case basis,”⁶ and if the Aboriginal perspective is to seriously and truly inform the determination of Aboriginal rights claims, the Court must fully realize the implications of their case-by-case approach.

Finally, I am mindful of the devastation wrought by colonialism and colonial policies, some of which continue today. Thus, there is variation in terms of the preparedness and abilities of specific Aboriginal communities to apply their laws. Each nation will determine their readiness, but it should not be used by the Court (or the Crown) as an added burden similar to the ‘organized society’ standard that still lurks in the background of the Court’s thinking. The proposed mechanism for reconciling coastal First Nations and common law legal traditions should be reciprocal and beneficial to the communities as they continue to revive and strengthen their cultural meshworks within which their legal traditions and laws are intertwined.

I. FALLACIOUS RECONCILIATION

In *Van der Peet*, the first factor that Chief Justice Lamer identifies for a court to take into account in assessing Aboriginal rights claims is the Aboriginal perspective.⁷ The reason that he gave for this was that it was part of “truly” reconciling “the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory” that is demanded by section 35(1) of the *Constitution Act, 1982*.⁸ Yet, highlighting Borrows’ criticism of this definition of the reconciliation process,⁹ Chief Justice Lamer reifies the colonial dominance and dispossession of Aboriginal peoples by holding that the Aboriginal perspective “must be framed in terms cognizable to the

⁵ For a theoretical treatment that involves or draws on the variation in potlatch systems among the peoples of the region, see Abraham Rosman & Paula G Rubel, *Feasting with Mine Enemy: Rank and Exchange among Northwest Coast Societies* (New York: Columbia University Press, 1971).

⁶ *R v Van der Peet*, [1996] 2 SCR 507 at para 69, [1996] 9 WWR 1 [*Van der Peet* (SCC)].

⁷ *Ibid* at para 49.

⁸ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Van der Peet* (SCC), *supra* note 6 at para 49.

⁹ “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001) 46 McGill LJ 615 at 660-61 (“Courts have read Aboriginal rights to lands and resources as requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians”).

Canadian legal and constitutional structure.”¹⁰ Chief Justice Lamer goes on to relegate this perspective to the final phase of his test for Aboriginal rights by restricting the Aboriginal perspective to rights which “exist within the general legal system of Canada.”¹¹

While both dissenting opinions in *Van der Peet* were critical of Chief Justice Lamer,¹² neither of the justices questioned his ‘cognizable’ approach to the Aboriginal perspective. In fact, when Chief Justice McLachlin reiterated the Court’s position regarding reconciliation with the Aboriginal peoples of Canada in *R v Marshall; R v Bernard*, she, too, neutralized the Aboriginal perspective by maintaining Chief Justice Lamer’s ‘cognizable’ approach:

The evidence, oral and documentary, must be evaluated from the aboriginal perspective. [...] Having evaluated the evidence, the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.¹³

Thus, instead of reconciliation being a ‘lateral’ process of restoring “harmony between persons or things that had been in conflict,”¹⁴ it becomes a ‘vertical’ process of translation. By inverting reconciliation into a vertical process, Chief Justice McLachlin perpetuates a legal hierarchy that has its roots in the colonialist assumptions imported into Canadian jurisprudence via *Baker Lake (Hamlet of) v Minister of Indian and Northern Development*,¹⁵ resulting in Canadian law becoming integral to Aboriginal law,¹⁶ all under the guise of restoring harmony.

II. POTLATCHING, FEASTING, AND DECISION-MAKING ON THE PACIFIC COAST

The concepts of potlatching and feasting are but one instance of how the Court has imported concepts from anthropology as they sought to develop the doctrine of Aboriginal rights. The potlatch, as an anthropological concept, has captured the ethnographic imagination of many an observer and has been important in the development of cultural anthropology.¹⁷ Both feasting and potlatching are processes of discussion, consultation, and negotiation that culminate in the gathering of invited people to witness the claims made by the host or hosts. They are a nexus that can, depending on the particular peoples, interweave land, law, the ancestors, trade, governance, kinship, inheritance, and

10 *Van der Peet* (SCC), *supra* note 6 at para 49 [emphasis added].

11 *Ibid.*

12 See e.g. *ibid* at paras 145, 313.

13 2005 SCC 43 at para 69, [2005] 2 SCR 220.

14 *Black's Law Dictionary*, 8th ed, *sub verbo* “reconciliation”, quoted in *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 at para 1339, [2008] 1 CNLR 112.

15 [1980] 1 FC 518, 107 DLR (3d) 513; Michael Asch, “Calder and the Representation of Indigenous Society in Canadian Jurisprudence” in Hamar Foster, Heather Raven and Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 101 at 106-07.

16 See e.g. James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006) at 203 [Henderson, *First Nations Jurisprudence*].

17 See e.g. Regna Darnell, “The Pivotal Role of the Northwest Coast in the History of Americanist Anthropology” (2000) 125/126 BC Studies 33; Michael Harkin, “Potlatch in Anthropology” in Neil J Smelser & Paul B Baltes, eds, *International Encyclopedia of the Social & Behavioral Sciences* (New York: Elsevier, 2001) 11885.

social structure.¹⁸ Many outside observers have attempted to explain their purpose and goal, though due to the atomism of Eurocentric thought that divorces the institutions from their cultural meshwork, most only capture part of what, following Marcel Mauss, we could call a “total social phenomena.”¹⁹ As a result, outside observers have suggested that potlatching and feasting among various Northwest Coast peoples²⁰ are analogous to a redistributive mechanism,²¹ a banking or loan system,²² a metaphorical substitution for warfare,²³ or as something cognizable to the common law legal tradition.²⁴

While none of these framings are totally incorrect, they again only capture an aspect of the potlatch system found on coastal British Columbia, thereby circumscribing its ‘totality’.²⁵ Part of the problem arises from the word ‘potlatch’ itself as it is “an invented omnibus word” that has its origins in the Nuu-chah-nulth word ‘patshatl,’ which has been glossed as ‘gift’ or ‘giving.’²⁶ Around the 1860s, the term entered into general use through the Chinook trade jargon.²⁷ Highlighting the variability of gatherings both intra- and inter-culturally encompassed by the term, many authors have pointed out how problematic it is. For example, among the Coast Salish of Washington State, the use of the term in the ethnographic literature has been criticized as being “too general in meaning and as not applying specifically to any single ceremonial form.”²⁸ Throughout the general Northwest Coast region, then, if ‘potlatch’ is used at all, it is an umbrella term that envelops finer gradations of gatherings and ceremonies.²⁹ Thus, among the Gitksan, each type of event or gathering—which range from totem pole- or gravestone-raising feasts to weddings, divorces, and other gatherings marking changes in status³⁰—

18 See e.g. Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 31; Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) at 43; NJ Sterritt, “Unflinching Resistance to an Implacable Invader” in Boyce Richardson, ed, *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) 267 at 277.

19 Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (London: Routledge, 2001) at 48-49. For a discussion of atomism, see Deborah Gordon, “Tenacious Assumptions in Western Medicine” in Margaret Lock & Deborah Gordon, eds, *Biomedicine Examined* (London: Kluwer Academic Publishers, 1988) 19.

20 For a more comprehensive list than what follows, see Barbara Saunders, “Kwakwaka’wakw Museology” (1995) 7 *Cultural Dynamics* 37 at 54-55; Agnes Alfred, *Paddling to Where I Stand: Agnes Alfred, Qwiqwasutinuxw Noblewoman*, ed by Martine J Reid, translated by Daisy Sewid-Smith (Vancouver: UBC Press, 2004) at 244-45.

21 See e.g. Stuart Piddocke, “The Potlatch System of the Southern Kwakiutl: A New Perspective” (1965) 21:3 *Southwest Journal of Anthropology* 244.

22 See e.g. Franz Boas, *The Social Organization and the Secret Societies of the Kwakiutl Indians*, Report of the US National Museum for 1895 (Washington: Government Printing Office, 1897) at 341-342; Kenneth D Tollefson, *The Cultural Foundation of Political Revitalization Among the Tlingit* (PhD Thesis, University of Washington, 1976) [unpublished] at 65, 73.

23 See e.g. Helen Codere, Fighting with Property: A Study of Kwakiutl Potlatching and Warfare, 1792-1930, Monographs of the American Ethnological Society 18 (New York: J.J. Augustin, 1950).

24 See e.g. *Lax Kw'alaams Indian Band v Canada* (AG) 2008 BCSC 447, [2008] 3 CNLR 158 at para 32 [*Lax Kw'alaams* cited to CNLR]; Margaret Seguin Anderson, *The Allied Tribes Tsimshian of North Coastal British Columbia: Social Organization, Economy and Trade* (Expert witness report submitted for *Lax Kw'alaams*, 2006) at 2-3, 69.

25 See too Rosman & Rubel, *supra* note 5 at 1.

26 Douglas Cole & Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990) at 6.

27 *Ibid.*

28 William Elmendorf, *The Structure of Twana Culture* (Pullman: Washington State University Press, 1960) at 329.

29 See e.g. Jay Miller, *Lushootseed Culture and the Shamanic Odyssey: An Anchored Radiance* (Lincoln: University of Nebraska Press, 1999) at 147-48; Alfred, *supra* note 20 at 122-23.

30 Sm'ooygit Hannamauxw, “Preface” in Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000) ix at ix.

has a specific name in their language.³¹

With the use of both ‘potlatch’ and ‘feast’ in Aboriginal rights rulings,³² and given I am attempting to develop a general framework or procedural mechanism, the problem with the term ‘potlatch’ provides a flexible starting point for Aboriginal litigants and their claims. It is important to be mindful that in the case of the Tsimshian and the Wet’suwet’en in particular, the term ‘feast’ appears to be used more often today.³³ Yet, as mentioned, even this use encompasses various kinds of gatherings. As a result, I will use ‘potlatch system’ or ‘complex’ to signal the general institution that, while varying in specifics, occasions, and purposes, is suggested as being a central feature of the cultures throughout the region³⁴ so that Aboriginal claimants can then use the appropriate terms *in their own language* for their claims. This use would also accord with both the Court’s position that Aboriginal rights must be determined on a “case-by-case basis”³⁵ as well as the “aboriginal specificity” that the phrase “distinctive culture” in their test is supposed to capture.³⁶

Perhaps the most significant feature of the potlatch complex is the coming together of people, Houses, clans, and so on (depending on the culture) in a public venue so that

31 Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notebooks* (Vancouver: UBC Press, 2000) at 253, n 1. See also, more generally, Cole & Chaikin, *supra* note 26 at 6.

32 In a very cursory search, ‘potlatch’ appears in the British Columbia Supreme Court (BCSC) ruling in *R v Vanderpeet* ([1991] BCJ No 2573, [1991] 3 CNLR 161). It also appears in the BCSC ruling in *Delgamuukw v BC* ([1991] BCJ No 525, [1991] 5 CNLR xiii [*Delgamuukw* (BCSC) cited to CNLR]) but ‘feast’ is used by far more often there. ‘Feast’ is used in *R v Vanderpeet* at the British Columbia Court of Appeal (BCCA) ([1993] BCJ No 1401, [1993] 4 CNLR 221); ‘potlatch’ does appear in this ruling as well—though only in a quoted passage from the BCSC ruling. Similarly, ‘feast’ is used by the BCCA in *Delgamuukw v British Columbia* ([1993] BCJ No 1395, [1993] 5 CNLR 1), although a couple of times ‘potlatch’ is used but is distinguished from ‘feast’ without any discussion as to how and why. At the SCC, only ‘feast’ was used in *Delgamuukw v British Columbia* ([1997] SCJ No 108, [1997] 3 SCR 1010). While by no means consistent, the BCSC has continued to imply a distinction between potlatching and feasting, but has yet to really clarify what each refers to and how they differ. *Lax Kw’alaams* may provide some insights into this: in Justice Satanove’s discussion of the expert witness testimony, she recounts that, according to one witness for the plaintiffs, a “major feast was referred to as a potlatch.” *Supra* note 24 at para 184. Shortly thereafter, Justice Satanove writes that “Dr. Lovisek [an expert witness for the defendants] states that another difference between the pre and post-contact potlatch was that the gift giving of food during the pre-contact feast was from a group’s own territories and not outside of them.” *Ibid* at para 188. Whether Justice Satanove accepted the former use of ‘potlatch’ and the implications of it remains unclear though.

33 See e.g. Margaret Seguin Anderson, “Understanding Tsimshian Potlatch” in R Bruce Morrison & C Roderick Wilson, eds, *Native Peoples: The Canadian Experience*, 3d ed (Toronto: Oxford University Press, 2004) 408 at 408; Christopher F Roth, *Becoming Tsimshian: The Social Life of Names* (Seattle: University of Washington Press, 2008) at 113. Antonia Mills mentions this as well, but suggests that at least some Wet’suwet’en “also use the word ‘potlatch’ (the Chinook or trade language term) when speaking either English or Witsuwit’en.” *Supra* note 18 at 43. The use of ‘potlatch’ and ‘feast’ in the ethnographic literature may have a temporal aspect to it with more recent literature often favouring the latter (see e.g. Neil J Sterritt et al, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998); Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22) while older sources favour the former or both (see e.g. Viola E Garfield, “The Tsimshian and Their Neighbors” in Viola E Garfield & Paul S Wingert, *The Tsimshian Indians and Their Arts* (Seattle: University of Washington Press, 1966) 3). See generally in Jay Miller, “Feasting With the Southern Tsimshian” in Margaret Seguin, ed, *The Tsimshian: Images of the Past, Views for the Present* (Vancouver: University of British Columbia Press, 1984) 27; Cole & Chaikin, *supra* note 26 at 58, and in how the words appear in Anderson & Halpin, *supra* note 31 at 32.

34 See e.g. Daly, *supra* note 18 at 31.

35 *Van der Peet* (SCC), *supra* note 6 at para 69.

36 *R v Sappier; R v Gray*, 2006 SCC 54 at paras 42-45, [2006] 2 SCR 686.

claims being made by the hosts can be witnessed. Through the ceremonial distribution of property to guests invited to witness during these gatherings, assertions and demonstrations of social prerogative and status are recognized and validated. These are taken to be the general characteristics of the potlatch complex on the Northwest Coast.³⁷

An important aspect of the potlatch complex for our concerns is its role in governance:

Here, a complex system of ownership and jurisdiction has evolved, where the chiefs continually validate their rights and responsibilities to their people, their lands, and the resources contained within them. The Gitksan and Wet'suwet'en express their ownership and jurisdiction in many ways, but the most formal forum is the feast, which is sometimes referred to as a potlatch. Here Gitksan and Wet'suwet'en government occurs.³⁸

While there are various ways of manifesting status and leadership along the coast, perhaps the most important status markers throughout the region are names. Names are often considered to be a form of property held by the significant social units of a particular people. For example, among the Gitksan, each House (or '*wilp*')³⁹ has the rights to a collection of inherited, ranked names of several types.⁴⁰ Each of these names "indicates the holder's status in the House."⁴¹ During the course of one's life they will usually serially hold a number of names until they reach one of high rank.⁴² In other words, names equal a social rank and role. For example, there are names for those who serve as councillors and speakers for the chiefs and for those who will someday inherit a chiefly name.⁴³ The highest ranked names in a *wilp* are those held by the *simgigyet* or *sigidim haanak'a*—both of which are often glossed as 'chief'⁴⁴—and the highest ranked chief's name of a House is also the name of the House.⁴⁵ The taking of a name among the Tsimshian, though common throughout the region, must be formalized through the holding of a feast which, in turn, signals the individual's membership in a House.⁴⁶

It is possible, in some Northwest Coast cultures, to elevate a name through hard work and by distributing goods through the potlatch complex. By holding the highest ranking name in the House, a Tsimshian *simgigyet* then serves as the steward for the House's

37 See e.g. Homer G Barnett, "The Nature of the Potlatch" (1938) 40:3 American Anthropologist 349; Helen Codere, "Kwakiutl: Traditional Culture" in Wayne Suttles, ed, *Handbook of North American Indians*, vol 7 (Washington: Smithsonian Institution, 1990) 359 at 370.

38 Sterritt, *supra* note 18 at 277.

39 The *wilp*'s membership is based on kinship, and it is considered to be the primary political unit in Gitksan society today. Overstall, *supra* note 33 at 31.

40 Anderson & Halpin, *supra* note 31 at 22.

41 Overstall, *supra* note 33 at 31.

42 *Ibid.*

43 Anderson & Halpin, *supra* note 31 at 22; Daly, *supra* note 18 at 88.

44 The reason for the two terms is that the title/role is distinguished based on gender—*simgigyet* being for men, while *sigidim haanak'a* for women. P Dawn Mills, *For Future Generations: Reconciling Gitxsan and Canadian Law* (Saskatoon, SK: Purich Publishing, 2008) at 18. While these terms clearly distinguish between male or female, in practice, the holder of a specific chiefly name might be of another gender. In such circumstances, though, the holder is treated publicly by behaviour that is appropriate for the name's gender. Thus, a woman with a man's chiefly name is/was treated as a male chief at feasts (Jay Miller, pers comm, 2010).

45 Anderson & Halpin, *supra* note 31 at 22; Overstall, *supra* note 33 at 31.

46 *Ibid.*

property—including its traditional territory and resource sites.⁴⁷ In other words, names, their holders, kinship, the land, and the rest of the cultural meshwork are interwoven. Highlighting this interweaving, and the chief's role in it, is Delgam Uukw's opening statement to the Supreme Court of British Columbia (BCSC):

For us, the ownership of the territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit—they all must be shown respect. That is the basis of our law.

The Chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things. When a Chief directs his House properly and the laws are followed, then that original power can be recreated. That is the source of the Chief's authority.⁴⁸

But while the head chief is responsible for the actions of the House and its members, leadership and authority is not outright, and the head chief must consult other chiefs and Elders within the House and, depending on the importance of the decision, the chiefs of other Houses.⁴⁹

The potlatch system is important to both the host's status and authority, as it is during the performance and telling of the House's histories, songs, dances, and other displays of property that the host's power is embodied. For a Tsimshian chief, by hosting a feast they are able to publicly demonstrate the wealth of the House, and therefore, the prestige of the chiefly name through those performances and through gifting and feeding those who have been invited. Accordingly, Tsimshian feasting displays that the chief(s) have respected the land and House members and, as a result, “the law, the Chief, the territory, and the Feast become one.”⁵⁰ The general potlatch complex validates authority and provides a forum to exercise it according to indigenous laws; the chiefs can use this authority “to settle disputes and breaches of [...] law both inside and outside the feast hall.”⁵¹

The public aspect of the potlatch complex is also key to chiefly authority as the forum it provides allows for the formalization, elaboration, and ratification of important social and political decisions through giving gifts to the head chiefs and other leaders of those invited to attend as witnesses.⁵² In this respect, Richard Daly has referred to Gitksan and Wet’suwet’en feasts as “publicly and jurally witnessed activities.”⁵³ It is only through this witnessing by members of other kin groups and communities that any claims and social transitions are recognized and validated. The status of the claim being made and

47 Marjorie M Halpin & Margaret Seguin, “Tsimshian Peoples: Southern Tsimshian, Coast Tsimshian, Nishga, and Gitksan” in Wayne Suttles, ed, *Handbook of North American Indians*, vol 7 (Washington: Smithsonian Institution, 1990) 267 at 274. While the chief is considered to be a steward of property, it is actually held by the House. All of the forms of House property are similar, in a way, to ‘property’ in the Canadian legal sense in that people from other Houses can only speak of or use another House’s property with permission. See, for example, Daly, *supra* note 18 at 258.

48 Gisday Wa & Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet’suwet’en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987* (Gabriola, BC: Reflections, 1989) at 7.

49 Overstall, *supra* note 33 at 32.

50 Gisday Wa & Delgam Uukw, *supra* note 48 at 7; Mills, *supra* note 44 at 89.

51 Mills, *supra* note 18 at 43; Borrows, *Indigenous Constitution*, *supra* note 1 at 40.

52 Daly, *supra* note 18 at 168–69.

53 *Ibid* at 57. Though the parallel between the potlatch system and the courts of the common law should again not be made too strongly.

of the individual(s) making it is publicly illustrated by the status of the attendees and the contributions, payments, and gifts distributed.⁵⁴ In this way, the potlatch system also provides a public display of the relative ranking of an individual and/or kin group.⁵⁵

An important part of witnessing and the potlatch complex is the role of food. As Antonia Mills writes: “The feast is literally a feast.” Food served at the gatherings is often taken from the host’s territory, affirming the relationship for the Tsimshian, at least, between the House and its territory and displaying the respectful and proper treatment of the latter.⁵⁶ Serving food from the House’s territory serves to reaffirm ownership of the land as well. Accepting hospitality, partly through the food given to them to take home, is also part of a witness’ duties.⁵⁷ Again, we see the interweaving of authority, land, and law in the feast hall.

Another significant aspect of witnessing is in its role in decision making. Again, the potlatch system provides a forum in which claims are made and validated publicly; any change in social status, etc., must be witnessed and approved publicly.⁵⁸ Through speeches and other performances, food, and gifting, the host/chief makes their jurisdiction clear to all those in attendance.⁵⁹ Notably, often the majority of the work and decisions performed and presented at a feast or potlatch happen beforehand. This work includes much of the exchange and accumulation of goods needed to host a feast or potlatch, as well as the negotiations and discussions.⁶⁰ That the potlatch complex involves more than an atomized, isolated public event makes Chief Justice McEachern’s rejection of most of the evidence presented by the plaintiffs in *Delgamuukw* (BCSC) confusing and absurd:

For example, the fact that the plaintiffs’ claim has been so much discussed for so many years, and the further fact that so much of the evidence was assembled communally in anticipation of litigation, or even during this litigation, is a fact which must be taken into account.⁶¹

Conversely, Mills recounts that these ‘meetings’ held by the Wet’suwet’en were in fact feasts and were held “to clarify and to validate, before and with neighbouring Native groups, the outer boundary of the Witsuwit’en territory, [...] and, in particular, to settle issues of overlapping claims.”⁶² Mills continues that they could have held actual meetings to discuss their land claims and to clarify the boundaries of their territory, but they chose to have a feast instead, “for that is the proper forum in which to discuss such matters.”⁶³ Again, this is because the feast is where “ownership and jurisdiction of territory is spoken about, passed on, witnessed, and validated.”⁶⁴ Furthermore, the public forum provided in the feast hall also provides a place where “differences of opinion can be aired calmly and witnessed, thus setting in motion the process of resolving the disagreement.”⁶⁵

54 Anderson & Halpin, *supra* note 31 at 32; Barnett, *supra* note 37 at 351.

55 *Ibid* at 356. This can even include, among some peoples, where the individual is announced and seated by the hosts at the gathering. Daly, *supra* note 18 at 82.

56 *Supra* note 18 at 61.

57 *Ibid*.

58 Overstall, *supra* note 33 at 35.

59 Mills, *supra* note 18 at 43.

60 My thanks to Charles Menzies who pointed this out to me and Val Napoleon who also reminded me.

61 *Supra* note 32 at 41.

62 Mills, *supra* note 18 at 44.

63 *Ibid*.

64 *Ibid*; Borrows, *Indigenous Constitution*, *supra* note 1 at 40-41.

65 Mills, *supra* note 18 at 71.

This last point emphasizes the idea that the potlatch complex is a process and not an atomized single event (or ‘snapshot’). More specifically, it plays an important role in consensus- and decision-making processes, because, as Richard Overstall writes, “political decisions are by consensus.”⁶⁶ Therefore, decision-making requires the specific forum and protocols that the potlatch system provides. Decision-making is democratic in the sense that “greater weight [is] given to the thoughts of those with proven ability, experience, and wisdom,” and status.⁶⁷ Decision-making is determined more by authority than anything else, and, again, this authority is derived from the power that Delgam Uukw discussed above.⁶⁸ Consensus is reached about the history of the House and its territory and jurisdiction over it through the “formal telling of the oral histories in the Feast, together with the display of crests and the performance of the songs, witnessed and confirmed by the Chiefs of other Houses.”⁶⁹

The consensus- and decision-making aspects of the potlatch complex is a process that is ever changing and fluid as each gathering further develops authority, jurisdiction, and precedent through the unfolding of events in the feast hall: “Public behaviour is not only witnessed and remembered, but also comprises the historical record passed down through the memories of succeeding generations.”⁷⁰ Therefore, a particular feast or potlatch is like a snapshot taken during a continually unfolding process that is not limited to the public gatherings and extends both forward into the future and backwards into the past:

By following the law, the power flows from the land to the people through the Chief; by using the wealth of the territory, the House feasts its Chief so he can properly fulfill the law. This cycle has been repeated on my land for thousands of years. The histories of my House are always being added to.⁷¹

According to Borrows, this deliberative aspect of the potlatch complex has tremendous potential not only for the continued development and operation of potlatching and feasting, but also for the development of Indigenous law.⁷² For example, he suggests that the formal announcing of law in feast halls and other public settings allows “ancient and contemporary legal ideas [to] mingle together and become the basis for bylaws, statutes, conventions, and protocols.”⁷³ Thus, the potlatch system interweaves the past and the present in a way that allows ‘tradition’ to continue to respond to the issues and needs of the contemporary.

Further highlighting the fluidity and the adaptability of the potlatch system (and culture generally), Delgam Uukw continues by including the events unfolding in the BCSC:

My presence in this courtroom today will add to my House’s power, as it adds to the power of the other Gitksan and Wet’suwet’en Chiefs who will appear here or who will witness the proceedings. All of our roles, including yours, will be remembered in the histories that will be told by my grandchildren. Through the witnessing of all the histories, century after century, we have exercised our jurisdiction.⁷⁴

⁶⁶ Overstall, *supra* note 33 at 35.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* See also text accompanying note 48.

⁶⁹ Gisday Wa & Delgam Uukw, *supra* note 48 at 26.

⁷⁰ Daly, *supra* note 18 at 58.

⁷¹ Gisday Wa & Delgam Uukw, *supra* note 48 at 8.

⁷² *Indigenous Constitution*, *supra* note 1 at 41.

⁷³ *Ibid* at 47.

⁷⁴ Gisday Wa & Delgam Uukw, *supra* note 48 at 8.

In this quote from *Delgam Uukw*, we can see much of what is being discussed in this article. Both his and Gisday Wa's testimony in the *Delgamuukw* proceedings could provide further insights into how the potlatch system could be converged with judicial reasoning—that is, if the common law legal system (*qua* judges) is amenable to creating a common law procedural mechanism for adopting Aboriginal laws and legal traditions on their own merits as substantive. This ontogenetic trait of the potlatch system is then not only important for the restoration of Indigenous law, but also for convergence.

III. CONVERGING POTLATCHING AND JUDICIAL REASONING

As an entrée into how to go about converging the potlatch complex and common law judicial decision-making, let us begin with Chief Justice Lamer's point in *Van der Peet* that Aboriginal rights cannot "be defined on the basis of the philosophical precepts of the liberal enlightenment."⁷⁵ If the Court truly subscribes to this belief and seeks to realize the challenge issued by section 35, then should this not automatically allow the (at least equitable) interweaving of Aboriginal legal traditions, practices, and mechanisms? Moreover, such a use of and reliance on Aboriginal jurisprudences and perspectives by the courts is also consistent with section 27 of the *Canadian Charter of Rights and Freedoms* ("Charter"), which requires the interpretation of the *Charter* "in a manner consistent with the preservation and enhancement of the multicultural heritage of [all] Canadians."⁷⁶ This question, though, still remains unrealized, partly because of the failure of the Court to fully consider Aboriginal jurisprudences. For example, James Youngblood Henderson notes that the SCC in *Van der Peet* "did not explain how different jurisprudence can be compared or reconciled in a manner that does not undermine First Nations jurisprudences."⁷⁷ Not only did the Court undermine Aboriginal jurisprudences in this way, they also failed to look at and consider Stó:lō or Salish jurisprudence in deciding that particular case.⁷⁸ Even if they had looked at Aboriginal jurisprudences, attempting to make Aboriginal perspectives "cognizable" to Canadian law maintains and reifies Eurocentric hegemony, and distorts and fragments Aboriginal cultures and jurisprudences.⁷⁹ Incorporating Aboriginal legal traditions does not entail the abandoning of law; rather, what is needed is the discarding of discriminatory *interpretations* of law.⁸⁰ Yet if making Aboriginal perspectives cognizable to the Canadian one is not appropriate, how can they then be reconciled?

Henderson's argument for "constitutional convergence" appears to be a better and more legally defensible way forward.⁸¹ Henderson acknowledges that the "interpretative doctrine of constitutional convergence" was in fact created by the Court itself,⁸² arising through Aboriginal peoples becoming "an essential part of the Canadian federated sovereignty" with the patriation of the Constitution in 1982.⁸³ In theory, "the convergence

⁷⁵ *Van der Peet* (SCC), *supra* note 6 at para 19.

⁷⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Henderson, *First Nations Jurisprudence*, *supra* note 16 at 124, n 40.

⁷⁷ *Ibid* at 108.

⁷⁸ *Ibid* at 110.

⁷⁹ Moreover, as I have mentioned above, the 'cognizing' process reduces Aboriginal rights to a subcategory of Canadian law. *Ibid* at 199.

⁸⁰ Borrow, *Indigenous Constitution*, *supra* note 1 at 20.

⁸¹ James (Sa'kej) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007) at 815ff [Henderson, *Treaty Rights*].

⁸² *Ibid* at 819.

⁸³ Henderson, *First Nations Jurisprudence*, *supra* note 16 at 87.

and reconciliation of Aboriginal right[s] with government power” has also been affirmed by the Court as necessary.⁸⁴

The convergence doctrine does not involve making Aboriginal jurisprudences ‘cognizable,’ but instead these jurisprudences “are to be implemented and respected in the same and equal way as the common law and the French civil law are respected in Canada.”⁸⁵ Important to implementing this convergence is reading all the forms of jurisprudences together to generate a “symbiosis” of different constitutional orders.⁸⁶ A result of the convergence analysis should be that “neither governmental powers nor Aboriginal and Treaty rights [can] be absolute,” but through reading together the “distinct constitutional rights of First Nations [...] with other constitutional principles and traditions,” *all* rights are equally protected in their own right.⁸⁷ This will entail that the courts understand Aboriginal jurisprudences on their own terms and reinforce the need for a trans-systemic legal framework.

Importantly, this understanding cannot be gained by approaching these jurisprudences in an atomistic fashion but by, in part, understanding Aboriginal languages.⁸⁸ This is a tough process, as I have learned, but my cultural father has continually highlighted the importance of learning the language and the insights and lessons that one can learn about the culture generally. Moreover, in the context of where I have done research, I have heard that an understanding of the cultural meshwork prior to contact is best achieved through oral narratives.⁸⁹ Convergence means that the Court must change their approach to oral histories. As alluded to above, they are more than sources of evidence—they are intimately intertwined with status, jurisdiction, and laws. Furthermore, they are not like Eurocentric ‘history,’ as Borrows has discussed.⁹⁰

Convergence is neither a mirror of the ‘cognizable’ approach, nor is it unidirectional. Henderson also places a duty on Aboriginal peoples:

Aboriginal Elders and knowledge-keepers have corresponding constitutional responsibilities to teach Aboriginal jurisprudences, through dialogue with the legislatures, with the bureaucracy, with the judiciary, and with Canadians generally.⁹¹

Thus, with the laws of a particular First Nations peoples being performed in the feast

⁸⁴ *Ibid* at 58 citing *R v Sparrow*, [1990] 1 SCR 1075 at 1109, [1990] 3 CNLR 160.

⁸⁵ Henderson, *Treaty Rights*, *supra* note 81 at 821.

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 827-28.

⁸⁸ James (Sákéj) Youngblood Henderson, “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon SK: Purich Publishing, 2004) 67 at 73 [Henderson, “Aboriginal Jurisprudence”].

⁸⁹ I always hesitate to use the word ‘myth’ or ‘mythic’ when talking about these narratives as I am mindful of the popular usage of the word ‘myth’—particularly in light of Chief Justice McEachern’s rejection of Gitksan and Wet’suwet’en oral traditions. P Dawn Mills writes with regards to the dismissing of Gitksan *adawaaks*, “McEachern, it would appear, placed emphasis on the mythological or legendary characteristics of the accounts instead of their legal meaning.” *Supra* note 44 at 68. Moreover, ‘myth’ implies a separation between the real and the mythical or between the natural and supernatural that is not found among the First Nations peoples of the Northwest Coast. See e.g. Michael E Harkin, “Person, Time, and Being: Northwest Coast Rebirth in Comparative Perspective” in Antonia Mills & Richard Slobodin, eds, *Amerindian Rebirth: Reincarnation Belief among North American Indians and Inuit* (Toronto: University of Toronto Press, 1994) 192 at 209; Frederica de Laguna, “Tlingit Ideas About the Individual” (1954) 10 *Southwestern Journal of Anthropology* 172 at 172; Wayne Suttles, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) at 74-75.

⁹⁰ *Indigenous Constitution*, *supra* note 1 at 65-72.

⁹¹ “Aboriginal Jurisprudence,” *supra* note 88 at 77.

hall, the potlatch complex provides a venue for this dialogue between jurisprudences and legal traditions. This dialogical approach to convergence is key, and can only benefit the Canadian legal system by adding a fluidity and flexibility to its approach generally. Indigenous peoples are resilient, and the fluidity and adaptability of their cultural meshworks and practices is evidenced in the potlatch systems of coastal British Columbia First Nations. Instead of ending this fluidity (as some of the approaches developed in the courts posit⁹²), European contact in some cases increased it.⁹³ In one sense, Chief Justice McEachern was correct:⁹⁴ Aboriginal peoples and their cultures are flexible, but contrary to judicial interpretations like Chief Justice McEachern's, this flexibility and fluidity is a strength and not a weakness. *All* cultures are fluid, including the Eurocentric, yet the Court's approach to Aboriginal rights—particularly in their search for 'centrality'—assumes the opposite.⁹⁵

This flexibility and fluidity has implications for converging the various potlatch complexes and common law judicial decision-making. As seen in *Delgamuukw*, perhaps the most obvious legal matter in which this convergence would be beneficial is with regards to claims involving territory and ownership.⁹⁶ In the Tsimshian feast, jurisdiction and ownership of territory are described through "naming the places or natural features at the outer reaches of the territory."⁹⁷ Names, as alluded to above, interweave individuals to these territories through the ancestors who have held the same name:

Names link members of a Tsimshian lineage to the past and to the territory on which that past unfolded. A Tsimshian name holder shares his or her name with a succession of matrilineally related predecessors stretching back to the ancient historical events that describe the origins of the name, of the house lineage, and of the lineage's rights to territories and resources.⁹⁸

Because names must be formalized and maintained through feasting or potlatching, the potlatch system could also possibly be converged in the contexts of claims to commercial Aboriginal rights. While, for example, in *Lax Kw'alaams* feasts and potlatches were discussed in the contexts of determining the type and scale of trade, this use of the potlatch system maintains the vertical process of translation as it fragments the institution, reducing it to a 'cognizable' economic system, neutralizing its political and juridical functions, which can then be measured against Eurocentric concepts like the idea of the 'market'.⁹⁹ Future research in this context would be to explore how focusing on names, instead of particular holders of a name, may provide a better, and more culturally appropriate, approach for commercial rights.

The fluidity and flexibility of the potlatch complex does make it difficult to identify other legal matters for which this proposed convergence could work.¹⁰⁰ I am hesitant, in part,

⁹² For example, *Van der Peet* (SCC), *supra* note 6 at para 61.

⁹³ Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 741, 747.

⁹⁴ "It became obvious during the course of the trial that what the Gitksan and Wet'suwet'en witness describe as law is really a most uncertain and highly flexible set of customs." *Delgamuukw* (BCSC), *supra* note 32 at 206.

⁹⁵ See e.g. Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993 at 1001.

⁹⁶ See text accompanying notes 62–63.

⁹⁷ Susan Marsden, "Northwest Coast Adawx Study" in Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 114 at 117.

⁹⁸ Roth, *supra* note 33 at 30.

⁹⁹ See *supra* note 32 at para 288 for an example.

¹⁰⁰ Borrows does identify some other potential legal matters the potlatch complex could/can be applied to in *Indigenous Constitution*, *supra* note 1 at 41.

because I am mindful of Gloria Cranmer-Webster's words that resonate with the above:

There is some criticism that contemporary potlatches are not like they were "in the old days." How could they be? The world we live in today is vastly different from that in which our grandparents lived. [...] If a culture is alive, it does not remain static. Ours is definitely alive and changes as the times require.¹⁰¹

The various, particular potlatch complexes and their cultural meshworks have continually unfolded and enfolded with changing contexts since time immemorial, and this article hopefully serves as an impetus for discussing how Aboriginal perspectives and legal systems, such as that embodied in the potlatch complex, can equitably be converged with the common law legal system. As such, the most critical aspect of this proposal for converging the potlatch system and common law judicial decision-making is that it should provide an example of an avenue for a more true and equitable reconciliation of the distinct legal systems and perspectives of coastal British Columbia First Nations peoples and the common law courts on a nation-by-nation, case-by-case basis.

The potlatch complex has significant implications for the relationships between these peoples, the Court, and the Crown. I have mentioned above that the potlatch complex should not be required to be 'cognizable' to the common law courts. The onus, then, falls upon Canadian legal practitioners to be willing to listen and have enough understanding of Aboriginal cultures and jurisprudences, and to recognize that while aspects of law were part of and performed via the potlatch system, that is only part of the meshwork in which it is situated. Tsimshian law, for example, and its performance in the feast hall is *not* the same as the common law and its performance. As a result, converging the two systems will entail the latter adapting and expanding its practices and rituals as well. Perhaps a formal procedure for convergence could be created that would be general enough for it to be performed on a nation-by-nation basis. For example, because convergence is multidirectional, not only would claims be decided through the processes and procedures of the common law courts, but also through the process of the potlatch system. The Court, the Crown, or both could host a potlatch or feast as part of the culmination of the protocols I have been discussing as part of a claim-making process. What I mean by this is that the Court and the Crown could be enfolded into the unfolding processes and protocols of the potlatch system. In the case of the Crown, similar to coastal First Nations practices, they could host an honorary potlatch or feast to acknowledge the results of the dialogue between them and the particular First Nations peoples. Thus, the duty to consult and accommodate could be enfolded through the unfolding potlatch complex. For the Court, as part of converged legal outcomes, rulings could be delivered via the protocols of the feast hall that would express and validate the completion of a process of negotiation and consensus-making. Such convergences would acknowledge, in a respectful manner, the law-making mechanisms of Northwest Coast peoples whose claims are being addressed.

How these particular convergences would occur would be on a case-by-case basis through processes of negotiation that could then be adjoined to the converged system. As I discussed above, convergence involves a reading together of distinct legal perspectives. I am not suggesting a form of cultural appropriation, but a symbiosis that equally engages two different legal perspectives and systems. I argue that the potlatch complex is one means of creating a symbiosis for coastal British Columbia, as it provides a flexible and fluid procedural mechanism through which reconciliation can truly occur.

¹⁰¹ Gloria Cranmer-Webster, "From Colonization to Repatriation" in Gerald McMaster and Lee-Ann Martin, eds, *Indigena: Contemporary Native Perspectives* (Vancouver: Douglas & McIntyre, 1992) 25 at 36.

Moreover, because the potlatch complex “is central in recreating the people’s primary relationship with the world,”¹⁰² this convergence spills beyond regulatory offences and civil proceedings. For example, Don Ryan (*Masgaak*) writes that “[i]n our model for Confederation and reconciliation, the Gitksan jurisdiction, based on our pre-existing rights, fits right in between” the federal and provincial governments.¹⁰³ Ryan’s sentiment has been echoed by P. Dawn Mills: “The Gitxsan feel that the Gitxsan–Canada relationship should be based on privileged reciprocity”¹⁰⁴—highlighting the continuing unfolding and enfolding of relationships as the world and contexts change. The potlatch complex, then, can provide a venue for not only these relationships, but also a forum in which to develop them. In this way, Canada (and British Columbia) would become reciprocally assimilated into the kin networks and relationships of ‘traditional’ Gitksan culture, instead of the current opposite, unidirectional assimilation.

As the potlatch system is situated as a nexus in various cultural meshworks—and not as an atomized practice, custom, or tradition that the Eurocentric tradition divorces from its context—it is perhaps best situated to accomplish this interweaving and convergence. Thus, in light of the role of the potlatch system in asserting jurisdiction over territory, the potlatch system would be the most appropriate venue for any sort of future treaty or other land agreement to be made:

No transaction concerning land is legally binding unless it takes place in the feast. [...] However, the Witsuwit'en find themselves in an awkward situation – a situation in which the surrounding immigrants and federal and provincial governments accept individual transactions as valid and are only peripherally aware of the feast as the proper mechanism for dealing with any and all transfers of property.¹⁰⁵

Therefore, for the First Nations peoples of coastal British Columbia the potlatch system is the appropriate arena for convergence.

How the potlatch system has risen to meet contemporary demands also reflects continuing unfolding and enfolding:

I am not suggesting that the feast system of the Gitksan and the Witsuwit'en, the paradigm for this region's gift-centred societies, has died and gone to the museum of antiquities as a result of *Delgamuukw*; rather, since the collective litigation, feasts have become a medium for new challenges in a rapidly changing world.¹⁰⁶

Thus, because the potlatch system is fluid and flexible, the particular peoples in question are best placed to determine if they are ready and how their laws and potlatch system can enter into a convergence with common law judicial decision-making. Again, this should not be unidirectional nor co-optive, but a forum in which the ‘Aboriginal perspective’ can be truly be ‘taken into account’ in the contexts of Aboriginal rights claims.

For the First Nations peoples of coastal British Columbia, unfortunately, litigation seems to be the only current mode of recourse for attempting to enact the particular form of convergence discussed here:

¹⁰² Overstall, *supra* note 33 at 28.

¹⁰³ “Afterword: Back to the Future” in Daly, *supra* note 18, 299 at 300.

¹⁰⁴ *Supra* note 44 at 135.

¹⁰⁵ Mills, *supra* note 18 at 144.

¹⁰⁶ Daly, *supra* note 18 at 289-90.

In my opinion the Witsuwit'en, through their Aboriginal title action, are seeking to develop a cooperative mechanism of integrating Canadian and Witsuwit'en law; just as they have developed a cooperative legal relationship, based on mutual respect, between themselves and the Gitksan, the Nutsen'i, the Nisga'a, and the Haisla.¹⁰⁷

That the Wet'suwet'en develop these cooperative relationships is positive as too often the contexts of litigation have created an adversarial environment between Aboriginal peoples.¹⁰⁸ Yet still absent from these relationships are Canada and British Columbia. Section 35 constitutionalized such a relationship, though, so a procedural mechanism is needed that equitably balances the perspectives and needs of all those involved. The atomism of Eurocentric thought that pervades the Court's approach to Aboriginal rights hinders this goal. Thus, I assert that the convergence of the 'Aboriginal perspective' from the actual perspective of the peoples in question on a nation-by-nation, case-by-case basis provides valuable insights for reconciliation.

CONCLUSION

There are many topics, concepts, and issues that I have not addressed here, but this article represents a first step in an important discussion and argument that needs to be raised. There is still much work to be done. My proposal here aligns with Borrows in his discussion of an Indigenous Canadian Constitution:

It is my hope that this work represents a further invitation for those interested in this topic to join with me and other willing scholars, practitioners, politicians, policy analysts, Elders, chiefs, and leaders in the identification, recognition, questioning, and further development of our legal traditions.¹⁰⁹

For many reasons, some of which I have alluded to above, there is a constitutional justification for this work. As Henderson writes,

[c]laims of Aboriginal rights represent a right to disrupt ordinary politics and practice that encourage the entrenchment of racial, cultural, social, and economic hierarchy and legal classification that have obstructed and continue to obstruct First Nations' full participation in Canadian life.¹¹⁰

While the Canadian government has attempted to extinguish it in the past, potlatching and feasting, as illustrated in *Delgamuukw*, continue to not only be important parts of various legal traditions¹¹¹ but remain vital and central to the cultural meshworks and identities of contemporary Northwest Coast First Nations peoples. It is time that Aboriginal peoples finally sit at the table in the place that our constitution mandates. To do so means that we need to rethink the table.

¹⁰⁷ Mills, *supra* note 18 at 164.

¹⁰⁸ Regarding the way litigation creates an adversarial relationship among First Nations peoples see e.g. Richard Daly & Val Napoleon, "A Dialogue on the Effects of Aboriginal Rights Litigation and Activism on Aboriginal Communities in Northwestern British Columbia" (2003) 47:3 Social Analysis 108 at 115-16.

¹⁰⁹ *Indigenous Constitution*, *supra* note 1 at 10.

¹¹⁰ *First Nations Jurisprudence*, *supra* note 16 at 203.

¹¹¹ See e.g. Borrows, *Indigenous Constitution*, *supra* note 1 at 40.

ARTICLE

TOURISM AND FORESTRY TENURE ON CROWN LAND: A TIME FOR CHANGE

Natasha Gooch*

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INTRODUCTION

This paper examines the forestry and tourism industries' uses of British Columbia's Crown lands, investigates the kinds of conflicts that arise between forestry and tourism tenure holders, and identifies how these problems might best be remedied through the use of legal tools. A *Forest Act*¹ tenure holder² (Licensee) is a business that holds an approved Forest Stewardship Plan (FSP) under the *Forest and Range Practices Act* ("FRPA").³ An adventure tourism operator is an operator who provides outdoor recreation activities such as guide services, transportation, lodging, feeding, or entertainment to visitors.⁴ This paper argues that industry relations would best be served by using a process that strongly facilitates, if not actually requires, the direct participation of both the adventure tourism and the forestry industries in shared decision-making processes with regard to forest management planning. In the course of making that argument, this paper will provide background information, consider the legislative and policy regimes involved, identify what rights and responsibilities each party has with respect to the other, examine conflicts between Licensees and adventure tourism operators through the use of a specific case study, explore strategies to address issues facing regulation of competing tenures on Crown lands, and survey some of the difficulties specific to British Columbia arising from its unique legal landscape.

I. BACKGROUND

British Columbia (BC) is a province rich in natural resources. As a result, the province's Crown lands⁵ support several primary resource sectors, including: forestry, mining, agriculture, energy, and more recently, adventure tourism. Extraction of timber

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1 *Forest Act*, RSBC 1996, c 157.

2 *Forest Act* tenure holders include those agencies that hold a major licence (e.g., forest, tree farm, and timber licences), timber sale licence, or community salvage licence. *Forest Range and Practices Act*, *infra* note 3 at s 3.

3 *Forest and Range Practices Act*, SBC 2002, c 69 [FRPA].

4 British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *Land Use Operational Policy: Adventure Tourism* (May 26, 2011), at 1 [MFLNRO, *Adventure Tourism Policy*].

5 Lands owned and managed by the provincial government.

resources, BC's "green gold,"⁶ has been, and continues to be, a major driver of the province's economic engine. BC's economy is also increasingly supported by a growing and prosperous tourism economy. This support is largely based on the province's 'Super, Natural BC™' "reputation for unmatched scenic beauty, clean air and water, abundant fish and wildlife, and the world-class tourism products that capitalise on these natural endowments."⁷

Both the forestry and adventure tourism sectors contribute significantly to the provincial economy but the levels of those contributions have shifted over time. It is clear that BC's primary resource economies all play an important role in the province's future health.

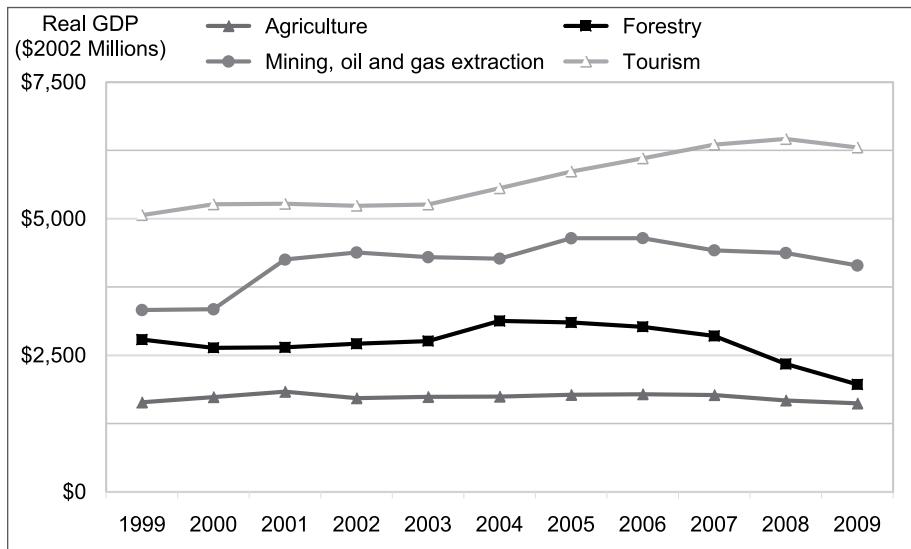


Figure 1 Real GDP of BC's Primary Resource Industries (1999 to 2009)⁸

As figures 1 and 2 illustrate, the Real Gross Domestic Product (GDP) and Real GDP Index of tourism increased between 2003 and 2009 while at the same time those measures showed a steady decline for the forestry industry.⁹ The forestry industry has faced many challenges in recent years, namely the weakening housing market in the US, low timber prices, and softwood lumber duties,¹⁰ but has regained some market share since 2009 through emerging Chinese markets.¹¹

6 Roger Hayter & Trevor J Barnes, "Troubles in the Rainforest: British Columbia's Forest Economy in Transition" in Trevor J Barnes & Roger Hayter, eds, *Canadian Western Geographical Series 33: Troubles in the Rainforest: British Columbia's Forest Economy in Transitions* (Victoria, BC: Western Geographical Press, 1997) 1 at 1–3.

7 Council of Tourism Associations of BC, *A tourism industry strategy for forests* (Council of Tourism Associations: April 2007) at 6 [COTA, *Strategy*]. I note that COTA is now known as the Tourism Industry Association of BC.

8 British Columbia, Ministry of Jobs, Tourism and Innovation, *Measuring the value of tourism in British Columbia: Trends from 1999 to 2009* (British Columbia: April 2011) at 15 [MJTI, *Measuring the value*].

9 *Ibid.*

10 British Columbia, Ministry of Advanced Education and Labour Market Development and BC Stats, *A Guide to the BC Economy and Labour Market 2010* (British Columbia: BC Stats, 2010) at 63.

11 CBC News, "BC lumber exports to China soar" CBC News (17 July 2011), online: CBC <<http://www.cbc.ca/news/canada/british-columbia/story/2011/07/17/bc-china-lumber.html>>.

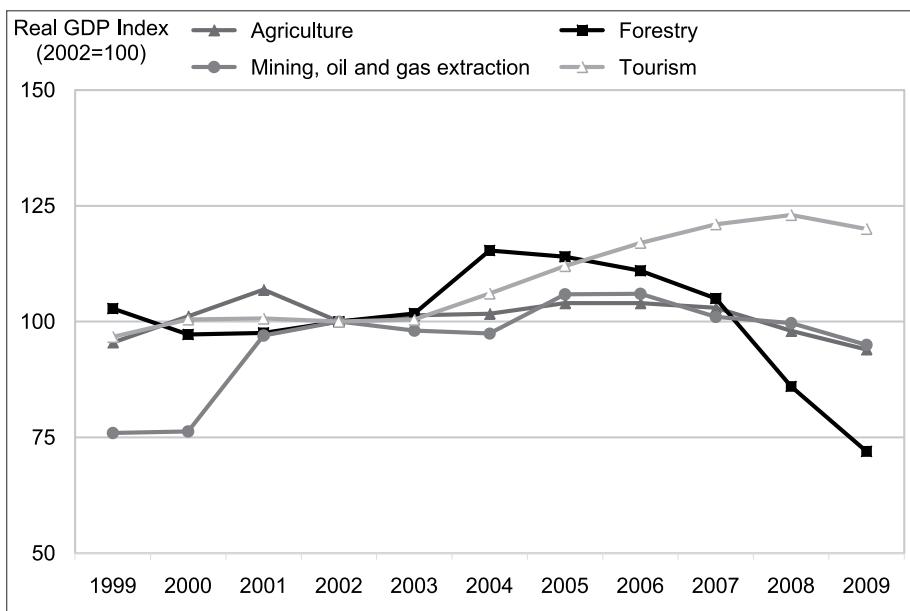


Figure 2 Comparing Real GDP Index by Primary Resource Industry (1999 to 2009)¹²

Coupled with these market stressors, the forest industry has been challenged by the Mountain Pine Beetle (MPB) epidemic—an “unprecedented forest-altering event”¹³—which has killed approximately 726 million cubic metres of timber in the province since the 1990s.¹⁴ In response, the BC government increased the Annual Allowable Cut (AAC) to “recover the greatest value from dead timber before it burns or decays, while respecting other forest values.”¹⁵ Herein lies the challenge for adventure tourism operators, particularly in MPB impacted areas, as they struggle to cope with changes to their immediate surrounding forest environment due to fibre extraction activities.¹⁶

Forestry and adventure tourism industries each seek different values from the same Crown land base. Licensees focus on gaining value from the land by extracting wood fibre while adventure tourism operators focus instead on providing visitors with high quality experiences in the spaces between the trees. As evidenced by several reports to the Wilderness Tourism Association¹⁷ and reports from the Forest Practices Board, “other forest values” are not always respected by the Licensees. Adventure tourism operators

12 MJTI, *Measuring the value*, *supra* note 8 at 15.

13 British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *A History of the Battle Against the Mountain Pine Beetle 2000 to 2012* (British Columbia) at 2.

14 British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *Facts About BC's Mountain Pine Beetle* (British Columbia: April 2011) at 1.

15 British Columbia, Ministry of Forests, *British Columbia's Mountain Pine Beetle Action Plan 2006-2011* at 11, online: Ministry of Forests <http://www.for.gov.bc.ca/hfp/mountain_pine_beetle/actionplan/2006/Beetle_Action_Plan.pdf>. For an industry perspective on this report, please see COTA, *Strategy*, *supra* note 7 at 20.

16 *The Vancouver Sun* has extensively explored the Crown land issues exacerbated by the Mountain Pine Beetle. See Stephen Hume, “BC resources need support,” *The Vancouver Sun* (16 February 2012) (ProQuest) and Larry Pynn, “Pine beetle series part 4: ‘It looks like Armageddon,’” *The Vancouver Sun* (7 December 2011) (ProQuest). Hume references Ralph Archibald et al, *Trends in Renewable Resource Management in BC* (February 2012), online: Healthy Forests – Healthy Communities <<http://bcforestconversation.com/wp-content/uploads/TrendsinRR.pdf>>.

17 Personal Communication, 21 November 2011, Evan Loveless, Executive Director, Wilderness Tourism Association.

believe that their land use interests continue to be overshadowed by forestry's "as a result of government's fixation on Forestry's traditional contribution to GDP."¹⁸ If the adventure tourism sector is to gain a larger market share, this antiquated approach by government must be addressed.

The province's traditional and continued reliance on economic returns from the timber harvest is grounded in the *Government Actions Regulation ("Regulation")*.¹⁹ Section 2(1) requires that orders and objectives that deal with non-timber resource values do not "unduly reduce" the province's timber supply and that any benefit to the public from such orders must outweigh the impact on a Licensee's wood rights and costs.²⁰ Although the regulation also covers topics important to tourism, such as scenic areas and visual quality objectives, the leading statement to not "unduly reduce" timber supply strongly indicates that government continues to focus on traditional economies, such as forestry, over emerging opportunities, such as adventure tourism.

In the *2012-2016 Strategy for Tourism* (Strategy), the BC government stated a goal of achieving tourism sector²¹ revenue worth \$18 billion by 2016.²² One Strategy goal focuses specifically on rural tourism with the goal to market "tourism uses of provincial infrastructure and Crown assets, consistent with the focus on key products such as touring and outdoor adventure/eco-tourism."²³ Clearly, the intent is to see adventure tourism continue its upward contributions to the province's economy, although it is unclear how this will be achieved under the current focus of the *Regulation*. Adventure tourism's interests, values, and requirements of the forested Crown lands are different than those of forestry and these differences need to be considered through effective consultation by government and Licensees.

II. REGULATORY FRAMEWORK

BC's *Land Act* allows the responsible Minister to establish objectives for the use and management of Crown land.²⁴ The *Land Use Objectives Regulation* under that Act shows that the government chooses to prioritize the forestry industry's interests over those of others when creating or amending these legal objectives. The regulation states that the Minister must be satisfied that "the importance of the land use objective or amendment outweighs any adverse impact on opportunities for timber harvesting or forage use within or adjacent to the area that will be affected."²⁵ The primacy of the government's concern for forestry values must be addressed if relations between the industries are to become more cooperative, which would enable BC to more effectively navigate future economic challenges and to benefit fully from its forest resources.

¹⁸ Robert Hood & Sydney Johnsen, *Report on Rural Tourism Conference Session: Tourism's Use of Crown Lands in BC* (2011) [unpublished] at 6. A version of this paper is now published: Robert Hood et al, *Beyond the Tourism Plan: Bringing life to tourism in your rural locale* (2011), online: LinkBC <<http://linkbc.ca/siteFiles/85/files/BeyondtheTourismPlan.pdf>>.

¹⁹ *Government Actions Regulation*, BC Reg 582/2004.

²⁰ *Ibid*, s 2(1).

²¹ This goal applies to the broader tourism industry, not just the adventure tourism sector.

²² British Columbia, Ministry of Jobs, Tourism and Innovation, *Gaining the Edge: A Five-year Strategy for Tourism in British Columbia 2012-2016* (2011) at 3 [MJTI, Strategy].

²³ *Ibid* at 25.

²⁴ *Land Act*, RSBC 1996, c 245, s 93.4.

²⁵ *Land Use Objectives Regulation*, BC Reg 357/2005, s 2(2)(b).

A. Forestry and Adventure Tourism on BC's Crown Lands

This section will provide more detail on the operating environment of both Licensees and adventure tourism operators and will conclude with a comparison of tenure documents.

i. Forestry

The forestry industry in BC is governed under several provincial statutes. In order to carry out any timber harvesting, proponents must first seek a forest licence from the Ministry of Forests, Lands and Natural Resource Operations (MFLNRO). The *Forest Act* allows the Minister of the current MFLNRO to enter into tenure agreements that grant rights to harvest Crown timber by way of a variety of licence forms.²⁶ These tenures are volume-based or area-based. Volume-based tenures grant multiple licensees the right to harvest a certain amount of timber within a specified Timber Supply Area, while area-based tenures grant exclusive rights to one licensee to harvest timber within a specified area.²⁷ The *Forest Act* also allows the province's Chief Forester to set and adjust the AAC for the province's Licensees.²⁸ Once proponents have applied for, and received, licences under the *Forest Act*, they must meet the requirements under the *Forest and Range Practices Act* ("FRPA").²⁹ Essentially, the *FRPA* is the governing Act for the forestry industry's practices; it outlines several legal objectives for the management of forests and range in the province including concerns about soils, visual quality, timber, forage and associated plant communities, water, fish, wildlife, biodiversity, recreation resources, resource features, and cultural heritage resources.³⁰ More localized objectives may also exist for certain areas of the province, generally through Land Use Plans and Land and Resource Management Plans (LRMP) developed throughout the province. These plans were originally enacted as law under the old *Forest Practices Code of British Columbia Act* ("Code").³¹ As many of the goals reached through these planning processes were not transferred to the *FRPA* from the *Code*, they are not necessarily legally binding under the *FRPA*. However, these plans do provide an agreed upon framework for development of a certain region and are capable of representing a wide variety of stakeholder values.

The *FRPA* requires Licensees to create a Forest Stewardship Plan (FSP)³² that specifies strategies to meet the government's forest objectives.³³ Areas under these FSPs may be very large and many of the plans submitted cover areas over 300,000 hectares.³⁴ Before submitting a draft FSP to the Minister for approval, the *FRPA* provides a mandatory period for public review and comment.³⁵ Publishing a notice in a newspaper satisfies the requirement for public notice³⁶ and the review and comment period generally runs for

26 *Forest Act*, *supra* note 1, s 12.

27 British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *Timber Tenures in British Columbia: Managing Public Forests in the Public Interest* (British Columbia: June 2012) at 4.

28 *Forest Act*, *supra* note 1, ss 8 & 8.1.

29 *FRPA*, *supra* note 3.

30 *Ibid*, s 149.

31 *Forest Practices Code of British Columbia Act*, RSBC 1996, c 159. I note that the Code has been substantively replaced by the *Forest and Range Practices Act*, SBC 2002, c 69 by way of BC Reg 7/04.

32 *FRPA*, *supra* note 3, s 3(1).

33 *Ibid*, s 5(1)(b).

34 Forest Practices Board, "Board Bulletin Volume, 7 – Forest Stewardship Plan Review: A Public Responsibility" at 1, online: Forest Practices Board <<http://www.fpb.gov.bc.ca/WorkArea/DownloadAsset.aspx?id=1350>>.

35 *FRPA*, *supra* note 3, s 18.

36 *Ibid*, s 20(1).

sixty days following publication of that notice.³⁷ However, adventure tourism operators may not know about the opportunity to review and comment on the FSP if they miss the ad in the paper given the remote nature of their operations and their intense seasonal operating period. Also, in certain cases, the comment period can be reduced to just ten days, such as when the timber has been infested with MPB, which exacerbates the difficulties with the existing review and comment system.³⁸

Licensees must provide other Crown land lessees (e.g., tourism operators) with the opportunity to review the FSP in a “manner that is commensurate with the nature and extent to which the person’s rights may be affected.”³⁹ However an administrative guide to FSPs prepared by the Resource Tenures and Engineering Branch of the Ministry of Forests and Range states that “[t]here is no clear direction in legislation to measure what constitutes adequate consultation ‘commensurate with rights.’”⁴⁰ These review and comment periods are to be made available to the public as a whole; there is currently *no legislated requirement* for Licensees to seek out or notify specific parties such as tenured adventure tourism operators. A 2010 *FRPA* Administration Bulletin states that

[o]nce a forest agreement holder who is required to prepare a FSP has identified which tenured commercial recreational operators are located within its plan area, forest agreement holder staff preparing FSPs for submission are *encouraged* to share information with tenured commercial recreational operators early on in the FSP development process to determine what level of information sharing is warranted.⁴¹

Additionally, since FSPs only refer to the boundary of the planned forest development, commenters are required to raise any and all concerns about the entire area despite not knowing the specific plans for an area in which they may or may not be affected. This requirement puts much of the burden on third parties, such as adventure tourism operators, to make guesses or assumptions about what might happen on the land in an FSP and whether or not they believe it will affect their operations. The lack of detail in an FSP could result in adventure tourism operators needlessly spending time commenting on one area of land while neglecting another area. The time required to make exhaustive comments could significantly impact the operating budgets of small adventure tourism operators.

Once granted, FSPs are valid for a term of five years but can be extended up to five additional years upon application to the Minister.⁴² Before road construction or timber harvesting commences, a Licensee must prepare a site plan that contains a more detailed identification and description of the application of an FSP to a particular area within the FSP boundary.⁴³ Like the FSP, this site plan must be made available for the public to view; unlike the FSP, a Licensee is not required to consider public comment at this point.⁴⁴ Adventure tourism operators may therefore refrain from commenting, especially

³⁷ *Ibid*, s 20(2)(a).

³⁸ *Ibid*, s 20(2)(d).

³⁹ *Ibid*, s 21(1)(c).

⁴⁰ BC Ministry of Forests and Range, Resource Tenures and Engineering Branch, *Administrative Guide for Forest Stewardship Plans (FSPs): Volume I Preparation and Approval of an FSP* version 2.1 (August 2009) at 116.

⁴¹ British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *FRPA Administration Bulletin Number #14 “FSP Review and Comment Requirements Relative to Tenured Commercial Recreational Operations on Crown Land”* (4 March 2010) at 2 [MFLNRO, *FRPA* Bulletin] [emphasis added].

⁴² *FRPA*, *supra* note 3, s 6.

⁴³ *Ibid*, s 10.

⁴⁴ *Ibid*, s 11.

if budgetary constraints mean that taking the administrative time to comment will negatively affect the immediate interests of the business. Lack of commentary may be interpreted incorrectly by the Licensees. Even where adventure tourism operators do take the time to comment at this stage, they may experience a sense of powerlessness because their comments may not even be considered. This power imbalance is one of the key problems creating discord between the forestry and adventure tourism industries.

ii. Adventure Tourism

Adventure tourism operators' rights and responsibilities are authorized under the *Land Act* by BC's "Land Use Operational Policy: Adventure Tourism" (Adventure Tourism Policy), which is administered by MFLNRO's Division Coordination Branch.⁴⁵ To apply for tenure, the Adventure Tourism Policy requires operators to prepare Tenure Management Plans (TMPs), which specify and justify the proposed area or areas as to their purpose, terms, and conditions.⁴⁶ The TMP must address three requirements: one, establish an estimated level of use including the number of clients on a daily and monthly basis; two, specify measures to eliminate or minimize conflicts with existing interests in the area; and three, identify "as precisely as possible" the areas of concentrated use, the nature of those uses, and the land areas required for the use.⁴⁷ The adventure tourism tenure applicant is required to also demonstrate how they plan to minimize potential conflict with all other users of the Crown land, including the public.⁴⁸ Once the TMP is accepted, the Authorizing Agency⁴⁹ will process the application and review the status of the land under application, solicit comments from "recognized agencies and groups," inform the applicant of advertising requirements, consult with First Nations, and finally, may conduct field inspections.⁵⁰ The comment period provided by the Authorizing Agency is thirty days.⁵¹ Any notification or advertising that is required by the applicant adventure tourism operator must "clearly describe the Tenure location, types of activity proposed, and the type of tenure under application" and must be consistent with the scale of the proposal.⁵² The Authorizing Agency assesses the application with respect to the general ability of the land to support the use specified in the TMP by considering such issues as whether there are sensitive areas within the boundaries, other overlapping adventure tourism tenures, any archaeological impacts, and any land use plans or regional growth strategies for the area.⁵³ These TMPs range between a few and several thousand hectares but typically cover a much smaller geographic area than FSPs.⁵⁴

Before the Authorizing Agency will issue the tenure documents to an applicant, a final TMP addressing any issues raised during the assessment of the application must be prepared and must also identify how the operating conditions, standards, and criteria that had been previously identified will be met.⁵⁵ Once tenure is granted, the TMP is "typically reviewed every five years by the Authorizing Agency."⁵⁶ Adventure tourism

⁴⁵ MFLNRO, *Adventure Tourism Policy*, *supra* note 4.

⁴⁶ *Ibid.*, s 8.1.

⁴⁷ *Ibid.*, s 8.2.1.

⁴⁸ *Ibid.*

⁴⁹ The *Adventure Tourism Policy* defines Authorizing Agency as the provincial government body responsible for the policy's delivery. MFLNRO, *Adventure Tourism Policy*, *supra* note 4 at 2.

⁵⁰ *Ibid.*, s 8.4.

⁵¹ *Ibid.*, s 8.6.

⁵² *Ibid.*, s 8.6.2.

⁵³ *Ibid.*, s 8.8.

⁵⁴ Personal Communication, 30 November 2011, Kate Greskiw, Land and Resource Specialist, Ministry of Forests, Lands, and Natural Resource Operations.

⁵⁵ MFLNRO, *Adventure Tourism Policy*, *supra* note 4, s 8.9.3.

⁵⁶ *Ibid.*, s 9.7.1.

operators are required to provide annual reports related to the “diligent use” of the land which refers to the “responsible use of Crown land for activities carried out by an Adventure Tourism Tenure holder that meet the requirements identified in the approved [TMP] associated with an existing Tenure.”⁵⁷ Final tenure documents include the Licence of Occupation Agreement, which is an agreement setting out the rights, responsibilities, and requirements of the adventure tourism operator and the province, as represented by the Minister responsible for the *Land Act*.

B. Comparison of Forestry and Tourism Crown Land Tenure Documents

In a brief comparison of the two strategies for tenure management on Crown land, it is apparent that the Adventure Tourism Policy shows greater concern for ensuring minimal conflict and encroachment on the enjoyment of other land users than the *FRPA* framework, which gives forestry values top priority. The lack of specific reference to adventure tourism values in the *FRPA* framework reinforces forestry’s primacy in BC. Additionally, adventure tourism operators are concerned about the security of their interests in the land as they do not enjoy the same level of tenure renewal security as Licensees.⁵⁸ To this end, a 2005 report prepared for several adventure tourism associations in BC calls for increased tenure security for adventure tourism operators and states that “central to such security is clear and fair property rights.”⁵⁹ As will be discussed below, tenure security could also be positively affected if adventure tourism operators are able to engage more fully during the forest management planning process in a way that allows them to express their concerns and values in a cooperative and cohesive process.

III. CONFLICT ON THE LAND

Since the public has an opportunity to comment on and review Licensees’ FSPs, any potential land use conflicts between the Licensees and the adventure tourism operators would be dealt with proactively at this early stage. However, as will be discussed in this part of the paper, not all issues are necessarily addressed during the FSP review stage. These outstanding issues may be either due to the fact that FSPs cover large geographic areas and do not provide detailed information, or because the public notice published in a local newspaper may not be received by an operator whose access to this information is restricted by distance or time.

The only dispute resolution mechanism available to complainants about a Licensee’s activities is through the Forest Practices Board (the Board). The Board, which was originally established under the *Code* and continued under the *FRPA*,⁶⁰ is a non-governmental agency that “conducts audits and investigations and issues public reports on how well industry and government are meeting the intent of British Columbia’s forest practices legislation.”⁶¹ The Board characterizes the hallmarks of “effective consultation” as interaction that involves the following elements: early and meaningful; adequately resourced; inclusive; informative and accessible; responsive and genuine; verifiable;

57 *Ibid*, s 3.

58 Aaron Heidt & Peter Williams, *Towards Greater Tenure Security for Commercial Recreation Operators*, prepared for Association of Canadian Mountain Guides, Back Country Lodges Association of BC, BC Helicopter and Snowcat Skiing Operators Association, BC River Outfitters Association, Commercial Bear Viewing Association of BC, Guide Outfitters Association of BC, Sea Kayak Guides Alliance of BC, and Wilderness Tourism Association of BC (15 November 2005) at 14, online: Wilderness Tourism Association <<http://www.wilderness-tourism.bc.ca/docs/tenureSecurity.pdf>>.

59 *Ibid* at 4.

60 *FRPA*, *supra* note 3, s 136.

61 Forest Practices Board, online: Forest Practices Board <<http://www.fpb.gov.bc.ca>>.

continuous; and provides for sufficient time.⁶² Although the Board has no legal power to demand legislative reform, this “independent watchdog” of BC’s public forests has actively expressed disfavour with the *FRPA* structure when warranted.⁶³ The Board has criticized the *FRPA*’s required level of consultation because it fails to live up to the principles of “effective public consultation” and has further stated that in most cases, effective consultation will not be achieved if only the minimum requirements of the *FRPA* are followed.⁶⁴

The powers of the Board are limited to investigations, reports, and recommendations, and cannot direct parties to carry out any actions. However, in part because of these limited powers, it has been determined by the BC Court of Appeal that the Board is entitled to “a considerable degree of deference to the views of the Board itself about [its authority].”⁶⁵ Complaints directed to the Board generally must involve only public land and can reference issues of “planning, including forest stewardship plans, site plans and woodlot licence plans; forest practices; range plans and practices; protection of resources including recreation; and industry compliance and government enforcement of the legislation.”⁶⁶ This narrow jurisdiction stifles the Board’s ability to make meaningful decisions addressing conflict between adventure tourism operators and Licensees.

A recent Board decision relating to a conflict between an adventure tourism representative and a Licensee illustrates the kinds of challenges facing Licensees and adventure tourism operators.⁶⁷ In this case, the complainant, Upper Nechako Wilderness Council, submitted a complaint stating that the Licensee, Canadian Forest Products Ltd., had “harvested timber within a lakeshore management reserve used by the complainant’s member business for guided-wilderness moose hunts and hike-in fishing.”⁶⁸ Essentially, the complainant argued that the Licensee made a unilateral decision to abandon certain objectives of a publicly-developed LRMP for the area. This decision was problematic for the complainant and its member tenure holders because the harvested area was closer to the lakeshore than the LRMP would have allowed, and, as such, there were concerns that the remaining live trees and MPB killed trees would blow down “further diminishing the wilderness value of the lake, as the view to and from the lakeshore and cutblock is exposed.”⁶⁹ However, the Board found that there was no legal requirement for the Licensee to apply the lakeshore objectives under the LRMP to its forest activities.⁷⁰ This decision was based on the fact that the lakeshore management zones had not been transferred into legal objectives under the *FRPA*, and because the *FRPA* does not require strategies for lakeshore management to be addressed within an FSP. Additionally, while the adventure tourism operator expected the Licensee’s FSP to address the riparian values included in the initial draft of the FSP made available to the public for review, they were not included in the final FSP and thus were not legally enforceable.⁷¹

62 Forest Practices Board, “Board Bulletin Volume, 3 – Opportunity for Public Consultation under the Forest and Range Practices Act,” online: Forest Practices Board <<http://www.fpb.gov.bc.ca/WorkArea/DownloadAsset.aspx?id=1342>> [FPB, Bulletin].

63 Forest Practices Board, *supra* note 61.

64 FPB, Bulletin, *supra* note 62.

65 *Northwood Inc v BC (FPB)*, 2001 BCCA 141 at para 41, [2001] BCJ No 365 (QL).

66 Forest Practices Board, *supra* note 61.

67 Forest Practices Board, “Logging and Lakeshore Management near Vanderhoof” (March 2010) FPB/IRC/163 [FPB, Logging].

68 *Ibid* at 1.

69 *Ibid*.

70 *Ibid* at 2.

71 This facet of the case raises the problematic issue of Licensees removing important content included in the draft FSP after the public review period. While it is beyond the scope of this paper to address the issue, this ‘dropping’ of content arguably negates the comment period if those parties making comments are not able to rely on the values presented in a draft FSP.

Despite this finding, the Board went on to consider the effectiveness of the consultation between the Licensee and the complainant. In this case, the Licensee and the complainant previously had a “cooperative and productive relationship that met their respective interests,”⁷² but in this instance some of the parties’ specific interests and concerns were not effectively communicated and the complainant felt “powerless to affect the cutblock design.”⁷³ The Board identified the fact that the discussions had only taken place via email as another possible reason for ineffective consultation between the parties.⁷⁴ Future parties wishing to engage in effective consultation might see this comment as a suggestion from the Board to use in-person meetings or telephone meetings in the place of email because important nuance and tone can be lost in written communication.

The Board’s decision also discusses the *FRPA*’s approach to competing business values. Specifically, the Board mentions that because of the results-based approach of the legislation, rather than a process-based approach, the “details of where and how the Licensee might harvest timber are left largely up to the Licensee [...and] whether public concerns about specific forest activities are resolved is a matter of negotiation between the public and the Licensee.”⁷⁵ Because of the Board’s limited powers under the *FRPA*, it may only help to facilitate these types of negotiations and relationship building rather than being able to adjudicate such a matter when parties are unable or unwilling to do so themselves. This approach by government to the competing business values leaves tenured adventure tourism operators in a position of significantly lower negotiating power since the final decision essentially rests with the Licensee. Even where consultation is generally positive and cooperative, being in a position of lower power can leave tenured adventure tourism operators with a decreased sense of business security as they are reliant on the goodwill of the Licensees.

As a result of this decision, the Board made a recommendation under section 131(2) of the *FRPA* for the development of

a means to deal with direct overlapping interests of tenured land and forest resource users by a process of mediation in which the interests of the parties are effectively identified and a reasonable balance between all interests is struck, consistent with the law, but also responsive to locally specific circumstances.⁷⁶

In making the recommendation, the Board acknowledged that simply creating more restrictive legislative requirements would be an ineffective solution. This would be especially true where, as is the case between Licensees and adventure tourism operators, business interests in the land are competing and where one party would likely continue to hold more power in a negotiation situation than the other party. In response to the Board’s recommendation, the government simply stated that “the *FRPA* framework adequately addresses the interests of competing tenure holders and that a mediation process is not necessary.”⁷⁷ The government response further states that while the *FRPA* does not require Licensees to consult with affected tenure holders beyond the draft FSP stage, they are “expected to take reasonable steps to ensure site-level plans would

⁷² FPB, Logging, *supra* note 67 at 3.

⁷³ *Ibid* at 4.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid* at 8.

⁷⁷ Forest Practices Board, 2010/2011 Annual Report (31 March 2011) at 6, online: Forest Practices Board <<http://www.fpb.gov.bc.ca>>.

not adversely affect the rights of other tenure holders.”⁷⁸ This response then goes on to describe the many voluntary measures that exist to help address competing interests between the various tenure holders. Essentially, this response letter suggests that because there are voluntary measures to promote consultation and cooperation early through the higher level multi-party development of land use plans and a later requirement for a review and comment period during FSP development, conflicts will not arise at a later date.⁷⁹

However, in a Board response to the government’s position, the Chair of the Board makes it clear that these voluntary measures are not adequate and that a “perception of unfair process with no recourse” for a non-forest license tenure holder still exists.⁸⁰ While the Board explicitly recognizes the proactive steps that the government has taken to address the issues facing tenure holders with regard to their competing interests, it is clear that the current approach still does not help non-forest license tenure holders who, despite the voluntary measures, still find themselves in a situation of conflict over operational decisions made by the Licensees. Therefore, it appears that the Board has exhausted its options for creating change in the approach to competing tenure holders as it does not have the power under the *FRPA* to require a party to take action. For this reason, it is important to explore other approaches to dealing with competing interests and conflict on Crown land in order to either bolster the recommendations made by the Board, in the hopes that further appeals to the government will help to affect change, or to suggest a different approach that the government might be more willing to adopt moving forward. This step is particularly important if the provincial government wants to achieve its goal to increase tourism revenues by five percent for each of the next five years through a focus on the “provincial infrastructure and Crown assets” in the adventure tourism market.⁸¹

IV. OTHER MODELS FOR SUCCESS

This section explores Ontario’s management of tourism on forested lands and compares that approach with BC’s management regime. The section also introduces the use of Memoranda of Understanding as they are used in both Ontario and BC.

A. Navigating Competing Values: The Ontario Model

Ontario’s provincial government has explicitly recognized that “[m]anaging the resource-based tourism/forestry interface is a *critical* part of forest management planning.”⁸² In that province, the government regulates the forestry industry through the *Crown Forest Sustainability Act* (“CFS”).⁸³ Under the *CFS*, Registered Professional Foresters, in conjunction with a multi-disciplinary planning team, prepare Forest Management Plans

⁷⁸ Letter from Office of the Deputy Minister of Ministry of Forests and Range to Chair, Forest Practices Board (25 October 2010) at 2, online: Forest Practices Board <http://www.fpb.gov.bc.ca/IRC163_Government_response.pdf>.

⁷⁹ *Ibid.*

⁸⁰ Letter from Chair of Forest Practices Board to Deputy Ministers, Ministry of Forest, Mines and Lands; Ministry of Natural Resource Operations; Ministry of Agriculture; and Ministry of the Environment (1 December 2010) at 2, online: Forest Practices Board <http://www.fpb.gov.bc.ca/IRC163_Board_response.pdf>.

⁸¹ MTJI, Strategy, *supra* note 22 at 25.

⁸² Ontario, Ministry of Natural Resources, Forest Management Branch, *Management Guidelines for Forestry and Resource-based Tourism* (Toronto: Queen’s Printer for Ontario, July 2001) at 23 [OMNR, Guidelines] [emphasis added].

⁸³ *Crown Forest Sustainability Act*, SO 1994, c 25, s 8 [CFS].

(FMP) for management units designated under section 7 of the *CFSAs*.⁸⁴ For guidance, the Ontario Ministry of Natural Resources (OMNR) enacted the *Forest Management Planning Manual*,⁸⁵ which “provides direction for all aspects of forest management planning for management units designated under the *CFSAs*”⁸⁶ and requires FMPs to be consistent with provincial laws and policies related to forest management.⁸⁷ The Ministry’s *Management Guidelines for Forestry and Resource-Based Tourism* (Ontario Guidelines) “assist with planning forestry operations in those parts of Ontario’s forest being used for both forestry and tourism.”⁸⁸ The Ontario Guidelines are intended to provide the developers of FMPs with a range of practices, tools, and techniques that can be used to protect resource-based tourism values.⁸⁹ The Ontario Guidelines require Licensees⁹⁰ to comply with the FMPs in the course of their forestry activities in the management unit in which they hold a licence.⁹¹ Originally developed through a cooperative process between both industries and their respective Ministries, the OMNR reviewed the Ontario Guidelines in 2006 and found them to be effective.⁹²

Beyond the Ontario Guidelines, the resource-based tourism⁹³ and forestry industries in Ontario have also entered into a Memorandum of Understanding (MOU) intended to “allow the Resource-Based Tourism and Forestry industries in Ontario to co-exist and prosper.”⁹⁴ Under the MOU, resource-based tourism tenure holders and Licensees agree to voluntarily enter into negotiated Resource Stewardship Agreements (RSA) that contain a map of projected road corridors in the area, the tourism values to be protected, a restatement of the MOU principles, and any other agreed upon provisions that are not already part of an FMP.⁹⁵ Additionally, the MOU has specific provisions for both mediation and arbitration, but “before recourse to the Forest Management Planning dispute resolution process [...] is] available” the MOU requires parties to first undertake the entire RSA development process.⁹⁶

84 Ontario, Ministry of Natural Resources, “Documents required under the Crown Forest Sustainability Act (CFSAs),” online: Ontario Ministry of Natural Resources <http://www.mnr.gov.on.ca/en/Business/Forests/2ColumnSubPage/STEL02_164322.html>.

85 *Forest Management Planning Manual*, Ont Reg 159/04.

86 Ontario, Ministry of Natural Resources, “Operational and Administrative Policy,” online: Ontario Ministry of Natural Resources <http://www.mnr.gov.on.ca/en/Business/Forests/2ColumnSubPage/STEL02_164306.html>.

87 Ontario, Ministry of Natural Resources, *Forest Management Planning Manual for Ontario’s Crown Forests* (Toronto: Queen’s Printer for Ontario, November 2009), online: Ontario Ministry of Natural Resources <<http://www.mnr.gov.on.ca/en/Business/Forests/2ColumnSubPage/286583.html>> [OMNR, Planning Manual].

88 OMNR, Guidelines, *supra* note 82 at 1.

89 *Ibid.*

90 “Licensee” is used in this section to refer to the group that exists under the Ontario legislation, which is essentially the same type of Licensees as found in BC.

91 CFSAs, *supra* note 83, ss 25 & 26.

92 OMNR, Guidelines, *supra* note 82 at 1.

93 Resource-based tourism is referred to as adventure tourism in BC.

94 Ontario, Ministry of Natural Resources, *Tourism and Forestry Industry Memorandum of Understanding* (July 2000) at 1, online: Ontario Ministry of Natural Resources <http://www.mnr.gov.on.ca/stdprodconsume/groups/lr@mnr@forests/documents/document/mnr_e000278.pdf>.

95 *Ibid* at 2.

96 *Ibid* at 3.

i. Assessing the Ontario Model: Key Lessons for BC

Like the Ontario Guidelines, Ontario's RSA process was reviewed by Sarah Browne, Murray Rutherford, and Thomas Gunton from the School of Resource and Environmental Management at Simon Fraser University, and was found "to be a positive move in forest management" with many strengths.⁹⁷ Specifically, the review identified the following strengths: inclusion of tourism; increased dialogue and reduced conflict; commitment to process and implementation; principled negotiation, respect and trust; balanced distribution of power; and the participants' perception that the benefits of the process outweigh the costs.⁹⁸ The review also highlighted a few areas for improvement within the process, however, and listed a need for the following: more inclusive representation; greater transparency of the process; increased equality between forestry and tourism industries to be achieved through shifting negotiating power away from the forestry industry; use of an independent third party to conduct the RSA process; and, finally, consideration of whether the OMNR should continue to have the power to reject RSA recommendations that are not "consistent with the OMNR's mandate of conserving and managing Ontario's public lands and resources for all citizens."⁹⁹ Perhaps the most relevant and pressing consideration highlighted by this review is the perceived and real power imbalance between the two industries in forest management decisions. While Ontario's approach may not fully level the playing field, it does help by redistributing some of the power.

The *Forest Management Planning Manual* provides for an "Issue Resolution Process," which is essentially an extension of the period of public review during the FMP process.¹⁰⁰ However, it is important to recognize that Ontario's FMP process provides for more opportunities to provide input into the FMP than BC's framework for FSPs; public input is actively sought and addressed at four stages throughout the process.¹⁰¹ The FMP process is lengthy and generally requires two and a half years of preparation before submission of a final draft and approval under the *CFSAs*.¹⁰² Additionally, the FMP process includes a greater level of detailed information available for comment with specific attention to proposed planned road construction that has been identified as a key issue for resource-based tourism operators where continued remoteness is valued as a top priority for those operators.¹⁰³

While the framework under Ontario's *CFSAs* does not provide for an explicit dispute resolution process for conflicts arising after the approval and granting of a forest licence, the FMP process is significantly more detailed and requires active consultation on the part of the forestry industry with other affected tenure holders, and specifically with resource-based tourism operators. By providing for greater depth of consultation and outwardly recognizing the importance of addressing competing interests, both at an early stage and throughout the process, the approach in Ontario may help to ensure fewer conflicts arise once forest licences have been granted and forest management and harvesting activities have begun. This approach also demonstrates "effective consultation" as defined by BC's Forest Practices Board.¹⁰⁴

⁹⁷ Sarah A Browne, Murray B Rutherford & Thomas I Gunton, "Incorporating Shared Decision Making in Forest Management Planning: An Evaluation of Ontario's Resource Stewardship Agreement Process" (2006/2007) 34:3 *Environments* 39 at 53.

⁹⁸ *Ibid.*

⁹⁹ *Ibid* at 53–54.

¹⁰⁰ OMNR, *Planning Manual*, *supra* note 87, Part A, s 3.4.1.

¹⁰¹ OMNR, *Guidelines*, *supra* note 82 at 10–11.

¹⁰² *Ibid* at 10.

¹⁰³ *Ibid* at 24.

¹⁰⁴ Forest Practices Board, *supra* note 61.

ii. Translating the Ontario Model: The Unique Landscape of Land Claims in BC

However, it is important to note that a framework such as the one used in Ontario could not simply be adopted in BC given BC's unique situation as it pertains to Aboriginal land claims on Crown land. This context requires any regulatory changes to consider the challenges of the current model as well as the Crown's obligations to First Nations in BC.

While almost the entire land base in Ontario is covered by treaty agreements,¹⁰⁵ much Crown land in BC remains untreated and therefore is involved in ongoing adjudication of Aboriginal rights and land claims.¹⁰⁶ These unsettled claims create a more complex legal landscape in BC that is intimately tied to the duty of the Crown to consult and accommodate Aboriginal peoples in the course of state decision-making. This duty arises by way of section 35 of the *Constitution Act, 1982*, which constitutionalises Aboriginal rights, including treaty rights and land claims that have been acquired or that may be acquired in the future (section 35 rights).¹⁰⁷

While it is beyond the scope of this paper to present a full discussion of the land claims issues in BC, this section highlights some of the difficulties that government might face in an attempt to update or renew approaches related to the use and enjoyment of Crown land by Licensees and adventure tourism operators.

The duty to consult was expressed by the Supreme Court of Canada in *Delgamuukw v British Columbia* ("Delgamuukw") in 1997 and it has been further considered and shaped by the courts since that time.¹⁰⁸ The federal and provincial governments' duty to consult and accommodate is "grounded in the honour of the Crown."¹⁰⁹ The duty is triggered when the Crown has knowledge of a claim; the Crown is making a decision or contemplating an action that engages Aboriginal rights; and when the decision or action could have a negative impact on section 35 rights.¹¹⁰ Accommodation involves "notifying and consulting aboriginal peoples with respect to the development of the affected territory," and may include fair compensation.¹¹¹

The duty to consult and accommodate will have different requirements depending on whether or not the Aboriginal rights in question are treaty rights, proven section 35 rights, or asserted but unproven section 35 rights.¹¹² The extent of those requirements will also vary, running along a spectrum from shallow to deep consultation and accommodation. Deep consultation and accommodation will be required where, for instance, the section

¹⁰⁵ "Aboriginal Land Claims and the Federal and Provincial Governments," *The Outfitters* (July/August 2000) at 14, online: Nature and Outdoor Tourism Ontario <http://noto.ca/theoutfitterarchives/aboriginal_land_claims_and_government>.

¹⁰⁶ BC Treaty Commission, *The First Annual Report of the British Columbia Treaty Commission for the Year 1993-1994* at 3, online: BC Treaty Commission <http://www.bctreaty.net/files/pdf_documents/1994_Annual-Report.pdf>. For example, there are currently 60 First Nations, including 104 Indian Act bands, involved in the BC treaty process. See BC Treaty Commission, *Learning from our Success: BC Treaty Commission Annual Report 2012* at 13, online: BC Treaty Commission <http://www.bctreaty.net/files/pdf_documents/2012_Annual-Report.pdf> [BC Treaty Commission, *Learning*].

¹⁰⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11, s 35.

¹⁰⁸ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108 (QL) (cited to QL) [*Delgamuukw*].

¹⁰⁹ *Haida Nation v British Columbia and Weyerhaeuser*, 2004 SCC 73 at para 16, [2004] SCJ No 70 (QL).

¹¹⁰ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31, [2010] SCJ No 43 (QL).

¹¹¹ *Delgamuukw*, *supra* note 108 at para 203.

¹¹² Environmental Law Centre, "Consultation and Accommodation: ELC Associates April 18.2011 Teleconference Backgrounder" (April 2011) at 3, online: Environmental Law Centre <<http://www.elc.uvic.ca/associates/documents/2011Apr18-Consultation-and-Accommodation-Backgrounder.pdf>> [ELC, Accommodation Backgrounder].

35 rights are “proven or extensive and easily proven and the potential harm will virtually extinguish the right.”¹¹³ However, it should be noted that there is no duty to agree and that the Crown is only required to act reasonably.¹¹⁴

The duty to consult and accommodate brings with it a degree of uncertainty for all parties involved and affected by land claims. The parties to those claims, namely the First Nations making the claims and the federal and provincial governments, must await judicial rulings in many cases. Each claim brings with it the “unique circumstance of every First Nation.”¹¹⁵ Therefore, the courts will be required to consider the unique factual scenarios placed before it each time a land claim arises, and cannot simply make a ruling that would apply to a wide range of claims. Likewise, industry operators such as adventure tourism operators and Licensees will be affected by the outcomes of the decisions as they generally operate on land that is wholly or partially implicated in land claims.

The first modern-day land claims agreement was made in BC in 2000 between the Nisga'a Nation, the Government of BC, and the Government of Canada.¹¹⁶ The negotiation of the Nisga'a Treaty was an extensive process; the federal government originally began treaty negotiations with the Nisga'a in 1976 while the province joined the negotiations in 1990.¹¹⁷ Several other treaties have been signed since 2000, yet many more claims remain in ongoing negotiation or litigation.¹¹⁸ Each claim is accompanied by a unique factual scenario and therefore each claim requires a consideration of its strength before a determination of the level of consultation and accommodation can be made. This determination must be made on a case-by-case basis. The level of uncertainty and complication arising from these claims means that decision-making processes related to the use and enjoyment of Crown lands in BC is substantially more complex than similar processes in Ontario.

This brief introduction to Aboriginal land claims issues on Crown land in BC is meant to bring attention to the unique legal climate of BC. If the land used by forestry and adventure tourism industries is involved in Aboriginal land claims, then the Crown is under a requirement to consider the level of consultation and accommodation required depending on what and where the various claims are. Therefore, the BC provincial government is unable to simply enter into negotiations and agreements with the forestry and adventure tourism industries to create a legislative approach such as the one found in Ontario because the government must also consider its consultation and accommodation obligations. Additionally, the First Nations involved in a claim may come to the negotiation table with varying degrees of interest given that some First Nations are operators of either forestry or adventure tourism businesses. Like the differences in the values sought on the land between adventure tourism operators and Licensees, First Nations, whether or not they are operators themselves, also hold different values on the same land.

¹¹³ *Ibid.*

¹¹⁴ *Ibid* at 3.

¹¹⁵ *Ibid* at 4.

¹¹⁶ *Nisga'a Final Agreement* (27 April 2000), online: Nisga'a Nation Knowledge Network <<http://www.nnkn.ca/files/u28/nis-eng.pdf>>.

¹¹⁷ Aboriginal Affairs and Northern Development Canada, “Fact Sheet: The Nisga'a Treaty” (September 2010), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100016428/1100100016429>>.

¹¹⁸ According to the BC Treaty Commission, the Tsawwassen First Nation and Maa-nulth First Nations implemented final agreements in 2009 and 2011 respectively. Three other First Nations have completed final agreements: Lheidli T'enneh First Nation; Tla'amin Nation; and Yale Nation. See BC Treaty Commission, *Learning*, *supra* note 106 at 13–14.

As the foregoing illustrates, adopting a process that encourages harmony between forestry Licensees and adventure tourism operators is advisable when not faced with BC's unique context. However, despite the significant differences and the complexities that the land claims in BC bring to the table, the government is no stranger to consultation and accommodation at this point in time. By bringing all of the stakeholders into the discussion and negotiation process—not just industry and government as is the case in Ontario—it is likely that some of the key successes of the Ontario method could be incorporated into a 'made in BC' approach. That approach could, for example, include processes similar to Ontario's RSA, which would offer more detailed information to adventure tourism operators about the forestry activities planned for the land. Additionally, BC could look to the Ontario Guidelines as an example of how to provide greater guidance to tenure holders on Crown land and how those tenure holders can best navigate their competing interests. Finally, requiring tenure holders to actively seek public input on their plans for Crown land at several junctures would reflect a key element of the Ontario FMP process, and could support Crown consultation when the duty to consult and accommodate First Nations with interests in the land applies.

B. Existing Tools in BC: Memoranda of Understanding

Another important tool, as demonstrated by the Ontario approach, is the MOU. MOUs are a way for parties to identify and express mutual values and interests. In 1996, the Council of Tourism Associations of BC (COTA)¹¹⁹ entered into an MOU with the Council of Forest Industries and the Forest Alliance of BC to "help foster ongoing dialogue and proactive relations between the two industries."¹²⁰ However, the agreement lacks substantive content and is essentially a statement of mutual support from both industries. Perhaps in recognition of these shortcomings, COTA entered into another MOU in 2004 with the Mining Association of BC and the BC and Yukon Chamber of Mines. Along with mutual statements of support between the industries, the MOU sets out the purpose, principles, and interests of all the parties—both mutual and individual—as well as the protocols that would be followed "to support a beneficial ongoing business relationship" between the parties.¹²¹ More importantly, the MOU includes a specific provision for a conflict resolution process that the parties agreed to encourage their members to use in instances of unresolved disputes.¹²² An Appendix to the MOU details specific approaches for conflict resolution available to members, including reference to the Mediation and Arbitration Board of BC where necessary. By specifically implementing a process to resolve disputes, the parties made a commitment to an ongoing relationship rather than propagating unilateral decisions by the more powerful party in the instance of disagreement. This type of agreement is the kind that the Board has advocated for previously, and could be considered for integration into the legislation managing the forestry and adventure tourism industries' relationship.

CONCLUSION AND RECOMMENDATIONS

Licensees and adventure tourism operators cannot rely on government agencies to create the 'perfect solution' for planning processes or conflict resolution, and should take responsibility to be 'good neighbours.' As evidenced throughout this paper, several

¹¹⁹ COTA has since changed names to the Tourism Industry Association of BC, see note 7.

¹²⁰ COTA, *Strategy*, *supra* note 7 at 8.

¹²¹ "Memorandum of Understanding: BC & Yukon Chamber of Mines, Council of Tourism Associations of BC, Mining Association of BC" (22 January 2004), s 6, online: COTA BC <<http://www.cotabc.com/documents/publications/Mining-Tourism%20MOU.pdf>>.

¹²² *Ibid*, s 7.

recommendations for proactive participation by both the forestry and tourism industries have already been called for.¹²³ However, a number of recommendations based on this paper's review of the BC and Ontario processes are provided below:

1. Make existing objectives in Land Use Plans and Land and Resource Management Plans legally enforceable under *FRPA* as they previously were under the old *Forest Practices Code*. These objectives were developed with broad stakeholder engagement and local stakeholder's input should be respected.
2. Re-engage local stakeholders in local forest land planning processes. Plans are 'living' documents that should be modified to respond to changed circumstances (e.g., MPB). Incorporate cross-sectoral strategies to better ensure that *all* forest values are respected and interests are best met.
3. Protect fibre and non-fibre forest values to ensure availability of a wide range of economic opportunities. Communities with a range of diverse economic opportunities are healthier and more resilient.
4. Manage the critical adventure tourism/forestry interface in those parts of BC's forests used for both forestry and tourism. Facilitate the development of agreements between the adventure tourism and forestry tenure holders that use key elements of Ontario's Resource Stewardship Agreements and which provide for the development of a voluntarily negotiated regional strategic development plan inclusive of a wide range of values from both industries as well as First Nations with Aboriginal rights and land claims. Ensure that First Nations are also involved in the negotiation processes. While there is a legal duty to consult and accommodate on the part of the Crown, it is important to recognize that the inclusion of First Nations at all levels of planning and negotiation is key to success in any industry operating on Crown land.
5. Require Licensees to engage in a forest planning process that provides detailed operational plans (e.g., site plans, road plans) and undertakes "effective consultation" processes in order to protect a wider range of opportunities and reduce conflicts.

These suggestions to reform the current levels of "effective consultation" between tenure holders are provided with the hope that they might facilitate better neighbourly relationships and allow both industries to prosper and flourish on BC's Crown lands. In those situations where "effective consultation" does not work, the author also suggests that:

6. A better dispute resolution system should be established to deal with those conflicts. This could be achieved by developing local resolution boards to investigate, report, and recommend specific remedies.
7. The Forest Practices Board, or a re-mandated version of the Board that includes jurisdiction reaching beyond forest practices and including other industries situated within the forest (such as adventure tourism), be provided with more powers to:

123 See MFLNRO, "FRPA Bulletin", *supra* note 41.

- a. Facilitate negotiations between Licensees and adventure tourism operators where agreements are being developed (similar to Ontario's RSAs); and
- b. Investigate, intervene, and provide remedies when stakeholder disputes cannot be resolved at the local level. The Board has a clear understanding of the issues but has thus far not been able to provide much in the way of substantial remedies to the parties before them.

The long-held focus on the extractive resource industries, particularly the forestry industry, has given rise to a traditional mindset that has made it difficult for the province to seize and protect newer, emerging opportunities on BC's forested Crown lands. The BC government needs to challenge and reconsider the historical and current focus on the forestry industry as the province's primary economic driver. A new, more current approach that addresses the myriad of issues on Crown land in BC could benefit industry, government, and First Nations. This change would encourage a policy and legislative framework that supports a broader range of compatible and beneficial relationships among tenure holders on Crown land, but only if Aboriginal land claims are effectively considered and addressed. Such a framework at the strategic level would encourage substantive changes at the operational levels of government and forest-based industries.

These suggestions are provided in the hope that BC can more effectively navigate future economic challenges and benefit fully from the province's forest resources on Crown land.

ARTICLE

THE PRIVATIZATION OF JUSTICE IN QUÉBEC'S DRAFT BILL TO ENACT THE NEW CODE OF CIVIL PROCEDURE: A CRITICAL EVALUATION

By P Scott Horne*

CITED: (2013) 18 Appeal 55-80

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[I]l est quelquefois nécessaire de changer certaines loix ; mais le cas est rare, & lorsqu'il arrive, il n'y faut toucher que d'une main tremblante.
—Montesquieu¹

INTRODUCTION

Access to justice poses a difficult challenge to society as well as an ethical problem for the legal profession. High costs, long delays, and unequal representation deter many people from having recourse to the courts. The Right Honourable Beverley McLachlin, PC, recently drew attention to the question of access to justice, “an issue dear to [her] heart.”² While laying the responsibility for ensuring this “fundamental right”³ on the shoulders of lawyers, whose monopoly over legal services entails a duty “to provide [them] for everybody,”⁴ she also called upon the legislature and the judiciary to make court procedures simpler, more accessible, and more efficient.⁵

With the cost of even a two-day civil trial running well into five figures,⁶ litigation has become unaffordable to most people. Skyrocketing costs have contributed greatly to the decline in litigation: the number of lawsuits initiated in Québec declined by 55 percent between 1977 and 2007 even though Québec’s population during that period increased by 19.6 percent.⁷ Yet while lawsuits decline in number, they increase in length.⁸ More and more, civil litigation is becoming the province of governments and corporations.⁹

Most litigants, be they plaintiffs or defendants, must pay their own expenses. Owing to the high cost of counsel, many people choose to represent themselves in court or

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1 “Sometimes it is necessary to modify certain laws; but such cases are rare, and when they occur, they must be addressed with a trembling hand.” De Montesquieu, *Lettres persanes*, t 2 (Cologne: no publisher, 1755) at 19 [translated by author].

2 Lucianna Ciccocioppo, “There is no justice without access to justice: Chief Justice Beverley McLachlin” (14 February 2011), online: University of Toronto Faculty of Law <<http://www.law.utoronto.ca/news/there-no-justice-without-access-justice-chief-justice-beverley-mclachlin>>.

3 *Ibid.*

4 Kirk Makin, “And Justice for All, If You Can Afford It,” *The Globe and Mail* (11 February 2011) A4.

5 Ciccocioppo, *supra* note 2.

6 See Robert Todd, “The Going Rate,” *Canadian Lawyer* (June 2011) 32, online: Canadian Lawyer <<http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2011/legalfeessurvey.pdf>> (Canadian survey for 2011 found that the average fees for counsel in a two-day civil lawsuit were \$24,318 and that the average hourly rate for a lawyer of ten years’ standing was \$326 at 34, 37).

7 See Me Hubert Reid, “Rapport d’évaluation de la loi portant réforme de la *Code de procédure civile*” (31 January 2008), online: Wilson & Lafleur Ltée <<http://www.wilsonlafleur.com/wilsonlafleur/wl-images/cat/Memoire.pdf>>.

8 See e.g. “Ministry of Attorney General Green Paper: The Foundations of Civil Justice Reform” (2005) 63:2 *The Advocate* (Law Society of British Columbia) 221 at 222; Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1:3 *J Empirical Legal Stud* 459 at 477-78.

9 See e.g. Gillian K Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System” (2000) 98:4 *Mich L Rev* 953 at 962; Galanter, *supra* note 8 at 517.

abandon viable claims. Legal aid is available to few; the threshold of eligibility for a single person with multiple children falls below the income of a full-time worker at the minimum wage.¹⁰ *Pro bono* services cannot possibly meet demand. Legal insurance, which is more common in Québec than in the rest of Canada, covers only a small part of the cost of litigation.¹¹ Even prevailing in court may be a Pyrrhic victory if enforcing the judgment proves to be difficult or impossible.¹² For these reasons, many litigants are reluctant to take the great financial risk of suing.

Besides being too expensive, adjudication is perceived as taking too much time. Delays of a year and a half or more are usual in small-claims court and some administrative tribunals, such as the Régie du logement (which hears disputes over residential leases),¹³ the Court of Québec and the Superior Court can take even longer. By the time a dispute proceeds to a hearing, the lawyers will likely have forgotten the details and will have to spend more time reviewing the file.¹⁴ This requirement to “hurry up and wait” not only delays resolution of the dispute but also costs the litigants more money and increases the risk that crucial witnesses or evidence will no longer be available at trial.

Access to justice is a quasi-constitutional right in Québec, whose *Charter of Human Rights and Freedoms* guarantees “a full and equal, public and fair hearing by an independent and impartial tribunal.”¹⁵ Yet the formidable practical obstacles of time, expense, and representation stand in the way of securing this right for all.

In response to the growing concerns about access to justice, Québec’s Ministry of Justice has prepared its *Draft Bill to Enact the New Code of Civil Procedure* (“Draft Bill”),¹⁶ which is “intended to modernize and simplify procedure, and also to promote amicable dispute resolution methods and collaboration between the parties.”¹⁷ The proposed code “is designed to enable, in the public interest, the resolution of interpersonal, collective or societal disputes through appropriate, efficient and fair-minded processes of civil justice that encourage the parties to participate in preventing and resolving disputes.”¹⁸ It “is also intended to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules, the

10 See *Regulation Respecting Legal Aid*, RRQ, c A-14, r 2, s 18(1) (threshold of eligibility for a single adult with two or more children is \$17,727); *Regulation Respecting Labour Standards*, RRQ, c N-1.1, r 3, s 3 (minimum wage for most workers is \$9.90 per hour, which comes to approximately \$20,000 per year for full-time employment at forty hours per week).

11 A typical policy pays no more than \$5,000 per lawsuit, with maximum coverage of \$15,000 per year. See Barreau du Québec, “Assurance juridique,” online: Barreau du Québec <<http://www.barreau.qc.ca/public/acces-justice/assurance-juridique/index.html>>.

12 See e.g. 2332-4197 Québec inc c Galipeau, 2011 QCSC 2332, JE 2011-1094 [Galipeau] (judgment for damages, including punitive damages, and costs against wound-up corporation would evidently prove to be dry at para 108).

13 See e.g. Louise Plante, “La Régie du lancement!,” *Le Nouvelliste* (10 February 2010) online: La Presse <<http://www.lapresse.ca/le-nouvelliste/actualites/201002/10/01-948118-la-regie-du-lancement.php>>. At the time of this writing, the office of the Régie du logement at Montréal–Village olympique announced delays of eighteen months or more for a hearing—except in cases of alleged non-payment of rent, which are heard in about six weeks (personal communication).

14 Proceedings ordinarily must be inscribed within 180 days of service of the initiating motion, or 1 year in the case of family matters (art 110.1, para 1 CCP). The action, however, may not proceed to a hearing for 2 years or more.

15 RSQ c C-12, s 23, para 1 [Québec Charter].

16 2nd Sess, 39th Leg, Quebec, 2011 [Draft Bill]. (French title: *Avant-projet de loi instituant le nouveau Code de procédure civile.*)

17 Justice Québec, “New Code of Civil Procedure: Quicker, Cheaper Access to Justice” (Québec: Gouvernement du Québec, September 2011) at 2, online: <<http://www.justice.gouv.qc.ca/english/themes/cpc/pdf/ncpc-en.pdf>>.

18 *Draft Bill*, *supra* note 16, Preliminary Procedure, para 2.

exercise of the parties' rights in a spirit of cooperation and balance, and respect for all participants in the justice system."¹⁹ To these ends, the *Draft Bill* proposes a number of changes: promotion of alternative dispute resolution, greater curial responsibility for case management, expanded jurisdiction for the Small Claims Division, restrictions on pre-trial examinations and expert evidence, oral rather than written argument in simple proceedings, abolition of cost shifting, and simpler language for greater accessibility to the lay reader.

The *Draft Bill* has attracted much criticism within the legal profession: for instance, the Barreau du Québec,²⁰ the Canadian Bar Association,²¹ the Institut de médiation et d'arbitrage du Québec,²² and the Association du jeune Barreau de Montréal²³ have all published detailed responses, some running to hundreds of pages. Many of the criticisms strike at the very core provisions of the proposed changes and warn of adverse consequences for the administration of justice in Québec.

This article shall examine the shift towards "[p]rivate civil justice"²⁴ under the *Draft Bill* and its implications for access to justice in Québec. The analysis will focus on two key elements of the proposal: the reallocation of the costs of litigation and the promotion of alternative dispute resolution. A few of the proposed changes would improve access to justice by reducing costs, streamlining procedure, fostering conciliation, and possibly accelerating dispute resolution. Other changes, however, would impede access to justice by increasing costs, encouraging unnecessary lawsuits, facilitating abuse of process, exacerbating imbalances of power, removing curial oversight, or hindering the development of the law. Some provisions that are positive in the main would introduce problems that the authors of the *Draft Bill* appear not to have anticipated. Consequently, the *Draft Bill* will require extensive revision in order to achieve its stated goals.

I. COSTS AND FEES OF LITIGATION

A. Current Allocation in Québec

The general rule for an action in Québec is that "[t]he losing party must pay all costs,"²⁵ in the absence of a specific decision to the contrary. Thus Québec observes the rule of "loser pays" (*le principe de la sucombcance*) that prevails in most jurisdictions around the world.

19 *Ibid*, Preliminary Procedure, para 3.

20 Barreau du Québec, "Mémoire du Barreau du Québec sur l'avant-projet de loi instituant le nouveau Code de procédure civile" (Legislative Comment presented to the Committee on Institutions, National Assembly of Québec, 19 December 2011), online: <<http://www.barreau.qc.ca/pdf/medias/positions/2012/20120202-memoire-code-procedure-civile.pdf>> ("Mémoire du Barreau").

21 Canadian Bar Association, "Mémoire relatif à l'Avant-projet de loi instituant le nouveau Code de procédure civile" (Legislative Comment presented to the Committee on Institutions, National Assembly of Québec, 16 December 2011), online: <http://www.cba.org/quebec/docpdf/pdf/ABCQuebec_MAPl_CPC.pdf>.

22 Institut de médiation et d'arbitrage du Québec, "Mémoire de l'Institut de médiation et d'arbitrage du Québec sur l'Avant-projet de loi instituant le nouveau Code de procédure civile" (Legislative Comment presented to parliamentary committee, 13 December 2011), online: <<http://www.imaq.org/wp-content/uploads/2012/01/MEMOIRE.pdf>>.

23 Association du jeune Barreau de Montréal, "Mémoire de l'Association du jeune Barreau de Montréal sur l'Avant-projet de loi instituant le nouveau Code de procédure civile" (Legislative Comment presented to the Committee on Institutions, National Assembly of Québec, 16 December 2011), online: <http://www.ajbm.qc.ca/documents/file/memoires/memoire-ajbm-avant-projet-de-loi-instituant-le-c_p_c_-dec_-2011.pdf>.

24 *Draft Bill*, *supra* note 16, art 1.

25 Art 477 CCP.

Costs, however, are defined by “the tariffs in force.”²⁶ The disbursements listed in the *Tariff of Court Costs in Civil Matters and Court Office Fees*²⁷ can be recovered in full: they cover such matters as filing suits, photocopying documents, and executing judgments. Of lawyers’ fees, however, generally only the portion characterized as judicial fees (*honoraires judiciaires*) can be awarded. Judicial fees are limited to the amounts in the *Tariff of Judicial Fees of Advocates*,²⁸ which was last updated in 1976.²⁹ Currently the highest amount that can be awarded is \$1,000 for a civil case worth \$50,000 or more that is carried through a full trial at first instance.³⁰ Smaller amounts are available for marital disputes; slightly higher ones are available for appeals. Judicial fees are in any event limited to the amount of the judgment.³¹

When the value of the dispute exceeds \$100,000, an additional fee of one percent of the excess over \$100,000 is also awarded,³² irrespective of the winning party’s actual legal costs. However high this additional fee may be, the winner is entitled to it unless the court specifically denies it as a matter of discretion.³³

The *Tariff of Judicial Fees* also gives the court discretion to “grant a special fee [...] in an important case.”³⁴ Very few cases—those of great public significance that call for an uncommonly large commitment of legal resources—qualify as “important” according to the twenty-three “[f]acteurs objectifs et critères d’appréciation de l’importance d’une cause”³⁵ enumerated in *Banque canadienne impériale de commerce v Aztec Iron Corp*,³⁶ which the courts have consistently upheld.³⁷ In addition, the courts of Québec have the power to make a discretionary award of costs in the interest of justice, notably to address abuse of process.³⁸

A non-resident plaintiff must post security for costs in an amount determined by the court.³⁹ This provision serves to ensure that a successful defendant will collect an award of costs, which might otherwise be infeasible against a non-resident judgment-debtor, especially one with no assets or income subject to seizure within the court’s jurisdiction.

The remaining portion of lawyers’ fees, known as extrajudicial fees (*honoraires extrajudiciaires*), ordinarily is not granted in an award of costs. Exceptionally, extrajudicial

26 Art 480 CCP. Note that an award of costs bears interest, which begins to accrue on the date of the order (art 481 CCP).

27 RRQ, c T-16, r 9 [*Tariff of Court Costs*].

28 RRQ, c B-1, r 22 [*Tariff of Judicial Fees*].

29 See Comité de révision de la procédure civile, *Une nouvelle culture judiciaire* (Québec: Ministère de la Justice, 2001) at 13, online: <<http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crpc-rap2.pdf>>.

30 *Supra* note 28, s 25.

31 Art 477, para 3 CCP; *Tariff of Judicial Fees*, *supra* note 28, s 18.

32 *Tariff of Judicial Fees*, *supra* note 28, s 42.

33 *Industries Leader inc v Canadian Pension Equity Corp*, JE 96-1740, 1996 CarswellQue 1564 (WL Can) at para 27 (Qc Sup Ct) [*Industries Leader*].

34 *Tariff of Judicial Fees*, *supra* note 28, s 15.

35 “Objective factors and criteria for assessing the importance of a case” [translated by author].

36 [1978] CS 266 at 284, JE 78-94 (Qc).

37 See e.g. *Widdrington Estate v Wightman*, 2011 QCCS 1788 at para 3636, 83 CCLT (3d) 1; *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47 at para 48, [2009] 3 SCR 208; *JTL MacDonald Corp c Canada (PG)*, 2009 QCCA 110 at para 60, [2009] RJQ 261.

38 Art 46 CCP.

39 Arts 65, 152-53 CCP. Under a provincial agreement with France, however, plaintiffs of French nationality are exempt from security. See *An Act to Secure the Carrying Out of the Entente between France and Québec Respecting Mutual Aid in Judicial Matters*, RSQ c A-20.1, s IV.3.

fees are granted by statute in disputes over obligations of support,⁴⁰ certain appeals pertaining to provincial taxes,⁴¹ and a few other matters. They may also be awarded in response to an “improper” use of procedure: the court enjoys the discretion to award “damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party, and, if justified by the circumstances, [...] punitive damages.”⁴² The standard for impropriety, however, is high. According to *Viel c Entreprises immobilières du terroir ltée*, the leading case on this issue, extrajudicial fees can be awarded for abuse of the right to sue (*l'abus du droit d'ester en justice*) but generally not for the abusive acts that form the subject of the lawsuit (*l'abus sur le fond du litige*).⁴³ Abuse of the right to sue is characterized by bad faith; examples include vexatious behaviour, dilatory actions, and plainly groundless claims.⁴⁴ Lengthy examinations and pleadings at trial are not of themselves abusive,⁴⁵ nor is the initiation of proceedings that have a poor chance of success.⁴⁶ Even negligence or breach of undertakings by a party’s lawyers does not by itself engage the additional liability for improper proceedings, despite the harm to the opposing side.⁴⁷

B. Proposal in *Draft Bill*

The *Draft Bill* would generally eliminate awards for costs: it provides that “[l]egal costs are borne by the parties, each paying its own.”⁴⁸ “Legal costs” include court costs, costs for service of documents, the cost of transcription, and fees payable to witnesses, experts, and interpreters.⁴⁹ Each party would also be responsible for its own lawyers’ fees; the judicial fees that can be awarded under the tariff pursuant to the current *Code* do not exist in the *Draft Bill*.

Legal costs could be awarded against a party only for such uncooperative or obstructive behaviour as abuses of procedure, violations of the principle of proportionality, breaches of undertakings, rejections of genuine offers in settlement,⁵⁰ failure of a defendant to answer a summons,⁵¹ violations of the case protocol,⁵² and excessive or unnecessary examinations.⁵³ In addition, a plaintiff could be ordered to pay costs for suing in a court that lacked subject-matter jurisdiction.⁵⁴ Even though lawyers’ fees are not included in the definition of legal costs, the court could also award, “as legal costs, an amount that it

40 Art 588, para 2 CCQ; *Rules of Practice of the Superior Court of Québec in Family Matters*, RRQ, c C-25, r 13, s 20; D (S) c G (Sy), EYB 2005-94517, 2005 CanLII 31528 (Qc Sup Ct) (provision for costs includes extrajudicial fees at paras 141-45).

41 *Tax Administration Act*, RSQ c A-6.002, s 93.1.23, para 3.

42 Art 54.4, para 1 CCP.

43 [2002] RJQ 1262 at para 83, [2002] RDI 241 (CA) [*Viel*]. *Contra Société Radio-Canada c Gilles E Néron Communication Marketing Inc*, [2002] RJQ 2639, [2002] RRA 1130 (CA), Otis JA [*Néron*] (deliberately destroying a person’s reputation, thereby forcing him to sue, constitutes an abuse of rights under art 7 CCQ and justifies an award of extrajudicial fees at paras 360-63), aff’d on other grounds 2004 SCC 53, [2004] 3 SCR 95; *Coopérative d’habitation Jeanne-Mance c Choueke*, [2001] RJQ 1441, [2001] RRA 629 (CA) [*Choueke*] (to compel someone to incur hefty legal bills in order to defend his interests would be to deny him access to justice at para 106).

44 See *Viel*, *supra* note 43 at para 75.

45 See *Royal Lepage Commercial inc c 109650 Canada Ltd*, 2007 QCCA 915 at paras 57-59, JE 2007-1325.

46 *Simard Vincent c Conseil de la nation huronne-wendat*, 2010 QCCA 178 at para 63, [2010] RDI 283.

47 *Cosoltec inc c Structure Laferté inc*, 2010 QCCA 1600 at para 69, JE 2010-1659.

48 *Draft Bill*, *supra* note 16, art 337.

49 *Ibid*, art 336, para 1.

50 *Ibid*, arts 338-39. See also *ibid*, arts 51-56.

51 *Ibid*, art 141, para 2.

52 *Ibid*, art 146.

53 *Ibid*, art 224.

54 *Ibid*, art 162, para 2.

considers fair and reasonable to cover the professional fee of the other party's lawyer or, if the other party is not represented by a lawyer, to compensate the other party for the time spent on the case and the work involved.⁵⁵ Appeals from judgments pertaining to legal costs would be allowed only by leave,⁵⁶ which could be granted only for such reasons as "a question of principle, a new issue or a question of law that has given rise to conflicting judicial decisions."⁵⁷ A plaintiff not resident or domiciled in Québec could be required to post security for costs,⁵⁸ except in family proceedings.⁵⁹

C. Comparison to Other Jurisdictions

i. The Rest of Canada

Currently, Québec differs sharply from the rest of Canada in allocating the costs of litigation. The common law provinces and territories observe the rule that the losing party must pay the winning party's costs ("costs follow the event").⁶⁰ Although no such right exists at common law,⁶¹ the thirteenth-century *Statute of Gloucester*⁶² established awards of court costs. Subsequent statutes in many jurisdictions have provided for awards of lawyers' fees as well.⁶³

In Canada's common law jurisdictions, the winning party's reasonably necessary court costs are ordinarily awarded in full. Lawyers' fees, however, are awarded according to three scales. The usual award is a partial indemnity,⁶⁴ on the so-called 'party-and-party' basis; typically it represents about half of the lawyers' bill.⁶⁵ The amount is usually determined by the taxing officer, but sometimes the judge will state a percentage in the order for costs. In order to punish "reprehensible, scandalous or outrageous conduct"⁶⁶ and compensate for some of the unnecessary expenses that the opposing party has incurred as a consequence thereof, a court may award lawyers' fees on the higher 'solicitor-and-

55 *Ibid*, art 339.

56 *Ibid*, art 30(3).

57 *Ibid*, art 30 *in fine*.

58 *Ibid*, art 491, para 1.

59 *Ibid*, art 492, para 1.

60 See e.g. *R v Justices of Surrey* (1846), 9 QB 37 at 39, 115 ER 1189.

61 See 2 Coke's Inst 288. Coke explained that before the *Statute of Gloucester* (*infra* note 62), "at the common law no man recovered any costs of suit either in plea real, personal, or mixt: by this it may be collected that justice was good cheap of auncient times, for in king Alfreðs time there were no writs of grace, but all writs remedials were graunted freely, and Fleta saith, [lest the clerks demand excessive fees for drafting, it was established that the clerks of the justiciar and the chancellor alike must be satisfied with a single penny for writing one writ]. This statute was the first that gave costs" [translated by author].

62 1278 (Eng), 6 Edw I, c 1 ("[w]hereas formerly damages were not assessed, except those for the value of the fruits of the land, it is hereby provided that the plaintiff can recover from the defendant the costs of the purchased writ, together with the aforementioned damages" [translated by author]). Subsequent statutes expanded court costs and extended the right of recovery to defendants. See e.g. *An Act to Give Costs to the Defendant upon a Nonsuit of the Plaintiff, or a Verdict against Him*, 1606 (Eng), 4 Jac I, c 3.

63 See Parts I.c.i-ii, below, for examples.

64 In British Columbia, the partial indemnity is known as "ordinary costs." See Erik Knutsen, "Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36:1 Queen's LJ 113 at 122, n 30.

65 See e.g. *Riddell v Conservative Party of Canada*, 2007 CarswellOnt 4202 (WL Can) (Ont Sup Ct J) (stating as a "rule of thumb" that "[f]ull indemnity represents 100% of the claim, partial indemnity represents 60% of the claim, and substantial indemnity (one and one-half times the partial indemnity scale) represents 90% of the claim" at para 38).

66 *Young v Young*, [1993] 4 SCR 3 at 134, 108 DLR (4th) 193.

client' basis, known as substantial indemnity.⁶⁷ In Ontario, the substantial indemnity is half again as much as the partial indemnity.⁶⁸ Exceptionally, a court may even award a full indemnity, on the 'solicitor-and-own-client' basis, representing one hundred percent of lawyers' fees.⁶⁹ Although one court has contemplated an indemnity "in excess of 100% of [...] actual costs,"⁷⁰ an award generally may not exceed actual costs billed and paid.⁷¹

Some Canadian jurisdictions use awards of costs to encourage the parties to settle as soon as possible, thereby avoiding unnecessary litigation. Ontario, for instance, imposes a financial penalty for refusing an offer in settlement that proves to be no less favourable than the judgment obtained: if the offer was made at least seven days before the start of the hearing, the offering party receives costs from that date forward.⁷² British Columbia has a similar provision that benefits only the defendant.⁷³ In Nova Scotia, rejection of an offer in settlement is a factor taken into account during taxation.⁷⁴ These provisions create a beneficial incentive both to make and to consider serious offers at an early point in the proceedings.⁷⁵

ii. Other Common Law Jurisdictions

Like their Canadian counterparts, most of the world's other common law jurisdictions observe the rule that "costs follow the event." In England and Wales, this rule originated at common law but continues today in statute.⁷⁶ Australia employs this rule for civil disputes but leaves each party to bear its own costs (as in the *Draft Bill*) in family proceedings.⁷⁷ In New Zealand, the loser pays costs, including lawyers' fees generally assessed at roughly two-thirds of a reasonable rate for counsel.⁷⁸ In India, costs follow the event unless the court directs otherwise, with reasons.⁷⁹ Costs in Belize include necessary lawyers' fees in a "reasonable" amount, subject to the courts' discretion to award only a

⁶⁷ In British Columbia, the substantial indemnity is known as "special costs." See Knutsen, *supra* note 64 at 122, n 31.

⁶⁸ *Rules of Civil Procedure*, RRO 1990, Reg 194, s 1.03(1).

⁶⁹ See e.g. *Mintz v Mintz* (1984), 46 CPC 234, 1984 CarswellOnt 471 (WL Can) (Ont SC); *Re Seitz* (1974), 6 OR (2d) 460, 53 DLR (3d) 223 (Ont H Ct J).

⁷⁰ *Foundation Co of Canada Ltd v United Grain Growers Ltd* (1996), 8 CPC (4th) 354 at para 29, 25 CLR (2d) 1 (BCSC).

⁷¹ See *Stellarbridge Management Inc v Magna International (Canada) Inc* (2004), 187 OAC 78 at para 97, 71 OR (3d) 263.

⁷² *Rules of Civil Procedure*, *supra* note 68, s 49.10(1-2). For a rejected offer, the plaintiff receives costs at a substantial indemnity; the defendant, at a partial indemnity. Oddly enough, s 49.10(2) appears not to provide for the eventuality of a "defendant" winning a judgment despite having offered to settle; however, a court could exercise its discretion to award the defendant costs at a partial or greater indemnity.

⁷³ *Supreme Court Civil Rules*, BC Reg 168/2009, s 9-1(5)(d).

⁷⁴ *Nova Scotia Civil Procedure Rules*, s 10.03.

⁷⁵ The *Draft Bill* includes a much weaker provision, which allows the court to order legal costs "if a party [...] refused, without valid cause, to accept genuine offers" (*supra* note 16, art 338, para 2). The order would be discretionary rather than obligatory and would invite a subjective defence of "valid cause."

⁷⁶ *The Civil Procedure Rules 1998*, SI 1998/3132, ss 43-48. Note that these rules also apply in Gibraltar. The Isle of Man, however, now has its own civil procedure, with rules on costs that are largely copied from the English rules: see generally *Rules of the High Court of Justice 2009* (Isle of Man), s 11.1. Guernsey and Jersey also each have distinct rules of civil procedure that are derived from the English ones.

⁷⁷ Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation* (Canberra: Commonwealth of Australia, 1995), online: Australian Law Reform Commission <<http://www.austlii.edu.au/au/other/alrc/publications/reports/75/ALRC75.pdf>> at Overview.

⁷⁸ *High Court Rules*, s 14.2, being Schedule 2 of the *Judicature Act 1908* (NZ), 1908/89.

⁷⁹ *Civil Procedure Code 1908* (India), s 35(1-2).

portion of costs.⁸⁰ While these practices vary in their details, they all generally require the losing party to pay costs, including lawyers' fees, in whole or in large part.

In the United States, both the federal government and most states observe the "American rule," according to which the losing party pays for court costs but each party pays for its own lawyers.⁸¹ China,⁸² Japan,⁸³ and the Philippines⁸⁴ also observe the American rule, although their legal systems are based on civil law. The few strongholds of the American rule, however, have been moving away from it. Various state and federal statutes in the United States now provide for cost shifting, usually to punish and deter abuse of process but sometimes to support suits brought in the public interest or even to correct a financial imbalance between the parties.⁸⁵ In conjunction with a draft bill to revise China's civil procedure, China's national association of lawyers recently submitted to the National People's Congress a set of recommendations under which the lawyer's fees would be borne by the losing party.⁸⁶ Thus the American rule is gradually yielding to the international practice of shifting costs.

iii. Other Civil Law Jurisdictions

In the civil law tradition, the rule of "loser pays" has a continuous history of more than one and a half millennia. The Byzantine emperor Zeno first proclaimed, in 487, that a judgment had to include the costs of litigation.⁸⁷ The Justinian Code famously expresses this rule as "*in expensarum causa victum victori esse condemnandum*";⁸⁸ the losing party shall be ordered to pay to the winning party the costs of the action.

Today, most civil law jurisdictions other than Québec award the victor full indemnity for costs, including lawyers' fees.⁸⁹ Some jurisdictions, however, cap the amount that can be awarded for lawyers' fees: in Spain, this limit is one-third of the value of the lawsuit.⁹⁰ Some jurisdictions award court costs in full but apply a tariff to lawyers' fees.

80 Civil Procedure Rules 2005 (Belize), ss 63.2(1), 63.6, 64.2(1)(a).

81 Alaska is the notable exception: it has long shifted a portion of attorneys' fees to the losing party. See *Alaska Rules of Civil Procedure*, Rule 82.

82 Except in Macau, which uses civil law because of the Portuguese colonial legacy. See Art 376 Código de processo civil.

83 Art 61 Minzi Sosyou Hou [Code of Civil Procedure] (loser pays court costs; no provision for shifting lawyers' fees).

84 Arts 142.1, 142.6 Rules of Court.

85 See e.g. Issachar Rosen-Zvi, "Just Fee Shifting" (2010) 37:3 Fla St UL Rev 717 at 731-32; Jonathan Fischbach & Michael Fischbach, "Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting" (2005) 19:2 BYUJ Pub L 317 at 332-35; John F Vargo, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice" (1993) 42:4 Am U L Rev 1567 at 1587-90; "State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?" (1984) 47:1 Law & Contemp Probs 321 at 327-28.

86 Rújūn Wēn, "Lùshī fèiyòng yóu bàisù dāngshírén chéngdān" [Let the Losing Party Bear the Lawyers' Fees], *Fǎzhi Wǎnbào* [Legal Evening News] (28 November 2011), online: *Fǎzhi Wǎnbào* <<http://www.fawan.com/Article/bs/ss/2011/11/28/145252137892.html>>.

87 Cod 7.51.5. Costs could include a ten-percent surcharge, payable to the state, to punish truculence. A judge who neglected to award costs was personally liable for them (Cod 7.51.5.2).

88 Cod 3.1.13.6 [translated by author].

89 Examples: ARGENTINA: Art 68 Código procesal civil y comercial de la nación. BRAZIL: Art 20 Código de proceso civil. BULGARIA: Art 78 Grazhdanski procesualen kodeks. FINLAND: C 21, ss 1, 8(1) Oikeudenkäymiskaari. FRANCE: Art 696 NC proc civ. GERMANY: § 91(1-2) Zivilprozeßordnung. ICELAND: Art 130 Lög um meðferð einkamála. ITALY: Art 91 Codice di procedura civile. MACAU: Art 376 Código de processo civil. MOROCCO: Art 124 Code de procédure civile. PORTUGAL: Arts 446(1), 447D(2) (d) Código de processo civil. RUSSIA: Art 100(1) Grazhdanskij Processual'nyj Kodeks (for non-commercial disputes); Art 110(2) Arbitrazhnyj Processual'nyj Kodeks (for commercial disputes).

90 Art 394(3) Ley de enjuiciamiento civil.

In Germany, for example, lawyers' fees are set by statute.⁹¹ Although a German lawyer may negotiate higher fees with the client,⁹² the amount that can be granted for the costs of litigation is limited to the "necessary" (*notwendig*) amounts—i.e., the rates given in the tariff.⁹³ The civil codes of Austria⁹⁴ and Chile⁹⁵ similarly limit the recovery of lawyers' fees to the rates in a tariff set by the professional order of lawyers. Unlike the rates in Québec's *Tariff of Judicial Fees*, however, these statutory rates are realistic amounts in line with the market for legal services; for example, they serve as the basis for the payment of court-appointed lawyers.

iv. Comparison to Québec

In allocating the costs of litigation, Québec differs markedly from the rest of Canada and even from most other civil law and common law jurisdictions. It is perhaps most similar to the jurisdictions that follow the American rule, since the "derisory fees"⁹⁶ available in the *Tariff of Judicial Fees* are little better than no award for lawyers' fees at all.

The allocation of costs proposed in the *Draft Bill* appears to lack parallels anywhere in the world. Almost all other jurisdictions award at least court costs to the successful party; most award all or part of lawyers' fees as well. By leaving costs to fall where they may, the scheme of the *Draft Bill* goes even further than the American rule, which is being tempered or abandoned by the few jurisdictions that still observe it. Thus Québec's proposed move to a régime in which costs are shifted only exceptionally, at the court's discretion, goes against the global trend towards substantial awards of costs.

D. Advantages and Disadvantages of the *Draft Bill's* Proposal

The *Draft Bill* would improve predictability and access to justice by eliminating the litigant's risk of liability for the opposing party's legal fees, which typically are difficult to assess in advance. Under the proposed regime, litigants could manage their own costs, and make decisions accordingly, without the risk of an adverse judgment in an amount that is indeterminate at the outset. In particular, self-represented litigants could effectively estimate and control their expenses. These considerations are especially important for public-interest litigation, which often seeks injunctive relief rather than a monetary remedy. Few people are so civic-minded as to accept a substantial risk of financial ruin solely for the benefit of the public. The removal of awards for costs could thus greatly expand the scope of public-interest litigation, an important vehicle for progressive social change.

In addition, the elimination of cost shifting would offer administrative advantages. Freed of the burden of awarding costs, taxing bills, adjudicating disputes over the allocation of costs, assessing interest, and enforcing orders for costs, the courts could devote more resources to their case load and other responsibilities. The amounts currently provided in the *Tariff of Court Costs* may indeed be too small to warrant the administrative overhead that they entail.

On the other hand, the *Draft Bill's* proposal would have the unsavoury consequence

⁹¹ § 2(2) Rechtsanwaltsvergütungsgesetz; Anlage 1 Rechtsanwaltsvergütungsgesetz.

⁹² § 2(1), 3a(1) Rechtsanwaltsvergütungsgesetz.

⁹³ § 91(1) Zivilprozeßordnung (Germany).

⁹⁴ § 41(2) Zivilprozeßordnung (Austria).

⁹⁵ Arts 138-40 Código de procedimiento civil.

⁹⁶ Jean-Louis Baudouin & Patrice Deslauriers, *La Responsabilité civile*, vol 1, 7th ed (Cowansville, Que: Yvon Blais, 2007) at 345 [translated by author].

of punishing the victor. While denying an award for costs may be appropriate in some cases, it seems fundamentally unfair for a genuinely virtuous party to have to pay quite substantial sums for the privilege of vindicating its position. Costs can run high enough to yield the Dickensian nightmare of a monetary award fully absorbed or even turned into a net loss;⁹⁷ for instance, a victim of defamation in Québec won some \$164,000 in damages but incurred \$540,000 in unrecoverable lawyers' fees.⁹⁸ Although the jurisprudence on this question is inconsistent,⁹⁹ cost shifting is arguably justifiable as a means of making the winning party whole (*restitutio in integrum*),¹⁰⁰ since reasonable costs of litigation can be seen as damages or losses caused by the opposing side.¹⁰¹ Denying awards for these costs would render the pursuit of some well-founded claims impractically expensive.

The proposal would also do little to improve access to justice for a plaintiff who is much weaker than the defendant. By itself, an imbalance of power constitutes a strong deterrent to suing. The amounts awardable for costs under the current tariffs are too small to increase the deterrent effect substantially; only in the very large cases that are subject to the additional one-percent fee would the *Draft Bill* greatly reduce the amount of an adverse judgment for costs. Thus the proposed change would not significantly facilitate the pursuit of a meritorious case against a more powerful opponent.

The change would, however, discourage much meritorious litigation, especially when gains net of expenses would likely be small or negative. Potential plaintiffs might abandon strong claims or accept inadequate settlements; potential defendants might make unnecessary concessions just to avoid irrecoverable expenses. Parties might take the risk of representing themselves in court rather than incurring high costs for counsel. Although large corporations, government entities, and wealthy individuals can often afford the costs of litigation, ordinary people may be disinclined to spend large amounts of money on lawsuits that they cannot be assured of winning. Litigants with greater means and better legal resources would therefore enjoy an unwarranted procedural advantage.

In addition, this change could undermine the *Draft Bill's* objectives by discouraging recourse to private means of dispute resolution. The risk of an adverse award for costs serves as an incentive to try negotiation and other extrajudicial means before resorting to litigation. Rather than fostering access to justice, eliminating this risk could well encourage ill-founded and unnecessary lawsuits, thereby saddling virtuous parties with expenses that they should not have to incur. Thus the proposal sits oddly with the promotion of private civil justice.

Indeed, the abolition of cost shifting could lead to more vexatious litigation and other abuses of process. Although the *Draft Bill* grants the court discretion to award costs in cases of abusive proceedings and other acts or omissions that are unreasonably prejudicial to the opposing party,¹⁰² Québec's courts have rarely made such awards. Mere failure to prove a claim does not justify a discretionary award of costs,¹⁰³ even recourse to repetitive

97 See especially *Jarndyce v Jarndyce* (c 1825), London, UK (Ch), adjourned *sine die* (costs in a twenty-year lawsuit over the validity of a will consumed the entire estate). Unofficially and informally reported in Charles Dickens, *Bleak House* (Oxford: Oxford University Press, 2008). It was the best of times for the lawyers; it was the worst of times for poor Richard Carstone.

98 See *Société Radio-Canada c Guitouni*, 2005 QCCA 155 at para 83, [2002] RJQ 2691.

99 See e.g. Néron, *supra* note 43 at paras 360-63; Choueke, *supra* note 43 at para 106. *Contra Viel*, *supra* note 43 (fees generally available only for abuse of the right to sue at para 83).

100 See e.g. arts 1457, 1607, 1611 CCQ.

101 Baudouin & Deslauriers, *supra* note 96 at 350.

102 *Draft Bill*, *supra* note 16, arts 338-39.

103 See *Harper c Gewurz* (1976), [1976] CA 411 at 412, AZ-76011117 (Azimut) (Qc).

or needlessly costly proceedings may not suffice.¹⁰⁴ Just as self-represented litigants, safe in the knowledge that any order for costs will be dry, take advantage of their judgment-proof status to harass others with vexatious and frivolous litigation,¹⁰⁵ vexatious litigants in general would only be emboldened by the *Draft Bill's* policy.

Similarly, the *Draft Bill's* costs scheme would create an incentive for non-payment of debts. The creditor of an undisputed debt would have to incur substantial costs to obtain a court order for what was uncontroversially due. Unless the amount was large, the creditor might well abandon the claim rather than pursuing it without being able to recover the costs of litigation. The debtor would have little to lose, but much to gain, by exploiting what in this case would amount to a perverse rule of "winner pays." Although the *Draft Bill* provides for a discretionary award of costs for failure to answer a summons,¹⁰⁶ a defendant debtor who appeared and presented a pleading that was not "clearly unfounded" might avoid liability for the creditor's costs.¹⁰⁷

The *Draft Bill* would not greatly change the allocation of costs, since awards of lawyers' fees today are nominal, and court costs are minor in comparison to lawyers' fees. Eliminating the additional one-percent fee for disputes in excess of \$100,000 would make no difference at all in small cases and only a minor difference in any but the largest ones. It is therefore difficult to see how the proposed changes to the allocation of costs would improve access to justice or contribute significantly to the achievement of the *Draft Bill's* other stated objectives. Their adverse consequences would outweigh the meagre benefits.

E. Other Implications for Costs

i. Small Claims

Under the current *Code of Civil Procedure*, claims for \$7,000 or less must be referred to the Small Claims Division.¹⁰⁸ The *Draft Bill* would raise the threshold to \$10,000 immediately,¹⁰⁹ and to \$15,000 three years after the new *Code* came into effect.¹¹⁰ This progressive change would promote access to justice by assigning more disputes to the Small Claims Division, which offers faster and cheaper adjudication. In addition, since litigants in small-claims court cannot be represented by lawyers,¹¹¹ the parties are more evenly situated, and there are no lawyers' fees to allocate. The simplified procedures and the severe limitations on rights of appeal also help to keep costs low.

At \$7,000, Québec's current limit for small claims is lower than that of every other Canadian jurisdiction but the Yukon. Most provinces and territories set the limit at

¹⁰⁴ See e.g. *G (S) c J (D)* (2000), [2000] RL 601 at 613, AZ-00026149 (Azimut) (Qc Sup Ct); *Leblanc c Lavoie*, [1960] BR 153 at 159-60 (WL Can) (Qc).

¹⁰⁵ See e.g. *Galipeau*, *supra* note 12.

¹⁰⁶ *Draft Bill*, *supra* note 16, art 141, para 2.

¹⁰⁷ *Ibid*, art 51.

¹⁰⁸ Art 953 CCP. Note that art 954 CCP makes exceptions for claims pertaining to leases, payment of support, class actions, slander, and recovery of assigned claims.

¹⁰⁹ *Draft Bill*, *supra* note 16, art 799(4).

¹¹⁰ *Ibid*, art 539.

¹¹¹ Art 959 CCP. See also *Draft Bill*, *supra* note 16, art 545, para 1.

or above \$25,000.¹¹² The higher limit of \$15,000 provided in the *Draft Bill*, though still relatively low, would therefore bring Québec closer to those of other Canadian jurisdictions. This expansion of the jurisdiction of the Small Claims Division is long overdue: the ceiling on small claims has not been raised since 1 January 2003. The Barreau du Québec has unreservedly endorsed this proposed change.¹¹³

ii. Restrictions on Pre-Trial Examinations

The *Code of Civil Procedure* allows pre-trial examinations, except in cases worth less than \$25,000.¹¹⁴ The number and duration of these examinations are decided by the parties themselves, or by the court if the parties cannot agree.¹¹⁵ Although there is no prescribed limit on examinations, the principle of proportionality constrains them in both cost and time.¹¹⁶ Upon request, the court may halt an examination that it deems abusive or unnecessary and issue an order for the associated costs.¹¹⁷

The *Draft Bill* would limit the scope of a pre-trial examination to five hours in general, and to only two hours “in family matters or cases where the value in dispute is less than \$100,000”;¹¹⁸ in suits worth less than \$30,000, pre-trial examinations would be barred altogether.¹¹⁹ Only by leave of a judge could these limits be exceeded.¹²⁰ The courts would retain their power to halt unnecessary examinations and issue orders for costs.¹²¹

The proposed restrictions find parallels in other Canadian jurisdictions. British Columbia and Ontario, for example, generally limit oral examinations for discovery to seven hours in all;¹²² Nova Scotia limits them to three hours in an action for less than \$100,000.¹²³ These restrictions are stronger than those of the *Draft Bill*, which would limit the duration of each individual examination, not the total for each side.

These constraints on pre-trial examinations would help both to reduce the costs and delays of litigation and to discourage intrusive, irrelevant inquiries. The Barreau du Québec supports the proposal but would increase the limit from five hours to seven, and from two hours to three for disputes worth less than \$100,000.¹²⁴ Although these details

¹¹² ALBERTA (\$25,000): *Provincial Court Civil Division Regulation*, Alta Reg 329/1989, s 1.1. BRITISH COLUMBIA (\$25,000): BC Reg 179/2005, s 1. MANITOBA (\$10,000): *Court of Queen's Bench Small Claims Practices Act*, CCSM c C285, s 3(1). NEW BRUNSWICK (\$30,000): *Rules of Court*, Reg 1982-73, s 80.02(1). NEWFOUNDLAND AND LABRADOR (\$25,000): NLR 69/04, s 2. NOVA SCOTIA (\$25,000): *Small Claims Court Act*, RSNS 1989, c 430, s 9. NORTHWEST TERRITORIES (\$35,000): *Territorial Court Act*, RSNWT 1988, c T-2, s 16(1). NUNAVUT (\$20,000): *Small Claims Rules of the Nunavut Court of Justice*, Nu Reg 023-2007, s 3.1(2). ONTARIO (\$25'000): *Small Claims Court Jurisdiction*, O Reg 626/00, s 1(1). PRINCE EDWARD ISLAND (\$8,000): *Small Claims Regulations*, PEI Reg EC741-08, s 2. QUÉBEC (\$7,000): Art 953 CCP. SASKATCHEWAN (\$20,000): *Small Claims Regulations*, RRS, c S-50.11, Reg 1, s 3. YUKON (\$5,000): *Small Claims Court Act*, RSY 2002, c 204, s 2(1).

¹¹³ “*Mémoire du Barreau*,” *supra* note 20 at 17.

¹¹⁴ Art 396.1 CCP.

¹¹⁵ Art 396.2 CCP.

¹¹⁶ Art 4.2 CCP.

¹¹⁷ Art 396.4 CCP.

¹¹⁸ *Draft Bill*, *supra* note 16, art 223, para 2.

¹¹⁹ *Ibid*, para 1.

¹²⁰ *Ibid*, para 2.

¹²¹ *Ibid*, art 224.

¹²² BRITISH COLUMBIA: *Supreme Court Civil Rules*, *supra* note 73, s 7-2(2). ONTARIO: *Rules of Civil Procedure*, *supra* note 68, s 31.05.1(1).

¹²³ NOVA SCOTIA: *Civil Procedure Rules*, *supra* note 74, s 57.10.

¹²⁴ “*Mémoire du Barreau*,” *supra* note 20 at 24. The Barreau also objects to the special limit applied to disputes at family law, which sometimes involve large sums of money and may require more extensive examinations.

may be subject to reasonable disagreement, the policy of limiting the duration and scope of pre-trial examinations gives concrete expression to the principle of proportionality and offers a prudent and workable way to improve access to justice. Nevertheless, the text of the *Draft Bill* does not clearly limit the *total* duration, only the duration of each examination. If the legislator's intent is to limit the total, as several other provinces do, the text should so state explicitly.

iii. Case Management

Currently "the parties to a proceeding have control of their case," but "[t]he court sees to the orderly progress of the proceeding and intervenes to ensure proper management of the case."¹²⁵ Special case management is available for family matters and long or complex cases, either at the initiative of the presiding judge or upon request of a party.¹²⁶

The *Draft Bill* would explicitly make it "part of the mission of the courts to ensure proper case management"¹²⁷ and would subordinate the parties' control of their case to this "duty of the courts [...]."¹²⁸ Measures taken for the purpose of case management would not be subject to appeal, except by leave of a judge of the Court of Appeal if they seemed "unreasonable in light of the guiding principles of procedure."¹²⁹ Thus the *Draft Bill* would expand the ambit of case management as well as the courts' role in controlling and reducing the costs and delays of litigation. Rather than interceding only to correct excesses and inefficiencies, the courts would assume primary responsibility for case management, setting the bounds within which the parties would conduct their case. These provisions have the potential to yield economies, and therefore enhance access to justice, if the courts exercise their authority consistently and effectively.

iv. Limits on Expert Evidence

Currently the several parties may decide on the amount of expert evidence that they will adduce. They must state their decision in the case protocol.¹³⁰ The leading of expert evidence remains adversarial, although the court may require the parties' experts to "reconcile their opinions."¹³¹

Under the *Draft Bill*, "[t]he purpose of expert evidence" would be "to enlighten the court and assist it in assessing evidence."¹³² This duty to the court would "override[] the parties' interests."¹³³ The parties would be encouraged to seek joint expert evidence¹³⁴ and would have to justify in the case protocol any decision not to do so.¹³⁵ A judge could order joint expert evidence notwithstanding the parties' decision.¹³⁶ The parties would be limited to "one expert opinion, whether joint or not, per area or matter," unless a court allowed more.¹³⁷

¹²⁵ Art 4.1 CCP.

¹²⁶ Art 151.11 CCP.

¹²⁷ *Supra* note 16, art 9, para 3.

¹²⁸ *Ibid*, art 19, para 1.

¹²⁹ *Ibid*, art 32.

¹³⁰ Art 151.1, para 3 CCP.

¹³¹ Art 413.1 CCP.

¹³² *Draft Bill*, *supra* note 16, art 225, para 1.

¹³³ *Ibid*, art 229.

¹³⁴ *Ibid*, arts 226-27.

¹³⁵ *Ibid*, art 144, para 2.

¹³⁶ *Ibid*, art 155(2).

¹³⁷ *Ibid*, art 226, para 2.

If successful, these limitations would tend to lower costs by reducing the number of experts hired and the amount of time spent obtaining, presenting, and contesting their testimony; they would also foster a spirit of cooperation and collaboration, at least over the factual questions in dispute. They stand in tension, however, with the adversarial nature of court proceedings in Québec. Both current procedure and the *Draft Bill* place the parties in control of the case.¹³⁸ As a result, each party will attempt to lead evidence, including expert evidence, that supports the party's own position. A party would be unlikely to agree to present expert evidence that was not known beforehand to favour that party's side of the dispute; indeed, parties in adversarial disputes sometimes consult numerous experts before selecting one to present in court.¹³⁹ It may therefore be unrealistic to expect joint expert evidence, especially in a case that turns on questions of technical knowledge or opinion. The expectation of joint evidence could also exacerbate an imbalance of power in highly subjective disputes, such as those involving family law.

One option that is more harmonious with the aims of the *Draft Bill* is the use of court-appointed experts. Jurisdictions with an investigative procedure employ them as a matter of course. France, for instance, has a statutory registry of court-recognized experts (*experts judiciaires*), who are called in by the courts as needed.¹⁴⁰ In Germany, "the court takes the initiative in nominating and selecting the expert" unless the parties agree upon a choice.¹⁴¹ Unlike experts chosen by the parties, whose evidence tends to be discounted as presumptively biased in favour of the party that commissioned it, those appointed by the court itself are generally taken to be neutral and trustworthy.¹⁴² Even some adversarial jurisdictions, such as Texas, have experimented profitably with court appointment of experts,¹⁴³ a practice facilitated by case management.¹⁴⁴ Indeed, because court-appointed experts reduce partisan bias and help to achieve more accurate findings of fact,¹⁴⁵ they are likely to be used more and more in North America for such complex fact-specific matters as toxic torts and product liability.¹⁴⁶ This successful approach to obtaining expert evidence dovetails with the *Draft Bill*'s objective of saving money and time for the sake of increased access to justice; it is also more realistic and more practical than requiring the parties to adduce joint expert evidence.

138 Art 4.1, para 1 CCP; *Draft Bill*, *supra* note 16, art 19, para 1.

139 See *Thorn v Worthing Skating Rink* (1877), 6 Ch D 415 at 416, CA (Eng) [*Thorn*]. Jessel MR observed that "[a] man may go, and does sometimes, to half-a-dozen experts. [...] He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, Will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one."

140 *Loi n° 71-498 du 29 juin 1971 relative aux experts judiciaires*, JO, 30 June 1971, 6300.

141 John H Langbein, "The German Advantage in Civil Procedure" (1985) 52:4 U Chicago L Rev 823 at 837.

142 *Ibid* at 836-37.

143 See Anthony Champagne et al, "Are Court-Appointed Experts the Solution to the Problems of Expert Testimony?" (2001) 84:4 *Judicature* 178.

144 Langbein, *supra* note 141 at 841.

145 See "Confronting the New Challenges of Scientific Evidence" (1995) 108:7 Harv L Rev 1481 at 1590.

146 See Karen Butler Reisinger, "Court-Appointed Expert Panels: A Comparison of Two Models" (1998) 32:1 Ind L Rev 225 (the use of court-appointed experts is widely expected to increase at 233-34); Tahirih V Lee, "Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence" (1988) 6:2 Yale L & Pol'y Rev 480 (court-appointed experts show particular advantage in criminal matters, toxic torts, complex litigation, and child placement at 488-92).

v. Focus on Oral Proceedings

The *Draft Bill* would favour oral over written proceedings by requiring oral pleadings “in all instances where the case [did] not present a high level of complexity or it [was] desirable that the case be decided promptly,”¹⁴⁷ unless the parties agreed to use written pleadings.¹⁴⁸ This change would streamline litigation by eliminating the time and expense that the preparation, filing, and service of written pleadings entails. Yet these benefits could come at the unacceptable cost of injustice. Written pleadings set out the arguments to be raised at trial. By contrast, the exclusive use of oral pleadings can facilitate “trial by ambush,”¹⁴⁹ in which issues and arguments are raised for the first time at trial so as to deprive the opposing party of the opportunity to prepare an effective response. A self-represented litigant with no legal training would be at a disadvantage against competent opposing counsel. Judges should therefore have the discretionary power to allow written pleadings whenever they are necessary to ensure just proceedings.

F. Critical Assessment

Although Québec, like the rest of the world, generally requires the loser to pay the winner’s costs, the definition of “costs” in Québec is so circumscribed that only a minor portion of expenditures is recoverable. This is especially true of lawyers’ bills, as the *Tariff of Judicial Fees* stipulates a “ridiculously low percentage for the reimbursement of extrajudicial fees.”¹⁵⁰ Realistically speaking, the amount available as “judicial fees” is likewise unrelated to the costs of litigation: the current maximum of \$1,000 in a contested action for \$50,000 or more would cover, at the average Canadian rate, only three hours of a lawyer’s time,¹⁵¹ which would not suffice for preparing and pleading even the simplest lawsuit.

One peculiar consequence of Québec’s allocation of costs is the possibility of a windfall in the largest cases. For a claim in excess of \$100,000, the additional one percent of the value of the dispute that is provided in the *Tariff of Judicial Fees*¹⁵² will be awarded even if it exceeds the legal costs of the suit.¹⁵³ In *Aéroports de Montréal c Société en commandite Adamax immobilier*, a claim for some \$30 million that was dismissed after only three hours of hearings resulted in an order for \$300,000 in costs, almost all of which represented this additional one-percent fee.¹⁵⁴ Most likely this amount greatly exceeded the respondent’s expenditures. Calling the order “unfair and disproportionate under the circumstances,” the judgment-debtor brought an appeal that proved unsuccessful.¹⁵⁵ Indeed, “unfair and disproportionate” accurately characterizes Québec’s whole scheme of allocating costs, which so richly indemnifies the winners of lawsuits over amounts in the tens of millions of dollars while capping the judicial fees for more modest lawsuits

¹⁴⁷ *Draft Bill*, *supra* note 16, art 167, para 1. By way of illustration, the text specifies oral pleading “in all instances where the purpose of the proceeding is to obtain support or a right relating to the custody of a child, to obtain the surrender of property, an authorization, a designation, a homologation or the recognition of a decision, or where its subject matter is the manner in which an office is to be performed or the sole determination of a sum of money due under a contract or as reparation for proven prejudice.”

¹⁴⁸ *Ibid*, art 144, para 2. The parties would have to justify this decision in the case protocol, and the court would have the power to order oral pleadings instead (*ibid*, art 155(6)).

¹⁴⁹ “Mémoire du Barreau,” *supra* note 20 at 19.

¹⁵⁰ *Larose c Fleury*, 2006 QCCA 1050 at para 77, [2006] RJQ 1799 [translated by author].

¹⁵¹ The average hourly rate for a Canadian lawyer is \$326. See Todd, *supra* note 6 at 37.

¹⁵² *Supra* note 28, art 42.

¹⁵³ *Industries Leader*, *supra* note 33.

¹⁵⁴ 2012 QCCA 293, JE 2012-465.

¹⁵⁵ *Ibid* at para 10 [translated by author].

at a nominal amount that cannot make up for fees paid. Wittingly or not, the legislator has set up a scheme that favours the corporations and government bodies that bring the largest lawsuits over the ordinary people and small companies involved in litigation for lesser sums.

The tax treatment of legal expenses also distinctly privileges corporations, which, unlike natural persons, can deduct all of their legal expenditures from their taxable income.¹⁵⁶ Thus the cost of counsel itself is higher for individuals, for whom only legal expenses related to income are generally deductible.¹⁵⁷ Far from correcting this inequality, the *Draft Bill* would exacerbate it by depriving individuals of the chance to recover the legal bills that they usually must pay with after-tax dollars.

The Ministry of Justice proposes to correct the current unjust allocation by letting costs fall where they may. This drastic proposal has no precedent elsewhere in the world that could provide experience or data with which to evaluate its merits. It lacks an empirical basis; indeed, very few empirical studies have been conducted on the effect of different regimes for allocating the costs of litigation, and most of them have been simulations rather than comparisons of conditions in real jurisdictions.¹⁵⁸ Both its theoretical and its practical motivation are insufficient in view of its potential to exacerbate the very inequalities that the Ministry of Justice proposes to address.¹⁵⁹

Vexatious litigants, already a scourge, would only be emboldened by the provisions of the *Draft Bill*. Those who represent themselves in court might well consider it a bargain to be able to harass their enemies for a few hundred dollars in filing fees and related court costs. Already many vexatious litigants fail to satisfy orders for costs.¹⁶⁰ Rather than making it cheaper for people to harass others with abusive process, the legislator should take measures to discourage and prevent vexatious litigation. Ultimately a persistent vexatious litigant must be stopped from continuing or initiating actions;¹⁶¹ however, to protect opposing parties from unnecessary expenses, the legislator might require a litigant with unpaid adverse judgments or a history of abusing process to put up security against costs.

By adopting an allocation of costs so far removed from those of other jurisdictions, Québec could inadvertently encourage forum shopping. Prospective plaintiffs with the possibility of suing in Québec would tend to prefer Québec if its rules on costs favoured them and to seek another forum otherwise. Just as large differences in remedies can motivate a strategic choice of forum, so could large differences in awards for costs. Québec might thus attract a disproportionate number of speculative or even frivolous lawsuits. The risk of forum shopping, although uncertain in the absence of empirical data, may therefore provide another reason not to deviate markedly from international

¹⁵⁶ See Canada Revenue Agency, Interpretation Bulletin IT-99R5, "Income Tax Act Legal and Accounting Fees" (5 December 2000) at paras 1-4.

¹⁵⁷ See *ibid* at para 1; *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 18(1)(a).

¹⁵⁸ See Laura Inglis et al, "Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims" (2005-06) 33:1 Fla St UL Rev 89 at 92.

¹⁵⁹ See *supra* note 17 and accompanying text.

¹⁶⁰ See e.g. *Brousseau c Drouin*, 2012 QCCS 977 (CanLII); *Re Lang Michener and Fabian* (1987), 59 OR (2d) 353, 37 DLR (4th) 685 (Ont H Ct J); *Wong v Giannacopoulos*, 2011 ABCA 206, [2011] AWLD 3133; *Landmark Vehicle Leasing v Marino*, 2011 ONSC 1671 (available at CanLII); *Lukezic v Royal Bank*, 2011 ONSC 5263, 206 ACWS (3d) 735.

¹⁶¹ See Yves-Marie Morissette, "Abus de droit, querulence et parties non représentées" (2003) 49 McGill LJ 23 at 51-54. See also *Attorney-General v Ebert*, [2001] EWHC Admin 695, [2002] 2 All ER 789 (HJC QBD) (vexatious litigant who had brought at least 151 actions in the same matter, made scandalous accusations and threats against judges, and purported to effect a citizen's arrest of one judge was finally barred from initiating lawsuits and even from attending at the courthouse).

practices, especially the practices of those jurisdictions for which Québec is likely to be an alternate choice of forum in many lawsuits.

The simplicity of administration that the *Draft Bill*'s allocation of costs promises could prove to be illusory if it led to more discretionary awards and contestations thereof. Exercise of judicial discretion could also result in inconsistent awards, especially if judges felt the need to correct the harshness of the *Draft Bill*'s scheme through their discretionary powers. Numerous jurists already insist that reconciling awards for costs with the principle of *restitutio in integrum* will require "a legislative reform";¹⁶² some go so far as to advocate that the courts circumvent the current tariffs by awarding extrajudicial fees as compensatory damages, costs, or even punitive damages.¹⁶³ Yet the "legislative reform" offered by the *Draft Bill* runs counter to these proposals.

The new scope of the principle of proportionality would also leave room for inconsistency. The *Draft Bill* would set objective limits on examinations and expert evidence while leaving other matters uncertain. The resulting subjectivity would allow for proportionality to be used as a sword rather than as a shield: pre-emptive challenges made tactically on the grounds of proportionality could compromise justice, especially when the parties were unequally matched in power and resources. Although judges could use their discretionary powers to address abusive challenges, the principle of proportionality could operate inconsistently with the stated objectives of the *Draft Bill*.

Awards of costs are designed to achieve such worthy goals as fairness to the winning party, deterrence of vexatious and other unnecessary litigation, encouragement to keep costs down, and facilitation of access to justice. Since these objectives stand in tension, the legislator must endeavour to find the golden mean. The allocation of costs in the *Draft Bill*, however, advances none of these objectives other than cost control; it even detracts from some of them.

Until there is sound justification, preferably empirical, for abandoning the rule of "loser pays," the legislator should maintain that rule—and keep the *Tariff of Judicial Fees* current, either by indexing it to inflation or through regular updates, to reflect the fees that prevail in the market for legal services. Indeed, a more generous allocation of costs, such as those of the other Canadian jurisdictions, deserves serious consideration. At the same time, the courts should be granted discretion to reduce or eliminate costs in the interest of justice, as in cases in which each party wins on some issues or a wide disparity between the parties' respective financial resources would make an award of costs oppressive.¹⁶⁴ This grant of discretion would be consonant with the greater responsibility for case management that the *Draft Bill* places on the courts. The legislator should also provide guidance for the exercise of this discretion so as to achieve the worthy social goals of promoting access to justice and ensuring procedural equity.

Contrary to the *Draft Bill*'s proposal, the starting point should be that the losing party must pay the winning party's reasonably necessary costs, including lawyers' fees, unless a court orders otherwise in the interest of justice. The quantum of costs, however, should be kept within limits, as in all other jurisdictions. The Australian Law Reform Commission has recommended the practical and sensible approach of fixing the maximum risk in advance with a ceiling on awards for costs (perhaps a percentage of the value of the dispute, as in Spain¹⁶⁵), and also adjusting the amount to account for wasteful or abusive

¹⁶² Baudouin & Deslauriers, *supra* note 96 at 350 [translated by author].

¹⁶³ *Ibid* at 346, 350-51.

¹⁶⁴ See "Mémoire du Barreau," *supra* note 20 at 17.

¹⁶⁵ See *supra* note 90 and accompanying text.

actions by either party.¹⁶⁶ This allocation of costs achieves the goals listed above while reasonably balancing the interests of the opposing parties and also embodying the principle of proportionality that is central to both the current *Code of Civil Procedure*¹⁶⁷ and the *Draft Bill*.¹⁶⁸

II. ALTERNATIVE DISPUTE RESOLUTION

A. Current Status in Québec

Since 1997, Québec has required pre-hearing mediation for most disputes pertaining to family law, if the interests of children are involved.¹⁶⁹ Parents seeking separation, divorce, or annulment of their marriage must attend one seventy-five-minute session and may receive as many as six at the state's expense.¹⁷⁰ This progressive programme reflects sensitivity to the welfare of the children, who are deeply affected despite being non-parties to the dispute between their parents.¹⁷¹

Mediation is more effective than contentious court proceedings at fostering the communication and collaboration that are essential to an arrangement made in the best interests of the children;¹⁷² it replaces "the logic of the adversarial system" with a human approach that creates "an atmosphere conducive to envisioning the future."¹⁷³ In addition, successful mediation leaves available for the children money that would otherwise have gone to pay legal bills—a consideration of especial importance in families of modest means. A study commissioned by the Ministry of Justice found that the great majority of participants were highly satisfied with pre-hearing mediation and felt that they were the authors of their own resolution.¹⁷⁴

In addition, small claims are subject to alternative dispute resolution under the ægis of a private mediator, a judge, or both. The Small Claims Division of the Court of Québec arranges mediation, at the request of the parties, for no expense beyond that already incurred to initiate the action.¹⁷⁵ If the dispute proceeds to court, "the judge attempts to reconcile the parties,"¹⁷⁶ whether or not they have tried mediation. These exceptions aside, Québec's courts do not require alternative dispute resolution for civil matters, although they may "invite the parties to a settlement conference or [...] recommend mediation."¹⁷⁷

166 *Supra* note 77 at s 2.

167 Art 4.2 CCP.

168 See e.g. *Draft Bill*, *supra* note 16, Preliminary Provision, para 3; *ibid*, art 2, para 2; *ibid*, art 18, para 1.

169 Arts 814.3-14 CCP.

170 *Regulation Respecting Family Mediation*, RSQ, c C-25, r 9, ss 10-11. The parties may also receive three sessions in order to have a judgment reviewed, for purposes such as varying the amount of support or the arrangements for custody of the children.

171 Feminists, however, have pointed out that any scheme of mandatory mediation for family-related disputes must take into account such important gender-linked issues as power imbalances and domestic violence. See Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24 CJWL 207.

172 See Marie-Claire Belleau & Guillaume Talbot-Lachance, "La Valeur juridique des ententes issues de la médiation familiale : présentation des mésententes doctrinales et jurisprudentielles" (2008) 49 C de D 607 at 614.

173 *Ibid* at 615 [translated by author].

174 Québec, Ministère de la Justice, *Troisième Rapport d'étape du Comité de suivi sur l'implantation de la médiation familiale* (Québec: Gouvernement du Québec, 2008) at 95.

175 Art 973 CCP.

176 Art 978, para 1 CCP.

177 Art 151.6(5) CCP.

For arbitration, the *Code of Civil Procedure* establishes procedural rules that apply unless the parties have stipulated otherwise.¹⁷⁸ A dispute must be heard by three arbitrators,¹⁷⁹ who are endowed with *Kompetenz-Kompetenz* (the authority to determine their own competence)¹⁸⁰ and the power to conduct inspections and gather evidence.¹⁸¹ Unlike court proceedings, arbitral proceedings are kept confidential.¹⁸² The arbitrators' decision is binding upon the parties¹⁸³ and is not subject to appeal or judicial review; “[t]he only possible recourse against [it] is an application for its annulment,”¹⁸⁴ which can be entertained only on the grounds enumerated in the *Code of Civil Procedure*.¹⁸⁵

B. Proposal in *Draft Bill*

Under the *Draft Bill*, the parties to a dispute would be required to “consider the private modes of prevention and resolution”¹⁸⁶ before resorting to adjudication.¹⁸⁷ The *Draft Bill* specifically identifies negotiation, mediation, and arbitration as “[t]he principal such modes” but would allow disputants to select another process.¹⁸⁸ It also defines “the procedure applicable to private modes of dispute prevention and resolution when it is not otherwise determined by the parties.”¹⁸⁹ In general, participants in private dispute prevention or resolution would “undertake to preserve the confidentiality of anything said, written or done during the process.”¹⁹⁰

The *Draft Bill* would retain the requirement of a mediation information session for family-related disputes involving the interests of children¹⁹¹ but would also allow the courts to refer other disputes to mediation at any time.¹⁹² Unless a court ordered otherwise, the costs of mediation would be borne equally by the parties.¹⁹³

For arbitration, the number of required arbitrators would be reduced from three to one,¹⁹⁴ unless the parties agreed to appoint more than one arbitrator.¹⁹⁵ The arbitrators would be required to uphold both “the adversarial principle and the principle of proportionality”¹⁹⁶ but would retain their authority to conduct inspections and gather evidence.¹⁹⁷ *Kompetenz-Kompetenz* would be subject to judicial review, without right of

178 Art 940 CCP.

179 Art 941 CCP.

180 Art 943 CCP.

181 Art 944.4 CCP.

182 Art 945 CCP.

183 Art 945.4 CCP.

184 Art 947 CCP.

185 Art 946.4-5 CCP.

186 *Draft Bill*, *supra* note 16, art 1, para 3.

187 *Ibid*, arts 2, 7.

188 *Ibid*, art 1, para 2.

189 *Ibid*, Preliminary Provision, para 1. The *Draft Bill* does not, however, specify whether the parties could contractually define the procedure in advance. In arbitration, the choice of procedure is left to the arbitrator (*ibid*, art 633, para 1).

190 *Ibid*, art 4.

191 *Ibid*, art 414, para 1.

192 *Ibid*, art 418, para 1.

193 *Ibid*, art 620, para 1.

194 *Ibid*, art 625, para 1. In international commercial disputes, however, three arbitrators would be used (*ibid*, art 647, para 1).

195 *Ibid*, art 625, para 1. The text speaks of “more than one arbitrator, in which case each party appoints one arbitrator, and the two so appointed appoint the third.” This poorly drafted passage suggests that “more than one” means precisely three.

196 *Ibid*, art 633, para 1.

197 *Ibid*, art 634, para 3.

appeal.¹⁹⁸ The arbitrators would have to issue their decision “in writing within three months after the matter is taken under advisement.”¹⁹⁹

C. Alternatives

Although the *Draft Bill* provides some support for alternative dispute resolution, it could go further in this direction. Rather than merely requiring the parties to “consider”²⁰⁰ alternative dispute resolution, the legislator could expand the judiciary’s existing programmes to encompass a broader class of civil disputes, starting with those types of cases that are most conducive to a mediated settlement. The success of mediation in the context of family law bodes well for disputes of other kinds.

The legislator could also make mediation obligatory, as do a number of other North American jurisdictions. Since 1999, Ontario has imposed mandatory private mediation, at the parties’ expense, for cases subject to case management in three of the province’s largest cities.²⁰¹ In British Columbia, the judge managing the case can “requir[e] the parties of record to attend one or more of a mediation, a settlement conference or any other dispute resolution process”;²⁰² in addition, legislative provisions allow any party to require mediation in a claim for an accident involving motor vehicles,²⁰³ a family-law proceeding,²⁰⁴ a dispute over residential construction,²⁰⁵ or another matter that is not specifically excluded.²⁰⁶ Alberta,²⁰⁷ Newfoundland and Labrador,²⁰⁸ Saskatchewan,²⁰⁹ and several states in the United States²¹⁰ have also instituted mandatory alternative dispute resolution for many civil matters.

Instead of always requiring consideration of non-adjudicative approaches, the legislator could leave more discretion to the judge. The nature of the dispute and the condition of the disputants could inform the decision to recommend private civil justice. Judiciously applied, this approach could improve efficiency by referring only suitable cases to alternative dispute resolution.

D. Advantages and Disadvantages of the *Draft Bill*’s Approach

Alternative dispute resolution can contribute to the goals that undergird the *Draft Bill*. It has the potential of settling disputes more quickly and less expensively than the courts. Court-connected civil mediation in Québec and the other provinces where it has been instituted has succeeded in this respect: most disputes are settled before or during mediation, on average in about half the time of disputes taken to litigation.²¹¹ Lawyers surveyed have

¹⁹⁸ *Ibid*, paras 2-3.

¹⁹⁹ *Ibid*, art 638, para 1.

²⁰⁰ *Ibid*, art 1, para 3.

²⁰¹ *Rules of Civil Procedure*, *supra* note 68, ss 24.1, 75.1. The rules list a few exceptions.

²⁰² *Supreme Court Civil Rules*, *supra* note 73, s 5-3(1)(o).

²⁰³ *Notice to Mediate Regulation*, BC Reg 127/98, s 2.

²⁰⁴ *Notice to Mediate (Family) Regulation*, BC Reg 296/2007, s 2.

²⁰⁵ *Notice to Mediate (Residential Construction) Regulation*, BC Reg 152/99, s 2.

²⁰⁶ *Notice to Mediate (General) Regulation*, BC Reg 4/2001, s 3.

²⁰⁷ *Alberta Rules of Court*, Alta Reg 124/2010, s 4.16.

²⁰⁸ *Rules of the Supreme Court*, SNL 1986, c 42, Schedule D, s 37A.

²⁰⁹ *Queen’s Bench Act*, SS 1998, c Q-1.01, s 42.

²¹⁰ See e.g. Holly A Streeter-Schaefer, “A Look at Court Mandated Civil Mediation” (2000-01) 49 *Drake L Rev* 367 (discussing mandatory mediation of civil disputes in Alabama, Delaware, Indiana, Louisiana, Maine, Montana, Nevada, and North Carolina).

²¹¹ See Michaela Keet & Teresa B Salamone, “From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation” (2001) 64 *Sask L Rev* 57 at 66-67.

estimated substantial cost savings for clients whose disputes were mediated.²¹²

Alternative dispute resolution also encourages conciliation rather than contention and empowers the parties by giving them the leading roles in their own settlement; it even indirectly benefits society by training the public in the autonomous resolution of disputes. Empirical research suggests that users of mediation are more likely than users of adjudication to be satisfied with the fairness of the process and to emerge with less enmity and anger,²¹³ perhaps because each party to a mediated dispute can come away with the feeling of having won. Indeed, most disputants who have resorted to mediation have been satisfied with the process.²¹⁴ Disputants who are wary of litigation, owing to its high costs and risks as well as its confrontational, winner-take-all character, may be more willing to pursue their interests through alternative means.

Even for a dispute that ultimately proceeds to litigation, an attempt at alternative dispute resolution can beneficially settle some issues and clarify or narrow the scope of the conflict. In a dispute marked by technical complexity in a specialized field, arbitrators or mediators with the required expertise may be preferable to a judge.

In addition, alternative dispute resolution relieves the burden on the courts. Even when alternative approaches fail to achieve a resolution, they can helpfully simplify the dispute by disposing of some issues and clarifying the remaining ones. They also free the trial courts up for disputes that truly require their costly and time-consuming formal procedures. Since opportunities to contest non-adjudicated settlements are limited, alternative approaches indirectly lighten the workload of the appellate courts as well.

While recognizing these advantages, however, the *Draft Bill* only weakly promotes alternative dispute resolution. It stops short of making non-adjudicative approaches obligatory, requiring only that the parties “consider”²¹⁵ them. The requirement would prove hollow if a party bent on adjudication could satisfy it through a mere avowal of having “considered” alternative approaches.

Yet some forms of alternative dispute resolution could result in unjust outcomes. Mediation, being subject to judicial approval, receives curial oversight and is thus less risky, despite the confidentiality of its proceedings. Moreover, either party can end mediation at any time and take the dispute to the courts. These safeguards help to ensure the fairness of mediated resolutions. By contrast, arbitration results in a binding decision that forecloses appeals and the option of litigation. The danger of an unfair arbitral outcome looms especially large when an imbalance of power exists between the parties. Courts should therefore hesitate to refer unevenly matched parties to arbitration.

Although alternative dispute resolution is sometimes thought to save money, it tends to be more expensive than adjudication. In Ontario, for instance, the parties must pay for mandatory mediation on top of the court costs that they have already incurred. For a case involving only two parties, a mandatory session of mediation can cost as much as \$600, plus GST.²¹⁶ These fees cover three hours; additional time is billed at “the mediator’s

²¹² See *ibid* at 82, n 79. Compare Jean Guibault, “Les Moyens alternatifs de résolution de conflits en matière civile et commerciale dans une perspective de réforme du *Code de procédure civile*” (1999) 40:1 C de D 75 at 86; Jean Marquis, “Médiation, conciliation : les tribunaux, agents de changements” (2001) 42:3 C de D 783 at 788.

²¹³ See Roselle L Wissler, “The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts” (1997) 33 Willamette L Rev 565 at 568-69.

²¹⁴ See Keet & Salamone, *supra* note 211 at 67-68.

²¹⁵ *Draft Bill*, *supra* note 16, art 1, para 3.

²¹⁶ *Mediators' Fees (Rule 24.1, Rules of Civil Procedure)*, O Reg 451/98, s 4(1).

fees or hourly rate,” which ordinarily will be much higher than the statutory amount.²¹⁷ Arbitration can be even more expensive, especially if, as in Québec today, multiple arbitrators are required. Ancillary expenses, such as travel, increase the cost of these means of resolving disputes. The courts, by contrast, charge a flat fee that is relatively low, typically no more than a few hours of an arbitrator’s time at standard rates. The fee may depend on the amount in dispute²¹⁸ but not on the duration of the proceedings: the same fee applies whether the lawsuit be dismissed immediately or extend to hundreds of days of hearings.

Because of its private nature, alternative dispute resolution could also have adverse implications for the development of the law. Our legal system depends on the publication of decisions: judges and lawyers invoke them as precedent; scholars criticize them; students learn the law from them. For that reason, we expect judgments to be available to the public. Yet decisions reached through arbitration, mediation, or negotiation ordinarily are not published; consequently, they cannot contribute to the law’s evolution. If alternative dispute resolution kept pivotal legal questions out of the courts, it could lead to the relative stagnation of the law. Indeed, some parties may prefer alternative dispute resolution precisely because it eliminates the risk of establishing adverse precedent. Furthermore, arbitrators and mediators contribute little to jurisprudence. Unlike judges, they do not ordinarily explain their decisions with written opinions on questions of law.²¹⁹

Likewise, the privacy of arbitration and mediation could result in inconsistent resolutions of disputes. Since the facts, arguments, and decisions are kept confidential, similar questions could be resolved differently by different arbitrators and mediators.²²⁰ In addition, arbitrators can select the rules of law to apply to the dispute.²²¹ Their choices may vary inconsistently across cases.

The private nature of mediation could also lead to duplication of proceedings after a failed attempt at mediation. Since “[n]o information given or statement made during the mediation process [could] be admitted in evidence in arbitration, administrative or judicial proceedings, whether or not they [were] related to the dispute,”²²² examinations and hearings might have to be conducted afresh in a dispute that moved from mediation to arbitration or adjudication.²²³ Such wasteful repetition would conflict with the *Draft Bill*’s objective of economy and could discourage attempts at mediation.

There is a risk that arbitration, and to a lesser extent mediation, could become formalized and institutionalized to the point of constituting a new judiciary. The requirement of adversarial and proportional proceedings would reduce arbitrators’ authority over procedure and recast arbitration in a judicial mould. In addition, heavy reliance on arbitrators or mediators with expertise in the subject matter of the dispute could eventually divide the law into specialized sectors, each with its own legal rules, thereby compromising the law’s uniformity and generality.

The *Draft Bill* does not indicate how arbitrators could be held to their obligation to

²¹⁷ *Ibid*, s 4(3).

²¹⁸ See e.g. *Tariff of Court Costs*, *supra* note 27, ss 1, 4.

²¹⁹ The clients of arbitrators and mediators generally do not wish to pay hundreds of dollars per hour for this service.

²²⁰ See e.g. Judge Craig Smith & Judge Eric V Moyé, “Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts” (2012) 44 Tex Tech L Rev 281 at 297-98.

²²¹ *Draft Bill*, *supra* note 16, art 626.

²²² *Ibid*, art 611, para 1.

²²³ See e.g. Denise Wilson, “Alternative Dispute Resolution” (1993) 7:2 Auckland UL Rev 362 at 376-77.

uphold the adversarial principle and the principle of proportionality. Also unclear is the point at which the parties could determine the procedure for private dispute resolution. For example, the text does not state whether a contract could stipulate the procedure prospectively, or whether a court could set such stipulations aside and substitute the default procedure in the case of a consumer contract or a contract of adhesion. Lacunae such as these in the *Draft Bill* could themselves become sources of litigation.

Another issue is that the risk that prescription would extinguish the claim could discourage recourse to alternative dispute resolution. A plaintiff pursuing a non-adjudicative approach in good faith might have to file suit just to preserve the right of action, thereby wasting time and money while also potentially antagonizing the opposing party. The defendant could otherwise take unjust advantage of the plaintiff's carelessness or ignorance by deliberately prolonging the non-adjudicative proceedings until prescription had run. The *Draft Bill* makes only weak provision for this problem: it merely allows parties in mediation to agree to waive the benefit of prescription,²²⁴ without similarly accommodating negotiation or other informal attempts at alternative dispute resolution. The legislator could easily fill this lacuna either by suspending prescription during attempts at alternative dispute resolution (provided that the court be seized of them) or by extending the time to institute proceedings after the failure of such attempts, similar to the three-month extension that is currently available for proceedings that were timely filed in the wrong forum.²²⁵

E. Critical Assessment

Despite presenting a number of problems that require prudent management, alternative dispute resolution offers many advantages that promote the *Draft Bill's* stated goals. Unfortunately, the *Draft Bill's* timid approach to alternative dispute resolution stands in sharp contrast to its bold reallocation of the costs of litigation. The mere requirement that the parties consider alternative dispute resolution is a hollow recital. Meaningful promotion of alternative dispute resolution calls for imperative measures. For example, the court personnel could be required to ensure, through an interview or other procedure, that the parties had given serious consideration to alternative approaches. A party that refused to attempt negotiation or mediation in good faith could be punished with the costs of the ensuing legal proceedings. Although mandatory arbitration would probably violate the Québec *Charter* by depriving disputants of a public hearing in court²²⁶ (since arbitral decisions are generally not subject to judicial review²²⁷), mediation could properly be required, as indeed it already is in various provinces.²²⁸

Perhaps the choice not to insist on mandatory mediation stems from sensitivity to the fact that some disputes are not amenable to approaches that foster communication and collaboration.²²⁹ For instance, mediation may simply be a waste of time if the conflict has become so rancorous that the parties will no longer accept reconciliation. Such cases, however, could be released from mandatory mediation at the discretion of the court upon application by the parties, along the lines of the exemptions available upon motion in Ontario.²³⁰ The mediator could also quickly refer a case back to the court rather than

224 *Ibid*, art 613, para 1.

225 Art 2895, para 1 CCQ.

226 *Supra* note 15.

227 Art 947 CCP; *Draft Bill*, *supra* note 16, art 648, para 1.

228 See Keet & Salamone, *supra* note 211 at 61–65 (describing mandatory mediation in British Columbia, Ontario, and Saskatchewan).

229 See *ibid* at 68.

230 *Rules of Civil Procedure*, *supra* note 68, s 24.1.05.

continuing futile mediation. The exceptional cases that do not lend themselves to non-adjudicative resolution need not prevent the institution of mandatory mediation.

Some curial oversight of recourse to alternative dispute resolution may be appropriate, especially when there is a great imbalance of power between the parties. The courts should ensure, for example, that a party does not agree to arbitration without understanding that the arbitral decision will be final, with no possibility of appeal. The courts' administrative obligations to protect the rights of parties entering into alternative dispute resolution should be made explicit in the *Draft Bill*.

CONCLUSION

As its very first words indicate, the code proposed in the *Draft Bill* privileges “[p]rivate civil justice.”²³¹ Its innovations reflect an ideology of privatization. To be sure, private approaches to dispute prevention and resolution can usefully complement their public counterparts and help to make justice more accessible to all. Civil procedure, however, must strike a balance between the public and private modalities so that each can be employed to best advantage. Unfortunately, the *Draft Bill* moves so far in the direction of privatization, especially in its allocation of costs, that it even appears to have been designed in the image of corporations. Although it purports to improve access to justice, it might have just the opposite effect for ordinary people. While its allocation of the costs of litigation goes too far, its promotion of alternative dispute resolution does not go far enough.

Allocation of costs requires sensitive consideration of circumstances. A bright-line rule—awarding full costs or none at all—cannot effectively balance the contending social objectives that inform cost-shifting policies. For precisely that reason, every jurisdiction tempers its policy by limiting awards of costs in view of the circumstances of each case. The allocation proposed in the *Draft Bill*, however, lacks both balance and nuance. Rather than parting ways with all other jurisdictions, the legislator should develop a principled rule for allocating costs and some guidelines for the appropriate exercise of judicial discretion.

With its mere hortatory requirement to “consider” alternative dispute resolution, the *Draft Bill* too meekly promotes an important means of facilitating access to justice. The legislator could instead profit from the experiences of other provinces and impose mandatory mediation for a large class of civil matters, at either public or private expense. The success of Québec’s programme of mediation in the context of family law bodes well for expansion to other types of disputes.

The *Draft Bill* unfortunately leaves a number of important questions unanswered. What is the significance of the requirement that the parties to a dispute “consider” alternative dispute resolution? Would the caps on pre-trial examinations apply to each examination or to the full set for each side? Could the terms of a contract prospectively establish the procedure for mediation? If so, could they be challenged in court as unfair if a dispute arose? What could a party do, short of filing suit, to protect its rights from prescription during a *bona fide* attempt at alternative dispute resolution? If a party sought a discretionary award of legal costs for the opponent’s rejection of a fair offer in settlement, would the confidentiality of the offer be maintained under privilege? How would the requirement that arbitrators uphold the adversarial principle and the principle of proportionality be enforced? These uncertainties point to the need for revision of the

²³¹ *Draft Bill*, *supra* note 16, art 1.

Draft Bill, and even reconsideration of key issues and principles.

Fundamental change to an instrument as important as the *Code of Civil Procedure* must be approached with caution. The public would suffer from the obsolescence of such important popular sources of free legal information as Éducaloi,²³² which might not be updated for some time. The transition to the new code would also be difficult for judges and lawyers. Disputes over the interpretation of the new *Code* would give rise to more litigation and would endure until they were resolved in case law. Vulnerable parties might not be adequately protected in the interim. Furthermore, a reform that proved unsuccessful would necessitate remedial legislation—possibly even the enactment of a new *Code*, which would result in even more disruptions and inconvenience.

Québec bills itself as a leader in progressive social change, but in both the allocation of costs and the adoption of alternative dispute resolution it is decidedly behind the rest of Canada and indeed most of the world. Unfortunately, a number of changes proposed in the *Draft Bill* run counter to the legislator's social objectives. To its credit, the *Draft Bill* includes some much-needed reforms, such as limits on pre-trial examinations and a higher ceiling on small claims. It will, however, require fundamental revision, with due attention to the experience of other jurisdictions and to empirical findings that indicate superior procedural practices, in order to achieve its laudable goal of improving access to justice.

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ARTICLE

IN PURSUIT OF EQUALITY: RETHINKING THE CONSTITUTIONALIZATION OF LABOUR RIGHTS AFTER *FRASER*

By Alex Kerner*

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INTRODUCTION

When the Supreme Court of Canada (“the Court”) released its *Ontario (Attorney General) v Fraser* (“Fraser”) decision in late April 2011,¹ the labour movement had to reevaluate whether a legal strategy of constitutionalizing collective bargaining rights continued to make sense. For most of the twentieth century, courts consistently fettered and punished workplace organizing and militancy, engendering distrust toward the judiciary among trade unionists.² After the enactment of the *Canadian Charter of Rights and Freedoms* (“Charter”) in 1982,³ there was some modest optimism that workers’ rights to collectively bargain and strike could find a place within the new Constitution’s listed rights and freedoms. The Court quickly extinguished such hopes in its *Labour Trilogy*, refusing to read the right to strike or bargain collectively into the ‘freedom of association’ guarantee listed under section 2(d) of the *Charter*.⁴ However, within two decades of these decisions the Court shifted gears, with *Dunmore v Ontario (Attorney General)* (“Dunmore”)⁵ and *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* (“Health Services”)⁶ indicating a thawing of judicial antipathy towards labour. After three decades of diminishing membership and reduced political and economic clout, unions and their allies were understandably excited when Canada’s highest court stated that in

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1 *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

2 Eric Tucker, “The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada,” (2008) 61 Labour/Le Travail 151 at 171.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*].

4 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] SCR 313, 38 DLR (4th) 161 [*Alberta Reference*]; *Retail, Wholesale and Department Store Union v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277 [*RWDSU*]; *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249. Although not directly touching upon the inclusion of labour rights within the *Charter*, *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174 also signaled to unions that the new era of robust constitutionalism would offer little to organized labour.

5 *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].

6 *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*Health Services*].

certain circumstances the state has a positive obligation to ensure an “effective exercise” of freedom of association,⁷ and held that collective bargaining was a right within the meaning of this freedom.⁸ When the Court was asked in *Fraser* to elaborate on what this right constituted, however, a majority refused to tie any substantial procedural requirement to collective bargaining beyond the obligation to listen in good faith.⁹

While this rather hollow guarantee disappointed those who had hoped for a more robust constitutionalizing of collective bargaining rights, I believe the *Fraser* decision also provides an opportunity to reorient the focus of labour rights litigation. Envisioning the aspirations of organized labour through the lens of freedom of association has been a fruitful endeavour, but simultaneously limiting. This approach has focused on the importance of a procedural guarantee to collective bargaining, but has given less significance to the equality-advancing outcomes that workplace democracy and collective bargaining have sought to achieve. If the Court is now hesitant to use the section 2(d) freedom to describe what a collective bargaining system should look like, it may be worthwhile to gauge whether the *Charter*’s section 15 equality provision can better advance the goals of labour. In *Health Services*, the Court seems to have suggested as much, asserting that “one of the fundamental achievements of collective bargaining is to palliate the historical *inequality* between employers and employees” and that “[c]ollective bargaining [...] enhances the *Charter* value of *equality*.¹⁰”

In this paper, I will argue that unions should look more seriously to the *Charter*’s equality provision as an alternative avenue to advocate for the constitutionalization of labour rights, both because this would provide an additional line of argument to persuade the Court and because it may actually strengthen workers’ section 2(d) claims. Although the Court has refused to include employment status or class in the list of analogous grounds in its equality test, several concurrent opinions have suggested that this is not an insurmountable hurdle and that work and employment may be an essential element of a person’s identity.¹¹ The importance the Court assigned to equality concerns in collective bargaining rights litigation was most evident in the *Dunmore* decision, which was ultimately characterized as a section 2(d) case but nonetheless relied heavily on the language of equality to buttress the Ontario agricultural workers’ freedom of association claim. The Court’s understanding of equality and discrimination, however, has progressively narrowed over the years, with recent decisions refusing to deem certain treatments unequal if they fall outside of the parameters of stereotyping and prejudice.¹² The task of pushing the Court to better defend collective bargaining rights under section 15(1) will, therefore, require convincing the Court to embrace a broader understanding of discrimination—one which includes laws that maintain social and economic disempowerment.

This article will advance its argument in four parts. In Part I, I will examine how the Court has considered the question of collective bargaining since the emergence of the *Charter*, tracing the jurisprudence from the *Labour Trilogy* until *Fraser*, as well as the academic critiques that have emerged in response to the judiciary’s approach to the collective goals

⁷ *Dunmore*, *supra* note 5 at para 30.

⁸ *Health Services*, *supra* note 6 at para 2.

⁹ *Fraser*, *supra* note 1 at para 103.

¹⁰ *Health Services*, *supra* note 6 at para 84 [emphasis added].

¹¹ Justice L’Heureux-Dubé in *Dunmore*, *supra* note 5 at para 166, acknowledged an equality breach in the Ontario government’s treatment of agricultural workers, although the Court felt that only in certain cases could an occupational category satisfy the enumerated and analogous grounds test. Justice Deschamps in *Fraser*, *supra* note 1 at para 319 gave a cautious endorsement, acknowledging that such an approach would be “more faithful to the design of the *Charter*.”

¹² *Health Services*, *supra* note 6 at para 165; *Fraser*, *supra* note 1 at para 116.

and activities of workers. As mentioned above, most of these decisions dealt specifically with associational freedoms, but were nonetheless submerged in the lexicon of equality, as the Court attempted to decipher whether unions and their bargaining rights had a special institutional role within the Canadian polity. In Part II, I will examine the jurisprudence around the *Charter's* equality provision, which has fettered the labour movement's constitutional challenges by limiting the grounds on which one can claim discrimination and by narrowing what kinds of treatment amount to discrimination. Recent decisions have revealed tensions in the dominant doctrinal approaches to section 15(1), however, offering the possibility of expanding who the section protects and what type of actions are prohibited. This has prompted prominent labour law thinkers to explore whether collective bargaining rights can be pushed through section 15(1)—either directly or by strengthening workers' freedom of association claims—and to further explore the limitations of this approach. In light of this potentially broadened approach to the *Charter's* equality provision, Part III will explore the concept of equality in more depth, in the hope of demonstrating that the aspiration of substantive equality the Court has vocalized requires looking beyond stereotyping and prejudice. This will involve discussing the literature of equality among political and legal theorists over the last two decades, which has espoused visions of equality that integrate demands for the redistribution of wealth, the recognition of and respect for all citizens, and a deeper participation in societal decision-making. Lastly, Part IV and the Conclusion will attempt to show that the long history of unions and collective bargaining advancing societal equality, along with the growing number of voices recognizing collective bargaining as a fundamental human right, can persuade the Court to include the protection of collective bargaining within the realm of the *Charter's* equality provision.

I. THE SUPREME COURT OF CANADA'S DELICATE DANCE WITH LABOUR

A. The Birth of the *Charter* and the *Labour Trilogy*

During one of the many constitutional debates leading to the ratification of the *Canadian Charter of Rights of Freedoms*, Member of Parliament Svend Robinson introduced an amendment in the House of Commons to explicitly include “the freedom to organize and bargain collectively” within section 2(d). Solicitor General Bob Kaplan responded that the government’s opinion was that those guarantees were covered within the meaning of ‘freedom of association,’ and Robinson’s proposed amendment came to naught.¹³ However, Kaplan’s opinion quickly faded from the judicial debates that emerged shortly after the adoption of the *Charter*. This was hardly a surprise in light of Canada’s long-held legal tradition of treating constitutional texts as ‘living trees’, with minimal weight given to the intention of the framers.¹⁴

The year 1987 would see three cases hit the Court’s docket, which dealt directly with the right to strike and collectively bargain. In its decisions, the Supreme Court made it clear that the *Charter* would “not be used in ways which threaten the economic and political status quo.”¹⁵ Justice Le Dain, in a rather truncated majority decision in *Reference Re: Public Service Employee Relations Act (Alberta)* (“*Alberta Reference*”), reinforced the image of judicial antipathy toward the concerns of labour when he affirmed that the rights to collectively bargain and strike were “modern” and not “fundamental,” existing outside

¹³ Tucker, *supra* note 2 at 166-167.

¹⁴ *Edwards v Canada (AG)*, [1929] JCJ No 2, [1930] AC 124 at para 44.

¹⁵ Judy Fudge, “Labour, the New Constitution and Old Style Liberalism,” (1988) 13 Queen’s LJ 61 at 109.

the notion of guarantees protected under section 2 of the *Charter*.¹⁶ Justice McIntyre went further in his concurring judgment, claiming that section 2(d) was limited to associational activities that were protected independently for individuals under the *Charter*.¹⁷ He contended that although collective organizations were means by which individuals further realized their rights and aspirations, the associational activities themselves were not entitled to special privileges that existed exclusively for the group.¹⁸ Because the right to collectively bargain and strike is not analogous to any individual right found in the *Charter*, it could not be “implied for the group merely by the fact of association.”¹⁹

Chief Justice Dickson, dissenting, disagreed with Justices Le Dain and McIntyre, offering not only an argument for the inclusion of the right to collectively bargain and strike within the meaning of ‘freedom of association,’ but also recognizing the special role that these rights played in promoting the goals of social and economic equality. Although agreeing with Justice McIntyre that this was an instance where the protected rights would have no analogy involving individuals, he did not believe that this fact should preclude constitutional protection of an innately collective activity.²⁰ In his view, the majority and concurring opinions’ narrow understanding of section 2(d) promoted a “legalistic, ungenerous, indeed vapid” freedom, where “the joining together of persons for common purposes” was protected “but not the pursuit of the very activities for which the association was formed.”²¹

Although it is unclear whether Chief Justice Dickson believed this reasoning would apply to all associational activities that did not have individual comparators, he appeared to acknowledge that the rights to collectively bargain and strike were special activities, promoting substantive outcomes that made them unlike other associational undertakings. The ability to form unions, negotiate as a group, and leverage their economic might allowed workers to “overcome the inherent inequalities of bargaining power in the employment relationship.”²² Workers’ associational activities addressed not only “remunerative concerns” but also “health and safety in the work place, hours of work, sexual equality and other aspects of work fundamental to the dignity and personal liberty of employees.”²³ Collective bargaining advanced not only more balanced power relations but also industrial democracy, helping to “introduce into the work place some of the basic features of political democracy [and] the substitution of the rule of law for the rule of men in the work place.”²⁴

Chief Justice Dickson’s dissent notwithstanding, the *Labour Trilogy* generated significant criticism; it was seen as yet another example of the judiciary placing barriers to the organizational goals of workers.²⁵ The majority’s reasoning, in particular, demonstrated the kinds of biases that the labour movement believed were inherent in the court system. The depiction of collective bargaining as “the consequence of modern political

16 *Alberta Reference*, *supra* note 4 at para 141-144.

17 *Ibid* at para 175.

18 *Ibid* at para 155.

19 *Ibid* at para 157.

20 *Ibid* at para 89.

21 *Ibid* at para 81.

22 *Ibid* at para 23.

23 *Ibid*.

24 Dickson CJ quoting the “Woods Task Force Report on Canadian Industrial Relations,” *Ibid* at para 93.

25 “The history of how judges have deployed the economic torts and injunctions against unions in labour disputes and how they have usurped the functions of arbitrators and labour relations boards through their review powers, is now part of labour folklore[...].” Geoffrey England, “Some Thoughts on Constitutionalizing the Right to Strike,” (1988) 13 Queens LJ 168 at 204.

compromise,” unworthy of constitutional protection, contrasted starkly with a long history of judicial deference to “the common law relations of property and contract,” which were deemed “essential to individual freedom.”²⁶

The Court’s preference for relationships and social practices that were vital to the operation of the market economy confirmed many commentators’ suspicions that the *Charter* would mostly prop up capitalist interests. As Geoffrey England noted at the time, the *Labour Trilogy* served to reinforce fears within the labour movement that the omnipresent individualism that informed many of the rights conferred by the *Charter* would give “free rein for [judges’] anti-union sentiments and result in the *Charter* being used to weaken labour’s collective interests.”²⁷ Similarly, Judy Fudge expressed doubt that the courts would ever break from their “historic function [...] to protect individual property rights and facilitate free contracting” and use the *Charter* to “positively affect workers.”²⁸ With these misgivings so prevalent, it came as no surprise when Canadian Labour Congress Executive Vice-President Nancy Riche, only a few months after the release of the *Labour Trilogy*, stated that “we [will] take our chances with the political leaders and the lobby efforts and the pressure we could bring to bear on getting change as it affects the trade union movement as opposed to leaving it to the courts.”²⁹

B. *Dunmore* Opens the Door

With the Court’s rejection of a constitutional guarantee to bargain collectively, the strength of labour rights remained subject to the political winds, with governments changing labour statutes and regulations to express their particular ideological biases. In the early 1990s, British Columbia and Ontario New Democratic governments passed legislation facilitating workers’ ability to join unions, with the latter finally giving agricultural workers an opportunity to bargain collectively.³⁰ Subsequent conservative governments, however, rolled back many of these statutory gains for labour. For example, the Mike Harris government in Ontario rescinded agricultural workers’ right to unionize.³¹ Mixed in with the introduction of neo-liberal trade agreements that further threatened labour standards and depleted union density in the Canadian economy,³² the labour movement felt compelled to reengage in a litigation strategy, hoping that the judiciary had changed its attitude on whether labour rights were implied in the *Charter*.

It is in this context that *Dunmore* was decided. The United Food and Commercial Workers Union brought a challenge against Ontario’s *Labour Relations and Employment Statute Law Amendment Act* (“LRESLAA”)³³, which excluded agricultural workers from the province’s *Labour Relations Act* (“LRA”).³⁴ The LRESLAA had replaced the *Agricultural Labour Relations Act*,³⁵ which for one year had allowed agricultural workers to unionize and collectively bargain. Since the *Labour Trilogy* the Court had affirmed

26 Fudge, *supra* note 15 at 109.

27 England, *supra* note 25 at 204.

28 Fudge, *supra* note 15 at 110.

29 Quoted in Larry Savage, “Organized Labour and Constitutional Reform Under Mulroney,” (2007) 60 Labour/Le Travail 137 at 146.

30 Kevin M Burkett, “The Politicization of the Ontario Labour Relations Framework in the 1990s,” (1998) 6 Canadian Lab & Emp LJ 161 at 168-174

31 *Ibid* at 175-177.

32 Clyde Summers, “The Battle in Seattle: Free Trade, Labor Rights, and Societal Values,” (2001) 22 U Pa J Int’l Econ L 61.

33 Ontario, Bill 7, *Labour Relations and Employment Statute Law Amendment Act*, 1st Sess, 36th Leg, Ontario, 1995

34 *Dunmore*, *supra* note 5 at para 1.

35 *Agricultural Labour Relations Act*, RSO 1994, c 6.

Justice McIntyre's position, as exemplified by Justice Sopinka's opinion in *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* that "section 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association," but rather only protects "the exercise in association of the constitutional rights and freedoms of individuals [...and] the lawful rights of individuals."³⁶ In *Dunmore*, however, Justice Bastarache's majority was not prepared to accept this limitation, holding that state prohibition of group activities that are not necessarily associational exertions of individual rights and freedoms could amount to a violation of section 2(d).³⁷ He noted that:

The collective is "qualitatively" distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot [...] to limit s. 2(d) to activities that are performed by individuals would, in my view, render futile these fundamental initiatives.³⁸

Specifically, workers' associational activities and collective interests were not identical to those of individual workers. If the *Charter* only protected collective activities that were also lawful for the association's individual members, the association's capacity to function would be effectively undermined.³⁹

In addition to rejecting the collective-versus-individual dichotomy, Justice Bastarache also affirmed that in certain circumstances the state had an obligation to take positive actions "to make a fundamental [Charter] freedom meaningful."⁴⁰ Although agricultural workers' employment circumstances were ostensibly private, that did not make their claim impervious to *Charter* scrutiny. The heightened vulnerability of agricultural workers made them "substantially incapable of exercising their fundamental freedom to organize without [a] protective regime."⁴¹ The provincial government's decision to exclude agricultural workers from the *LRA* effectively removed their "only available channel for associational activity."⁴² In this context, the government turning a blind eye to the private circumstances that impeded agricultural workers' ability to associate amounted to "an affirmative interference with the effective exercise of a protected freedom."⁴³ As such, the Court required the Ontario government to enact protective legislation that made section 2(d) rights meaningful to agricultural workers.

Although Justice Bastarache cautioned that the right to associate did not include the right to collectively bargain,⁴⁴ his decision nonetheless gave considerable weight to the special role that unions play in promoting equality in the work place and society as a whole. He acknowledged that trade unions "advocate on behalf of disadvantaged groups [...] present[ing] views on fair industrial policy" and play a function that is vital to the promotion of "a democratic market-economy."⁴⁵ The exclusion of agricultural workers from the *LRA* was not simply an infringement of associational rights, but was an express

36 *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 72 DLR (4th) 1 at para 73.

37 *Dunmore*, *supra* note 5 at para 16.

38 *Ibid.*

39 *Ibid* at para 17.

40 *Ibid* at para 23.

41 *Ibid* at para 35.

42 *Ibid* at para 44.

43 *Ibid* at para 22.

44 *Ibid* at para 42.

45 *Ibid* at para 38.

suggestion that “workplace democracy had no place in the agricultural sector.”⁴⁶ Justice L’Heureux-Dubé’s concurring judgment struck a similar tone, stating that “[caught] in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the worker] can attain freedom and dignity only by cooperation with others of his group.”⁴⁷ *Dunmore*, therefore, was not simply an affirmation that collective associational activities merit the same rights as the already-protected individual freedoms. Rather, the Court embraced this expanded interpretation of freedom of association because of the special character and goals associated with collective bargaining—be it leveling the unbalanced bargaining power between employer and employee or furthering democratic control of the workplace.

C. From *Health Services* to *Fraser*: Pushing the Envelope and Closing the Door

While *Dunmore* gave pause to those who had been pessimistic about courts granting fundamental status to the rights of workers,⁴⁸ Justice Bastarache nonetheless hesitated to extend the meaning of section 2(d) too far. It took the British Columbia government’s hasty attempts to unilaterally restructure the collective agreements of provincial health care workers in 2002⁴⁹ to finally convince the Court to include the right to collectively bargain within the meaning of ‘freedom of association’.⁵⁰ Chief Justice McLachlin and Justice LeBel’s majority decision in *Health Services* represented a clean break from the *Labour Trilogy*. For them, section 2(d) guaranteed workers a “process through which [their associational] goals are pursued,” including a right to “unite, to present demands [...] collectively and to engage in discussions in an attempt to achieve workplace goals.”⁵¹ While insisting that such guarantees do not favour any particular model of labour relations⁵² nor “dictate the content of any particular [collective] agreement,”⁵³ Chief Justice McLachlin and Justice Lebel determined that they do impose on workers and employers a duty to bargain in good faith. Such a duty requires “meaningful dialogue” between the parties, the exchange and explanation of their respective positions, and “a reasonable effort to arrive at an acceptable contract.”⁵⁴

Once again, the goal of social and economic equality was apparent throughout the decision. Chief Justice McLachlin and Justice LeBel stressed that the ability to influence workplace conditions through collective bargaining “enhances the human dignity, liberty and autonomy of workers” by giving them “control over a major aspect of their lives.”⁵⁵ They went as far as crediting collective bargaining for enhancing the values of equality that underlie the *Charter* by reducing the “historical inequality between employers and employees.”⁵⁶ One could come away from reading this decision believing that the section 2(d) rights the Court granted to trade unions, including the right to collective bargaining, are as tied to the concept of equality as they are to that of freedom of association.

46 *Ibid* at para 46.

47 *Ibid* at para 85, quoting Senator Wagner’s justification of the original collective bargaining regime in the United States.

48 See e.g. Judy Fudge, “Labour is Not a Commodity: The Supreme Court of Canada and the Freedom of Association,” (2004) 67 Sask L Rev 425 at 425.

49 *Health Services*, *supra* note 6 at para 7-12.

50 *Ibid* at para 2.

51 *Ibid* at para 89.

52 *Ibid* at para 92.

53 *Ibid* at para 99.

54 *Ibid* at para 101.

55 *Ibid* at para 82.

56 *Ibid* at para 84.

It appeared that *Health Services* could usher in an era of “coordinated and proactive litigation strategy to vindicate labour’s collective rights.”⁵⁷ Even Judy Fudge, once skeptical that the labour movement could use the *Charter* for its own ends, acknowledged the symbolic importance of marking collective bargaining rights as “worthy of constitutional protection” and providing “a halo of much needed legitimacy to one of organized labour’s core activities.”⁵⁸ Others remained quite cautious, however, unconvinced that *Health Services* marked a radical shift in labour rights litigation. Eric Tucker, for example, believed that the declining political and economic strength of unions allowed the court to embrace collective bargaining, arguing that while “[a] strong labour movement was feared [...] a weak one can safely be presented as a vehicle for advancing democracy and equality.”⁵⁹

Despite this caution, the labour movement hoped that the Court in *Fraser* would add more substantive content to its definition of collective bargaining. Once again, Ontario agricultural workers were challenging legislation that outlined their workplace rights—in this case the *Agricultural Employees Protection Act* (“AEPA”)⁶⁰ that had replaced the *LRESLAA*. The new legislation gave farm workers greater protections in their efforts to form associations and required employers to listen to employee representations. However, it continued to exclude them from the *LRA*’s collective bargaining regime.⁶¹ Chief Justice McLachlin and Justice LeBel, speaking for the majority, refused to conclude that the legislation had “substantially interfere[d] with the ability to achieve workplace goals through collective actions”⁶² and held that the collective bargaining rights read into section 2(d) of the *Charter* in *Health Services* went no further than requiring parties to negotiate in good faith.⁶³ In overturning the Ontario Court of Appeal’s decision, the majority stated:

Health Services does not support [...] that legislatures are constitutionally required [...] to enact laws that set up a uniform model of labour relations imposing a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements [...] *what it protected is associational activity, not a particular process or result.*⁶⁴

Unlike in previous decisions, the role of collective bargaining in advancing the goals of industrial democracy and social equality is starkly absent from the majority opinion in *Fraser*. Justice Rothstein’s concurring opinion, which sought to reverse *Health Services*, questioned whether it was ever prudent to consider such matters within the context of section 2(d). He cautioned the Court against granting normative importance to the particular activities of trade unions,⁶⁵ or granting a particular right because it allowed individuals to “do a particular activity more effectively.”⁶⁶ Justice Deschamps also expressed concerns about how expansive the meaning of *Health Services* had become, although she did not believe these matters were necessarily outside the parameters of *Charter* litigation. Rather, she believed that the goal of economic equality, so central to

57 Judy Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* case in Canada and Beyond,” 37:1 Indus LJ 25 at 27.

58 *Ibid* at 39.

59 Tucker, *supra* note 2 at 172.

60 *Agricultural Employees Protection Act*, RSO 2002, c 16.

61 *Fraser*, *supra* note 1 at para 6.

62 *Ibid* at para 2.

63 *Ibid* at para 37.

64 *Ibid* at para 47 [emphasis added].

65 *Ibid* at para 214.

66 *Ibid* at para 202.

the recent jurisprudence on labour rights, “should not be accomplished by conflating freedom of association with the right to equality.”⁶⁷

As Judy Fudge argues, *Fraser* marked the end of the judiciary’s incremental expansion of labour rights through the *Charter* guarantee of freedom of association,⁶⁸ raising the threshold for finding violations of section 2(d) and making the meaning of a duty to bargain in good faith, established in *Health Services*, substantially less meaningful.⁶⁹ The majority’s failure to even comment on the significant jurisprudence related to statutory duties to bargain points to a Court not wanting to impose any sort of concrete obligations onto the bargaining process.⁷⁰ The Court could have attempted to identify particular features or mechanics necessary to guarantee meaningful collective bargaining,⁷¹ and as Justice Abella noted in her lone dissent, doing so would not have impeded future innovation to the Canadian labour relations model.⁷² The preference of the Court, however, was to delay this discussion for another day.

Whether that discussion will happen under section 2(d), however, is doubtful. The composition of the Court is quickly changing, and Justice Rothstein’s desire to return to a *Labour Trilogy* version of section 2(d), where only associational expressions of individual rights are protected, may gain further supporters on the bench.⁷³ It appears unlikely that future decisions will give so expansive a reading of “freedom of association” as to include detailed collective bargaining rights. As such, it may be a prudent course for the labour movement to pursue the goals of greater industrial democracy and distributive justice through the *Charter*’s equality provisions.

II. AN AWKWARD FIT: SECTION 15(1) AND LABOUR RIGHTS

The Court has stressed on numerous occasions that the equality provision embodied in section 15(1) of the *Charter* has at its heart the promotion of substantive equality, meaning its goal is “not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society [...].”⁷⁴ Chief Justice McLachlin and Justice Abella further reinforced this in *R v Kapp*, stating that “equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings deserving of concern, respect and consideration.”⁷⁵

67 *Ibid* at para 319.

68 Judy Fudge, “Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case,” 41:1 Indus LJ 1 at 15.

69 *Ibid* at 23.

70 Beth Bilson, “Developments in Labour Law: The 2010-2011 Term—Was *Health Services* a Mistake? The Supreme Court Decision in *Fraser v Ontario*,” (2011) 55 SCLR (2d) 285 at 295-296.

71 Fudge, *supra* note 68 at 25.

72 *Fraser*, *supra* note 1 at para 351.

73 Kirk Makin, “The coming conservative court: Harper to reshape the judiciary”, *The Globe and Mail* (13 May 2011). Online: The Globe and Mail < <http://www.theglobeandmail.com/news/politics/the-coming-conservative-court-harper-to-reshape-judiciary/article595398/>>.

74 *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 66.

75 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 15, quoting *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 at 171 (“*Andrews*”).

A. Section 15(1) and 2(d)'s Reluctant Dance

Despite these pronouncements and the above-mentioned affirmations that collective bargaining advances goals similar to those underlying section 15(1), the Court has hesitated to seriously consider whether substantive equality requires the government to enact labour rights' legislation. In *Delisle v Canada (Deputy Attorney General)*, Justice Bastarache, writing for the majority, took great pains to show that sections 2(d) and 15(1) operated very differently and should not inform each other when considering the statutory exclusion of a group from labour legislation.⁷⁶ Although the Royal Canadian Mounted Police officers' appeal was ultimately rejected in any case, the Court believed that their exclusion from the *Public Service Staff Relations Act* was best dealt with through the *Charter's* equality provisions, which "may require the government to extend the special status, benefit or protection it afforded to the members of one group to another group if the exclusion is discriminatory and is based on an enumerated or analogous ground of discrimination."⁷⁷ The Court determined that issues related to "inclusion in a statutory regime" were ill-suited to a section 2(d) analysis, since this provision requires "only that the state not interfere" with a protected activity.⁷⁸

In *Dunmore*, Justice Bastarache appeared to have shifted from his earlier position when evaluating the exclusion of agricultural workers from Ontario's labour laws. Although he refused to consider the agricultural workers' section 15(1) claim, stating that an equality analysis would not alter the remedy he ultimately decided upon,⁷⁹ it is impossible to divorce the section 2(d) analysis Justice Bastarache relied on from the underlying equality concerns the agricultural workers had put forward to the Court. While the majority may have not felt, as Justice L'Heureux-Dubé did in her concurrent judgment, that the "effect of the distinction [in the legislation] is to devalue and marginalize" agricultural workers,⁸⁰ it did stress that the under-inclusiveness of Ontario's labour laws infringed on the claimants' "empowerment and participation in both the workplace and society at large."⁸¹ While not formally rejecting Justice Bastarache's previous insistence that sections 2(d) and 15(1) require discrete and unrelated approaches, the overarching implication of *Dunmore* is that unequal access to associational rights fettered agricultural workers' ability to participate in Canadian society.⁸² Issues traditionally falling within the domain of the *Charter's* equality provision had seeped into the Court's approach to freedom of association.

In *Health Services*, however, the Court reverted to a much more cursory analysis of a group's equality concerns when their section 15(1) claim intersected with collective bargaining issues. Even though this case involved a provincial government targeting health care workers, a traditionally female-dominated occupation,⁸³ Chief Justice McLachlin and Justice LeBel ignored the gendered character of the workforce and dismissed the section 15(1) claim on the basis that labour legislation often treated different sections of the labour force uniquely and such treatment did not "get a discrimination analysis off the ground."⁸⁴ The majority in *Fraser* came to a similar conclusion, affirming that a formal legislative distinction did not necessarily trigger section 15(1) unless it amounted to "substantive

⁷⁶ *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989, 176 DLR (4th) 513

⁷⁷ *Ibid* at para 25.

⁷⁸ *Ibid*.

⁷⁹ *Dunmore*, *supra* note 5 at para 2.

⁸⁰ *Ibid* at para 168.

⁸¹ *Ibid* at para 11.

⁸² *Ibid* at para 39-42.

⁸³ Judy Fudge, "Conceptualizing Collective Bargaining under the Charter: The Enduring Problem of Substantive Equality," (2008) 42 SCLR (2d) at 234.

⁸⁴ *Health Services*, *supra* note 6 at para 165.

discrimination that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage.”⁸⁵ They arrived at this conclusion without seriously considering the significance of evidence that agricultural workers were “heavily drawn from migrant and immigrant populations,” or assessing whether exclusion from legislative protection would further marginalize the status of these workers in Canadian society.⁸⁶

The Court’s reasoning on this matter is problematic on a number of fronts. Firstly, it seems to be a retreat from the more robust pronouncements the Court has made regarding substantive equality. In both *Health Services* and *Fraser*, the majority appeared to imply that section 15(1)’s exclusive purpose is to remedy incidents of stereotype and prejudice⁸⁷ rather than, as the Chief Justice has herself suggested, “extend[ing] the guarantee of equality to matters beyond the scope of traditional anti-discrimination law.”⁸⁸ Secondly, despite ample evidence that the differentiation in the impugned legislation in these cases adversely impacted employees from traditionally marginalized groups, the Court demonstrated significant discomfort dealing with issues of intersectionality, and was unwilling to affirm a claim of discrimination even though a significant portion of the targeted group of workers shared an identity enumerated in section 15(1). Lastly, the majority has repeatedly and stubbornly refused to classify differential treatment of particular sectors of the labour force as discriminatory. Despite repeatedly stating the importance that work plays in the life of individuals, the Court has not considered one’s employment or class as something significantly essential to the human identity so as to make it worth protecting from discriminatory legislation.

B. The Journey of Section 15(1)

Clearly something is amiss in how the doctrinal tests for section 15(1) handle what is arguably a major source of societal inequality. The Court’s initial approach to equality claims was quite broad, with Justice McIntyre asserting in *Andrews v Law Society of British Columbia* that any “distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge [of] discrimination.”⁸⁹ Although he was careful to note that the list of grounds under which one could claim discrimination were non-exhaustive, his decision emphasized that the enumerated categories were the “most common and probably the most socially destructive and historically practiced bases of discrimination.”⁹⁰ While the Court has recognized additional analogous grounds to those listed,⁹¹ it has refused to extend such protection to class or occupational status. As Justice Bastarache stated in *Delisle*, analogizing professional status or employment to recognized groups ignores the mutable characteristic of employment “in a context of labour market flexibility.”⁹²

When the Court revisited section 15(1) in *Law v Canada (Minister of Employment and Immigration)*, it proposed a higher threshold to demonstrate a breach of the Charter’s equality provision. *Law*’s approach involved locating a relevant comparator to the

⁸⁵ *Fraser*, *supra* note 1 at para 116.

⁸⁶ *Ibid* at para 348.

⁸⁷ Fudge, *supra* note 83 at 216.

⁸⁸ Beverly McLachlin, “Equality: The Most Difficult Right” (2001) 14 SCLR (2d) 17 at 24.

⁸⁹ *Andrews*, *supra* note 57 at para 19.

⁹⁰ *Ibid* at para 20.

⁹¹ Sexual orientation in *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609, marital status in *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693, citizenship in *Andrews*, *supra* note 84 and Aboriginals living off reserve in *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*].

⁹² *Delisle*, *supra* note 70 at para 44.

claimant⁹³ and demonstrating certain contextual factors to substantiate the claim.⁹⁴ Shifting away from the more inclusive *Andrews* criteria, the Court now felt that distinct treatment, based on an enumerated or analogous ground, was not sufficient to claim a violation of equality in a substantive sense unless the differentiation infringed upon an individual's human dignity.⁹⁵ For legislation to negatively impact one's human dignity it had to:

[impose] a burden upon or [withhold] a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society[...].⁹⁶

In effect, *Law* narrowed legitimate section 15(1) claims to legislation or government action that was "premised upon a prejudicial stereotype" or that failed to "account [for] the social disadvantage of an individual or group."⁹⁷ Legislative differentiation that fell outside of these categories, on the other hand, would be difficult to challenge.

Despite making it more difficult for claimants to prove discrimination, *Law* offered a glimmer of hope for the consideration of labour rights within the *Charter*'s equality provision. Justice Iacobucci, for the Court, appeared willing to question the enumerated or analogous grounds requirement, stating that a "claimant is not required to establish membership in a sociologically recognized group in order to be successful."⁹⁸ Despite the Court's reluctance to include class or employment as an analogous ground, it was now fathomable that a particular group of workers could show discrimination if legislative differential treatment was sufficiently egregious. In addition, Justice Iacobucci's strong emphasis on human dignity spoke directly to the attributes the Court has repeatedly credited to collective bargaining. If the purpose of section 15(1) is rooted in the "promotion of human dignity,"⁹⁹ legislation that denies a group access to an activity that advances those ends could be seen as violating equality guarantees. As it did in *Fraser*, however, the Court may again ignore such potential reasoning on the grounds that the infringement does not impact human dignity in a way that speaks to stereotyping or prejudice.

More recent decisions have offered uneven encouragement for advocates of the inclusion of labour rights within section 15(1). In *Kapp*, Chief Justice McLachlin and Justice Abella maintained that "human dignity is an essential value underlying the s. 15 equality guarantee,"¹⁰⁰ but also noted that as a legal test it had "become confusing and difficult to apply" and "an additional burden on equality claimants."¹⁰¹ Although interpreting equality through the lens of human dignity "has tended to emphasize self-worth and integrity [at the expense of] material and systemic factors,"¹⁰² making human dignity a non-testable facet of an equality analysis could reduce its weight and thereby undermine

⁹³ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 56-58.

⁹⁴ *Ibid* at para 62-87.

⁹⁵ *Ibid* at para 53.

⁹⁶ *Ibid* at para 88.

⁹⁷ *Ibid* at para 80.

⁹⁸ *Ibid* at para 66.

⁹⁹ *Ibid* at para 47.

¹⁰⁰ *Kapp*, *supra* note 75 at para 21.

¹⁰¹ *Ibid* at para 22.

¹⁰² Fudge, *supra* note 83 at 231.

the cause of labour rights litigation. After all, one of the strongest arguments encouraging the Court to embrace such litigation is labour's role in promoting human dignity.

In *Withler v Canada (Attorney General)*, Chief Justice McLachlin and Justice Abella maintained *Law*'s narrow conception of inequality, which requires successful section 15(1) claimants to demonstrate that an impugned piece of legislation "impose[d] disadvantage by stereotyping members of the group."¹⁰³ However, they also advocated a more flexible test that did not rely on identifying a single comparator group in order to prove discrimination. Chief Justice McLachlin and Justice Abella pointed out that "discrimination may not be discernible with reference to just one prohibited ground... but only in reference to a conflux of factors."¹⁰⁴ As a result of removing the need "to pinpoint a particular group that precisely corresponds to the claimant group" the Court would have the "flexibility required to accommodate claims based on intersecting grounds of discrimination."¹⁰⁵ This development could certainly assist labour rights cases that involve workforces comprised of marginalized communities, though the Court's failure to even attempt applying this approach in *Fraser*—which was released only one month after *Withler*—may caution the labour movement against being too optimistic.

C. What's Work Got to Do with It? Fitting Labour Rights into the Charter's Equality Provisions

While the Court has chosen not to use the current doctrinal test for section 15(1) to process labour rights, several concurring opinions have offered insights that may be fruitful for future litigation. While the Court has excluded one's job as a characteristic on par with the enumerated grounds, in *Slaight Communications Ltd v Davidson* Chief Justice Dickson's majority decision described "a person's employment [as] an essential component of his or her sense of identity."¹⁰⁶ In *Fraser*, Justice Deschamps' concurring opinion echoed this sentiment, stating that "opening the door to the recognition of more analogous grounds" was a prudent approach, even if it would "entail a sea change in the interpretation of s. 15."¹⁰⁷ Justice L'Heureux-Dubé had previously taken similar positions in *Delisle* and *Dunmore*, contending that "occupation and working life are often important sources of personal identity."¹⁰⁸ She argued that in circumstances where the workers in question had limited employment mobility and could change their occupational status "only at great cost, if at all," including employment status as an analogous ground would promote the overarching goals of section 15(1).¹⁰⁹ If the Court had embraced this approach in *Fraser* and *Health Services*, the workers in those cases could have argued more effectively that the impugned legislation's differential treatment of particular sectors of the labour force triggered the *Charter*'s equality provision.

Despite the Court's reticence on the matter, the above pronouncements and the approach the Court adopted in *Dunmore* prompted prominent labour law theorists to explore the possibility of advancing collective bargaining rights through the *Charter*'s equality provision. Nitya Iyer, writing after *Dunmore* but prior to *Health Services*, noted that the Court consistently shied away from equality claims that "challenged the distribution of economic resources and benefits," preferring to only wield the sword of section 15(1)

¹⁰³ *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396 at para 36.

¹⁰⁴ *Ibid* at para 58.

¹⁰⁵ *Ibid* at para 63.

¹⁰⁶ *Slaight Communications Ltd v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 at para 20.

¹⁰⁷ *Fraser*, *supra* note 1 at para 319.

¹⁰⁸ *Delisle*, *supra* note 76 at para 8.

¹⁰⁹ *Dunmore*, *supra* note 5 at para 169, citing *Corbiere*, *supra* note 91 at para 14.

to advance the “egalitarian liberal vision of equality as ‘equality of opportunity’.”¹¹⁰ Leading up to *Dunmore*, however, many commentators had predicted that a successful result for the farmworkers would be rooted in their section 15(1) claim, which was conveniently situated within the Court’s comfort zone, since they “were seeking equality of opportunity: they wanted access to the same ground rules in order to compete for economic gain, not compensation for being unable to compete.”¹¹¹ Iyer and others were surprised when Justice Bastarache, despite his previous cautionary tone in *Delisle*, wrote a decision that interwove the farmworkers’ equality claim into his section 2(d) analysis.

Despite Justice Bastarache’s approach in *Dunmore*, Iyer believes that the choice to deal with the equality claim through section 2(d) illustrates an inherent limitation in pursuing collective bargaining claims through the *Charter*’s equality provision. Specifically, she argues that using section 15(1) “would [have been] more expansive of the reach of the *Charter* into the economic realm than applying s. 2(d)” and may have resulted in the Court limiting the consequences of its ruling through its section 1 analysis.¹¹² Iyer believes that the remedial choices available for a section 15(1) claim may have resulted in agricultural workers gaining full access to the Ontario *Labour Relations Act*’s collective bargaining system, which the Court may have deemed too broad an intrusion into the legislative sphere.¹¹³ In contrast, section 2(d) provided a “narrower way to hold in favour of the claimants. All that the legislature had to be ordered to do was to give farm workers enough statutory rights to guarantee their freedom of association.”¹¹⁴ The more restrained remedial choices available to the Court under a successful section 2(d) claim may have encouraged Justice Bastarache to steer clear of section 15(1), even when the facts of the case favoured an equality analysis. The Court’s approach in *Health Services* and *Fraser*, which eschewed even a modicum of acknowledgement of the equality issues at play in those cases, seems to strengthen Iyer’s thesis.

In contrast to Iyer’s position, Fay Faraday maintains a cautious optimism about advancing collective bargaining rights via the *Charter*’s equality provision, even after the *Fraser* decision. She harshly criticizes the direction of the Court during its second foray into the plight of agricultural workers, arguing that “[t]he courts’ failure to engage deeply with the equality argument yields an impoverished and decontextualized analysis which allows the differential and prejudicial treatment to persist.”¹¹⁵ While Justice Bastarache’s decision in *Dunmore* “recognized that the [impugned] law can operate in a way that ‘substantially orchestrates, encourages and sustains’ the farmworkers’ disempowerment, Faraday believes that the majority in *Fraser* “located [the] vulnerability in the workers themselves rather than understanding it as the end product of a regulatory response to the social relationship of farm labour.”¹¹⁶ Even though *Dunmore* was ultimately decided through the lens of freedom of association, the Court’s willingness to engage with

¹¹⁰ Nitya Iyer, “Disadvantaged Unions: The Merging of ss. 2(d) and 15(1) of the *Charter*,” 12 Canadian Lab & Emp LJ 1 (2005) at 2-3.

¹¹¹ *Ibid* at 13.

¹¹² *Ibid* at 15.

¹¹³ As such, Iyer argues “viewed from the perspective of ensuring that the *Charter*’s application in the economic sphere does not wander out of the domain of equality of opportunity and interfere with outcomes, this remedial concern makes sense of why the Court used s. 2(d) rather than s. 15(1) to find for the claimants in *Dunmore*. If it is important to the legislature to maintain the benefit in question, the impact of upholding of a claim under s. 15(1) in respect of an underinclusive benefit will always be greater than that of upholding the same claim under freedom of association.” *Ibid* at 16-17.

¹¹⁴ *Ibid* at 17.

¹¹⁵ Fay Faraday, “Envisioning Equality: Analogous Grounds and Farm Workers’ Experience of Discrimination,” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Press, 2012) 109 at 111.

¹¹⁶ *Ibid* at 126-127.

considerations of equality encouraged a more accurate assessment of the evidence than *Fraser*, and subsequently a better appreciation of the law's role in causing the inequality in bargaining rights that negatively impacted farmworkers.

Despite this trend, Faraday maintains that a section 15(1) analysis “addresses most directly the political and socio-economic dynamics of disempowerment” that exclusionary collective bargaining regimes create.¹¹⁷ Faraday notes the judicial comments suggesting that employment could be considered an analogous ground, and pushes this idea further, emphasizing that “work is both one’s calling card and a key mechanism for distributing social, economic and legal power.”¹¹⁸ Since the Court has recognized that work relationships are “inherently one[s] of unequal power”¹¹⁹ and that collective bargaining is a mechanism through which workers can “moderate...the imbalance of power at work,” legislation that denies workers the ability to bargain collectively “deprives them of a remedy for their pre-existing disadvantage.”¹²⁰ As such, legislation that denies a group of workers access to true collective bargaining touches directly upon the type of state action that section 15(1) aims to eradicate.

As helpful as Iyer’s and Faraday’s arguments are in understanding the potential and limits of approaching collective bargaining rights through the *Charter*’s equality provision, their analysis does not completely settle the matter. The remedial options available under section 2(d) may make it a more palatable approach for the Court, but the contrasting results in *Dunmore* and *Fraser* also highlight how the Court’s receptiveness (or lack thereof) to robust section 15(1) arguments can strengthen or weaken workers’ freedom of association claims. Similarly, Faraday’s reasoning runs into the problem that the economic equality she advocates has not been embraced as “an equality right for the purposes of s. 15 of the *Charter*.”¹²¹ To successfully further labour rights through section 15(1), advocates will have to prod the Court to embrace a more robust concept of equality than the jurisprudence has demonstrated up to this point.

III. RETHINKING EQUALITY AND THE CHARTER

As Sandra Fredman has noted, “distributive issues have always been problematic for courts.”¹²² As such, constitutional equality guarantees have tended to focus on status-based inequalities, leaving socio-economic inequalities to the purview of the welfare state.¹²³ The Canadian equality jurisprudence has followed suit, limiting the concept of “substantive equality to identity-based recognition issues [...] channel[ing] redistributive claims outside of the *Charter*’s guarantee of equality.”¹²⁴ While Chief Justice McLachlin has stated that the “equal benefit of the law and equal protection from the law’s burden [can] extend the guarantee of equality to matters beyond the scope of traditional antidiscrimination law,”¹²⁵ the Court has repeatedly foreclosed the possibility of considering equality beyond the lens of stereotyping and prejudice. Even attempts to “reformulate socio-economic inequality as a status-based wrong” have met unsympathetic

117 *Ibid* at 111.

118 *Ibid* at 132.

119 *Ibid* at 133.

120 *Ibid* at 136.

121 *Fraser*, *supra* note 1 at para 315.

122 Sandra Fredman, “Redistribution and Recognition: Reconciling Inequalities,” (2007) 23 SAJHR 214 at 215.

123 *Ibid* at 214.

124 Judy Fudge, “Substantive Equality, The Supreme Court of Canada, and the Limits of Redistribution” (2007) 23 SAJHR 235 at 241-242.

125 McLachlin, *supra* note 88 at 24.

ears,¹²⁶ as exhibited in the Court's dismissive approach to intersectional equality claims in *Health Services* and *Fraser*. Instead of adhering to its once-stated goal of substantive equality, the Court has embraced a guiding philosophy of 'maximalist equality of opportunity', under which legislative discrimination based on the personal attributes of an individual is prohibited but persistent structural inequalities are tolerated.¹²⁷ For labour rights to find a home in a section 15(1) analysis, the Court will have to accept a more robust version of equality than this—one that embraces as essential the goals of redistribution, recognition, and participation.

A. Three Pillars of Equality

Despite the Court's reluctance to embrace distributive justice in the section 15 jurisprudence, many political and judicial theorists of equality have long advocated for a more egalitarian distribution of society's material wealth. In *A Theory of Justice*, John Rawls noted that his two principles of justice¹²⁸ were a subset of a broader concept of justice that "[a]ll social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be *distributed equally* unless an unequal distribution of any, or all, of these values is to everyone's advantage."¹²⁹ The more conservative legal theorist Ronald Dworkin has also articulated that an equal distribution of resources, at least in the initial stage of an individual's life, is a vital element of a just society.¹³⁰ In her landmark essay "What Is the Point of Equality?", Elizabeth Anderson posits that in order to "create a community in which people stand in relations of equality to others,"¹³¹ individuals must have access to the "personal, material and social resources [...] necessary for functioning as an equal citizen in a democratic state,"¹³² including "effective access to the means of sustaining one's biological existence [...] and access to the basic conditions of human agency."¹³³ Every significant assessment of equality or egalitarian justice has attempted to address what the Court has refused to—the issue of redistribution of resources. Although the Court has highlighted the underlying goal for section 15(1) as "protecting equal membership and full participation in Canadian society,"¹³⁴ it is difficult to imagine accomplishing such a goal while refusing to consider redistributive outcomes.

While a more equal distribution of wealth is certainly an essential element, this does not displace the importance of respect and recognition. Status-based inequalities, such as disparagement or stereotyping of disadvantaged groups because of their identity, are not reducible to merely distributive concerns; rather, they are intimately tied to what Nancy Fraser calls 'injuries of misrecognition'.¹³⁵ A common remedy sought by oppressed groups in response to such 'injuries of misrecognition' is to "construct a collective identity that

126 Fredman, *supra* note 122 at 217.

127 Alex Callinicos, *Equality* (Cambridge: Polity Press, 2000) at 38.

128 Rawls' theory of 'justice as fairness' was divided into two main principles, the first being that each person should have equal right to an extensive system of basic liberties and the second being that social and economic inequalities should be arranged so that they are "to the greatest benefit of the least advantaged" and "attached to offices and positions open to all under conditions of fair equality and opportunity." *Ibid* at 45.

129 John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999) at 62 [emphasis added].

130 Callinicos, *supra* note 127 at p 59-60.

131 Elizabeth S Anderson, "What is the Point of Equality?" (January 1999) 109 *Ethics* 287 at 289.

132 *Ibid* at 316.

133 *Ibid* at 317.

134 *Gosselin v Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 at para 23.

135 Nancy Fraser, "From Redistribution to Recognition? Dilemmas of justice in a 'postsocialist' age," in Steven Seidman & Jeffrey C Alexander, eds, *The New Social Theory Reader: Contemporary Debates* (London: Routledge, 2001) 285 at 286.

[...] gives a new and positive evaluation of the difference on the basis of which they suffer discrimination.¹³⁶ Substantive equality appears to align with such a goal, encouraging the “promot[ion of] respect for the equal dignity and worth for all, [including] the positive affirmation of [...] differing identities.”¹³⁷ The Court has acknowledged that section 15(1) has this aim, stating that equality “entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”¹³⁸ While this positive recognition is essential to any satisfactory understanding of equality, it cannot be the end of the matter. Fredman correctly points out that groups subject to ‘injuries of misrecognition’ suffer disproportionately from economic inequality. Any “understandings of inequality which focus *only* on individual prejudice or misrecognition [will leave] structures of inequality [...] intact” if they do not concern themselves with issues of wealth redistribution.¹³⁹

A satisfactory theory of equality must also embrace the advancement of agency and participation for its redistributive and recognitive goals to become meaningful and sustainable. While the notion of substantive equality under section 15(1) has mostly focused on outcomes, be they material or symbolic, much scholarship has highlighted the ‘procedural dimension’ of equality. Rawls, for example, correlated the goal of political liberty to the existence of equal rights of political participation, including the equal opportunity to attain positions of political authority, the means to become informed about political issues, and the ability to propose alternatives to the political agenda.¹⁴⁰ Although these requirements fit well with most conceptions of modern liberal democracy, more recent works have advocated for a much deeper notion of participation. Anderson, for example, argues that equal citizenship is not satisfied solely through political agency but also through enabling people to effectively “participate in the various activities of civil society [...] including participation in the economy [and] freedom of association.”¹⁴¹ More recently, Colleen Sheppard has supported a vision of ‘inclusive equality’ that demands “more democratic and participatory structures of power and decision-making in the institutional contexts of daily life.”¹⁴² There is a growing consensus that equality involves not only the redistribution of material wealth and recognition, but also the redistribution of access to society’s decision-making processes.

The failure of the Court to embrace such a broad concept of equality, however, is not the fault of the wording of section 15(1) nor of the intention behind the provision. The debates and discussions surrounding the construction of the provision, as well as the Court’s early statements, suggest that the meaning of ‘discrimination’ under section 15(1) was much broader than subsequently applied by the Court.¹⁴³ The Court’s narrow application of the provision to discrimination that amounts to stereotype and prejudice, in fact, has done a great disservice to those seeking to use section 15(1) to quash a wide variety of unequal treatments that fall outside of the Court’s equality rubric. As Sophia Moreau argues, “depriving some of a benefit available to others, in circumstances where

¹³⁶ Callinicos, *supra* note 127 at 80.

¹³⁷ Fredman, *supra* note 122 at 225-226.

¹³⁸ Kapp, *supra* note 75 at para 15.

¹³⁹ Fredman, *supra* note 122 at 218 [emphasis added].

¹⁴⁰ Rawls, *supra* note 129 at 197.

¹⁴¹ Anderson, *supra* note 131 at 317-318.

¹⁴² Colleen Sheppard, *Inclusive Equality: The Relational Dimension of Systemic Discrimination in Canada* (Montreal: McGill-Queen’s University Press, 2010) at 12.

¹⁴³ Fay Faraday, Margaret Denike & M Kate Stephenson, “In Pursuit of Substantive Equality,” in Fay Faraday, ed., *Making Equality Rights Real: Securing Substantive Equality Rights Under the Charter* (Toronto: Irwin Law, 2006) 9 at 12.

the treatment is unfair to them” need not involve prejudice or stereotype.¹⁴⁴ Legislation that “perpetuates oppressive power relations [...] further entrenching or reinforcing power imbalances,” for example, may result indirectly from “institutional structures [...] not designed deliberately to harm the individuals in question, or express contempt for them, but nevertheless perpetuate the social and political domination of certain groups.”¹⁴⁵ Those negatively affected by such legislation should be able to turn to section 15(1) even though their oppression does not result from stereotype or prejudice.

If the *Charter*’s equality provision is to protect collective bargaining rights, the Court will have to reconsider its narrow understanding of discrimination to take into account the fact that unequal treatment under the law may engage section 15(1) without necessarily involving prejudice or stereotyping. Integrating the concerns of redistribution, recognition, and participation into the legal tests and reasoning that the section 15(1) jurisprudence has relied on would be a significant step toward accomplishing this goal.

IV. LABOUR RIGHTS AND THE PURSUIT OF EQUALITY

For over one hundred years, unionized workers have been at the forefront of advancing the type of societal equality laid out in Part III. While union efforts have been imperfect and uneven, collective bargaining has generally improved wages, helped counter systemic inequalities of groups most affected by ‘injuries of misrecognition,’ and provided avenues for workers to democratically shape the content of their working lives. The particular mechanisms of the *Wagner Act* model¹⁴⁶ have produced several shortcomings that demand alternative forms of industrial democracy, but the general process of collective bargaining is essential in securing the equality that section 15(1) sets out to achieve.

One of the greatest benefits unions claim is the wage premium their members are able to obtain through collective bargaining. Instead of the whims of supply and demand setting the price at which workers are able to sell their labour, unions can use their position as monopoly bargaining agents and the threat of workers striking to negotiate wages above the competitive level that a pure free market would reward.¹⁴⁷ This is a generally accurate depiction, although the way that union premium wages play out is often complex, especially when considering whether collective bargaining has enhanced a more equal distribution of wealth in society as a whole.

Unions have certainly had success at increasing workers’ wages in large monopoly or oligopoly industries, where employers can often meet additional wage costs by passing

¹⁴⁴ Sophia Moreau, “The Wrongs of Unequal Treatment,” in Fay Faraday, ed., *Making Equality Rights Real: Securing Substantive Equality Rights Under the Charter* (Toronto: Irwin Law, 2006) 31 at 32.

¹⁴⁵ *Ibid* at 40-41.

¹⁴⁶ The *Wagner Act* was the defining labour legislation of the New Deal in the United States, providing the legal framework for union recognition and collective bargaining for the first time in North America. Most Canadian jurisdictions adopted similar pieces of legislation after World War Two, prompting the wave of unionization across the private, and then the public sector, that followed the war. See Donald M. Wells, “Origins of Canada’s Wagner Model of Industrial Relations: The United Auto Workers in Canada and the Suppression of ‘Rank and File’ Unionism, 1936-1953,” 20:2 *Canadian Journal of Sociology* 193.

¹⁴⁷ Alex Bryson, “The Effect of Trade Unions on Wages,” (2007) 46 *Reflets et Perspectives* 33, contends that unionized workplaces may offer higher wages for reasons that are not directly attributable to collective bargaining, noting that it is difficult to identify a counterfactual, a sufficiently comparative society that has an absence of unions. Although there is certainly a diverse set of factors that determine wage rates (including the choices that workers of different skills sets make and the choices unions make in deciding which industries to organize) it is specious to underestimate the role that monopoly bargaining rights and the potential to strike have had in achieving pecuniary and non-pecuniary benefits for unionized workers.

them on to the consumer without fear of being undercut by non-existent or also-unionized competitors.¹⁴⁸ This is reflected most obviously by the decades of high wages and good benefits that auto and steel workers have been able to negotiate in Canada and the United States.¹⁴⁹ Public sector employees, since they won the right to bargain collectively, have also secured relatively good pecuniary remuneration, with their government employer able to pass on additional costs to the taxpayer.¹⁵⁰ During periods of economic austerity, unionized workers have also been more adept at resisting downward pressures on wages than the non-unionized—a tendency that is especially evident when one compares the increases in wage inequality in Canadian and American workforces over the last three decades. Although it has depleted since its height in the 1970s, Canadian union density has remained significantly higher than in the United States. As a result, employers' attempts to decrease the monetary benefits of unionized workers have been less successful in Canada.¹⁵¹ It is also possible that the threat of unionization has compelled non-union employers to raise wages to avoid a formal collective bargaining process.¹⁵² This may be one of the most significant—though indirect—redistributive effects of collective bargaining, helping to increase the overall material wealth of all workers.

This relative strength of unionized workers vis-à-vis the non-unionized, however, does not always mean a more generalized reduction of societal income inequality. For male workers, studies have shown that unions promote a more balanced distribution of wages, significantly reducing the wage variation in society. For female workers, however, unionization actually tends to increase wage variance in the workforce.¹⁵³ Union concentration levels in the private and public sector, as well as the choices employees of different skill levels tend to make, can partially explain this phenomenon. Highly skilled women are more likely to pursue employment in the unionized public sector than highly skilled men, who are more likely to choose non-unionized work environments in the private sector.¹⁵⁴ While the collective bargaining process has given highly skilled women access to better wages, the result is that the wage disparity grows between them and lower-skilled women, who tend to concentrate in industries with less union density and lower pay.¹⁵⁵ On the other hand, unionization in the private sector tends to concentrate in male-dominated mid- to low-skill industries, allowing unionized male workers to reduce the wage disparity with those in more highly skilled fields.¹⁵⁶ While it is not false to argue that unionization has advanced redistributive justice in society, since collective bargaining has not extended to all workers, unionization has never been able to produce the kind of egalitarian redistribution of society's material wealth the labour movement had once promised.

While collective bargaining has largely focused on the economic needs of workers, it would be a mistake to belittle the leverage unions use to challenge society's 'injuries of misrecognition,' especially in the realm of racial and gender oppression. The collective bargaining process provides a very concrete way to address economic and non-economic inequalities that are rooted in discrimination. Workers were able to negotiate entitlements

148 *Ibid* at 33.

149 Thomas Lemieux, "Unions and Wage Inequality in Canada and the United States," in David Card & Richard B Freeman, eds, *Small Differences That Matter: Labor Markets and Income Maintenance in Canada and the United States* (Chicago: University of Chicago Press, 1993) at 70-71.

150 *Ibid* at 75-77.

151 *Ibid* at 95.

152 Bryson, *supra* note 147 at 34.

153 In 1986-87 it was estimated that unions reduced wage variance by 14.5 percent for men, and increased the variance by 4.1 percent for women in the workforce (Lemieux, *supra* note 149 at 92).

154 *Ibid* at 87-88.

155 *Ibid* at 80-81.

156 *Ibid* at 81-82.

such as pay equity, affirmative action, employment equity, and anti-harassment measures well before governments addressed these issues.¹⁵⁷ In the auto industry, for example, unions negotiated seniority rights, as well as rules about job postings and transfer rights, that allowed Black autoworkers to overcome discriminatory promotion practices and move into better positions in the factories.¹⁵⁸ In the 1970s, as the feminist movement gained traction in Canadian society, unions became a forum in which women could campaign for equal pay legislation, maternity leave, and abortion rights.¹⁵⁹ Trade unions offered “organizational continuity [and] material resources” for feminists as they campaigned for change in the workplace and society at large.¹⁶⁰

Despite these proactive efforts to advance equality of recognition, the dominant collective bargaining models have also produced significant obstacles to more extensive equal rights for marginalized and gendered communities. Pamela Sugiman notes that the unity forged between Black and White workers in the post-war auto plants was a solidarity of ‘brotherhood,’ which excluded women from union politics and subordinated the needs of the few female autoworkers to those of “their UAW brothers.”¹⁶¹ Adelle Blackett and Colleen Sheppard also point out that the collective bargaining paradigm that entrenched itself in North America after the Second World War was ideally suited for the male-dominated Fordist factory, but less nimble for dealing with other kinds of workplace organization. As a result, trade unions have faced particular difficulties in applying *Wagner Act* models of collective bargaining to the less stable and service-oriented sectors of the economy, which tend to have workforces with higher representation of women and people of colour. This is starker in the agricultural and domestic economies, where workers are often completely excluded from industrial relations legislation or ignored by unions’ organizing efforts.¹⁶² Even one of the most important achievements of the labour movement, the seniority system that provides rights and protection to employees based on time of service rather than arbitrary management discretion, has proven problematic for gendered and racialized workers. Women workers, who are often employed intermittently because of familial duties, and workers of colour, who are often immigrants joining the workforce later in life, tend to accumulate less seniority than white male workers, meaning that “seniority rules can both accentuate the effects of past exclusion and reinforce the privileges of ‘insiders.’”¹⁶³ Although collective bargaining has helped weaken injustices of ‘misrecognition,’ its structural limitations continue to perpetuate some of the more entrenched oppressions in Canadian society.

As the Court has acknowledged, trade unions have played a central role in advancing industrial democracy in Canadian society.¹⁶⁴ As Geoffrey England argues, “the hallmark of collective bargaining, which distinguishes it from all other forms of job regulation, is that management and the union, *jointly* author the rules of the workplace.”¹⁶⁵ England claims, somewhat over-optimistically, that “collective bargaining help[s] liberate work

157 Hans Rollman, “Disproportionately Disenfranchised: Gendered Impacts of Interference in Collective Bargaining,” 17:18 *Just Labour: A Canadian Journal of Work and Society* 70 at 79.

158 Pamela Sugiman, “Privilege and Oppression: The Configuration of Race, Gender, and Class in Southern Ontario Auto Plants, 1939 to 1949,” (2001) 47 *Labour/Le Travail* 83 at 102.

159 Heath Jon Maroney, “Feminism at Work,” in Bryan D Palmer, ed, *The Character of Class Struggle: Essays in Canadian Working-Class History, 1850-1985* (Toronto: McClelland and Stewart, 1986), 160 at 162.

160 *Ibid* at 164.

161 Sugiman, *supra* note 158 at 97.

162 Adelle Blackett and Colleen Smith, “Collective Bargaining and Equality: Making Connections,” 142:4 *International Labour Review* 419 at 423.

163 *Ibid* at 434.

164 *Health Services*, *supra* note 6 at para 85.

165 England, *supra* note 25 at 177.

from the unilateral control of capitalists,” and that strikes and collective bargaining prepare workers for “industrial self-government and [...] for governance of the state.”¹⁶⁶ Yet the very same regime that encouraged more democratic say in the operations of the workplace has also promoted the receding of rank-and-file activity among actual workers. The *Wagner Act* model that emerged during and after the Second World War obligated employers to negotiate with majority-supported unions and punished unfair labour practices that discriminated against pro-union employees. However, it also removed the freedom to strike during the term of a collective agreement and the need for recognition strikes.¹⁶⁷ This promoted industrial peace, but also turned collective bargaining into a bureaucratically-controlled process. Union leadership mobilized its members during contract negotiations, but otherwise discouraged rank-and-file activism that would have been at the heart of a healthy industrial democracy. While collective bargaining has advanced the participation in societal decision-making that is essential to equality, the “democratic deficit” in present-day industrial relations may speak to the limits of the *Wagner Act*’s model of collective bargaining, which is neither the ideal nor only form of industrial democracy.¹⁶⁸ Any discussion about constitutionalizing labour rights, therefore, should involve a consideration of different models of workplace democracy, which could be significantly less bureaucratic, involve a much broader level of participation in workplace decision-making, and even extend to workers who are not unionized.

CONCLUSION: LABOUR RIGHTS AS HUMAN RIGHTS AND BEYOND

The return of the boom-bust cycle in the 1970s ushered in the era of neoliberalism, with many governments hastening the deregulation and liberalization of the economy by diluting labour legislation.¹⁶⁹ Weaker collective bargaining rights, including more burdensome processes to obtain them, have fueled a thirty-year widening of the income gap between the richest and poorest in Canadian society.¹⁷⁰ This has encouraged many voices to push for the formal recognition of labour rights as fundamental human rights, in hopes of hastening the momentum against societal inequality.¹⁷¹ Although prompted by the growth of inequality, the emergence of this ‘labour rights as human rights’ discourse may be useful in persuading the Court that the protection of collective bargaining rights is fundamental to the promotion of equality in Canadian society and deserving of section 15(1) protection.

¹⁶⁶ *Ibid* at 185-186.

¹⁶⁷ Jeremy Webber, “The Malaise of Compulsory Conciliation: Strike Prevention During World War II,” in Bryan D Palmer, ed, *The Character of Class Struggle: Essays in Canadian Working-Class History, 1850-1985* (Toronto: McClelland and Stewart, 1986) 138 at 142-143.

¹⁶⁸ The *Wagner Act* model may well fall within the scope of such a guaranteed right, but other forms of democratic workers’ control should not be excluded. Eric Tucker, for example, argues that constitutionalized workplace democracy could include “works councils” that operate in a similar fashion to occupational and health and safety committees that already exist for numerous work environments, Tucker, *supra* note 2 at 175. The system of compulsory collective representation under which the Quebec construction industry operates could also fall within the rubric of workers’ democracy. There are many similar examples of employee control that extend beyond formal collective bargaining regimes, such as the German *Betriebsrat* or the *Délégués du Personnel* in France.

¹⁶⁹ Fudge, *supra* note 48 at 427-428.

¹⁷⁰ Burkett, *supra* note 30.

¹⁷¹ Judy Fudge canvases the various writings of those wanting to broaden the concept of human rights to include social rights, such as access to collective bargaining, in “The New Discourse of Labour Rights: From Social to Fundamental Rights?” (2007-2008) 29 Comp Lab L Pol'y J 29.

Advocates for the recognition of labour rights as fundamental human rights succeeded in obtaining some formal recognition of their position, with the International Labour Organization (ILO) passing its Declaration of Fundamental Principles and Rights at Work in 1998 (“Declaration”) and the European Union adopting a comparable measure within its 2000 Charter of Fundamental Rights (“the Charter”).¹⁷² Similar to the language the Court has adopted in considering the *Charter*’s equality provision, the ILO’s Declaration describes labour rights as going to “the essence of human dignity at work, touching upon bedrock values of freedom and equality.”¹⁷³ While the labour rights affirmed in the Declaration and the Charter are not enforceable through individual adjudication, “casting labor rights as international human rights has transformed ‘the legal matter at hand into a moral one—the moral and unjust denial of human dignity.’”¹⁷⁴

While the lack of teeth in these measures may seem counterproductive for those pushing for the constitutionalization of collective bargaining rights, this approach may in fact offer new means to encourage the Court to broaden its understanding of equality and to fit labour rights within the rubric of section 15(1), either directly or indirectly. As Iyer notes, the Court has mostly shirked at acknowledging social rights—such as collective bargaining—as justiciable, preferring to leave these matters to the purview of the legislature. This has made it particularly difficult for labour advocates to convince the Court that collective bargaining rights should be included within the *Charter*’s equality provision, since doing so could force the Court to intervene aggressively in the policy domain of government. The human rights discourse works well with this judicial hesitancy, preferring to “function as interpretive norms and principles of institutional design.”¹⁷⁵ In effect, this is how the Court imported the principles underlying section 15(1) into its section 2(d) analysis in *Dunmore*. Justice Bastarache used the principles of societal equality to strengthen the more remedially modest associational rights of farmworkers, furthering their social rights indirectly by giving farmworkers the tools to advance their equality goals through self-activity.

The Court’s approach to equality in *Health Services* and *Fraser*, however, raises some concerns for those hoping to advance access to collective bargaining through section 15(1); these cases may reflect a growing conservatism in the Court, which could fetter the promotion of all social rights—not just labour rights—through constitutional litigation. Nonetheless, there are several reasons to continue to argue that collective bargaining merits protection from the *Charter*’s equality provision. Firstly, as noted in Part II of this article, several justices have indicated that section 15(1) may be a preferable forum in which to discuss these issues. The increased willingness of the Court to deal with intersectional claims, as expressed in *Withler*, may further strengthen equality arguments for organizing efforts involving traditionally oppressed communities. Secondly, while the Court may remain reluctant to discuss equality and discrimination outside of the ‘stereotype and prejudice’ box, advancing robust equality claims may indirectly strengthen plaintiffs’ associational arguments by imbuing them with a stronger moral character. Similar to the goals of the ‘labour rights as human rights’ discourse, and following the reasoning that Justice Bastarache used in *Dunmore*, advancing a broader vision of equality and highlighting the role collective bargaining in promoting this vision, can shape the interpretive norms the Court has relied on when considering workers’ freedom of association rights.

¹⁷² *Ibid* at 30.

¹⁷³ *Ibid* at 39.

¹⁷⁴ Francis Maupain, Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights, 16 EUR J INT'L L 439 (2005) cited in *ibid* at 40.

¹⁷⁵ *Ibid* at 42.

None of this guarantees success, but with income disparity growing and reduced workplace rights becoming the industrial norm,¹⁷⁶ labour advocates have a responsibility to highlight the role unions have played in advancing equality in Canadian society. They must continue to argue that constitutionally-protected collective bargaining rights are essential for unions to continue to this pursuit. The success or failure of these arguments will heavily shape the future of equality in Canadian society.

176 *Ibid* at 29-30.

ARTICLE

COLLATERAL CONSEQUENCES: THE EFFECTS OF DECRIMINALIZING PROSTITUTION ON WOMEN'S EQUALITY IN BUSINESS

By Danielle K. Lewchuk*

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INTRODUCTION

Prostitution may be decriminalized in Canada in the next few years. In British Columbia, the Downtown Eastside Sex Workers United Against Violence Society (SWUAV) and Sheryl Kiselbach are using the *Canadian Charter of Rights and Freedoms* ("Charter")¹ to challenge the constitutionality of Canada's adult prostitution offences.² SWUAV and Ms. Kiselbach were granted public interest standing to take their case forward by the Supreme Court of Canada (SCC) in September 2012.³ In March 2012, the Ontario Court of Appeal in *Canada (Attorney General) v Bedford* ("Bedford")⁴ found the sections of the *Criminal Code*⁵ related to keeping a common bawdy-house⁶ and living off the avails of prostitution⁷ inconsistent with section 7 of the *Charter*.⁸ Communicating for the purposes of prostitution⁹ remains illegal, although this too was struck down at the trial level.¹⁰ Leave to appeal and cross-appeal the *Bedford* decision was granted by the SCC in October of 2012.¹¹

The decriminalization of prostitution will certainly affect the lives of sex workers, who are among some of the most marginalized women in our society. As many advocacy groups and sex workers themselves have argued, decriminalization stands to improve the lives of sex workers in numerous ways.¹²

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

2 *Downtown Eastside Sex Workers United Against Violence Society v Canada (AG)*, 2010 BCCA 439 at para 4, 324 DLR (4th) 1.

3 *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, 34 BCLR (5th) 1.

4 2012 ONCA 186, 346 DLR (4th) 385 [Bedford].

5 *Criminal Code*, RSC 1985, c C-46.

6 *Ibid*, s 210.

7 *Ibid*, s 212(1)(j).

8 *Bedford*, *supra* note 4 at para 325.

9 *Criminal Code*, *supra* note 5, s 213(1)(c).

10 *Bedford v Canada*, 2010 ONSC 4264 at paras 6, 508, 327 DLR (4th) 52.

11 *Bedford*, *supra* note 4, leave to appeal to SCC granted, 34788 (October 25, 2012).

12 See generally Pivot Legal Society Sex Work Subcommittee, *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws* (2004), online: <www.pivotlegal.org>.

Intersectionality theory,¹³ however, explains that a policy change that will improve equality for one group of women, such as sex workers, who live at one intersection of race, class, and gender, will not necessarily improve equality for all women. For example, networking is well-documented as a gendered activity that affects women's promotion and high-level success in the corporate world.¹⁴ Businesswomen are particularly disadvantaged when networking occurs in the context of sex entertainment, a barrier which I argue is likely to increase if prostitution is decriminalized. To achieve substantive equality, decision makers must take the differential effects of policy changes into consideration. I argue that women's equality in business can be addressed through a modification of the *Income Tax Act*¹⁵ to limit the deductibility of sex-entertainment expenses.

This paper begins in Part I with an introduction to intersectionality theory and its relationship to feminism and notions of substantive equality. I also explore the income tax system and its past use to advance equality causes. Part II describes the gendered aspects of networking, and Part III explains how decriminalizing prostitution will further reduce women's ability to network. The tax policy options available to prevent a move towards equality for sex workers from decreasing equality for businesswomen are discussed in Part IV. The paper concludes that a careful consideration of intersectionality theory and a timely policy response that prevents sex-entertainment expenses from being deductible for income tax purposes would be an effective solution to move our society towards substantive equality for everyone in light of the potential decriminalization of prostitution.

I. GENDER EQUALITY

A. Intersectionality, Sex Workers, and Business Women

The right to equality in Canada is embodied in section 15 of the *Charter*.¹⁶ It represents a right beyond formal equality—substantive equality.¹⁷ The term 'substantive equality' has been present in SCC jurisprudence since *Eldridge v British Columbia (Attorney General)*,¹⁸ while the concept was first articulated in 1989 in *Andrews v Law Society of British Columbia*.¹⁹ Although the commitment to substantive equality has not necessarily translated into successful equality claims, it still exists in our larger legal framework.²⁰ More recently, academics have argued that to achieve substantive equality, it is necessary to engage in intersectionality analysis, which the SCC has largely not done.²¹

13 American critical race theorist Kimberlé Crenshaw is credited as the first person to engage in intersectionality analysis. She used intersectionality to explain that the particular oppression experienced by women of colour arises through a combination of race and gender that cannot be explained with reference to race or gender alone. See Carol A Aylward, "Intersectionality: Crossing the Theoretical and Praxis Divide" (2010) 1:1 *Journal of Critical Race Inquiry* 1 at 9.

14 See e.g. Yvonne Benschop, "The Micro-politics of Gendering in Networking" (2009) 16:2 *Gender, Work and Organization* 217; Savita Kumra & Susan Vinnicombe, "A Study of the Promotion to Partner in a Professional Services Firm: How Women are Disadvantaged" (2008) 19:s1 *British Journal of Management* S65 [Kumra & Vinnicombe, "A Study"].

15 Income Tax Act, RSC 1985, c 1 (5th Supp).

16 *Supra* note 1.

17 Formal equality refers to the mere absence of distinction based on difference in a given law. Substantive equality, however, looks at whether the actual impact of the law is equal. See e.g. *Withler v Canada (AG)*, 2011 SCC 12 at para 39, [2011] 1 SCR 396.

18 *Eldridge v British Columbia (AG)*, [1977] 3 SCR 624, 151 DLR (4th) 577.

19 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

20 Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 *Sup Ct L Rev* 2d, 183 at 184.

21 Aylward, *supra* note 13 at 8.

Since the early days of the feminist movement, tension has existed between power, privilege, and disadvantage.²² The effect of the decriminalization of prostitution on female sex workers and female businesspeople embodies much of this complexity. An integrated vision of feminism requires that we direct our attention towards intersections and the manner in which they combine to affect women's experiences of discrimination.²³

Intersectional discrimination "arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone."²⁴ Traditionally, intersectionality has been used to advance equality issues for particularly marginalized groups of people.²⁵ Such discrimination results from a combination of factors including, but not limited to, more traditional grounds of discrimination such as gender, race, class, disability, and sexual orientation.²⁶ By taking an intersectional approach, one can understand and appreciate how a policy change such as the decriminalization of prostitution can affect two different groups of the same gender inequitably.

From an equality perspective, sex workers are more in need of protection than businesswomen. Sex work is a highly gendered activity. Between 75 to 80 percent of Canadian prostitutes are women, and almost all clients are men.²⁷ Sex work is also racialized. Aboriginal women are over-represented among sex workers, particularly in the western provinces and Québec.²⁸ The class dimension is slightly more complicated. While only 20 percent of prostitutes work on the street, they are the most vulnerable to violence, making prostitution one of the most dangerous occupations in Canada.²⁹ Some prostitutes choose their work, while many others turn to it from a perceived lack of choice.³⁰

Pivot Legal Society ("Pivot"), who intervened in *Bedford*, asserts that the social conditions leading women to become involved in sex work include "poverty, homelessness, violence, addiction and colonization."³¹ Pivot seeks to end the violence and discrimination experienced by sex workers and to do so, they believe that the decriminalization of prostitution is an important first step.³² Sex workers live in and work in conditions that are extremely violent and dangerous, and from their own experience, the current structure of Canadian criminal law exacerbates those harmful conditions.³³ Therefore, a policy change that includes the decriminalization of prostitution would be a step towards equality for women who are sex workers.

22 Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002) at 3.

23 Aylward, *supra* note 13 at 2-7.

24 Mary Eaton, "Patently Confused: Complex Inequality and *Canada v. Mossop*" (1994) 1 Rev Constit Studies 203 at 229.

25 See e.g. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1988-89] U Chicago Legal F 139.

26 *Ibid* at 21.

27 Library of Parliament, *Prostitution in Canada: An Overview* by Julie Cool (Ottawa: Parliamentary Information and Research Service, 2004) at 3, online: Government of Canada Publications <<http://publications.gc.ca/collections/Collection-R/LoPBdP/PRB-e/PRB0443-e.pdf>>.

28 *Ibid*.

29 *Ibid* at 1, 7-8.

30 *Ibid* at 12.

31 Pivot Legal Society, *Sex Worker Rights*, online: <<http://www.pivotlegal.org/our-work/sex-worker-rights>>.

32 *Ibid*.

33 Pivot Legal Society Sex Work Subcommittee, *supra* note 12 at 2.

Businesswomen, however, will likely experience a different type of discrimination if the *Bedford* decision stands. Relatively high-level businesswomen exist at a different intersection of race, class, and gender than sex workers. They are privileged in terms of class, probably race, and likely only share gender with sex workers. However, as a society we do not want policy choices that may improve conditions for one group of marginalized women to worsen them for others. Through intersectionality theory, we can understand the nuanced mechanisms contributing to inequality and look beyond the problems to possible solutions.

Further policy change can prevent the secondary effect of the decriminalization of prostitution and perhaps even reduce the discrimination currently experienced by businesswomen. Business scholars Robin Ely and Debra Myerson suggest that to achieve a more equal workplace, one should “locate and enact a vision of work and social interaction that is less constrained by gendered and other oppressive roles, images, and relations,” which can be achieved through “an emergent, localized process of incremental change.”³⁴ I propose that changing the *Income Tax Act* in an effort to modify social behaviour in the workplace would be an effective method to address inequality for businesswomen. Care would, however, need to be taken to ensure that any such change would not detract from the equality gains of more marginalized women.

B. Feminism and Tax

The fairness of an income tax system is typically judged with reference to four factors: neutrality, simplicity, equity, and efficiency.³⁵ Traditionally, equity is measured vertically between people of different income levels and horizontally between people at the same income level, but carrying out different activities.³⁶ A feminist critique of the tax system focuses on the principle of equity and examines the way the system affects people differently based on their gender.³⁷ The *Income Tax Act* as it stands is formally equal legislation, since it applies to taxpayers regardless of their gender. However, it is not necessarily substantively equal, since it produces unequal outcomes.

It should not be a surprise that the *Income Tax Act* has the potential to both address and create the conditions for substantive equality. The income tax system is a massive spending program, which has been described as “a most powerful social and economic tool.”³⁸ Tax expenditures have numerous potential social policy applications, such as redistributing income, encouraging economic behaviours, and delivering social programs.³⁹ Tax law was the centre of two prominent SCC equality cases in the mid-1990s: *Thibaudeau v*

³⁴ Robin J Ely & Debra E Myerson, “Theories of Gender in Organizations: A New Approach to Organizational Analysis and Change” (2000) 22 *Research in Organizational Behaviour* 103 at 132-133.

³⁵ Status of Women Canada, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System* by Claire FL Young (Ottawa: Status of Women Canada Policy Research Fund, 2000) at 5 [Young, “Women, Tax”]; Claire Young, “Taxing Times for Women: Feminism Confronts Tax Policy” (1999) 21 *Sydney L Rev* 487 at 487-88 [Young, “Taxing Times”].

³⁶ Tim Edgar & David Sandler, *Materials on Canadian Income Tax*, 13th ed (Toronto: Thomson Carswell, 2005) at 66.

³⁷ Young, “Taxing Times”, *supra* note 35 at 487.

³⁸ *Ibid* at 492; Young, “Women, Tax”, *supra* note 35 at 1.

³⁹ Young, “Women, Tax”, *supra* note 35 at 5.

*Canada (MNR)*⁴⁰ and *Symes v Canada* (“*Symes*”).⁴¹ Tax law is not traditionally thought of as connected to political issues, but Lisa Philipps and Margot Young, legal scholars who study tax policy and equality law respectively, write that through these two cases, tax law has become a leading vehicle for presenting the judiciary with gender equality issues.⁴²

Symes dealt with the deductibility of childcare expenses in a business context and it illustrates some of the feminist critiques of the income tax system. In particular, *Symes* highlights the relationship between business and gender in a tax context. In *Symes*, the majority refused to classify childcare expenses as deductible business expenses. They relied on section 63 of the *Income Tax Act*, which allows some deduction of childcare expenses for all taxpayers, with a specific formula drafted to give the lower income spouse the majority of the deduction.⁴³ Elizabeth Symes also mounted a section 15(1) *Charter* challenge, but the majority focused on section 63 of the *Income Tax Act* and did not find a violation of the *Charter*.⁴⁴ Justice McLachlin (as she then was) and Justice L’Heureux-Dubé argued that Ms. Symes should have been able to deduct her childcare expenses. In her reasons, Justice L’Heureux-Dubé questioned whether the business deductions that already existed for cars, club dues, entertainment, dining, and charitable donations were “so obviously business expenses rather than personal ones.”⁴⁵

Justice L’Heureux-Dubé went on to examine the gendered foundations of the business world:

When we look at the case law concerning the interpretation of “business expense”, it is clear that this area of law is premised on the traditional view of business as a male enterprise and that the concept of a business expense has itself been constructed on the basis of the needs of businessmen. This is neither a surprising nor a sinister realization, as the evidence well illustrates that it has only been in fairly recent years that women have increasingly moved into the world of business as into other fields, such as law and medicine. The definition of “business expense” was shaped to reflect the experience of businessmen, and the ways in which they engaged in business.⁴⁶

Women’s move into the business world can no longer be considered recent, yet Justice L’Heureux-Dubé’s comments remain relevant 20 years later. The gendered effect of networking in the context of sex-entertainment expenses continues to place a burden on women. These concepts are explored in Part II, below.⁴⁷

40 *Thibaudeau v Canada (MNR)*, [1995] 2 SCR 627, 124 DLR (4th) 449. *Thibaudeau* was a section 15(1) *Charter* challenge. Suzanne Thibaudeau argued that by shifting the tax liability from the non-custodial to custodial spouse, her equality rights were violated. The court analysed section 15(1) by using a two-step framework, where the first step requires differential treatment that causes a burden. The majority did not find that shifting tax liability constituted a burden, while both Justice McLachlin (as she then was) and Justice L’Heureux-Dubé did.

41 *Symes v Canada* [*Symes*], [1993] 4 SCR 695, 110 DLR (4th) 470 [*Symes*]. In both cases, the only female judges on the SCC at the time, Justice McLachlin (as she then was) and Justice L’Heureux-Dubé, dissented in separate reasons.

42 Lisa Philipps & Margot Young, “Sex, Tax and the Charter: A Review of *Thibaudeau v. Canada*” (1995) 2:2 *Review of Constitutional Studies* 221 at 224.

43 *Supra* note 41 at 744-751.

44 *Ibid* at 771-72.

45 *Ibid* at 803.

46 *Ibid* at 798 [emphasis in original].

47 There is no equivalent to section 63 for sex-entertainment expenses. If a case about sex-entertainment expenses were to go before the SCC today, it would be interesting to see if the Court would continue to split along gender lines although we are back to only three women sitting on the bench. However, a more timely avenue for achieving policy change in this area is likely through the legislature and the *Income Tax Act*, which is addressed below in Part IV.

II. NETWORKING IN BUSINESS

A. Current State of Women in Business

Women's presence in Canada's paid labour force has steadily increased over the past 30 years. In 2009, women represented 48 percent of the paid labour force and 57 percent of 'Professional' occupations, including 51 percent of 'Business and Finance'.⁴⁸ Although women's average income is increasing more quickly than men's, as of 2008, men still out-earned women, averaging \$47,000 a year compared to women at \$30,100.⁴⁹

At the managerial level, women are better represented in lower levels than more senior ones. In addition, there tend to be more female managers in fields where more women are employed at all levels.⁵⁰ In 2009, 32 percent of senior managers were women, compared with 37 percent of managers overall.⁵¹ In 2001, only 12 percent of *Fortune 500* company board seats were held by women,⁵² and of the top seven ranks in organizations, women filled a mere 5 percent.⁵³

B. Importance of Networking for Career Advancement

Contemporary career success depends more on informal networks than official hierarchical channels. Such networks comprise an individual's social capital, which is bolstered by the nature and quality of one's personal relationships.⁵⁴ For those who have the opportunity to develop and exploit them, informal networks have a variety of benefits that have been documented since the 1970s.⁵⁵ The benefits of high-quality networks include upward mobility, career planning and strategizing, accomplishing tasks, personal and professional development, information exchange, and increased visibility.⁵⁶ A good network is one that benefits from informal interactions, which may involve favours, persuasion, and lead to other connections with people who are already influential.⁵⁷

C. The Gendered Nature of Networking

The benefits of networking and networks are no different for women than for men. Networks are advantageous because they provide information about job opportunities that might not otherwise be available, provide visibility, act as an important source of information about unwritten rules, and allow access to senior individuals and decision-

48 Statistics Canada, "Paid Work" in *Women in Canada: A Gender-based Statistical Report* by Vincent Ferrao, (Ottawa: Minister of Industry, 2010) at 5, 21, online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11387-eng.pdf>>.

49 Statistics Canada, "Economic Well-being" in *Women in Canada: A Gender-based Statistical Report* by Cara Williams (Ottawa: Minister of Industry, 2010) at 6, online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11387-eng.pdf>>.

50 Janet Cooper Jackson, "Women middle managers' perception of the glass ceiling" (2001) 16:1 *Women In Management Review* 30 at 30.

51 Ferrao, *supra* note 48 at 21-23.

52 Douglas M Branson, *No Seat at the Table - How Corporate Governance and Law Keep Women Out of the Boardroom* (New York: New York University Press, 2007) at 89.

53 Ely & Myerson, *supra* note 34 at 104.

54 Savita Kumra & Susan Vinnicombe, "Impressing for Success: A Gendered Analysis of a Key Social Capital Accumulation Strategy" (2010) 17:5 *Gender, Work and Organization* 521 at 523.

55 See e.g. Margaret Hennig & Anne Jardin, *The Managerial Woman* (New York: Anchor Press/Doubleday, 1977).

56 Jia Wang, "Networking in the Workplace: Implications for Women's Career Development" [2009] 122 *New Directions for Adult and Continuing Education* 33 at 33-34; Jackson, *supra* note 50 at 32.

57 Wang, *supra* note 56 at 33-34.

makers.⁵⁸ However, structural inequalities make it much more difficult for women to succeed in building adequate social capital.

Inequality in the workplace is exacerbated because the structure of formal and informal social practices was created by and for men.⁵⁹ Yvonne Benschop, whose research focuses on how gender and diversity function in organizations, argues that networking invokes two aspects of gender.⁶⁰ The first is a more traditional view of gender, which she describes as gendering practices.⁶¹ Gendering practices constitute the repertoire of social actions that comprise masculine or feminine behaviour.⁶² The second dynamic that networking invokes is practising gender, which is the real-time implementation of gender in a social setting.⁶³ Men and women ‘do gender’ and construct their social gender identities through a process of reciprocal positioning.⁶⁴

One particularly poignant ad executive stated in 1988 that “[t]here are no female account directors on the really big accounts anywhere in advertising, because to get on in this business an individual has to be able to drink, fart and fuck with the best.”⁶⁵ More recent studies of women in international consulting firms continue to reveal a gendered dynamic. In one study, half of the women who were interviewed did not believe that the activity of networking came as naturally to women as it did to men.⁶⁶ Another study that interviewed 50 female managers revealed that they all perceived that there was an ‘old boys’ network in their organization and 86 percent thought there was not enough networking amongst senior female managers.⁶⁷ The interviewees believed that this lack of networking resulted in “blocked promotion and blocked career development, discrimination, occupational stress, and lower salaries.”⁶⁸ This gendered effect is present on Canadian corporate boards, where female directors still report the presence of the ‘old boys’ club.⁶⁹

D. Networking in the Context of Sex Entertainment

There is no place where the ‘old boys’ network is more pernicious than when networking takes place in homosocial settings, such as golf courses and strip clubs.⁷⁰ Sheila Jeffreys, an Australian political scientist who has written prolifically about gender, adds further nuance to this point by arguing that “the strip club is gendered in a way that golf is

58 Ines Wichert, *Where Have All the Senior Women Gone?: 9 Critical Job Assignments for Women Leaders* (Great Britain: Palgrave Macmillan, 2011) at 30-33.

59 Ely & Myerson, *supra* note 34 at 113.

60 Benschop, *supra* note 14 at 222.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 Barbara Poggio, “Editorial: Outline of a Theory of Gender Practices” (2006) 13:3 *Gender, Work & Organization* 225 at 225.

65 Michele Rene Gregory, “Inside the Locker Rooms: Male Homosociability in the Advertising Industry” (2009) 16:3 *Gender, Work and Organization* 323 at 323.

66 Kumra & Vinnicombe, “A Study”, *supra* note 14 at S69-70.

67 Margaret Linehan, “Networking for female managers’ career development: Empirical evidence” (2001) 20:10 *Journal of Management and Development* 823.

68 *Ibid* at 825.

69 Patricia Bradshaw & David Wicks, “The Experiences of White Women on Corporate Boards in Canada” in Ronald J Burke & Mary C Mattis, eds, *Women on Corporate Boards of Directors: International Challenges and Opportunities* (Dordrecht, NL: Kluwer Academic Publishers, 2000) at 203, 208.

70 Homosocial refers to same-sex relationships that are not romantic or sexual in nature. See generally Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (New York: Columbia University Press, 1985).

not. Women cannot learn to be good at visiting strip clubs. Women are not able to join in the bonding that takes place.”⁷¹ In many cases, women are explicitly excluded from these outings.⁷² In one study “the saleswomen...described over and over again being told not to come, not being invited, and even being deceived as the men snuck out to a strip club.”⁷³ The discomfort and reduced networking opportunities for women that result from sex entertainment constitute both direct and indirect sex discrimination.⁷⁴

Strip club networking has been documented in the United Kingdom, United States, and Australia. In the United Kingdom, almost half of lap dancing clubs target employers directly through online marketing.⁷⁵ The expansion of such clubs in the United Kingdom, since they were first allowed in 1995, has both increased and normalized their use in the business context.⁷⁶ In the United States, there are no official numbers, but industry insiders estimate that 33 to 40 percent of their revenue is sourced from business clients.⁷⁷ In Australia, where prostitution has been legalized, brothels market themselves directly to their corporate clients. One escort agency even attributes the ‘bulk’ of its business to clients being entertained by corporate hosts.⁷⁸ In addition, the use of strip clubs in business has been the subject of legal action in the United Kingdom⁷⁹ and United States.⁸⁰

There is little information regarding the prevalence of such business activities in Canada. However, strip clubs are legal and given the cultural closeness between Canada and the United States, United Kingdom, and Australia, it is reasonable to infer that networking in the context of sex entertainment also occurs here. For example, both Canada and the United States allow a 50 percent deduction of entertainment expenses.⁸¹ As a proportion of gross domestic product, Canada spends as much, if not more than the

71 Sheila Jeffreys, “The sex industry and business practice: An obstacle to women’s equality” (2010) 33:3 Women’s Studies International Forum 274 at 279.

72 Laurie A Morgan & Karin A Martin, “Taking Women Professionals Out of the Office: The Case of Women in Sales” (2006) 20:1 Gender & Society 108 at 116.

73 *Ibid* at 117.

74 Kat Banyard & Rowena Lewis, “Corporate Sexism: The sex industry’s infiltration of the modern workplace” (September 2009) at 15, online: Fawcett Society <www.fawcettsociety.org.uk>.

75 *Ibid* at 15.

76 *Ibid* at 13.

77 Jeffreys, *supra* note 71 at 276.

78 *Ibid* at 277.

79 Although she lost her case, Anna Atkins alleged sex discrimination and victimization against her superiors, who were senior bank executives, at a United Kingdom Employment Tribunal in 2009. See James Colasanti, “Loughton: Sexism claims rejected by employment tribunal”, *The Guardian* (13 March 2009). She stated that it was “not uncommon for off-site meetings to end up in strip clubs.” See David Brown, “City bank’s ‘strip club and cigars’ culture excluded woman executive, tribunal told”, *The Times* (11 February 2009).

80 In 2004, Allison Schieffelin, through the United States Equal Employment Opportunity Commission, settled her sex discrimination suit (*EEOC v Morgan Stanley*, No 01-8421 (SDNY)) against Morgan Stanley for \$54 million, with \$12 million to her personally. Before the settlement, the trial had expected to hear from more than 20 women, whose testimony would have included “lurid details about their colleagues’ entertaining clients at strip clubs.” See Patrick McGeehan, “Morgan Stanley Settles Bias Suit with \$54 Million”, *The New York Times* (13 July 2004). Scheiffelin’s personal allegations included one instance where she was the primary host of a client dinner and was then told to go home so that the men could attend a strip club with that same client. See also Patrick McGeehan, “Wall Street Highflier to Outcast: A Woman’s Story”, *The New York Times* (20 February 2002).

81 *Income Tax Act*, *supra* note 15; Richard Schmalbeck & Jay A Soled, “Elimination of the Deduction for Business Entertainment Expenses” (2009) 123 Tax Notes 757 at 764.

United States on providing that deduction.⁸² If businesses in both countries are spending similar amounts on entertainment, and in the United States a substantial portion of such expenses is related to sex entertainment, we can assume that at least some Canadian business entertainment also occurs in sex venues.

III. THE EFFECT OF DECRIMINALIZING PROSTITUTION

Regardless of the extent to which sex-entertainment networking currently occurs in Canada, the decriminalization of prostitution will likely increase its prevalence in two ways. First, decriminalization will normalize the sex industry and increase the networking that occurs in venues that are currently legal. Second, it will permit networking in formerly illegal venues that are even more exclusive to women, such as brothels.

A. Normalization of the Sex Industry

The sex industry has increased in prevalence and acceptability in our society over the last 30 years. Not only has demand for commercial sexual services increased, but the services that are available have become even more specialized.⁸³ In her work, sociologist Elizabeth Bernstein argues that the merging of business and play (which includes sex), “is a feature of any society progressing through the late stages of capitalism.”⁸⁴

Traditionally, law and the content of legal doctrine are thought of as instrumental;⁸⁵ their main role is to codify the current state of social reality. However, there is some movement within the field of legal theory to view law as constitutive. From this point of view, the sense of consciousness that develops through exposure to existing legal categories shapes one’s understanding of law and affects one’s resulting identity.⁸⁶ Legal theorist Yvonne Zylan explains the constitutive tendency of law in terms of social desire: “Law defines our desires because we desire the discipline of law.”⁸⁷ When viewed through a constitutive lens, women’s studies scholar Janice Raymond’s argument that social and ethical barriers to prostitution will disappear after the legal barriers do is persuasive.⁸⁸ Therefore, changes in prostitution law could actually inspire a change in how society delimits the acceptability of sex work.

For example, if prostitution becomes more easily accessible, strip clubs no longer lie on the fringes of socially and morally agreeable behaviour, since brothels will occupy that space. Such a change will push strip clubs towards the mainstream, making them more plausible venues for business networking. Erotic dancers or sex workers could also be increasingly invited to provide entertainment at business parties and conferences. For

82 The United States’ gross domestic product (GDP) is \$14 billion and they spend \$4-\$5 billion on providing the entertainment deduction, which amounts to 28-35% of GDP. Canada spends \$450-\$600 million on providing the deduction, while GDP is \$1.3 billion, amounting to 35-46% of GDP. See *ibid* at 764; Department of Finance Canada, *Tax Expenditures and Evaluations 2011* (Ottawa: Department of Finance, 2011) at 19, 25, 28, online: Department of Finance Canada <<http://www.fin.gc.ca/taxexp-depisc/2011/taxexp11-eng.asp>>; *2011 Development Indicators* (Washington, DC: The World Bank, 2011) at 198, 200, online: The World Bank <<http://www.worldbank.org>>.

83 Elizabeth Bernstein, “The Meaning of Purchase: Desire, Demand and the Commerce of Sex” (2001) 2:3 Ethnography 389 at 392.

84 *Ibid* at 396.

85 Yvonne Zylan, *States of Passion: Law, Identity, and the Social Construction of Desire* (New York: Oxford University Press, 2011) at 12.

86 *Ibid* at 23, 29.

87 *Ibid* at 63.

88 Janice G Raymond, “Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution” (2004) 2:3-4 Journal of Trauma Practice 315 at 322.

example, at an Australian climate change conference in 2006, the dinner entertainment included burlesque dancing, which caused many of the female scientists to walk out in protest.⁸⁹

The moral wrong envisioned by anti-prostitution laws has also changed from the 19th and 20th centuries. The wrong used to rest in the actions of the prostitute herself, while current views tend to sanction consumer behaviour (i.e. the male client).⁹⁰ Although this is largely viewed as a positive change for women's equality, Bernstein argues that this shift is linked with the normalization of the sex industry that is already occurring.⁹¹ A change in prostitution laws in the current social context will be more effective at normalizing behaviour since it will affect the demand side of the business. Were the wrong still to lie with the prostitute herself, the change in law would perhaps lead more women to choose sex work. However, when the wrong lies with the client, the change could create the space for more clients, which requires less investment and behavioural change than it does to become a sex worker, thus increasing the potential for sex work to be normalized.

B. Networking in Brothels

Decriminalizing prostitution not only threatens to normalize the sex industry, but also to facilitate networking in new environments that are even more exclusive to businesswomen, such as brothels. Brothels are more exclusive to businesswomen because of their limited ability to participate in the type of activity that takes place and the effect of brothels on businessmen. In the context of the mass media's portrayal of women, research establishes a link between the sexual objectification of women and male aggression. In a study of university students exposed to print advertising, psychologists Krya Lanis and Katherine Covell found that after male respondents viewed images that sexually objectified women, they were more accepting of sexual harassment, interpersonal violence, rape myths, and sex role stereotypes.⁹² One might reasonably expect that this effect would be exacerbated when the exposure is not only to images, but engagement in paid sexual activity.

There is evidence to suggest that networking in brothels is already occurring in places where prostitution is legal. In most of Australia, both brothels and escort prostitution are legal, which increases the possibilities for business use of the sex industry.⁹³ The marketing strategy of these brothels supports the proposition that they are used in a business context. Brothels market themselves directly to the corporate world, for a variety of business activities including meetings and networking, both inside and outside of business hours, as well as product promotions.⁹⁴

In Nevada, prostitution has been a legal aspect of the state's economy since the early 1900s. Recently, there has been a shift in the industry, with a number of brothels using more mainstream marketing strategies.⁹⁵ Such brothels are offering a wider range of services beyond selling sex. For example, they are adding souvenir shops, larger bars, restaurants, coffee shops, and small strip clubs.⁹⁶ One brothel owner, who renamed his

89 Jeffreys, *supra* note 71 at 278.

90 Bernstein, *supra* note 83 at 393.

91 *Ibid.*

92 Kyra Lanis & Katherine Covell, "Images of Women in Advertisements: Effects on Attitudes Related to Sexual Aggression" (1995) 32:9/10 Sex Roles 639 at 646.

93 Jeffreys, *supra* note 71 at 277.

94 *Ibid.*

95 Barbara G Brents & Kathryn Hausbeck, "Marketing Sex: US Legal Brothels and Late Capitalist Consumption" (2010) 10:4 Sexualities 425 at 432.

96 *Ibid* at 432.

venue ‘The Resort at Sheri’s Ranch’, wants to be viewed “as just another business in the community.”⁹⁷ At Sheri’s, Budweiser sponsors a hot tub party room inside the brothel, and the complex includes a hotel and sports bar. The clientele of the sports bar often includes seniors, families, and groups of friends who are eating and drinking.⁹⁸ This type of brothel, offering a variety of services, could easily facilitate extensive business networking.

The combination of the global mainstreaming of the sex industry and the decriminalization of sex work in Canada could work together to form a new social order where networking occurs even more in strip clubs and in new modern brothels. The result could be women’s further exclusion from business opportunities. Although the decriminalization of prostitution would be a move towards equality for some women, the intersectional basis of inequality requires a more holistic view of the collateral consequences of this policy change. In the context of women and business networking, there are some tax policy options that could mitigate the potential negative effect of decriminalizing prostitution.

IV. TAX POLICY OPTIONS

A. Status of Sex-Entertainment Expenses

In Canada, deducting expenses in the computation of income from business is governed by a prohibition in subsection 18(1) of the *Income Tax Act*.⁹⁹ However, the general exception to this prohibition is found in paragraph 18(1)(a), which applies to expenses to the extent that they are incurred “for the purpose of gaining or producing income.” Currently, 50 percent of a given expense for food, beverages, or enjoyment of entertainment is deductible.¹⁰⁰ Prior to 1987, when the percentage changed to 80 percent, 100 percent of such expenses were deductible.¹⁰¹ In 1994, the deductible percentage was further reduced to 50 percent.¹⁰²

The only exception to the deductibility of entertainment expenses is found in paragraph 18(1)(l).¹⁰³ It prohibits the deduction of costs for the use or maintenance of yachts, camps, lodges, or golf courses,¹⁰⁴ as well as membership fees or dues for clubs whose main purpose is dining, recreation, or providing sporting facilities.¹⁰⁵ The Canada Revenue Agency (CRA), in its policy statements, explains that paragraph 18(1)(l) exists because the direct business purpose of such activities is marginal. A taxpayer can deduct dining expenses at a golf course restaurant as long as the meal is not consumed in conjunction with golf or any other activity.¹⁰⁶ Therefore, if entertainment is enjoyed in sex venues for the purpose of gaining or producing income, 50 percent of the amount spent is currently deductible.

If businesspeople in Canada are paying for illegal sex work, it is also deductible, as long as the expense was incurred for the purpose of gaining or producing income. The only two

97 Brents & Hausbeck, *supra* note 95 at 433.

98 *Ibid.*

99 *Income Tax Act*, *supra* note 15.

100 *Ibid.*, s 67.1(1).

101 Claire FL Young, “Deductibility of Entertainment and Home Office Expenses: New Restrictions To Deal with Old Problems” (1989) 37:2 Canadian Tax Journal 227 at 238.

102 Edgar & Sandler, *supra* note 36 at 389.

103 *Income Tax Act*, *supra* note 15 (applies to expenses incurred after 1971).

104 *Ibid.*, s 18(1)(l)(i).

105 *Ibid.*, s 18(1)(l)(ii).

106 Canada Revenue Agency, Interpretation Bulletin IT-148R3, “Recreational Properties and Club Dues” (21 July 1997) at para 4.

situations where ‘illegal’ payments are not deductible are payments relating to corrupt public officials¹⁰⁷ and expenses incurred for most fines and penalties.¹⁰⁸ As long as the taxpayer has documentation of the expense being incurred, all types of sex entertainment are currently deductible in Canada. The Canadian government spent \$455 million on the entertainment deduction in 2011, down from \$605 million in 2006.¹⁰⁹

B. Why Sex-Entertainment Expenses Should Not Be Deductible

Two traditional tax policy arguments against the deductibility of entertainment expenses apply in the context of sex entertainment. First, if the personal satisfaction resulting from entertainment equals its cost, it should not be deductible.¹¹⁰ Sex entertainment fulfills this criterion in two ways. A) Many men engaging in sex-entertainment experience personal satisfaction, and also acquire social capital, which is a personal benefit, by way of the networking and bonding that occurs. Women generally do not generally experience the same satisfaction, nor do they get the same personal benefit in the same situation. B) Strip clubs and brothels are not by their nature environments conducive to business. They are fundamentally personal activities. The second argument mirrors the policy rationale behind paragraph 18(1)(l).¹¹¹ Allowing deductions for luxury items decreases the moral acceptability of the tax system.¹¹² Paying for sex and sex-based entertainment is certainly as much of a luxury item as golfing or staying at a camp or lodge.

More importantly, given the gendered nature of networking, sex-entertainment expense deductibility offends the substantive equality of our tax system, specifically in relation to horizontal gender equity. While men and women have formally equal access to business expense deductions, the current scheme affects them differently. Men are able to gain significant career benefits through their networking experiences, and the government is subsidizing this activity. Women, on the other hand, either do not get the same level of subsidy when they are excluded from outings, or, if they are included, get less benefit from outings that objectify women and arguably contribute further to women’s disadvantage in the workplace. If a corporation is footing the entertainment expense bill, the current system rewards the corporation for giving a professional advantage to their male employees, while disadvantaging their female employees, even if such treatment is unintentional. The deductibility of sex-entertainment expenses exacerbates gender inequality. There are two potential policy solutions that could address the substantive inequality created for businesswomen by our income tax system.

C. Policy Solutions

i. Partial Ban

A more tempered policy response would be a partial ban on the deductibility of entertainment expenses, aimed specifically at removing sex-related entertainment expenses. This first option is one proposed by the Fawcett Society in the United Kingdom. In their study of the sex industry and the workplace, they found that 86 percent of London lap dancing clubs would provide receipts that did not include the name of

¹⁰⁷ Canadian Income Tax Act with Regulations, Annotated, 94th ed by Joseph Frankovic et al (Toronto: CCH Canadian Limited, 2011), s 67.5 (covers expenses incurred after 1990).

¹⁰⁸ *Ibid*, s 67.6 (covers expenses incurred after 2004).

¹⁰⁹ Department of Finance Canada, *supra* note 82 at 19, 25, 28.

¹¹⁰ Neil Brooks, “The Principles Underlying the Deduction of Business Expenses” in B Hanson, V Krishna & J Rendall, eds, *Canadian Taxation* (Toronto: Richard de Boo, 1981) 198 at 201-03.

¹¹¹ Canada Revenue Agency, *supra* note 106.

¹¹² Brooks, *supra* note 110 at 201-03.

the club, so that they could be discreetly written off.¹¹³ They suggest the licensing of ‘sex encounter venues’.¹¹⁴ This licensing requirement could apply to strip clubs, escort agencies, and brothels, so that they would have to clearly identify their status on receipts. If the *Income Tax Act* were amended to add ‘sex encounter venues’ to paragraph 18(1)(l) or to include it in its own section, taxpayers could no longer deduct expenses incurred in such locales. The advantage to this approach is that it would specifically target sex entertainment to mitigate its inequalities.

Although sex entertainment might be the extreme example of the gendered aspect of networking, it is certainly not the only issue for women in business. As Justice L’Heureux-Dubé articulated in *Symes*, the relationship between business and entertainment can be seen as structured by men for men. Another approach to target the larger inequality would be to eliminate the deductibility of all entertainment expenses. Food expenses could still be deducted since they are much more likely to have a legitimate business purpose.¹¹⁵

ii. Complete Disallowance

The biggest pitfall in both partial ban options is determining which expenses are deductible and which are not. The licensing option would be easy to implement once licences were issued, but it would be difficult to decide what venues would require such a licence. For example, if a theatre venue sometimes has nudity in its performances, does it need a licence? In addition, the line between food and entertainment is not always clear. What if there is entertainment during dinner? A ticket price will not necessarily differentiate between the two costs.

To solve these problems, another policy option is to prohibit the deduction of all food and entertainment expenses. Both Australia and Japan have taken this route, with Australia banning any food or entertainment expense deduction since 1986.¹¹⁶ The backlash from the food and entertainment industry would likely be significant, and such a measure could be viewed as a ‘levelling down’ equality measure, where benefits for women and men are eliminated to level the field. However, such a policy would effectively prevent the deduction of any sex-related business expense.

D. Recommendation

The existence of the glass ceiling for women in the business world is not a problem that is easy to fix. Nor will a simple amendment to the *Income Tax Act* solve the problem entirely. However, the current state of the system is one in which the government subsidizes discriminatory behaviour for some of the most privileged and powerful people in our society: businessmen. The potential decriminalization of prostitution will likely increase the dollar value of this subsidy as well as the discrimination it facilitates.

Although a complete disallowance is perhaps an ideal long-term solution, there are some significant benefits to the partial ban that make it the preferred policy alternative. With

¹¹³ Banyard & Lewis, *supra* note 74 at 13.

¹¹⁴ *Ibid* at 17.

¹¹⁵ Schmalbeck & Soled, *supra* note 81 at 759.

¹¹⁶ Walter F O’Connor, “A Comparative Analysis of the Major Areas of Tax Controversy in Developed Countries” (1992) 1:1 *Journal of International Accounting Auditing & Taxation* 61 at 67; Austl, Commonwealth, Australian Taxation Office, *Fringe tax benefits and entertainment*, online: <<http://www.ato.gov.au/businesses/content.aspx?menuid=0&doc=/content/52028.htm&page=17&H17>>; Cedric Sandford, “Worldwide Tax Reform ‘How does Australia Compare?’” (1992) 25:1 *The Australian Economic Review* 22 at 27.

a licensing requirement, the tax scheme would be able to direct behaviour away from unwanted entertainment, towards more egalitarian forms. The partial ban might have to cover more luxury entertainment items than simply sex entertainment, but it would be an effective method to influence behaviour in a more equitable direction.

If no entertainment expenses are deductible, there is no longer an incentive for taxpayers to choose forms of entertainment that maximise their tax savings. Assuming that businesses will not suddenly stop entertaining clients if they can no longer deduct the expense, they may very well spend more money in sex-entertainment venues. The evidence from Australia shows that sex entertainment is still marketed to businesspeople even though entertainment expenses are not deductible.¹¹⁷ Thus, the partial ban with the licensing scheme would be the best policy choice to improve substantive equality for businesswomen in the face of decriminalized prostitution.

E. Effect on Sex Workers

If the partial ban has the desired effect to reduce discrimination against businesswomen, it will inevitably reduce business dollars spent in sex-entertainment venues including strip clubs and brothels. Depending on the percentage of venue revenue that comes from businesspeople, changing the *Income Tax Act* could have a significant effect on the economic profitability of the sex industry. This in turn will affect the women who rely on that industry for their economic sustenance, reducing their ability to exercise their newly acquired rights.

Although problematic, this is not a reason to continue the discrimination in the *Income Tax Act*. A system of allowing businesses to deduct sex-entertainment expenses is a form of government subsidy for such activity. If the government believes that the sex industry and sex workers require subsidization, it could create a direct granting program for employees or club owners. It is not the existence of sex-entertainment venues that is the issue, it is a question of their proper location in the business or personal sphere. A granting program could help clubs market themselves as personal pleasure institutions. Alternatively, the government could, as Pivot suggests, “challenge the social conditions that lead some women (and men) to get involved in sex work.”¹¹⁸ Thus, sex workers can be fully supported, whether they choose to remain sex workers or move into a different line of work.¹¹⁹

CONCLUSION

With the potential for sex work to be decriminalized in Canada, it is important to understand the implications of this decision more broadly within Canadian society. Decriminalization of sex work is very important for the women who currently experience violence and discrimination in the course of their employment. Nevertheless, policy makers should apply the principles of intersectionality and be aware that gains for female sex workers who live at one intersection of race, class, and gender, can be detrimental to women who live at another, such as businesswomen. To strengthen women’s equality throughout Canada, we need flexible policies that can respond to changes such as decriminalization.

¹¹⁷ Jeffreys, *supra* note 71 at 277.

¹¹⁸ Pivot Legal Society, *supra* note 31.

¹¹⁹ *Ibid.*

In the business world, women are subject to the gendered effects of informal networking, as they are often unable to achieve the same quality or quantity of networks as their male peers. This effect is exacerbated when networking occurs in the context of sex entertainment, since women are either explicitly excluded or feel unwelcome when they do participate. If prostitution is decriminalized, businesswomen will be at more of a disadvantage, as sex entertainment becomes normalized and the range of sex-based activities in which businesspeople can legally engage grows. The best policy response to facilitate the substantive equality of women in business is an amendment to the *Income Tax Act*. By licensing sex-entertainment venues, the legislature can prevent sex-entertainment expense deductions even if they were incurred to gain or produce income.

A feminist perspective accounting for intersectionality highlights the difficulties inherent in creating a more equal society. Policy change affecting women who live at one intersection necessarily also affects women who live at another. An awareness of these different intersections and a flexible, forward-thinking policy approach can help us navigate these important issues. By combining the decriminalization of prostitution and the elimination of sex entertainment as a deductible business expense, we can take two steps forward for women's equality in Canada.

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ARTICLE

SOMETIMES HELP HURTS: IMAGINING A NEW APPROACH TO SECTION 15(2)

By Joseph Marcus*

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One point is critical. Substantive equality is not necessarily served by legislators taking differences into account in designing their policies. The important question is this: which differences should they take into account?

— Donna Greschner¹

INTRODUCTION

Broadly put, section 15(1) of the *Canadian Charter of Rights of Freedoms* tells Canadian governments to treat everyone equally.² Section 15(2), however, provides a crucial qualification, allowing governments to assist certain disadvantaged groups “without being paralyzed by the necessity to assist all.”³ While the Supreme Court of Canada’s longstanding interpretation of these two provisions as operating in unison to promote substantive equality enjoys widespread acceptance, the same level of accord cannot currently be affixed to the precise role that section 15(2) should play within the section 15 analysis as a whole. It is, as such, the aim of this paper to engage in this debate, to explore the Supreme Court’s current equality test with a critical eye, and ultimately to propose—or at least to imagine—a more appropriate approach.

Naturally, this paper finds its genesis in the case of *Alberta v Cunningham*, the Supreme Court’s recent articulation of its preferred approach to section 15(2). On 21 July 2011, Chief Justice McLachlin, writing for a unanimous bench, rejected a section 15(1) claim brought forth by a group of equality-seeking claimants from Alberta’s Peavine Métis Settlement.⁴ One day later, Denise Réaume published a pointed blog entry declaring that Chief Justice McLachlin’s excessively deferential section 15(2) methodology could essentially give governments a free pass, opening up a “loophole” so gaping that their

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1 Donna Greschner, “Does Law Advance the Cause of Equality?” (2001) 27 Queen’s LJ 299 at 304.

2 *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

3 *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 49, 2 SCR 670 [Cunningham].

4 *Ibid.*

“lawyers could drive a Mack truck through.”⁵ Just as the authoritative words of Chief Justice McLachlin provide the genesis for this paper, it is the unrepentant sentiments of Denise Réaume that supply the inspiration.

Réaume’s basic concern was that the Supreme Court’s new affirmative action approach would effectively enable governments, simply by claiming that a program is genuinely aimed at ameliorating the circumstances of a certain disadvantaged group, to “exclude other similarly disadvantaged groups with impunity.”⁶ It should be made clear that the force and precision with which Réaume articulated this concern were not generated entirely in the single day between the judgment’s release and her blog entry’s publication; the *Cunningham* decision merely added fuel by way of confirmation, lending authoritative support to the Supreme Court’s ruling in *R v Kapp* three years earlier.⁷ Though *Kapp* is widely heralded as rectifying the judicial test for section 15(1) claims, it is also recognized for providing section 15(2) with independent analytical force. It is with section 15(2)’s newfound power to cut short the full trajectory of a section 15 analysis that both Réaume and this paper take issue.

It may draw on Réaume’s rather inflammatory notion of a truck-sized loophole (read: exemption), but this paper has no intention of mimicking her arguments. Indeed, a fundamental purpose of this paper is to critically assess the true breadth of this supposed loophole; to the extent that it does appear truck-sized, this paper hopes to narrow it and to contribute to the search for a more balanced methodology.

The discussion proceeds in three parts. Part I provides the necessary background, concentrating on the meaning of “substantive equality” as it has been developed in Canada’s *Charter*-era equality jurisprudence. Building on Part I’s jurisprudential considerations, Part II zeroes in on the current incarnation of the test, as was formed in *Kapp* and reaffirmed in *Cunningham*. It traces the rationale laid out by Chief Justice McLachlin in her two sets of reasons, keeping a critical eye focused on her decision to opt for a distinctly deferential methodology. Compelled by the conceivable dangers of treating underinclusive ameliorative programs with such supreme deference, Part III constructs a more nuanced test, one that at least tries to strike a balance between deference and scrutiny, thereby encouraging governments to create and implement ameliorative programs that do not violate the *Charter*’s equality guarantee through discriminatory underinclusion.

I. SUBSTANTIVE EQUALITY AND THE COURT’S PATH TO KAPP

Rarely does the Supreme Court of Canada miss an opportunity to reiterate that “[s]ections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole.”⁸ It follows that any analysis of section 15 as a whole will necessarily be grounded in its particular vision of substantive equality; similarly, the aptness of an equality test will necessarily be measured by its alignment with the vision of substantive equality to which it subscribes. To provide the proverbial stick, then, against which the efficacy of a section 15 test can be properly measured, this section’s aim is to review the conception of substantive equality that has been developed in Canada’s *Charter* jurisprudence over the past few decades.

⁵ Denise Réaume, “Equality Kapped: Alberta v. Cunningham” *The Women’s Court of Canada* (22 July 2011) online: <<http://womenscourt.ca/2011/07/equality-kapped-alberta-v-cunningham/>>.

⁶ *Réaume, supra* note 5.

⁷ *R v Kapp*, 2008 SCC 41, 2 SCR 483 [*Kapp*].

⁸ See e.g. *ibid* at para 16.

Since its enactment in 1960, the *Canadian Bill of Rights* has preserved “the right of the individual to equality before the law and the protection of the law.”⁹ By the 1980s, as pre-*Charter* consultations were being conducted, it had long been clear—to equality advocates, at least—that these protections were inadequate and unacceptably formalistic. Accordingly, advocacy groups called for the inclusion in the *Charter* of a much broader equality guarantee that would ensure “not just equal treatment before the law but equal protection and equal benefit of the law as well.”¹⁰ These calls were heard, it appears, as the final language of section 15 marked an apparent shift towards a more substantive brand of equality. The provision came into force in the spring of 1985, but it was not until 1989 that the Supreme Court had a chance to weigh in.

The justices in *Andrews v Law Society (British Columbia)* may have differed with respect to section 1, but all were in agreement when it came to ridding equality jurisprudence of the “similarly situated should be similarly treated” approach.¹¹ Though Justice McIntyre did not actually use the phrase “substantive equality,” he did characterize true equality as a “comparative concept” and recognize that “identical treatment may frequently produce serious inequality.”¹² Implicit in Justice McIntyre’s unanimously supported characterization of the law surrounding section 15(1)¹³ was a fear of formal equality’s power to spawn a “veneer of consensus” capable of neutralizing underlying inequalities and steepening the path to proof for victims of discrimination.¹⁴ Of course, the contribution of *Andrews* to future discrimination analyses was not limited to its principled rejection of formal equality: Justice McIntyre’s reasons also stressed the need to consider both the purpose of an impugned law and its effects. In considering “the ideal of full equality before and under the law,” Justice McIntyre wrote, “the main consideration must be the *impact* of the law on the individual or the group concerned.”¹⁵ The pursuit of substantive equality for Justice McIntyre thus demanded a purposive view of section 15(1)’s “without discrimination” component that would embrace a law’s true impact. He explained that

[d]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the *effect* of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withdraws or limits access to opportunities, benefits, and advantages available to other members of society.¹⁶

It appears, therefore, that Justice McIntyre used an effect-based conception of discrimination to help develop and articulate his vision of “true” or “full” equality.¹⁷

⁹ *Canadian Bill of Rights*, SC 1960, c 44 s 1(b).

¹⁰ Fay Faraday, Margaret Denike & M Kate Stephenson, “In Pursuit of Substantive Equality” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 12 [*Making Equality Rights Real*].

¹¹ See generally *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, BCLR (2d) 273 [*Andrews*].

¹² *Ibid* at para 8.

¹³ Though Justice McIntyre dissented in result (with Justice Lamer concurring), his views on “the law regarding the meaning of s. 15(1)” were embraced unanimously. See *ibid* at paras 47, 71.

¹⁴ Andrew Petter & Allan C Hutchinson, “Rights in Conflict: The Dilemma of Charter Legitimacy” (1989) 23 UBC L Rev 531, cited in Diana Majury, “The Charter, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 Osgoode Hall LJ 297 at 301.

¹⁵ *Andrews*, *supra* note 11 at para 8 [emphasis added].

¹⁶ *Ibid* at para 19 [emphasis added].

¹⁷ *Ibid* at paras 8, 13. For a more robust exploration of the conceptual interaction between discrimination and substantive equality, see Beverley Baines, “Equality, Comparison, Discrimination, Status” in *Making Equality Rights Real*, *supra* note 10 at 73; and J Donald C Galloway, “Three Models of (In)Equality” (1993) 38 McGill LJ 64.

And so, it seemed as though the Supreme Court of Canada had subscribed unanimously to a vision of substantive equality that was focused on impact. Unanimity was short lived, however, as the Court soon splintered three ways in a trilogy of section 15 decisions delivered in 1995.¹⁸ In the first camp sat Chief Justice Lamer, along with Justices Gonthier, Major, and La Forest, arguing that a distinction only amounts to discrimination when it is based on an “irrelevant” personal characteristic.¹⁹ Justices McLachlin, Sopinka, Cory, and Iacobucci, making up the second camp, defended the approach taken in *Andrews* and rejected the introduction of an irrelevancy requirement. The ultimate question, a dissenting Justice Cory noted in *Egan v Canada*, “as to whether or not there is discrimination should be addressed from the perspective of the person claiming a *Charter* violation.”²⁰ Justice L’Heureux-Dubé, unaccompanied in the third and final camp, took this claimant-oriented approach to another level. For a section 15 analysis to accurately identify and address discrimination in all of its varied contexts and forms, she wrote, “it is preferable to focus on *impact* (i.e., discriminatory effect) rather than on *constituent elements* (i.e., the grounds of the distinction).”²¹ Justice L’Heureux-Dubé may have been alone in her attempt to look beyond enumerated and analogous grounds entirely, but her focus on those adversely affected by discrimination was a theme common to all camps.

Even at the Supreme Court’s most divided point, then, attention to impact remained constant. It is thus unsurprising that when the Supreme Court re-achieved harmony in *Law v Canada*, the human dignity of the claimant was a central aspect of its new section 15 methodology.²² Viewed this way, it seems somewhat ironic that human dignity came to represent an additional burden on equality-seekers. It was seen not only as a burdensome element but as an imprecise element informed by four similarly imprecise “contextual factors.” After considering whether the impugned law (1) imposed differential treatment based on a prohibited ground, Justice Iacobucci’s *Law* test asked (2) whether the impugned law had “a purpose or effect that is discriminatory.”²³ It was at this all-important second stage that Justice Iacobucci’s four contextual factors were supposed to aid in determining whether or not the distinction constituted discrimination within the meaning of section 15(1). These factors are:

1. Pre-existing disadvantage;
2. Relationship between grounds and claimant’s characteristics or circumstances;
3. Ameliorative purpose or effects; and
4. Nature of the interest affected.

Although factor number three stands out in the context of this paper’s section 15(2) discussion,²⁴ each factor offers a certain insight into the Court’s developing conception of discrimination.

In explaining the first contextual factor, Justice Iacobucci noted that a basic purpose of section 15(1) was to protect Canada’s vulnerable and disadvantaged; as such, “[t]he effects

¹⁸ *Egan v Canada*, [1995] 2 SCR 513 [*Egan*]; *Miron v Trudel*, [1995] 2 SCR 418; *Thibaudeau v Canada*, [1995] 2 SCR 627.

¹⁹ See e.g. *Egan*, *ibid* at para 8.

²⁰ *Ibid* at para 188.

²¹ *Ibid* at para 39 [emphasis in original].

²² *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497 [*Law*].

²³ *Ibid* at para 88.

²⁴ The third factor seems closely aligned with section 15(2), however their current relationship with one another remains somewhat unclear. For further discussion on this issue, see footnote 57.

of a law as they relate to this purpose should always be a central consideration.”²⁵ With respect to factor number two, he explained, “it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant’s actual situation.”²⁶ The distinctly claimant-oriented, non-deferential perspective exhibited in the first two factors was even more prominent in the fourth. Justice Iacobucci appealed to Justice L’Heureux-Dubé’s lone dissent in *Egan*, where she argued that the “consequences on the affected group” should be paramount.²⁷ In fact, Justice Iacobucci built on Justice L’Heureux-Dubé’s reasoning, stressing the general irrelevance of government intent when it came to establishing an infringement of section 15(1).²⁸

Considering the effect-oriented scrutiny present in the three abovementioned factors, Justice Iacobucci could have surely afforded to be more deferential to legislative intent with respect to his “ameliorative purpose or effects” factor. To a certain extent, he was, noting section 15’s dual purpose to both prevent future discrimination and ameliorate historic disadvantage. He made it clear, however, that he did not “wish to be taken as foreclosing the possibility that a member of society could be discriminated against by laws aimed at ameliorating the situation of others.”²⁹ In such situations, he went on, a court might need to consider section 1 or section 15(2). From one point of view, he was positioning a law’s ameliorative aim and effect as just one factor in a very broad and contextual analysis; from a more interesting angle, he could have been reserving section 15(2) for a sort of post-section 15(1), section 1-esque justification role. If he had meant the latter, it is conceivable that underinclusive ameliorative legislation could first be deemed discriminatory under section 15(1) and then be saved by some then-undetermined section 15(2) test. As per his reasons in *Lovelace v Ontario*, however, which were delivered the following year, he clearly meant the former.³⁰

In *Lovelace*, the Supreme Court took its first run at section 15(2). The facts date back to 1993 when the Government of Ontario began negotiating with First Nations bands over the creation of a reserve-based casino as a means of generating cash for social, cultural, and economic development purposes. By the summer of 1996, Casino Rama was open for business. In the spring of that same year, the government informed the future claimants that the casino’s proceeds would be “distributed only to Ontario First Nations communities registered as bands under the *Indian Act*.”³¹ Although they had individual members that qualified as status Indians under the *Indian Act*, the claimant groups were not officially “bands” and were thus ineligible to share in the proceeds.³² The claimants immediately commenced proceedings, seeking “a declaration that Ontario’s refusal to include them in the Casino Rama project was unconstitutional and that they should be allowed to participate in the distribution negotiations.”³³

Operating without the “benefit” of *Law*,³⁴ the Ontario Court (General Division)’s Justice Cosgrove adopted the approach taken—or at least the language used—by the Ontario Court of Appeal in *Roberts v Ontario* and found in the claimants’ favour.³⁵ The *Roberts* decision dealt with section 14(1) of Ontario’s *Human Rights Code*, essentially the statutory

25 *Law*, *supra* note at 22 at para 68.

26 *Law*, *supra* note 22 at para 70.

27 *Egan*, *supra* note 18 at para 63.

28 See e.g. *Law*, *supra* note 22 at para 80.

29 *Ibid* at para 73.

30 *Lovelace v Ontario*, 2000 SCC 37, 1 SCR 950 [*Lovelace*].

31 *Ibid* at para 1.

32 *Ibid*.

33 *Ibid* at para 32.

34 *Ibid* at para 5.

35 *Lovelace v Ontario*, (1996) 38 CRR (2d) 297 (Ont Gen Div).

equivalent to section 15(2) of the *Charter*, and interpreted the provision's purpose as twofold: (1) to permit affirmative action and (2) to promote substantive equality.³⁶ An affirmative action program would be protected, but only so long as it was not delivered in a manner contrary to substantive equality. Weiler JA, for the majority in *Roberts*, wrote that a court's inquiry does not end "when 'special programs' status is proven."³⁷ A court must ask two further questions:

- (1) whether a particular provision or limitation of a special program results in discrimination against a person or group with the disadvantage the program was designed to benefit, and (2) whether the provision or limitation is reasonably related to the scheme of the special program.³⁸

Compelled as he was by Weiler JA's more probative approach, Cosgrove J's decision failed to hold up at the Court of Appeal. In overturning Cosgrove J's decision, a unanimous Court of Appeal acknowledged that section 15(2) might not fully immunize affirmative action programs from judicial scrutiny, but the scrutiny it does permit should be so limited as to not discourage governments from establishing such programs.³⁹

When *Lovelace* finally reached the Supreme Court of Canada, a line had been drawn. On one side sat Ontario's government and Court of Appeal, fearful that deficient deference would deter governments from creating ameliorative programs; on the other sat the claimants and interveners, unconvinced. For example, the Council of Canadians with Disabilities (CDC) argued in its factum that "[r]ather than encouraging governments to advance the purposes underlying section 15(1) in their programs, immunizing them from review would diminish their incentive to update them and to ensure they further the cause of equality."⁴⁰ Though Iacobucci J, for a unanimous Supreme Court, agreed in result with the Court of Appeal, he viewed the *Lovelace* case as "an opportunity for this Court to confirm that the s. 15(1) scrutiny applies just as powerfully to targeted ameliorative programs."⁴¹ Given the four-factored contextual analysis that he had advocated for in *Law*, the approach to section 15(2) that he adopted in *Lovelace* was somewhat predictable. Building on the fundamental premise that ameliorative programs are consistent with the *Charter*'s substantive equality guarantee, Justice Iacobucci characterized section 15(2) as an embedded, confirmatory component of a full section 15(1) analysis. In other words, as per *Law*, a program's ameliorative purpose would serve as one "counter-indicator" of a substantive equality violation.⁴² As compelling a counter-indicator as it may have been in *Lovelace*, it was seen not as an exemption, but as an "interpretive aid."⁴³ Without precluding the need for section 15(2) to play an independent role at some point in the future, Justice Iacobucci defended his interpretive aid approach as "ensur[ing] that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review."⁴⁴

From *Andrews* to *Law* to *Lovelace*, the Supreme Court of Canada's vision of substantive equality remained relatively stable. Integral to this vision, of course, was a recognition that it "requires that the differences between groups and individuals be recognized and

36 *Roberts v Ontario*, (1994) 19 OR (3d) 387 at para 37 (Ont CA) [*Roberts*].

37 *Roberts*, *supra* note 36 at para 63.

38 *Ibid.*

39 *Lovelace v Ontario*, (1997) 33 OR (3d) 735 at para 64 (Ont CA).

40 Factum of the Intervener, Council of Canadians with Disabilities, submitted in *Lovelace*, *supra* note 30 (November 1999), online: <<http://www.ccdonline.ca/en/humanrights/promoting/lovelace>>.

41 *Lovelace*, *supra* note 30 at para 61.

42 Denise G Réaume, "Discrimination and Dignity" in *Making Equality Rights Real*, *supra* note 10 at 173.

43 *Lovelace*, *supra* note 30 at para 106.

44 *Ibid* at para 108.

accommodated so that a law secures equality in its *effect*.⁴⁵ In the words of Colleen Sheppard, writing for the Ontario Law Reform Commission in 1993, substantive equality “demands real, actual equality in the social, political, and economic conditions of different groups in society.”⁴⁶ By extension, assessing “whether society’s commitment to equality is being met” involves “looking at actual social conditions.”⁴⁷ It follows, as this paper is concerned, that in assessing whether differential treatment (or exclusion) should be enabled in the name of substantive equality, courts must at least look at the actual social conditions that such treatment can serve to (re)produce. Indeed, for all of the differences considered in Part I of this paper, the Supreme Court never fully divorced a law’s purpose from its effect—until *Kapp*.

II. THE TEST IN *KAPP* AND *CUNNINGHAM*

In the decade leading up to *Kapp*, the *Law* test endured its fair share of pointed scholarly critique. In the apt phrasing of Peter Hogg, *Law*’s contextual human dignity requirement was “unfortunate” for at least two reasons.⁴⁸ Firstly, it was “vague, confusing and burdensome to equality claimants.”⁴⁹ Secondly, “the inquiry into human dignity [was] highly unstructured compared with the inquiry into s. 1.”⁵⁰ Viewed together, Hogg’s comments shed light on the troubling truth that *Law* had simultaneously enhanced the burden on claimants and alleviated the government’s need to defend its actions under the comparatively well-structured scrutiny of the *Oakes* test⁵¹—in particular, its minimal impairment (or least drastic means) requirement. The proportionality analysis typically left to section 1 had been both collapsed and disorganized. Echoing Hogg’s argument, Beverly Baines described *Law*’s second step as “blur[ring] the relationship between section 15(1) and section 1.”⁵² Lost in that blur was section 15(2).

By the time *Kapp* came along, the criticism being shelled out by the likes of Hogg and Baines had helped set the agenda. The Supreme Court needed to address the human dignity barrier and clarify how the four factors would interact. The facts of the case, however, revolved around an ameliorative initiative; as such, the Court would have to pay particular attention to the proper analytical purpose of section 15(2). Specifically, the claim stemmed from a communal fishing licence that granted “members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours.”⁵³ The claimants were non-Aboriginal commercial fishers and they argued that the licence discriminated against them on the basis of race. The Crown, in response, invoked section 15(2), pointing out that the licence’s purpose was to regulate

45 Fay Faraday, Margaret Denike & M Kate Stephenson, “In Pursuit of Substantive Equality” in *Making Equality Rights Real*, *supra* note 10 at 12 [emphasis added].

46 Colleen Sheppard, *Study Paper on Litigating the Relationship between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993) at 5.

47 *Ibid.*

48 Peter W Hogg, *Constitutional Law of Canada*, 5th ed, (Toronto: Thompson Reuters, 2009) at 1200.

49 *Ibid.*

50 *Ibid* at 1201.

51 See *R v Oakes*, [1986] 1 SCR 103. The three-part *Oakes* test is used by courts to determine whether a *Charter* infringement may be justified as a “reasonable limit” under section 1. First, the limit must be prescribed by law; second, the law’s objective must be pressing and substantial; and, third, the government must have adopted proportional means of pursuing its objective. The third branch’s proportionality analysis involves three sub-steps: rational connection, minimal impairment, and proportionate effect. For a thorough examination of the *Oakes* test, see Sujit Choudhry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 34 Sup Ct L Rev (2d) 501.

52 Beverly Baines, “*Law v Canada: Formatting Equality*”, (2000) 11 Const F 65 at 72.

53 *Kapp*, *supra* note 7 at para 1.

the fishery and to ameliorate the conditions of a disadvantaged group.

For the majority, Chief Justice McLachlin and Justice Abella rejected the claimants' argument and accepted the Crown's, seizing the opportunity to rethink the framework adopted in *Law* and *Lovelace*. The joint opinion portrayed *Law* as a mere twist on *Andrews*—a twist that needed untwisting, apparently, as the joint opinion abandoned “human dignity as a legal test” and downplayed the formal force of the four factors.⁵⁴ Going forward, a distinction based on a prohibited ground would be discriminatory under section 15(1) if it “create[d] a disadvantage by perpetuating prejudice or stereotyping.”⁵⁵ Deservedly, *Kapp* earned kudos from equality advocates for dropping human dignity; that said, it provided little guidance in terms of navigating the “perpetuating prejudice or stereotyping” stage.⁵⁶

Whereas it had served since *Lovelace* as an interpretive aid, embedded within the expansive contextual phase of the *Law* framework, section 15(2) was now a thoroughly non-contextual threshold question.⁵⁷ Once a claimant had shown there to be a distinction based on a prohibited ground, the government would then be able to call on section 15(2); if two specific conditions were satisfied, the claim would be dismissed, no (contextual) questions asked. As articulated by Chief Justice McLachlin and Justice Abella,

A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.⁵⁸

It is important to note that these two conditions are not particularly onerous. Nor are they the least bit impact-sensitive, which seems rather curious because at paragraph 23 of their judgment, Chief Justice McLachlin and Justice Abella wrote that an equality analysis should employ “factors that identify impact amounting to discrimination.”⁵⁹ As curious as it might seem, the justices were quite deliberate in their decision to recalibrate the analytical role of section 15(2).

54 *Kapp*, *supra* note 7 at para 21.

55 *Ibid* at para 17.

56 Perhaps the closest the joint opinion came to structuring this contextual stage was tentatively linking factors one and four to prejudice, and factor two to stereotyping. See *ibid* at para 23. For a scholarly reaction to the *Kapp* decision, see Bruce Ryder, “R. v. *Kapp*: Taking Section 15 Back to the Future”, *TheCourt.ca* (2 July 2008) online: <<http://www.thecourt.ca/2008/07/02/r-v-kapp-taking-section-15-back-to-the-future/>>.

57 As an interpretive aid, section 15(2) appeared to do much of the same work as the third contextual factor in *Law*. Since *Kapp*, however, the jurisprudence has not clearly equated these two concepts, nor has it ruled out a residual role for the third contextual factor. To meet the section 15(2) threshold test set out in *Kapp*, a program must not only have an ameliorative purpose, but also target a particular disadvantaged group. A certain law or government program could thus fail to meet the section 15(2) threshold because it is not sufficiently targeted yet still have its ameliorative or remedial character taken into consideration by a court as a factor in favour of deference. This was arguably the situation in *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*], where the Supreme Court viewed the impugned legislative provisions, which related to death benefits for widows of civil servants and military officers, as operating within “a much larger employee benefit program which takes into account the need for a continuation of a stream of income and for coverage of medical expenses upon the death of the spouse” (para 78). Ultimately, it is important to appreciate that even where section 15(2) is not at play, the post-*Kapp* jurisprudence seems to indicate that a government will still be able to invoke *Law*'s ameliorative purpose/effect factor to counter an argument that section 15(1)'s substantive equality guarantee has been infringed.

58 *Kapp*, *supra* note 7 at para 41.

59 *Ibid* at para 23.

To explain its decision, the joint opinion appealed immediately to the pre-*Charter* case of *Athabasca Tribal Council v Amoco Canada Petroleum*, where the Supreme Court saw “no reason why the measures proposed by the ‘affirmative action’ programs for the betterment of the lot of the native peoples in the area in question should be construed as ‘discriminating against’ other inhabitants.”⁶⁰ This notion that the inherently exclusionary nature of affirmative action programs did not necessarily amount to discrimination might have been progressive in 1981—when the flaws of formal equality were still being uncovered—but not in 2008. From this principle, however, flowed the decision to award independent, exemptive force to section 15(2). Although they acknowledged Iacobucci J’s preference for an interpretative aid approach, Justices McLachlin and Abella chose to focus on his leaving the door open instead of giving real consideration to the underlying reason for his choice: ensuring that an impugned law or government program—ameliorative or otherwise—endures the full scrutiny of a contextual discrimination analysis. Rather than recognize the centrality of effect to the Supreme Court’s established conception of substantive equality, they stressed the need for a strictly purpose-based section 15(2) framework to ensure that governments be given the necessary “leeway to adopt innovative [ameliorative] programs, even though some may ultimately prove to be unsuccessful.”⁶¹ Implicit in such a statement is the judgment’s unsubstantiated assumption that the application of an even remotely impact-sensitive judicial analysis would discourage governments from combating discrimination through ameliorative programs moving forward.

For *Kapp*, a deferential, exemptive, intent-based approach worked just fine. The claim was essentially one of reverse discrimination, much like *Athabasca*, and once again the Supreme Court had no intention of forcing the government to defend its decision to exclude the relatively advantaged from a program aimed at combating disadvantage. Critics were not upset by the result of *Kapp* so much as they were fearful that shifting section 15(2) from “a shield to a sword” could prove dangerous on a different set of facts.⁶² One year later, as interveners in the case of *Jean v Minister of Indian and Northern Affairs Canada*, the Women’s Legal Education and Action Fund (LEAF) articulated this fear in its factum:

The consequence of an approach that protects all ameliorative programs from Section 15(1) *Charter* scrutiny would be a two-tiered hierarchy of equality rights that would accord second-class status to members of disadvantaged groups who are excluded from these programs. The particularly vulnerable and marginalized members of disadvantaged groups – those who experience multiple and intersecting grounds of discrimination, including on the basis of sex, race, Aboriginality, disability, poverty, marital status and sexual orientation – would be most likely to suffer from such exclusion and diminished constitutional recognition.⁶³

The question became: would a charge of underinclusiveness amounting to discrimination be treated just like a charge of reverse discrimination? According to the Federal Court of Appeal’s Justice Trudel, the answer was yes, for “if *Kapp* had been intended to be read in

⁶⁰ *Kapp*, *supra* note 7 at para 31.

⁶¹ *Ibid* at para 47.

⁶² Tess Sheldon, “The Shield Becomes the Sword: The Expansion of the Ameliorative Program Defence to Programs that Support Person with Disabilities” (Toronto, Law Commission of Ontario, 2010) at 93, online: <<http://www.lco-cdo.org/disabilities/sheldon.pdf>>.

⁶³ Factum of the Intervener, Women’s Legal Education and Action Fund (LEAF) submitted in *Linda Jean, Chief of the Micmac Nation of Gespege, in her own name and in the name of all the other members of her Band, et al v Minister of Indian and Northern Affairs Canada, et al*, [2009] FCA 377 [*Jean*], online: <<http://www.leaf.ca/legal/facta/2009-micmac1.pdf>>.

a limited manner, the Supreme Court of Canada would have stated so.”⁶⁴ If the Supreme Court of Canada did, in fact, have an interest in restating its intentions, the facts in *Cunningham* might have presented a reasonable opportunity to do so.

At issue in *Cunningham* was the alleged underinclusivity of the *Metis Settlements Act* (“MSA”).⁶⁵ The roots of the MSA trace back to the early 1980s, when the Government of Alberta, anticipating section 35 of the *Constitution Act, 1982* coming into force, established a Joint Métis-Government Committee to review the adequacy of the province’s legislative framework as it related to its Métis population.⁶⁶ The committee’s report was released in 1984, recommending that Alberta’s Métis communities be granted the right to self-govern a “secure … land base” in order to preserve their distinct culture.⁶⁷ Negotiations ensued. After five years, the government transferred plots of land to Métis communities and passed pieces of legislation aimed at protecting the rights of those communities; among them was the MSA. The provision of particular interest in *Cunningham* was section 90, which provides that an individual’s official Métis settlement membership may be terminated upon voluntary registration under the *Indian Act*.⁶⁸

Unlike the “outsider” claimants in *Kapp*, these claimants were “insiders,” official members of the law’s target community. Though they were longstanding members of the Peavine Métis Settlement, they also qualified as status Indians under the *Indian Act*. When they registered as status Indians to obtain medical benefits, however, their Métis settlement memberships were revoked pursuant to the MSA. In response, they argued that membership denial due to their Indian status constituted discrimination under section 15(1). After being rejected at trial, their claim found success at the Court of Appeal.⁶⁹

For a unanimous Court of Appeal, Justice Ritter could not believe that the Supreme Court in *Kapp* had truly intended to remove discriminatory effect from the equality analysis altogether:

If the discriminatory effects of specific provisions could be disregarded in light of an overall ameliorative purpose, cases like *Vriend v. Alberta* … would no longer be good law. In *Vriend*, the Government of Alberta clearly could have made a case that there was an ameliorative purpose to Alberta’s human rights legislation, as it then existed. If the respondents’ interpretation of s. 15(2) is correct, a finding that the Alberta Legislature’s failure to provide human rights protection for homosexuals was discriminatory would have been barred. I doubt that the Supreme Court in *Kapp* intended to take the law relating to the *Charter*’s equality protection to this point.⁷⁰

It is not difficult, Justice Ritter seemed to be saying, to imagine a set of facts upon which the *Kapp* test, applied strictly, could produce a severely irrational outcome. It made sense, as such, to read into the test a certain level of rationality. Having accepted the MSA’s aim to preserve Métis culture as legitimately ameliorative, he refused to accept

⁶⁴ Jean, *ibid* at para 9.

⁶⁵ *Metis Settlements Act*, RSA 2000, c M-14 [MSA].

⁶⁶ *Cunningham*, *supra* note 3 at para 14. In addition to entrenching existing Aboriginal rights, s. 35 of the *Constitution Act, 1982* explicitly recognized three distinct Aboriginal groups: Indians, Inuit, and Métis.

⁶⁷ *Ibid* at para 15.

⁶⁸ MSA, *supra* note 65, s 90.

⁶⁹ *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, 8 Alta LR (5th) 16 [*Cunningham*, Alta CA].

⁷⁰ *Ibid* at para 23.

the exclusion of status Indians as rationally furthering such an aim. For starters, there was no evidence submitted to show “any attempt by persons with Indian status who did not formerly have a substantial connection with Peavine, or some other Métis settlement, attempting to gain Métis status.”⁷¹ Moreover, Métis status actually requires Aboriginal lineage to a certain degree, together with self-identification; in fact, “evidence established that in some settlements, one third of the members also hold Indian status.”⁷² This point speaks to the fact the *MSA* enables settlement councils to choose on seemingly arbitrary grounds whether or not to revoke membership—in this case, the Peavine Council chose only to revoke the membership of the Cunningham family, leaving the settlements’ other status Indian members alone. For these reasons, Justice Ritter found that the “impugned provisions do not rationally advance the purported legislative purposes of the *MSA*. In consequence, section 15(2) of the *Charter* is not a bar to consideration of section 15(1).”⁷³

It is important to highlight the difference between the rationality that Justice Ritter read into the *Kapp* test and the rationality that was already there. The *Kapp* judgment asked: “Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose?”⁷⁴ Justice Ritter, on the other hand, asked if the impugned exclusion “rationally advanced the purported legislative purposes.” Unlike Chief Justice McLachlin and Justice Abella, who ostensibly used the term in the softest possible sense, Justice Ritter stated explicitly that he intended rationality to mean “sensible, or imbued with reason.”⁷⁵ Justice Ritter’s aggressive application of *Kapp* garnered positive feedback from Jennifer Koshan, who argued in her 2009 blog entry that Canadian courts should “not accept the government’s argument that because the overall purpose of the *MSA* was ameliorative, this should bar the section 15 claim.”⁷⁶

Chief Justice McLachlin was less appreciative of Justice Ritter’s interpretation. “In my view,” she wrote, “the Court of Appeal erred in demanding positive proof that an impugned distinction will in the future have a particular impact.”⁷⁷ She really meant what she wrote in *Kapp*, apparently, although she acknowledged Justice Ritter’s fear that the test could be taken too far on different facts:

The fundamental question is this: up to what point does s. 15(2) protect against a claim of discrimination? The tentative answer suggested by *Kapp*, as discussed above, is that the distinction must serve or advance the ameliorative goal. This will not be the case, for instance, if the state chooses irrational means to pursue its ameliorative goal. This criterion may be refined and developed as different cases emerge. But for our purposes, it suffices.⁷⁸

Having decided that these facts were not ones to command refinement to the test that she had helped create, Chief Justice McLachlin answered the two *Kapp* questions in turn.⁷⁹

71 *Ibid* at para 26.

72 *Cunningham*, Alta CA, *supra* note 69 at para 27.

73 *Ibid* at para 31. After concluding that the government had failed to satisfy the section 15(2) test, Justice Ritter went on to conduct a full section 15(1) analysis, ultimately finding a violation that could not be justified under section 1.

74 *Kapp*, *supra* note 7 at para 49.

75 *Supra* note 69 at para 29.

76 Jenifer Koshan, “Another Take on Equality Rights by the Court of Appeal”, *ABlawg.ca* (13 July 2009) online: <http://ablawg.ca/wp-content/uploads/2009/07/blog_jk_cunningham_abca_july-2009.pdf>. For another supportive piece, see Ruth Thompson, “To Be, or Not to Be, Métis?”, *SLAW* (8 November 2011) online: <<http://www.slaw.ca/2011/11/08/to-be-or-not-to-be-metis/>>.

77 *Cunningham*, *supra* note 3 at para 74.

78 *Ibid* at para 46.

79 Indian status as an analogous ground was not in dispute. See *ibid* at paras 56-58.

First, she found the genuineness of the *MSA*'s ameliorative purpose to be "manifest."⁸⁰ Second, she determined that this particular exclusion advances the *MSA*'s ameliorative purpose because allowing "membership in the *MSA* communities to Métis who are also status Indians would undermine the object of the program."⁸¹ With respect, such reasoning does a poor job of rebutting the fact that the *MSA* actually does allow such membership. As Ruth Thompson points out, consistent enforcement of this exclusion would actually reduce Métis settlement populations: "Can we really take seriously the claim that the fewer lifelong Métis allowed legal recognition of their Métis identity, the stronger the Métis culture will be?"⁸² The Supreme Court of Canada was aware of this argument, of course, as it was adopted by Justice Ritter and advocated for in the factums submitted by LEAF and by the Canadian Association for Community Living (CACL).⁸³

To Chief Justice McLachlin's credit, she was not trying to rebut the argument; she was simply dismissing its relevance, saying that "some line drawing will be required" and the line drawn by the *MSA* in this case appears sufficiently non-outlandish to warrant section 15(2) protection.⁸⁴ Looking past the question of whether or not the exclusion truly aids in the commendable pursuit of preserving Métis culture, it is the Supreme Court's complete refusal to engage in the debate that frustrates scholars such as Ruth Thompson, Denise Réaume, and Jennifer Kosan. The great irony here is that both teams—captained, for the purposes of this paper, by Chief Justice McLachlin on one side and Denise Réaume on the other—defend their perspective in the name of substantive equality.

For Chief Justice McLachlin, the Court's commitment to substantive equality has, since *Andrews*, been grounded in a rejection of formal equality's endorsement of identical treatment. Her judgments rely heavily on this rejection, stressing Peter Hogg's notion that "different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it."⁸⁵ She concludes, in turn, that ameliorative programs do not violate the type of substantive equality that section 15 promotes.⁸⁶ With respect, a more logical conclusion would be that ameliorative programs do not *necessarily* violate the type of substantive equality that section 15 promotes. This is essentially the argument being pushed by Réaume and her colleagues—that Chief Justice McLachlin's test for substantive equality rests on *Andrews'* rejection of identical treatment while at the same time ignoring its reason for doing so, namely to unmask the power of a facially neutral law to produce, in effect, "serious inequality."⁸⁷ Indeed, if the whole point of a substantive equality guarantee is to peek past a law's purpose to perceive its true effect, how can the inquiry into its violation so unapologetically do the opposite?

The answer is that section 15 does not only prevent governments from discriminating; it also enables governments to combat discrimination.⁸⁸ As her appreciation for deference would suggest, Chief Justice McLachlin's use of the word "enabling" in *Kapp* was more likely a synonym for "encouraging," as opposed to "allowing." Encouraging governments to ameliorate disadvantage might seem easy to justify, but refusing to "acknowledge

⁸⁰ *Ibid* at para 70.

⁸¹ *Cunningham*, *supra* note 3 at para 77.

⁸² Thompson, *supra* note 76.

⁸³ Factum of the Intervener, Women's Legal Education and Action Fund (LEAF) submitted in *Cunningham*, *supra* note 3, online: <<http://ablwg.ca/wp-content/uploads/2010/12/leaf-factum1.pdf>>; Factum of the Intervener, Canadian Association for Community Living (CACL) submitted in *Cunningham*, *supra* note 3.

⁸⁴ *Cunningham*, *supra* note 3 at para 86.

⁸⁵ *Kapp*, *supra* note 7 at para 49.

⁸⁶ See e.g. *ibid* at para 3.

⁸⁷ *Andrews*, *supra* note 11 at para 8.

⁸⁸ *Kapp*, *supra* note 7 at para 25.

even the possibility of discriminatory ameliorative schemes” most certainly is not, as it runs contrary to the effect-centred conception of substantive equality upon which section 15 is based and to which the pre-*Kapp* Supreme Court had long subscribed.⁸⁹ The consequent aim of Part III, building on the scholarship and caselaw considered thus far, is to sketch out an alternative approach, one that balances Chief Justice McLachlin’s need for deference with Réaume’s call for scrutiny.

III. IMAGINING A NEW APPROACH TO SECTION 15(2)

Make no mistake: the door is ajar. *Lovelace* recognized that “we may well wish to reconsider this matter at a future time in the context of another case,”⁹⁰ *Kapp* left “open the possibility for future refinement,”⁹¹ and *Cunningham* foresaw the test being “refined and developed as different cases emerge.”⁹² A test reconfigured to suit facts is less a test than a malleable method of judicial justification. Leeway is important for courts—just as it is for governments⁹³—but the deep-rooted principles of certainty and predictability dictate that a test capable of accommodating all fact patterns is preferable. The *Kapp* framework is ripe for revision, therefore, as there are facts it cannot reasonably accommodate. That being said, this paper has already confessed its apparently incorrect belief that the *Cunningham* facts had the potential to inspire such revision. Even though the claimants evoked sympathy as insiders excluded on a prohibited ground, it is true that the complexity and importance of ameliorating Aboriginal disadvantage demands a certain level of deference. The Albertan government spent years negotiating an ameliorative scheme with Métis leaders and the impugned exclusion came out of those talks; far be it for the courts to interfere. Imagine, though, if the exclusion was tied not to Aboriginal identity, but to gender identity or to sexual orientation. Moreover, to borrow Ritter J’s *Vriend* comparison, consider what would happen if a government were to invoke section 15(2) with respect to a piece of human rights legislation that failed to include sexual orientation as a protected ground.⁹⁴ Confronted with such issues, Chief Justice McLachlin would surely feel the need to revisit her test.

In restructuring the Court’s approach in order to accommodate the understanding that ameliorative schemes can discriminate, the first issue is whether the heavy analytical lifting is well suited for section 15 or best left to section 1. Hogg has long argued for the latter: “[T]he only way to bring clarity and coherence to the law … is to accept that discrimination under s. 15 is nothing more than a disadvantage imposed on a listed or analogous ground.”⁹⁵ Pre-*Kapp*, Hogg’s argument drew strength from the noted ambiguity of the *Law* test, especially as compared to the depth and organization of the *Oakes* test. *Kapp* did not change Hogg’s mind; for him, “discrimination” is nearly as vague as “human dignity” and the new “perpetuation of disadvantage or stereotyping” element still rests on the same contextual factors.⁹⁶ Respectfully, a significant issue with Hogg’s argument is that leaving affirmative action considerations to section 1 would unnecessarily allow reverse discrimination claimants (e.g. those in *Kapp*) to successfully render any ameliorative program an infringement of the *Charter*’s equality guarantee before being justified. As Chief Justice McLachlin mentioned in *Kapp*, there clearly is a “symbolic

⁸⁹ *Supra* note 83 at para 10.

⁹⁰ *Lovelace*, *supra* note 30 at para 108.

⁹¹ *Kapp*, *supra* note 7 at para 41.

⁹² *Cunningham*, *supra* note 3 at para 46.

⁹³ See *Kapp*, *supra* note 7 at para 47.

⁹⁴ See generally *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*].

⁹⁵ Hogg, *supra* note 48 at 1203.

⁹⁶ *Ibid* at 1204.

problem” with “finding a program discriminatory before ‘saving’ it as ameliorative.”⁹⁷

In reality, Chief Justice McLachlin was not using this “symbolic problem” simply to justify pushing section 15(2) ahead of section 1. She was using it to push section 15(2) to the forefront of section 15(1), thus highlighting Part III’s second issue: whether section 15(2) is more appropriately characterized as an interpretive aid (*Lovelace*) or as a preemptive exemption (*Kapp*).⁹⁸ To the purist interpretive aid proponent, the real purpose of section 15(2) is to remind all interested parties that section 15(1) cannot be skewed to support the blind equating of distinction with discrimination; in other words, section 15(2) was not meant as a substantive provision, but was included in an act of “excessive caution.”⁹⁹ In *Lovelace*, Justice Iacobucci took a compatible, though less extreme, position. He depicted the two provisions as confirmatory in purpose, seeing in section 15(1) the capacity to “embrace ameliorative programs of the kind that are contemplated by s. 15(2).” Depicting the relationship otherwise, as argued in the CDC’s factum, “would suggest the sub-sections are mutually antagonistic” because one could override the other.¹⁰⁰ Interestingly, the Supreme Court in *Kapp* accepted Iacobucci J’s confirmatory angle, but did not see it as “preclud[ing] an independent role for s. 15(2).”¹⁰¹ It “is more than a hortatory admonition,” the Supreme Court wrote, meaning that section 15(2)’s “simple clear language” called for independent analytical force.¹⁰²

Given this paper’s apparent claimant-centred bent, its partiality to Iacobucci J’s interpretative aid approach is predictable; substantive equality is a contextual concept, and determining its violation warrants an equally contextual examination. As a legal test, though, such an approach is susceptible to many of the same criticisms that were directed at *Law*; indeed, *Lovelace* was little more than an application of *Law*. Of note, however, is the fact that the four contextual factors, unlike human dignity, have not been altogether abandoned. As the Supreme Court wrote recently in *Withler*, part two of the section 15(1) analysis is inherently contextual and so “[f]actors such as those developed in *Law* … may be helpful.”¹⁰³ It then confirmed what it had suggested in *Kapp*, namely that factor one (pre-existing disadvantage) and factor four (nature of interest affected) point to the perpetuation of disadvantage or prejudice, while factor two (correspondence with the claimants’ actual characteristics or circumstances) points to the operation of stereotype. There is little doubt that, on the facts in *Cunningham*, these factors would have demanded serious consideration. The Court of Appeal’s analysis in *Cunningham* of the fourth factor is exemplary:

The more severe and localized the consequence, or the more significant the interest affected, the more likely that discrimination will be found: *Law* at para. 74, citing *Egan v. Canada* … In this case, settlement membership not only affects the right to meaningfully participate in the community, but also affects housing and transportation services, employment, recreation, land rights, and identity. The appellants are denied voting rights, participation in governance, and the right to maintain their cultural connection. The

97 *Kapp*, *supra* note 7 at para 40.

98 The Court in *Kapp* did not admit to creating an exemption, but its “third approach” literally functions to exempt governments from the full scrutiny of a section 15(1) analysis. Réaume writes: “What’s new is that the Court grants such exemptions without actually saying out loud that it is an exemption, indeed, without even looking to see whether the equality rights of those excluded have been violated before deciding whether to permit an exclusionary program to stand.” Réaume, *supra* note 5.

99 *Supra* note 39 at para 105.

100 *Ibid* at para 11.

101 *Kapp*, *supra* note 7 at para 38.

102 *Ibid*.

103 *Withler*, *supra* note 57 at para 66.

denial of voting and participatory rights alone is sufficient to indicate that significant interests are being affected.¹⁰⁴

This quote is intended to reflect the nuance and persuasive pressure that any one of the *Law* factors can bring to the contextual stage of a section 15(1) analysis; before embarking on such an analysis, therefore, it would be helpful to have already determined whether the impugned law or program was remedial or ameliorative within the meaning of section 15(2). Even though this paper agrees in principle with Iacobucci J's characterization of section 15(2) "as an interpretive aid to s. 15(1), providing conceptual depth and clarity on the substantive nature of equality," affirmative action considerations will inevitably colour the rest of the analysis.¹⁰⁵ In other words, section 15(2) must come first. No matter its name, be it "interpretive aid" or "preemptive exemption," section 15(2)'s inherent contextual influence gives it a distinctly gatekeeper-like function. The real question, which constitutes Part III's third and final issue, thus becomes: What exactly should this gate look like? More specifically, what sorts of exclusion claims should the gate keep out and what sorts should it let through?

As it stands now, the gate keeps out all genuinely ameliorative programs, ensuring their exclusions are not analyzed contextually. It does so by cutting effect out of the equation completely, and it does so because it does not want to deter governments from creating ameliorative programs in the future.¹⁰⁶ If the objective here is to balance Chief Justice McLachlin's appreciation for deference with Réaume's interest in scrutiny, the logical solution is to insert an appropriate amount of effect-oriented scrutiny back into *Kapp*'s two-stage section 15(2) test.¹⁰⁷ In this paper's view, the appropriate amount would be that which blocks cases clearly destined for failure while letting through those with equality issues substantive enough to deserve the same broad and contextual analysis awarded to other section 15(1) claims. Exemplifying the former, of course, is reverse discrimination; as for the latter, the model would be underinclusion on the basis of an enumerated or analogous ground.

For some, it may not be immediately clear how a lack of help can constitute harm amounting to discrimination. In *Vriend*, the Supreme Court acknowledged that "[i]t may at first be difficult to recognize the significance of being excluded from the protection of human rights legislation. However, it imposes a heavy and disabling burden on those excluded."¹⁰⁸ The Supreme Court went on to explain how the consequences of underinclusive legislation may be "just as grave as that resulting from explicit exclusion."¹⁰⁹ The context was quite different in *Vriend*; nonetheless, the Court's reflections on underinclusion bringing about real harm can easily be applied to genuinely ameliorative programs.¹¹⁰ Indeed, the Ontario Court of Appeal did just that in its aforementioned *Roberts* decision. The *Roberts* case stemmed from a human rights complaint filed by a blind man after he was denied access to the Ministry of Health's Assistive Devices

¹⁰⁴ *Supra* note 69 at para 38.

¹⁰⁵ *Cunningham, supra* note 3 at para 97.

¹⁰⁶ Although, Réaume suggests it may be because "Supreme Court is bored with equality litigation, or finds it too difficult to actually work through the 'elusive concept' of equality ... and really doesn't want to see any more equality cases. It has certainly done its utmost to discourage claimants." Réaume, *supra* note 5.

¹⁰⁷ Though effect was never part of the *Kapp* test, the word "back" seems appropriate here given the fact that effect had always played a role in equality analyses (including *Lovelace*) until *Kapp* took it out.

¹⁰⁸ *Vriend, supra* note 94 at para 98.

¹⁰⁹ *Ibid.*

¹¹⁰ The Court was addressing the exclusion of same-sex couples from protection under the *Individual's Rights Protection Act*, RSA 1980, c I-2.

Program due to his age.¹¹¹ Weiler JA, for a unanimous Court of Appeal, found that the Divisional Court's exemptive focus on section 14(1)'s protection-of-special-programs purpose "constituted an error of law."¹¹² Much like the *Charter*'s section 15(2), the *Code*'s section 14(1) has a second purpose: promote substantive equality.¹¹³

Fairness, and the recognition of substantive equality, require that discrimination, in the provision of a service to a person who is a member of a disadvantaged group for whom a special program is designed, not be tolerated and be subject to review. This interpretation does not second-guess the Legislature. Rather, it fulfills one of the purposes of the Legislature."¹¹⁴

To reiterate, where a claim of exclusion or underinclusiveness is brought forth against an ameliorative program by a targeted beneficiary of that program, the claim quite plainly deserves further consideration. This paper supports the insertion of this principle into the section 15(2) analysis in the form of a question, to be positioned directly after the two questions set out in *Kapp*. Doing so would enable the successful deflection of reverse discrimination allegations, while at the same time embracing the established principle that programs designed to ameliorate disadvantage can, in effect, discriminate through underinclusion.¹¹⁵ It might appear to be balanced, but a threshold question such as this one is likely to invoke a certain amount of critique on both fronts.

First, the principled, pro-scrutiny equality advocate might view such a threshold as unfairly blocking outsider claims. Sophia Moreau, in her paper entitled "The Wrongs of Unequal Treatment," points to a number of ways in which individuals may be wronged by differential treatment.¹¹⁶ Among them is the perpetuation of oppressive power relations. If one accepts that a law serving to perpetuate oppressive power relations can produce harm, it becomes relatively easy to understand how a government's decision to help out one disadvantaged group and not another can do the same. Without getting carried away, the admittedly philosophical point here is that the familiarisms can be reproduced by governments picking favorites as between disadvantaged groups. For a Court unwilling to look past *bona fide* intent, however, it is unrealistic to expect an argument like this to hold water, especially when accepting it would by extension demand positive government action on a large scale.

This points to the second anticipated criticism of the *Roberts*-inspired proposal above, to come from governments and other members of the deference camp—including Chief Justice McLachlin and her Supreme Court. These deference defenders would obviously approve of weeding out reverse discrimination claims, yet they would remain unsatisfied with the height of the threshold, as it would still allow all insider claims through to the contextual stage, thus forcing governments to endure the full scrutiny of a section 15(1) analysis in cases like *Cunningham*. Interestingly, the seeds of a solution to this problem may also be found in the *Roberts* analysis. In addition to his excluded-beneficiaries-deserve-to-be-heard principle, Justice Weiler saw as relevant the extent to which the

¹¹¹ *Roberts*, *supra* note 36.

¹¹² *Ibid* at para 18. Again, section 14(1) of the *Human Rights Code* mirrors section 15(2). It reads: "A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I."

¹¹³ See e.g. *ibid* at para 33.

¹¹⁴ *Ibid* at para 44.

¹¹⁵ See *Vriend*, *supra* note 94; *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360 [*Ball*].

¹¹⁶ See generally Sophia Moreau, "The Wrongs of Unequal Treatment" in *Making Equality Rights Real*, *supra* note 10 at 31.

“limitation is reasonably related to the scheme of the special program.”¹¹⁷ Introducing a “reasonably related” test might seem at first glance like the opposite of deference. In light of Weiler J’s first principle having already been accepted, however, a rationality-type stage would actually provide governments and deferential courts with another chance to prevent the analysis from reaching stage two.

The challenge is deciding how deep this rationality requirement should cut. It is helpful to step back in this respect and to remember that this paper’s goal is to imagine a section 15(2) framework that will make it easy for governments to defend ameliorative programs that are well intentioned and well thought-through, while making it difficult for them to defend those ameliorative programs that discriminate through arbitrary underinclusion. It is difficult to imagine how such an objective could be realized without some exploration of the process and rationale behind the decision as to how and why the program’s limits were set. Accordingly, this paper would recommend the inclusion of an objective, pseudo proportionality question. While this question is inspired in part by Weiler J’s “reasonably related” test, it is perhaps more aptly described as a less probative variation of the *Oakes* test’s minimal impairment stage. It is a simple question, but one that will hopefully hold governments accountable without requiring positive proof of a law’s effect and without neglecting the uniquely challenging and multi-faceted nature of public policy decisions. The final component of the proposed section 15(2) threshold test would read: Has the government acted reasonably in deciding how and where to establish the limits of the program? The idea here is that governments will have to earn the deference that Chief Justice McLachlin simply awards them by showing that they took reasonable steps in making their decision. To be clear, the question asks not whether the limit itself is reasonable, but whether the government acted reasonably in establishing it. Did they seek advice from experts? Did they consult key public stakeholders? Can they show that they made an effort to weigh the salutary effects of the limit against the deleterious ones, or that they opted for what they determined to be the least drastic means?

These are all questions that reasonable government departments work through when creating a public program and, in all likelihood, the government in *Cunningham* would have been able to easily satisfy this portion of the test—thus ending the analysis—by reference to the extensive negotiations that went into the detailed formulation of the impugned limit in the *MSA*. As noted earlier, the CDC has expressed a concern that “immunizing [laws] from review would diminish [governments’] incentive to update them.” This proposed reasonableness query aims to reconcile the government’s need for deference with the CDC’s fear of immunization by employing a disclosure-based, reflexive approach to the promotion of section 15(1) compliance. Even where, in the name of deference, a court is unwilling to subject an impugned exclusion to the full section 15(1) analysis, the court of public opinion would still have all the information it needs to render judgment. Aside from judicial intervention, few incentives are more powerful than public disapproval.

In an effort to give practical meaning to the principles discussed above, this paper’s proposed test is summarized as follows:

1. Does the law or program create a distinction based on an enumerated or analogous ground? If no, section 15(1) has not been violated. If yes, proceed to question 1(a).
 - a. Does the law or program have an ameliorative or remedial purpose and target a disadvantaged group identified on enumerated or analogous grounds? If no, proceed to question 2. If yes, proceed to question 1(b).

¹¹⁷ Roberts, *supra* note 36 at para 44.

- b. Is the claim of exclusion or underinclusiveness against an ameliorative program being brought by a targeted beneficiary of that program? If no, section 15(1) has not been violated. If yes, proceed to question 1(c).
 - c. Has the government acted as a reasonable government would in deciding how and where to establish the limits of the program? If yes, section 15(1) has not been violated. If no, proceed to question 2.
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? If no, section 15(1) has not been violated. If yes, section 15(1) has been violated, proceed to section 1.

CONCLUSION

“The crux of a substantive equality analysis,” Donna Greschner once wrote, “is critical scrutiny of the criteria that policy-makers use to differentiate.”¹¹⁸ This paper is in full agreement with Greschner’s point and, up until *Kapp*, it appeared as though the Supreme Court of Canada was as well. As Part I of this paper explained, the Supreme Court’s initial endorsement of substantive equality reflected a fundamental understanding that inequality cannot always be seen at the surface. Often inequality must be uncovered, meaning “[w]e cannot assess whether a policy promotes or impedes substantive equality without examining people’s circumstances … independently of the words of the law itself.”¹¹⁹ With Part I having established the centrality of impact to the Supreme Court’s vision of substantive equality, Part II showed how the Supreme Court in *Kapp*, fearful of discouraging governments from ameliorating disadvantage, opted in favour of exemptive deference. The Supreme Court was willing to make sure that a law was genuine in its ameliorative intent; however, it was not prepared to force governments to prove (or disprove) the law’s precise impact. Part III, accordingly, sought a middle ground. It agreed that section 15(2) operates best in a threshold capacity, but argued that it is possible to insert scrutiny into the test without significantly enhancing the somewhat theoretical risk of deterrence. Drawing on *Roberts*—which remains the leading decision in the statutory realm¹²⁰—Part III advocated for the insertion of a permit-insider-claims component that would weed out reverse discrimination claims and let others through to the contextual stage. It then proposed a reasonableness element. While the wording of this aspect of the test may need to be revised, its underlying aim is to push governments to explain how and why they decided on the impugned exclusion. Such a requirement aligns both with the CDC’s call for a test scrutinous enough to serve as an incentive for governments to keep their program in line with modern notions of equality and with the Supreme Court’s refusal to “demand positive proof that an impugned distinction will in the future have a particular impact.”¹²¹ Without cutting too deep, this last question attempts to employ the power of transparency to promote compliance. After criticizing the Supreme Court’s current approach to section 15(2), this paper hopes to have offered a reasonable alternative. As the Supreme Court of Canada has made a habit of saying, however, the door remains open.

¹¹⁸ Greschner, *supra* note 1 at 304.

¹¹⁹ *Ibid.*

¹²⁰ See e.g. *Ball*, *supra* note 115.

¹²¹ *Cunningham*, *supra* note 3 at para 74.

ARTICLE

THE CONSTITUTIONAL IMPLICATIONS OF THE *HUDSON* DECISION: LESSONS FOR ADAPTING TO THE HEALTH EFFECTS OF CLIMATE CHANGE IN CANADA

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INTRODUCTION

Climate change policy is divided into two main types of action, mitigation and adaptation. Mitigation refers mainly to interventions aimed at reducing greenhouse gas emissions at the source.¹ Adaptation refers to “adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.”² Historically, adaptation has been viewed as the poor cousin of climate change mitigation,³ but it is now seen as a crucial component of climate change policy.⁴

Climate change has been identified as one of the biggest health threats of the 21st century,⁵ and should be a key priority for the global health community.⁶ Canada will likely experience climatic impacts with severe consequences for public health.⁷ Canadians’

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 - 1 Klein et al, “Inter-Relationships Between Adaptation and Mitigation” in ML Parry et al, eds, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007) 745 at 750.
 - 2 *Ibid.*
 - 3 Roger Pielke, Jr, et al, “Climate Change 2007: Lifting the Taboo on Adaptation” (2007) 445 Nature 597.
 - 4 *Ibid.*; Barry Smit et al, “An Anatomy of Adaptation to Climate Change and Variability” (2000) 45:1 Climatic Change 223.
 - 5 Anthony Costello et al, “Managing the Health Effects of Climate Change” (2009) 373:9676 Lancet 1693 [Costello et al 2009]; Costello et al, “Global Health and Climate Change: Moving from Denial and Catastrophic Fatalism to Positive Action” (2011) 369:1942 Philosophical Transactions of the Royal Society A - Mathematical Physical and Engineering Sciences 1866.
 - 6 Margaret Chan, World Health Organization, Media Statement, “The Impact of Climate Change on Human Health” (7 April 2008), online: WHO <<http://www.who.int/mediacentre/news/statements/2008/s05/en/index.html>>.
 - 7 Canada, Natural Resources Canada, *From Impacts to Adaptation: Canada in a Changing Climate 2007* (Ottawa: Government of Canada, 2008) [From Impacts to Adaptation]; Canada, Health Canada, *Human Health in a Changing Climate: A Canadian Assessment of Vulnerabilities and Adaptive Capacity* (Ottawa: Health Canada, 2008) [Human Health].

vulnerability has been highlighted recently, through events including the 1998 Ice Storm and 2000 Walkerton water crisis.⁸ Emergencies such as these are expected to increase, and adaptation actions will be necessary to prevent, reduce, and manage climate change-related risks.⁹

In this paper, I will address the question: to what extent are Canadian municipalities constitutionally able to adopt adaptations to the impacts of climate change on health? For example, to what extent will municipalities be able to implement emergency management programs, or protect local water sources from contamination? I will argue that municipalities have potentially wide latitude for local environmental regulation, including health adaptation.¹⁰ While municipal authority in this domain is not unlimited, courts and provincial legislatures are increasingly adopting a deferential approach to municipal authority, as exemplified by the landmark decision *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v Hudson (City of)* ("Hudson").¹¹ Drawing on *Hudson*, I will argue that, depending on the initiative, municipal adaptations may be: (i) implemented under authority of existing enumerated powers, although supported by omnibus provisions; (ii) supported by the principle of subsidiarity; (iii) supported by the precautionary principle; and (iv) permitted to complement federal or provincial regulations related to the same matter.

This paper takes a novel approach to examining climate change adaptation in Canada. Climate change law literature is dominated by mitigation.¹² Division of powers analyses exist regarding climate change mitigation efforts generally and in other jurisdictions,¹³ and to a limited extent, in Canada specifically.¹⁴ These analyses examine how different levels of government could construct carbon taxes or other tools *intra vires* their powers. Little has been written about division of powers and climate change adaptation in Canada and this gap must be filled, because unclear division of responsibilities and lack of

8 From *Impacts to Adaptation*, *supra* note 7.

9 Kristie L Ebi & Ian Burton, "Identifying Practical Adaptation Options: An Approach to Address Climate Change-Related Health Risks" (2008) 11:4 Environmental Science & Policy 359.

10 Note that "health adaptation" refers to an adaptation to the health effects of climate change.

11 *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v Hudson (City of)*, 2001 SCC 40, [2001] 2 SCR 241 [*Hudson*].

12 Robert L Glicksman, "Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations" (2010) 40:4 Envtl L 1159 ("Although an extensive literature concerning the federalism implications of climate change mitigation policy has developed, less has been written about the federalism issues arising from climate change adaptation policy" at 1159); W Neil Adger, Nigel W Arnell & Emma L Tompkins, "Successful Adaptation to Climate Change Across Scales" (2005) 15:2 Global Environmental Change 77 (The "dynamic nature of linkages between levels of governance" regarding adaptation is poorly understood and not well-studied – at 80).

13 See e.g. Robert K Huffman & Jonathan M Weisgall, "Climate Change and the States: Constitutional Issues Arising from State Climate Protection Leadership" (2007-2008) 8:2 Sustainable Development Law and Policy 6; Alice Kaswan, "A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System" (2007-2008) 85:4 Denv UL Rev 791; Thomas D Peterson, Robert B McKinstry, Jr & John C Dernbach, "Developing a Comprehensive Approach to Climate Change Policy in the United States that Fully Integrates Levels of Government and Economic Sectors" (2008) 26 Va Envtl LJ 227; Carol M Rose, "Federalism and Climate Change: The Role of the States in a Future Federal Regime – An Introduction" (2008) 50:3 Ariz L Rev 673.

14 See e.g. Nathalie J Chalifour, "Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes" (2008) 22:2 NJCL 119; Shi-Ling Hsu & Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54:3 McGill LJ 463.

coordination between actors can represent serious barriers to adaptation.¹⁵ Furthermore, this paper takes an innovative approach to analysing *Hudson* by connecting the local pesticide issue in *Hudson* to climate change adaptation.

Climate change adaptation has the potential to evoke complex division of powers issues in Canada. As a federalist state, Canada faces “special challenges” in developing effective environmental regulations,¹⁶ since environmental issues do not fit neatly into constitutional categories.¹⁷ These challenges will likely surface for climate change adaptation because adaptation processes, by their nature, occur across various interacting scales.¹⁸ On one hand, adaptation is often characterized as a local matter; climate impacts tend to be felt and dealt with relatively locally and top-down, ‘one size fits all’ solutions do not apply to all localities.¹⁹ Canada is currently experiencing, and is expected to experience, various local climate impacts given the country’s diverse landscapes and vulnerabilities.²⁰ On the other hand, local adaptation occurs in the context of larger processes.²¹ Regional and national adaptation programs and strategies guide adaptation research, planning, and resources, with implications for local adaptation. Larger-scale processes may also be necessary to combat collective action problems.²² Adaptation taken by one local actor may have “adverse spillover effects” in other jurisdictions, potentially undermining the overall effectiveness. Adaptation may require policy coordination across multiple jurisdictions to avoid this leakage problem.²³ For these reasons, adaptation involves complex interactions between different levels of government that may lead to constitutional disputes. These issues must be resolved for adaptation measures to be successful.

Municipalities are a relevant level of government to study for two key reasons. First, as mentioned, municipal adaptation is crucial because climate change impacts tend to be felt and addressed locally. Urban municipalities face unique vulnerabilities to climate change. Eighty percent of Canada’s population lives in municipalities.²⁴ Although urban

15 Emma Tompkins et al, “Observed Adaptation to Climate Change: UK Evidence of Transition to a Well-Adapting Society” (2010) 20:4 *Global Environmental Change* 627 at 628; James D Ford & Lea Berrang-Ford, “Introduction” in James D Ford & Lea Berrang-Ford, eds, *Climate Change Adaptation in Developed Nations: From Theory to Practice* (Dordrecht: Springer, 2011) 3 at 9.

16 “Preface” in Kenneth M Holland, FL Morton & Brian Galligan, eds, *Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States* (Westport, CT: Greenwood Press, 1996) viii at vii.

17 John Swaigen, “The Hudson Case: Municipal Powers to Regulate Pesticides Confirmed by Quebec Courts” (2000) 34 *Canadian Environmental Law Reports* 162 at 182; Chalifour, *supra* note 14 at 173; FL Morton, “The Constitutional Division of Powers with Respect to the Environment in Canada” in Kenneth M Holland, FL Morton & Brian Galligan, eds, *Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States* (Westport, Conn: Greenwood Press, 1996) 37 at 37.

18 Adger et al, *supra* note 12.

19 Thomas J Wilbanks, “Scale and Sustainability” (2007) 7:4 *Climate Policy* 278 at 284; Jan McDonald, “Mapping the Legal Landscape of Climate Change Adaptation” in Tim Bonyhady, Andrew Macintosh & Jan McDonald, eds, *Adaptation to Climate Change* (Annandale, NSW: Federation Press, 2010) 1 at 23-25; Glicksman, *supra* note 12 at 1164.

20 *From Impacts to Adaptation*, *supra* note 7; *Human Health*, *supra* note 7.

21 Adger et al, *supra* note 12 at 79; Wilbanks, *supra* note 19 at 284.

22 Collective action problems may arise in the federalism context when individual states have incentives to act in a way that deviates from the interests of the nation as a whole (Glicksman, *supra* note 12 at 1175).

23 Glicksman, *supra* note 12 at 1165.

24 Statistics Canada, “Population, urban and rural, by province and territory” (last modified 22 September 2009), online: Statistics Canada < <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo62a-eng.htm> [Statistics Canada]; Eugene Meehan, Robert Chiarelli & Marie-France Major, “The Constitutional Legal Status of Municipalities 1849-2004: Success Is a Journey, but Also a Destination” (2007) 22:1 *NJCL* 1 (growing urban population at 6).

centres have high adaptive capacity in some respects,²⁵ they rely heavily on critical energy, transportation, and water infrastructure and suffer greater heat stress and poorer air quality.²⁶ Second, municipalities represent a dynamic level of government from a constitutional perspective. The constitutional status of municipalities as mere “creatures” of the provinces has been questioned recently, particularly following *Hudson*.²⁷ Municipal responsibilities have grown to include broad and diverse matters. Most municipalities have environment-related responsibilities, including water and waste systems, zoning,²⁸ and hydroelectric plants.²⁹ Municipalities have also been subject to federal and provincial downloading of services, which has further increased their responsibilities.³⁰ Have municipalities become a de facto third level of government in Canada with the power to regulate environmental issues?³¹

Hudson provides a prism through which to view health adaptation because it demonstrates municipalities’ potential power to regulate issues at the nexus of environmental health and constitutional law. In this case, the Town of Hudson, Quebec (“Hudson”), adopted By-law 270 (“the By-law”) in 1991. The By-law responded to residents’ concerns by restricting the use of cosmetic pesticides in Hudson. In 1992, two landscaping and lawncare companies, Spraytech and Chemlawn, were charged with violating the By-law. Spraytech and Chemlawn asserted that the By-law was *ultra vires* Hudson’s authority and inoperative due to a conflict with provincial and federal regulation.³² The By-law was found to be valid and operable at the Superior Court and the Court of Appeal, and this finding was upheld at the Supreme Court of Canada (SCC). Although the By-law was not framed as addressing adaptation to climate change per se, it could easily be construed as such: climate change will likely lead to increased heavy precipitation events,³³ and this precipitation could increase pesticide runoff into water bodies,³⁴ with negative effects on human health.³⁵ *Hudson* may also have wider implications for other adaptations. The By-law relied on a general welfare (‘omnibus’) provision in the *Cities and Towns Act*: “the council may make by-laws: to secure peace, order, good government, health and general welfare in the territory of the municipality [...].”³⁶ Presumably, omnibus provisions such

25 Urban centers tend to have higher levels of wealth, education and skill sets, and access to technology and institutions (*From Impacts to Adaptation*, *supra* note 7 at 14).

26 These vulnerabilities are particularly dangerous for poor and elderly populations, which tend to cluster in urban areas (*ibid*).

27 Meehan et al, *supra* note 24 at 43-44.

28 For an excellent summary of municipal powers and land use, see Howard M Epstein, “Subsidiarity at Work — The Legal Context for Sustainability Initiatives at the Local Government Level: How an Environmental Agenda Could be Advanced by Canadian Municipalities” (2010) 63 *Municipal and Planning Law Reports* 56 [Epstein 2010].

29 Donald Lidstone, “A Comparison of New and Proposed Municipal Acts of the Provinces: Revenues, Financial Powers and Resources” (Paper prepared for the 2001 Annual Conference of the Federation of Canadian Municipalities, Banff, Alberta, 27 May 2001) [unpublished] at 1.

30 Meehan et al, *supra* note 24 at 8.

31 Meehan et al, *supra* note 24.

32 *Hudson*, *supra* note 11 at paras 6-7.

33 *From Impacts to Adaptation*, *supra* note 7 at 10.

34 Pamela D Noyes et al, “The Toxicology of Climate Change: Environmental Contaminants in a Warming World” (2009) 35:6 *Environment International* 971.

35 KL Bassil et al, “Cancer Health Effects of Pesticides” (2007) 53:10 *Canadian Family Physician* 1705.

36 RSQ c C-19, s 410(1).

as this could be used for other environmental health issues relevant to climate change adaptation.³⁷

This paper is subsequently divided into Parts I through III. Part I will present a brief overview of projected impacts of climate change on Canadians' health and introduce the concept of climate change adaptation. Part II will describe the legal context for adaptation, as well as existing health adaptations, at federal, provincial, and municipal levels. Part II will draw variously on environmental law, general climate change adaptation, and health adaptation, as appropriate.³⁸ Part III will provide a *Hudson* case comment. This Part will describe the case, analyze its implications for municipal authority over environmental issues, respond to criticism of the case, and explain its potential implications for municipal health adaptation. Finally, the Conclusion will summarize the main findings, namely that municipalities may have increasing latitude to regulate local environmental issues, including health adaptation.

I. CLIMATE CHANGE HEALTH IMPACTS AND ADAPTATION

Climate change will have serious and complex impacts on human health. The Intergovernmental Panel on Climate Change (IPCC) states that climate change is "unequivocal"³⁹ and is projected to lead to health impacts in all countries and regions.⁴⁰ These impacts will "put the lives and wellbeing of billions of people at increased risk,"⁴¹ particularly vulnerable populations like children and the elderly.⁴² Health Canada highlights six main health vulnerabilities for Canada: extreme temperatures; air quality; stratospheric ozone depletion; extreme weather events; vector- and rodent-borne infectious disease; and food- and water-borne disease.⁴³ Consider water-borne disease, which could be affected by climate change in various ways. Heavy precipitation could increase runoff, leading to water contamination by *E. coli* (similar to contamination by pesticide runoff, discussed above). Marine environments could experience increased algal blooms, such that fish and shellfish for human consumption contain increased levels of toxins. Water-borne disease may also be impacted indirectly by climate change—longer swimming seasons could increase exposure to poor water quality, increasing disease risk. These vulnerabilities are summarized in Table 1. Adaptation will be necessary to prevent, reduce, and manage these climate change-related risks.

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- 37 Howard Epstein, "Case Comment: *Spraytech v. Town of Hudson*" (2001) 19 Municipal and Planning Law Reports 56 at 65 [Epstein 2001] (potential for omnibus provisions to address variety of issues); Swaigen, *supra* note 17 at 163 (potential for omnibus provisions to address variety of issues); Marcia Valiante, "Turf War: Municipal Powers, the Regulation of Pesticides and the *Hudson* Decision" (2001) 11 J Envtl L & Prac 327 at 339 (potential for omnibus provisions to address variety of issues).
- 38 Health adaptation is an incredibly broad, cross-cutting issue that could involve a wide range of government departments (see Part I). This paper is written primarily with a lens on environmental issues and climate change, rather than health care per se, to provide a more focused analysis of *Hudson*.
- 39 "IPCC, 2007: Summary for Policymakers" in S Solomon et al, eds, *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007) at 5.
- 40 Klein et al, *supra* note 1.
- 41 Costello et al 2009, *supra* note 5 at 1693.
- 42 *Human Health*, *supra* note 7 at 371.
- 43 *Ibid* at 14.

Table 1: Summary of typical climate change impacts on health in Canada⁴⁴

Health vulnerability	Selected climate-related causes	Selected projected / possible health effects
Extreme temperatures	<ul style="list-style-type: none"> • More frequent and severe heat waves 	<ul style="list-style-type: none"> • Heat-related illnesses and deaths • Respiratory and cardiovascular disorders
Air quality	<ul style="list-style-type: none"> • Increased air pollution: higher levels of ground-level ozone and airborne dust • Increased production of pollens and spores by plants 	<ul style="list-style-type: none"> • Eye, nose, and throat irritation and shortness of breath • Exacerbation of asthma and allergy symptoms • Respiratory and cardiovascular disorders
Stratospheric ozone depletion	<ul style="list-style-type: none"> • Depletion / modification of stratospheric ozone • Increased human exposure to UV radiation owing to behavioural changes resulting from a warmer climate 	<ul style="list-style-type: none"> • More cases of sunburns, skin cancers, cataracts, and eye damage
Extreme weather events	<ul style="list-style-type: none"> • More frequent and violent thunderstorms and hurricanes • Heavy rains causing mudslides and floods • Rising sea levels and coastal instability • Increased drought 	<ul style="list-style-type: none"> • Death, injury, and illness from violent storms, floods, etc. • Social / emotional / psychological harm • Health impacts due to food or water shortages • Illnesses related to drinking water contamination • Indirect health impacts from infrastructure damage, etc.
Vector- and rodent-borne infectious disease	<ul style="list-style-type: none"> • Changes in the biology and ecology of various disease-carrying insects, ticks, and rodents • Longer disease transmission season 	<ul style="list-style-type: none"> • Increased incidence of vector-borne infectious diseases native to Canada (e.g. Rocky Mountain spotted fever) • Possible emergence of new diseases
Food- and water-borne disease	<ul style="list-style-type: none"> • Contamination of drinking and recreational water • Changes in marine environments that result in algal blooms and higher levels of toxins in fish and shellfish • Increased disease risk owing to behavioural changes resulting from a warmer climate (e.g. through longer BBQ and swimming seasons) 	<ul style="list-style-type: none"> • Outbreaks of strains of micro-organisms such as <i>E. coli</i> and other water-borne pathogens • Food-borne illnesses

44 Adapted from *Human Health*, *supra* note 7 at 14.

Adaptation is a complex process, since adaptation can take many forms and involve various actors over time.⁴⁵ Adaptation actions include: research, such as reports, maps, and models; planning strategies to guide adaptation; networks between relevant stakeholders; legislation; awareness raising; and implementing adaptation infrastructure.⁴⁶ Sustained commitment to research and planning, for instance, is often required before adaptation infrastructure can be implemented successfully. It is necessary to appreciate these different types of actions to understand the diverse and complementary roles that may be played by actors at different levels of government.

It can be difficult to identify health adaptations. Health and climate change are broad subjects affected by a range of government roles and responsibilities. Often, initiatives not described as explicit health adaptation, like the *Hudson* By-law, have implications for adapting to the health effects of climate change.⁴⁷ It is preferable to take a broad view of health adaptation, rather than limit the analysis to measures that explicitly cite climate change as a motivation,⁴⁸ because (1) a measure's true motivation can be difficult to ascertain, and (2) an action's impact—rather than its stated motivation—is more relevant to Canadians' *actual* health. Therefore, I adopt a broad concept of health adaptation for this paper.

II. LEGAL FRAMEWORK FOR ADAPTATION AND EXISTING HEALTH ADAPTATIONS

To understand the legal framework for municipal health adaptation, it is necessary to understand the broader legal context at different levels of Canadian government.⁴⁹ First, Subpart A will examine the federal and provincial division of powers and how this division of powers has played out for environmental issues in general, and adaptation in particular. Subpart B will examine municipalities' evolving powers and roles, drawing principally from work by constitutional law expert and practitioner Eugene Meehan,⁵⁰ and will provide a snapshot of adaptations occurring at the municipal level.

A. Federal and Provincial Governments

i. Federal and Provincial Division of Powers

The *Constitution Act, 1867* sets out the legislative powers of the federal government and provincial governments in sections 91 and 92 respectively.⁵¹ The environment constitutes

⁴⁵ Lindsay F Wiley, "Mitigation/Adaptation and Health: Health Policymaking in the Global Response to Climate Change and Implications for Other Upstream Determinants" (2010) 38:3 *JL Med & Ethics* 629 at 636 (interdisciplinary nature of adaptation).

⁴⁶ Tompkins et al, *supra* note 15.

⁴⁷ Carolyn Poutiainen et al, *Civil Society Organizations and Adaptation to the Health Effects of Climate Change in Canada* (2011) [in press].

⁴⁸ Tompkins et al, *supra* note 15 at 630 (definition of adaptation that includes actions motivated by non-climate drivers as well as climate change).

⁴⁹ This analysis does not consider: (1) actions taken by other actors (civil society organizations, businesses, individuals), which are important for adaptation (Poutiainen et al, *supra* note 47); or (2) the international legal context, since the United Nations Framework Convention on Climate Change (UNFCCC) (9 May 1992, 1771 UNTS 107) prioritizes adaptation in developing countries, rather than domestic adaptation in developed countries.

⁵⁰ *Supra* note 24.

⁵¹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c3, ss 91-92, reprinted in RSC 1985, App II, No 5.

a cross-cutting, inter-sectoral matter that does not fit neatly into these legal categories.⁵² Many federal heads of power are potentially relevant to environmental issues, such as trade and commerce (section 91(2)) and fisheries regulation (section 91(12)).⁵³ The federal government also has the residual “peace, order and good government” (POGG) power.⁵⁴ The POGG power has been applied to environmental issues such as marine pollution.⁵⁵ Meanwhile, the provinces have jurisdiction over property and civil rights (section 92(13)), which has proved most relevant to environmental regulation.⁵⁶

Under the classical federalism paradigm, jurisdictions are seen as “watertight compartments,” with strong exclusivity between federal and provincial powers.⁵⁷ However, the prevailing modern paradigm features weaker exclusivity between federal and provincial powers, which permits complementary programs between levels of government and spillover effects of single-jurisdiction programs.⁵⁸ For example, the SCC has sanctioned the use of administrative inter-delegation,⁵⁹ sometimes enthusiastically.⁶⁰ Both paradigms have been associated with different stages of Canadian constitutional history—with the classical paradigm corresponding with the pre-World War II Privy Council period, and the modern paradigm gaining prominence post-World War II⁶¹—and map onto different subject matters.⁶² The classical paradigm, with its deregulatory bias, has been applied to legislation that is viewed as “interfering with the operation of free markets”; the modern paradigm has been applied to legislation seen as treating “issues of morality or social order.”⁶³ The modern paradigm has also been useful for legislation addressing complex issues that “do not fit so neatly into jurisdictional boxes” as envisioned by the classical paradigm.⁶⁴

52 *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1; *Swaigen*, *supra* note 17 at 182; *Chalifour*, *supra* note 14 at 173; *Morton*, *supra* note 17 at 37. Note that environmental issues will be examined here because they offer richer and more extensive jurisprudence than climate change, and environmental issues often have implications for health adaptation.

53 *Morton*, *supra* note 17 at 42.

54 *Constitution Act, 1867*, *supra* note 51 (Parliament may make laws “for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces” at s 91).

55 *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161.

56 *Morton*, *supra* note 17 at 38.

57 Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36:2 McGill LJ 308 at 312, 323 (citing, e.g., *Canada (AG) v. Alberta (AG)*, [1916] 1 AC 588, 26 DLR 288 (PC) Lord Haldane).

58 *Ibid* at 312.

59 *Prince Edward Island (Potato Marketing Board) v HB Willis Inc*, [1952] 2 SCR 392, 4 DLR 146; *Reference Re Agricultural Products Marketing Act*, [1978] 2 SCR 1198, 84 DLR (3d) 257; *Coughlin v Ontario (Highway Transport Board)*, [1968] SCR 569, 68 DLR (2d) 384 [*Coughlin*]; Ryder, *supra* note 57 at 326 (citing these cases). Administrative inter-delegation refers to the delegating of power by the federal Parliament and the provincial legislatures “in furtherance of the administration of government” (CED (Administrative Law), II.1.(b) at §12).

60 *Coughlin*, *supra* note 59 (Cartwright J stated that “it is satisfactory to find that there is nothing which compels us to hold that the object sought by this co-operative effort is constitutionally unattainable” at 576 cited to SCR); Ryder, *supra* note 57 at 326 (citing permissive judicial attitude in *Coughlin*).

61 *Ibid* at 380.

62 *Ibid* at 327-28.

63 *Ibid* at 380. See e.g. *Re Insurance Act of Canada*, [1932] AC 41, [1932] 1 DLR 97 (PC) (striking down federal insurance regulation under classical paradigm, cited by Ryder, *supra* note 57 at 329), *Russell v R*, (1882) 7 App Cas 829 (PC) (allowing regulation of liquor trade using principles of modern paradigm, cited by Ryder, *supra* note 57 at 329). Note that obviously, legislation does not “come pre-packaged with a markets or morality ‘tag.’ The characterization that is adopted is largely a matter of judicial discretion [...]” (Ryder, *supra* note 57 at 331).

64 *Ibid* at 313.

Unsurprisingly, this modern trend is prevalent for environmental regulation. This regime has been shaped by jurisprudence and political forces to emerge as a province-dominated patchwork. Jurisprudence has recognized concurrent jurisdiction in most environmental areas, limiting federal unilateralism and allowing a strong provincial presence.⁶⁵ In *Friends of the Oldman River Society v Canada (Minister of Transport)*, Justice La Forest acknowledged that the environment “does not comfortably fit within the existing division of powers without considerable overlap and uncertainty,”⁶⁶ and that both the federal and provincial levels of government can exercise authority in a way that affects the environment.⁶⁷ The provinces became active in regulating environmental issues in the 1960s-70s, principally based on section 92(13) powers relating to property and civil rights.⁶⁸ By the late 1960s, when the federal government first became interested in regulating environmental issues, much provincial regulation with a firm constitutional basis had already been established. This timing—in conjunction with a limited judicial interpretation of the federal POGG power up to that point—minimized federal unilateral powers on environmental matters.⁶⁹ To summarize, the Canadian environmental policy regime is a patchwork that could be described as province-dominated, with federal support in shared programs and limited federal unilateralism.⁷⁰

ii. Federal and Provincial Climate Change Adaptation

Canadian climate change adaptation is described as an evolving patchwork or “mosaic” of actions at different levels of government.⁷¹ Canada still lacks a national adaptation plan or strategy to provide top-down direction and cohesion to adaptation efforts.⁷² However, the federal government has been active in developing climate models and scenarios⁷³ and undertaking national assessments.⁷⁴ Regarding health in particular, the major research group is the Climate Change and Health Office in Health Canada. This group published *Human Health in a Changing Climate* in 2008,⁷⁵ which assesses Canada’s vulnerability and ability to adapt to the health effects of climate change. This group also conducts other research, such as response systems to address extreme heat events.⁷⁶

Many provinces have provincial adaptation plans or strategies containing health-relevant components.⁷⁷ For example, Ontario’s Climate Change Action Plan addresses climate change impacts on source water protection.⁷⁸ Provinces also participate in six Regional Adaptation Collaboratives (RACs) in the North, British Columbia, the Prairies, Ontario,

65 Morton, *supra* note 17.

66 *Supra* note 52 at para 94.

67 *Ibid* at para 95.

68 See e.g. *R v Lake Ontario Cement*, [1973] 2 OR 247, 35 D.L.R. (3d) (Ont HC); Morton, *supra* note 17 at 38-40 (citing *R v Lake Ontario Cement*).

69 *Ibid* at 41.

70 *Ibid* at 50.

71 Thea Dickinson & Ian Burton, “Adaptation to Climate Change in Canada: A Multi-Level Mosaic” in James D Ford & Lea Berrang-Ford, eds, *Climate Change Adaptation in Developed Nations: From Theory to Practice* (Dordrecht: Springer, 2011) 104.

72 *Ibid* at 105-106, 116.

73 *Ibid*.

74 Canada, Environment Canada, *The Canada Country Study: Climate Impacts and Adaptation* (Ottawa: Government of Canada, 1997); *From Impacts to Adaptation*, *supra* note 7.

75 *Human Health*, *supra* note 7.

76 Health Canada, “Developing Heat Resilient Communities and Individuals in Canada” (2010), online: Health Canada <<http://www.hc-sc.gc.ca/ewh-semt/climat/adapt/heat-chaleur-eng.php>>.

77 Dickinson & Burton, *supra* note 71 at 109.

78 *Ibid* at 112.

Quebec, and the Atlantic, respectively.⁷⁹ RACs were established in conjunction with Natural Resources Canada and the provinces⁸⁰ in order to address regional decision-making and adaptation planning. Many areas of study are connected to health, such as water management and flood protection in the British Columbia RAC.⁸¹

In summary, adaptation efforts to date bear out the modern trend that allows concurrent jurisdiction and discards the watertight compartment paradigm. Adaptation efforts resemble the environmental policy regime in that adaptations are emerging ad hoc. However, it is unclear whether adaptation will end up dominated by the provinces as the general environmental regulation regime has been. Both levels of government must continue addressing adaptation, and in particular, a national plan or strategy is needed to guide efforts at all levels.

B. Municipal Governments

i. Municipal Powers: the Traditional View

Under the traditional view, municipal powers are quite limited. Municipal powers are derived from two fundamental sources: the *Baldwin Act* and section 92(8) of the *Constitution Act, 1867*. The 1849 *Baldwin Act* set out the role, function, and structure of local governments in what was to become Canada.⁸² The *Baldwin Act* places local governments in a “secondary and subservient position” to higher levels of government.⁸³ Section 92(8) of the *Constitution Act, 1867* grants provinces the authority to pass laws establishing municipalities.⁸⁴ Municipalities, as “creatures” of the provinces, are delegated their authority from the provinces through provincial statutes.⁸⁵ These provincial statutes can only delegate powers to municipalities that are *intra vires* the provinces’ own authority under the Constitution.⁸⁶

Broadly speaking, provinces delegate authority by enacting municipal enabling legislation. Provinces pass general municipal acts⁸⁷ that provide for the “framework, formation and operation” of municipalities.⁸⁸ To incorporate a specific municipality, a province may also enact an individual statute (e.g. *City of Toronto Act*).⁸⁹ The general municipal act plus any specific incorporating legislation comprise that municipality’s “enabling legislation.”⁹⁰

⁷⁹ Natural Resources Canada, “Regional Collaboratives: About the Collaboratives” (2011), online: Natural Resources Canada <<http://www.nrcan.gc.ca/earth-sciences/climate-change/community-adaptation/regional-collaborative/657>> [RACs].

⁸⁰ Dickinson & Burton, *supra* note 71 at 107.

⁸¹ RACs, *supra* note 79.

⁸² Ian MacFee Rogers, *The Law of Canadian Municipal Corporations*, vol 1 (Toronto: Carswell, 1959) at 32.

⁸³ Meehan et al, *supra* note 24 at 4.

⁸⁴ *Constitution Act, 1867*, *supra* note 51 at s 92(8); Rogers, *supra* note 82 at 36 (explanation of provincial constitutional authority).

⁸⁵ Meehan et al, *supra* note 24 at 5 (explanation of municipal status).

⁸⁶ Rogers, *supra* note 82 at 36.

⁸⁷ *Ibid* at 37; Mark Adkins, Len Griffiths & Shawna Parr, “The Hudson Decision: An ‘Over-Precautionary’ Approach?” (2002) 51 UNBLJ 231 at 232-33; Meehan et al, *supra* note 24 at 16.

⁸⁸ Adkins et al, *supra* note 87 at 232.

⁸⁹ *City of Toronto Act, 2006*, SO 2006, c 11, Sch A. See Rogers (*supra* note 82 at 37) for details on various modes by which incorporation may occur.

⁹⁰ Adkins et al, *supra* note 87 at 232. Note that this is a simplified view of “enabling legislation.” For example, Ontario has over 100 statutes assigning powers to local authorities beyond those conferred on them by the general municipal act (Rogers, *supra* note 82 at 32).

Using a basic framework, enabling legislation typically gives municipalities authority in two ways.⁹¹ First, this legislation may enumerate municipal authority within specific subject areas,⁹² such as local tree planting. Second, enabling legislation may include omnibus provisions that confer discretionary powers over broad issues that are not enumerated by the legislation.⁹³ For example, recall that section 410(1) of the Quebec *Cities and Towns Act*, which was at issue in *Hudson*, states that “the council may make by-laws: to secure peace, order, good government, health and general welfare in the territory of the municipality [...].”⁹⁴

The traditional principle, known as Dillon’s Rule, is that municipalities can only exercise powers that are explicitly conferred upon them by a provincial statute, construed narrowly.⁹⁵ Any doubts are resolved against municipality authority.⁹⁶ As summarized by the Ontario Court of Appeal in *Ottawa Electric Light Co v Ottawa (City)*:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others, first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.⁹⁷

This traditional view is also expressed in *East York (Borough) v Ontario (Attorney General)*, in the following four principles:

- (i) municipal institutions lack constitutional status;
- (ii) municipal institutions are creatures of the legislature and exist only if provincial legislation so provides;
- (iii) municipal institutions have no independent autonomy and their powers are subject to abolition or repeal by provincial legislation;
- (iv) municipal institutions may exercise only those powers which are conferred upon them by statute.⁹⁸

Overall, the traditional view has largely constrained municipal law-making powers and revenue-raising abilities.⁹⁹ Municipal action has been “particularly susceptible” to judicial inspection.¹⁰⁰

ii. Increased Municipal Latitude: A Changing Paradigm

In spite of the traditional view of municipalities, jurisprudence and legislation have increasingly allowed some degree of deference to municipal decisions. Yet, despite their

⁹¹ Adkins et al, *supra* note 87 at 233.

⁹² Rogers, *supra* note 82 at 306.

⁹³ *Ibid* at 313.

⁹⁴ *Cities and Towns Act*, *supra* note 36.

⁹⁵ Meehan et al, *supra* note 24 at 16, 26; Valiante, *supra* note 37 at 333.

⁹⁶ Meehan et al, *supra* note 24 at 26.

⁹⁷ *Ottawa Electric Co v Ottawa (City)* (1906), 12 OLR 290 (Ont CA), cited in Meehan et al, *supra* note 24 at 16.

⁹⁸ (1997), 34 OR (3d) 789 at para 14, 45 CRR (2d) 237, (Ont Gen Div).

⁹⁹ Meehan et al, *supra* note 24 at 15.

¹⁰⁰ *Ibid* at 22.

increasing importance, neither municipalities' constitutional status nor revenue raising abilities have substantially changed.¹⁰¹ Municipalities today are therefore in a difficult position: "[o]n the one hand the demands made upon municipalities have significantly grown, yet on the other hand, the law-making and financial tools have remained virtually unchanged."¹⁰²

Responding at least in part to this problem, progressive judicial interpretation of municipal authority has emerged. In *Shell Canada Products Ltd v Vancouver (City)* ("Shell Canada Products"), the SCC assessed whether impugned municipal provisions were ultra vires.¹⁰³ Justice McLachlin (as she then was), dissenting, identified two approaches to assessing municipal powers: (1) a "narrow confining approach" or (2) a "broader more deferential approach."¹⁰⁴ While the majority adopted the narrow approach, Justice McLachlin argued that, except in cases where municipal actions are clearly *ultra vires*, the deferential approach is preferable for four reasons. First, courts must respect local decisions for the proper functioning of local democracy.¹⁰⁵ Second, deference to municipal decisions avoids the costs and uncertainty of excessive litigation.¹⁰⁶ Third, deference is more consistent with municipalities' expanding range of responsibilities; a traditional interventionist approach would confine municipalities in the "straightjackets of tradition."¹⁰⁷ Finally, a deferential approach is more consistent with the SCC's approach to judicial review of administrative agencies.¹⁰⁸ The deferential approach advocated here has been quoted approvingly in recent SCC cases, including *Hudson*.¹⁰⁹ Progressive judicial interpretation may contribute to easing municipalities' difficult position in the face of increasing responsibilities.

Some recent provincial legislation similarly adopts a progressive approach to municipal law making. Section 8 of the Ontario *Municipal Act, 2001* dictates that municipal powers should be interpreted broadly to "confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues."¹¹⁰ The Quebec *Municipal Powers Act* ("MPA")—which replaced the *Cities and Towns Act* at issue in *Hudson*—has similar interpretive provisions.¹¹¹ The British Columbia *Community Charter: A New Legislative Framework for Local Government* ("Community Charter") recognizes that municipalities are an order of government that occupy a "central place" in the governmental system, and that they must have a relationship with the provinces based on "mutual respect."¹¹²

101 Meehan et al, *supra* note 24 at 9.

102 *Ibid* at 10.

103 *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231, 88 BCLR (2d) 145 [*Shell Canada Products*].

104 *Ibid* at para 49; Meehan et al, *supra* note 24 at 28 (noting two approaches taken in *Shell Canada Products*).

105 *Shell Canada Products*, *supra* note 103 at para 64; Meehan et al, *supra* note 24 at 28 (noting benefits of deferential approach expounded by McLachlin J.).

106 *Shell Canada Products*, *supra* note 103 at para 65; Meehan et al, *supra* note 24 at 28 (noting benefits of deferential approach expounded by McLachlin J.).

107 *Shell Canada Products*, *supra* note 103 at para 66.

108 *Ibid* at para 67; Meehan et al, *supra* note 24 at 28 (noting benefits of deferential approach expounded by McLachlin J.).

109 *Hudson*, *supra* note 11 at para 23; Meehan et al, *supra* note 24 at 28 (noting Supreme Court's approval in *Hudson*).

110 *Municipal Act, SO 2001*, c 25, s 8.

111 RSQ 2009, c C-47.1, art 2.

112 British Columbia, *The Community Charter: A New Legislative Framework for Local Government* (British Columbia: Government of British Columbia, 2002) at 7 [*Community Charter*].

In summary, a progressive approach to municipal regulation has emerged in the jurisprudence and some provincial legislation. This progressive approach, and especially the Quebec *MPA*, will be discussed in Part III. However, municipalities' constitutional status remains formally unchanged, and their revenue raising abilities remain largely limited, despite being faced with increasing responsibilities.¹¹³

iii. Municipal Climate Change Adaptation

Many municipal responsibilities are potentially relevant for health adaptation,¹¹⁴ and adaptations are occurring within these recognized spheres in conjunction with other levels of government.¹¹⁵ An example of national–municipal cooperation is the Natural Resources Canada report *Adapting to Climate Change: An Introduction for Canadian Municipalities*.¹¹⁶ This report provides information to municipal decision-makers, primarily through case studies on municipal adaptations across Canada. For instance, the report highlights Metro Vancouver's Stormwater Management Program, which addresses stormwater runoff quality and quantity. An example of provincial–municipal cooperation is the Ontario Climate Change Action Plan, which provides for the creation of Municipal Water Sustainability Plans under the provincial *Water Opportunities and Water Conservation Act*.¹¹⁷ In this way, higher levels of government recognize and guide municipal adaptation within spheres of established municipal responsibility.

To summarize Subpart B, the subordinate constitutional status of municipalities has not formally changed, although jurisprudence and provincial legislation are showing increased deference to municipal authority. Municipalities are currently engaging in adaptation initiatives, like stormwater management described above. These initiatives contribute to Canada's adaptation patchwork and support the view that adaptation is occurring in the spirit of the modern federalism paradigm, with action being taken at different levels of government. The *Hudson* decision further suggests how municipalities may contribute to this adaptation patchwork.

III. HUDSON: CASE COMMENT

A. Description

i. Facts

The Town of Hudson, Quebec, adopted By-law 270 in 1991. The By-law restricted the use of cosmetic pesticides in the municipality. In 1992, two landscaping and lawncare companies, Spraytech and Chemlawn ("the appellants"), were charged with violating the By-law and summoned before the Municipal Court. The appellants held valid provincial

¹¹³ Meehan et al, *supra* note 24 at 30-31, 35-36.

¹¹⁴ Dickinson & Burton, *supra* note 71 at 108.

¹¹⁵ Municipal adaptations are also occurring in conjunction with non-governmental actors. Many municipalities participate in the Partners for Climate Protection program, which is run by the Federation of Canadian Municipalities and ICLEI Canada to support adaptation to local climate impacts (Federation of Canadian Municipalities, "Partners for Climate Protection: Municipal Resources for Adapting to Climate Change" (2009), online: Federation of Canadian Municipalities <http://www.fcm.ca/Documents/reports/PCP/Municipal_Resources_for_Adapting_to_Climate_Change_EN.pdf>).

¹¹⁶ Canada, Natural Resources Canada, *Adapting to Climate Change: An Introduction for Canadian Municipalities* (Ottawa: Government of Canada, 2010) [Adapting to Climate Change].

¹¹⁷ Ontario, Ontario Ministry of the Environment, *Climate Ready: Ontario's Adaptation Strategy and Action Plan* (Ontario: Government of Ontario, 2011) at 30-31.

licences and applied federally registered pesticides.¹¹⁸ The appellants pled not guilty to the municipal charge and obtained a suspension of proceedings in order to bring a motion for a declaratory judgment before the Quebec Superior Court. The appellants sought a declaration that the By-law was *ultra vires* Hudson's authority and inoperative due to conflict with provincial and federal regulation.¹¹⁹

ii. Legal History

At the Superior Court, Justice Kennedy first found that the By-law was valid under the omnibus section 410(1) of the Quebec *Cities and Towns Act*, which states that “the council may make by-laws: to secure peace, order, good government, health and general welfare in the territory of the municipality [...].”¹²⁰ Justice Kennedy also held that the By-law did not conflict with federal or provincial regulation¹²¹ and was therefore valid and operable.

At the Court of Appeal, the appellants challenged Justice Kennedy’s ruling on two grounds. First, the appellants alleged that the By-law was enacted pursuant to section 412(32) of the Quebec *Cities and Towns Act*, which regulates toxic substances, rather than section 410(1). However, Justice Delisle held that the By-law was enacted under section 410(1), since the By-law’s definition of “pesticide” is identical to that found in the *Pesticides Act*,¹²² and does not refer to toxicity or terms used in section 412(32).¹²³ Furthermore, the By-law was enacted in the public interest and in response to residents’ health concerns.¹²⁴ Second, the appellants argued that the By-law conflicted with the provincial *Pesticides Act*¹²⁵ and was therefore inoperative. The court rejected this argument and confirmed the Superior Court judgment.¹²⁶

iii. Supreme Court of Canada Judgment

The SCC upheld the By-law and dismissed the appeal. The seven Justices were divided between two opinions. Justice L’Heureux-Dubé wrote for the majority (Justices Gonthier, Bastarache, and Arbour concurring), and Justice LeBel wrote a concurring judgment (Justices Iacobucci and Major concurring).

Justice L’Heureux-Dubé summarized the two issues raised by the appeal: (1) did Hudson have the statutory authority to enact the By-law; and (2) if Hudson had authority to enact it, was the By-law inoperative due to a conflict with federal or provincial legislation?¹²⁷

Regarding the first issue, Justices L’Heureux-Dubé and LeBel agreed that the By-law was validly enacted since its purpose falls within the ambit of section 410(1). The Justices noted that by-laws are presumed valid;¹²⁸ the party challenging the by-law has the burden of proof;¹²⁹ and courts should take care to avoid substituting their views of

118 Valiante, *supra* note 37 at 330.

119 *Hudson*, *supra* note 11 at paras 6-7.

120 *Cities and Towns Act*, *supra* note 36.

121 *Hudson*, *supra* note 11 at para 11.

122 *Pesticides Act*, RSQ 1993, c P-9.3, s 1.

123 *Hudson*, *supra* note 11 at paras 12-13.

124 *Ibid* at para 14.

125 *Pesticides Act*, *supra* note 122.

126 *Hudson*, *supra* note 11 at paras 15-16.

127 *Ibid* at para 17.

128 *Ibid* at para 10.

129 *Ibid* at para 21.

what is best for citizens,¹³⁰ in line with the principle of subsidiarity.¹³¹ Under this view, the By-law was held to respond to residents' concerns about alleged health risks of non-essential pesticides applied within the municipality, thus falling under section 410(1).¹³² While Justice LeBel rejected the relevance of international law,¹³³ Justice L'Heureux-Dubé noted that her reading of statutory authority is consistent with international law's precautionary principle. This principle dictates:

Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.¹³⁴

Hudson's concerns about pesticides fits within this "rubric of preventative action."¹³⁵ However, municipalities cannot enact *any* by-law whatsoever under omnibus provisions; omnibus provisions "do not confer unlimited power" and municipalities cannot use these provisions to enact by-laws that serve ulterior non-municipal objectives.¹³⁶ Irrespective of these general limits to omnibus provisions, the By-law was validly enacted.

Regarding the second issue—the By-law's operability—Justices L'Heureux-Dubé and LeBel agreed that the By-law did not conflict with federal or provincial legislation and thus was operable. The Justices applied the "express contradiction"¹³⁷ or "impossibility of dual compliance"¹³⁸ test to assess whether a conflict existed between legislation by higher levels of government and the By-law. This test defines conflict as one regulation saying 'yes' while another says 'no,' such that "the same citizens are being told to do inconsistent things."¹³⁹ The federal *Pest Control Products Act* ("PCPA")¹⁴⁰ regulates the importation, manufacturing, sale, and distribution of pesticides in Canada.¹⁴¹ As the *PCPA* is permissive, rather than exhaustive,¹⁴² the *PCPA* was found not to conflict with the By-law.¹⁴³ The provincial *Pesticides Act* establishes a permit and licensing system for vendors and commercial applicators of pesticides.¹⁴⁴ The SCC found no barrier to dual compliance with the *Pesticides Act* and the By-law. The provincial legislation complements the federal and municipal legislation, creating a "tri-level regulatory regime"¹⁴⁵ in which the By-law was operable. This decision embodies several principles that are potentially relevant to municipal environmental regulation.

130 *Ibid* at para 23.

131 L'Heureux-Dubé J explained the principle of subsidiarity as the "proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (*Ibid* at para 3).

132 *Hudson*, *supra* note 11 at paras 26–27, 53.

133 *Ibid* at para 48.

134 *Ibid* at para 31 (quoting para 7 of the Bergen Ministerial Declaration on Sustainable Development (1990)).

135 *Ibid* at para 32.

136 *Ibid* at para 20. Also note that there were no limitations on section 410(1) (*Cities and Towns Act*, *supra* note 36), e.g. municipalities did not require ministerial approval when enacting by-laws pursuant to this section.

137 *Ibid* at para 34.

138 *Ibid* at para 46.

139 *Ibid* at para 34.

140 *Pest Control Products Act*, RSC 1985, c P-9.

141 *Hudson*, *supra* note 11 at paras 35, 46.

142 *Ibid* at para 35.

143 *Ibid* at para 46.

144 *Pesticides Act*, *supra* note 122.

145 *Hudson*, *supra* note 11 at para 39.

B. Analysis

i. *Hudson* and Implications for Municipal Environmental Regulation

Hudson exemplifies the emerging trend of judicial deference to municipal authority, and seems to embody several principles for interpreting municipal laws, including:

1. The party challenging the by-law has the burden of proof to show it is *ultra vires*.¹⁴⁶ By-laws are generally presumed valid;
2. The principle of subsidiarity may be a useful lens for viewing municipal laws;¹⁴⁷
3. Although they do not confer unlimited power, omnibus provisions can be a valid source of law.¹⁴⁸ Omnibus provisions must be given meaning to allow municipalities to address emerging or changing local issues;¹⁴⁹
4. The precautionary principle can be invoked to support a by-law;¹⁵⁰
5. A federal or provincial regulatory regime does not automatically invalidate a municipal by-law pertaining to the same matter; important matters can be addressed by all levels of government. The dual compliance test should be used to assess whether a conflict exists, and thus determine the by-law's operability;¹⁵¹ and
6. In general, municipal powers should be interpreted generously.¹⁵²

Immediately following the *Hudson* decision, commentators had conflicting views as to what the effects of the case might be. On the one hand, the municipal and environmental law scholar Howard Epstein argued that *Hudson*'s practical effect would be quite limited, and that municipalities would likely prefer to rely on enumerated powers rather than omnibus provisions for increased certainty.¹⁵³ On the other hand, some commentators hailed *Hudson* as a "turning point" for Canadian municipalities, with the potential to dramatically enhance municipalities' abilities to respond to issues ranging from climate change mitigation to perfume bans to further restrictions on smoking.¹⁵⁴

¹⁴⁶ *Hudson*, *supra* note 11 at para 21; Epstein 2001, *supra* note 37 at 59 (highlighting important principles in *Hudson*).

¹⁴⁷ *Hudson*, *supra* note 11 at paras 3, 10; Epstein 2001, *supra* note 37 at 59 (highlighting principles in *Hudson*); Meehan et al, *supra* note 24 at 44 (highlighting principles in *Hudson*). Recall the principle of subsidiarity enunciated in *Hudson*: the "proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (*supra* note 11 at para 3).

¹⁴⁸ *Hudson*, *supra* note 11 at para 20; Epstein 2001, *supra* note 37 at 59 (highlighting principles in *Hudson*); Meehan et al, *supra* note 24 at 57-58 (highlighting principles in *Hudson*).

¹⁴⁹ *Hudson*, *supra* note 11 at para 51; Epstein 2001, *supra* note 37 at 59 (highlighting principles in *Hudson*); Meehan et al, *supra* note 24 at 58 (highlighting principles in *Hudson*).

¹⁵⁰ Valiante, *supra* note 37 at 353. Recall the precautionary principle enunciated in *Hudson*: "Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation." (*supra* note 11 at 31, quoting para 7 of the Bergen Ministerial Declaration on Sustainable Development (1990)).

¹⁵¹ *Hudson*, *supra* note 11 at paras 34, 46; Epstein 2001, *supra* note 37 at 59 (highlighting principles in *Hudson*); Meehan et al, *supra* note 24 at 57 (highlighting principles in *Hudson*). Note that the dual compliance test has the effect of minimizing potential conflicts (Valiante, *supra* note 37 at 341).

¹⁵² *Hudson*, *supra* note 11 at para 23; Epstein 2001, *supra* note 37 at 59-60 (highlighting principles in *Hudson*): *Hudson* continues and exemplifies the trend of a deferential judicial approach towards municipal powers, rejecting the restrictive approach adopted by the majority in *Shell Canada Products*, *supra* note 103); Meehan et al, *supra* note 24 at 44 (highlighting principles in *Hudson*).

¹⁵³ Epstein 2001, *supra* note 37 at 59-60.

¹⁵⁴ Valiante, *supra* note 37 at 339, 358; Adkins et al, *supra* note 87.

Empirically, the former view has prevailed, with most municipalities relying on enumerated powers—although isolated examples support the latter view as well. For example, some Quebec decisions have upheld municipalities' role in regulating local environmental matters.¹⁵⁵ In *Wallot c Québec (Ville de)* ("Wallot") at the Quebec Court of Appeal, the City of Quebec was permitted to enact regulations forcing landowners to maintain riparian vegetation in order to protect water quality.¹⁵⁶ The regulations were enacted under the omnibus provisions of the *Municipal Powers Act*,¹⁵⁷ as well as enumerated powers of the *Charter of Ville de Québec* relating to water quality.¹⁵⁸ Notwithstanding these enumerated powers, the authority conferred under omnibus provisions was weighed heavily by the Court.¹⁵⁹

Principles embodied in *Hudson* have also been cited in decisions about municipal regulation under enumerated powers. The principle of subsidiarity has been cited in certain Ontario decisions.¹⁶⁰ For example, in *Pub & Bar Coalition of Ontario v Ottawa (City)* ("Pub & Bar Coalition"), the Pub and Bar Coalition ("Coalition") argued that two by-laws enacted by the City of Ottawa ("the City"), which banned smoking in certain locations, were *ultra vires* the City's powers. The Court rejected the Coalition's arguments, supporting its decision by citing the SCC's invocation of the principle of subsidiarity in *Hudson*. The Court also affirmed that the party challenging a by-law's validity has the burden of proving it is *ultra vires*, and adopted a generous view of the City's authority.¹⁶¹ Therefore, while *Hudson* may not have dramatically increased municipal regulations under omnibus provisions, principles embodied in *Hudson* have proved nonetheless useful for assessing municipal regulations enacted under enumerated powers.

A generous view of municipal authority is also reflected in recent changes to Quebec's legislative regime. The *Municipal Powers Act*,¹⁶² which replaced the *Cities and Towns Act*, still contains an omnibus provision: "In addition to the regulatory powers under this Act, a local municipality may adopt a by-law to ensure peace, order, good government, and the general welfare of its citizens."¹⁶³ The *MPA* also contains other key articles that have profoundly modified our conception of municipal powers with respect to environmental matters.¹⁶⁴ Article 2 states:

[M]unicipalities are granted powers enabling them to respond to various changing municipal needs in the interest of their citizens. The provisions of the Act are not to be interpreted in a literal or restrictive manner.¹⁶⁵

155 Jean-François Girard, « Dix ans de protection de l'environnement par les municipalités depuis l'arrêt *Spraytech*: constats et perspectives » in Service de la formation continue, Barreau du Québec, *Développements récents en droit de l'environnement*, vol 329 (Cowansville, Que : Yvon Blais, 2010) 49 at 55.

156 *Wallot c Québec (Ville de)*, 2011 QCCA 1165 [Wallot].

157 *Supra* note 111.

158 *Charter of Ville de Québec*, RSQ, c C-11.5, ss 147, 195; *Wallot*, *supra* note 156 at paras 29-34.

159 *Ibid* at paras 29-33.

160 *Pub & Bar Coalition of Ontario v Ottawa (City)* (2001), 23 MPLR (3d) 42 (Ont SCJ) [*Pub & Bar Coalition*], affirmed 2002 CarswellOnt 2079 (Ont CA) and 2002 CarswellOnt 2080 (Ont CA); *Ben Gardiner Farms Inc v West Perth (Township)*, (2001) MPLR (3d) 43, 152 OAC 47, (Ont Div Ct); *Goldlist Properties Inc v Toronto (City)* (2002), 58 OR (3d) 232, 26 MPLR (3d) 25, (Ont Div Ct), additional reasons in 2002 CarswellOnt 1753 (Ont Div Ct), leave to appeal refused and reversed in part (2003) 232 DLR (4th) 298, 67 OR (3d) 441, (Ont CA); Meehan et al, *supra* note 24 at 45-46 (citing above cases).

161 *Pub & Bar Coalition*, *supra* note 160.

162 *Supra* note 111.

163 *Ibid*, s 85.

164 Girard, *supra* note 155 at 55-61 (explaining significance of *MPA*).

165 *Supra* note 111.

This interpretive provision foresees municipal action on new or emerging issues, including environmental. Article 4(4), a general provision on municipal powers, specifically grants municipalities jurisdiction in the environmental field.¹⁶⁶ Article 19 elaborates that “[a] local municipality may adopt by-laws on environmental matters”¹⁶⁷—if it were not already sufficiently clear. In this way, the *MPA* strengthens municipalities’ ability to regulate environmental issues.

The *Municipal Powers Act* does not confer municipal authority in all circumstances. In *Ferme l’Évasion inc c Elgin (Municipalité du canton d’)* (“*Ferme l’Évasion*”), the namesake farm was charged with violating a municipal by-law that prohibited spreading sewage sludge as agricultural fertilizer.¹⁶⁸ The farm claimed the ban was *ultra vires* municipal authority. The Superior Court decision echoed *Hudson*: Justice Reimnitz held that the by-law was valid under the *MPA*, and even invoked the precautionary principle, noting that lack of scientific certainty was not a barrier to the by-law’s validity.¹⁶⁹ However, this decision was reversed on appeal. Since provincial legislation set specific parameters for permissible municipal bans on sludge application, and the by-law did not respect these parameters, the by-law was struck down as invalid.¹⁷⁰ Therefore, while the overall trend in Quebec jurisprudence and legislation arguably points to a liberal conception of municipal authority, cases like *Ferme l’Évasion* show limits to municipal authority as well. Municipalities remain technically subordinate, and cannot regulate in a way that conflicts with specific regulation by higher levels of government.¹⁷¹

ii. Criticism of *Hudson*

Some commentators argue that *Hudson* is problematic. In this section, I will outline and respond to criticism focused on municipalities’ apparently limited capabilities to regulate environmental issues, in conjunction with the SCC’s treatment of the precautionary principle.

Hudson may arguably provide support for municipalities to regulate complex areas that are beyond the experience, expertise, and resources of municipal councils. Municipalities may invoke the precautionary principle to pass by-laws regulating potentially harmful activities; this type of regulation could be a “major step backward” for scientifically sound environmental regulation.¹⁷² I concede that municipalities often lack financial resources to conduct, for example, their own research on best practices.¹⁷³ I also concede that the criticism of the precautionary principle is serious, and will be discussed in Subpart C.iii.

However, the notion that municipalities should not regulate in complex areas that are supposedly beyond local capabilities is suspect for three reasons. First, local governments may possess greater knowledge of certain aspects of local issues than higher levels of government. This rationale underpins the principle of subsidiarity, which recognizes that

¹⁶⁶ *Quebec Municipal Powers Act*, *supra* note 11, s 4(4) (“In addition to the areas of jurisdiction conferred on it by other Acts, a local municipality has jurisdiction in the following fields: (4) the environment”).

¹⁶⁷ *Ibid*, s 19.

¹⁶⁸ *Ferme l’Évasion inc. c Elgin (Municipalité du canton d’)*, 2009 QCCS 4386 [*Ferme l’Évasion*].

¹⁶⁹ *Ferme l’Évasion*, *supra* note 168 at paras 175-177.

¹⁷⁰ *Ferme l’Évasion inc. c Elgin (Municipalité du canton d’)*, 2011 QCCA 967.

¹⁷¹ Valiante, *supra* note 37 (“If federal or provincial governments want to exclude municipal action from particular subjects, or steer it in specific limited directions, they will have to do so expressly” at 343).

¹⁷² Adkins et al, *supra* note 87 at 232, 237-238.

¹⁷³ Jaclyn A Paterson et al, “Adaptation to Climate Change in the Ontario Public Health Sector” (2012) 12 BMC Public Health 452; Sarah Burch, “Transforming Barriers into Enablers of Action on Climate Change: Insights from Three Municipal Case Studies in British Columbia, Canada” (2010) 20:2 Global Environmental Change 287 at 293.

local governments are more effective in responding to local needs.¹⁷⁴ This rationale also fits with local adaptation to local impacts of climate change, which will be discussed further below in Subpart C. Second, this criticism ignores interaction between municipalities and other actors. Municipal regulation does not occur in a vacuum; it can be supported by research (e.g. best practices guides) and financing from higher levels of government to combat resource deficits and to avoid duplication of effort where appropriate.¹⁷⁵ Depending on the municipality, even non-governmental organizations (NGOs) may play crucial roles.¹⁷⁶ Third, municipal action can be critical when higher levels of government fail to regulate effectively, as was arguably true for pesticide regulation at the time of *Hudson*. The federal government has acknowledged that pesticide registration is no guarantee that they are safe—it just means that pesticide risks were considered acceptable at the time of registration.¹⁷⁷ According to an audit in 1999, the federal government failed to re-evaluate the risks of pesticides that had been approved for use long ago, with many active ingredients in registered pesticides having been approved before 1960.¹⁷⁸ This pesticide regime demonstrates that municipal action may be needed to protect residents' health when regulation at higher levels of government is inadequate. For these reasons, the argument that municipalities are ill-equipped to respond to complex environmental issues likely does not apply in all cases.

Overall, *Hudson* demonstrates the enormous potential for municipalities to regulate issues related to the environment and health. To what extent may this be true for adaptation to the health effects of climate change?

C. *Hudson* and Health Adaptation

This section will explore the possible implications of *Hudson* for health adaptations undertaken by Canadian municipalities, based on the following four points:

1. Adaptations will likely occur under the authority of existing enumerated powers, although omnibus provisions may provide support;
 2. Municipal health adaptations may be supported by the principle of subsidiarity;
 3. Municipal health adaptations may be supported by the precautionary principle; and
 4. Municipal health adaptations may complement federal or provincial regulations related to the same matter.
- i. **Adaptations Will Likely Occur Under the Authority of Existing Enumerated Powers, Although Omnibus Provisions May Provide Support**

Unlike in *Hudson*, enumerated powers will likely be used to implement municipal health adaptations. First, as discussed above, municipalities tend to rely on enumerated powers for certainty. Second, enumerated powers have great potential for implementing health

¹⁷⁴ Meehan et al, *supra* note 24 at 44.

¹⁷⁵ Paterson et al, *supra* note 173; Burch, *supra* note 173 at 293; John R Nolon & Patricia E Salkin, *Climate Change and Sustainable Development Law in a Nutshell* (St. Paul: Thomson Reuters, 2011) at 52.

¹⁷⁶ For example, Toronto has an active NGO community that conducts research on environmental issues (e.g. Clean Air Partnership, Pollution Probe). However, not all Canadian municipalities have access to this NGO support (Poutiainen et al, *supra* note 47).

¹⁷⁷ Swaigen, *supra* note 17 at 179.

¹⁷⁸ Valiante, *supra* note 37 at 344-346.

adaptations, due to the cross-cutting nature of health adaptation. Municipalities are likely to implement many adaptations in enumerated domains of municipal jurisdiction which are indirectly related to health and climate change. Recall that health and climate change are incredibly broad subjects that are affected by a range of government roles and responsibilities. Often, initiatives that are not described as explicit health adaptations have implications for adapting to the health effects of climate change.¹⁷⁹ For example, urban tree-planting within a municipality can be considered a health adaptation.¹⁸⁰ Trees in urban areas can offset the heat-island effect to protect against extreme heat;¹⁸¹ improve air quality;¹⁸² provide shade to protect against UV radiation; and reduce storm runoff volume, therefore reducing flooding hazards and surface pollutant washoff.¹⁸³ In this way, tree-planting as part of municipal planning, over which municipalities have enumerated powers, could be considered a health adaptation. Whether an initiative is *intra vires* will depend on the type of initiative: an initiative falling within an area of recognized municipal authority (e.g. planning, sewage treatment) will likely be acceptable, but an initiative characterized as a matter within federal or provincial control (e.g. healthcare) or exceeding enumerated municipal powers will likely be *ultra vires*.¹⁸⁴

Adaptations enacted on the basis of enumerated powers may be further supported by omnibus provisions. Recall *Wallot*, in which the City of Quebec's regulations relied on both enumerated powers and omnibus provisions.¹⁸⁵ Municipal adaptations could likewise be supported by progressive provincial legislation recognizing municipal authority generally¹⁸⁶ or in the environmental field.¹⁸⁷

ii. Municipal Health Adaptations may be Supported by the Principle of Subsidiarity

The principle of subsidiarity is well suited to supporting local health adaptation undertaken by a municipality. The principle of subsidiarity was explained in *Hudson* as the proposition that:

[L]aw-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.¹⁸⁸

This principle is useful notwithstanding that provinces have jurisdiction over regulating

¹⁷⁹ Poutiainen et al, *supra* note 47.

¹⁸⁰ *Ibid.*

¹⁸¹ Per Bolund & Sven Hunhammar, "Ecosystem Services in Urban Areas" (1999) 29:2 *Ecological Economics* 293; H Akbari, M Pomerantz & H Taha, "Cool Surfaces and Shade Trees to Reduce Energy Use and Improve Air Quality in Urban Areas" (2001) 70:3 *Solar Energy* 295.

¹⁸² Bolund & Hunhammar, *supra* note 181; David J Novak, Daniel E Crane & Jack C Stevens, "Air Pollution Removal by Urban Trees and Shrubs in the United States" (2006) 4:3-4 *Urban Forestry & Urban Greening* 115.

¹⁸³ Qingfu Xiao & E Gregory McPherson, "Rainfall Interception by Santa Monica's Municipal Urban Forest" (2002) 6:4 *Urban Ecosystems* 291.

¹⁸⁴ Epstein 2010, *supra* note 28 at 89 (limits on exercise of municipal power); *Hudson*, *supra* note 11 ("In *Shell Canada Products*...the Court emphasized the local ambit of such power. It does not allow local governments and communities to exercise powers in questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously" at para 53).

¹⁸⁵ *Wallot*, *supra* note 156.

¹⁸⁶ Ontario *Municipal Act*, *supra* note 110, s 9; *Community Charter*, *supra* note 112 at 7.

¹⁸⁷ Quebec *Municipal Powers Act*, *supra* note 111, ss 4(4), 19.

¹⁸⁸ *Hudson*, *supra* note 11 at para 3.

health care outcomes per se.¹⁸⁹ Many areas of municipal competence, such as sewage and zoning, are indirectly related to health adaptation. The principle of subsidiarity could be invoked to support municipal regulation in these domains, as was done in *Pub & Bar Coalition* where the principle of subsidiarity was cited to support municipal anti-smoking by-laws enacted pursuant to enumerated powers.¹⁹⁰

The principle of subsidiarity emphasizes how local governments are well-positioned to regulate local issues effectively. Adaptation is often characterized as a local matter: climate impacts tend to be felt and dealt with fairly locally. Top-down ‘one size fits all’ solutions do not apply to all localities, given each location’s particular vulnerabilities.¹⁹¹ Each location has unique exposure and sensitivity to climatic impacts, and unique abilities to adapt.¹⁹² Different locations are exposed to different climatic impacts, such as storm surges in Atlantic Canada and permafrost melting in Northern Canada. Different locations have varying levels of sensitivity to climate impacts: a location with less coastal development will be less sensitive to storm surges than a location with extensive development on the coast; a location with a lower population density will be less sensitive to permafrost melting than a location with a higher population density, all other things being equal. Different locations also have unique capacities to adapt due to local social, human, and financial capital. In this way, the principle of subsidiarity, which emphasizes the importance of local decision-making, is a suitable lens through which to view and justify local adaptation.¹⁹³

iii. Municipal Health Adaptations May Be Supported by the Precautionary Principle

Although potentially problematic, the precautionary principle may serve as an interpretive aid to support municipal health adaptations if operationalized in a meaningful way.

The SCC’s use of the precautionary principle as an interpretive tool in *Hudson* has been roundly criticized.¹⁹⁴ The principle cited by the SCC dictates that:

Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.¹⁹⁵

The SCC has been criticized for missing an opportunity to advance the development of this principle in Canadian law, leaving many questions unanswered.¹⁹⁶ Given the

¹⁸⁹ Constitution Act, 1867, *supra* note 51, s 92(7).

¹⁹⁰ *Supra* note 160.

¹⁹¹ “Appendix 1: Glossary” in in ML Parry et al, eds, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007) 869 at 883 (defines vulnerability as “a function of the character, magnitude, and rate of climate change and variation to which a system is exposed, its sensitivity, and its adaptive capacity”).

¹⁹² Wilbanks, *supra* note 19 at 284; McDonald, *supra* note 19 at 23-25; Glicksman, *supra* note 12 at 1164.

¹⁹³ McDonald, *supra* note 19 (“Applying the principle of subsidiarity to adaptation policy and law, the vast majority of measures will have to be designed, implemented and enforced at the local scale, closest to where impacts are experienced and their effects must be minimized.” At 24, footnote omitted).

¹⁹⁴ Valiante, *supra* note 37 at 354; Adkins et al, *supra* note 87 at 240.

¹⁹⁵ *Hudson*, *supra* note 11 at 31 (quoting para 7 of the Bergen Ministerial Declaration on Sustainable Development (1990)). Note that there are various formulations of the precautionary principle, but all generally follow the notion “better safe than sorry” (Chris Tollefson, “Litigating the Precautionary Principle in Domestic Courts” (2008) 19:1 J Envtl L & Prac 33 at 35-36).

¹⁹⁶ Valiante, *supra* note 37 at 353-54; Adkins et al, *supra* note 87 at 240.

principle's open-ended and ambiguous nature, how should the principle be implemented? What constitutes a "threat" of serious or irreversible damage, and what constitutes "serious" or "irreversible" damage? What kinds of measures are permitted in proportion to the given risk? To what domains does the precautionary principle apply? To what extent is it even possible to operationalize the precautionary principle?¹⁹⁷ This difficulty can be illustrated by a real-life example that involved a public park infested by non-native beetles. In this situation, the Canadian Food Inspection Agency cited the precautionary principle to justify its plan to cut and burn the trees in the park, in order to protect the lumber industry from the beetle invasion. Groups opposed to the plan *also* cited the precautionary principle to justify their proposal of no cutting and further research.¹⁹⁸ Clearly, the precautionary principle needs a framework to formalize its implementation and prevent its "arbitrary use."¹⁹⁹

While Canadian courts have not yet put forward a detailed framework, Australian courts demonstrate that it is possible to do so. At the Land and Environment Court of New South Wales, Chief Justice Preston outlined a framework to apply the precautionary principle in *Telstra Corporation Ltd v Hornsby Shire Council*.²⁰⁰ The principle had been invoked due to health concerns allegedly posed by radiation from a proposed cell phone station. Chief Justice Preston explained that two conditions must be met before applying the precautionary principle. First, there must be a real threat of serious or irreversible damage.²⁰¹ Factors to consider include: (a) the spatial scale of the threat; (b) the magnitude of possible impacts on natural and human systems; (c) the perceived value of the threatened environment; (d) the timing, persistence, and complexity of possible impacts; (e) the manageability and reversibility of possible impacts (i.e. whether feasible solutions are available); and (f) the level and basis of public concern.²⁰² The second precondition is whether the appropriate level of scientific uncertainty exists regarding the nature and scope of environmental damage.²⁰³ The appropriate level may be informed by a proportionality test—"where the relevant degree or magnitude of potential environmental damage is greater, the degree of certainty about the threat is lower"²⁰⁴—or a "reasonable scientific plausibility" test.²⁰⁵

If these preconditions are met, then the precautionary principle is triggered. The burden of proof shifts to the party seeking to implement a given project to show that the threat of serious or irreversible damage "does not in fact exist or is negligible."²⁰⁶ This shifting does not decide the outcome of the assessment; it affects only one factor, environmental damage, among many social and economic concerns that must be weighed in a risk assessment to determine the appropriate response.²⁰⁷ In this way, the principle "provides a structured way to determine the inputs to a cost-benefit analysis."²⁰⁸ The principle does not imply zero-risk responses; responses must be proportional to the risk at hand.²⁰⁹

¹⁹⁷ Valiante, *supra* note 37 at 354-55; Tollefson, *supra* note 195 at 35-39.

¹⁹⁸ Epstein 2001, *supra* note 37 at 64.

¹⁹⁹ Valiante, *supra* note 37 at 356.

²⁰⁰ *Telstra Corporation Ltd v Hornsby Shire Council*, [2006] NSWLEC 133 [*Telstra*]. According to Tollefson (*supra* note 195 at 56), the best known case applying Preston CJ's framework is *Gray v Minister for Planning*, 152 LGERA 258, [2006] NSWLEC 720.

²⁰¹ *Telstra*, *supra* note 200 at para 129; Tollefson, *supra* note 195 at 50.

²⁰² *Telstra*, *supra* note 200 at para 131; Tollefson, *supra* note 195 at 50.

²⁰³ *Telstra*, *supra* note 200 at para 140.

²⁰⁴ *Ibid* at para 146.

²⁰⁵ *Ibid* at para 148.

²⁰⁶ *Ibid* at para 150; Tollefson, *supra* note 195 at 51-52.

²⁰⁷ *Telstra*, *supra* note 200 at para 154; Tollefson, *supra* note 195 at 52.

²⁰⁸ Tollefson, *supra* note 195 at 52.

²⁰⁹ *Telstra*, *supra* note 200 at paras 157, 166.

If the SCC similarly adopted such a framework, the precautionary principle could be a useful interpretive aid in assessing municipal health adaptation. Climate change poses serious threats to Canadians' health, but the precise impacts of climate change on health are fraught with some level of scientific uncertainty. For example, predictions about these impacts are typically given in probabilistic terms,²¹⁰ and it is difficult to predict the occurrence and impacts of extreme events. Furthermore, indirect impacts often interact synergistically, with potentially complex outcomes that are difficult to predict.²¹¹ For example, recall that the health burden of poor water quality induced by climate change may be exacerbated by behavioural changes related to climate (increased swimming).²¹² Given existing knowledge about the health impacts of climate change, the precautionary principle could serve as an interpretive aid to support health adaptation undertaken by municipalities—particularly “anticipatory” adaptation that seeks to mitigate impacts before a given stimulus.²¹³

iv. Municipal Health Adaptations May Complement Federal or Provincial Regulations Related to the Same Matter

Just as the By-law in *Hudson* contributed to a tri-level regulatory regime for pesticides, valid and well-designed municipal health adaptation would likely be permitted to complement federal and provincial initiatives related to the same health impact. The municipal adaptation would be subject to the dual compliance test for operability—but mere overlap between municipal adaptation and action by other levels of government would not render the municipal adaptation inoperable.

Indeed, health adaptation seems to be occurring as a “mosaic” today, with complementary efforts being undertaken at all levels of government, and actions at higher levels trickling down to inform actions at lower levels.²¹⁴ Complementary efforts should continue to be taken at different levels of government. First, health adaptation touches matters within the jurisdictions of all levels of government due to its cross-cutting nature.²¹⁵ Different aspects of a given health impact of climate change, like water quality, could interact with matters within federal, provincial, and municipal authority simultaneously, implying that adaptation to this impact would require an overlapping regulatory regime. Second, adaptation processes must occur at different levels of government to be effective. While local adaptations must be tailored to local conditions, they must also be guided by broader adaptation plans or strategies and supported by research and financial resources from higher levels of government.²¹⁶ For these reasons, an overlapping scheme of health adaptations should continue in Canada, as long as municipal health adaptation does not directly conflict with action by other levels of government.

v. Summary

Principles established in *Hudson* could help to assess the validity and operability of municipal health adaptations. First, although adaptations will likely be enacted on

²¹⁰ Timothy R Carter et al, “New assessment methods and the characterisation of future conditions” in ML Parry et al, eds, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007) 133.

²¹¹ Costello et al 2009, *supra* note 5.

²¹² *Human Health*, *supra* note 7 at 14.

²¹³ Many writers distinguish “anticipatory” vs. “reactive” adaptations based on whether the action occurs before or after the stimulus (Smit et al, *supra* note 4 at 239).

²¹⁴ Dickinson & Burton, *supra* note 71 at 104.

²¹⁵ McDonald, *supra* note 19.

²¹⁶ Paterson et al, *supra* note 173; Burch, *supra* note 173 at 293; Nolon & Salkin, *supra* note 175 at 52.

the basis of enumerated powers, omnibus provisions may provide additional support. Second, the principle of subsidiarity may justify local health adaptation undertaken by a municipality, since climate impacts tend to be felt and dealt with fairly locally. Third, municipal health adaptation may be supported by the precautionary principle as an interpretive aid if a practical framework exists to implement the principle. The precautionary principle would be particularly persuasive when the adaptation targets a complex and uncertain health impact of climate change, and when the adaptation is anticipatory. Finally, valid municipal health adaptations may complement federal or provincial adaptations related to the same matter. Municipal adaptation would be subject to the dual compliance test for operability, but mere overlap between municipal adaptation and action by other levels of government would not render the municipal adaptation inoperable. Overlap is particularly likely for health adaptations, which by their nature affect matters within different levels of government jurisdiction, and occur across scales. The existing adaptation mosaic evidences this overlap.

The validity and operability of a given municipal health adaptation must obviously be assessed on a case-by-case basis. Yet, these broad principles extracted from *Hudson* suggest that municipalities potentially have wide latitude in implementing local health adaptations.²¹⁷

CONCLUSION

Climate change will have serious impacts on Canadians' health, and adaptation at all levels of government will be required to cope with these impacts.²¹⁸ Division of powers issues could present unique challenges to successfully adapting to climate change. In particular, municipal health adaptations may be susceptible to constitutional challenges, since municipal authority is relatively limited. However, if recent provincial legislation and cases like *Hudson* are any indication, municipalities may have increasing latitude to regulate local environmental issues, including health adaptation.

Even if municipalities face fewer legal barriers to implementing health adaptation, other formidable challenges remain. If municipal leaders do not perceive their communities to be at risk from climatic changes—as is arguably the case in developed countries generally²¹⁹—or if they are uncertain about the extent of municipal authority to undertake health adaptation, then they may fail to act. Other salient questions include: To what extent do municipalities possess sufficient political will and funding to adapt?²²⁰ How do municipal adaptations interact with those by higher levels of government?²²¹ What is the most effective way to implement municipal adaptations?²²² These questions must be resolved for successful adaptation to occur across all levels of Canadian government.

217 Other barriers to effective adaptation may exist, such as political leadership, integration of actions between levels of government, and financial constraints (Burch, *supra* note 173).

218 Helene Amundsen, Frode Berglund & Hege Westskog, "Overcoming Barriers to Climate Change Adaptation - A Question of Multilevel Governance?" (2010) 28:2 Environment and Planning C: Government and Policy 276 at 277, 287.

219 Ian Burton et al, "From Impacts Assessment to Adaptation Priorities: The Shaping of Adaptation Policy" (2002) 2:2 Climate Policy 145 at 147; Johanna Wolf, "Climate Change Adaptation as a Social Process" in James D Ford & Lea Berrang-Ford, eds, *Climate Change Adaptation in Developed Nations: From Theory to Practice* (Dordrecht: Springer, 2011) 21 at 22.

220 Joel B Smith, Jason M Vogel & John E Cromwell III, "An Architecture for Government Action on Adaptation to Climate Change. An Editorial Comment" (2009) 95:1-2 Climatic Change 53 at 54; Wilbanks, *supra* note 19 at 283-284.

221 Smith et al, *supra* note 220 at 55; Wilbanks, *supra* note 19 at 283-284.

222 See Patricia Hania, "Climate Change and the Protection of Drinking Water in Ontario: An Opportunity to Adopt Adaptive Management?" (2011) 22:2 J Envtl L & Prac 167 at 170 (discussion of climate change adaptation implemented using adaptive management principles).

ARTICLE

SPEAK SOFTLY AND CARRY A SEALED WARRANT: BUILDING THE INTERNATIONAL CRIMINAL COURT'S LEGITIMACY IN THE WAKE OF SUDAN

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INTRODUCTION

The Rome Statute, the constitutive treaty of the International Criminal Court (ICC), sets out the goals by which the Court's legitimacy can be measured: punishment of perpetrators, deterrence of future crimes, and positive effects on the peace, security, and well-being of the world.¹ Upholding and enhancing the legitimacy of the ICC is the duty of the Prosecutor of the International Criminal Court,² and Luis Moreno Ocampo, Prosecutor until June 2012, made it his project to make the ICC a "reality" which political actors "cannot ignore."³ During his time in office, Moreno Ocampo handed over a steady stream of accused war criminals and genocidaires from states party to the Rome Statute (State Parties) to the judges in The Hague.⁴ However, he was much less successful in bringing defendants from non-State Parties before the Court.

Under the Rome Statute, the ICC possesses a limited power of *universal* jurisdiction, whereby it may prosecute individuals from non-State Parties through referrals from the United Nations Security Council (UNSC).⁵ This power, however, is not well-

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- 1 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [Rome Statute].
- 2 The International Criminal Court, in its 2006 Strategic Plan, set out three overarching strategic goals. The second is the building of legitimacy, or in the ICC's words, striving towards "a well-recognized and adequately supported institution," recognizing the fact that "the Court must obtain cooperation and support if it is to carry out its functions." International Criminal Court Assembly of States Parties, *Strategic Plan of the International Criminal Court*, 5th Sess, ICC-ASP/5/6 (2006) at 5-6.
- 3 Allison M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court" (2003) 97 AJIL 510 at 511; Luis Moreno Ocampo, "The International Criminal Court Today" (Lecture delivered at the Faculty of Law, University of Toronto, 14 November 2011), [unpublished].
- 4 Jacqueline Geis & Alex Mundt, "When to Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action" (2009) (Paper delivered at the World Humanitarian Studies Conference, Groningen, February 2009) [unpublished].
- 5 Cedric Ryngaert, "The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?" (2009) 12 New Criminal Law Review 498 at 500.

established. In contrast to the ICC's jurisdiction based on the principles of territoriality (*i.e.* jurisdiction over crimes that have occurred in the territory of a State Party) and nationality (*i.e.* jurisdiction over crimes committed by a national of a State Party), an assertion of universal jurisdiction by the ICC seems to run afoul of the international law principle that treaties cannot impose obligations on non-State Parties.⁶ Therefore, in situations where the ICC seeks to exercise its limited power of universal jurisdiction, the question of its legitimacy as an international institution that can act on referrals from the UNSC becomes paramount.

Because universal jurisdiction proceedings are the only means by which the ICC can take action in non-State Parties, which still constitute more than a third of the world's countries,⁷ they are important in establishing the ICC as a true world court, rather than as a mere arbiter of disputes between State Parties. Juan Méndez, president of the International Center for Transitional Justice, stated in 2007 that “[t]he next few years will tell whether the ICC is a success or a failure [...] If [Moreno Ocampo] ends up producing two or three trials and has 20 outstanding warrants, the appetite for international criminal justice will fade away completely.”⁸ Nowhere is this more true than in the ICC's universal jurisdiction proceedings, by which the Court seeks to establish itself as a credible deterrent against non-cooperative regimes.

Universal jurisdiction—that is, jurisdiction based on a referral by the Security Council and without a territorial or national nexus to a State Party—has been asserted only twice by the ICC: in Sudan, the focal case of this paper, and most recently in Libya. Not coincidentally, the ICC's very first assertion of its power of universal jurisdiction over a non-State Party—the issuance of arrest warrants against Sudan's Humanitarian Affairs Minister Ahmed Mohammed Harun, Janjaweed militia commander Ali Kushayb (both in 2007 for crimes against humanity and war crimes), and President Omar al-Bashir (in 2009 for crimes against humanity and war crimes, and in 2010 for genocide)—was also the first time the ICC encountered a sitting government that categorically rejected its jurisdiction and refused to cooperate with its investigation.⁹ In response, the Prosecutor's approach to Sudan was to forgo certain well-entrenched norms of prosecutorial discretion employed by the ICC in previous cases and common in the domestic criminal context in favour of a more aggressive approach that has been described as “the ultimate high stakes

⁶ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 31 (entered into force 27 January 1980), art 34–35.

⁷ 121 of the 193 United Nations member states are currently party to the Rome Statute, leaving 72 non-State Parties. “The State Parties to the Rome Statute”, online: International Criminal Court <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx/>.

⁸ Romesh Ratnesar, “The Don Quixote of Darfur”, *Time* (2 November 2007) online: Time <<http://www.time.com/time/magazine/article/0,9171,1680150,00.html>>.

In total, of the twenty-nine arrest warrants issued by the ICC during Moreno Ocampo's tenure as prosecutor (not including any as-yet undisclosed warrants that are under seal), there had only been only one conviction by the end of 2012, that of Congolese rebel Thomas Lubanga Dyilo. Nine other defendants were in custody and five had been released upon acquittal or the refusal of the Court to confirm the charges, while twelve defendants remained at large and another two died before being brought to justice. Cf. “Situations and cases,” online: International Criminal Court <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>.

⁹ The events giving rise to the UNSC's referral of Sudan to the ICC began in 2003, when rebels in the Darfur region of Sudan rose up against President Bashir's government. The government, in response, launched a military campaign against the rebels while arming local “Janjaweed” militias, which attacked the tribes suspected of supporting the rebels. Approximately 300,000 people were killed and two million displaced in the ensuing violence, and the UNSC referred the situation to the ICC on April 1, 2005. Pablo Castillo, “Rethinking Deterrence: The International Criminal Court in Sudan” (2007) 13 UNISCI Discussion Papers 167 at 168.

gamble” in terms of building the Court’s legitimacy.¹⁰ Prosecutor Moreno Ocampo’s opinionated communications with the public, his use of open, rather than sealed, arrest warrants, and his decision to directly prosecute Omar al-Bashir, Sudan’s head of state, harmed the efforts of the ICC to legitimize its universal jurisdiction. A stronger adherence to commonly accepted prosecutorial norms of practice in future exercises of universal jurisdiction would better extend the legitimacy of the ICC into this new area of law.

I. PUBLIC COMMENTS

As Prosecutor of the ICC, Moreno Ocampo frequently gave press conferences and interviews in which he discussed the cases against Bashir, Harun, and Kushayb. These public pronouncements and media communications regarding Sudan often departed from the traditional practice of the Prosecutor’s office and stood in sharp contrast to domestic norms of conduct found in State Parties such as Canada. Most notably, Moreno Ocampo loudly, consistently, and publicly made it clear that he believed the defendants to be guilty. After the Sudanese regime defied the ICC’s arrest warrants against Harun and Kushayb, for example, Moreno Ocampo stated that all of Darfur was a “crime scene” and compared the Sudanese regime to Nazi Germany.¹¹ Six months later, petitioning the Court for the issuance of the Bashir warrant, he publicly opined on the *mens rea* of Sudan’s president, stating that “[h]is alibi was a counterinsurgency. His intent was genocide.”¹² These are not the only examples of conclusory and apparently biased statements by the Prosecutor. Throughout the Sudan proceedings, Moreno Ocampo was criticized for being “confrontational” and “torn between the roles of prosecutor and public advocate seeking to create political leverage,”¹³ as well as being publicity-seeking and partial to the Darfuri rebel groups.¹⁴ While not likely sufficient to disqualify Moreno Ocampo as Prosecutor, such remarks were contrary to ICC and domestic prosecutorial guidelines and harmful to the ICC’s legitimacy.

The ICC Prosecutor’s discretion to make public statements is constrained by treaty and ICC regulations. The Rome Statute provides that “[t]he Prosecutor is expected at all times to act impartially.”¹⁵ Furthermore, Article 42(7) of the Rome Statute and rule 34(1) of the Rules of Procedure and Evidence provide a non-exhaustive list of grounds which require the disqualification of the Prosecutor, including the “[e]xpression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.”¹⁶ The ICC has held that these provisions require the Prosecutor to respect the presumption of innocence beyond and independently of any pending court proceedings.¹⁷

¹⁰ Geis & Mundt, *supra* note 4 at 17.

¹¹ James Traub, “Unwilling and Unable: The Failed Response to the Atrocities in Darfur” (2010) Global Centre for the Responsibility to Protect Occasional Paper Series at 21.

¹² “Sudan Head Accused of War Crimes”, BBC News (14 July 2008) online: BBC News <<http://news.bbc.co.uk/2/hi/africa/7504640.stm>>.

¹³ “Sudan: Justice, Peace and the ICC” (2009) International Crisis Group (ICG) Africa Report No. 152 at 26-27.

¹⁴ Sarah M.H. Nouwen & Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan” (2011) 21 EJIL 941 at 960-61.

¹⁵ *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 3, Decision on the Request for Disqualification of the Prosecutor (12 June 2012) at para 18 (International Criminal Court Appeals Chamber noting that “Article 42(7) of the Statute provides specifically that “[n]either the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground”).

¹⁶ *Rome Statute*, *supra* note 1, art 42(7); *Rules of Procedure and Evidence of the International Criminal Court*, UN Doc PCNICC/2000/1/Add.1 (2000), rule 34(1).

¹⁷ *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, *supra* note 15 at para 26.

Domestic prosecutorial norms may provide further guidance for such situations. In Canada, a State Party with an independent and effective criminal justice system,¹⁸ prosecutorial standards dictate that prosecutors should not argue their cases through the media or make any comment that could prejudice an ongoing investigation; this includes all statements of personal opinion, particularly those regarding the guilt or innocence of the accused or the strength or weakness of their legal case.¹⁹ The purpose is to allow the dissemination of factual information to the public to bolster its confidence in the system, while preserving the “overriding duty” to ensure that trials are fair.²⁰ While the ICC differs in many ways from the domestic criminal justice system of a State Party such as Canada, it seeks to uphold the same basic purposes—punishment, deterrence, and positive effects on the peace, security, and well-being of society—and ought therefore to espouse similar principles of prosecutorial behaviour. Ocampo’s conclusory statements as to the intention and ultimate guilt of the defendants clearly do not accord with the respect for the presumption of innocence demanded by ICC and domestic Canadian prosecutorial guidelines.

Indeed, similar statements by Moreno Ocampo in a separate universal jurisdiction proceeding during his tenure as Prosecutor—*Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*—earned him the admonition of the Appeals Chamber of the International Criminal Court, although the Court stopped short of disqualifying Moreno Ocampo as Prosecutor in that case.²¹ In 2012, the defendants in the Libya case, Saif Qaddafi and Abdullah Senussi, filed a request to disqualify Moreno Ocampo based on public, out-of-court statements he had made regarding their prosecution.²² Most of the objectionable statements came in an interview for *Vanity Fair* magazine in which Moreno Ocampo stated, among other things, that “Senussi was in charge of the killing and the shooting”; that Gaddafi “was deliberately and with knowledge organizing the system”; and that “[t]here was no battle. It was people going to a funeral. That’s a crime against humanity.”²³ The Appeals Chamber held:

[T]he Prosecutor’s behaviour was clearly inappropriate in light of the presumption of innocence. Such behaviour not only reflects poorly on the Prosecutor but also, given that the Prosecutor is an elected official of the Court and that his statements are often imputed to the Court as a whole, *may lead observers to question the integrity of the Court as a whole* [emphasis added].²⁴

The Appeals Chamber did not disqualify Moreno Ocampo, holding that “[a] reasonable observer [...] would have understood that the Prosecutor’s statements were based on the evidence available to him and that the judges would ultimately take the relevant

18 Canada ranks higher than average among Western European and North American countries, and among high income countries worldwide, under the categories “Criminal investigation system is effective” and “Criminal system is free of improper government influence” in the World Justice Project’s Rule of Law Index. Mark D. Agrast et al., “Rule of Law Index 2012-2013” (2012) The World Justice Project at 75. While not the only example of a State Party with an independent and effective criminal justice system, Canada is useful as a standard of comparison because its domestic prosecutorial guidelines are published in English and the author is familiar with the Canadian legal system.

19 “The Federal Prosecution Service Deskbook”, online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/>>, ss 10.3.3, 10.4.1, 10.4.2.3 [Deskbook].

20 *Ibid*, s 10.2.

21 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, *supra* note 15.

22 *Ibid*.

23 *Ibid* at para 9.

24 *Ibid* at para 33.

decisions on the evidence.”²⁵ However, the decision represents an unequivocal concern of the judges of the ICC that Moreno Ocampo’s opinionated public statements, while not flatly prohibited, threaten the legitimacy of the Court—or in the words of the Court, its “integrity” in the eyes of “observers”.²⁶

Dr. Sarah Nouwen of the University of Cambridge and Wouter Werner of the University of Amsterdam argue that Moreno Ocampo’s statements may have helped boost the legitimacy of the ICC by creating the perception that the Court has its priorities straight—it is targeting modern-day Nazis, individuals whose guilt is beyond a doubt, and through this approach is more likely to garner the support of other states and political actors that benefit from positioning themselves on the “good” side of a stark moral dichotomy.²⁷ This argument, however, may conflate cause and effect; the atrocities in Sudan were already well-known and broadly condemned worldwide due to media, government, and NGO reports by the time the ICC took up the issue in 2005.²⁸ It therefore seems unnecessary for the Prosecutor to have added his voice to the chorus. His statements could only raise questions about procedural fairness in the ICC in regards to specific defendants.

Moreno Ocampo’s public comments also raise broader concerns about the ICC’s legitimacy given the political context in which it must operate. Every exercise of universal jurisdiction by the Court, arising as it must from a UNSC referral, is inherently political, at least to the extent that the veto-wielding non-State Parties—China, Russia, and the United States—have power over the Court’s actions while remaining beyond its jurisdiction.²⁹ This institutional reality gives rise to inevitable accusations of neocolonialism and imperialism from non-State Party targets of the ICC, including the Sudanese.³⁰ Taken at face value, these accusations undermine the Court’s legitimacy as an institution capable of impartial punishment and deterrence. This is because China, Russia, and the United States, along with the Security Council veto-wielding State Parties, France and the United Kingdom, must all agree to any exercise of universal jurisdiction by the ICC against a non-State Party, but any one of these countries may veto such a referral for any reason whatsoever. The ICC’s relationship to the great powers is actually much more complex than such accusations imply. For example, despite action in Darfur being a United States foreign policy priority,³¹ the United States had to be persuaded not to veto the Sudan referral in the UNSC.³² However, charges of neocolonialism gain credibility, and may undermine the legitimacy of the Court across the globe, if the Prosecutor’s comments appear to reinforce them.

In the case of Sudan, an argument can be made that the Prosecutor’s comments have undermined the legitimacy of the ICC, as the Sudanese regime was able to claim that such opinionated outspokenness was evidence of a neocolonial agenda, and thereby mobilize domestic and international political support against the ICC. Moreno Ocampo’s condemnatory rhetoric and pronouncements in the Sudan prosecutions enabled Bashir to draw parallels between his prosecution and the rationale of humanitarian intervention being put forward by the United States in justification of its invasion of Iraq in 2003,

25 *Ibid* at para 34.

26 *Ibid* at para 33.

27 Nouwen & Werner, *supra* note 14 at 963.

28 “A Dilemma Over Darfur”, *The Economist* (15 July 2008) online: Economist <<http://www.economist.com/node/11737170>>.

29 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

30 Geis & Mundt, *supra* note 4 at 10; see also “Warrant Issued For Sudan’s Leader”, *BBC News* (4 March 2009) online: BBC News <<http://news.bbc.co.uk/2/hi/7923102.stm>> [BBC 2009/3/4].

31 Kenneth A. Rodman, “Darfur and the Limits of Legal Deterrence” (2008) 30 *Hum Rts Q* 529 at 544-45.

32 International Crisis Group, *supra* note 13 at 5, fn 17.

which was derided as neocolonialist by many Arab and African countries.³³ By portraying himself as a victim of American neocolonialism, Bashir boosted his domestic support following the announcement, not only from party faithful,³⁴ but also from his traditional political opponents.³⁵ He also parlayed the warrants into international support; African and Arab countries and organizations including Egypt, Tanzania, the Arab League, the African Union, the Organization of the Islamic Conference, and the Non-Aligned Movement rallied around Bashir both before and after the issuance of the first warrant against him,³⁶ defiantly joining him in telling the ICC to “eat it.”³⁷ Far from isolating Bashir from the rest of the international community, the ICC’s proceedings against Bashir provided a common cause with which he was able to rally support from other states and organizations. Moreno Ocampo’s rhetoric may have reinforced this unintended effect, as it gave the impression that the ICC had pre-judged the guilt of Bashir and his regime before any legal proceedings had taken place.

The Prosecutor’s public comments may also have had negative effects on peace and security in Darfur by exacerbating the standoff between the regime and Darfuri rebel forces. As an influential international institution, the ICC can create a moral hazard by taking sides in a conflict whereby the favoured side’s righteousness and sense of inevitable triumph are enhanced, and its willingness to compromise is correspondingly reduced.³⁸ This not only limits the chances for long-term peace, but worse, can cause rebel groups to allow or even provoke further atrocities in order to draw further condemnation of the regime from the West.³⁹ This phenomenon has been observed in Darfur, both generally⁴⁰ and with regard to specific key actors like Abdul Wahid Mohamed al-Nur, leader of a faction of the Sudan Liberation Army, who proclaimed that “the international community wants success, not peace” when he abandoned peace talks in May 2006.⁴¹ Abdul Wahid’s continuing refusal to return to the negotiating table remains a major obstacle to peace. Moreno Ocampo’s comments with respect to the Sudan case were similar, if not stronger, than his remarks on the Libya situation that the Appeals Chamber denounced as a threat to the Court’s legitimacy in 2012. His public comments may therefore have been damaging to peace and security in Darfur, in addition to potentially undermining the legitimacy of the ICC on punishment and deterrence.

II. SEALED WARRANTS

Moreno Ocampo’s use of open arrest warrants instead of sealed ones against Bashir, Harun, and Kushayb in the Sudan case also represented a significant departure from domestic and international prosecutorial norms. The purpose of an open arrest warrant is to provide information to the public, thereby strengthening the appearance of an

³³ Rodman, *supra* note 31 at 543.

³⁴ BBC 2009/3/4, *supra* note 30.

³⁵ Geis & Mundt, *supra* note 4 at 13.

³⁶ BBC 2009/3/4, *supra* note 30; Traub, *supra* note 11 at 22; International Crisis Group, *supra* note 13 at 27, 30.

³⁷ Xan Rice, “Sudanese President Tells International Criminal Court to ‘Eat’ Arrest Warrant”, *The Guardian* (4 March 2009) online: The Guardian <<http://www.guardian.co.uk/world/2009/mar/04/sudan-al-bashir-war-crimes>>.

³⁸ Mayank Bubna, Issue Brief, “The ICC’s Role in Sudan: Peace versus Justice” (2010) Institute for Defense Studies and Analyses at 8; Traub, *supra* note 11 at 26.

³⁹ Traub, *supra* note 11 at 26.

⁴⁰ Nouwen & Werner, *supra* note 14 at 957.

⁴¹ Julie Flint, *Rhetoric and Reality: The Failure to Resolve the Darfur Conflict* (Geneva: Small Arms Survey, Graduate Institute of International and Development Studies, 2010) at 17; “Sudan Liberation Army – Abdul Wahid (SLA-AW)”, online: Small Arms Group <<http://www.smallarmssurveysudan.org/facts-figures-armed-groups-darfur.php>>.

open and just judicial system.⁴² However, under ICC and Canadian domestic practice, countervailing considerations can lead a judge to seal a warrant on application by the prosecutor, preventing its disclosure to the public or the intended subject of arrest. Under Canadian guidelines, this can include situations in which an open warrant would “compromise the nature and extent of an ongoing investigation” or “prejudice the interests of an innocent person”.⁴³ Sealed warrants are also available to the ICC prosecutor; they are withheld from the public and only made available to select persons, usually whichever national law enforcement officers are expected to have an opportunity to implement the arrest.⁴⁴ Such warrants have been used successfully against at-large defendants on a number of occasions, including three militia leaders arrested in the Democratic Republic of Congo and two Congolese militia leaders arrested in Belgium and Germany, resulting in the defendants being brought to The Hague to stand trial.⁴⁵ As Prosecutor, Moreno Ocampo even used sealed warrants successfully in the Sudan case, but only against the three Darfuri rebel leaders, Abu Garda, Banda, and Jerbo, in 2009.⁴⁶ The question here is whether the use of open warrants against Bashir, Harun, and Kushayb—the “name and shame” approach—was of overall benefit to the Court’s legitimacy.

The most obvious consequence of the use of open warrants against defendants in non-State Parties is that it virtually guarantees that the arrest and eventual punishment of the defendant will not be achieved. As one columnist wrote after the first warrant was issued against Bashir, “the president of Sudan is going to think twice before boarding any airliner now.”⁴⁷ Of course, it is inherent that a sovereign state will not enforce an arrest warrant against its own head of state or cooperate with any investigation,⁴⁸ so the warrants against Bashir are almost by definition unenforceable as long as he remains in power. However, Moreno Ocampo prioritized publicity over punishment in Harun’s case as well. In June 2008, the Prosecutor revealed in an interview that he planned to divert a plane carrying Harun in order to arrest him, causing the then-Humanitarian Affairs Minister, quite foreseeably, to skip his flight.⁴⁹ The use of open warrants in exercises of universal jurisdiction clearly undermines the Court’s ability to punish; the question becomes whether open warrants are nonetheless justified on other grounds.

Despite the fact that “name and shame” takes punishment off the table, advocates of the approach argue that it still achieves deterrence in other ways. Human Rights Watch, for example, applauded the Bashir warrant, as it enabled them to denounce Bashir in legal as well as political and humanitarian terms; he became not only a brutal dictator, but also “a wanted man.”⁵⁰ This deterrence, then, is general rather than specific—it deters other would-be perpetrators from committing crimes by alerting them that they too could be branded international criminals, harming their reputation, prestige, and potentially their

⁴² Deskbook, *supra* note 19, ch 39.

⁴³ *Criminal Code*, RSC 1985, c C-46, s 487.3.

⁴⁴ Alison Cole, “Gaddafi Might Have Been Arrested By Now If the ICC’s Warrant Had Been Sealed”, *The Guardian* (31 August 2011) online: The Guardian <<http://www.guardian.co.uk/law/2011/aug/31/gaddafi-arrest-warrant-under-seal>>.

⁴⁵ *Ibid.*

⁴⁶ “Situation in Darfur, Sudan”, online: International Criminal Court <http://www.icc-cpi.int/EN_Menu/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200205/Pages/situation%20icc-0205.aspx>.

⁴⁷ Julie Flint, “Ocampo’s Great Gamble”, *The Guardian* (15 July 2008) online: The Guardian <<http://www.guardian.co.uk/commentisfree/2008/jul/15/sudan.humanrights>> [Flint, *Guardian*].

⁴⁸ Bubna, *supra* note 38 at 7-8; Traub, *supra* note 11 at 26.

⁴⁹ Flint, *Guardian*, *supra* note 47.

⁵⁰ BBC 2009/3/4, *supra* note 30.

freedom if they ever fall from power.⁵¹ Moreno Ocampo seemed to subscribe to the logic that open warrants are preferable because of their purported political impact; obtaining a warrant against a defendant, according to Moreno Ocampo, constituted ninety percent of his job as Prosecutor, while the enforcement of the warrant was “fallout” that was not part of his mandate.⁵² If the ICC’s open warrants were actually effective in achieving general deterrence, the Court’s legitimacy could be enhanced despite the reduced chances of punishment under this approach.

This logic, however, rests upon the assumption that the mere denunciatory power of the Court has an inherent deterrence value. In the domestic criminal context, this assumption may be true; national criminal justice systems in countries like Canada have long histories of relatively effective and fair enforcement, giving the threat of an individualized criminal denunciation in those countries significant deterrent power.⁵³ ICC exercises of universal jurisdiction, on the other hand, are a novel and untested form of legal authority with virtually non-existent enforcement capabilities.⁵⁴ Given this reality, it is easy, at least at this early stage in the ICC’s existence, for prospective perpetrators in non-State Parties to dismiss the ICC as an impotent Western stooge⁵⁵ rather than allow the Court’s actions to fill them with apprehension and, as Moreno Ocampo has proposed, allow mediators to arrange for their safe passage into exile in non-State Parties.⁵⁶

Indeed, Bashir has taken every opportunity to flaunt his impunity from the Court’s justice, and many prominent world leaders have joined him in doing so. Within weeks of the issuance of the first warrant against him in 2009, Bashir traveled to Egypt, Libya, and Eritrea.⁵⁷ He then flew to Qatar for the Arab League summit, where he was welcomed with a red carpet and a kiss from the Qatari Emir.⁵⁸ On the way home he stopped in Mecca, Saudi Arabia, then traveled to Ethiopia for bilateral talks in late April.⁵⁹ Later that year, he attended an African Union Peace and Security Council Meeting in Nigeria.⁶⁰ On July 22, 2010, nine days after the second arrest warrant was issued against him, this time for genocide, Bashir traveled on a state visit to Chad⁶¹ and soon after to Kenya to celebrate the country’s new constitution.⁶² In June 2011, he embarked on a state

51 Bubna, *supra* note 38 at 4; Geis & Mundt, *supra* note 4 at 1.

52 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

53 Leila Nadya Sadat, “Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable” in Stephen Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2004) 193 at 195.

54 Rodman, *supra* note 31 at 531.

55 “The International Criminal Court Bares Its Teeth”, *The Economist* (12 May 2011) online: The Economist <<http://www.economist.com/node/18682044>>.

56 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

57 International Crisis Group, *supra* note 13 at 20.

58 Michael Slackman & Robert F. Worth, “Often Split, Arab Leaders Unite for Sudan’s Chief”, *New York Times* (30 March 2009) online: New York Times <<http://www.nytimes.com/2009/03/31/world/africa/31arab.html>>.

59 International Crisis Group, *supra* note 13 at 20.

60 Amnesty International, Press Release, “Nigeria: Government Must Arrest Sudanese President During Visit” (22 October 2009) online: Amnesty <<http://www.amnesty.org/en/for-media/press-releases/nigeria-government-must-arrest-sudanese-president-during-visit-20091022>>.

61 “Bashir Defies Warrant on Chad Trip”, *Al Jazeera* (22 July 2010) online: Al Jazeera <<http://english.aljazeera.net/news/africa/2010/07/201072183438656172.html>>.

62 Jaclyn Belczyk, “ICC Reports Kenya to UN Over al-Bashir Visit”, *Jurist* (28 August 2010) online: Jurist <<http://www.jurist.org/paperchase/2010/08/icc-reports-kenya-to-un-over-al-bashir-visit.php>>.

visit to China,⁶³ and in October 2011 he attended a trade summit in Malawi.⁶⁴ Even Libya's National Transitional Council (NTC) hosted Bashir in January 2012,⁶⁵ despite having just overthrown Muammar Qaddafi's regime, the second attempted subject of ICC universal jurisdiction after Sudan. The latter event was particularly humiliating for the ICC, since the NTC had, shortly prior to the visit, made clear its refusal to hand over Saif Qaddafi and Abdullah Senussi, the other Libyan ICC defendants, to the ICC.⁶⁶ While Bashir has turned down high-profile invitations from Turkey⁶⁷ and Uganda⁶⁸ after ICC-related protests from the European Union and NGOs, respectively, neither country indicated that it was prepared to arrest Bashir if he did attend.

Bashir's recent travel itinerary indicates that, absent actual enforcement, naming does not necessarily lead to shaming. Due to Bashir's successful use of the narrative of Western imperialism, the warrants may have even won the Sudanese President more friends, with leaders of other African and Middle Eastern countries using Bashir's visits to bolster their own anti-neocolonial credentials. In light of this failure of general deterrence, Moreno Ocampo would have better served the ICC's legitimacy by following prosecutorial standards more in line with those practiced in earlier ICC cases involving State Parties and in the domestic context of State Parties like Canada, including the use of sealed warrants. This would have given the Court a better opportunity to capture and punish defendants, bringing the Court one step closer to acquiring the effective general deterrence power of a national criminal justice system.

III. THE DECISION TO PROSECUTE

Underlying the two elements of prosecutorial discretion discussed above—public comments and sealed warrants—is the decision of whom to prosecute in the first place. The Rome Statute states that the Prosecutor may issue an arrest warrant against a person if, *inter alia*, “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”.⁶⁹ In deciding whether to investigate a person in anticipation of issuing an arrest warrant, the Prosecutor must also consider, *inter alia*, whether “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁷⁰ Similarly, Canadian guidelines call for a prosecutor to ask two questions before instituting criminal proceedings against an individual: first, whether there is enough evidence to support a “reasonable prospect of conviction,”⁷¹ and second, whether the public interest requires a prosecution to be pursued.⁷² With respect to the public interest issue, the Canadian guidelines lay out specific factors that

63 Michael Wines, “Sudan Leader is Welcomed in Visit to China”, *New York Times* (29 June 2011) online: New York Times <<http://www.nytimes.com/2011/06/30/world/asia/30china.html?r>>.

64 “Hague Court Questions Bashir’s Visit to Malawi”, *Reuters* (19 October 2011) online: Reuters <<http://af.reuters.com/article/topNews/idAFJOE79I0K520111019>>.

65 “Sudan’s Bashir Offers Help to Libya During Criticized Visit”, *BBC News* (7 January 2012) online: BBC News <<http://www.bbc.co.uk/news/world-africa-16454493>>.

66 Marlise Simons, “Hague Prosecutor Opens Door to Libya Trial of Son and Aide”, *New York Times* (22 November 2011) online: New York Times <<http://www.nytimes.com/2011/11/23/world/africa/hague-official-backs-trials-in-libya-for-two-men.html?ref=internationalcriminalcourt>>.

67 “Bashir Cancels Visit to Istanbul”, *BBC News* (8 November 2009) online: BBC News <<http://news.bbc.co.uk/2/hi/8349678.stm>>.

68 “Wanted Bashir ‘Drops Uganda Trip’”, *BBC News* (16 July 2009) online: BBC News <<http://news.bbc.co.uk/2/hi/africa/8154730.stm>>.

69 *Rome Statute*, *supra* note 1, art 58(1)(a).

70 *Ibid*, art 53(1)(c).

71 *Deskbook*, *supra* note 19, s 15.3.1.

72 *Ibid*, s 15.2.

should determine whether a prosecution is in the public interest. Two are of particular relevance here because they align with the ICC's fundamental goals: "the need for general and specific deterrence" and "whether the prosecution would be perceived as counter-productive,"⁷³ which could include adverse effects on the peace, security, and well-being of the victims. Since the evidentiary issue ultimately relates to punishment, domestic prosecutorial standards correspond very closely with the three main goals of the ICC: punishment, deterrence, and peace.⁷⁴

Like domestic prosecutors, Moreno Ocampo as Prosecutor had discretion to pick his targets. While he states that his decisions were made on the basis of available evidence,⁷⁵ his decision to target Bashir is considered to have been, at least in part, retaliation for the President's non-cooperation with the Harun and Kushayb warrants.⁷⁶ Moreno Ocampo also avoided at least one easy target for probable political reasons: Salah Abdallah Ghosh, a former intelligence chief and valuable counter-terrorism intelligence source for British and American governments. Ghosh was heavily involved in the Darfur atrocities and could have easily been arrested while visiting the UK in 2006 for medical treatment.⁷⁷ Moreno Ocampo evidently exercised prosecutorial discretion in selecting his targets, and the decision to prosecute Bashir, a sitting head of state, rather than Ghosh or other high-ranking members of the Sudanese regime, may have ultimately harmed the legitimacy of the Court.

The proceedings against Bashir pose unique evidentiary problems given his position as the head of a sovereign state.⁷⁸ Unlike the targeting of lower-level officials, where the cooperation of the regime is at least theoretically possible, issuing a warrant against the head of state means that cooperation with the Court can occur only by means of a regime change.⁷⁹ Moreno Ocampo knew, therefore, that his investigators would be denied access to Sudan, dramatically restricting the likelihood of collecting sufficient evidence against Bashir.⁸⁰ Some sources of evidence remained available to the Court, such as furtive interviews with Sudanese dissidents and activists in Sudan, as well as information from Sudanese expatriates and refugees in Chadian camps.⁸¹ However, while such sources may have had good knowledge of on-the-ground atrocities, they would likely not have been able to provide sufficient evidence of a chain of command in the Sudanese regime leading back to, and implicating, Bashir. Moreno Ocampo never requested investigatory access to Darfur, even when only the Harun and Kushayb warrants had been issued, out of concern for the safety of witnesses and victims.⁸² However, it is at least possible that Bashir could have eventually been convinced or coerced into allowing investigators into Sudan as long as he himself was not on the chopping block. Therefore, the effect of Moreno Ocampo's decision to target Bashir, rather than other members of his regime beyond Harun, was to make a grand rhetorical statement at the expense of almost any chance of achieving justice.

73 *Ibid*, s 15.3.2.

74 *Rome Statute*, *supra* note 1.

75 Moreno Ocampo, "The International Criminal Court Today", *supra* note 3.

76 Geis & Mundt, *supra* note 4 at 11.

77 Francis Elliott, "Sudan Intelligence Chief was in London for Treatment – Report", *Sudan Tribune* (26 November 2006) online: Sudan Tribune <<http://www.sudantribune.com/Sudanese-intelligence-chief-was-in,18908>>.

78 The Bashir indictments are based on command, rather than direct, responsibility. They allege that Bashir is responsible in three separate capacities for the alleged crimes: as President of Sudan, as head of the National Congress Party, and as commander-in-chief of the Sudanese armed forces. See International Crisis Group, *supra* note 13 at 6.

79 Geis & Mundt, *supra* note 4 at 1; Castillo, *supra* note 9 at 169.

80 Ryngaert, *supra* note 5 at 502.

81 Castillo, *supra* note 9 at 171.

82 Rodman, *supra* note 31 at 554.

A stricter adherence to prosecutorial guidelines may have produced a different course of action. As discussed above, the Rome Statute requires that the Prosecutor have “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” in order to seek the issuance of an arrest warrant,⁸³ a standard that, facially, has nothing to do with the admissibility of the evidence upon which the Prosecutor’s belief is based. However, the Canadian prosecutorial standard, that there be a “reasonable prospect of conviction” in order to proceed with a case, may shed light on the underlying purpose of the analogous Rome Statute provision. By focusing on the standard of “conviction,” rather than mere knowledge of guilt, the Canadian standard requires the prosecutor to take into consideration his ability to assemble admissible evidence before initiating a case. Therefore, using Canadian prosecutorial guidelines to interpret the language of the Rome Statute, evidentiary considerations weigh against seeking charges against Bashir, at least as long as he remains firmly entrenched as the political and military leader of Sudan, for the inherent difficulties of obtaining evidence against a sitting head of state make successful prosecution much less likely.

Secondly, the decision to prosecute the head of state, rather than a lower-level official like Harun or non-governmental militant like Kushayb, impairs the goal of deterrence. The problem arises not with respect to general deterrence, which was discussed earlier, but specific deterrence; that is, the objective of deterring future criminal conduct in Sudan itself. Specific deterrence is meant to “divide and conquer,” causing the target to be marginalized or turned over to the Court by other regime members desperate to avoid punishment themselves.⁸⁴ The target of the proceedings, of course, will have nothing to lose from continuing to behave badly, so the gamble in such situations is that the Court proceedings will take advantage of existing power struggles in the regime.⁸⁵ This is least likely to succeed against powerful dictators who control every branch of the state apparatus, like Bashir, and in his case the gamble has, indeed, been a failure. Despite having had a somewhat tenuous hold on the leadership of the National Congress Party (NCP) when the first arrest warrant was issued,⁸⁶ and despite the fact that some Sudanese officials privately lament Bashir’s guiding of Sudan into “pariah nation” status and appear genuinely afraid of being sent to The Hague themselves,⁸⁷ Bashir was ultimately powerful and politically astute enough to consolidate his grip on power over NCP after each of the ICC’s warrants were issued.⁸⁸ Unable to unseat Bashir, NCP officials have closed ranks around their leader, knowing that if he falls, they will fall too.⁸⁹ Rather than sewing the seeds of discord and thereby deterring continuing atrocities, the warrants against Bashir, given his position as head of state, had the opposite effect: they drove him and his cohorts to close ranks, dig in their heels, and continue committing atrocities.

The decision to prosecute Bashir has arguably undermined the legitimacy of the Court in a third way: by harming the peace, security and well being of the people of Sudan. The failure of specific deterrence has caused Bashir to tighten his grip over the state apparatus and thereby acquire freer reign to carry out further atrocities. Bashir has also apparently lashed out at his subjects out of sheer retaliatory spite. On the day the first warrant against Bashir was issued, Sudan expelled thirteen international humanitarian organizations and three local ones in retaliation, depriving 4.7 million aid-reliant Darfuris of half of the support they had been receiving.⁹⁰ Bashir also ordered all international NGOs

⁸³ *Rome Statute*, *supra* note 1, art 58(1)(a).

⁸⁴ *Ibid*, at 533.

⁸⁵ Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

⁸⁶ Geis & Mundt, *supra* note 4 at 12.

⁸⁷ Rodman, *supra* note 31 at 546; Bubna, *supra* note 38 at 6.

⁸⁸ International Crisis Group, *supra* note 13 at 9, 21.

⁸⁹ Castillo, *supra* note 9 at 180.

⁹⁰ Traub, *supra* note 11 at 22.

to leave the country by the following year, threatening hundreds of thousands more in other parts of Sudan.⁹¹ This humanitarian catastrophe was ultimately mitigated through diplomacy; United States Senator John Kerry visited Sudan in April 2009 to mediate the redeployment of three international NGOs,⁹² and the United States was eventually able to persuade Bashir to allow a broader return of aid organizations by pursuing an “engagement” policy towards Sudan that avoided any mention of the ICC.⁹³ The international NGO Doctors Without Borders, which hailed the ICC’s formation in 1999 and urged it to take sweeping action,⁹⁴ stated ten years later that “at the time, few organizations fully grasped how international judicial processes could come in direct conflict with providing humanitarian aid.”⁹⁵ This reversal of opinion by one of the strongest original backers of an aggressive ICC indicates that even if ICC action against a sitting head of state has the potential to produce effective specific deterrence, the discipline required of the international community in isolating and condemning the defendant as a criminal is extremely difficult to maintain in the face of the ongoing messy complexities of international diplomacy and humanitarian assistance.

Humanitarian realities on the ground continued to undermine Moreno Ocampo’s tough stance against Bashir throughout the final years of his tenure as Prosecutor. In 2010, the international community quietly allowed Bashir to fraudulently win re-election,⁹⁶ in part out of fear that, in the wake of the ICC’s actions, an election controversy would jeopardize the impending peaceful secession of South Sudan.⁹⁷ Bashir’s sense of impunity, meanwhile, did not seem to decrease after the issuance of the first warrant against him in 2009; his forces embarked on fresh rampages in Southern Kordofan and Blue Nile states in 2011,⁹⁸ detaining United Nations Peacekeepers and subjecting them to a mock firing squad.⁹⁹ Moreno Ocampo argues that, to bolster its legitimacy, the ICC must take principled actions and force other actors to adjust to its behaviour,¹⁰⁰ but the adjustments described above were damage control—attempts by international actors to mitigate the disruptive effects of the ICC’s actions on peace and security in Sudan. By ignoring the reality on the ground, the Bashir proceedings during Moreno Ocampo’s tenure were largely counter-productive.

CONCLUSION

There is a pattern in Luis Moreno Ocampo’s departures from traditional prosecutorial practice in the Sudan case: his actions were more public and more aggressive than long-

91 International Crisis Group, *supra* note 13 at 18.

92 *Ibid.* at 22.

93 Traub, *supra* note 11 at 23.

94 James Orbinski, “The Nobel Peace Prize Speech” (Speech delivered at the Nobel Peace Prize Ceremony, Oslo, 10 December 1999), online: Doctors Without Borders <<http://www.msf.org/msf/articles/2000/11/the-nobel-peace-prize-speech.cfm>>.

95 Christophe Fournier, “Darfur Expulsion: Response By the MSF International President”, *Doctors Without Borders* (5 March 2009) online: <<http://www.msf.org/msf/articles/2009/03/darfur-expulsion-response-by-the-msf-international-president.cfm>>.

96 Jeffrey Gettleman, “Bashir Wins Election as Sudan Edges Toward Split”, *New York Times* (26 April 2010) online: New York Times <<http://www.nytimes.com/2010/04/27/world/africa/27sudan.html>>.

97 International Crisis Group, *supra* note 13 at 14; Geis & Mundt, *supra* note 4 at 11; Bubna, *supra* note 38 at 6.

98 Jeffrey Gettleman, “Sudan Attacks Disputed Border State”, *New York Times* (2 September 2011) online: New York Times <<http://www.nytimes.com/2011/09/03/world/africa/03sudan.html>>; Jeffrey Gettleman, “As Secession Nears, Sudan Steps Up Drive to Stop Rebels”, *New York Times* (20 June 2011) online: New York Times <<http://www.nytimes.com/2011/06/21/world/africa/21sudan.html>>.

99 *Ibid.*

100 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

standing prosecutorial norms of discretion would have dictated. Moreno Ocampo desired that the Court, in its full statutory glory, be accepted as a reality by world actors, and believed it was necessary to stir the pot as much as possible to get political actors to accept that the ICC's powers of universal jurisdiction are a reality.¹⁰¹ The problem with this approach is that it ignores the potential for failure; the possibility that the universal jurisdiction powers in Article 13(b) of the Rome Statute, a contentious element of the treaty at its drafting,¹⁰² could fall into disuse as a few initial prosecutions fail to establish the legitimacy of the Court in exercising universal jurisdiction. Moreno Ocampo rightly rebutted critics who urged him to take a more political approach to prosecution,¹⁰³ but his actions as Prosecutor were already overly politicized. He would have better served the legitimacy of the ICC by taking a less adversarial approach and adhering to the standards of prosecutorial behaviour established in State Parties like Canada, as well as by the ICC treaty and regulations themselves.

By keeping his public comments calm and impartial, the Prosecutor could have enhanced the Court's credibility in Africa and the Middle East instead of providing the Sudanese defendants, who naturally and self-servingly were ready to accuse the Court of neocolonialism, with more ammunition. A neutral approach could have also avoided exacerbating the military standoff on the ground. By using sealed rather than open warrants, the Prosecutor could have had a better chance of capturing and punishing the perpetrators, helping to establish a track record of successful enforcement. Should several successful exercises of universal jurisdiction one day be accomplished, "naming and shaming" defendants with open warrants may be an effective policy option. However, in asserting its universal jurisdiction over a non-State Party for the first time, the ICC did not yet have sufficient legitimacy to employ such a strategy. The Court's legitimacy would also have been better served had Moreno Ocampo followed ICC and domestic prosecutorial guidelines in choosing his targets. The proceedings against Bashir, irrespective of his likely culpability, have not led to his conviction and punishment and have been counter-productive with respect to deterrence as well as to peace, security, and well-being in the region.

With Libya's new regime refusing to hand over Saif Qaddafi and Abdullah Senussi to the Court, the death of Muammar Qaddafi while in rebel custody,¹⁰⁴ and the outstanding Sudanese warrants against Bashir, Harun, and Kushayb, along with a 2012 arrest warrant against Abdel Rahim Hussein, Sudan's Minister of National Defence, languishing on the books without any prospect of enforcement, the ICC has not yet effectively exercised its universal jurisdiction as of the end of 2012. Fatou Bensouda, who replaced Moreno Ocampo as Prosecutor in 2012,¹⁰⁵ should more strictly follow ICC and domestic prosecutorial standards—speaking softly, carrying a sealed warrant, and picking her targets prudently—as such a change in direction would give the ICC the greatest chance to expand its legitimacy into the realm of universal jurisdiction.

101 *Ibid.*

102 Diane F. Orentlicher, "The Future of Universal Jurisdiction in the New Architecture of Transnational Justice", in Stephen Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2004) 214 at 218.

103 Moreno Ocampo, "The International Criminal Court Today", *supra* note 3.

104 Marlise Simons, "Hague Prosecutor Opens Door to Libya Trial of Son and Aide", *supra* note 66.

105 Marlise Simons, "The Hague: New Prosecutor Picked for International Criminal Court", *New York Times* (1 December 2011) online: New York Times <<http://www.nytimes.com/2011/12/02/world/europe/the-hague-new-prosecutor-picked-for-international-criminal-court.html?ref=internationalcriminalcourt>>.

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