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The 2015/16 *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 Ted McDorman and Michael M'Gonigle for their guidance in the production of this volume of *Appeal*.

PREFACE

by Lina Truong & Jim Wu

Appeal: Review of Current Law and Law Reform is a student-led journal that publishes exclusively student work. This year, we continue to feature a vast array of fascinating topics from students across Canada. We introduce authors from the University of Victoria, University of British Columbia, University of Calgary, Dalhousie University, Queen's University, University of Toronto, and McGill University.

We begin with topics especially important to the west coast community, beginning with an Aboriginal law paper that distils the topic of restorative justice practices for Aboriginal offenders. We feature environmental papers that address unique issues, including the protection of Canada's glaciers from climate change and the harnessing of tidal energy for a sustainable future. Our *Charter* articles involve the right against unlawful searches and seizures of computers, freedom of thought and expression in the context of combatting home-grown terrorism, Parliament's possible use of the notwithstanding clause to override the newly recognized right to strike, and the approach to administrative law decisions that invoke these *Charter* rights. Finally, we present an ethics article on the dilemmas lawyers face in balancing their need to maintain civility in the courtroom while remaining a zealous advocate.

Publishing *Appeal* is a team-effort and we thank the Faculty of Law at the University of Victoria. This volume would not be possible without the constant and continued support of the many faculty members who share their insights and experience with our Editorial Board. In particular, we would like to extend our appreciation to Ted McDorman for his steadfast support of *Appeal*. We also thank our student volunteers, many of whom are first-year students eager to contribute to the law school community.

Furthermore, we would like to extend our sincerest thanks to our external reviewers who donated time out of their busy schedules in support of *Appeal*. Their expertise and professional opinions allow our authors and editors to create articulate, well-balanced, and deeply analyzed articles that reflect timely legal issues and the future of law reform in Canada. *Appeal* would not be possible without their contributions.

We also thank our patrons and sponsors, whose financial support makes *Appeal* possible. Their ongoing support ensures that *Appeal* continues to be a home, both online and in print, for exceptional student work.

Finally, we thank our exceptional authors for their hard work in the editing process (even in the course of world travel) to improve and enhance their papers, and our outstanding Editorial Board for their dedication in producing this volume. It has been our privilege to serve as this year's Editors-in-Chief.

This journal is the product of nearly fifty passionate contributors, students, and external reviewers; it is our joy and pride that we now present Volume 21 of *Appeal* to you, the reader.

ARTICLE

RESTORATIVE JUSTICE PRACTICES FOR ABORIGINAL OFFENDERS: DEVELOPING AN EXPECTATION-LED DEFINITION FOR REFORM

Meagan Berlin*

CITED: (2016) 21 Appeal 3

INTRODUCTION

> Anyone in the justice system knows that lady justice is not blind in the case of Aboriginal people. She has one eye open. She has one eye open for us and dispenses justice unevenly and often very harshly. Her garment is rent. She does not give us equality. She gives us subjugation. She makes us second-class citizens in our own land.[1]
>
> — Chief Allan Ross, Norway House, Cree Nation

Restorative Justice ("RJ") practices for Aboriginal offenders within the Canadian criminal justice system have made a valiant attempt at addressing the 'harsh and uneven' distribution of justice by targeting the alarming[2] over-incarceration of Aboriginal peoples.[3] However, RJ practices are not sufficiently used, and in some cases, are implemented inappropriately. Restorative Justice sits in a limbo between overwhelming theoretical support and disappointingly inconsistent practical implementation. There

* Meagan Berlin wrote this paper for the course *Aboriginal Law* at Queen's University's Faculty of Law in the second year of her JD program. Meagan would like to thank Professor Hugo Choquette for his assistance and research guidance. She wishes to thank various staff of the Edmonton Institution for Women for their informative contributions and to the Four Directions Aboriginal Student Centre at Queen's University for facilitating various informative conversations.

1 Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba, Vol 1: The Justice System and Aboriginal People* (Winnipeg: Aboriginal Justice Inquiry, 1991) at 6 [AJIM]. Quoted in Royal Commission on Aboriginal Peoples (RCAP), *Bridging the Cultural Divide: A report on Aboriginal People and the Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) [RCAP] at 2.

2 A current statistic referenced by Valerie Gow, acting Manager of Restorative Justice Programs of the Edmonton Institution for Women ("EIFW"), a federal institution of Correctional Service Canada. Gow provides a glimpse into the reality and imminence of this concern, stating "with respect to women's corrections, sadly, it has continued to blossom, even though there is consideration of the *Gladue* factors and Bill C-41. Over-representation is growing at a steady pace in the prairie provinces. The maximum security unit of the *EIFW* has been hovering at a rate of 100% Aboriginal offenders or just below for two years now." Interview of Valerie Gow by Meagan Berlin (23 March 2015).

3 A definition of over-incarceration by Dickson-Gilmore and La Prairie succinctly outlines the issues: "when the proportion of members of a particular group found in a given institutional setting, such as the correctional system, disproportionately exceeds that group's share of the overall population." Jane Dickson-Gilmore & Carol La Prairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) at 29 [Dickson-Gilmore].

exist insufficiencies and—in some cases—inappropriate forms of RJ for Aboriginal offenders, their communities, and the victims that their crimes impact. There needs to be a forward push to continue developing RJ practices. This paper proposes a structural definition that captures a threshold for measurable success or failure of RJ practice. This definition would include the incorporation of relevant barriers to successful iterations of RJ in different cases, so as to promote more appropriate use of such practices into programs that are practically and sustainably sound.

Prior to beginning this discussion on the status of RJ within Canada as applied to Aboriginal peoples, it is important to note the assumption that it is built upon: RJ is inherently good, when viewed relatively in contrast to punitive measures prioritizing incarceration. Nonetheless, this assumption is also built upon the premise of the Canadian criminal justice system being a system that is "perfect, but just needs tweaking."[4] Ovide Mercredi, former National Chief of the Assembly of First Nations, spoke to the frustration of dealing with the dominant view of assumption that the criminal justice system in Canada is characterized as such, but that even with RJ measures and consideration, that "as long as we stay in this criminal justice system, the judges do not have options outside of the *Criminal Code*. Even with special rules [as outlined in *Gladue*], the jails are filling up."[5] This is an issue of contention in and of itself; this discussion does not aim to undermine voices of opposition to this dialogue.

Val Napoleon, noted Indigenous law researcher and Law Foundation Professor of Aboriginal Justice and Governance[6] refines this issue to the particular context of restorative justice[7] stating that "the rhetoric of restorative justice usually obscures forms of local law."[8] Additionally, she points out the potentially damaging reasoning behind its use for Indigenous law. Napoleon posits that the reasoning for using RJ is not "a jurisdictional one," but "explicitly ameliorative," based on addressing over-representation of Aboriginal offenders in the criminal justice and correctional system and the premise of this resulting from cultural differences.[9] Napoleon notes that RJ as it stands, extending even to the linguistic representation of RJ "practices" delegitimizes Indigenous legal traditions and law.[10] This paper is written with hope that the proposed structural definition will enable opportunity for increased legitimacy, political and practical space, and ability for Aboriginal communities to define Indigenous law and legal traditions. However, it remains that this discussion centres on the state of the criminal justice system in Canada as it stands, and the recommended structural definition fits within the current framework.

I. DEFINITIONAL LIMITATIONS OF RESTORATIVE JUSTICE AND CONCEPTIONS OF ITS SUCCESS

Restorative Justice is an evolving concept that has been defined varyingly in practical and specific programming-based terms. These include a philosophical approach to sentencing, and in sociological contexts, youth-oriented restorative justice, gender-specific

4 Ovide Mercredi, "Aboriginal Treaty Rights" (Lecture delivered at the Faculty of Law, Queen's University, 31 March 2015) [unpublished].

5 *Ibid*.

6 At the University of Victoria Faculty of Law.

7 Val Napoleon, Angela Cameron, Colette Arcand & Dahti Scott, "Where is the Law in Restorative Justice?" in Yale D Belanger, ed, *Aboriginal Self-Government in Canada - Current Trends and Issues 3rd edition* (Saskatchewan: Purich Publishing, 2008).

8 *Ibid* at 4.

9 Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 10.

10 *Ibid*.

practices, and culturally specific practices. Great difficulty exists in assessing the success of RJ practices, due to differences in the definitions of 'what' RJ constitutes and 'what' determines 'success' of the perceived goal.

Without clarity and knowledge of the differences in definitions that they each involve, assessments of its success in different populations will consistently be lacking. Criticism will always stick if there is no limitation or 'box' surrounding the expectations of a RJ practice. If there is no bar of expectation to measure a practice against, it will always fall short of abstract expectations when seen through a critical lens. The danger that the absence of a concrete threshold of expectation poses is that a promising theoretical structure can be written off as being ineffective or inefficient without empirical evidence of where, if at all, such gaps actually occur. This danger defines the limbo where RJ practices currently sit, as there is no framework of comparison to correctly measure their application against to see where they are and are not falling short.

Restorative Justice is conceived differently in different social contexts, both culturally and geographically. It is necessary to take into account the specific factors relevant to a population, in order to avoid a lack of specificity in what factors RJ practices should include as well as what the measures of success are. Restorative Justice practices used in other Commonwealth countries with colonial history or in the context of the youth criminal justice system will have commonalities with but *will not share* all of the same target factors and measures of success specific to Aboriginal peoples in Canada. This is because of the specific past history and treatment that has shaped the social and legal contemporary reality of this population. Restorative Justice is not a one-size-fits all shirt.

The current approach to RJ practices tries to address this by offering the same shirt in different sizes so as to 'fit' the different needs of different populations. Specifically RJ practices are unique for offenders under youth justice, non-Canadian Indigenous offenders, non-Aboriginal offenders, and Aboriginal offenders in Canada. Still, this approach of offering the same shirt in classified sizes ignores the differences of situational factors *within* these populations. In order to address the specific factors for each of these different classifications, RJ practices would need to be individualized at a deeper level to address the different populations within such classifications. Without this approach, the homogenization of Aboriginal peoples into one category of RJ ignores the vast cultural, linguistic, socio-economic, and historic differences between and among the Métis, Inuit, and 634 First Nations bands.[11]

If the populations to which RJ practices are applied to differ, the measurements of whether they have done what they have set out to achieve must be relational. Thus, different measurements of the threshold for success and these different iterations must be clearly defined and distinguished.

A. Current Definitions of Restorative Justice

Restorative Justice is often defined broadly through the borrowed philosophies it has developed upon. The concept is built upon conceptions of the origin of criminal behaviour common to a number of Indigenous cultures worldwide. Many of these cultures see the nature of criminal behaviour as stemming from a shared responsibility of both the individual and the community, giving legitimization to the understanding that situational factors contribute to and perpetuate the ease and frequency at which crimes are committed by individuals. There is a degree of empathy embedded in this understanding that is not present in non-RJ sentencing or reintegration practices. Though

11 The Assembly of First Nations, "Description of the AFN" (12 April 2015), *Assembly of First Nations* (webpage), online: <http://www.afn.ca/index.php/en/about-afn/description-of-the-afn> archived at <https://perma.cc/B7TQ-8MRU>.

the responsibility of the individual is not diminished, the inclusion of the community as part of the root cause of crime, and thus, inherently expected to be a part of the healing process, is a perspective that is unique to RJ. Marginalization is a key feature that the healing component of RJ aims to rectify. As it is not within a person's full ability to un-alienate themself within a community context, the community bears some responsibility in this process. After committing a crime, an individual is perceived to be out of balance with his or her potential and with the expectations of the community; it is contingent upon a unified effort of both community members and the offender to participate in a restorative process to return to balance.[12]

Additionally, though the underlying principle is common and borrowed from many Indigenous belief systems, the elements of some RJ practices are built from actual practices of certain Aboriginal communities. The use of these elements is specific to the application of RJ within the context of Aboriginal peoples in the Canadian criminal justice system. Sentencing[13] or healing circles[14] are embedded as common applications of RJ practices for Aboriginal offenders. The community—represented by affected individuals, elders, the offender, and often the victim(s)—use a healing circle as a forum for understanding and oral representation of the effects of the crime on each of the different individuals represented, on the community as a whole, and on the victim(s). The personal circumstances of the offender and the factors that have contributed to the commission of the crime are discussed and focused on. Each factor is given consideration; factors such a drug or alcohol addiction, child abuse, family and individual experience with the residential school system, lack of familial ties, and other situational factors that may have contributed to the commission of the offence will be considered.[15]

Restorative Justice—applied appropriately—allows for a humane balance in allowing the consideration of an offender's punishment to be addressed in a manner that gives the appropriate attention to the victim's experience and healing process, but without the circular systemic oppression and suffering that is often additionally punitive with and following incarceration.

The concept of 'appropriate application' and the proposed structural definition coincide. By making space for adjusting how innovation can occur in RJ practices are provided, while still creating standards of expectation, the meaning of 'appropriate application' can be established with closer certainty. John Braithwaite, distinguished criminologist specialized in studying the regulation of restorative justice practices, provides extensive narrative on both the need for standards for RJ practices, and what

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12 For general understanding and further explanation of the current definition of restorative justice in Canada, see Government of Canada, "About Restorative Justice" (13 January 2014), *Correctional Service Canada* (webpage), online: <http://www.csc-scc.gc.ca/restorative-justice/003005-0007-eng.shtml> archived at <https://perma.cc/TAL4-S6Y2>.

13 *R v Moses* (1992), 71 CCC (3d) 347, (Yukon Terr Ct).

14 Native Counselling Services of Alberta, "A Cost-benefit Analysis of Hollow Water's Circle Healing Process" (3 April 2014), *Government of Canada, Public Safety Canada* (webpage), online: <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/cst-bnft-hllw-wtr/index-eng.aspx> archived at <https://perma.cc/FQ3C-CGS4>.

15 The Justice Education Society of BC [*Justice Education Society*] outlines the goals of a healing circle by saying that "the healing circle often leads to an organic consensus of what steps should be taken by the offender to correct the harms caused by their actions. These could include:

   a. Specialized counselling or treatment programs targeted at the impact factors that contributed to the offence (alcohol programs, abuse counselling)
   b. Community work service at the direction of an elder's counsel
   c. Potlatch and other traditional remedies specific to the customs of the tribe
   d. Direct restitution to the victim or the community
   e. Sometimes unique and creative solutions emerge, such as the offender agreeing to tell the public their story and speak out against the conduct that led to their offence."

they would practically entail. Such standards provide a basis for the foundation that this proposed structural definition would be built upon.[16] Notably, Braithwaite urges that his proposed standards and the factors that define them are malleable: that such standards can provide an opening point for dialogue on what standards any particular RJ practice should be measured upon.[17] Braithwaite succinctly provides a justification for the following proposed structural definition, saying that "[e]vidence and innovation from below […] should be what drive the hopes of restorative justice to replace our existing injustice system […]."[18] The following provides space for innovation, and the controlled expansion of the definitional scope of RJ in response to evidentiary feedback to its successful iterations.

B. A Definitional 'Box'—Outlining Thresholds of Expectation on All Sides

This paper proposes that a theoretical 'box' defining the expectations of RJ in practice needs to be built to support further structuring, refinement, and positive reform of RJ. It can be built by establishing lines defined by expectations.[19] The top horizontal line of this 'box', as illustrated in the following graphic, will establish the threshold of expectation, so that it can be clear when RJ practices are being met or not. This serves a dual purpose: first, as an assessment of when a RJ practice falls short, so that it can be improved in the instant case if there is time to remedy the practice, or in the future in similar implementation, and; second, as a bar of expectation set so that once consistently surpassed, practices can be assessed in order to determine why. This can lead to innovation in restructuring and assessing *why* certain practices worked in certain contexts, and encourage ever-striving reform of RJ applications. Importantly, this 'box' is flexible, and the top threshold can move upwards in response to such assessments.

The two 'side' lines of the definitional 'box' of RJ, also illustrated in the following graphic, which connect the upper aspirational threshold of expectation to the lower, set state of RJ as it currently stands, are those that capture all of the possibilities of innovation in creating new practical applications of RJ practices–this would capture the derivations of sentencing circles and healing circles and novel implementations of victim-offender mediation. The lines can move laterally, allowing the shape to expand horizontally to consistently add new applications of RJ practices.

The bottom line of the 'box' is a definitional structure that will outline all that RJ should not achieve or entail in practice. This is also visually represented in the following graphic. Factors such as those outlined fully in the remainder of this paper, such as judicial misapplication of the *R v Gladue* ("*Gladue*")[20] factors, lack of or inappropriate community for support, and lack of education regarding cultural appropriateness, should be embedded within this definition, so that a standard best practices model is incorporated to outline what *does not* work in RJ practice. Incorporating this limitation within the definition of RJ will help move away from repeated misapplication of the theoretical framework to practical applications, and act as a gatekeeper for objective assessment of the application or implementation of RJ principles. This theoretical 'base' of the 'box' stands upon the ground. It is thus unable to move up or down, unlike the top threshold. It is the only line set by this structural definition that has already been defined by the current state of RJ practices, and thus remains unchanged.

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16 John Braithwaite, "Setting standards for restorative justice" (2002) 42:3 Br J Criminol 563 at 572 [Braithwaite Setting Standards].

17 *Ibid*.

18 Braithwaite Setting Standards, *supra* note 16 at 576.

19 An illustration of this conceptual definition is below for aid.

20 *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].

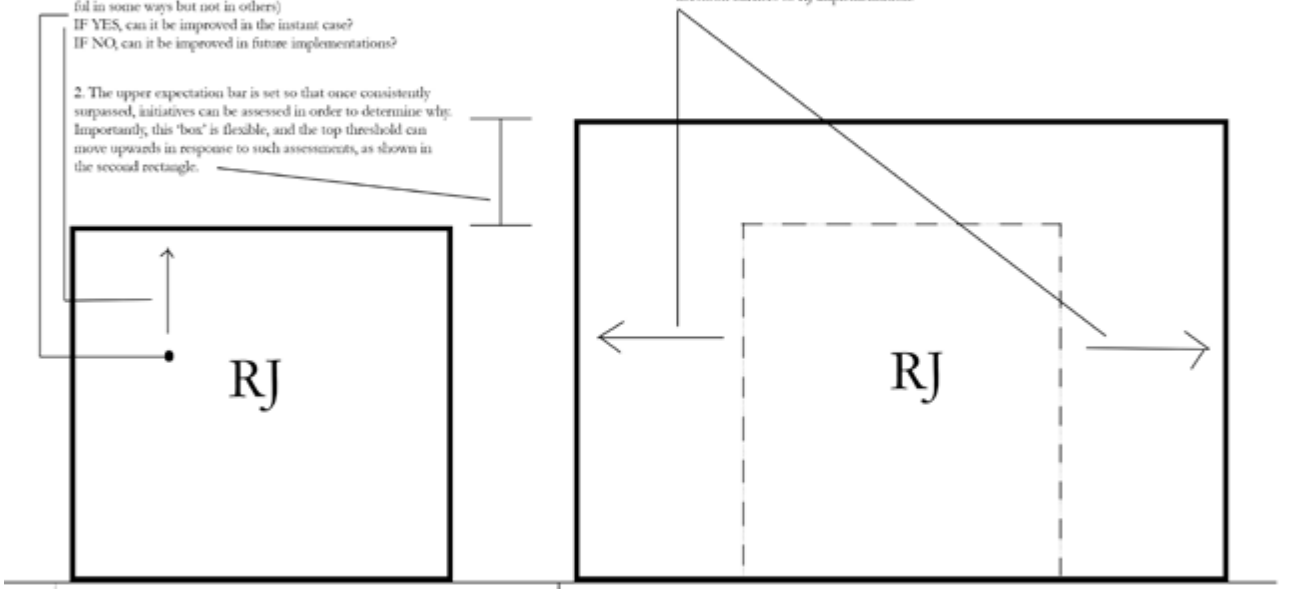
The top horizontal line of this box establishes the threshold of expectation of 'successful' RJ measures, so that it can be clear when RJ practices are meeting it or not. It allows for assessment based on two factors:

1. Is a RJ practice falling short of this expecation? (and thus somewhere in the box, successful in some ways but not in others)
IF YES, can it be improved in the instant case?
IF NO, can it be improved in future implementations?

2. The upper expectation bar is set so that once consistently surpassed, initiatives can be assessed in order to determine why. Importantly, this 'box' is flexible, and the top threshold can move upwards in response to such assessments, as shown in the second rectangle.

The two sides of the definitional box apture all of the possibilities of innovation in creating new practical applications of RJ practices—this would capture the derivations of sentencing circles and healing circles and novel implementations of victim-offender mediation or other support structures falling under RJ. The lines can move laterally, allowing the shape to expand horizontally to consistently add new applications of RJ practices.

They are still assessed in relation to the fixed upper threshold of success. This allows for new implimentation, but with a fixed assessment tool that captures all best practices and understood barriers to RJ implementation.



The fixed definitional foundation of the lower line of the box remains unchanged. This is defined through the factors of inappropriate and improper use of and application of RJ in practice. Many practices will have shortcomings or situational reasons as to why they fall within the box, and below the upper threshold of 'success', but as a forward-looking defintion, this lower limit defines the 'worst practices' of RJ and theoretically should not be replicated if the definition is being used correctly so as to avoid such implementations.

A DEFINITIONAL 'BOX' OF RESTORATIVE JUSTICE:

OUTLINING THRESHOLDS OF EXPECTATION ON ALL SIDES

II. A HISTORY OF RESTORATIVE JUSTICE IN CANADA AS APPLIED TO ABORIGINAL PEOPLES

The ability to consider and allow RJ practices at sentencing was established through the sentencing reforms outlined in Bill C-41,[21] which expanded sentencing options to include such practices—by addressing the special circumstances of Aboriginal offenders—through section 718.2(e) of the *Criminal Code.* This section statutorily enshrines this intent:

> 718. (2) A court that imposes a sentence shall also take into consideration the following principles:
>
> > (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.[22]

This section allows for trial judges to consider other sanctions aside from imprisonment, usually in the form of community-based sentences such as conditional sentences, healing circles, sentencing circles, or victim-offender mediation. Clarification on the application parameters of section 718.2(e) was established through the Supreme Court of Canada's ("SCC") guidelines in *R v Gladue*, which sought to ensure that a proper sentence 'fit' for Aboriginal offenders is obtained in each particular case.[23] The SCC held in this case that sentencing judges must:

> 1. consider the unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and
>
> 2. the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular [A]boriginal heritage or connection.[24]

Resources supporting the obligation of the judiciary to assess proper sentence fit for Aboriginal offenders based on the *Gladue* factors are innovative and showcase the promise of proper application of *Gladue.* Such innovations include *Gladue* reports offered through private services such as IndiGenius[25] and by the Aboriginal Legal Services in Toronto ("ALST"), *Gladue* courts in Ontario, the creation of an Aboriginal Caseworker Program by the ALST,[26] and the existence of many community-based RJ support organizations. The *Gladue* Court (the Court) in Toronto was established in 2001 and was the first court specifically tailored and designed to properly apply the *Gladue* principles set by the SCC and to address the particular needs of Aboriginal offenders.[27] Specific training is given to justice officials sitting at the Court on the resources and restorative options available in general and in the particular community. *Gladue* reports are incorporated at every sentencing case. Judicial acceptance, knowledge, education, and experience in applying

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21 Bill C-41, *An Act to amend the Criminal Code with respect to sentencing*, 1st Sess, 35th Parl, 1994.

22 *Criminal Code*, RSC 1985, c C-46, s 718(2)(e).

23 *Gladue*, *supra* note 20.

24 *Ibid* at para 6.

25 *IndiGenius & Associates* (webpage), online: <http://indigeniusandassociates.com> archived at <https://perma.cc/LK2S-SF7D>.

26 Government of Canada, "Location of Aboriginal Justice Strategy Programs in Canada: Ontario" (7 January 2015) *Department of Justice* (webpage), online: <http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplace/index.html> archived at <https://perma.cc/BN4Y-DDHQ>. In order to support the *Gladue* Court, Aboriginal Legal Services of Toronto created the position of the *Gladue* Caseworker. These caseworkers prepare written reports on Aboriginal offenders at the request of the judge, defence or Crown.

27 *R v Armitage,* 2015 ONCJ 64 at para 6.

the *Gladue* principles is demanded and embedded within the culture of the Court. The presence of such a court sets a standard of what should be expected by the considerations of any court; however, such a court remains a rarity nationally.

Gladue reports contain case-specific information tailored to the individual offender's circumstances, which is not only helpful in assisting judges, but has a significant positive effect on both full understanding—which decreases the likelihood of racist assumptions and misunderstanding—and on sentencing outcomes.[28] Research shows that 76% of offenders being sentenced for a repeat offense received a shorter sentence when a *Gladue* report was considered than offenders without one.[29]

Gladue reports are in practice under-produced and not expected or demanded, due to lack of money, time, information or a cultural shift within the criminal justice system to embed them as necessary within a justice process.[30] Without a proper *Gladue* report, courts are limited in awareness of the particular circumstances surrounding an Aboriginal offender and are thus unable to determine proper bail conditions or impose appropriate sentences. Jonathan Rudin, Program Director at the ALST, in the executive summary for the Ipperwash Inquiry, made note of this pervasive limitation; stating—that outside of the *Gladue* Court—"judges are generally not getting the information they require to make *Gladue* meaningful to Aboriginal offenders before the court."[31]

R v Gladue makes specific allowance for the use of sentencing approaches that incorporate RJ principles. *R v Wells* clarifies that application of section 718.2(e) does not mean that an offender will receive an automatic sentence reduction; rather, a full assessment of individual circumstances of the offender, the offence, sentencing options, and community context are all part of the "different methodology" for assessing a proper sentence for an Aboriginal offender, though such methodology does not "mandate a different result."[32] *R v Ipeelee* ("*Ipeelee*") refined and reaffirmed the application of the *Gladue* factors by reaffirming that they apply in all contexts.[33] In *Ipeelee*, the SCC noted that misapplication of the considerations necessitated by *Gladue* by the courts must be addressed, that offenders need not establish any causal link between the background factors that the court needs to consider and the commission of the offence, and that

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28 Recognizing historical as well as circumstantial impact, *Gladue* reports contain, and are not limited to, outlines on any relevant events that have impacted an Aboriginal offender's life: the *Indian Act, Bill C-31,* outlawing of ceremonies & traditional practices, enfranchisement to get a job, join the army, or vote, the *Canada Act 1982*, Missing and Murdered Aboriginal Women and Girls, the Yukon gold rush, WWII and the building of the Alaska Highway, Residential Schools, the 60s Scoop, Land Claims and Self Government Agreements, Community specific events, such as the creation of National parks or energy sector projects on traditional territories, settlement relocation, Band amalgamation) and circumstantial factors affected by these events, including increased violence, substance abuse, intergenerational violence, unemployment and poverty, food insecurity, lack of clean water on reserves, and poor health determinants. Any childhood factors are considered, including school experiences, foster care, and group home experience. Past criminal involvement and mental health issues are also considered.

29 Legal Services Society of BC, "Gladue Report Disbursement: Final Evaluation Report" (June 2013), online: <http://legalaid.bc.ca/assets/aboutUs/reports/aboriginalServices/gladueReportDisbursementEvaluationJune2013.pdf> archived at <https://perma.cc/35L2-WMKT>.

30 Sébastien April & Mylene M Orsi, "*Gladue* Practices in the Provinces and Territories" (2013) *Research and Statistics Division, Department of Justice Canada*. Note that the 2013 DOJ report says that Gladue Reports are available in NWT. However, the Law Society of NWT's Summer 2014 newsletter says that none are available. The Quebec government is currently considering a proposal to fund a Gladue Report program through the Department of Justice.

31 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (2005) *Ipperwash Inquiry*, online: <http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf> archived at <https://perma.cc/WU4X-ZAHL> at 2.

32 *R v Wells,* [2000] 1 SCR 207 at para 3.

33 *R v Ipeelee,* 2002 SCC 13 at para 3 [*Ipeelee*].

misapplication by courts of the factors outlined in *Gladue* "display[s] an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples."[34] Yet, assuming that no changes need to be made to these principles, and that *Gladue* represents the pinnacle of what RJ should strive to achieve, this leaves RJ with limited possibility to reach for and establish a higher standard of success.

R v Morin[35] outlines that sentencing circles–a common RJ practice–are allowed as "part of the fabric of our system of criminal justice…[and are] a recognized and accepted procedure."[36] Together, these cases open the door so that such sentencing options are available; however, with no expectation established that such principles can and should be improved upon, and with no understanding that there is room for them to change in response to practical weaknesses, means the door is opened narrowly. Currently, not everyone who should be passing through this doorway can fit through it.

III. WHY ARE RESTORATIVE JUSTICE PRACTICES NOT BEING MORE WIDELY IMPLEMENTED?

As *R v Gladue* sets out, there is an expectation in any case involving the sentencing of an Aboriginal offender that if the *Gladue* factors are considered and met, then RJ practices should be the preferred and primary approach in sentencing considerations. Of course, not all offenders and cases will meet these factors. This is not the concern. The real concern, which contributes to the over-incarceration of Aboriginal peoples and to the under-use of RJ practices when they would be appropriate, lies in two distinct and broadly encompassing issues:

> 1. Whether–within the population of those individuals who are objectively suitable under the *Gladue* factors for consideration of RJ practices at sentencing–the same number of individuals are actually being sentenced in accordance with the *Gladue* factors. This ties into judicial discretion, which will be addressed further in this paper.
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> 2. The second factor that may contribute to RJ not being more widely used at sentencing is a lack of a practical implementation 'net,' consisting of resources and community support, in order to actually allow for an appropriate or applicable RJ practice to be implemented, even where an accused individual has been assessed to meet the *Gladue* factors.

A further problem that hampers the ability of RJ to establish an appropriate definitional 'box' built on suitable and effective practical application is that in cases where RJ is *not* the correct or appropriate approach, the misapplication of using RJ in these cases restricts and hampers the growth and acceptance of RJ practices in the future. Improper applications of RJ practices reflect RJ in a globalized manner to the public, as a 'failed' principle, when in reality, these instances reflect an inappropriate application in incorrect circumstances. We must seek to both:

> 1. Limit inappropriate use of RJ practices, by clearly including what factors and circumstances are 'appropriate' and will thus lead to 'successful' implementations; and 2. determine which instances are inappropriate based on factors that can be controlled and improved so as to make the circumstances more appropriate, and thus, establish the parameters of the definitional 'box'.

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34 *Ibid* at paras 81-83.

35 *R v Morin*, [1995] 3999 SKCA, 9 WWR 696.

36 *Ibid* at para 85.

A. Limitations on Aboriginal Communities To Be Able To Regulate and Practice Their Own Models of Restorative Justice

Another proposed reason for the stagnation of progress in RJ reforms and appropriate structuring for different contexts is the limited regulatory ability of Aboriginal communities to self-regulate justice practices. *The Royal Commission on Aboriginal Peoples* listed the following statement as the first of its *Major Findings and Conclusions*:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada. First Nations, Inuit and Metis people, on-reserve and off-reserve, urban and rural in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.[37]

The conflict caused by these different views of the nature and purpose of justice is further aggravated when combined with the difficulty of implementing reforms to RJ because of the possibility of warranted apprehension of Aboriginal peoples in accepting legal reform. The subjugation of Aboriginal peoples has often been enabled and allowed through law.[38] Examples of this historic legal subjugation are laws under the *Indian Act 1876* restricting the movement of Aboriginal peoples out of reserves,[39] and legal limitations—including penal sanctions—to access family unification in the wake of the residential school system.[40]

This is not a new criticism of the seemed inertia of the development of RJ. Deeper reform is needed, and has been called for, which would allow for the practice of community-controlled justice practices *within* the ability to self-govern.[41] The limitations are thus seen to stem not from the practices or theoretical framework of RJ, but rather, the fact that it is controlled, offered, and dictated through the court system and largely controlled through judicial implementation, rather than by the community whom the individual is reconciling with and being supported by during the restorative process.

An argument forwarded by Jennifer Grace, an academic focusing on RJ in the Canadian context of Aboriginal peoples, discusses the slowing of the appropriate use of RJ in the context of the 'social control' seen throughout colonization and the resultant loss of Aboriginal peoples' culture. She posits that to 'allow' for RJ through the dominant non-Indigenous criminal legal system is a mirror of the continued social control and power dynamic that Aboriginal peoples of Canada have experienced since contact.[42] Within this context, RJ is seen as an 'allowance' by the dominant legal system.

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37 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister and Supply Services, 1995) at 309.

38 Patricia Monture-Angus, "Myths and Revolution: Thoughts on Moving Justice Forward in Aboriginal Communities" in *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 263.

39 Honourable Justice Murray Sinclair, "What Do We Do about the Legacy of Indian Residential Schools?" (The Tom Courchene Distinguished Speakers Series delivered at the Isabel Bader Centre for the Performing Arts, Kingston, 27 March 2015) [unpublished].

40 Paula Mallea, *Aboriginal Law: Apartheid in Canada?* (Brandon, MB: Bearpaw Publishing, 1994) at 2.

41 Jennifer Grace, *The Challenges of Restorative Justice Projects in Aboriginal Communities through Social, Economic, and Political Perspectives* (MA Thesis, Carleton University Faculty of Arts, 2004) at 10 [Grace].

42 *Ibid* at 12.

IV: PROBLEMS AND LIMITATIONS WITHIN THE CURRENT APPROACH TO RESTORATIVE JUSTICE IMPLEMENTATION FOR ABORIGINAL PEOPLES IN CANADA

A. Lack of Resources within a Response Community

The lack of consideration and understanding of the social, economic, and political realities that affect Aboriginal communities and their ability to actually make RJ practices work is a barrier to their increased and improved use. Other contributions to this barrier include decreased funding to support programs and training of required support staff, lack of community motivation or ability to volunteer for RJ practices (often influenced by poverty, unemployment, and other endemic social factors), and lack of resources. Justice Barry Stuart—the first judge to implement sentencing circles within standard sentencing practice—noted that "many communities do not have the ability to provide sufficient finances and personnel to sustain the efforts of restorative justice."[43] When RJ practices are implemented without proper planning or attention to the lack or presence of these necessary factors within the community, volunteer retention can suffer, as community volunteers will often not have the training and ability of professionals, which are necessary to avoid volunteer burnout.[44] Correctional Service Canada ("CSC") Officer Ruby Gordey of the *Edmonton Institution for Women* ("EIFW")[45] addressed the need for an appropriate community for RJ to work and achieve sustainable goals for the offender and community, in her statement:

> If leadership in that reserve is not healthy, this is another situation in which justice is not going to work. If you feel as a worker by going into a school and hearing from students that it is not a safe community, then it is not a community where it can work. You may have a willing participant who is assessed under the *Gladue* factors, and in some cases, a willing victim, but the community support is not there. You need to uplift the community before you are able to uplift any individual member of a community.[46]

B. Lack of an Appropriate Community

A community can be defined strictly as those related to the offender's crime, or as the community which an offender is part of; however, increased rates of Aboriginal peoples moving to urban centres have changed the dynamic of what constitutes a 'community' for the purposes of practical implementation of RJ practices. This lack of community means a lack of support for the healing of relationships following the commission of a crime. It can also mean a lack of the 'community shaming' element that is inherently present in RJ models. The lack of a community makes RJ practices less effective for community cohesion, reparation of relationship, and offender recidivism rates.[47] CSC Officer Gordey regards the lack of community as one of the most difficult factors limiting

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43 Barry Stuart, *Building community justice partnerships: Community Peacemaking Circles* (Ottawa: Department of Justice, 1997) at 93.

44 Grace, *supra* note 41 at 76.

45 CSC Officers at the Edmonton Institution for Women are on the front line of what the federal government has called "even more pronounced" over-representation of Aboriginal women as opposed to men, among a system already over-incarcerating Aboriginal peoples. Aboriginal women "represent the fastest growing offender population." See Mandy Wesley, "Marginalized: The Aboriginal Women's experience in Federal Corrections", *Government of Canada, Public Safety Canada* (webpage), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/mrgnlzd/index-en.aspx> archived at <https://perma.cc/4D7V-KLHG>.

46 Interview of Correctional Service Canada Officer Ruby Gordey by Meagan Berlin, Edmonton Institution for Women, Correctional Service Canada (18 March 2015) [Gordey].

47 Grace, *supra* note 41 at 73.

the effectiveness of RJ, noting that "most [offenders] come from Winnipeg, Regina area. Their communities, reserves, families are gone. There is no community on the reserve, where there could otherwise be a restorative justice circle."[48]

Even within communities that *are* present and established, the very factors that are contributory to criminal activity in the first place also add to the difficulty in community mobilization efforts. High unemployment rates, poverty, low education, family dysfunction, and weakened sense of community ties due to the loss of cultural practices or language, all affect the ability of community members to participate in and maintain RJ practices.[49]

As a majority of programs within Aboriginal communities structured around RJ are dependent on volunteers, underfunding and under-involvement often leads to burnout in those volunteers who are engaged.[50] Additionally, in cases that include violence or sexual violence against the victim, additional support—which often cannot be provided solely by volunteers—needs to be present (often in the form of counselling) to protect the victims, who may not wish to see their offender.[51]

An objective 'failure' in implementation of RJ practices was seen in the case of *R v Pauchay*, where the accused was sentenced with circle sentencing and allowed to return to his community after being convicted of the negligent deaths of his two daughters, who froze when left outside while he was drinking.[52] Public and media response was immediate, harsh, and critical. The nature of the crime and the lack of understanding of RJ practices conveyed through the media coverage tainted public opinion on the use of RJ for Aboriginal peoples, and made the lack of community support evident.[53] Margaret Roper, a social worker who was on the Yellowquill First Nation reserve at the time of the offense, remarked on the need for continued measures of support to make RJ achievable and 'successful,' mentioning that there was "talk about a treatment facility [and] bringing programs in," but that nothing had changed.[54] Pauchay breached his conditions by drinking; there were no support structures in place within the community to support him or his family following the sentencing.

C. Judicial Limitations

The imposition of restrictive sentencing measures for offences that have mandatory sentencing restricts the ability to implement RJ practices.[55] With the imposition of mandatory sentencing in so many different areas, such as weapons possession, cultural context and RJ practice options cannot be appropriately considered, as they are supposed to follow *Gladue*. This closes the door on the opportunity and ability to use RJ in instances that could have otherwise included an appropriate offender. With the option removed simply because of mandatory sentencing, it is challenging to incorporate RJ principles where they are otherwise warranted.

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48 Gordey, *supra* note 46.

49 Grace, *supra* note 41 at 45.

50 *Ibid* at 62.

51 Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) [LaRocque].

52 *R v Pauchay*, [2009] SKPC 4.

53 Kevin Libin, "Sentencing circles for aboriginals: Good justice?" *The National Post* (27 February 2009), online: <http://www.nationalpost.com/news/story.html?id=1337495#__federated=1> archived at <https://perma.cc/P952-XZMH>.

54 Brendan Wagner, "Former Yellowquill counsellor reflects on Christopher Pauchay case", *Prince Albert Now* (27 January 2011), online: <http://panow.com/article/41126/former-yellowquill-counsellor-reflects-christopher-pauchay-case> archived at <https://perma.cc/E9FM-FRJX>.

55 Dickson-Gilmore, *supra* note 3.

Commentary on the actual application of the *Gladue* factors at the trial level reflects mixed views. The discrepancy with which they are applied and how they are considered can be a reflection of judicial experience[56] in application of the factors, or knowledge by judges of the support or lack of support for implementing a RJ practice, which can be an outward deterring factor when deciding to allow for RJ practices.[57] CSC Officer Gordey commented on a noticeable culture at trial sentencing, stating, "despite [the fact that] that they are supposed to take into account the social history and *Gladue* factors, there is a feeling that this is being done at a cursory level."[58] The Justice Education Society of BC has made a recommendation in response to this problem: "Judges need to know that the facilities for best practices are in place before they can provide sentencing which is innovative and restorative."[59] Educative measures for those involved in the judiciary at the trial sentencing stage can address the support systems available in communities at regional and provincial levels in the sentencing process, which can target this lack of understanding.

As an example of judicial guidance when implementing a sentencing circle as an application of RJ, Justice Fafard lays out seven factors of consideration as to whether or not application is appropriate in the circumstances, in *R v Joseyounen*:

> 1. The accused must agree to be referred to the sentencing circle.
>
> 2. The accused must have deep roots in the community in which the sentencing circle is held and from which the participants are drawn. Elders or respected, non-political community leaders will participate.
>
> 3. The victim is willing to participate, without being subjected to coercion or pressure.
>
> 4. Although not applicable to this case, the following criterion was added to cover future possibilities: The court should try to determine beforehand whether the victim suffers from battered woman's syndrome. If she does, then she should receive counseling and be accompanied in the circle by a support team.
>
> 5. Disputed facts have been resolved in advance.
>
> 6. The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.[60]

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56 Pamela Rubin, *Restorative Justice in Nova Scotia: Women's Experience and Recommendations for Positive Policy Development and Implementation, Report and Recommendations* (Nova Scotia: Status of Women Canada's Women's Program, 2003) [Rubin]. Mandatory education programming for the Judiciary was one of the key recommendations from the 2003 *Report and Recommendations*: "Education on abuse, women's equality issues, [and cultural sensitivity] was needed…for all justice system professionals. Women cited out-dated and insensitive remarks, actions and attitudes of police, lawyers, judges and other justice system professionals throughout discussions. They felt that mandatory education on abuse, women's equality and cultural sensitivity for judges in particular was needed, who, women felt, would not educate themselves on these issues unless compelled."

57 AJIM, *supra* note 1.

58 Gordey, *supra* note 46.

59 Justice Education Society, *supra* note 15.

60 *R v Joseyounen*, [1995] 6 WWR 438, [1996] 1 CNLR 182 (SKPC).

D. Lack of Approriate Application of RJ for the Crime or Victim

Concern for the victims of crime is central to the healing process intended by RJ processes. Consideration of the involvement of the victim within this process is an element that is lacking in the traditional criminal justice system, where the victim is limited to testifying under carefully controlled conditions, or to providing a victim impact statement. The increased focus on the involvement of victims of a crime within RJ practices such as sentencing or healing circles has a specific concern that needs to be adequately addressed and often is not: a power imbalance between the offender and victim, produced by the relationship or by the crime itself.

One example of this issue being poorly considered, within the context of a repeated domestic violence offender, occurred in a community of Inuit Peoples in Nunavik region, Quebec.[61] The victim had been repeatedly assaulted, over fifty times, and the offender had received four other convictions for the same offence against the same victim. The victim rarely spoke during the sentencing circle. Members of the community only spoke to the impact of the assault on her once.[62] The nature of domestic violence as a cyclical pattern can silence the victim. Thus, for a fully equal balance of power to occur within the context of RJ practices, there is a strong argument that the nature of domestic abuse or child abuse cases on the relationship between the offender and the victim make this equality unattainable without specific and targeted support, training, and attention to the victim's needs and ability to participate. In the absence of such support, training, and attention, such offences should not be addressed through RJ practices. Additionally, it is noted by Mary Crnkovich, a lawyer and scholar focusing on Northern Inuit culture and sentencing circles, that in an analysis of collected observations of sentencing circles, an evident commonality is that judges "express the idea that the views of the community and the victim are the same."[63] The danger of this perception is that focus can fix on the accused, rather than the specific needs or desires of the victim. The nature of domestic abuse and the factors that perpetuate it also make it more difficult for victims to feel able to speak up and share these specific needs or desires for sentencing or healing.[64]

A further obstacle that is present in the use of RJ practices for all crimes, not just domestic assaults, is the nature of the community. Many pre-existing relationships will be brought into the process.[65] In cases where the community consists of friends, family members, and people who know the victim and/or the offender, there is a fear of conscious or unconscious bias in favouring the accused over the victim, leading to the possibility of victim blaming and the perpetuation of unbalanced power relations seeping into the RJ practice.[66]

E. Lack of Appropriate Cultural Understanding in Assuming "Blanket" Appropriateness of Restorative Justice Practices

Approaches to using RJ principles in sentencing by the courts are predominantly made with limited understanding of the specific cultural appropriateness of the practices to some Aboriginal communities. Restorative Justice is founded on an assumptive understanding of most Aboriginal communities being based upon the prioritized

61 Mary Crnkovich, "A Sentencing Circle" (1996) 36 J Legal Plur Unoff Law 159 at 159 [Crnkovich].

62 *Ibid*.

63 *Ibid* at 167.

64 *Ibid* at 278.

65 Grace, *supra* note 41 at 78.

66 Rubin, *supra* note 56. "Women talked about how, upon criminalization or after suffering woman abuse, what they had thought was their "community" could quickly become hostile to them, particularly in more insular communities. This was particularly emphasized for women who had experienced sexual assault or abuse, or who were non-offending parents of children who were sexually abused by male partners."

concern for collective forgiveness. This assumption ignores the vast differences between Aboriginal communities, in relation to economic participation, connection to historical cultural practices, geographic location, and values.[67] The Inuit, influenced by geographic circumstance and a relatively protected continued way of life in line with historic cultural practice, would prize collectivism and community empowerment, differently from Métis culture, where independence and "individuals […] were highly regarded in society […] and their safety and dignity were, as a rule, not sacrificed for the collective."[68] Even the treatment of offences that are now approached through healing RJ practices were not collectively approached in such ways by all Aboriginal groups. Ignoring the differences that exist community-to-community and proposing a blanket form of RJ perpetuates homogenizing views of Aboriginal peoples.

For example, past practice in the treatment of serious offences, such as violent assault or murder, and even offences leading to non-bodily injury to the victim or community, such as theft, were treated by the Ojibway of Northern Manitoba with swift retribution through imposed illness, death, or psychic manipulation, with no account to community healing.[69] Banishment cases also point to differences, especially in Northern Inuit communities, in the conceptual definition of 'community healing.' The maintenance of a community and its ability to survive cooperatively were dependent on the removal of an individual whose presence could endanger the ability of the community to function and thrive collectively. Crnkovich, at the *Canadian Institute for the Administration of Justice Conference,* outlined the frustration of Inuit communities when RJ principles are implemented judicially with the assumption and lack of knowledge that sentencing circles are not, in fact, a "traditional" practice that is being re-instituted:

> In the context of Inuit culture, [there is nothing] so exact or complete as a traditional justice 'system' or traditional justice 'practice' that you can immediately identify and implement. There are well known formal and informal traditional practices of social control such as a shaming song, individuals fighting one another, challenges of strength, ostrasization, banishment, or in very rare cases, killing.[70]

V: APPROPRIATE RJ IMPLEMENTATION EXAMPLES—WHAT LESSONS CAN BE LEARNED?

A. Example of Proper Assessment of *R v Gladue* Factors at Sentencing

An upper-threshold defining example of judicial expertise in applying and considering the extensive factors outlined in *R v Gladue* during the sentencing of an Aboriginal offender is the recent Ontario Court of Justice decision by Justice Nakatsuru in *R v Armitage*[71] ("*Armitage*").

Of important note is that the decision was one of many stemming from a *Gladue* Court.[72] The presence of this court itself is a promising example of the possibilities of RJ implementation and of judicial acceptance, education, and expertise in considering the *Gladue* factors at sentencing.

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67 *LaRocque*, *supra* note 51 at 73.

68 *Ibid* at 81.

69 *Ibid*.

70 Mary Crnkovich. "The Role of the Victim in the Criminal Justice System – Circle Sentencing in Inuit Communities." Prepared for the *Canadian Institute for the Administration of Justice Conference,* Banff, Alberta, 1995.

71 *R v Armitage,* 2015 ONCJ 64 [*Armitage*].

72 *Ibid* at para 6.

Yet, *Armitage* also outlines the danger of a sweeping definition of 'success', as this will be different case-by-case. This is an important consideration to take into account when interpreting the success of RJ reform and practices; *they must be assessed as to their success in each particular case.*[73]

B. Example of Proper Resources, Established Community, and Community Engagement

Restorative Justice principles can also be used at any point *during or after* an incarceration sentence. The allowances for this through Correctional Service Canada are extensive and take into account the specific needs of Aboriginal offenders, with extensive programming targeted to their specific needs. The use of halfway healing houses by CSC should be recommended as a partial solution for RJ reform at sentencing. This necessitates funding, but could target the dual issue of a lack of community for offenders from an urban centre, and lack of volunteer and community support.

Section 81 of the *Corrections and Conditional Release Act* ("*CCRA*") allows for the transfer of an Aboriginal offender to an Aboriginal community in a non-institutional setting. Section 84 of the *CCRA* provides Aboriginal communities with the opportunity to participate in an offender's release plan following incarceration. Successful reintegration becomes part of the overall healing path for all involved: the community, the offender and the victim.

Buffalo Sage Wellness House ("BSWH") in Alberta is a representative example of what could be, and of what proper and appropriate RJ practices can achieve. BSWH offers the aid of Elders, Alcoholics Anonymous, Narcotics Anonymous, Sharing Circles, Sweat Ceremonies, support groups, drumming circles, Powwows, Round Dances, Night Lodge Ceremonies, and Sun Dance ceremonies, and picking of traditional medicines as part of the healing process for the offender, and jointly for the offender and victim or victim's family, if they are willing to partake. BSWH is a makeshift community for those who do not have one to return to. Valerie Gow of the EIFW states that the biggest challenge for expansion of such programs outside of the correctional service system, and into urban centres, is funding for such facilities. The communities, through an agreement with CSC, run four of the eight Wellness Houses under CSC programming on reserves. A further difficulty in continuing to offer restorative services is that innovation by these Aboriginal communities is stilted, as only CSC 'core' lessons are federally funded. "Lack of continuity" after leaving the program was also cited as a challenge, as Aboriginal-specific programming is limited both within reserves and in urban centres, depending on where an ex-inmate is. A recommendation is that Aboriginal peoples' efforts to develop more localized, community-based justice programs grounded in their own legal traditions need to be fostered, and federal funding and structural assistance where requested, needs to be made available.[74]

Indigenous legal traditions suffer within the legal and procedural confines of Canadian criminal law, even though the SCC has supported incorporation and validation of Aboriginal customary law in Canada by noting the continuity of Aboriginal legal traditions before and after colonial contact.[75] John Borrows, Canada Research Chair in Indigenous Law, in his report on Indigenous legal traditions in Canada for the Law Commission of Canada, argues for national recognition of Indigenous legal traditions,

73 *Ibid* at paras 67-72.

74 AJIM, *supra* note 1.

75 *R v Mitchell,* [2001] 1 SCR 911 at para 8.

and specifically, for the need to "[provide] Aboriginal peoples with the resources and political space to cultivate and refine Indigenous law according to their own aspirations and perspectives."[76]

The lack of funding and restricted political space to incorporate Indigenous legal traditions is—surprisingly—evidenced in the specialized Cree Court within the Saskatchewan Provincial Court. Though the Cree Court's ability to expand opportunities for RJ practices is greater because of community, structural, and judicial support, and though RJ concepts reflect Cree traditions in a culturally appropriate way, Borrows notes that "it does *not* represent anything close to a fully functioning Cree legal system."[77] Though similarities to Cree legal tradition are reflected in sentencing options available through Canadian law in RJ practices, some aspects remain—in actuality—incompatible with Cree legal traditions.[78] This discrepancy highlights that *even where* extensive work has been done to affirm and reflect "Aboriginal legal principles" in Canadian criminal law and sentencing practices—such as the presence of the Cree Court—without the political and financial support necessary to develop community-based justice programs reflective of (or at least not incompatible with) the community's own Indigenous legal system, good intentions will fall short. RJ practices not grounded in the appropriate Indigenous legal tradition will not satisfy the goals that RJ practices seek.

VI: WHERE IS THE DEFINITIONAL 'BOX' AS IT STANDS AND WHERE SHOULD WE STRIVE FOR IT TO BE?

The issue of lack of definition as to what RJ should accomplish, and what factors contribute to a definition of 'successful' versus 'non-successful' implementation of such practices was discussed.[79] A definition that establishes both upper and lower expectation thresholds and 'best practices,' allowing for reform and innovation possibilities, but considering the substantial challenges facing RJ practices for practical implementation, is advised as necessary in order to move past inappropriate practical implementations of RJ, which lead to its current suspended state. Many factors must be addressed before the implementation of RJ practices will consistently meet and surpass the definitional 'success' captured by the upper threshold line of this definition. If RJ practices are not consistently applied and assessed, no documentation or data of its suitability and appropriate application will be incorporated within the definition, and it will remain stationary. This points to a need for increased research and documentation, which is a further recommendation made that will strengthen the definition's utility.

The most key feature that ties into the lack of support, resources, training, and ability for volunteer motivation and retention is lack of funding.[80] The *Royal Commission on Aboriginal Peoples* ("RCAP") recommended strongly "at a *minimum*, funding for new

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76 John Borrows, *Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada* (Ottawa: Law Commission of Canada, 2006) at 6 [*Borrows*] [emphasis in original].

77 *Ibid* at 52.

78 *Ibid* at 53.

79 It is of note that a strong argument exists that any RJ measure, as an alternative to incarceration, may be considered 'successful' when measured on such an external, single-function criterion, if incarceration were a sure alternative. However, this paper rests on the argument that though this may be true, internal standards of assessment must be considered in order to improve RJ in practice, thus making the markers of success based on comparisons between and among RJ practices and implementations, not as compared singularly against the alternative of incarceration.

80 Community engagement efforts to address support services, motivation issues, and volunteer retention can also take the form of within-community engagement measures that train members to provide services.

[RJ] initiatives should be guaranteed for at least the period required."[81] Funding is key to allowing for increased research into assessing the failures of and barriers to RJ implementation at provincial and national levels, in order to address them adequately. Recent political pressure with the release of the Truth and Reconciliation Commission of Canada's ("TRC") reports and series of recommendations may be what is needed in order to meet the funding gap that has perpetuated in the 20-year wake since the release of the RCAP's recommendation. Particularly, in the Calls to Action by the TRC, the explicit call to the federal government to provide sustainable funding for "existing and new Aboriginal healing centres to address the physical, mental, emotional, and spiritual harms caused by residential schools" has a direct link to the need for federal funding to ensure healing and community lodges for use in RJ practices are present and functioning.[82] Additionally, the TRC's call upon the Federation of Law Societies of Canada to "ensure that lawyers receive appropriate cultural competency training," if implemented properly, will address, at a deep level, the continuity of judicial misapplication or ignorance of appropriate applications of RJ.[83] The last recommendation that will put explicit political pressure on addressing, through the provision of funds for continued research, is the call upon all levels of government to "provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending."[84]

The proposed definition in this paper is *only a first step* in addressing the harsh and uneven distribution of justice to Aboriginal peoples.[85] Justice needs to be informed and supported by continued research and the appropriate government funding to support this, in order to come to just and continually-improving standards of RJ for Aboriginal offenders.

Shortly after the 2015 federal election, Prime Minister Trudeau mandated that the new Minister of Justice, Jody Wilson-Raybould, review the criminal justice system with a view to include increased use of restorative justice practices and other initiatives with the intent to reduce the incarceration rate of Indigenous Canadians.[86] It is hoped that these modernization efforts will improve the efficiency and effectiveness of the criminal justice system.[87] Hopefully, this new tone in Canadian governance will address the funding gap needed to support RJ practices, which may reduce the systemic over-representation of Aboriginal peoples in the Canadian correctional and criminal justice system.

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81 RCAP, *supra* note 1 at 269 [emphasis added].

82 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, 2015) at para 21 [TRC].

83 *Ibid* at para 27.

84 *Ibid* at para 31.

85 AJIM, *supra* note 1.

86 Letter from Prime Minister of Canada Justin Trudeau to Minister of Justice Jody Wilson Raybould (15 November 2015) "Minister of Justice and Attorney General of Canada Mandate Letter" issued from the Office of the Prime Minister at para 19.

87 *Ibid* at para 20.

ARTICLE

FINDING A PLACE FOR GLACIERS WITHIN ENVIRONMENTAL LAW: AN ANALYSIS OF AMBIGUOUS LEGISLATION AND IMPRACTICAL COMMON LAW

Jennifer Cox*

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INTRODUCTION

Alberta is home to over 700 glaciers.[1] These glaciers, all found in the Rocky Mountains, are originating sources to five of Alberta's seven major river basins, including all of the rivers that run through Calgary, Edmonton, Red Deer, Medicine Hat, and Fort McMurray.[2] Many of these glaciers are also located within national and provincial parks and attract tens of thousands of visitors per year.[3] It is surprising to discover, then, that there is no legislation, either at the provincial or federal level, that explicitly regulates or protects Alberta's glaciers.

The aim of this article is three-fold. First, it explores why glaciers are of *sui generis* character and should be afforded a specific legal status unto themselves. It argues that the unique circumstances of glaciers mean that they cannot be fully contemplated under other legislation. Second, it examines the provincial, federal, and international laws that could provide guidance to the legal status of glaciers in Alberta. It concludes that neither Albertan nor Canadian law are sufficient to cover the *sui generis* nature of glaciers, and that the relevant international law has no application in Alberta. Third, it uses case studies from other jurisdictions to suggest a legal regime for Alberta's glaciers. This article concludes that, like Argentina, Chile, and Kyrgyzstan, Alberta and Canada should draft legislation on the specific matter of glaciers. Although other jurisdictions, such as British Columbia, have incorporated glaciers in their current legislation, this article argues that their approach cannot capture all of the realities of glaciers, including their role as "water towers," their intrinsic value as a public good, and their marketable value as a tourist attraction.

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1 Alberta Water Portal, "Learn: Area and Number of Glaciers in Alberta", *Alberta Water Portal,* online: <http://albertawater.com/glaciers/inventory-of-glaciers-in-the-canadian-rockies/area-and-number-of-glaciers-in-alberta> archived at <https://perma.cc/RH7X-EJZ3> [AWP: Number of Glaciers].

2 *Ibid*.

3 John J Clague, Brian Menounos & Roger Wheate, "Canadian Rockies and Coast Mountains of Canada" in Vijay P Singh, Pratap Singh & Umesh K Haritashya, eds, *Encyclopedia of Snow, Ice and Glaciers* (London: Consultant Goldhawk Information, 2012) at 108.

I. WHY HAVE A LEGAL REGIME FOR GLACIERS?

A. Alberta's Glaciers

Glaciers can be loosely defined as solid masses of snow, ice, and water that collect precipitation in the winter, but do not disappear in the summer. In Alberta, there are an estimated 741 glaciers that cover a surface area of 791.4 square kilometres.[4] Fourteen of these glaciers are between 10 and 40 square kilometers, and 378 of them are between 0.1 and 0.5 square kilometres.[5] These numbers, however, are always subject to change as glaciers around the world, including in Alberta, are constantly retreating, fragmenting, and re-forming. As such, it is impossible to ever say exactly how many glaciers exist, how much they contribute to the freshwater system, or how long it will be until they disappear completely. Due to the fluid lives of glaciers, this article assumes that glaciers are located in national parks, provincial parks, and in unprotected areas.[6]

While glaciers serve multiple purposes, this paper focuses on three major services they provide to the human population. First, they serve as "water towers"[7] that store the vast majority of the world's fresh water.[8] Second, they hold intrinsic value in their contribution to the environment and to scientific study.[9] Third, they hold economic value in terms of touristic and scientific development.[10] While there are different types of glaciers, this article focuses exclusively on the type in Alberta: alpine glaciers.

B. Threats to Glaciers

The greatest threat to Alberta's glaciers is, without a doubt, climate change. Climate change has resulted in an alarming rate of glacial melt around the world and Alberta's glaciers are no exception.[11] Between 1985 and 2005, Alberta lost 25 percent of its glaciated area. The Athabasca Glacier, one of Alberta's largest glaciers, retreats by 5 metres every year.[12]

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4 AWP: Number of Glaciers, *supra* note 1.

5 *Ibid*.

6 This is supported by the limited maps available. The only map that the author could locate was in C Simon L Ommanney, "Glaciers of North America-Glaciers of Canada: Glaciers of the Canadian Rockies" in Richard S Williams Jr & Jane G Ferrigno, eds, *Satellite Image Atlas of Glaciers of the World: US Geological Survey Professional Paper 1386-J-1* (Denver: USGS Information Services) at J204 [Ommanney].

7 Jakub Kronenberg, "Linking Ecological Economics and Political Ecology to Study Mining, Glaciers and Global Warming" (2013) 23 Environ Policy Governance 75 at 78 [Kronenberg]; Martin Beniston, Markus Stoffel & Margot Hill, "Impacts of Climate Change on Water and Natural Hazards in the Alps: Can Current Water Governance Cope with Future Challenges? Examples from the European 'ACQWA' Project" (2011) 14 Environ Sci Policy 734 at 734; Michael Butler, "Glaciers- Objects of Law and International Treaties" (2007) 3 Alpine Space-Man & Environment 19 at 27 [Butler].

8 AWP: Number of Glaciers, *supra* note 1; S Solomon et al, *Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007* (Cambridge: Cambridge University Press, 2007) at 341.

9 Kronenberg, *supra* note 7 at 78.

10 *Ibid*.

11 Alexander Gillespie, *Climate Change, Ozone Depletion and Air Pollution: Legal Commentaries with Policy and Science Considerations*, (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2006) at 117-8; Alberta Water Portal, "Learn: Climate Change Model Scenarios and Glacier Projections" *Alberta Water Portal,* online: <http://albertawater.com/glaciers/climate-model-scenarios-and-glacier-projections> archived at <https://perma.cc/HE6Q-M3UG>.

12 Alberta Water Portal, "Learn: Inventory of Glaciers in the Canadian Rockies" *Alberta Water Portal,* online: <http://albertawater.com/glaciers/inventory-of-glaciers-in-the-canadian-rockies>; The Canadian Press, "Athabasca Glacier could disappear within a generation, says manager," CBC News (25 May 2014), online: <http://www.cbc.ca/news/canada/calgary/athabasca-glacier-could-disappear-within-generation-says-manager-1.2653641> archived at <https://perma.cc/K3YJ-L58Z>.

As the glaciers melt, their ability to be "water towers" also diminishes. By 2100, scientists predict that up to 90 percent of the Rocky Mountains' current glaciers will have disappeared.[13] When these glaciers disappear, so too will a substantial amount of Alberta's water supply.

Glacial melting not only threatens freshwater supply, but it also raises the possibility of Glacial Outburst Floods ("GLOFs").[14] Although GLOFs have not yet been an issue in Alberta, they have caused wide-scale flooding in the Himalayas.[15] As climate change causes glaciers to continually melt, GLOFs could become a problem for Alberta.

Climate change is not the only threat to glaciers; development (both for mining and for tourism) also poses a large risk. Mining development in Asia and South America[16] has damaged glaciers where high alpine mining has resulted in glacial removal and degradation. Moreover, mining development that is simply *near* glaciers has been shown to lead to quicker melting and decreased water quality.[17] Although mining has not yet been a threat to Alberta's glaciers, it could be in the future. Touristic development, on the other hand, has already become an issue for Alberta's glaciers, and some environmental groups have advocated for greater protection for these glaciers in order to prevent further development.[18]

C. Glaciers and Droughts in Alberta

Alberta's glaciers hold an estimated 47 cubic kilometres of freshwater.[19] That means that the water in Alberta's glaciers could support Canada's entire domestic water use for 11 years.[20] Alberta's glaciers are a major source of freshwater for Alberta, particularly in years of drought.[21] Five of Alberta's seven major river systems originate in Alberta's glaciers and they deliver water to Calgary, Edmonton, Red Deer, Medicine Hat, and Fort McMurray.[22] Many of these rivers, including the Bow and Red Deer rivers, go through Palliser's Triangle, a notoriously dry region of Alberta, Saskatchewan, and Manitoba.[23]

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13 "Western Canada to lose 70 percent of glaciers by 2100," UBC News (6 April 2015), online: <http://news.ubc.ca/2015/04/06/western-canada-to-lose-70-per-cent-of-glaciers-by-2100/> archived at <https://perma.cc/8GQU-CLQZ>.

14 Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Leiden, the Netherlands: Martinus Nijhoff Publishers, 2005) at 280-281 [Verheyen].

15 *Ibid* at 180-3. For instance, there were major GLOFs in Nepal in 1985 and in Bhutan in 1994. Over 200 glacial lakes currently pose a threat to communities in the Himalayas. See generally Jack D Ives, Rajendra B Shrestha & Pradeep K Mool, *Formation of Glacial Lakes in the Hindu Kush-Himalayas and GLOF Risk Assessment* (Kathmandu: International Centre for Integrated Mountain Development, 2010).

16 Kronenberg, *supra* note 7 at 75-76.

17 *Ibid* at 81.

18 Canadian Parks and Wilderness Society, *Special CPAWS Report: Commercial Development Threatens Canada's National Parks* (Ottawa: Canadian Parks and Wilderness Society, 2015) [CPAWS Report].

19 Alberta Water Portal, "Learn: Glacier Volumes in Alberta", *Alberta Water Portal,* online: <http://albertawater.com/glaciers/inventory-of-glaciers-in-the-canadian-rockies/glacier-volumes-in-alberta> archived at <https://perma.cc/84MN-AD6X> [AWP: Glacier Volumes].

20 Based on a calculation of the average person consuming 329 litres per day and the current population of 35.54 million people. "Wise Water Use," *Environment Canada,* online: <https://www.ec.gc.ca/eau-water/default.asp?lang=en&n=00EEE0E6-1> archived at <https://perma.cc/4BET-D7TV>; "Population by year, province and territory", *Statistics Canada,* online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm> archived at <https://perma.cc/H32U-H9X8>.

21 Government of Alberta, *Facts about Water in Alberta* (Edmonton: Alberta Environment Information Centre, 2010) at 6 [Alberta: Water Facts].

22 AWP: Number of Glaciers, *supra* note 1; AWP: Glacier Volumes, *supra* note 19.

23 AWP: Glacier Volumes, *supra* note 19.

As climate change causes more glaciers to melt, this region will become substantially drier,[24] and issues over priority access to the remaining water supply will arise.

D. Glaciers and Legal Status

In early 2015, the National Aeronautics and Space Administration predicted that western North America, particularly the United States, would face a "mega-drought."[25] If this occurs, and if Palliser's Triangle is affected by it, then conflicts over water, whether regional or international, will follow. To imagine that glacial water would be outside this conflict is naïve. As more droughts are expected, and as Alberta's population continues to grow, several important questions need to be answered.

As glaciers retreat and their incredible water storage is used up, who gets priority to the water? What happens to the riparian rights downstream when the primary source disappears? Who can tourist companies and national parks sue when one of their main attractions disappear? What if precious minerals, such as gold or copper, are discovered underneath Alberta's glaciers? Who has rights to glaciers? Is there a right to glaciers? Can glaciers be removed and sold? If so, who gets the profits?[26] What happens to borders, provincial or international, when the glaciers that differentiate them melt?[27] Who will be liable in the case of a GLOF?

As argued below, Canada's laws do not contemplate the role of glaciers and currently cannot provide answers to many of these questions. Canada and Alberta need a legal regime to tackle these issues in order to prepare for the effects of droughts and climate change.

E. Glaciers as *sui generis*

The above questions cannot be answered merely by mapping glaciers onto the current legal regime of environmental and water rights. To do so would be to ignore the unique realities of glaciers, both in terms of their geographical specificities and their threefold importance to the public: intrinsic value, marketable value, and as a source of water.

Instead, this article argues that glaciers are of a *sui generis* nature and require their own body of law. Glaciers support intricate eco-systems that regulate stream flow, provide a historical story of the earth that is literally frozen in time, and contribute to the stable regulation of the environment.[28] There are no other geographical features in the world that share these same attributes. Simply mapping glaciers onto the current environmental or water law regime would fail to capture their complex role. This reality has become

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24 For an in-depth examination of the role of glaciers in Saskatchewan, see Laura Elizabeth Lamplugh Comeau, *Glacier Contribution to the North and South Saskatchewan Rivers* (MSc Thesis, University of Saskatchewan, Department of Geography, 2008) [unpublished].

25 Benjamin I Cook, Toby R Ault & Jason E Smerdon, "Unprecedented 21st Century Drought Risk in the American Southwest and Central Plains" (12 February 2015) *Science Advances*, online: <http://advances.sciencemag.org/content/1/1/e1400082> archived at <https://perma.cc/5KUD-MAZR>.

26 "Greenland to Sell Bottled Water from Melting Glaciers", *Time*, online: <http://content.time.com/time/video/player/0,32068,52260545001_1947480,00.html>; Kristen French, "Mining a Norwegian Glacier for Luxury Ice Cubes", (26 February 2015), *Glacier Hub* (blog), online: <http://glacierhub.org/2015/02/26/mining-a-norwegian-glacier-for-luxury-ice-cubes/> archived at <https://perma.cc/KG9X-J3LF>; "Svaice: The World's Most Wanted Icecube", *Svaice*, online: <http://www.svaice.com/>.

27 In 2007 a dispute arose between Italy and Switzerland over the retreat of a border-defining glacier. Although the dispute was amicable and quickly resolved, it demonstrated the potential for glacier-caused disputes.

28 Kronenberg, *supra* note 7 at 78. See generally Johannes Oerlemans, *Glaciers and Climate Change* (Lisse, the Netherlands: A A Balkema Publishers, 2001).

more obvious over time, and water scholars around the world have also called for the recognition of the *sui generis* nature of glaciers.[29] Moreover, there is precedence for recognizing different sources of freshwater as being *sui generis*.

Groundwater, for example, is a unique form of water storage that has been afforded its own body of law. The courts recognized groundwater's *sui generis* nature and thus came up with a specific common law system related to it.[30] The Alberta government also recognized this and explicitly added groundwater to its regulatory scheme within the *Water Act*.[31] Even though the definition of "water" in the *Water Act* includes "all water on or under the surface of the ground,"[32] "groundwater" still has its own definition.[33]

Icebergs are another example. Icebergs are large chunks of ice which have calved from Arctic or Antarctic glaciers and float in international and national waters until they melt. While there is little clarity on exactly what law applies to icebergs, there is consensus on the fact that icebergs do not fit within the current system of public international law.[34] Although there is currently no answer, it is evident that however the law settles, it will have to pull from the unique realities of icebergs, rather than from the law that already exists.[35]

With these examples in mind, the geographically unique features of glaciers bring rise to the necessity of recognizing them as a *sui generis* area of law in need of specific protection. The next section of this article explores whether the provincial, national, or international laws of Alberta are up to the task.

II. PROVINCIAL, FEDERAL, AND INTERNATIONAL LAWS ON GLACIERS

After establishing that glaciers are of *sui generis* nature, the question then turns to whether and how they are protected within the Canadian legal system. This section will examine the effect of provincial and national laws on glaciers as well as the applicability of the current common law water regime to glaciers. Three types of laws are examined herein: the provincial water regulation, provincial and federal parks statutes, and provincial and federal climate change statutes and regulations.[36] Overall, the author concludes that glaciers are outside the scope of all of these statutes and common law.

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29 Laurence Boisson de Chazournes, *Fresh Water in International Law* (Oxford: Oxford University Press, 2013) at 44-46 [De Chazournes]; Jorge Daniel Taillant, "The Human Right . . . *to Glaciers?*" (2013) 28 J Environ Law Litig 60 at 62 [Taillant].

30 For a full examination of this, see Gerard V La Forest et al, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Information Canada, 1973) [La Forest].

31 *Water Act*, RSA 2000, c W-3, s 1(v).

32 *Ibid*, s 1(fff).

33 *Ibid*, s 1(v).

34 Various approaches to icebergs have been proposed and rejected, such as recognizing them as *res nullius*, as shipwrecks, or of the common heritage of humankind. De Chazournes, *supra* note 29 at 39-44; Christopher C Joyner, "Ice-Covered Regions in International Law" (1991) 31 Nat Resour J 213 at 231-232.

35 *Ibid* at 42-44.

36 While it is possible that other statutes may have an effect on glaciers, or may be used to prosecute those who harm glaciers, these statutes were chosen for their more direct applicability. For instance, the *Water Act* was chosen because in British Columbia, glaciers are included in the water regulation statute. The provincial and national parks statutes were chosen because many of Alberta's glaciers are located within these parks. The climate change legislation was chosen because glaciers are strongly affected by climate change.

A. Statutory Law

The word "glacier" appears once in the entirety of Alberta's legislation,[37] in reference to Glacier Power Ltd within the *Dunvegan Hydro Development Act*.[38] The word "glacial," on the other hand, appears in three different regulations all referring to glacial fluvial deposits and glacial fill, and not to the glaciers themselves.[39] This means that there are no explicit laws in Alberta that clarify the law on glaciers. The question then turns to whether there are other laws in Alberta that might implicitly regulate or protect glaciers.

i. The *Water Act*

Glaciers could theoretically be within the scope of the Alberta *Water Act*.[40] Specifically, section 1(fff) of the *Water Act,* the definition of "water," could be interpreted to include glaciers.[41] This section defines "water" as meaning "all of the water on or under the surface of the ground, whether in liquid *or solid state*."[42] In simple terms, glaciers are solid forms of water. Thus, if this provision is interpreted broadly and literally, glaciers could be subject to the *Water Act*.

However, this is an unlikely interpretation of the *Water Act* for several reasons. First of all, it would require an overly broad interpretation of the word "solid." Water, in its solid form, can be both snow and ice, and glaciers are in fact a mix of snow, ice, and water. Given that the province owns all of the beds underneath waterbodies,[43] this broad interpretation of the word "solid" would mean that the province would own not only all of the water underneath the glaciers, but also under any part of Alberta that is covered in snow. Effectively, then, the Alberta government would own all of Alberta, but only during the winter months. Thus an interpretation of section 1(fff) that includes snow would lead to an absurdity that cannot hold water.

Second, even if this absurdity could be overcome, it is still unlikely that the definition of "water" would include glaciers due to the principle of *noscitur a sociis*. The principle of *noscitur a sociis* states that where a term in a provision is ambiguous, it should be interpreted in light of the rest of the statute.[44] As the rest of the *Water Act* is directed at an extensive water licensing scheme, and as the glaciers are high in the mountains and are far from cities, roads, and even most towns, and thus far from water licenses, it is unlikely that the legislature intended to include glaciers within the scope of the legislation.

Rather, it is far more likely that the word "solid" was included to make it clear that the *Water Act* applies to bodies of water regardless of whether they have frozen over the winter. This interpretation of the *Water Act* is supported by the water legislation in other provinces. Several provinces that do not have glaciers have similar or the same wording

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37 In a Canlii search of the word "glacier," 53 statutes and regulations came up. Fifty of these statues and regulations use the word to designate a geographical location, a name, or a place. Only three of these search results regulated activities in or around a glacier, but none of them have any effect in Alberta. Two come from British Columbia and the one federal regulation, the *National Parks of Canada Aircraft Access Regulations*, SOR/97-150 only prohibits take-offs and landings on particular glaciers in the Yukon and Northwest Territories.

38 *Dunvegan Hydro Development Act,* SA 2009, c D-18.

39 *Activities Designation Regulation*, Alta Reg 276/2003, s 2(1)(a); *Activities Designation Regulation,* Alta Reg 211/1996, s 2(1)(a); *Mines Safety Regulation,* Alta Reg 292/1995, s 212(2)(g). Both glacial fluvial deposits and glacial fill refer to the solid rocks and other debris that is deposited or moved by glaciers, but does not refer to the ice or water itself.

40 *Water Act*, *supra* note 31.

41 There is no case law on this provision of the *Water Act.*

42 *Water Act*, *supra* note 31, s 1(fff) [emphasis added].

43 *Ibid,* s 3(2).

44 Ruth Sullivan, *Statutory Interpretation,* 2nd ed (Toronto: Irwin Law, 2007) at 175-178.

in their legislation. For instance, Manitoba's *Water Protection Act* has almost identical language, and yet, Manitoba has no glaciers.[45] Prince Edward Island's *Environmental Protection Act*[46] refers to "frozen" bodies of water, and the Nova Scotia *Water Protection Act*[47] refers to "ice." Neither of these provinces have glaciers either. While these words differ slightly from Alberta's legislation, they effectively have the same meaning. It is unlikely, then, that Alberta would have used the same language in order to capture a completely different geographical phenomenon.

This idea receives further credence from the fact that British Columbia, the only other province whose glaciers substantially contribute to their water supply, recently changed their water legislation to explicitly include glaciers. While the previous BC *Water Act*[48] did not have any language of "solid," "frozen," or "ice," it did refer to "source of water supply" in the definition of "stream."[49] However, in the new legislation, the *Water Sustainability Act,*[50] the definition of "stream" was expanded to include glaciers.[51] While this legislation is not yet in force, it is clear that if glaciers were implicit in the *Water Act*, then their addition to the *Water Sustainability Act* would not have been necessary.[52] Following this logic, it is unlikely that Alberta's ambiguous language should be interpreted to include glaciers.

On the other hand, there are two strong arguments against this conclusion. First, the Yukon,[53] the Northwest Territories,[54] and Newfoundland and Labrador,[55] all have glaciers, and all use the language of "frozen" in their respective legislation. Unfortunately, even if one accepts that all of these jurisdictions intended to include glaciers, it does not get around the problem of *noscitur a sociis*, nor does it explain why they would use the same language as several other provinces that do not have glaciers. Moreover, many of the glaciers in the Yukon, the Northwest Territories, and Newfoundland and Labrador are arctic rather than alpine glaciers. This means that rather than contributing to the freshwater supply of the province, many of their glaciers melt or calf directly into the sea. It is more likely, then, that these provinces neither meant to include nor thought they included glaciers within the purview of their legislation.

The second point for including glaciers within the meaning of "solid" is that if the definition of "water" in the Alberta *Water Act* does not include glaciers, then 47 cubic kilometres of Alberta's water supply would not be protected or regulated by legislation. Not only does this seem to be a major oversight on the part of legislature, it seems to be a counter-productive interpretation of the provision. Despite this, the difference between the language in the *Water Act* and the realities of glaciers are so drastic that a mere read-in of glaciers into the legislation would be merely nominal. It would fail to capture the important scientific, economic, and water storage qualities of the glaciers. In fact, the extensive licensing scheme outlined in the *Water Act* would have no practical application on the glaciers to which they were extended.

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45 *Water Protection Act,* CCSM 2005, c W-65, s 1(1).

46 *Environmental Protection Act,* RSPEI 1988, c E-9, s 2(d).

47 *Water Protection Act,* SNS 2000, c 10, s 2(c).

48 *Water Act,* RSBC 1996, c 483, s 1.

49 *Ibid*.

50 Bill 18, *Water Sustainability Act,* 2nd Sess, 40th Parl, British Columbia, 2014 (assented to 29 May 2014).

51 *Ibid,* s 1(1).

52 There is no Hansard regarding the addition of this word.

53 *Waters Act,* SY 2003, c 19, s 1.

54 *Waters Act,* SNWT 2014, c 18, s 1.

55 *Water Resources Act,* SNL 2002, c W-4.01, s 2(1)(d).

After weighing the arguments for and against, it is highly unlikely that section 1(fff) of the *Water Act* does or should include glaciers within its scope. To include glaciers would not only lead to an absurdity and go against the principle of *noscitur a sociis*, it would have no practical effect on the management of Alberta's glaciers. The Alberta *Water Act,* then, does not govern glaciers.

ii. National & Provincial Parks

Since many of Alberta's glaciers can be found in parks,[56] the *Canada National Parks Act*[57] and the Alberta *Provincial Parks Act*[58] could theoretically provide clarity to the issue of the legal regime surrounding glaciers. Unfortunately, however, they provide little.

Both the *Provincial Parks Act* and the *Canada National Parks Act* have a dual mandate to maintain the enjoyment and benefits to human populations while ensuring that the landscape remains unimpaired for future generations.[59] While this dual mandate may implicitly cover glaciers, they do not explicitly mention them. Despite their silence on the issue, these statutes offer glaciers a layer of protection that they would otherwise not have. Because so many glaciers are found in national and provincial parks, mining development nearby has been a moot point. Moreover, in both statutes,[60] the parks have the power to remove recreational users who are causing harm to any part of the park, including the glaciers. However, the types of activities that occur in parks generally have only the potential to do minimal damage. At worst, someone could leave trash or drop gasoline on the glacier. These relatively minor issues are not the types of conflicts that warrant the development of a specific legal regime. As mentioned above, the major threats to glaciers are climate change and mining development, neither of which are contemplated in these statutes.

Luckily, these statutes bring one point of clarity. GLOFs are one of the major threats that melting glaciers pose to human populations. GLOFs occur when high alpine glacial meltwater lakes burst over their banks and send large volumes of water shooting down the mountain.[61] While GLOFs have not been a problem in the Rocky Mountains, they have caused a great deal of damage in the Himalayas.[62] Should a GLOF occur on a glacier within a provincial or national park, the respective level of government could be liable for any human damage that follows, particularly if the GLOF resulted from negligent maintenance of the glacier, or from failing to inform the public of the threat of a GLOF. While liability would depend on the precise situation, parks should be aware of the possibilities of GLOFs and should mitigate any potential damage that they might cause. If they fail to either identify or mitigate these GLOFs, it is likely that the parks would be liable.

Overall, neither the *Provincial Parks Act* nor the *Canada National Parks* clarify the legal regime of glaciers. While they do provide a layer of protection for the glaciers, and offer a solution for liability in the case of a GLOF, they do not answer questions of who gets priority when the glaciers melt, whether the glaciers are a public good, or whether there is a right to glaciers. In sum, these statutes are of limited use.

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56 Ommanney, *supra* note 6 at J204.
57 *Canada National Parks Act,* SC 2000, c 32 [*National*].
58 *Provincial Parks Act,* RSA 2000, c P-35 [*Provincial*].
59 *Provincial, ibid,* s 3; *National, supra* note 57, s 4(1).
60 *Provincial, ibid,* ss 17-24; *National, ibid,* ss 18-22, 32.
61 Verheyen, *supra* note 14 at 281.
62 *Ibid* at 280-291.

iii. Climate Change Legislation

One might think that federal and provincial laws on climate change might regulate or protect glaciers. Unfortunately, this is not the case. Although the effects of climate change can be readily perceived on the world's glaciers, and climate change is currently the biggest threat to glaciers, neither provincial nor federal climate change laws or regulations mention glaciers. Rather, they are directed at reducing greenhouse gas emissions.[63]

Importantly, these laws are incapable of addressing the effects of climate change on Alberta's glaciers, and thus on the changing realities of Alberta's water supply. This impotence means that the current climate change legislation in Canada falls short of providing any clarification in regards to the law around glaciers.

B. Common Law

Since statutory law provides minimal guidance, one should instead turn to the common law. In the common law, several types of rights arise in regards to water and its use. According to a CanLII search, there is no common law pertaining to rights to glaciers (*per se*) or to the application of common law water rights to glaciers. As Canada's common law came from England, and as glaciers are not a part of England's geographical landscape, this is not surprising. However, the common law can provide a lens through which to evaluate whether there is room for glaciers within the common law water rights. This section will examine common law riparian rights in the context of glaciers. It will conclude that riparian rights have no practical applicability in the context of glaciers, and thus are unlikely to be extended to glaciers.

i. Riparian Rights

Riparian rights are the rights arising out of owning land adjacent to bodies of water and riparian owners have the right to take and use water for ordinary personal use.[64] If either the quantity or quality of the water is interfered with by an upstream user, riparian proprietors can gain an injunction and obtain damages.[65]

It would be difficult to apply riparian rights to glaciers for several reasons. First, people do not live along alpine glaciers in the same way that people live along rivers and lakes. Alpine glaciers in Canada are tucked away in the mountains and are far from cities, agricultural development, and, in almost every case, roads. The ability to have traditional riparian rights is then limited. Moreover, glaciers shrink and expand every year, so a home that would be directly attached to a glacier in the summer may be crushed by that same glacier in the winter. It may be possible to claim that the national and provincial parks have riparian rights to these glaciers, but the ordinary personal use provision would not apply.

Second, it would be difficult to apply riparian rights to glaciers because of the manner that water is contained within the glacier. In standard watercourses, water is liquid and can be collected as a liquid, even in the winter. The water contained within glaciers, however, is solid year-round and would thus have to be harvested as ice and melted to be utilized.

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63 For example, see *Climate Change and Emissions Management Act*, SA 2003, c C-16.7; *Specified Gas Emitters Regulation*, Alta Reg 139/2007; *Renewable Fuels Regulation*, SOR/201-189.

64 *Keith v Corry*, (1877) 17 NBR 400; La Forest, *supra* note 30 at 224.

65 *KVP Co Ltd v McKie et al*, [1949] SCR 698, 4 DLR 497 [*KVP*]; La Forest, *ibid* at 214.

Finally, applying riparian rights to glaciers would be impractical due to the remedies available to violations of riparian rights. In a standard riparian situation, a riparian proprietor could sue someone upstream who has interfered with the quantity or quality of the water.[66] In a glacial setting, however, there are no upstream users and most of the damage that comes to glaciers arises from climate change. If there are riparian rights to glaciers, who can the riparian proprietor sue? Theoretically there could be multiple riparian users on the same glaciers, because glaciers store water in a static rather than fugitive manner, it is unlikely that any noticeable interference would occur.

It is therefore unlikely that the current common law regime of riparian rights would or could apply to glaciers as there are no glacial riparian owners, glacial water is solid rather than liquid, and the remedies provided to riparian owners are impractical when applied to glaciers.

After examining the applicable statutes and common law, it is probable that Alberta's current legal regime does not account for the realities of glaciers. Rather, there is a patchwork of laws that tangentially affect glaciers. In statutory law, neither the *Water Act,* the *Provincial Parks Act,* the *Canada National Parks Act,* nor the climate change laws provide any real guidance regarding the legal status of glaciers. Canada's common law water rights also do not give clarity as the primary common law water rights, riparian rights, do not logically apply to glaciers. In sum, glaciers are outside of Alberta's statutory and common law legal systems.

C. International Law

While Canada's domestic law is effectively silent in relation to glaciers, international law is not.[67] Specifically, the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses ("*UN Watercourses Convention*") includes glaciers within its definition of "a system of surface and groundwaters."[68] While the *UN Watercourses Convention* may concern other parts of Canada, at this time it has limited applicability to Alberta.

The *UN Watercourses Convention* was adopted in 1997 as a way to encourage better use and utilization of international watercourses.[69] It is a framework convention that lets each country apply and adjust it as deemed necessary. Most importantly, the *UN Watercourses Convention* adheres to the principle of equitable utilization.[70] Equitable utilization focuses on each State using a watercourse in a reasonable and shared manner.[71] As such, equitable utilization can mean one thing for Canada but a completely different one for India. This means that protection of international watercourses can vary drastically throughout the world.

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66 *KVP, ibid;* La Forest, *ibid.*

67 This section focuses exclusively on international law that is applicable to Canada. There are other international treaties, such as the *Alpine Convention* and the *Antarctica Treaty* that have developed more extensive legal regimes on glaciers. However, they are not relevant to the Canadian context and thus are not discussed.

68 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 12 UNTS 52106 art 2(b) (entered into force 17 August 2014) [*UN Watercourses Convention*].

69 Owen McIntyre, *Environmental Protection of International Watercourses under International Law* (Aldershot: Ashgate Publishing Inc, 2007) at 1.

70 *UN Watercourses Convention*, *supra* note 68, art 5.

71 *Ibid;* Ibrahim Kaya, *Equitable Utilization: the Law of Non-Navigational Uses of International Watercourses* (Aldershot: Ashgate Publishing Inc, 2003) at 89-91.

While the word "glacier" does not appear in the *UN Watercourses Convention* it can be found in the UN provided commentary. The commentary to Article 2(b) defines "a system of surface and groundwaters" as a hydrological system, which includes glaciers.[72] Merely being in the definition, however, does not mean that the *UN Watercourses Convention* actually applies to all glaciers. Rather, it likely only applies to glaciers that are integral to the water balance of an international watercourse.[73] An international watercourse means "a watercourse, parts of which are situated in different States."[74] According to legal scholar Laurence Boisson de Chazournes, putting these definitions together in light of the convention's prioritization of sharing means that many glaciers will be excluded from the statute.[75] For instance, glaciers that are not integral or contributing to international watercourses would not be covered under this Convention.[76]

As a result, this law has limited applicability to Alberta's glaciers. The only place where it could be applied is in the South Saskatchewan River Basin ("SSRB"), the only river basin in Alberta that both crosses into the United States and has glaciers.[77] As there is no clear map of all of the glaciers in Alberta, it is impossible to say whether any of the water in the southernmost tip of the SSRB originates in glaciers and, if it does, whether those glaciers are integral to the international watercourse. In sum, while international law has started to contemplate a legal regime for glaciers, that regime is particularly narrow and mostly inapplicable to Alberta.

III. GLACIER LAW CASE STUDIES & RECOMMENDATIONS FOR ALBERTA

Since domestic law provides minimal clarification in regards to glaciers, and the law of international watercourses has little applicability in Alberta, it follows that Alberta's laws cannot respond to the *sui generis* nature of glaciers. Given that Alberta will likely face water shortages within the next century,[78] and that glaciers are the originating source of all of the rivers that run through Alberta's major cities, it is only a matter of time until there is a conflict over Alberta's glacial waters. The real question then is whether it will be addressed by the legislature or by the courts.

This article suggests that Alberta should be proactive in drafting legislation that protects and defines glaciers, rather than waiting for the matter to go to the courts. The reason for this is threefold. First, passing legislation before a conflict occurs may help to minimize opposition to the bill. Once litigation has started there will have been, by definition, a conflict. When there is a conflict, it means that there are competing rights, and therefore more opposition to any bill. Second, passing legislation could give the public an opportunity to be consulted. No such opportunity will be granted by the courts.[79] Finally, legislation on glaciers could be comprehensive, while a court decision will likely only address the particular issue before it. For these three reasons, drafting legislation on glaciers is preferable to waiting for the courts to decide upon the issue.

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72 Commentary on United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 12 UNTS 52106 art 2(b) (entered into force 17 August 2014).

73 De Chazournes, *supra* note 29 at 44-45.

74 *UN Watercourses Convention, supra* note 68, art 2.

75 De Chazournes, *supra* note 29 at 44-45.

76 See generally Fabienne Quilleré-Majzoub & Tarek Majzoub, "A qui Profitent les Eaux de Glaciers de Montagne" (2010) 51 Les Cahiers de Droit 69.

77 Alberta: Water Facts, *supra* note 21 at 8, 14.

78 D W Schindler & W F Donahue, "An Impending Water Crisis in Canada's Western Prairie Provinces" (2006) 103:19 Proc Natl Acad Sci USA 7210 at 7212-7214.

79 Legislation could subsequently override any common law rules imposed by the courts.

Below are four case studies on the implementation, attempted or realized, of legislation on glaciers. After examining these cases studies, this article will provide suggestions for what equivalent legislation in Alberta should aim to do.

A. Glacier Protection Laws Around the World

Many countries around the world protect glaciers, either as an explicit part of their environmental protection schemes,[80] or, more recently, through specific legislation unto itself.[81] Over the past decade legislatures around the world realized that their statutes were insufficient to govern glaciers and, some reactively and some proactively, implemented or proposed legislation that explicitly protects glaciers. In the next subsections, this article will examine four case studies: Kyrgyzstan, Argentina, Chile, and Switzerland. These examples demonstrate the benefits of having a proactive legislature and the pitfalls that come from waiting for a conflict to arise.

i. Kyrgyzstan

In 1992, the Kumtor Gold Company gained approval to start an open pit gold mine in the Tian Shan Mountains. This region, and specifically the mountain on which the open pit mine operated, is covered with glaciers. For almost twenty years, Kumtor and its Canadian operator, Centerra, have successfully mined substantial amounts of gold, but at a high environmental cost. From 1994 to 2011 they removed 39 million cubic metres of glacial ice, dumped waste on the glaciers that remained, and potentially caused long-term water pollution issues in the region.[82] In addition, due to the high alpine location of the mine's tailings ponds, concerns arose over a tailings pond spill that could pollute waters all over central Asia. Despite these environmental concerns, the project was extended beyond its original 2014 end date and will now continue until at least 2023.

In 2014, the Kyrgyz Parliament passed the *Glacier Law*. This law laid out liability for glacier damage, prohibited development on glaciers, created an inventory for glaciers,[83] and was clearly aimed at projects such as Kumtor. While a translated version of the proposed Kyrgyz legislation could not be obtained, it is clear that the law would leave mining and other forms of industry liable for destruction and damage caused to glaciers at a rate to be determined by the government.[84] This uncertain liability both deters development on glaciers and gives the government an incentive to prosecute those who damage glaciers. Unfortunately, this law has never been signed by the President of Kyrgyzstan and thus

80 Peru, Colombia, Austria, Italy, and France are examples of regions that have incorporated glaciers into their other statutes. See Clare Shine & Cyrille de Klemm, *Wetlands, Water, and the Law: Using Law to Advance Wetland and Conservation and Wise Use: IUCN Environmental Policy and Law Paper No. 38* (Bonn, Germany: IUCN Environmental Law Centre, 1999).

81 See examples of Argentina, Chile, and Kyrgyzstan below.

82 Kronenberg, *supra* note 7 at 80-81. Some of the chemicals stored on the glacier have been absorbed into the glacier and may be making their way into the water supply. The effect on the water supply will not be known for many years.

83 Henry Lazenby, "Proposed Kyrgyz 'Glacier Law' Could Impact on Centerra's Kumtor Mine" (25 April 2014), *Mining Weekly,* online: <http://www.miningweekly.com/article/effects-of-proposed-kyrgyz-glacier-law-uncertain-on-centerras-kumtor-mine-2014-04-25> archived at <https://perma.cc/C8UD-Z8DT>.

84 Samantha Brletich, "Eurasian Heart of Gold: What is the Impact of Kumtor on Kyrgyzstan's Gold Mining Sector?" (22 January 2015), *Eurasia Review,* online: <http://foreignpolicynews.org/2015/01/22/eurasian-heart-gold/> archived at <https://perma.cc/23GE-KSX4>; Lazenby, *ibid.*

is not in force. Moreover, even if it were in force, it probably would be unable to stop the Kumtor project due to the arbitration clauses in the mining contract.[85] Thus, this important step in protecting Asia's glaciers has been left in legal limbo.

ii. Chile

In the early 2000's, Barrick Gold began a mining project, Pascua Lama, that takes place high in the Andes Mountains, right along the Argentine border and in close proximity to three small glaciers.[86] Shortly after the project surveying began, local and Indigenous communities learned of Barrick Gold's plan to dynamite and remove parts of the small glaciers in order to access the gold underneath.[87] These communities were outraged and set out to stop the development. In response to this public outcry, Barrick Gold changed course and decided not to remove any part of any glaciers.[88] The project has now gone ahead.[89]

This incident brought international media attention to the issue of the protection of Chilean glaciers. For the past several years, there has been substantial international pressure on the country to put in place legal safeguards for their glaciers and in particular to protect them from mining development. However, due to the country's dependence on mining, the development of this law has been slow. Since 2013, several versions of the law have been proposed and rejected.[90] In March 2015 the newest version of the legislation was proposed.[91] The new law allows for automatic protection of any area defined as a "glacier," assigns different classifications to different glaciers, and prohibits any activity that damages a glacier. This multi-layered approach provides extensive protection for glaciers within national parks (estimated to be 80-85% of Chile's glaciers), but only limited protection for all others.[92] Under the proposed legislation, a Council of Ministers would make decisions regarding glaciers outside of national parks, potentially making these decisions vulnerable to extensive lobbying.

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85 Market Wired, "Kyrgyz Parliament Passes Law on Glacier" (24 April 2014), *Market Wired,* online: <http://www.marketwired.com/press-release/kyrgyz-parliament-passes-law-on-glaciers-tsx-cg-1903001.htm> archived at <https://perma.cc/2S5T-TVWD>.

86 Kronenberg, *supra* note 7 at 83.

87 *Ibid*.

88 Barrick Gold, "Pascua-Lama Update – Questions and Answers", *Barrick Gold*, online: <http://web.archive.org/web/20071011105043/http://barrick.com/CorporateResponsibility/Issues/PascuaLama/PascuaLamabrQA/default.aspx> archived at <https://perma.cc/98ZQ-HHQ2>.

89 Barrick Gold, "Pascua-Lama FAQs", *Barrick Gold,* online: <http://www.barrick.com/operations/argentina-chile/pascua-lama/faq/default.aspx> archived at <https://perma.cc/YKJ6-P83D>. The project is currently under suspension for several reasons. One of the reasons was resolved in the Chilean Environmental Court on March 23, 2015. In 2013, local farmers had sued Barrick Gold for causing the three glaciers in question to melt faster due to dust from the mining operations. The court rejected the evidence put forward by the state scientists and instead followed the scientific evidence presented by Barrick Gold. Barrick Gold was held not responsible for damage done to the three glaciers in questions. "Science on Trial at Pascua Lama" (26 March 2015), *Glacier Hub,* online: <http://glacierhub.org/2015/03/26/chile-environmental-court-rules-on-scientific-truth/> archived at <https://perma.cc/7FM7-3HJK>.

90 Kristen French, "Will Chile Get its Five-Star Glacier Law?" (12 March 2015), *Glacier Hub,* online: <http://glacierhub.org/2015/03/12/will-chile-get-its-five-star-glacier-law/> archived at <https://perma.cc/YW3P-LXUJ>.

91 Unfortunately, no translated version of the law could be obtained. All information about the law has come from secondary sources.

92 *Ibid*.

iii. Argentina

The Argentine *National Glacier Act*[93] was the first legislation in the world dedicated to the protection of glaciers. The legislature enacted the law proactively in response to the situation in Chile and, comparatively, it came into effect without much incident. Although a first draft of the legislation was vetoed in 2008,[94] a second version of the law passed in 2010.[95] This law takes three important steps in protecting glaciers: it recognizes glaciers as a public good, creates the National Glacier Inventory, and prohibits development, specifically mining, to occur on glacial or periglacial regions.[96] Scientific and touristic development, however, are allowed on glaciers provided that they do no damage.[97] Although the mining industry in Argentina fought the legislation, they were ultimately unsuccessful and the law has been well-received.[98] The success of the Argentinian *Glacier Protection Law* should serve as an example for other countries to follow.

iv. Switzerland

Unlike the other case studies in this list, Switzerland has a long history of glacial regulation. The difference, though, is that the law is embedded in the Swiss Civil Code ("SCC") and is not about protecting glaciers but rather focuses on balancing touristic development with protection of the scenery that makes that tourism viable.[99] The SCC defines glaciers as objects with no owner, as having soil unsuitable for cultivation, and as public property for common use.[100] This definition of glaciers also includes the land immediately around the glaciers as well as the point at which the glacial waters enter streams, rivers, and lakes. Laws over individual glaciers, however, vary from canton to canton. In some cantons where land transfers occurred in the 19th or early 20th centuries, glaciers have been determined to be a part of privately owned land.[101] In contrast, courts in other cantons have ruled that glaciers have never been and could never be part of land transfers.[102] Interestingly, courts have found that transfers in any canton that were done before 1800 did not include glaciated areas because prior to that date, these areas had no useful value to landowners.[103]

Switzerland faced substantial court disputes over glaciers in the late 20th century. This occurred for two reasons. First, many cantons and municipalities brought in legislation limiting development near glaciers, despite the fact that these areas are often popular for skiing and mountaineering. Private parties and companies have challenged these laws with varied success. These private entities want rights and permits to build infrastructure, such as cable cars, onto and over the glaciated areas. While the laws on cable cars require them to be environmentally safe, at least one scholar has argued that the current environmental protections are not strong enough to protect the glaciers.[104] Despite this, touristic development continues.

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93 Argentine National Congress, Buenos Aires, 30 September 2010, *Argentine National Glacier Act: Minimum Standards Regime for the Preservation of Glaciers and the Periglacial Environment* [*ANGA*].

94 Taillant, *supra* note 29 at 62.

95 "Medio Ambiente", *InfoLeg*, online: <http://www.infoleg.gov.ar/infolegInternet/anexos/170000-174999/174117/norma.htm> archived at <https://perma.cc/C9KF-SG6C>.

96 *ANGA*, *supra* note 93, arts 3, 6.

97 *Ibid*, art 7.

98 Taillant, *supra* note 29 at 75-78.

99 Other European countries, such as France and Austria, have similar provisions in their legislation, *supra* note 79.

100 *Swiss Civil Code*, art 664.

101 One such example of a privately owned glacier is the Rhone Glacier which was determined to be owned by the Seiler family in 1936. Butler, *supra* note 7 at 19.

102 *Ibid*.

103 *Ibid* at 20.

104 *Ibid* at 25.

Second, due to the rise in popularity of alpine tourism, there have been more glacier-related accidents. For instance, there was an extended court battle over the 1965 glacier tragedy in Mattmark. The tragedy occurred in August 1965 when the tongue of the Allain Glacier calved from the mountain and fell directly on top of a construction project being built underneath it, killing 88 people instantly.[105] In addition to infrastructure hazards, the courts have also ruled on proper alpine technique. They have come up with several rules of negligence for glacier and mountaineer guides, such as roping in on a glacier when the route is partially or completely covered in snow.[106]

While Switzerland's glacier laws may be imperfect, they are quite extensive. Unlike Kyrgyzstan, Chile, and Argentina, Switzerland has used the law to carve out a complex balancing scheme where glaciers' economic value, intrinsic value, and "water tower" value are all contemplated, albeit with a particular emphasis on economic development. This legal regime stands in stark contrast to Alberta's limited laws.

B. Summary Recommendations for Alberta

These case studies provide several lessons for any legislation in Alberta that would protect its glaciers. First, any Albertan legislation would need to consider the potential mining development that might occur around glaciers. While mining development near glaciers is a problem in other parts of the world, such as in Chile and Kyrgyzstan, so far, it has not been an issue in Alberta. However, as the price of oil diminishes and new types of mining become more important, protective legislation will become more necessary. The case studies of Chile and Kyrgyzstan demonstrate that it is easier to pass this legislation before any mining takes place, not after. Thus, Alberta should be proactive in establishing these protections.

Second, the case studies of Argentina and Switzerland demonstrate the importance of balancing touristic development and scientific research with glacier protection and safety. This is an important issue for Alberta, as glacier tourism has increased over the past few decades, particularly on the Athabasca Glacier.[107] While Argentina has taken the approach that any touristic development cannot compromise the health of the glacier, Switzerland has developed a rigorous regulatory scheme for glacial tourism. Alberta should emulate these approaches in order to make sure that any future development does not jeopardize the glaciers. Like with mining development, however, any action here will be mostly proactive, rather than reactive.

Third, Alberta should follow the lead of Argentina, Chile, and Kyrgyzstan and begin drafting legislation that recognizes and is directed at the *sui generis* nature of glaciers. This is vital. Merely incorporating glaciers into other existing legislation, such as British Columbia has done, fails to recognize the multitude of purposes that glaciers serve.[108]

Fourth, like in Chile, different levels of protection should be afforded to glaciers depending on their location inside or outside of parks. These layers of protection will make sure that while most glaciers are protected extensively, economic development outside the parks will continue. Within this multi-layered approach, there should be a base layer of protection for areas identified as glaciated.

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105 *Ibid* at 20-21.

106 *Ibid* at 21.

107 CPAWS Report, *supra* note 18; Brewster Travel Canada, "Glacier Skywalk", online: <http://www.brewster.ca/activities-in-the-rockies/brewster-attractions/glacier-skywalk/#/0> archived at <https://perma.cc/3XTS-D3YA>.

108 Given that many of Alberta's glaciers are on federal land, the federal government would need to pass a companion law. Without this collaboration, any law that Alberta enacts would only apply to a portion of its glaciers.

Fifth, and most controversially, a right to glaciers needs to be contemplated. This could be dealt with either by simply calling glaciers a "public good," or by developing a more elaborate rights scheme. The more elaborate scheme could contemplate downstream priority to the water, whether chunks of glaciers could be removed and sold, and whether Albertans have a higher priority than other Canadians to the water in the glaciers.

Contemplating a right to glaciers could also force the government to consider how they will address future water shortages caused by climate change. As glaciers retreat further each year, it means that eventually they will be unable to provide the same amounts of water to the freshwater system as they currently do. This will exacerbate droughts and could likely make Alberta a drier province overall. By contemplating a right to glaciers, the government could pre-empt this retreat of the water supply and could potentially better conserve water flow. As climate change is the biggest threat facing glaciers, action on the right to glaciers should happen as soon as possible.

Finally, and most importantly, Alberta should not wait for a conflict to occur, be it over water ownership or over mining development. Not only do conflicts mean that the bill would be more controversial, it would also take longer. The Albertan and Canadian parliaments should start moving towards this legislation at a time when the political costs are low. Many of Alberta's glaciers are located within parks so the push-back from the mining community can be expected to be minimal. Moreover, this could improve Canada's poor environmental reputation. If Alberta and Canada wait, they may face greater pressures as climate change pushes these issues to the forefront of political discussion.

CONCLUSION

This article attempts to answer two questions. First, is there currently a legal regime for glaciers in Alberta? Second, if not, what should an effective regime look like? The answer to the first question is almost certainly no. The *Water Act,* the *Provincial Parks Act,* the *Canada National Parks Act,* and climate change laws do not provide any real guidance regarding the legal status of glaciers. The definition of "water" in the *Water Act* is too ambiguous and broad to include glaciers. The provincial and federal parks acts provide a general layer of protection for glaciers within their boundaries, but say nothing in relation to glaciers specifically. Provincial and federal climate change acts and regulations are silent on glaciers and instead focus on the reduction of greenhouse gas emissions. Canada's common law water riparian rights do not logically apply to the reality of glaciers, and thus add nothing to the legal regime. International law could theoretically provide guidance through its principle of equitable utilization, but this principle is legally inapplicable to the glaciers of Alberta. In conclusion, there is no current legal regime on glaciers in Alberta.

Alberta should look to create legislation that is aimed directly at glaciers and that encompasses their threefold purposes. In designing such legislation, Alberta should look to the mistakes and successes of the laws in South America, Europe, and Asia. Is there a right to glaciers? Who gets priority to the water in glaciers? Who is liable when there is damage to glaciers? These questions are particularly important as Alberta looks towards a future with far fewer glaciers, and thus with far less water in the freshwater system. Proactive legislation would protect this unique economic and environmental resource for Albertans and Canadian for decades to come.

ARTICLE

TIDAL ENERGY LAW IN CANADA: HINDERING AN UNTAPPED POTENTIAL FOR INTERNATIONAL PRIMACY

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INTRODUCTION

In recent years, countries around the world have been making significant strides toward building or renewing their energy infrastructures based on clear renewable portfolio standards ("RPS"), in which they set targets for renewable energy production within a given timeframe.[1] Early in the spring of 2015, for example, Costa Rica made news for having powered its entire country off of renewable energy alone for three full months.[2] Every morning, Icelanders turn on their lights without emitting an ounce of carbon into the atmosphere, thanks to the country's strong geothermal and hydro energy grid.[3] When it comes to riding the wave of renewable energy, Canada is no exception: the country produces almost 60 percent of its total energy from renewable sources, primarily hydropower.[4]

Despite such promising numbers, however, drastic discrepancies exist among provinces. On one hand, Quebecers enjoy over 90 percent of their electricity from renewable sources.[5] On the other, Nunavummiut[6] depend wholly on diesel-fueled generators to power their lives, while the territory's system does not benefit from a single input of renewable energy.[7] As renewable energy sources are geographically specific, Canada has struggled to diversify its infrastructure, depending primarily on hydropower installations developed from the 1950s to the 1970s to meet its renewable energy targets.

The Prairie provinces, the Maritime provinces, and the Arctic territories are among the jurisdictions with the lowest amount of renewables in their energy mix.[8] Yet, a tremendous untapped resource—42,000 megawatts (MW), enough to provide over 70 percent of Canada's present annual electricity consumption,[9] to be precise—exists just offshore of the maritime and arctic regions. That untapped resource is tidal energy.

I. PURPOSE & FOCUS

With tidal energy's potential to provide so much of Canada's energy, it is important to question why a valuable and promising resource is being ignored in favour of conventional energy development.[10] Political will, financial capabilities, regulatory difficulties, and

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1 For more on renewable portfolio standards in Japan and the United States, see e.g. Walter Musial & Bonnie Ram, "Large-Scale Offshore Wind Power in the United States: Assessment of Opportunities and Barriers" (2010) National Renewable Energy Laboratory at 27.

2 Using generally a combination of hydropower, geothermal, solar power, and wind power. Lindsay Fendt, "The truth behind Costa Rica's renewable energy", *The Guardian* (30 Mar 2015), online: <http://www.theguardian.com/commentisfree/2015/mar/30/truth-behind-costa-rica-renewable-energy-reservoirs-climate-change> archived at <https://perma.cc/E55S-M3WA>.

3 Cheryl Katz, "Iceland Seeks to Cash In On Its Abundant Renewable Energy" (3 October 2013), *Yale Environment 360*, online: <http://e360.yale.edu/feature/iceland_seeks_to_cash_in_on_its_abundant_renewable_energy/2697/> archived at <https://perma.cc/DS3Q-T55T>.

4 Energy and Mines Ministers' Conference, "Canada – A Global Leader in Renewable Energy: Enhancing Collaboration on Renewable Energy Technologies" (2013) Energy and Mines Ministers' Conference.

5 *Ibid*.

6 People of Nunavut.

7 Government of Nunavut, "Ikummatiit: Government of Nunavut Energy Strategy" (2007) Government of Nunavut.

8 Carol Ní Ghiollarnáth, *Renewable Energy Tax Incentives and WTO Law: Irreconcilably Incompatible?* (Nijmegen, NL: Wolf Legal Publishers, 2011).

9 Michael Tarbotton & Max Larson, "Canada Ocean Energy Atlas (Phase 1): Potential Tidal Current Energy Resources" (2006) Triton Consultants for Canadian Hydraulics Centre at 30.

10 Referring specifically to the continuing focus of energy development in Alberta's oilsands, in offshore oil & gas in the Atlantic Ocean, and in developing capabilities for drilling in the Arctic, broadly.

infrastructural gaps all contribute to the dearth of Canadian investment in tidal energy development. This paper explores the worldwide evolution of law, policy, and regulation surrounding tidal energy with the goal of clarifying a Canadian role in the industry. Furthermore, this paper identifies best practices for sustainable development of tidal energy in Canada, and aims to foster a debate around the role tidal energy can play in an international push toward carbon-free energy generation.

This paper begins with an overview of the various modes of ocean energy generation, and will underline the significance of in-stream tidal technology for this research. It will then provide an argument for the adoption of tidal energy at relevant and strategic sites in Canada. In doing so, this paper touches on the dynamics of energy law, examines the pros and cons of regulatory policy, and compares innovative models of financing. It also identifies potential difficulties regarding tidal energy implementation. This paper takes a historical and analytical approach to question strategic infrastructural and transmission development throughout the nation. A clear link is drawn between tidal energy development and obligations for increases in renewable energy, and invites readers to view this discussion from a holistic approach.

Finally, this paper identifies a framework for Canadian tidal energy development, including focus regions, regulatory overhaul, and investment strategies, with a specific focus on in-stream tidal power, which is a developing technology that is rapidly approaching commercial viability. Specific mention will be given to the importance and viability of developing tidal energy in Nunavut and Nova Scotia.

II. BACKGROUND ON OCEAN ENERGY

A. A Short Primer on Ocean Energy

Harnessing power from the ocean predates industrialization. As early as the 11th century, English farmers operated primitive tidal mills that generated churning energy from the rise and fall of the sea.[11] This technology slowly moved into Western Europe some seven centuries later.[12] Meanwhile, the Portuguese have experimented with tidal gates to provide energy to communities by operating dam-like structures on their coasts since the 15th century. Yet, during the last two hundred years of industrialization, ocean power's popularity drastically fell, as fossil fuels flourished and became regarded as the engine for growth. Non-renewable inputs fueled electrical development, infrastructural upheaval, and societal change in our homes, vehicles, and products, shaping the world as we know it.

The world continued developing on the back of oil and gas until the 1973 OPEC oil embargo, when prices of oil tripled overnight, sending economies worldwide into crisis. It was this shock to the system that reframed the mindset of vulnerable nations, and helped motivate renewed interest in alternative energy sources. Just as states went back to the windmill (in the form of wind energy), governments began reinvesting in ocean energy projects, albeit to a lesser extent.

Ocean energy encompasses a vast array of electrification technologies, with the umbrella term referring to energy produced by waves, tides, salinity gradients, and ocean thermal

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11 Brian Polagye, Brie Van Cleve, Andrea Copping, & Keith Kirkendall, eds, *Environmental Effects of Tidal Energy Development: Proceedings of a Scientific Workshop, Seattle, 2010* (Seattle: National Oceanic and Atmospheric Administration: National Marine Fisheries Service, 2011).

12 Matter Network, "Why Tidal Power is Europe's Best Near-Term Ocean Energy Technology" *World Environment Magazine & TV*, online: <http://www.worldenvironment.tv/green-news/86-energy/579-why-tidal-power-is-europes-best-near-term-ocean-energy-technology> archived at <https://perma.cc/LWE9-BZYF>.

convection units. Each of these technologies are evolving and commercializing at their specific paces. This paper focuses solely on the harnessing of tides for energy, as the most relevant technology to the Canadian context. Elsewhere, wave energy is nearing commercial operation in Portugal, salinity gradients are being tested in Norway, and ocean thermal convection units are being commercialized in the Philippines.[13] Each of these methods and technologies suffer similar barriers to development, and tidal energy is no exception. Thus, the results obtained from this paper's analysis will prove equally cogent to international analysis of ocean energy development.

B. Benefits of In-Stream Tidal

Tidal energy was one of the first forms of ocean energy brought into the grid over the course of the 20th century. In 1967, the La Rance tidal barrage was erected on the Rance River, in Brittany, France.[14] It produces up to 240 MW of power in a structure similar to that of a hydroelectric dam.[15] Canadians followed this lead in 1980, with the construction of the Annapolis Royal tidal barrage in Digby Neck, Nova Scotia, an installation that presently generates 20 MW of power for the province's grid.[16] Six tidal barrages currently operate throughout the world, with the largest located in South Korea.[17] However, tidal barrages have been found to have significant deleterious environmental impacts on local ecosystems. They also require very particular geographical locations for successful operation. Although potential exists for their development, tidal barrages are generally not seen as the most effective way of harnessing the ocean's tides for energy.[18]

Tidal lagoons are a variation of the barrages, and employ tidal fences to shuttle water in and out of man-made ponds by using the changing sea levels as two-way electricity generation.[19] This technology is still in development, although it is suggested that lagoons will have fewer environmental impacts than barrage systems.[20] Lagoons, however, are not the preferred technology of analysis for this paper as the bays and harbors necessary for its implementation are not present in Canada. Tidal lagoons show their greatest promise in and around the United Kingdom, where strong currents from the Gulf Stream provide powerful tides into select bays on that island.[21]

In-stream tidal technology, the focus for this paper, can take many shapes and sizes. Examples include tidal fences, vertical axis turbines, horizontal axis turbines, and

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13 Richard L Ottinger, *Renewable Energy Law & Development: Case Study Analysis* (Northhampton, MA: Edward Elgar, 2013) at 65.

14 Ernst & Young Global Cleantech Center, "Rising tide: Global trends in the emerging ocean energy market" (2013), Ernst & Young, online: <http://ey.com/cleantech> archived at <https://perma.cc/VP7E-MTXX>.

15 *Ibid*.

16 *Ibid*; OEER Association, "Fundy Tidal Energy Strategic Environmental Assessment: Final Report" (2008) OEER Fundy Tidal Energy for Nova Scotia Department of Energy at 14; Marine Renewables Canada, "Marine Renewable Energy in Canada & the Global Context: State of the Sector Report – 2013" Marine Renewables Canada at 28.

17 "Hydropower Explained: Tidal Power" (2016), *US Energy Information Association*, online: <http://www.eia.gov/energyexplained/index.cfm?page=hydropower_tidal>. archived at <https://perma.cc/3FPS-3TGZ>.

18 *Ibid*.

19 Vicki James, *Marine Renewable Energy: A Global Review of the Extent of Marine Renewable Energy Developments, the Developing Technologies and Possible Conservation Implications for Cetaceans* (Chippenham, UK: Whale and Dolphin Conservation, 2013) V1 at 12.

20 Linus Mofor, Jarrett Goldsmith & Fliss Jones, "Ocean Energy: Technology Readiness, Patents, Deployment Status and Outlook" (2014) International Renewable Energy Agency at 43.

21 Kolliatsas et al, *Offshore Renewable Energy: Accelerating the Deployment of Offshore Wind, Tidal and Wave Technologies* (New York: Earthscan, 2012) at 280.

oscillating hydrofoils.[22] The two most common variations include one with a closed-hub design (resembling a wheel hub) and another "water turbine," that resembles an inverted wind turbine.

Although still in the product development stage, in-stream tidal turbines have tremendous potential for electricity generation and commercialization. As water is 800 times denser than air, the energy potential in tides is exponentially greater than wind.[23] However, this has also caused great technological challenges for how to design tidal blades to resist breaking under the force of tidal currents.[24] While this challenge has resulted in making the tidal blades more expensive to build, tidal turbines capture the most energy per square foot of structure than any other ocean energy technology, thus greatly lessening their impact on the environment.[25] Two tidal turbines are currently in testing and operation in Scotland and South Korea.[26]

Tidal turbines hold considerable advantages over other forms of ocean and offshore energy. Generally located on the ocean floor, tidal turbines allow for multiple compatible uses of the ocean environment in their vicinity. Most other iterations of ocean energy are not well-suited for this arrangement, and require their own designated space. Compared to other kinds of offshore energy, tidal turbines are not visible from the mainland, mitigating NIMBY[27] concerns. Moreover, turbines—when commercially viable—will be most economical by having numerous turbine installations within close proximity of each other in "farm" environments. Even within such an environment, the ecological impact of turbine "farms" is predicted to be significantly less than that of fences, barrages, or lagoons, and will also allow for free passage of marine life and low tides.[28]

C. Siting and Geography

Tides are a natural phenomenon that can be harvested in ways similar to other existing renewable energy sources, such as solar, wind, hydro, or geothermal. Despite being intermittent, tidal energy is the most dependable form of renewable energy.[29] Based on the position of the moon, astronomers can predict how high tides will be on a given hour and day years in advance, and thus can allow tidal energy operators to schedule output according to forecasted energy demand.[30]

However, tidal energy requires very specific conditions for production. Tidal difference must be at least seven meters between high and low tide, an unusual condition that is unique to only a few places on the planet.[31] Although many states have shown interest

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22 OEER, *supra* note 16 at 13.

23 Ron R Luoma, "Capturing the Ocean's Energy" (1 December 2008), *Yale Environment 360*, online: <http://e360.yale.edu/feature/capturing_the_oceans_energy/2093/> archived at <https://perma.cc/543D-9RQW>.

24 Richard S Stein & Joseph Powers, *The Energy Problem* (Singapore: World Scientific, 2011) at 125.

25 US Energy Information Association, *supra* note 17.

26 *Ibid*. While another had been in testing in Nova Scotia, it could not withstand the strength of the Bay of Fundy's powerful tides. For more, see Jane Taber, "Project seeks to harness – and harvest – the force of Fundy", *The Globe and Mail* (16 Nov 2014), online: <http://www.theglobeandmail.com/news/national/project-seeks-to-harness-and-harvest-the-force-of-fundy/article21609715/> archived at <https://perma.cc/NV84-K9WW>.

27 Not in My Backyard. A term in environmental management of development, refers to the want to benefit from positive infrastructural projects, yet resisting siting in one's vicinity.

28 US Energy Information Association, *supra* note 17.

29 Tidal energy produces power dependably in 6-12 hour increments all year long.

30 Markian MW Melnyk & Robert M Andersen, *Offshore Power: Building Renewable Energy Projects in US Waters* (Tulsa, OK: PennWell, 2009).

31 Charlotte Helston, "Tidal Power" (2012), Energy BC – Profiles, online: <http://www.energybc.ca/profiles/tidal.html> archived at <https://perma.cc/G7KC-VER3>.

in tidal energy development, the geographic potential is greatest in Canada, France, England, and Russia.[32] Canada alone possesses 191 unique sites for potential generation, subject to accessibility and feasibility.[33] In addition to a large differential range, potential tidal energy production sites are generally found in channels with swift moving water that maximizes system input.[34] The best acknowledged sites for tidal energy development in Canada are in the Bay of Fundy (Nova Scotia), the Ungava and Hudson Straits (Quebec, Newfoundland and Labrador, and Nunavut), and the Georgia and Johnstone Straits (British Columbia).[35] Many also acknowledge the St. Lawrence River (Quebec), the west coast of Vancouver Island (British Columbia), and Frobisher Bay (Nunavut) as primary, albeit smaller, sites for development.[36]

Table 1: Canada Potential Tidal Current Energy by Province

Province	Potential Tidal Current Energy (MW)	Number of Sites (-)	Average Size (MW)
Northwest Territories	35	4	9
British Columbia	4,015	89	45
Quebec	4,288	16	268
Nunavut	30,567	34	899
New Brunswick	636	14	45
PEI	33	4	8
Nova Scotia	2,122	15	141
Newfoundland	544	15	36
TOTAL	**42,240**	**191**	**221**

Source: Michael Tarbotton & Max Larson, "Canada Ocean Energy Atlas (Phase 1): Potential Tidal Current Energy Resources" (2006) Triton Consultants for Canadian Hydraulics Centre at 15.

Besides ocean siting concerns, tidal developers need to consider the challenges of getting their energy to market. Although the example of the offshore wind industry has leveled the learning curve for tidal developers, bringing voltage onto land remains a serious challenge. In the United Kingdom, for instance, tidal energy projects are hampered by their remoteness and the inability of rural grids to handle extensive energy inputs from the sea. In the United States, the opposite is true: here, direct-link tidal sites near large urban centers have the potential to relieve congestion along overused transmission lines into cities.[37]

Finally, underwater geology is vital to correct siting of tidal energy projects, due to the ocean floor's dramatic impact on tide generation.[38] Unfortunately, little is known of the seabed geology and marine ecology of potential tidal development sites. Numerical and graphic modeling of tidal currents, river flows, and wave effect is required in order to properly test potential sites for development.[39]

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32 US Energy Information Association, *supra* note 17.

33 Kolliatsas et al, *supra* note 21 at 232.

34 Stein & Powers, *supra* note 24 at 124.

35 Tarbotton & Larson, *supra* note 9.

36 National Research Council Canada, "Archived – Oceans of Energy" (2008), *Government of Canada*, online: <http://nrccnrc.gc.ca> archived at <https://perma.cc/E8ZX-S6H2>.

37 Kolliatsas et al, *supra* note 21 at 326.

38 Melnyk & Andersen, *supra* note 30 at 39.

39 National Research Council Canada, *supra* note 36.

D. Technology Take-Aways

Although in-stream tidal energy is not yet commercially viable, it is less than a decade away from being ready for implementation.[40] A strong focus on research and development of wind technology brought offshore wind farms into the world's energy mix approximately twenty-five years after serious investment began in commercializing the product, time not currently afforded to tidal energy production. With our world's climate changing faster than ever, societal demands for alternative energy sources are continuing to increase. Nova Scotia has set some of the world's most stringent renewable energy standards in order to achieve 40 percent clean energy by 2020, which accounts for a jump from just 6 percent in 2005.[41]

Deployment of tidal energy brings about not only environmental benefits, but social and economic ones as well. Just as Quebec became a world leader in hydropower technology through its network development in the second half of the twentieth century, Canada's oceanfront provinces and territories have the potential to become early adopters of tidal technology and the opportunity to seize first-mover advantage in positioning an export market in the long term.[42]

However, the industry needs assistance. Despite rapid and promising technological progress, serious barriers to commercialization of tidal energy remain. Through a focus on global case studies, the following sections will analyze the financial, legal, regulatory, and infrastructural impediments to tidal energy development. Using Canada as a background setting, best practices will also be identified for legislative and policy reform.

III. ECONOMICS OF TIDAL POWER

When wind energy became an evolving input into the electricity grid in the early 1980s, it sold for a pricey 80 cents per kilowatt-hour (kWh). Utilities nevertheless incorporated this source of energy into their mix, whether willingly or through governmental mandate. Today, the most efficient wind turbines generate electricity for only 3-4 cents per kWh, approximately the same cost as hydroelectric dams, the most economical source of renewable energy.[43]

Nova Scotia is the first jurisdiction to offer producers a set price for tidal power, pricing the inputs at 78 cents per kWh in the scheme of its Community Feed-In Tariff (ComFIT) program. Nova Scotia's price is seen as offering a pricey premium for this technology, with central estimates for tidal energy hovering closer to 24-30 cents per kWh.[44] Nonetheless, the point being that the cost of producing tidal energy via clean, sustainable means is generally quite high. However, one only needs to look at producers' experience with wind energy development to clearly identify the cost reduction potential in a relatively short twenty-five year period. In less than three decades, as mentioned above, wind energy costs per kilowatt-hour have declined from an initial cost of over 55 cents per kWh to less than 5 cents per kWh, due in large part to technological development, grid integration, and economies of scale.[45] Tidal energy generators are likely to go through the same costing curve, with similar input factors (grid connectivity

40 Ernst & Young, *supra* note 14.

41 NS Reg 25/2010, c 25; Energy and Mines Ministers' Conference, *supra* note 4 at 10.

42 Marine Renewables Canada, *supra* note 16.

43 Helston, *supra* note 31.

44 Melnyk & Andersen, *supra* note 30.

45 See, as reference, Levi Tillemann, "Revolution Now: The Future Arrives for Four Clean Energy Technologies" (2013) US Department of Energy; Navigant Consulting Inc, "Offshore Wind Market and Economic Analysis: Annual Market Assessment" (22 February 2013), *US Department of Energy*, online: <http://www.navigant.com> at 50.

and technological development) and economic realities (scale and financing) likely to support decreasing costs. For instance, the Electric Power Research Institute projects that a 100 MW tidal energy farm (approximately 80-100 turbines) could generate power at a cost of 6-9 cents per kWh, bringing it within the competitive pricing fold of other renewable energy technologies.[46]

Whereas conventional and land-based renewables may be connected directly into the existing grid infrastructure and benefit from publicly financed rights of way, tidal energy producers must account for the expensive interconnection and transmission infrastructure required to get their power to market.[47] As will be further discussed, these capital costs need to be integrated into the public funding structure if a state wishes tidal to be a successful renewable resource input in the near future.

IV. PROJECT FINANCING

Financing offshore renewables involves a large amount of capital investment, which is not always easy to come by.[48] In the past twenty years, small private companies that largely rely on outside investment, as opposed to internal research and development funds, have mostly driven tidal technology development.[49] Yet the compounded immaturity of the industry, uncertainty over project viability, and the large amount of technical and performance risks has soured the investment market.[50]

Unlike the case of wind energy, where significant amounts of government funding were put into technology development in the 1970s, tidal energy has broadly been a privately financed endeavor. No standard model currently exists for project financing, which has required promoters of the technology to "reinvent the wheel" for every project financing strategy designed.[51] To date, venture capitalists and hedge funds—higher risk investors—have shown great reluctance towards entering the tidal energy market, citing the lack of governmental support and instability of long-term policy commitments.[52]

In order to manage investment risk, developers must be careful in site selection. In a clear catch-22, investors are reluctant to finance development at higher-yield energy sites, due to the unforeseen risk of trying to harness the strongest tides in the world.[53] As such, tidal projects are left selecting sub-optimal sites for energy and technological development in order to attract capital to their projects. This is a considerable research burden for an industry whose technology is still relatively nascent.

Where large tidal projects do happen, they require significant financial intervention from governments.[54] However, this requires drawing a delicate balance between industrial support and backing a particular technology among emerging designs.[55] Since governments do not want to be seen "picking winners," general financial instruments, such as feed-in tariffs, tax credits, tradable certificates, incentive payments and

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46 Matter Network, *supra* note 12.

47 Ernst & Young, *supra* note 14.

48 Kolliatsas et al, *supra* note 21 at 88.

49 Some exceptions, such as Siemens, do exist. Some private enterprises work in private-public partnership settings.

50 Kolliatsas et al, *supra* note 21 at 95.

51 As does exist with offshore wind development, see e.g. Kolliatsas et al, *supra* note 21.

52 *Ibid* at 195.

53 For more information on the 2009 breakdown of a testing turbine in the Minas Passage, please refer to Taber, *supra* note 26.

54 Kolliatsas et al, *supra* note 21 at 90.

55 *Ibid* at 106.

capital grants, have become the norm in the industry.[56] These are generally driven by broad governmental renewable energy directives, and subject to broad discretion and politicization, which can often leave potential investors with a reluctance to finance such projects. While similar financial investment for solar and wind energy have been largely successful through such programs, the increased risk in tidal energy development has detracted investors from applying the same system to investments in this industry.

Financing of comprehensive research budgets for tidal energy development, however, is one area where governments have been successful. The United States, the United Kingdom, Japan, and Canada round out the top spenders in research and development of tidal energy technologies.[57] As previously stated, most enterprises operating in this field are smaller companies that are unable to finance development through other revenue sources. As such, public-private partnerships have proven vital to growing the industry. Firms receiving public research and development support have been successful in leveraging this funding to attract investment from the private sector.[58] Yet, failed endeavors have dampened the entrepreneurial drive in this field. Too little support has kept numerous designs and technologies from ever being driven or tested in ocean environments.

V. ENERGY LAW & POLICY

Building on the financial means of private enterprise in the provision of tidal power, governmental law and policy with regards to renewable energy development largely determines the fate of successful enterprises in designing, testing, and anticipating risks inherent to their technologies. One of private developers' leading concerns is the lack of overall knowledge of the seabed, as well as hydrokinetic currents existent in the ecosystem.[59] As oceanographer Paul Snelgrove stated, "We know more about the surface of the Moon and about Mars than we do about [the deep sea floor]."[60]

Governments must therefore invest in conducting research in this area. The United States Department of Energy ("DOE") has spent more than $100 million USD to research marine hydrokinetics, providing developers a good knowledge base to help them site their projects, while lessening the risk of unknown siting effects.[61] In Canada, the National Research Council-led Canada Ocean Energy Atlas, which has worked toward modeling potential tidal current energy reserves throughout the country, has achieved similar results.[62] Drawing inspiration from the comprehensive Canadian Wind Energy Atlas, an initial tidal survey project was completed in 2006. Private developers have used its results to draw further investment to research and development in the sector.[63] However, unlike the Wind Atlas, no follow-up studies have been funded, leaving the Ocean Atlas as only a dream for the industry. Of key need are comprehensive resource assessments of targeted development regions, as well as interactive features allowing a variety of actors to make use of the tool.[64] Such a project is far too comprehensive and

56 *Ibid* at 54.

57 *Ibid* at 57.

58 Inspired from Abbie Badcock-Broe et el, "Wave and Tidal Energy Market Deployment Strategy for Europe" (2014) Strategic Institute for Ocean Energy.

59 See generally, OEER, *supra* note 16.

60 "Sea Quotes: Ocean Exploration", *Sea and Sky*, online: <http://www.seasky.org/quotes/sea-quotes-ocean-exploration.html> archived at <https://perma.cc/2MHW-6UPM>.

61 Bryan Cronan, "How ocean current could power half the homes in Florida" (4 December 2014), *Christian Science Monitor*, online: <http://www.csmonitor.com/Technology/Pioneers/2014/1204/How-ocean-current-could-power-half-the-homes-in-Florida> archived at <https://perma.cc/9WNZ-2SFQ>.

62 Tarbotton & Larson, *supra* note 9.

63 National Research Council Canada, *supra* note 36.

64 *Ibid*.

expensive for an industrial actor to undertake without further support and, as such, falls squarely on the responsibility of governmental energy policy.

Governmental energy policy with respect to tidal projects can dramatically change the feasibility of the industry in the early stages of development. While financing is a known barrier to entry, regulatory issues affect producers from the very beginning, in approving testing sites for devices.[65] One of the best-known tidal energy projects in the world, Verdant Power's East River project, is located between Manhattan and Queens in a narrow channel in the heart of New York City. In applying for testing sites, Verdant underwent over six years of regulatory hurdles in order to have two test turbines approved.[66] Five years into their application, Verdant's CEO, Gilbert Sterling, made the challenges obvious: "As new companies, we cannot compete with traditional energy. Our ability to survive without revenue is limited."[67]

Thus, the importance of pre-approved testing sites for development of new technologies becomes clear. As key cornerstones of comprehensive energy policy, governments need to invest in testing centers pre-permitted for the outlay of devices in ocean environments, so as to allow for their deployment as soon as technologically feasible.[68] The United States has taken the lead in the development of these sites by opening two at the University of Hawaii Honolulu and Oregon State University.[69] Canada followed suit with the opening of the Fundy Ocean Research Centre for Energy ("FORCE") in Parrsboro, Nova Scotia in 2006. However, Canada still lacks comprehensive testing facilities in its Pacific and Arctic environments, where key distinctions underlay the utility of tidal technology in these basins.[70]

VI. REGULATORY APPROACHES

Regulating the development of tidal energy systems has been one of the most contentious debates surrounding the deployment of the technology. Governmental regulation affects all aspects of tidal energy expansion, from the mode of energy capture, to transmission abilities, to financing the project, and finally, to building and installing the actual technology. As previously discussed, burdensome regimes can frustrate stakeholders and impede development, hindering a state's ability to reach renewable portfolio targets within its given timeframe. Stable and appropriate regulatory regimes are key for conscientious, wise, and strategic development of tidal power resources.

States take various approaches to regulating tidal energy, yet one thing is certain: stable regulatory regimes are essential for tidal development. Being a new technology, tidal energy has a steep commercialization curve, and is vulnerable to rafts of new permitting hurdles in attaining commercialization. States, broadly speaking, take very precautionary approaches to tidal development, putting the burden on proponents to prove the safety and environmental consciousness of their product.[71]

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65 Governmental regulatory approaches will be further discussed in the next section. For now, we discuss regulation in terms of barriers to product testing.

66 Luoma, *supra* note 23.

67 Kolliatsas et al, *supra* note 21 at 125.

68 Pre-permitted testing sites are those whose national, provincial, and local regulatory bodies have all given approval for a broad base of products to be tested in a given environment. They allow industry to bypass cumbersome regulatory hurdles in gaining approval for device testing.

69 Melnyk & Andersen, *supra* note 30 at 390.

70 In the Arctic realm, for instance, tidal turbines must be constructed to withstand the planet's fiercest temperature gradients and environmental conditions.

71 This is commonly referred to as the precautionary principle in law. For more, see "Definition of the Precautionary Principle", *The Canadian Chamber of Commerce*, online: <http://chamber.ca> archived at <https://perma.cc/SA7T-ZWHA>.

In large part, states have done little to create distinct regulatory regimes for tidal energy deployment.[72] Governments, such as the United States, rely on established permitting processes for granting development licenses, leasing ocean plots, and evaluating technological strength. Unfortunately, the regulatory regimes in place for other energy sources are simply not compatible with the needs of tidal energy systems. Particular issues identified by the International Energy Agency are the lack of clear permitting pathways, an overreliance on bespoken permitting processes, overly detailed design requirements, a lack of regulatory capacity and expertise, and unclear environmental impact assessment criteria. Together, these joint factors cause uncertainty, unpredictability, and a lack of coherence throughout the regulatory system.

In Canada, for instance, a proponent looking for regulatory approval to install a tidal turbine must hypothetically gain approval through dozens of pieces of legislation, including, but not limited to, the *Fisheries Act*,[73] the *Canadian Environmental Assessment Act*,[74] the *Species at Risk Act*,[75] the *Migratory Birds Convention Act*,[76] the *Navigable Waters Protection Act*,[77] the *National Energy Board Act*,[78] the *Oceans Act*,[79] the *Canada Environmental Protection Act*,[80] the *Shipping Act*,[81] and the *Canada Labour Code*.[82] In doing so, a company would likely interact with Natural Resources Canada, Fisheries and Oceans Canada, Environment Canada, the Canadian Environmental Assessment Agency, and Transport Canada at the federal level.[83] At the provincial level, they would

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72 The key exception here is the United Kingdom, whose model regulatory structure will be studied in this section.

73 *Fisheries Act*, RSC 1985, c F-14, online: <http://www.dfo-mpo.gc.ca/habi- tat/role/141/1415/14151-eng.htm> archived at <https://perma.cc/N8WG-96W2>. The *Fisheries Act* is binding to all levels of government in Canada, applying to all inland waters, territorial seas, and fishing zones on the country's three coasts. Sections 32 & 35-37 are of particular relevance.

74 *Canadian Environmental Assessment Act*, SC 1992, c 37, online: <http://laws-lois.justice.gc.ca/eng/acts/C-15.2/> archived at <https://perma.cc/V763-U27K>. Applicable to the EAs of any project involving decision-making, regulated under federal legislation, obtaining federal funding, on federal land, or under federal jurisdiction. Section 5 is particularly of importance.

75 *Species At Risk Act*, SC 2002, c 29 [*SARA*] online: <http://www.ec.gc. ca/alef-ewe/default.asp?lang=en&n=ED2FFC37-1> archived at <https://perma.cc/6BEC-XWUR>. Protects species at risk on federal lands, territorial seas, and inland waters. Sections 32-33, 58, & 73 may be invoked.

76 *Migratory Birds Convention Act*, 1994, SC 1994, c 22, online: <http://www.ec.gc. ca/nature/default.asp?lang=En&n=7CEBB77D-1> archived at <https://perma.cc/MY7B-XLB5>. Similar to *SARA*, designed to protect migratory birds (whose flight patterns naturally cross jurisdictional borders).

77 *Navigable Waters Protection Act*, RS 1985, c N-22, online: <http://laws-lois.justice.gc.ca/eng/acts/N-22/> archived at <https://perma.cc/YNQ9-6V5H>. Requires permitting for any building project undertaken in waters which are navigable, which includes the Bay of Fundy and the Hudson Strait(s). Section 5 is of relevance to tidal energy projects.

78 *National Energy Board Act*, RS, c N-6, online: <http://laws-lois.justice.gc.ca/eng/acts/n-7/FullText.html> archived at <https://perma.cc/RM34-K2UY>. Important in electricity generation and export contexts, as applies to any project crossing a provincial or territorial border. Section 58 is important for purposes of cross-border permitting.

79 *Oceans Act*, SC 1996, c 31, online: <http://laws-lois.justice.gc.ca/eng/acts/O-2.4/> archived at <https://perma.cc/84E5-LHKY>. Applicable to both the Bay of Fundy and Hudson Strait(s) projects, as internal waters within national territorial zones.

80 *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, online: <http://laws-lois.justice.gc.ca/PDF/C-15.31.pdf> archived at <https://perma.cc/6U8W-E8M7>. Designed to protect both human health and the environment, nationally. Codifies precautionary principle into Canadian law (discussed below) while outlining public participation requirements.

81 *Canada Shipping Act, 2001*, SC 2001, c 26, online: <http://laws-lois.justice.gc.ca/PDF/C-10.15.pdf> archived at <https://perma.cc/A9QC-S7X6>.

82 *Canada Labour Code,* RSC 1985, c L-2, online: <http://laws-lois.justice.gc.ca/PDF/L-2.pdf> archived at <https://perma.cc/3KZ9-T39K>.

83 Nova Scotia Department of Energy, "Marine Renewable Energy Legislation for Nova Scotia" *Province of Nova Scotia*, online: <gov.ns.ca/energy> archived at <https://perma.cc/8EX9-PHUA> at 13; Elisa Obermann, "The Regulatory Regime for Tidal Energy" Acadia Tidal Energy Institute, Acadia University at 67.

likely further seek approval from departments of energy, environment, natural resources, fisheries/aquaculture, Aboriginal affairs, and labour.[84] Once approved through each of these distinct channels, a company must seek the green light from local municipalities,[85] Indigenous groups,[86] and displaced stakeholders.[87]

One can see how these processes may lack a coordinated permitting approach, and result in untimely delays in the development process. Although these permitting requirements are standard for all energy development, one must keep in mind the uncertain nature of tidal energy deployment, the unpredictable outcomes, and the unforeseeable results. As much as impact assessments and studies attempt to define the potential consequences of turbine deployment, they are not always correct, especially given the lack of professional capacity within regulatory agencies.[88] Moreover, developers seldom know which legislation they need to comply with, resulting from regulatory uncertainty and lack of precedent.[89]

A. Developments Towards a Unique Approach

International actors have begun to work around these developmental challenges, in gaining support from governments for more streamlined and efficient permitting systems. In the United States, the Federal Energy Regulatory Commission and the Mineral Management Service signed a comprehensive Memorandum of Understanding ("MOU") in 2009, dividing regulatory tasks between them in distinct areas of renewable energy development.[90] Since then, the United States government has been signing MOUs with individual coastal states, each deferring some responsibility over traditional constitutional jurisdiction in order to streamline the tidal energy permitting process.[91]

The United Kingdom possesses the most robust regulatory and licensing scheme for tidal energy. In part aided by its unitary state structure, United Kingdom developers must approach a single authority for seabed leases,[92] and another for all permitting requirements, the Marine Management Organization (England) or Marine Scotland (Scotland).[93] The approval processes were streamlined through the Marine Bill for projects of less than 100 MW capacity.[94] This simplified permitting system is known in the industry as the Rochdale Envelope, referring to the egregious lead times experienced

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84 Herein using the example of Nova Scotia, see *ibid*. Although jurisdiction over indigenous affairs in Canadian constitution is vested with the federal government, administered through the latter's Department of Indigenous and Northern Affairs, the province of Nova Scotia maintains an Office of Aboriginal Affairs for the implementation of the unique Mi'kmaq-Nova Scotia-Canada Tripartite Forum and the Made-in-Nova Scotia Process. For more information, see *Nova Scotia Office of Aboriginal Affairs*, online: <http://novascotia.ca/abor/> archived at <https://perma.cc/5LNX-HQZY>.

85 By virtue of their jurisdiction over zoning and relevant onshore facilities.

86 *Mi'kmaq - Nova Scotia - Canada Framework Agreement*, 23 Feb 2007, online: <http://www.aadnc-aandc.gc.ca/eng/1100100031915/1100100031916> archived at <https://perma.cc/ML5K-3PSM>.

87 Information throughout this paragraph drawn from Meinhard Doelle et al, "Tidal Energy: Governance Options for NS" (2006) Dalhousie Law School: Marine & Environmental Law Institute.

88 Nicole C McDonald & Joshua M Pearce, "Renewable Energy Policies and Programs in Nunavut: Perspectives from the Federal and Territorial Governments" (2012) 65:4 Arctic 465.

89 Mofor, *supra* note 20 at 43.

90 Federal Energy Regulatory Commission will now control permitting on all tidal and wave current projects, while Mineral Management Service will license solar and offshore wind projects. Each will consult with the other where expertise requires.

91 Maine Department of Environmental Protection, "Information Sheet: Regulation of Tidal and Wave Energy Projects" (2010) Maine DEP.

92 Marine Renewables Canada, *supra* note 16.

93 *Ibid*.

94 Kolliatsas et al, *supra* note 21 at 380.

by offshore wind developers in the early days of that British industry.[95] Serious permitting delays between first project application and actual construction were so long, that by the time of approval, firms had to re-apply for agency consent as their technology had changed significantly in the interim, invalidating the original permit.[96] The Rochdale Envelope is an agglomeration of various permitting requirements brought together under the mantra of United Kingdom planning law.

B. Canadian Structure

The Canadian structure, as briefly discussed above, is more complicated than that of the United Kingdom, and more resembles the United States' approach to regulation. Unlike other natural resources extracted in the country, there is currently no specific regulatory scheme for tidal renewable energy in Canada.[97] Due to provinces' constitutional obligations, regulation with respect to the seabed must be undertaken at that level.[98] The federal government is then obliged to regulate due to its jurisdiction over fishing and navigation rights.[99]

Attempting to emulate the United Kingdom's success, Nova Scotia has been studying methods to develop an efficient and certain legal framework and regulatory process for assessing tidal energy projects.[100] Short of an improved seabed-licensing regime signed in 2011,[101] the federal government has had little buy in to this comprehensive legislation.[102] One development made news in 2014: the changing definition of the word "Province" in the framework legislation.[103] Although seemingly trivial, this small change could be significant in bringing certainty for developers by delineating jurisdictional project lines based on the wording used by the Canada-Nova Scotia Offshore Petroleum Board ("CNSOPB").[104] For a province with a strong history of provincial-federal cooperation through the CNSOPB, Nova Scotia's joint legislation could set forth a framework for inter-jurisdictional cooperation in regulatory permitting for tidal energy in Canada. Given this lack of framework in any other province, its establishment in Nova Scotia would be a clear step forward in clarifying permitting processes for tidal projects in the country.

It is conceded that changes to energy development requirements need a certain political will in order to move forward. Thus far, that political will has been most clearly exhibited in the United Kingdom, Germany, and Belgium, but remains absent in Canada.[105] However, existing processes may also be utilized to simplify the current regulatory structure. Strategic environmental assessments ("SEAs") are one way in which

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95 Badcock-Broe et al, *supra* note 58.

96 *Ibid*.

97 Obermann, *supra* note 83.

98 *Constitution Act, 1867,* (UK) 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, App II, No 5.

99 *Ibid,* s 92.

100 Obermann, *supra* note 83.

101 The Land Use Operational Policy for Ocean Energy Projects, see Marine Renewables Canada, *supra* note 16 at 72.

102 Marine Renewables Canada, *supra* note 16.

103 Matthew Clarke & Sara Mahaney, "Legal Alert: NS Keeps Ball Rolling with New Tidal Energy Regulations" (2014), *McInnes Cooper*, online: <http://www.mcinnescooper.com/> archived at <https://perma.cc/2TFS-QHKH>.

104 "The Canada-Nova Scotia Offshore Petroleum Board (CNSOPB) is the independent joint agency of the Governments of Canada and Nova Scotia responsible for the regulation of petroleum activities in the Nova Scotia Offshore Area. It was established in 1990 pursuant to the Canada-Nova Scotia Offshore Petroleum Accord Implementation Acts (Accord Acts)." For more, see *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, RSC 1985, c 28.

105 Kolliatsas et al, *supra* note 21 at 68.

governments can better understand and prepare for energy developments in a calculated manner. A SEA evaluates the potential environmental effects of a policy, plan, or program over a development jurisdiction before actual siting, so as to identify and predict effects relevant to the planning and design process.[106] Through public debate, regional forums, and advance conversation, SEAs invite stakeholder participation prior to project commitment, allowing governmental entities to plan around potential roadblocks in developing energy projects.[107]

The Offshore Energy Research Association conducted a comprehensive SEA of the Bay of Fundy in 2011 on behalf of Nova Scotia Power, yielding 29 recommendations for the utility and government. Among them is the need to develop comprehensive tidal energy legislation, as previously discussed. Another of importance to regulators is the need to create marine spatial plans for tidal energy development.[108] Employing detailed and distinct resource assessments, such as the Ocean Energy Atlas identified previously, lawmakers are able to incorporate ocean energy development in regional planning, instead of doing so on an ad hoc basis. Leading this field are Germany, Sweden, and the Netherlands, with national marine spatial plans already in place.[109] In order to attain this level of regulatory ability and efficiency, Canadian institutions will have to invest in developing the detailed regional assessments called for by the survey report of the Ocean Energy Atlas.[110]

Finally, regulatory regimes, even with the implemented set of remedies described above, still impede development of new technologies, as a result of the precautionary approaches taken.[111] Clearly for the better, our environment is now more strongly protected in large part due to the rigorous assessment processes that are required of development projects and natural resource based industries. Yet, by the same token, innovation is stymied in a regulatory environment by which companies struggle to test their technologies due to cumbersome legislative barriers. For this reason, states have implemented test centers, designed to minimize the burdens associated with obtaining testing and study permits. The implementation of these pre-consented sites has been a success in the United States, Ireland, and Canada.[112]

Prototype testing in Canada has been undertaken at the $70 million CAD FORCE center in Nova Scotia.[113] This public private partnership invites technology developers from throughout the world to test their product in the Minas Passage, the "Holy Grail" of world tides.[114] Although projects here have failed,[115] their impact on the local environment has been scientifically negligible.[116] Despite its relative youth,[117] the Center

106 Obermann, *supra* note 83.

107 OEER, *supra* note 16.

108 Mofor, *supra* note 20.

109 *Ibid*. Canada has one marine spatial plan on its coastline, commissioned by UNESCO, the Eastern Scotian Shelf Integrated Management Plan. However, this plan does not touch on any potential zones for tidal energy generation, nor does it consider many other uses of the sea besides fisheries.

110 This is not an easy task, as it will require years of inexistent surveys to be done, new science to be recorded, and public meetings to be held.

111 Chamber.ca, *supra* note 71.

112 Mofor, *supra* note 20 at 42.

113 Fundy Ocean Research Centre for Energy, as described in OEER, *supra* note 16.

114 Tides in this part of the Bay of Fundy rise to 16 meters, a full 9 meters above the required 7 for ability to generate.

115 See Taber, *supra* note 26.

116 Natural Resources Canada, "Tidal Energy Project in the Bay of Fundy", *Renewable Energy and Clean Energy Systems Demonstration Projects*, online: <http://www.nrcan.gc.ca/energy/funding/current-funding-programs/cef/4955> archived at <https://perma.cc/QM8D-859K>.

117 The center was established in 2009.

has proven a valuable contributor to lessening regulatory burdens on testing innovative technology. What remains, however, is a clear opportunity for Canadians to establish further testing centers and pre-permitted regions. As previously discussed, the variety of factors affecting tidal energy viability and efficiency remains largely undiscovered.[118] Canada, with its diversity of ecoregions and environmental conditions, has the unique opportunity to become a world leader in providing test sites for novel turbine technology aimed at use throughout the world.

VII. INFRASTRUCTURE AND TRANSMISSION

The regulatory issues studied are wide in ambit, yet broadly political in achievement. Most important to the tidal energy industry is the ability to streamline processes of application, gain a holistic scientific understanding of the ocean environment to be dealt with, and enable technology testing through public-private partnerships. Whereas certain of these initiatives will require governmental expenditure of resources, they are broadly net-even in outcome, given the tremendous savings that would incur as a result of streamlined regulations, survey savings, and less burdensome testing processes.

This section, on the contrary, points out the need for substantial government intervention across a much wider and more applied spectrum. As previously discussed, and as is conventional in energy resource development, projects are typically sited close to grid infrastructure, so as to reduce capital costs in building transmission infrastructure to get energy to market.[119] A developer can anticipate marginal costs in ensuring connectivity, funding substations, and locating ideal positions resulting from siting near waterways, wind-prone regions, or on south-facing slopes.[120] However, conventional and typical renewable energy developers seldom are faced with the significant costs of building transmission infrastructure from their generation facilities to far-off grids. This truism is unfortunately not the case for tidal energy producers.

Governments in Canada have a long history of significant investment in transmission capacity. Beginning with the hydroelectric projects of the 1950s, successive provincial and federal governments funded thousands of kilometers of transmission cables to bring electrical current from distant dams to the homes and industry of southern Canada. Quebec, Ontario, and Manitoba's provincial systems are most noted for their significant infrastructural development, financed on the backs of state utilities. That trend continues today, with the great Maritime Link undersea cable connecting Lower Churchill and Muskrat Falls in Labrador to mainland Nova Scotia, at an estimated cost of over $1.3 billion CAD over thousands of kilometers. This project, financed by rate payers through Nova Scotia Power, promises decades of clean energy to Nova Scotians, while opening up the export potential of Labrador energy to the Northeastern United States.[121]

Governments have not taken the same approach to offshore energy development and project-based undersea transmission. Tidal energy developers shoulder one hundred percent of the cost of their projects' transmission infrastructure. This instantly drives up project cost, especially in the early stages of development, as turbines are only added upon completion of construction, and thus dependent on all other facets of the project being completed on time.[122] Building new transmission capacity—especially undersea—is an

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118 Melnyk & Andersen, *supra* note 30 at 31.

119 Ernst & Young, *supra* note 14.

120 The last two being being industry choices in relation to wind and solar power, respectively.

121 Emera Newfoundland & Labrador, "The Maritime Link Project", *Emera NL*, online: <http://emeranl.com> archived at <https://perma.cc/F8HT-CMDV>.

122 The tidal turbine global supply chain is not significant enough at this moment for products to be ordered on demand. Long wait lists exist for products approaching commercial viability.

enormously expensive and time-consuming undertaking. What is more, tidal projects are often located in remote regions, where the existing grid is not robust enough to support substantial inputs of energy, such as those that would be generated from tidal projects.[123] As such, project proponents must ensure utility agreement and undertaking to shore up systems in order to be able to input the energy they produce into the existing grid.

Inherent issues arise in connecting offshore sites to a land-based transmission network, including loss of energy associated with grid length, dealing with unstable undersea soil conditions, and permitting for onshore receptors and substations.[124] Yet, global examples point to the ability to overcome these barriers to estimate a strong, viable system of offshore energy generation. Denmark's ability to shore up its national grid to receive substantial inputs from offshore wind projects is the prime example.[125] Domestically, Canada is a world leader in economical, efficient, and remote transmission infrastructure maintenance, with 231,966 kilometers of transmission lines nationwide.[126]

Building transmission capacity in the Bay of Fundy, on the one hand, would only require a 50-kilometer connection to the mainland grid.[127] This small connection is fractional in length to the world's longest undersea electrical cable, a 580-kilometer export link between Norway and the Netherlands (NorNed),[128] or Iceland's proposed 1000-kilometer export cable tied to northern Scotland.[129] Canada's work in progress, the Maritime Link, will constitute a 180-kilometer undersea cable linking Newfoundland to Nova Scotia.[130] The political reticence in funding a 50-kilometer transmission cable is a clear example of the vivid structural issues existent in the development of tidal power in Eastern Canada.

Whereas investment in transmission infrastructure is key to tidal energy development on Canada's Atlantic and Pacific coasts, it is even more primordial for harnessing Arctic tidal power. As discussed in the introduction, Canada's greatest tidal energy potential lies hidden in our remote northern waters.[131] This resource, albeit far-off, is not out of developmental question. Tidal resources in Hudson Strait all lay within 120 kilometers of land,[132] while strong tidal currents line the western edge of Hudson Bay, available for transmission through extensions of infrastructure from hydroelectric developments in northern Manitoba.[133] Further, with the growing interest in offshore oil and gas exploration in Arctic waters, strategic governmental energy policy has the potential to

123 Natural Resources Canada, "About Renewable Energy" (18 December 2015), *Energy Sources and Distribution: Renewables*, online: <http://www.nrcan.gc.ca/energy/renewable-electricity/7295> archived at <https://perma.cc/F997-UC46>.

124 TOBIN Consulting Engineers, "The Grid West Project: Lead Consultant's Stage 1 Report" (2014) TOBIN.

125 Kolliatsas et al, *supra* note 21 at 329.

126 Sébastien Rioux, Jean-Pierre L Savard & Alyssa A Gerrick, "Avian mortalities due to transmission line collisions: a review of current estimates and field methods with an emphasis on applications to the Canadian electric network" 8 Avian Conserv Ecol 7.

127 Canadian Encyclopedia, "Bay of Fundy and Gulf of Maine", *Historica Canada*, online: <http://www.thecanadianencyclopedia.ca/en/article/bay-of-fundy-and-gulf-of-maine> archived at <https://perma.cc/T2RT-NCRR>.

128 Carlo Laszlo, "The world's longest underwater electricity cable", *NYNAS*, online: <http://www.nynas.com/Segment/Transformer-oils/Case-stories/The-worlds-longest-underwater-electricity-cable/> archived at <https://perma.cc/59WE-28LC>.

129 At a cost of $2.1 billion USD: Katz, *supra* note 3.

130 Emera, *supra* note 121.

131 For further detail, please see Table 1, above.

132 IP Martini, *Canadian Inland Seas* (UK: Elsevier, 2011) at 238.

133 A Northern Vision, "Paths to a Renewable North: A Pan-Territorial Renewable Energy Inventory" (2011) Governments of Yukon, the Northwest Territories, and Nunavut at 46.

jointly develop infrastructure for extractive industry sites while connecting tidal farms to a cohesive national grid.[134]

Although Arctic infrastructure development has long been the bane of Canadian northern pride,[135] current development projects point to the ability to develop efficient and effective infrastructural needs when necessary. The Mary River mine, operated by Baffinland, is the prime example of this Arctic ingenuity, with the first railroad, long distance road, and deep sea port all being constructed to support a single driver of economic development.[136] Mary River is far from a conventional mine, just as the harnessing of tidal energy is distinct from the production of conventional sources of energy. Whereas the political and economic will is clearly present at Mary River's extractive site, it is still absent from the renewable sites of Hudson Bay and the Hudson Strait. With a changing reality in the Arctic, infrastructural development is imperative to the energy development of the region.

Cautious optimism will be key to carefully and strategically developing tidal energy in northern waters. The use of tidal turbines will be limited to those capable of withstanding seasonal ice changes and frigid water temperatures. Developing resilient infrastructure and undersea cables capable of withstanding the pressure of sea ice will determine the efficacy of these developments. Investment from the public sector will be key to finding private financing for tidal projects in the world's most powerful undersea currents.

It is without question that the market for tidal energy is existent. The energy potential of Nunavut alone could change the face of renewable energy in Canada.[137] Moreover, with the Arctic Council currently taking up issues of oil and gas governance regimes, timing could not be better to integrate viable tidal energy debate into the discussion.[138] Tidal energy projects have the potential to create a new and sustainable northern economy. Central to this will be the ability of governmental energy policy to promote focus areas for tidal energy development, while financing transmission trunk lines into these regions. This strategic foundation will need to be supported by cost sharing across the entirety of utility consumers, and not solely developers of tidal energy projects.

VIII. TIDAL ENERGY, ENVIRONMENT, & CLIMATE CHANGE

Tidal turbines, just as any other commercial energy projects, must undergo rigorous standards testing, environmental impact assessments, and public consultation prior to their approval. As discussed in the financing and regulatory sections of this paper, these steps are meant to mitigate environmental and social impact of technology deployment, while maintaining a strict set of standards across the industry. This section does not purport to re-enter the technical discussion of certification processes or licensing schemes, but rather, calls for a holistic approach to tidal energy development, taking into consideration its relatively minor environmental impacts, the innovative and novel nature of the technology, and its place in national energy plans. Discussing the tribulations of tidal energy project standards, Melnyk and Andersen put it best: "Given

134 Bernard Funston, "Arctic Energy" (2009) Arctic Council: Sustainable Development Working Group.

135 Author's opinion.

136 "Location and Project History", *Baffinland*, online: <http://www.baffinland.com/the-project/location-and-project-history/?lang=en> archived at <https://perma.cc/J96M-GWDC>.

137 Governments of Yukon, the Northwest Territories, and Nunavut, *supra* note 133 at 57.

138 The Arctic Council is "a high level intergovernmental forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic Indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic." "About the Arctic Council", *Arctic Council*, online: <http://www.arctic-council.org/index.php/en/about-us/arctic-council/about-arctic-council> archived at <https://perma.cc/T27V-XUHF>.

that renewable energy is, overall, the most environmentally sound source of energy, it is ironic that the various environmental laws are so significant a hurdle for developers of offshore renewable energy projects."[139]

A. Precautionary Principle

In Canada, the "various environmental laws" to which Melnyk and Andersen refer include the *Canadian Environmental Protection Act*, the *Oceans Act*, and the *Species at Risk Act*, to name just a few.[140] These laws all have a common thread, in that they call for a precautionary approach to environmental management within their preambles. Not uncommon across the Western world, the precautionary principle is a principle arising out of the international law. In jurisdictions where it has been adopted, the legal principle shifts the burden of proof onto a project's proponent, requiring them to prove that their actions will not cause harm to something that has yet to be proven.[141] Widely regarded as customary international law, the Supreme Court of Canada formally adopted the precautionary principle in the Canadian common law in *Spraytech v Hudson* ("*Spraytech*").[142]

Judicial interpretation of the precautionary principle in Canada was recently clarified in *Morton v Canada (Fisheries and Oceans),* in which the Federal Court supported "erring on the side of caution" in situations where full scientific certainty could not be provided as to the potential environmental harm caused by an industrial action.[143] In short, this means that lax regulation cannot be excused by incomplete technical knowledge, and governments must show restraint in allowing development, while prioritizing environmental protection.[144] In the fourteen years since *Spraytech*, Canadian courts have recognized the precautionary principle as one moving from mere public policy, to an important element of statutory interpretation drawn from substantive domestic law and customary international law.[145]

The precautionary principle is a valuable one in environmental law, and has undoubtedly made huge strides in our legal understanding of environmental risk mitigation. This paper does not seek to mitigate its utility or legitimacy in any way. Rather, it seeks to draw attention to the inherent difficulties that tidal energy developers have in overcoming burdens of proofs with regards to the precautionary principle in administrative permitting process. Little is known about the effects that large tidal farms might have on the underwater ecosystem in general.[146] On the whole, turbines are expected to slightly modify their ecosystems through inputs of ambient electricity in transmission, through vibration from the construction and operation of generation facilities,[147] through potential collision risk of fish stock and marine mammals,[148] and through the alteration of existing

139 Melnyk & Andersen, *supra* note 30 at 168.

140 More are listed and discussed in the section on Regulatory Approaches.

141 Environmental Law Centre – University of Victoria, "The Precautionary Principle in Canada" (2010), *ELC Associates Program*, online: <http://www.elc.uvic.ca/associates/documents/Jun14.10-Precautionary-Principle-Backgrounder.pdf> archived at <https://perma.cc/V69X-BTNW>.

142 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at paras 31-32.

143 *Morton v Canada (Fisheries and Oceans),* 2015 FC 575 [*Morton*].

144 Dianne Saxe, "Precautionary principle stronger part of Canadian law" (31 August 2015), *Siskinds: The Law Firm*, online: <http://envirolaw.com/precautionary-principle-stronger-part-of-canadian-law/> archived at <https://perma.cc/Z3DL-EM4G>.

145 *Morton, supra* note 143 at para 43.

146 Luoma, *supra* note 23.

147 US Office of Indian Energy and Economic Development, "Hydrokinetic Energy Facility Construction Impacts", *Tribal Energy and Environmental Information Clearinghouse: Environmental resources for tribal energy development*, online: <http://teeic.indianaffairs.gov/er/hydrokinetic/impact/construct/index.htm> archived at <https://perma.cc/LVW7-W7BD>.

148 Although certain authors say this is grossly overplayed. See e.g. Mofor, *supra* note 20.

marine currents and wave regimes. Yet little of this is proven, and initial studies show far less impact than expected on the marine environment.[149] Conventional uses of the ocean environment, such as shipping, fisheries, and oil and gas development, have far greater environmental impacts than tidal energy development. However, these impacts are more certain, assessed, and comprise a socially (or politically) accepted risk in development.

The inherent issue in tidal energy regulation is that the potential risk factors, despite being increasingly understood and accepted, are not being integrated into legal change at the regulatory and licensing stages of analysis. In order to promote a strong and viable tidal energy market, the removal of excessive legal environmental barriers for innovative technology is necessary. Just as SEAs promote sustainable development through planning of the marine environment, [150] and RPSs allow states to designate the development of tidal power as vital to meeting renewable energy goals,[151] these high level designations do little to ease the burden on developers during impact assessment processes. Individual tidal projects should thus not be seen in silos. Tidal turbines, and their related environmental impacts, should be considered amongst higher-level environmental goals, such as energy security policy, meeting compulsory greenhouse gas reduction targets,[152] diversifying provincial energy mix, and mitigating impact to the seabed while promoting diversified uses of the ocean environment.

B. Climate Change

In helping change the environmental assessment scheme for tidal energy, legislators will better position the industry and their provinces for entry into growing regional and international movements to combat climate change. The sale and purchase of carbon credits, conventionally known as a cap and trade system, is growing internationally. Called for in the United Nations Framework Convention on Climate Change, carbon credits were concretized in the Kyoto Protocol.[153] However, rather than evolving at a global level, as originally forecasted, carbon trading schemes developed regionally through provincial, national, and trans-border agreements.[154] Recently, the Western Climate Initiative, of which California and Quebec are the largest drivers and proponents, added on another signatory in the province of Ontario.[155] Canada's largest potential tidal producers have not yet commit themselves to these agreements.[156]

However, with Canada's ascension to the Paris climate accords, it is time for serious thought about entry into a carbon trading system or implementation of a carbon tax for Canada's tidal jurisdictions. The Maritime provinces, the Arctic region, and the West Coast would benefit from their investment and development of tidal energy in any

149 Obermann, *supra* note 83.

150 Strategic Environmental Assessments are discussed above.

151 Renewable portfolio standards are discussed in the introduction to this paper.

152 As would have been the case had Canada still been a part of the Kyoto Protocol at time of writing (2015-2016). This statement is made in the expectation that the Paris Conference of December 2015 drew renewed interest from the Canadian government for involvement in these international commitments.

153 *UN Report of the United Conference on Environment and Development,* Rio de Janeiro, 3-14 June 1992, Annex I, "Rio Declaration on Environment and Development", UN Doc A/CONF 151/26 (Vol I) (1992) [Rio Declaration]; *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* 10 Dec 1997, UN Doc FCCC/CP/1997/7/Add 1, 37 ILM 22 (entered into force 16 Feb 2005) [Kyoto Protocol].

154 Grant Boyle, "A Review of Emerging GHG Emissions Trading in North America: Fragmentation or Progress?" (2009) 46 Alta L Rev 173.

155 Saqib Butt & Joanna Rosengarten, "Ontario Introduces Cap & Trade System" (21 April 2015) *Canadian Energy Law Blog*, online: <http://www.canadianenergylawblog.com/2015/04/21/ontario-introduces-cap-trade-system/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original> archived at <https://perma.cc/J7KC-ZP9A>.

156 With the exception of British Columbia's internal carbon tax.

evolving accord to reduce emissions in line with Canada's commitments at Paris. By betting on technological development and less costly access to renewables, tidal energy producers have the potential to reshape electricity generation mix in their grids in the coming years.[157]

C. Mitigation of Environmental Concerns

Drawing further on the environmental benefits of tidal energy, a brief comparison is made here to conventional sources of energy, as well as other forms of renewable energy, in order to add context to the holistic discussion on energy strategy.

Key to tidal energy devices is their siting on the ocean surface. As they cannot be seen or heard, they draw relatively less concern over view shed pollution than do other forms of offshore energy projects, such as wind farms or conventional oil and gas exploration.[158] While having fewer overall NIMBY concerns, tidal projects still challenge traditional uses of the marine environment, potentially interfering with shipping, fisheries, and aquaculture activities.[159] Key to this adaptation of environmental use are holistic strategic plans calling for open dialogue of mitigation strategies in a given region.[160]

Tidal energy projects have a lesser effect on bird life, given their subsurface siting.[161] Their impact on marine life has thus far been perceived as minimal, and their development is even envisaged in certain marine protected areas, contingent on agreeability with the management plan of the region.[162] The alteration they may bring about to existing marine currents and tidal regimes is currently unclear, though should be studied extensively throughout deployment, so as to inform future projects.[163] Tidal energy farms are projected to have a clearly beneficial effect on the benthic (ocean bottom) environment, akin to that of a marine protected area.[164] By limited fishing and drag-netting operations across a surface, tidal platforms and installation will provide safe space for benthic organisms to affix onto new structures, while promoting fish spawning grounds and potential lessening of shipping activity in a region. Experience with offshore wind projects in Europe shows a clear rebound in marine life following platform construction.[165]

IX. A FRAMEWORK FOR TIDAL ENERGY DEVELOPMENT

This paper has sought to analyze various aspects of tidal energy development throughout the world. With a strong focus on the role of governmental regulation and intervention in the industry, this paper has touched on technological breakthroughs, energy law and policy, project financing, regulatory approaches, infrastructure and grid development, and tidal power's effects on the environment and climate change. Throughout, the author has sought to make reference to two specific case studies: Arctic Canada and the

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157 Drawn from Wendy Koch, "After Paris, 3 Reasons the World Could Bid Adieu to Fossil Fuels" (14 December 2015), *National Geographic: Paris Climate Talks*, online: <http://news.nationalgeographic.com/energy/2015/12/151214-can-the-world-bid-adieu-to-fossil-fuels-paris-climate-talks/> archived at <https://perma.cc/42Z7-TB9A>.

158 Drawn from research by Navigant Consulting Inc, "Offshore Wind Market and Economic Analysis: Annual Market Assessment" (22 February 2013), *US Department of Energy*, online: <http://www.navigant.com> archived at <https://perma.cc/2CNK-X8YS>.

159 Matter Network, *supra* note 12.

160 Kolliatsas et al, *supra* note 21 at 100.

161 Luoma, *supra* note 23.

162 Inger et al, "Marine renewable energy: potential benefits to biodiversity? An urgent call for research" (2009) 46 J Appl Ecol 1145.

163 Kolliatsas et al, *supra* note 21 at 235.

164 Inger, *supra* note 162.

165 *Ibid*.

Bay of Fundy, generally.[166] While other identified regions have been referred to—such as the Pacific Coast and the St. Lawrence River—the author does not purport to canvass these regions fully, which would be beyond the scope of this paper. Instead, concluding remarks are offered through an in-depth analysis of opportunities and cautions in moving forward with the development of tidal energy in the Arctic and Maritime regions.

A. Nunavut

In today's privately developed tidal energy industry, finding the right offshore renewable energy market begins on land. The first step to establishing a successful business is finding locations where the provision of tidal energy would yield the highest price.[167] In the United States, that location is Hawaii, with energy prices almost four times the mainland average.[168] In Canada, that location is Nunavut, where per capita energy use is double the Canadian average and government subsidized energy cost can amount to over $11,000 CAD per person, per year.[169] The costs of shipping fossil fuels to remote hamlets is extremely expensive, and limited to a very short shipping window. As such, the development of renewable fuels is essential to sustainability of this region.

An economic incentive is clearly present for tidal energy development to support Nunavut's communities. With energy cost above $1 per kWh in some communities, tidal energy generation becomes a profitable endeavor.[170] Moreover, technological development and investment in the region will yield the world's most durable turbines, capable of withstanding changes in sea ice, dramatic seafloor geology, and durable transmission systems.

Given the lack of a commercially ready turbine in the world, Nunavut's micro-grid communities are the ideal testing site for smaller projects generating few megawatts and having little impact on the surrounding environment. When ready for commercialization, these systems should be strategically expanded and connected to an expanded Canadian transmission infrastructure, through waypoints in the Northwest Territories, Manitoba, or Quebec. Over seventy percent of Canada's tidal current energy lies in the Hudson Strait and surrounding regions, offering plentiful potential for expansion.[171]

However, in order for this development to occur in the private sector, governments must adopt comprehensive and predictable energy policies to promote investment. These include (1) completing detailed resource assessments for tidal waters in the Arctic region, (2) funding strategic environment assessments of Nunavut waters, (3) promoting the development of a marine spatial plan for the region, (4) establishing pre-permitted test sites, and (5) making commitments to expand infrastructural transmission capacity to allow for product export. Working in coordination with ongoing conventional energy development in Canada's north and internationally, the aforementioned policy implements will serve as the groundwork for a solid energy regulation promoting private investment in tidal energy development.

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166 Referred throughout the text as referencing to Nunavut and Nova Scotia.

167 In order to cover the high cost of production, mostly.

168 Musial & Ram, *supra* note 1.

169 Energy Facts, "Energy Use in Canada's North: An Overview of Yukon, Northwest Territories, and Nunavut" (2011) National Energy Board.

170 Peter Varga, "Start-up company pitches tidal power for Nunavut: Frobisher Bay tides could phase out high-cost diesel generation, says Iqaluit entrepreneur" (19 November 2014), *Nunatsiaq Online*, online: <http://nunatsiaqonline.ca> archived at <https://perma.cc/GW9X-PNBT>.

171 "Offshore Renewable Energy", *Fisheries and Oceans Canada*, online: <http://www.dfo-mpo.gc.ca/science/oceanography-oceanographie/adaptation/offshore-eng.html> archived at <https://perma.cc/2VVG-CV9M>.

B. Nova Scotia

With its FORCE testing center in place, strategic environmental assessments of resources having been conducted, and ingenious projects already taking place in other energy sectors throughout the province,[172] Nova Scotia has taken initial steps to becoming an strong producer of renewable energy on a global scale. However, the province suffers from a federal inability to fully coordinate action in order to allow for the development of commercial scale tidal projects, which loom just over the horizon.[173]

Further, the development of Nova Scotia's tidal industry has rarely been run locally. Nova Scotia (and Canada as a whole) lags behind in turbine development, despite the investment of over $795 million CAD in a clean energy fund for tidal power innovation.[174] As such, although Nova Scotia remains an important and convenient testing site for new tidal technologies,[175] few to none are natively developed.[176]

In order to reverse this trend, political will must emanate from all levels of government: federal, provincial, local, and Aboriginal. Nova Scotia must invest in skills transfer from its lucrative and advanced oil extraction and shipbuilding sectors,[177] while establishing clear legislative priorities for development of the marine sector.

For this development to occur, both the federal and provincial governments must prioritize an energy policy that (1) commits to completing detailed resource assessments for all tidal channels in the Bay of Fundy, (2) promotes the development of a comprehensive marine spatial plan, (3) restructures financing models for transmission links to the grid infrastructure, (4) completes a marine renewable energy legislation, giving jurisdictional certainty to producers, and (5) clarifies the role and purpose of tidal energy as a central facet of the region's renewable energy development, ensuring a reduction of increasing burdens on the burgeoning technology.

CONCLUSION

In sum, Canada is a fortunate land. Endowed with seemingly innumerable conventional energy reserves, the Canadian economy has grown on the back of its natural resources. Yet Canadian energy policy and regulation must challenge the bent favoring conventional energy extraction, and focus on emerging renewable energy technologies as drivers of future economic success. Using its challenging climatic and geographical conditions to develop the most dependable tidal turbine technology in the world, Canada has the potential to become an export leader in innovative marine renewable technology, while developing two of its most economically deprived regions.[178] In order to spur this change, governmental energy policy and regulation need take heed of global change.

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172 Emera, *supra* note 121.

173 Despite Nova Scotia's Marine Renewable Energy Legislation framework having been discussed, debated, and published, the Government of Canada has made no mention of the possibility of establishing a coordinating agency between the two entities, as it had done in 1990 with the CNSOPB.

174 Kolliatsas et al, *supra* note 21 at 232.

175 The Minas Passage is considered the best testing sites in the world. If a turbine can stand up to the "Fundy Standard", it is said that it will be structurally successful in any of the world's waterways and channels.

176 Mofor, *supra* note 20 at 24.

177 Kolliatsas et al, *supra* note 21 at 155.

178 The Arctic and the Maritimes, broadly.

ARTICLE

REASONABLENESS AS PROPORTIONALITY: TOWARDS A BETTER CONSTRUCTIVE INTERPRETATION OF THE LAW ON SEARCHING COMPUTERS IN CANADA

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INTRODUCTION

It is axiomatic to suggest that the law tends to be a reactive force. Very rarely, or successfully, has the law been used to positively influence the behaviours of social actors until sufficient damage has been done to catapult an issue into the mainstream. Even when it does emerge, proactive regulation has traditionally been the domain of legislatures. Unlike courts, politicians are not obliged to justify their decisions on the basis of or in spite of what came before, freeing them to pursue whatever ends they wish, on any grounds whatsoever, subject only to the constitution. However, when one accounts for the exponential speed at which technology develops, legislatures do not fare much better at future-proofing their laws, and when the state's interest is arguably opposed to that of the individual, courts will necessarily be called upon to strike the balance. Case in point: on March 3, 2015, Canada Border Services Agency ("CBSA") personnel at the Halifax Stanfield International Airport charged Alain Philippon, a Quebec man returning from a trip to the Dominican Republic, with hindering an official from doing something he was authorized to do under the federal *Customs Act*, namely to search any "goods" up to the time of the traveller's release at the border.[1] In particular, Philippon was alleged to have "hindered" the official's investigation by refusing to divulge the passcode that would unlock his Blackberry smartphone.[2] In November 2015, he pleaded not guilty and his trial was scheduled for August 2016.[3] If convicted, Philippon faces a mandatory minimum $1,000 fine with a maximum penalty of $25,000 and 12 months of imprisonment.[4] Had Philippon willingly disclosed his password, enabling border officers to search the contents of his phone, he would have been among the many travellers who have passively surrendered access to their personal electronic devices, either "not wanting any trouble" or "having nothing to hide."[5] However, news of Philippon's civil disobedience quickly spread around the world, making international headlines and leaving many Canadians wondering whether border agents actually have the legal authority to search their cell phones and, if so, whether that should be the case.

Section 8 of the *Canadian Charter of Rights and Freedoms* states: "Everyone has the right to be secure against unreasonable search or seizure."[6] The highly sensitive nature and sheer volume of information that computers, such as laptops, tablets, cellular phones, and other electronic devices, hold or have the ability to access remotely go to the "biographical core"[7] of an individual and thus attract a reasonable expectation of privacy. Attempts by agents of the state to access that information constitute an infringement of this reasonable expectation of privacy. Where one has a reasonable expectation of privacy at law, an infringement of that reasonable expectation amounts to a "search" as that term has been interpreted under section 8.[8] The search must then be "reasonable" in order to be upheld as constitutional. This much is clear.

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1 *Customs Act*, RSC 1985, c 1 (2d Supp), ss 13, 99, 153.1.

2 Jack Julian, "Alain Philippon Phone Password Case May Meet *Charter* Challenge Conditions", *CBC News* (7 March 2015), online: <http://www.cbc.ca/news/canada/nova-scotia/alain-philippon-phone-password-case-may-meet-charter-challenge-conditions-1.2985694> archived at <https://perma.cc/2CTJ-Z78T>.

3 Steve Bruce, "Quebec Man to Fight Customs Charge of Hindering", *The Chronicle Herald* (5 November 2015), online: <http://www.thechronicleherald.ca/metro/1320917-quebec-man-to-fight-customs-charge-of-hindering> archived at <https://perma.cc/H26K-62KX>.

4 *Customs Act*, *supra* note 1, s 160.1.

5 See e.g. *R v Buss*, 2014 BCPC 16, 301 CRR (2d) 309 [*Buss*]. In this case, the accused gave border agents the passwords to his computer and cell phone, subsequently claiming that this violated the principle against self-incrimination under section 7 of the *Charter of Rights and Freedoms*.

6 *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*].

7 *R v Plant*, [1993] 3 SCR 281 at 293, 145 AR 104.

8 Stephen Coughlan, *Criminal Procedure*, 2nd ed (Toronto: Irwin Law, 2012) at 66.

Assessing reasonableness inherently calls upon courts to balance the interests of the state with those of the individual. However, existing common law jurisprudence governing the reasonableness of searching the contents of Canadians' personal electronic devices does *not* strike an appropriate balance between the individual's reasonable expectation of privacy and the state's interest in intruding upon that expectation to pursue the objectives of law enforcement. Most notably, the Supreme Court of Canada's majority judgment in *R v Fearon*[9] does not sit comfortably alongside fundamental aspects of the legal record, contrary to legal philosopher Ronald Dworkin's theory of law as integrity. This suggests that a better constructive interpretation of the law is needed in order to determine the reasonableness of computer searches at customs, for instance by referring to how reasonableness is assessed in other constitutional contexts. Courts ought to apply a more robust proportionality analysis, like that developed under section 1 of the *Charter*, in order to demonstrate integrity and to make the law on search and seizure of electronic devices "the best that it can be."[10]

A. Method

This paper seeks to address the reasonableness and, by extension, the justness of searching the contents of electronic devices in a variety of contexts. It does this not from a normative, privacy-or-die mentality, but by starting with a proposition first advanced by Dworkin: that in the absence of complete agreement as to the justice or morality[11] of adopting a particular interpretation of the law, judges can, do, and should demonstrate their commitment to act morally by acting with integrity—that is, by striving for coherence in their decision-making. Coherence does not *guarantee* that judges are, in fact, acting justly. However, when courts act incoherently, it suggests that they will only act morally by happenstance.[12] Coherence is thus to be preferred.

The relative incoherence in the way that Canada currently treats the search and seizure of electronic devices cannot be fully justified on the basis of the different contexts in which they occur, necessitating this quest for a better constructive interpretation of the law on search and seizure. Firstly, the paper begins by situating the issue of search and seizure of electronic devices by the state in its current social and legal context. In particular, I highlight these devices' differential legal treatment inside homes, after arrest, and at national ports of entry, including land border crossings and airports. This summary surveys the relevant constitutional, statutory, and common law norms that have historically governed Canada's search and seizure practices in relation to computers.

Secondly, I use Dworkin's interpretive theory of adjudication in order to frame a critique of the search incident to arrest doctrine as it has been applied to electronic devices, specifically cell phones. At this juncture, it is fair to ask "Why Dworkin?" What can *his* theory add to the discussion? Aside from the fact that his legal philosophy has been among the most influential in the last century, law as integrity offers a rubric to critically assess the Supreme Court of Canada's (mal)treatment of electronic devices searched incident to arrest. I therefore closely track the written reasons of the majority decision in *R v Fearon*, challenging the degree to which Justice Cromwell's constructive interpretation can be meaningfully described in Dworkinian terms as "fitting" or "justifying" the law on search and seizure as a whole. However, if Dworkin's interpretive theory is the stone that creates a chink in search and seizure law's armour, its real power lies in its ability to reconcile my central proposal here—that the doctrines of search incident to arrest

9 *R v Fearon*, 2014 SCC 77, [2014] SCR 621 [*Fearon*].

10 Ronald Dworkin, *Law's Empire* (Cambridge: Harvard UP, 1986) at 229.

11 I use these terms interchangeably.

12 Scott Hershovitz, "Integrity and Stare Decisis" in Scott Hershovitz, ed, *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (New York: Oxford UP, 2006) 103 at 115–116.

and the so-called "border exception" need refinement in light of the heightened privacy interests engaged by the contents of an individual's digital devices—with seemingly contradictory precedent. As this article will demonstrate, Dworkin's interpretive theory gives courts a licence to correct mistakes of the past without sustaining indecent attacks on their—and the law's—integrity.

Thirdly, after establishing that the Supreme Court of Canada's approach to electronic devices in the search incident to arrest context fails to provide the best constructive interpretation of the law as a whole, I consider how this lesson can and should inform the law's development in the border context. This analysis draws from the Supreme Court of Canada's jurisprudence on the "reasonable limits" clause at section 1 of the *Canadian Charter of Rights and Freedoms*, as well as the Court's more recent application of a "robust" reasonableness standard in discretionary administrative decisions that engage *Charter* protections.[13] Lastly, I offer proportionality theory as a potential lodestar for assessing the reasonableness of a law that authorizes computer searches by customs officials without any reasonable grounds.

B. Scope

Strictly speaking, this paper is not about the admissibility of evidence discovered in violation of section 8 of the *Charter*, which may be excluded under section 24(2).[14] While this essay addresses the search and seizure of computers at the Canadian border, it considers only digital content-related searches of such devices. That does not include physical searches of an electronic device in order to satisfy border officers that it is not concealing drugs or other non-digital contraband. It is also beyond the scope of the present analysis to answer whether and under what circumstances a CBSA officer may or may not compel a traveller such as Philippon to divulge his password or to otherwise actively assist the agent in the inspection of the traveller's electronic devices. This is an interesting question worthy of independent inquiry;[15] however, this second-order question assumes in the first place that the right of a border officer to search digital devices without individualized suspicion or probable grounds has been settled in law now and forever.[16] It is to this preliminary question that this analysis turns its attention: does the treatment of computers as "goods" like any others under the *Customs Act* constitute a reasonable limit on one's reasonable expectation of privacy in the contents of these devices? Put differently, does the uniform treatment of a computer and a briefcase at the border strike an appropriate balance between the state and individual interests at stake in an unwarranted search of those items? I argue that proportionality theory, variously

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13 *Charter* "protections" encompass specific rights, as well as more ambiguous (and undefined) values. See *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*]; *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].

14 For the appropriate test on admissibility, see *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

15 It has received some cursory treatment: see Robert Currie, "Cell Phone Searches at the Border: A New Frontier" (13 March 2015), *International & Transnational Criminal Law* (blog), online: <http://rjcurrie.typepad.com/international-and-transna/2015/03/cell-phone-searches-at-the-border-a-new-frontier.html> archived at <https://perma.cc/J5VS-3UEL>; *Buss*, *supra* note 5 at 33. An answer to this question may also be inferred by analogy from *R v Cimini*, [2008] OJ No 5380 (Ont Ct J) at paras 17–18: "If locked and the person refused to produce the key *and the police are unable to access the trunk or glove box without the key* then inaction in refusing to produce the key to access the trunk of the vehicle *could* amount to hindering or preventing" [emphasis added]. On this reading, it would appear that the Crown must prove customs officials took positive steps to try to unlock Philippon's phone without his help before it could reasonably charge him with hindering or preventing a Canada Border Services Officer from completing her duties under section 153.1 of the *Customs Act*. Of course, this assumes no distinction is to be drawn between digital devices and traditional receptacles, which runs counter to the spirit of this essay and the jurisprudence.

16 Indeed, it would appear that way on a strict interpretation of *R v Simmons*, [1988] 2 SCR 495, 55 DLR (4th) 673 [*Simmons*].

invoked by the Supreme Court of Canada in administrative and constitutional contexts, offers a principled basis upon which these questions may be answered defensibly and in a manner that better accords with Dworkin's interpretive theory of adjudication.

I. COMPUTERS, PRIVACY & THE LAW IN CONTEXT

Before evaluating the integrity of the law on search and seizure as it relates to computers, it would be prudent to briefly describe what "computers" includes and explain how these devices interact with the jurisprudence on section 8 of the *Charter*. Throughout this essay, the terms *computer*, *cell phone*, *smartphone*, *desktop*, *laptop*, *tablet*, *digital device*, and *electronic device* are used interchangeably. This is consistent with the way that those terms have been treated in section 8 jurisprudence. Although some have suggested that the law should distinguish between so-called "smart" and "dumb" technologies according to each device's individual capacities and functions, courts have repeatedly resisted attempts to distinguish between different phones, laptops, or computers.[17] Section 8 of the *Charter* guarantees "the right to be secure against unreasonable search or seizure."[18] Since 1982, courts have developed a two-stage framework for analysis in order to answer if the right has been violated. First, does the claimant have a reasonable expectation of privacy in the subject matter of the search? If so, was the search reasonable?[19] The latter question is the chief focus of this paper.

A. The Privacy Interests in Digital Information Are Unique

Before the Supreme Court of Canada's judgment in *R v Fearon*, a case affirming the reasonableness of searching a cell phone incident to arrest within circumscribed limits, there had been two conflicting currents among lower courts. The first of these schools held that the privacy interests engaged by a search of the informational contents of a cell phone are not significantly different than the interests in a diary, briefcase, or other physical document, each of which is ordinarily subject to being searched incident to arrest.[20] The second school ruled that an individual's privacy interests in the contents of his or her cell phone are qualitatively and quantitatively unique, attracting a heightened standard of protection, sometimes in the form of a warrant.[21] Indeed, modern cell phones are essentially mini-computers capable of storing vast amounts of personal information, akin to little "Mary Poppins technologies" in which one can put as much data as she wants without them getting any heavier.[22] With the speed of technological development, even the "dumbest" computer today has many times more memory and processing capacity than most desktop computers had 20 years ago, and there is nothing to suggest that this trend is slowing.

Any doubt that Canadian law does not or should not attribute a heightened privacy interest to such devices was resolved by the unanimous judgment in *R v Vu*[23] and affirmed in *Fearon*. As Justice Cromwell, writing for the majority, observed:

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17 *R v Vu*, 2013 SCC 60 at para 38, [2013] 3 SCR 657 [*Vu*]; *Fearon*, *supra* note 9 at paras 51–54.

18 *Charter*, *supra* note 6, s 8.

19 Mathew Johnson, "Privacy in the Balance – Novel Search Technologies, Reasonable Expectations, and Recalibrating Section 8" (2012) 58 Crim LQ 442 at 475–476. See Part I.B, below, for a discussion of section 8's reasonableness requirements.

20 See e.g. *R v Giles*, 2007 BCSC 1147 at para 63, 77 WCB (2d) 469.

21 See e.g. *R v Hiscoe*, 2013 NSCA 48 at para 76, 328 NSR (2d) 381; *R v Polius*, [2009] OJ No 3074 at para 57, 196 CRR (2d) 288 (Ont Sup Ct) [*Polius*].

22 Amber Case, "We Are All Cyborgs Now" (December 2010), online: TED <http://www.ted.com/talks/amber_case_we_are_all_cyborgs_now/transcript> archived at <https://perma.cc/7QJW-LVWW>.

23 *Vu*, *supra* note 17 at paras 39–45, 47.

> It is well settled that the search of cell phones, like the search of computers, implicates important privacy interests which are different in both nature and extent from the search of other "places"…. It is unrealistic to equate a cell phone with a briefcase or document found in someone's possession at the time of arrest. As outlined in *Vu*, computers…may have immense storage capacity, may generate information about intimate details of the user's interests, habits and identity without the knowledge or intent of the user, may retain information even after the user thinks that it has been destroyed, and may provide access to information [stored on remote servers] that is in no meaningful sense "at" the location of the search…[24]

Thus, subject to abandonment,[25] the idea that an individual has a reasonable expectation of privacy in the contents of his cell phone and other digital devices is no longer the subject of serious legal debate. Arguably beginning with the Supreme Court's 2010 decision in *R v Morelli*[26] and culminating with *Fearon*, Canada's treatment of electronic devices is a story of increasing recognition of the unique privacy interests that their information attracts. In particular, courts emphasize the values that privacy is thought to promote:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a *biographical core of personal information* which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would *include* information which tends to reveal *intimate details of the lifestyle and personal choices of the individual*.[27]

Much of the information stored on modern computers and smartphones falls into this "biographical core" of information that reasonable individuals in a democracy would expect to keep private. Significantly, however, not all information on a device must fall within this core in order to attract the *Charter*'s privacy protection. The question, in every case, as to whether an individual has a reasonable expectation of privacy in the subject matter of a search depends on the totality of the circumstances.[28] Since section 8 of the *Charter* protects against *unreasonable* searches by the state, one must have a reasonable expectation of privacy before an infringement can be found. This is not a particularly high threshold, since a finding that one has no reasonable expectation of privacy in any given context would effectively mean that there are no limits on the state's ability to search.[29] Hence, in all but the exceptional case, electronic devices will attract a reasonable expectation of privacy sufficient to trigger the *Charter*'s protections.

B. Assessing the Reasonableness of Searching Digital Information

The law's treatment of electronic devices is less consistent at section 8's second stage of analysis. Whether the state's interference with an individual's reasonable expectation of privacy in the contents of his smartphone, computer, or other device is constitutional or not depends on a separate assessment of reasonableness. In *R v Collins*, the Supreme Court distilled this test into three requirements: the search must be authorized by law, the law itself must be reasonable, and the search must be conducted in a reasonable

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24 *Fearon*, *supra* note 9 at para 51.

25 See e.g. *R v Patrick*, 2009 SCC 17, [2009] 1 SCR 579 where the accused was held to have abandoned any reasonable expectation of privacy in the contents of garbage bags placed at the edge of his property.

26 *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253 [*Morelli*]. This case is discussed below in Part II.B.

27 *R v Tessling*, 2004 SCC 67 at para 25, [2004] SCR 432 [*Tessling*, emphasis in original].

28 Coughlan, *supra* note 8 at 99.

29 *Ibid* at 87.

manner.[30] In *Hunter et al v Southam Inc* ("*Hunter*"), Justice Dickson (as he then was) held that an unwarranted search is *prima facie* unreasonable because the purpose of section 8 is to *prevent* unjustifiable intrusions into individual privacy, which could be guaranteed only by a system of prior judicial authorization based on reasonable and probable grounds where feasible.[31] Indeed, in light of section 24(2)'s limited power to exclude unconstitutionally obtained evidence under the modern *Grant* test,[32] the goal of *prevention* is all the more important.

Despite the Supreme Court's strong, principled statements on section 8 early in the life of the *Charter*, within two decades some scholars were already lamenting the perceived decline in its privacy-protective potential.[33] This is nowhere more evident than in the checkered protection afforded to the high privacy interests in the informational contents of computers. The reasonableness of searching these devices currently varies greatly by context. For example, computers ordinarily require specific pre-authorization. In *R v Vu*, the Supreme Court held that when police find computers or cell phones in a dwelling, they are limited to seizing the devices and may not search them without obtaining a separate warrant under section 487 of the *Criminal Code*.[34] Only if the original search warrant explicitly contemplated the possibility that electronic devices would be found at the dwelling (and accordingly balanced these unique interests against the state's interest in law enforcement) could police forego the specific warrant requirement.[35]

By contrast, the requirement for specific pre-authorization is waived when the electronic device is searched incident to arrest within certain constitutional limits. Search incident to arrest is a common law doctrine that authorizes warrantless pat-down searches of an arrested person and things in his immediate vicinity.[36] A majority of the Court in *Fearon* extended the doctrine to allow police to examine the digital contents of any electronic devices the arrestee may be carrying, concluding that the investigative necessity of conducting quick, cursory searches in the context of an arrest was sufficiently important to outweigh the individual's interest in privacy.[37] However, this does not mean police are free to search any device or its entire contents incident to arrest. The arrest must be lawful; the search must be truly incidental to arrest in that it is conducted for a valid common law purpose such as to protect the public, preserve evidence from destruction, or discover evidence relevant to the offence for which the individual has been arrested; and the search must be conducted in a reasonable manner. Furthermore, the nature and extent of the search should be tailored to the purpose for the search and police must take detailed notes throughout.[38]

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30 *R v Collins*, [1987] 1 SCR 265 at para 23, 56 CR (3d) 193 [*Collins*].

31 *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 160–162, 55 AR 291 [*Hunter*]. The decision need not be made by an actual judge, but by a body "capable of acting judicially."

32 Absent bad faith on the part of the police, oftentimes *not* admitting the evidence would tend to bring the administration of justice into disrepute. See *Grant*, *supra* note 14 for the complete test and a list of considerations.

33 See e.g. Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25 Queen's LJ 65.

34 *Criminal Code*, RSC 1985, c C-46, s 487 [*Code*].

35 *Vu*, *supra* note 17 at para 2.

36 *R v Caslake*, [1998] 1 SCR 51 at para 13, 123 Man R (2d) 208 [*Caslake*].

37 *Fearon*, *supra* note 9 at para 49. Contrast the Supreme Court of Canada's approach with the Supreme Court of the United States' unanimous decision in *Riley v California*, 573 US ___ (2014) [*Riley*]. There, the Court held that the search incident to arrest doctrine in the United States does *not* generally authorize police to search a cell phone's data without a warrant, owing in part to the qualitative and quantitative differences between cell phones and non-digital containers.

38 *Fearon*, *supra* note 9 at para 83.

Different still is the way electronic devices are treated at the Canadian border. Most travellers are accustomed to having border officials look through their luggage, or they are at least aware customs officers have this power. What people do not realize is just how extensive those powers are. The *Customs Act* requires all persons arriving in Canada to present themselves to customs officials, to answer all questions truthfully, and to report all goods a passenger is importing, including any goods that originated in Canada and are being brought back.[39] Section 99(1)(a) of the *Act*'s enforcement provisions empower officers to "examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts."[40] Section 101 allows customs officials to detain goods until they have been dealt with according to the statute.[41] Meanwhile, a "good" is defined broadly as including "conveyances, animals and any document in any form."[42] Most importantly, the general power in section 99(1)(a) is distinguishable from other provisions in the statute in that it does not require reasonable grounds to suspect a contravention—that is, individualized reasonable suspicion—before an agent may search the good.[43] In fact, no grounds whatsoever are required before an agent can conduct an allegedly routine or random search of a traveller's goods. Lower courts in Ontario have upheld the constitutionality of this broad and general statutory power as a result of the combined effect of sections 99(1)(a) and 101.[44]

In the 1988 case of *R v Simmons*, the Supreme Court considered whether former provisions authorizing a strip search under the *Customs Act* were reasonable and thus constitutional within the meaning of section 8 of the *Charter*. These provisions were substantially similar to section 98 of the modern *Act*, which regulates personal searches. Although the search in that case was not conducted in a reasonable manner and therefore fell on the third branch of *Collins*' reasonableness criteria, the majority held that the provisions authorizing the search were reasonable in spite of the fact that they did not conform to the default requirement of pre-authorization on reasonable and probable grounds set out in *Hunter*. At the border, the lesser requirement of reasonable suspicion combined with a statutory right of secondary authorization by a supervisor was not unreasonable.[45] The Court's consensus was that the border places individuals in a unique position in which they have a lowered expectation of privacy and the state has a strong interest in sovereign self-protection.[46] Chief Justice Dickson then delineated three categories of border searches according to their intrusiveness and the degree of protection they require: (1) routine questioning, searches of baggage, or "frisks" to which most travellers are subjected and which attract no stigma or constitutional issues; (2) strip searches in a private room like the one in *Simmons*; and (3) body cavity searches, which are to be considered highly invasive of privacy and deserving of stronger protection.[47]

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39 *Customs Act*, *supra* note 1, ss 11(1), 12(1), 12(3.1), 13.

40 *Ibid*, s 99(1)(a).

41 *Ibid*, s 101.

42 *Ibid*, s 2.

43 See e.g. *ibid*, s 98, according to which a search of the person requires reasonable grounds to suspect "that the person has secreted on or about his person" anything that contravenes the *Customs Act*, would afford evidence of a contravention, or which is prohibited or controlled from importation. For greater certainty that individualized suspicion is not a requirement for conducting a "non-intrusive examination" of goods, see also s 99.3.

44 *R v Agyeman-Anane*, [2009] OJ No 6005 at paras 33–35, 2009 CarswellOnt 5956 (Ont Sup Ct); *R v Corbyn*, [2005] OJ No 5578 at para 68, 2005 CarswellOnt 8299 (Ont Sup Ct).

45 *Simmons*, *supra* note 16 at paras 42, 50–51.

46 *Ibid* at paras 24, 48.

47 *Ibid* at paras 27–28.

It is worth pausing to consider Chief Justice Dickson's statement that "no constitutional issues are raised" by the first category of border search. This does not mean that one has *no* reasonable expectation of privacy in his or her baggage and cannot cross the threshold to trigger constitutional protection. It means only that one's expectation of privacy is presumptively *lower* at the border than in other contexts,[48] which is no bar to section 8's guarantee. *Simmons* stands for the proposition that if the search is of the first routine type, then the search is rendered reasonable, and thus constitutional, *by virtue of the fact that it occurs at the border*. Ostensibly, a computer and other electronic devices are "goods" within the ambit of the *Customs Act*'s broad definition. It would be foolish to suggest otherwise, and no court has tried. In the rare cases where an individual has challenged a border search as unreasonable post-*Simmons*, courts have consistently found that computers and cell phones are "goods" and are subject to routine searches of their contents like any other pocket, bag, or container.[49] This statutory interpretation, coupled with border officers' broad powers under the *Act* and Chief Justice Dickson's ruling in *Simmons*, means that customs law currently authorizes searches of electronic device contents without a warrant, without reasonable suspicion, and without any discernible limits.

The reasonableness of searching these devices that attract high privacy interests has depended greatly on the context and countervailing state interests that arise at the location of the search. To search a computer at home, police need a specific warrant. To search a computer incident to arrest, police do not need a warrant, but must have had grounds for the arrest pursuant to which the search is conducted. To search a computer at the border, officers require no grounds at all. Notwithstanding the unique situations that have been used to justify treating these devices differently in different contexts, this situational interpretation of section 8's reasonableness requirement does not fit or justify an undeniable trend in the jurisprudence towards *greater* recognition of and *more* protection for the heightened privacy interests that people hold in their devices. Thus, Dworkin's theory of law as integrity suggests that these situational contexts cannot single-handedly justify the vastly differential treatment of electronic devices in the face of their distinctive privacy interests.

II. SEARCHING ELECTRONIC DEVICES INCIDENT TO ARREST

In December 2014, the Supreme Court of Canada affirmed a decision of the Ontario Court of Appeal permitting police to search cell phones and similar devices incident to arrest without a warrant. Privacy advocates have described the ruling in that case, *R v Fearon*, as a "major disappointment."[50] While this assessment stems from a normative, pro-privacy rights perspective, *Fearon* is equally disappointing from the vantage point of law as integrity. The majority opinion written by Justice Cromwell is unlikely to be just because it does not exhibit the coherence that law as integrity requires. His interpretation as to the reasonableness of searching cell phones incident to arrest is incoherent because it allows a descriptive interpretation to obfuscate the normative nature of privacy under the *Charter*, it fails to account for the original justification for the search incident to arrest doctrine, and it imposes arbitrary search protocols that protect neither the individual's nor the state's interests. In this way, Justice Cromwell's constructive interpretation of the law does not strike a truly proportional balance between privacy and law enforcement, despite his intention to do just that.

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48 *Ibid* at para 49.

49 *R v Leask*, 2008 ONCJ 25 at para 16, 167 CRR (2d) 267 [*Leask*]; *R v Saikaley*, 2012 ONSC 6794 at paras 79–82, [2012] OJ No 6024 (QL); *Buss*, *supra* note 5 at para 25.

50 Kassie Seaby & Raji Mangat, "Making Privacy Meaningful in a Digital Age" (15 December 2014), *British Columbia Civil Liberties Association* (blog), online: <http://www.bccla.org/2014/12/making-privacy-meaningful-in-a-digital-age> archived at <https://perma.cc/8VPG-J4EC>.

A. Law as Integrity

Before appreciating the ways in which the majority's judgment does not fit or justify the law of searching electronic devices under section 8 as a whole, one must grasp the interpretive theory of adjudication that serves as a basis for the analysis. In *Law's Empire*, Ronald Dworkin argues that each case offers its own constructive interpretation of the law that shows the law as a whole in its best light, as though a single author wrote the entire body of law.[51] Ironically, a single author did, in fact, write the leading judgments in *R v Vu* and *R v Fearon*.[52] It is therefore especially troubling that the common law rules generated by the former decision stand in such sharp contrast to those produced by the latter. As briefly discussed above, Dworkin's virtue of integrity contends that while individuals in a pluralistic society may disagree about the particular ends of justice, society can be assured that judges act justly when they act coherently, as to act capriciously is to act without integrity, and by caprice one will only achieve justice by accident.[53] A commitment to integrity signifies that what courts have done in the past is relevant to what they ought to do in the present instance. It requires courts to actively engage with their past decisions. This does not necessarily mean courts must repeat every historical *ratio decidendi*: following, overruling, or distinguishing a case are all ways courts may demonstrate integrity.[54] Silence, on the other hand, will not count. Justice Cromwell's reasons in *Fearon* do not engage with significant aspects of the legal text which, had they been addressed, might have led to a different and more just result.

To be clear, this is not to suggest that there is an objectively discernible, "correct" story latent in the text, divorced from the individual convictions of the interpreter as to how the story can be made the best it can be. According to Dworkin, this would be a misleading objection.[55] However, fit and justification serve as measures by which constructive interpretations may be judged as more or less correct *as a matter of interpretative practice*. It is therefore possible to subject Justice Cromwell's opinion to the tests of fit and justification posited, if imperfectly, by a theory of law as integrity. Admittedly, this analysis is limited to the extent that it is not possible to neatly discriminate between the rigours required by fit as opposed to justification. Dworkin describes these two dimensions as interrelated and complex.[56] They necessarily require "a delicate balance among…political convictions of different sorts."[57] He downplays the significance of the distinction because in most cases one interpretation may fit more of the text than another,[58] which could be determinative. Still, the assessment as to what will and will not count as "fitting" the legal text is itself a political decision.[59] Thus, for Dworkin there is no real separation between law and morality.[60]

Still, the regulative power of law as integrity is hardly devoid of any practical application. On the contrary, the difference between fit and justification can be understood to roughly parallel legal and political decision-making as part of an interpretive exercise. "Fit" is used as a threshold test to judge competing interpretations as eligible and ineligible solely

51 Dworkin, *supra* note 10 at 225–226.

52 I assume for the sake of argument that to the extent court judgments might have been substantially drafted by a law clerk or someone other than the judge, the judge's choice to sign the opinion effectively underwrites the integrity of the decision (or lack thereof, as the case may be).

53 See Introduction, "Method", above.

54 Hershovitz, *supra* note 12 at 116–117.

55 Dworkin, *supra* note 10 at 238.

56 *Ibid* at 231, 239.

57 *Ibid* at 239.

58 *Ibid* at 231.

59 *Ibid* at 257.

60 Arthur Ripstein, ed, *Ronald Dworkin* (New York: Cambridge UP, 2007) at 14.

by reference to the legal text.[61] "Justification" need only arise when there are two or more eligible interpretations. It asks which of the interpretations is most defensible in that it shows the law in its best light.[62] Again, this is an oversimplification because whereas one judge may deem an interpretation eligible, another might rule that interpretation ineligible. Thus, where the judge sets his threshold for "fit" is itself subject to justification. By the same token, just because one interpretation provides a *better* fit than any other does not automatically rule out the other interpretations if they can be said to meet the threshold for fit and are justified by principles of justice and fairness that, if accepted by the community, would show the law in its best light.

Despite this interpretive ambiguity, Dworkin clearly states that it would demonstrate bad faith if a judge determined an interpretation's fit according to a normative standard outside the text.[63] He also suggests the best constructive interpretation will have general explanatory power without leaving any "major structural aspect of the text" unexplained.[64] What will or will not count as a major, as opposed to a minor, structural aspect is unclear from Dworkin's writing; however, if the justification advanced by the court for its interpretation directly contradicts existing precedent without explicitly distinguishing those parts of the text, then it may expose not only gaps in justification, but also fissures in fit.

Dworkin is not without his critics. For example, legal philosopher Joseph Raz rejects any theory of law that requires judges to decide cases as though courts speak with one voice. This, he says, diminishes the inescapably political character of judicial decision-making.[65] According to Raz, the flaw in law as integrity is that it presumes the existence of an "inner legal logic which is separate from ordinary moral and political considerations of the kind that govern normal government, in all its branches."[66] In other words, it is false to presume that there is ever a single right answer, even if Dworkin's measures of fit and justification suggest that there is. Raz argues that the risk with construing Dworkin's integrity as requiring strong coherence with past decisions is that it gives undue weight to fit and not enough to justification based on moral value.[67] Although Dworkin does not provide a mechanism for resolving these conflicts, it is precisely because there is rarely a consensus as to the moral value of one decision versus another that fit is a desirable baseline for courts to consider as they make decisions on what the law is or what it should be. There may be more than one just outcome in cases like *Fearon* or Philippon's, but insofar as courts are held accountable through their reasons and they strive to follow or distinguish precedent, some interpretations are clearly better than others.

B. A Poor Constructive Interpretation

According to law as integrity, Justice Cromwell's judgment in *Fearon* must be understood as a constructive interpretation of the law as a whole and as it relates to the reasonableness of searching electronic device contents. His interpretation does not fit with several fundamental principles in this area of the law. As such, despite appearances, *Fearon* does not represent a "hard case" in which one had to choose between multiple eligible interpretations. If the Supreme Court had demonstrated the engagement with these seemingly neglected aspects of the chain novel as required by integrity, then it is

61 Dworkin, *supra* note 10 at 255.

62 *Ibid* at 231.

63 *Ibid* at 255.

64 *Ibid* at 230.

65 Joseph Raz, "Speaking with One Voice: Dworkinian Integrity and Coherence" in Justine Burley, ed, *Dworkin and His Critics: With Replies by Dworkin* (Oxford: Blackwell Publishing, 2004) 285 at 285.

66 *Ibid* at 289.

67 *Ibid* at 288.

unlikely the majority would have reached the same decision. Firstly, Justice Cromwell does not acknowledge the normative roots of privacy under the *Charter*. For instance, in *R v Tessling*, the Supreme Court unanimously held that privacy is a normative rather than a descriptive standard.[68] In other words, one should not lose *Charter* protection simply because he or she expects that someone is spying.[69] Although the court in *Tessling* discussed privacy in terms of the threshold question—whether or not one has a reasonable expectation of privacy in the first place and is thus entitled to *Charter* protection at all—if privacy is normative at that stage of analysis, one cannot ignore its normative influence at the second stage when the court must assess whether a search was reasonable. This reasonableness assessment necessarily involves a balancing of the state and individual interests at play, which requires judges to characterize the level or significance of the individual's privacy interest.[70] In *Fearon*, Justice Cromwell characterized the intrusion into the contents of the accused's phone as follows:

> [I]n marked contrast to…bodily sample seizures [which always require a warrant]…while cell phone searches have the potential to be a significant invasion of privacy, they are neither *inevitably* a major invasion of privacy nor *inherently* degrading. Looking at a few recent text messages or a couple of recent pictures is hardly a massive invasion of privacy, let alone an affront to human dignity.[71]

The problem with this comparison is that it cites the specific facts in *Fearon*, in which only a photo of a handgun and an incriminating draft text message were subjects of the initial search, as proof that searches of electronic devices are not inherently intrusive. This is a purely descriptive account of the physical intrusiveness of such a search in *one* case that does not account for the individual's subjective experience of the intrusion, nor society's collective interest in characterizing the interest as particularly significant. To account for the normative understanding of privacy that the Supreme Court had previously endorsed, Justice Cromwell ought to have asked not whether the contents of electronic devices differ markedly from bodily samples, but whether this is the kind of privacy interest that the law *should* regard highly in a free and democratic society, notwithstanding its similarity or dissimilarity to non-electronic vessels of information.

Although this effectively judges the "fit" of Justice Cromwell's reasonableness interpretation according to a normative standard, this observation does not run afoul of Dworkin's law as integrity. While it is disingenuous to judge fit according to a normative standard, an important distinction must be drawn in the present context. Here, the normative standard is not one that I have chosen as morally right; rather, privacy's normative character *is the law* against which any constructive interpretation must fit. In this way, the interpretation advanced in *Fearon* does not cohere with *the law's* understanding of privacy. In fact, it is telling that Justice Cromwell never refers to the Supreme Court's earlier decision in *Tessling*, whereas Justice Karakatsanis does in her dissenting opinion. Therefore, he does not meaningfully engage with the normative aspect of privacy, contrary to the requirements of law as integrity.

Justice Cromwell's descriptive account of the informational privacy interest is also silent on the Court's previous characterization of a computer search's intrusiveness. In *R v Morelli*, a child pornography case in which there were insufficient grounds to issue a search warrant, a majority of the Court characterized the privacy interest as follows:

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68 *Tessling*, *supra* note 27 at para 42.

69 *R v Wong*, [1990] 3 SCR 36 at 51, 60 CCC (3d) 460.

70 Coughlan, *supra* note 8 at 91–92.

71 *Fearon*, *supra* note 9 at para 61 [emphasis in original].

> …it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer. Computers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet.[72]

Although the computer in *Morelli* was found in the accused's home, the majority's statement is no less true of portable electronic devices. It is precisely because cell phones are portable that the privacy interest in them should be so high. The fact that cell phones are carried on one's person make them, quite literally, the most personal computers in use today. This characterization of the intrusiveness of a computer search as being the most invasive of privacy and most revealing of sensitive information—more than a strip search or a body cavity search—bumps up against Justice Cromwell's notion that cell phone searches are not inherently problematic. One would have to strain to see how the interpretation of the law offered by *Fearon* could be interpreted as having been written by the same author as *Morelli*, barring a split personality disorder. These two interpretations are incoherent, raising questions as to whether the Court was acting morally then, now, or not at all.

Secondly, the majority's interpretation of the reasonableness of permitting cell phone searches incident to arrest leaves a major structural aspect of the legal text unexplained. One of Justice Cromwell's principal justifications for allowing electronic devices to be searched incident to arrest is that individuals have a reduced expectation of privacy after arrest.[73] If the objective of a judge who acts with integrity is to make the law "the best it can be," then this justification falls short because it too does not fit, nor does it explain, what came before. For example, since section 8 of the *Charter* necessarily involves an evaluation as to whether the state's interest is superior to that of the individual's in a given situation, a warrant requirement was originally preferred to determine *if* the state's interest prevailed on a case-by-case basis. By contrast, the doctrine of search incident to arrest was originally premised on an assumption that the state's interest in protecting the police and in preserving evidence after an arrest will *always* trump any legitimate expectation that the arrestee may have. In *R v Caslake*, the Supreme Court stated:

> The authority for the search [incident to arrest] does *not* arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information *which outweighs the individual's interest in privacy*.[74]

According to this logic, imposing a warrant requirement to weigh these competing interests after arrest would be redundant.[75] However, while this assumption might have been true when the Court released *Caslake* in 1998, it does not fit with the Court's subsequent recognition of the heightened and different privacy interests engaged by the contents of electronic devices. It is a simple fact of history that in 1998 cell phones were still relatively novel and unsophisticated. Today, they are ubiquitous and intelligent.

In this new context, the state's overwhelming interest in intruding upon the individual's privacy after arrest cannot be automatically presumed. In *Vu*, Justice Cromwell suggested that the basis for normally requiring a separate, specific warrant for computers is that one cannot reasonably infer or assume that the justice who issued the original warrant took account of the unique privacy interests that would be affected if the search extended to

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72 *Morelli*, *supra* note 26 at para 105.

73 *Fearon*, *supra* note 9 at para 56.

74 *Caslake*, *supra* note 36 at para 17 [emphasis added]. See also Coughlan, *supra* note 8 at 92.

75 *Polius*, *supra* note 21 at para 47.

the informational contents of computers discovered in that place.[76] By the same token, one cannot take for granted that the constitutional justification for waiving the warrant requirement for searches incident to arrest (i.e. that the state's interest after an arrest is so great as to override any privacy interest the arrestee may have) is equally true in the context of a device whose informational contents engage a range of very high privacy interests, a finding that Justice Cromwell himself endorsed. To be fair, Justice Cromwell acknowledges that there is a potential for greater privacy intrusions when police search the contents of cell phones incident to arrest, which is why he adds the requirement that police take detailed notes of their search of any electronic device to aid after-the-fact judicial review.[77] So, he does not necessarily assume that the interest balancing after an arrest inevitably favours the state; however, his greater problem from a perspective of law as integrity is that the justification he *does* offer for allowing cell phone searches incident to arrest—that arrested individuals have a reduced expectation of privacy—directly contradicts the essential premise on which the search incident to arrest doctrine was founded. It is true that a valid constructive interpretation need not fit every aspect of the text to be eligible and history is only relevant to integrity insofar as it facilitates consistency of principle in modern practice;[78] yet, a principle as crucial as this, even if historic, cannot be ignored. To the extent that this original justification no longer fits with contemporary principles of justice, then integrity required that the Court at the very least explain why its new justification is to be preferred over the other and how this, too, fits with the doctrine of search incident to arrest in every other context where police are *not* required to take detailed notes. Unfortunately, the decision does not engage with the ontological claim in *Caslake*, quoted above, and therefore does not demonstrate the fit demanded by law as integrity.

Lastly, Justice Cromwell's constructive interpretation of the reasonableness of searching cell phones incident to arrest imposes "search protocols" like those he specifically criticized as counterproductive in *Vu*. The Supreme Court has repeatedly affirmed, beginning in *Hunter*, that the purpose of section 8 is to *prevent* unreasonable searches *before* they occur, giving rise to the presumptive warrant requirement.[79] Justice Cromwell never expressly invokes or acknowledges this purpose of section 8 in *Fearon*. However, his project can be broadly interpreted as endeavouring to prevent unreasonable searches of cell phones incident to arrest from occurring, not by requiring prior authorization to balance state and privacy interests, but by balancing those interests in advance and circumscribing the limits within which an unwarranted search of such devices will be permissible.[80] In particular, *Fearon* permits a cursory search of a digital device's contents, limiting which computer applications police will generally be able to access and requiring law enforcement officials to take detailed notes on what they searched and how.[81] This does not fit with Justice Cromwell's earlier comments on the futility of such search protocols. Indeed, he held in *Vu* that it is not always possible or desirable to restrict police access to certain parts of a device based on assumptions about where evidence is likely to be stored. Such search protocols can be misguided and deprive police of access to well-hidden, yet highly relevant evidence.[82] Again, to be fair, Justice Cromwell restricts his reasons in that case to situations where a warrant must be obtained, regarding search protocols on top of a warrant to be an undue burden.[83] However, his decision in *Fearon* does not take up these qualms.

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76 *Vu*, *supra* note 17 at para 2.

77 *Fearon*, *supra* note 9 at paras 63, 82.

78 Dworkin, *supra* note 10 at 227, 230.

79 *Hunter*, *supra* note 31 at para 27; *R v Dyment*, [1988] SCR 417 at para 23, 55 DLR (4th) 503.

80 See *Fearon*, *supra* note 9 at para 82 for a checklist of these requirements.

81 *Ibid* at paras 76–77, 82.

82 *Vu*, *supra* note 17 at paras 57–59.

83 *Ibid* at paras 59, 63.

One can infer from his reasons that the Court justifies the incoherence on the basis that police have an investigative need to search these devices promptly after an arrest.[84] Ultimately, however, an interpretation that accounts for *both* these pragmatic concerns and legal conventions, consistent with Dworkin's law as integrity, would privilege prior authorization of such devices. For instance, if police proceed to conduct a cursory search of a cell phone incident to arrest and it yields no evidence in the places they would have *expected* to find some, then even if the search complied with Justice Cromwell's standards of "reasonableness" in *Fearon*, it would be difficult for the police to then argue that they still had reasonable grounds to believe the phone contained evidence. The net result is that this type of pre-emptive search, which Justice Cromwell interpreted as fitting and justifying the law as a whole, might actually impair the police's ability to obtain a warrant, even as evidence is hidden in another area of the device. This interpretation advances neither the state's interest in law enforcement, nor the individual's interest in privacy. In this way, a constructive interpretation of the law on searching electronic devices that does not in any defensible way account for the cogent reasons for rejecting computer search protocols undermines the law's integrity.

To be clear, I am not suggesting that Justice Cromwell is not a person of integrity generally, or that he does not strive to act morally and with integrity when he writes legal opinions. Indeed, the mere fact that he or any judge cites precedent to support his decisions by itself demonstrates, at the very least, an aspiration to act with integrity.[85] However, when one seeks to act with integrity, he should then be meticulous in doing so, as it opens him up to criticism that his interpretation of the law leaves significant aspects of the record unexplained. That is what happened here. The majority opinion in *Fearon* deemed eligible a constructive interpretation that neither fits nor justifies the law as a whole because it fails to fully engage with the normative roots of privacy, to consider the primordial justification for the doctrine of search incident to arrest, and to explain why search protocols are any less futile or any more proportional than requiring a warrant or independent reasonable grounds for the search. Therefore, a better interpretation is needed.

III. SEARCHING ELECTRONIC DEVICES AT THE BORDER

On its face, *Fearon* appears to dial back the privacy gains made in cases like *Vu*. If one accepts that the majority's decision in *Fearon* does not fit or justify the law on searching electronic devices as a whole—a law that clearly affirms the heightened and different privacy interests engaged by the contents of personal electronic devices compared to traditional receptacles—then a better constructive interpretation should be offered that may guide the law's development at the border. The law may be shown in its best light when the reasonableness of searching an electronic device focuses on the proportionality between the limits on privacy and the benefit to be gained as a result. Proportionality in section 8 ought to mimic the way proportionality has developed under section 1 of the *Charter* and in judicial review of discretionary administrative decisions affecting *Charter* protections. A proportional balance according to this interpretation would demand—at a minimum—a requirement for reasonable suspicion before an electronic device could be searched at the border.

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84 *Fearon*, *supra* note 9 at paras 49, 59, 66. Justice Cromwell also points to the restrictions imposed on strip searches conducted incident to arrest as evidence that an appropriate balance may be struck at para 62. Contrast this conclusion with Chief Justice John Roberts' opinion in *Riley*, *supra* note 37 at 13–14, that concerns about the destruction or "remote wiping" of evidence triggered by an arrest are "anecdotal." The Court held that, in most cases, cell phones will automatically lock such that an officer's opportunity to search digital information incidental to arrest will be practically limited and, furthermore, officers could preserve digital evidence by simply disconnecting a phone from its cellular network until they obtain a warrant.

85 Hershovitz, *supra* note 12 at 118.

A. Distinguishing *R v Fearon*

Integrity requires that future cases on computer searches engage with the choices made in *Fearon*, but it does not condemn judges to agree with them. For instance, the notion that *stare decisis* should compel judges to apply decisions they have come to realize are wrong does not fit or justify legal practice.[86] This is what Dworkin means when he says that law as integrity begins in the present.[87] His theory asks how one can justify what lawmakers have done in an overall story worth telling *today*. This means integrity may require judges to overrule a bad decision in order to make the law the best that it can be.

For instance, in *Carter v Canada*, the Supreme Court ruled that the prohibition on physician-assisted suicide was unconstitutional even though it had reached the opposite conclusion 22 years earlier.[88] In making its decision, the Court had to consider whether the trial judge was bound by the Court's prior judgment in a case with substantially similar facts. A unanimous Bench held that she was not:

> …*stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate"….[89]

Note that the two situations listed by the Court are specifically limited to when *trial courts* may reconsider settled rulings of higher courts. *Carter* places no restriction on when the Supreme Court may reconsider its own decisions. It is thus clearly open to the Court to reconstitute the law in cases where neither a new legal issue is raised nor have circumstances changed, but where the Bench has come to realize that an alternative interpretation of the law better fits and justifies legal practice. The rub is that if lower courts cannot lawfully cast doubt on the Supreme Court's decisions, then the Supreme Court may be less likely to recognize or acknowledge the error of its ways.

If, as I have argued, the interpretation of the law put forth by Justice Cromwell in *Fearon* leaves major parts of the text unexplained, then that decision might not be just and cannot preclude the law's advancement in a different direction. *Fearon* has led some observers to believe that if it is reasonable for police to search one's smartphone incident to arrest without a warrant, then it is almost certainly reasonable for agents to search the same electronic devices without specific prior authorization at the Canadian border.[90] According to this logic, no constructive interpretation that limits searches of computers at the border would fit with the informational privacy U-turn that *Fearon* has added to the chain novel. However, this conclusion does not necessarily follow for two reasons. First, an eligible interpretation of the law need not fit every part of the text to demonstrate integrity, particularly if that part is deficient.[91] Second, notwithstanding the Court's clear intent in *Simmons* to exempt routine border searches from the constitutional safeguards first articulated in *Hunter*, an important distinction should be made between the arrest and border contexts. Even accepting the outcome in *Fearon*, which at the very least affirmed the unique privacy interests engaged by cell phones even if it did not balance

86 *Ibid* at 103.

87 Dworkin, *supra* note 10 at 227.

88 *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

89 *Ibid* at para 44.

90 Mark Joseph Stern, "The Cops Can Pretty Much Always Search Your Smartphone in Canada" (6 March 2015), *Future Tense* (blog), online: <http://www.slate.com/blogs/future_tense/2015/03/06/alain_philippon_case_cops_can_search_your_cellphone_in_canada.html> archived at <https://perma.cc/ST6P-Y8TS>.

91 Dworkin, *supra* note 10 at 230.

those interests accordingly, a lawful search incident to arrest must be the result of a lawful arrest. A lawful arrest requires reasonable grounds to believe the individual has committed or is about to commit an offence.[92] By contrast, the *Customs Act* does not require any grounds before a border agent is empowered to examine a traveller's goods, including any electronic devices.[93] As such, if no judge is willing to reverse *Fearon*, it may be distinguished without undermining the new constructive interpretation of the law that I propose on the basis that at least *some* consideration is afforded to the arrestee's heightened privacy interest in his devices in a search incident to arrest. By comparison, allowing unrestricted, indiscriminate searches of the same devices at the border when the *Charter* guarantees the right to be secure against unreasonable search and seizure appears, at least notionally, to be the antithesis of reasonableness. Therefore, distinguishing *Fearon* is not only consistent with, but also required by law as integrity. This case poses no meaningful threat to developing a more coherent interpretation of a computer search's reasonableness under section 8.

B. A Fourth Category?

That courts have repeatedly asserted the border is not a "*Charter*-free zone"[94] suggests that privacy does and should still matter when an individual seeks to enter the country. In 1988, when *Simmons* was decided, a computer was something that few people owned and no one could carry in his pocket. As such, one has to wonder whether Chief Justice Dickson might have recognized a fourth type of border search—that of computers—and assigned special protections to such devices just as *Vu* did in the warranted context. In *Simmons*, the Court held border strip searches (the second category) were reasonable under the *Customs Act*. However, Chief Justice Dickson emphasized that what made them reasonable was not the state's interest in national security by itself, but also the added requirement that the border officer reasonably suspect that the traveller was secreting something on or about her person and the availability of a statutory right to seek secondary authorization.[95] The need for these additional safeguards were essential to render a strip search reasonable due to the more intrusive nature of that type of search compared to a routine search of goods.

Given the law's recognition that computers are unique in both the nature and volume of information they contain, thereby attracting different privacy interests, it is unreasonable that they would be subjected to a search like any other good without individualized suspicion. Justice Nadel of the Ontario Court of Justice rejected this argument in *R v Leask*. The accused, a trucker, was charged with possession and importation of child pornography after customs officials discovered 33 illicit videos on a laptop in the cab of his vehicle. Justice Nadel held that searching a computer without any special equipment was no more intrusive or embarrassing than searching a pocket or a purse, which is permitted without reasonable suspicion.[96] The problem with this stance is it uses the same misleading digital–analogue comparisons that delayed legal recognition of a computer's *unique* privacy interests in order to now deny the greater intrusiveness of interfering with them. This is an untenable conclusion that breeds incoherence and skepticism in the law, which fails to fit or justify the law as a whole.

Even if one were to assume that searching a computer is not *as intrusive* as a strip search—and Justice Fish's comments in *Morelli* certainly challenge such an assumption—this would not justify lumping computers together with all other goods at the border. For

92 *Code*, *supra* note 34, s 495.
93 *Customs Act*, *supra* note 1, s 99(1)(a).
94 *Buss*, *supra* note 5 at para 35.
95 *Simmons*, *supra* note 16 at para 51.
96 *Leask*, *supra* note 49 at para 16.

example, a 2014 study on Americans' attitudes toward a series of traditional and electronic border searches found that content-related searches of electronic devices are perceived to be "among the most intrusive […], the *most* revealing of sensitive information, [and] only less embarrassing than strip searches and body cavity searches…"[97] Attitudes may vary slightly in Canada, adjusting for a more deferential political culture; however, there is no reason to suspect that a similar study among Canadians would yield vastly different results. Ergo, it is wrong to suggest, as Justice Nadel did in *Leask*, that a computer is a good like any other "in the context of the border."[98] The qualities of a computer that invite heightened privacy interests in the information it contains are not magically transformed when an individual seeks entry to Canada. The only things that arguably change are the nature and significance of the state's countervailing interests. Yet, under section 8, courts have traditionally assessed the balance of these interests with disproportional emphasis on the external situation in which the search occurs. While *Simmons* is regularly cited as evidence that computer searches absent individualized suspicion are reasonable because they fall within the first category of "routine" searches of goods, that decision should not be read apart from Chief Justice Dickson's caution:

> It is true that a determination of reasonableness must depend to some degree on the circumstances in which a search is performed. In my view, however, it would be incorrect to place overwhelming emphasis on the surrounding circumstances when assessing reasonableness under s. 8. Regardless of the constraints inherent in the circumstances, the safeguards articulated in *Hunter v. Southam Inc.* should not be lightly rejected. Although *Hunter* did not purport to set down immutable preconditions for validity applicable to all searches, the Court arrived at the…minimum prior authorization requirements only after examining the values s. 8 is meant to protect. Foremost among these values is the interest in preventing unjustified searches before they occur. This is a basic value regardless of situational constraints. In light of the importance of preventing unjustified searches, departures from the *Hunter v. Southam Inc.* standards that will be considered reasonable will be exceedingly rare.[99]

The fact that Chief Justice Dickson sought to craft categories of border searches requiring different levels of protections at all suggests it is unreasonable to continue to treat computers the same as any other goods at the border, unless one can demonstrate that the state's interest in national security *so outweighs* the individual's interest in privacy. According to proportionality theory, one cannot.

C. The Border Fallacy

What is it about borders in particular that would justify permitting content-related searches of electronic devices absent any reasonable grounds? Numerous rationales have been advanced, including self-defence, public health, and enforcement of tax and criminal offences. The Ontario Court of Appeal went so far as to recognize the need to protect the national border as a principle of fundamental justice.[100] In that case, *R v Jones*, the issue was whether the principle against self-incrimination prevented the accused's answers to routine questions by border agents from being used in criminal proceedings. In ruling the evidence admissible, the Court described the border context in the following terms:

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97 Matthew B Kugler, "The Perceived Intrusiveness of Searching Electronic Devices at the Border: An Empirical Study" (2014) 81:3 U Chicago L Rev 1165 at 1196 [emphasis in original].

98 *Leask*, *supra* note 49 at para 14.

99 *Simmons*, *supra* note 16 at para 47.

100 *R v Jones* (2006), 81 OR (3d) 481 at para 31, 41 CR (6th) 84 (Ont CA) [*Jones*].

> Travellers…reasonably expect that Customs authorities will routinely and randomly search their luggage. Put simply, the premise underlying the principle against self-incrimination, that is, that individuals are entitled to be left alone by the state absent cause being shown by the state, does not operate at the border. The opposite is true. The state is expected and required to interfere with the personal autonomy and privacy of persons seeking entry to Canada. Persons seeking entry are expected to submit to and co-operate with that state intrusion *in exchange for entry into Canada*.[101]

Justice L'Heureux-Dubé's concurring reasons in *Simmons* express a similar sentiment:

> Individuals arriving at customs…in *electing* to travel outside the country or in seeking entry for the first time, have implicitly *chosen* to submit to the rules and procedures for leaving and entering the country. They expect, and are expected, to submit to a certain degree of inspection of their baggage, and in some cases, their person. Their situation is distinguishable from one where an individual is stopped or detained in the course of his or her normal activities within Canadian territory.[102]

Underlying these courts' rationale for treating the border differently is the idea that, unlike situations where police arrest an individual or intrude upon his privacy at home, seeking entry to the country is an individual's *choice*. According to this theory, surrendering one's privacy to border agents is a price calculated to elicit a reward: permission to enter the country. The implication is that if people object to a random border search, then either they have something to hide or they do not seriously wish to enter. Neither is necessarily true. With all of the cultural, geopolitical, and socioeconomic imperatives that globalization brings, it is questionable to what extent presenting oneself for entry to the country can be described as a truly free or voluntary choice.[103] Furthermore, while travellers may "reasonably expect" that border agents will search their luggage, it is not clear that the same holds true of their digital devices. One need look no further than the media's bewilderment at Philippon's situation in order to appreciate the lack of consensus on this issue.

The tendency to treat border searches differently also appears to stem from their "random" and "routine" nature. For instance, Chief Justice Dickson held in *Simmons* that "[n]o stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised."[104] Conducting groundless searches at the border is thus rendered reasonable in part by the fact that everyone is treated the same at the point of entry. However, the Ontario Court of Appeal conceded in *Jones* that, as a matter of fact, not all travellers *are* treated equally:

> In a general sense, everyone who is questioned at the border and whose luggage is examined is the target of an investigation. Questions are asked and routine searches conducted to find individuals who are in breach of border-related laws. *It only makes good sense that those responsible for*

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101 *Ibid* at para 30 [emphasis added].

102 *Simmons*, *supra* note 16 at para 85 [emphasis added].

103 See e.g. Ton van Naerssen & Martin van der Velde, "The Thresholds to Mobility Disentangled" in Martin van der Velde & Ton van Naerssen, eds, *Mobility and Migration Choices: Thresholds to Crossing Borders* (Dorchester, UK: Ashgate Publishing, 2015) 3 at 6. According to the authors, "the decision-making process that concerns mobility and migration movements needs to go beyond reductionist explanations that consider motivations to migrate as a matter of rational and measurable choice. That means, decision-making involves both cognitive and emotional processes…."

104 *Simmons*, *supra* note 16 at para 27.

> *enforcing border regulations will focus their routine questions and searches on persons who have for some reason attracted their interest*.[105]

If one accepts the Ontario Court of Appeal's statement as true, then border agents will not normally search an individual's cell phone or computer unless something triggers their suspicion. Therefore, the belief that *no* stigma attaches to the search of an individual's digital devices is debatable, especially when Chief Justice Dickson's comments did not specifically contemplate such devices in 1988.

Lastly, borders serve both literal and symbolic functions. They define a nation-state's territoriality, proclaim sovereignty, and determine a state's level of security against external threats depending on their "selective permeability."[106] Audrey Macklin, writing in the context of refugee policy, has argued that there is a disconnect between how Canadians imagine their borders and how they think of their communities.[107] On one hand, borders conjure up the image of an impenetrable fortress designed to keep foreign bodies out and to protect citizens from terrorism, narcotics, criminals, invasive species, and other things deemed undesirable. On the other hand, citizens like to think that Canada is an open and welcoming country in which differences and individual rights are respected. How the law treats computers at the border reflects the country's values. Respecting the privacy guarantee in section 8 is important in the customs context, not in spite of, but precisely because of the added pressure to search at the border. By treating the contents of digital devices with the same respect they warrant in other contexts, the law is shown in its best light.

D. A Better Constructive Interpretation

Law as integrity is anti-Archimedean in the sense that it does not contend that there is a single fixed point by which judges can find the correct interpretation of the law. Instead, judges explain the meaning of law by accounting for the legal system's underlying values.[108] I offer proportionality as the theme for a better constructive interpretation of a search's reasonableness under section 8, but not as a regulative principle taken from outside the law and foist upon it. Rather, proportionality is posited as a theory that, taken as a principle of justice which runs throughout the jurisprudence and has the general explanatory power required by law as integrity, provides a more attractive way of telling the story behind section 8's treatment of digital devices in the best possible light.

To say that reasonableness "takes its colour from the context" is manifest.[109] This administrative law maxim is equally apparent in section 8. However, an examination of how courts currently assess the reasonableness of a search reveals that the *Collins* criteria for reasonableness (the search is authorized by law, the law itself is reasonable, and the search is conducted in a reasonable manner) lack the analytical rigour of reasonableness in other constitutional or administrative law contexts. For example, although section 8 is theoretically subject to the *Charter*'s reasonable limits clause, the interest balancing that would normally occur at section 1 is practically contained within section 8. Indeed, it is unlikely that a court would hold that an *unreasonable* search could then be justified as a *reasonable* limit.[110] The trouble is, beyond the relatively vague notion that a judge

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105 *Jones*, *supra* note 100 at para 40 [emphasis added].

106 Audrey Macklin, "Borderline Security" in Ronald Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383 at 383.

107 *Ibid* at 384.

108 Ripstein, *supra* note 60 at 9.

109 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339.

110 Steven Penney, "Unreasonable Search and Seizure and Section 8 of the Charter: Cost-benefit Analysis in Constitutional Interpretation" (2013) 62 Sup Ct L Rev (2d) 101 at footnote 5.

must balance the interest of the individual against that of the state, the refined filter of proportionality provided by the *Oakes* test[111] is never applied in assessing a search's reasonableness. The result is a less robust reasonableness analysis without the quality control function that section 1 would ordinarily serve. Framing the issue in terms of finding the point at which the individual's interest in privacy must give way to that of the state, which finds its genesis in *Hunter*, misleadingly implies an inevitability: that there is always a point at which the individual's interest will give way. By contrast, asking whether an infringement of a right is *proportional* to the benefit to be obtained by the state is a more nuanced question, which seeks to accommodate both interests where feasible.

Precedent supports this approach. The proportionality project is an increasingly common constitutional narrative. In *R v NS*, the Supreme Court sought to strike a proportionate balance between a witness' freedom of religion and an accused's right to a fair trial, neither prohibiting a woman from wearing a niqab while testifying in court, nor universally condoning it.[112] More recently, in *Loyola High School v Quebec* ("*Loyola*") the Supreme Court considered whether a discretionary decision by the Minister of Education to deny Loyola High School an exemption from the provincially mandated Ethics and Religious Culture program was reasonable. The majority resolved the case by resort to the "robust" reasonableness standard in *R v Doré*,[113] finding the denial infringed the school's freedom of religion more than necessary, while the dissenting justices would have allowed the appeal as an unreasonable limit under section 1 of the *Charter*.[114] Although the Court split on the analytical approach to take, the reasonableness inquiry was the same: "did the Minister's decision limit Loyola's right to freedom of religion proportionately—that is, no more than was reasonably necessary?"[115] The parallels between this question and the *Oakes* test are obvious. Asking the same question, which is analogous to the minimal impairment step in the *Oakes* test, in the context of section 8 is more likely to produce a just outcome because it brings coherence and thus integrity to the interpretation of reasonableness under the *Charter*. It would be incoherent if what qualifies as a reasonable limit implicit in section 8 were substantially dissimilar from what counts as a reasonable limit in section 1 simply because one provision focuses on proportionality, while the other does not. Hence, reasonableness-as-proportionality offers a better constructive interpretation of the law as a whole, making it easier to believe Dworkin's pretension that a single author wrote it and, most importantly, maximizing the odds that courts act justly when they apply it.

One might criticize this approach on the basis that it usurps the balancing function of section 1 and thereby creates an unworkable framework. For example, Graham Mayeda argues that section 8 should broadly protect privacy interests and that any assessment as to the reasonableness of a search should occur under the auspices of the *Oakes* test.[116] He advocates a more flexible framework for evaluating breaches of privacy, criticizing the law's current approach to balancing an individual's privacy interests against countervailing state interests like security at section 8. Whether this balancing exercise should occur within section 8 or at section 1 deserves independent analysis; however,

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111 See *R v Oakes*, [1986] 1 SCR 103 at 138–140, 53 OR (2d) 719.

112 *R v NS*, 2012 SCC 72, [2012] 3 SCR 726.

113 *Doré*, *supra* note 13.

114 *Loyola*, *supra* note 13.

115 *Ibid* at paras 31, 114. According to Aharon Barak, the former President of Israel's Supreme Court and a noted constitutional rights scholar, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations and it does not differ substantially from proportionality" (quoted at para 38).

116 Graham Mayeda, "My Neighbour's Kid Just Bought a Drone…New Paradigms for Privacy Law in Canada" (2015) 35 NJCL 59 at 77–79.

the important point is that, as presently interpreted, section 8 leaves little to no room for section 1's proportionality analysis to work its magic, laying waste to the image of law as integrity and perpetuating significantly different—and potentially unjust—standards of reasonableness under the *Charter*. To the extent that law as integrity requires coherence with past judicial decisions, an approach that imports proportionality into section 8's internal assessment of a search's reasonableness better fits and justifies modern legal practice. A clear division of labour between sections 8 and 1 may be preferable from a practical perspective, but avoiding any overlap would require courts to revisit the seminal statements in *Hunter*, which launched the Court's emphasis on balancing individual and state interests under section 8.[117]

E. Proportionality as Integrity

On a conceptual level, proportionality theory and law as integrity share the same fundamental project. Dworkin's dimension of fit evokes an image of surgical precision in the law: of engineering an elegant solution to a legal problem that meets with the jagged, gap-toothed edge of the existing legal landscape, creating a perfect seal. Proportionality, by definition, seeks to achieve the same goal by finding the sweet spot at which the individual's interest in privacy and the state's interest in intruding upon that privacy are ideally balanced. Anything less than a proportional response is arbitrary to the extent that it is disproportional. Insofar as the arbitrary response impairs a right more than necessary, proportionality theory also holds that the limit is unreasonable.

Again, recall that an eligible constructive interpretation of the law does not have to fit every part of the historical text.[118] In the same way, there may be more than one means to achieve a proportional balance. A proportional limit on a constitutional right must fall within a range of reasonable alternatives, what Aharon Barak terms the "zone of proportionality."[119] In the same way that the problem with the Minister's decision in *Loyola* was her assumption that teaching Catholicism from a Catholic perspective was "necessarily inimical"[120] to the state's core objective to foster openness and respect for diversity, the problem with the *Customs Act*'s broad power to search goods is the assumption that any privacy protection for the contents of electronic devices is necessarily inimical to national security or the state's interest in self-protection. It is a simple matter of fact that even if the CBSA wanted to search every single electronic device that traverses its borders, the agency's limited resources prevent it from casting such a wide net. Therefore, as a matter of practical necessity, customs officials will typically (though not always) depend on the presence of reasonable grounds to suspect an individual has secreted something into the country before searching the digital contents of any electronics he might be carrying.[121] Introducing the requirement that customs officials have reasonable suspicion before searching the contents of electronic devices is a modest protection that would more proportionally balance the individual's heightened privacy interest in his digital information and the state's interest in self-protection. This proposal formalizes what effectively happens on the ground already. The reasonable suspicion standard, which has historically applied to border searches of the person, requires objective, articulable facts that would lead a reasonable person to suspect a traveller may

117 See Lisa M Austin, "Information Sharing and the 'Reasonable' Ambiguities of Section 8 of the Charter" (2007) 57:2 UTLJ 499 at 510–512. Austin describes how courts sometimes conflate the reasonable expectation of privacy threshold question with the interest-balancing function of section 8 and discusses the risks that this creates.

118 Dworkin, *supra* note 10 at 230.

119 Aharon Barak, "Proportionality (2)" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford UP, 2012) 738 at 748.

120 *Loyola*, *supra* note 13 at para 68.

121 Kugler, *supra* note 97 at 1178.

have contravened an Act of Parliament. It is not speculation, nor is it a hunch.[122] Rather, it is a standard higher than mere suspicion and lower than reasonable and probable grounds.[123]

One might argue that provisions like section 99(1)(a) of the *Customs Act* are necessary "when it is impossible to separate the narrower measures needed to realize the law's purpose from those that are overinclusive."[124] In other words, perhaps requiring individualized suspicion to search the contents of electronic devices at borders would not accomplish the legislative objective as effectively. Assuming for the sake of argument that this is true, the overinclusiveness of the customs search power vis-à-vis electronic devices may be dealt with in the final balancing act that proportionality requires. According to Barak, one must balance the social importance of the benefit to be gained from realizing the legislative objective (national security) against the social importance of avoiding the limitation on the right (privacy). Crucially, however, Barak emphasizes that this balancing—embodied in the last stage of the *Oakes* test—is not about comparing the overall importance of the objective to the overall importance of the right, but the *marginal social benefit* to be gained from *this particular law* with the *marginal harm* to the right.[125] This is an important insight because if privacy interests in the informational contents of electronic devices are compared to the objective of national security as a whole, as they have been in the section 8 jurisprudence until now, then privacy does not stand much chance at meaningful protection. However, the CBSA's incapacity to actually search every electronic device that enters the country means that the marginal benefit to national security that may be gained from this power is no greater than it would be if the law restricted such searches to instances where officers had reasonable suspicion. Indeed, as Barak suggests, a less infringing alternative that does not accomplish the legislative objective equally as effectively may nonetheless represent a more proportional balance between the importance attached to the objective and to the right.[126]

Barak also suggests that proportionality has a temporal aspect in the sense that its requirements are ongoing.[127] Similarly, law as integrity begins in the present. It requires a constructive interpretation according to which the past is relevant only to the extent that it fits with modern legal practice. In this sense, a constructive interpretation of section 8 based on proportionality need not abandon the legacy of *Simmons*' border exception altogether. This interpretation recognizes that the three categories crafted in 1988 may have been proportional and thus reasonable in light of technological and epistemological limits at that time. However, proportionality and integrity today both require an update to that old understanding in order to fit and justify modern legal practice. One might argue that transposing the kind of robust reasonableness analysis that the majority follows in *Loyola* or the rigours of the *Oakes* test to section 8 only makes explicit what was already implicit. However, Barak says proportionality must be orderly and transparent.[128] The current section 8 reasonableness analysis is both less orderly and less transparent than the interest balancing in *Loyola*. Like proportionality, integrity requires courts to engage with the law in a transparent manner. Therefore, a constructive interpretation of section 8's reasonableness that mirrors the more robust understanding of proportionality in section 1 and in decisions like *Loyola*, and which

122 *R v Kang-Brown*, 2008 SCC 18 at paras 26, 76, [2008] SCR 456.
123 *Ibid* at para 75.
124 Barak, *supra* note 119 at 744.
125 *Ibid* at 745.
126 *Ibid*.
127 *Ibid* at 743.
128 *Ibid* at 749.

seeks to accommodate the privacy values underlying section 8 "as fully as possible,"[129] fits and justifies the law as a whole better than the anemic analysis that currently allows situational factors to dominate. This interpretation also holds that requiring reasonable suspicion before conducting a computer search at the border would more proportionally balance an individual's privacy interests in the device's contents with the interest of the state in intruding for purposes of national self-protection.

CONCLUSION

This paper began with a simple, yet powerful, proposition from Dworkin: that although acting with coherence does not guarantee justice, by doing so judges demonstrate their commitment *to* justice. Law as integrity does not free judges to decide cases on a whim; their interpretation is constrained to the extent that they must account for legal practice and what came before, if only to overrule or distinguish unhelpful precedent. While setting the threshold for fit is an inherently political exercise, it is not simply an abstract concept. It may be applied, as above, to illustrate the risk that incoherence will breed injustice. The informational contents of computers, such as laptops, tablets, smartphones, and other electronic devices, are recognized in law as engaging heightened privacy interests. That they attract a reasonable expectation of privacy sufficient to trigger the *Charter*'s protection under section 8 is clear. Interference with those contents by the state constitutes a search, which must be reasonable under the Constitution. The reasonableness of a content-related computer search is largely dictated by the situation in which it occurs. At home, police need a separate warrant. After arrest, police do not need a warrant but must have grounds for the arrest and the search must be related to the offence for which the individual was arrested. At the border, customs officers can turn on and search through a traveller's electronics without any grounds whatsoever. This patchwork of reasonableness, where external circumstances are permitted to swoop in and trounce the individual's privacy interest, does not strike a reasonable balance between state and individual interests to the extent that it is disproportional. Incoherence and its corresponding risk of injustice are exemplified by the law's extension of the search incident to arrest doctrine to include electronic devices in *R v Fearon*. The majority opinion in that case offers a poor constructive interpretation of section 8's reasonableness requirement, leaving major structural aspects of the written record unexplained.

A better constructive interpretation of the law on section 8 would provide a more reasonable balance in that context and at the border. Adopting proportionality theory as it has been developed under section 1 of the *Charter* and in *Loyola* is one such interpretation. Proportionality provides a compelling way to see the law in its best light because it runs through the jurisprudence and has general explanatory power. It also restores coherence to how reasonableness will be interpreted under the *Charter*, making it easier to conceive of the law as a coherent novel written by a single author. Powers under the *Customs Act* that empower border agents to search a computer's contents without any grounds infringes an individual's privacy more than reasonably necessary. A more proportional response that better balances the state and individual interests at stake would require reasonable suspicion before CBSA officials may search such devices. To be sure, customs officials have a difficult job. But the task of a judge faced with a case like Philippon's is even harder: to make the law the best that it can be. When it comes to section 8, doing better is not only possible; it is proportional.

129 *Loyola*, *supra* note 13 at para 39.

ARTICLE

WALKING THE TIGHTROPE BETWEEN NATIONAL SECURITY AND FREEDOM OF EXPRESSION: A CONSTITUTIONAL ANALYSIS OF THE NEW ADVOCATING AND PROMOTING TERRORISM OFFENCE

Melissa Ku*

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INTRODUCTION

"There is no liberty without security," the former Minister of Public Defence and Emergency Preparedness, Steven Blaney, told the House of Commons at the second reading of Bill C-51.[1] "Canadians […] understand their freedom and security go hand in hand."[2] In response to the increased instances of terrorist acts globally, the recently defeated Conservative Government ("the former Government") made national security and counter-terrorism a political priority, and responded with a wave of anti-terrorism legislation, some of which came under scrutiny and none more so than Bill C-51. The former Government introduced Bill C-51 as another weapon in the war on terror. In particular, Bill C-51 creates a new criminal offence under section 83.221 of the *Criminal Code* ("the *Code*"),[3] which prohibits advocating and promoting terrorism offences. Despite voting in favour of Bill C-51, Liberal Leader and current Prime Minister, Justin Trudeau, promised amendments to "problematic elements" of Bill C-51 in his election platform and in his subsequent Ministerial Mandate Letters to the new Minister of Public Safety and Emergency Preparedness, and Minister of Justice.[4] In particular, he

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1 *Bill C-51, An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts,* 2nd Sess, 41st Parl, 2015 (assented to 18 June 2015), SC 2015, c 20.

2 *House of Commons Debates*, 41st Parl, 2nd Sess, No 174 (18 February 2015) at 1535 (Hon. Steven Blaney).

3 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

4 Letter from Justin Trudeau, Prime Minister of Canada to Mr. Ralph Goodale, Minister of Public Safety and Emergency Preparedness [nd] online: Prime Minister of Canada <http://pm.gc.ca/eng/minister-public-safety-and-emergency-preparedness-mandate-letter> archived at <https://perma.cc/NV9Q-E9NM>;

Letter from Justin Trudeau, Prime Minister of Canada to Ms. Wilson-Raybould, Minister of Justice and Attorney General [nd] online: Prime Minister of Canada <http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter> archived at <https://perma.cc/K9FJ-BZ74>.

promised to "narrow overly broad definitions."[5] He does not, however, specifically refer to section 83.221 as being a "problematic element" of Bill C-51 or a provision with overly broad definitions.

This paper argues that the newly elected Liberal Government should revisit and reassess section 83.221 because the provision potentially offends section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"),[6] and may not be demonstrably justifiable under section 1. To reach this conclusion, this paper conducts a *Charter* analysis and draws on analogous considerations from five other landmark cases that addressed criminalized limits to free expression: *R v Khawaja*;[7] *R v Sharpe*;[8] *R v Zundel*;[9] *R v Butler*;[10] and *R v Keegstra*.[11] Part I introduces section 83.221 and summarizes the five comparison cases. Part II discusses the uncertainty around whether the activity prohibited by section 83.221 may be construed as constitutionally protected expression. Part III outlines why the provision, if found to violate section 2(b), may not be saved under section 1 because its limitations do not minimally impair. Part IV discusses possible remedies.

I. THE BILL, THE SECTION, AND THE FIVE LANDMARK CASES: A PRIMER

A. Bill C-51 and Section 83.221

On January 30, 2015, the former Government tabled Bill C-51, which subsequently received Royal Assent on June 18, 2015. Minister Blaney highlighted the threats of terrorism in Canada during the second reading, and drew special attention to two terrorist attacks in October 2014 as a solemn reminder that international jihadists have also targeted Canada. Bill C-51 therefore reflected the former Government's commitment to protect Canadians from these threats of terrorism. This paper focuses on an amendment to the *Code* that created a new criminal offence in section 83.221, which as of January 30, 2016 reads:

> **83.221** (1) Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general—other than an offence under this section—while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.
>
> (2) The following definitions apply in this section:
> "communicating" has the same meaning as in subsection 319(7).
> "statements" has the same meaning as in subsection 319(7).

5 "Bill C-51", Liberal Party of Canada, online: Liberal <https://www.liberal.ca/realchange/bill-c-51/> archived at <https://perma.cc/B7VZ-YG5T>.

6 *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.

7 *R v Khawaja,* 2012 SCC 69; [2012] 3 SCR. 555; [2012] SCJ No 69 (QL) [*Khawaja*].

8 *R v Sharpe,* 2001 SCC 2; [2001] 1 SCR 45; [2001] SCJ No 3 (QL) [*Sharpe*].

9 *R v Zundel,* [1992] 2 SCR 731; [1992] SCJ No 70 (QL) [*Zundel*].

10 *R v Butler,* [1992] 1 SCR 452; [1992] SCJ No 15 (QL) [*Butler*].

11 *R v Keegstra,* [1990] 3 SCR 697; [1990] SCJ No 131 (QL) [*Keegstra*].

The prohibited act includes several elements.[12] First, an accused must communicate statements. Section 319(7) of the *Code* defines "communicating" to include "communicating by telephone, broadcasting or other audible or visible means," and "statements" to include "words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations."[13] Secondly, the individual must advocate or promote the communicated statements. As will be discussed in Part II, the meanings of "advocating" and "promoting" present a problematic uncertainty because the *Code* does not define them. Finally, the prohibited subject matter is "terrorism offences in general". Section 2 of the *Code* defines "terrorism offence" to mean any indictable offences committed for or in association with a terrorist group; any indictable offence that is also "terrorist activity", which is defined in section 83.01(1); a series of specific offences under Part II.1; and conspiracy, aiding after the fact, or counselling any of the above.[14] The provision does not specify any exceptions.

The new offence indicates that an accused must *knowingly* advocate or promote terrorism offences that he or she *knows,* or is *reckless* that a terrorism offence may be carried out as a result of the promoting or advocating.[15] However, the provision only requires that an accused know or be reckless that a terrorism offence *may* be committed, and does not require an accused to have a terrorist purpose.[16]

This new offence attempts to address the increasing number of radicalized individuals from western nations, and the role of terrorist media in the radicalization process. However, some civil liberties groups and legal academics worry that section 83.221 infringes the *Charter*, and will also chill legitimate expression. On July 21, 2015, the Canadian Civil Liberties Association and the Canadian Journalists for Free Expression launched a constitutional challenge against Bill C-51, in which they allege section 83.221 violates section 2(b) and cannot be saved under section 1.[17] At the time of writing, the court has not yet heard this challenge.

B. Criminalizing Expression: Five Landmark Cases

In addressing the potential for the new offence to run up against freedom of speech, the former Minister of Justice, Peter MacKay told the Standing Committee on Public Safety and National Security that the *Code* contains other provisions that criminalize expression which courts have upheld.[18] The *Code* does not include many criminalized limits to free expression. Therefore, drawing analogies from cases that have already addressed the constitutionality of criminally prohibited expressions may be useful in predicting what a court may conclude in the constitutional challenge to section 83.221. Indeed, *Keegstra* looks to *Butler* for comparisons, and *Zundel* to *Keegstra*. This section briefly outlines five landmark cases in which the Supreme Court of Canada ("the Court") considered the constitutionality of a criminalized limit to freedom of expression.

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12 See Kent Roach & Craig Forcese, "Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence" (3 February 2015), *Canada's Proposed Anti-Terrorism Act: An Assessment* (blog), online: <https://cdnantiterrorismlawaudit.wordpress.com/page/2/> archived at <https://perma.cc/UH9S-C8AG> at 9-16 [Roach & Forcese].

13 *Criminal Code*, *supra* note 3, s 319(7).

14 *Ibid*, s 2.

15 Roach & Forcese, *supra* note 12 at 6, 17-18.

16 *Ibid* at 17-18.

17 See Canadian Civil Liberties Association, News Release, "CCLA and CJFE mount Charter challenge against Bill C-51" (21 July 2015), online: Canadian Civil Liberties Association <https://ccla.org/ccla-and-cjfe-mounting-charter-challenge-against-bill-c-51/> archived at <https://perma.cc/A49N-V46W>.

18 Canada, Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 2nd Sess, No 053 (10 March 2015) at 0935 (Hon Peter MacKay) [Public Safety March 2015].

i. *Keegstra:* Hate Propaganda

The accused in *Keegstra* was charged under section 319(2) of the *Code* for communicating anti-Semitic statements to his students. Section 319(2) prohibits an individual from wilfully promoting hatred against any identifiable group by communicating statements. Although the Court found section 319(2) violated the accused's *Charter* protected rights under section 2(b), the impugned provision could be justified under section 1 of the *Charter*. In particular, during the proportionality arm of the section 1 analysis, the Court concluded that hate propaganda was not a form of expression that touched the core of the freedom's underlying values, especially in light of evidence that hate propaganda caused harm to members of the targeted group and to society as a whole.

ii. *Butler*: Obscenity

In *Butler*, the Court unanimously upheld section 163 of the *Code*, which prohibits the publication, distribution, or circulation of obscene materials. Focusing specifically on the definition of "obscene" in section 163(8), the Court found that although the prohibition infringed on the accused's freedom of expression, the prohibition was justified under section 1. Like *Keegstra*, the Court found the subject matter of expression in *Butler* to be outside the section 2(b) core values. It accepted evidence that demonstrated a causal relationship between exposure to obscene material and individuals' desensitization to violence and degradation of women. The Court also gave weight to the fact that the *Code* clearly defines the subject matter prohibited by section 163, and does not unnecessarily extend its reach to legitimate forms of expression.[19]

iii. *Sharpe*: Possession of Child Pornography

Section 163.1 of the *Code* prohibits the production, distribution, and possession of child pornography. In *Sharpe*, the Court dealt exclusively with section 163.1(4), which prohibits the possession of child pornography. The majority found that the limits in this provision violated section 2(b). Additionally, although the majority found the general application of section 163.1(4) justified under section 1, the provision also potentially captured two instances of "possession" not intended by Parliament. Instead of striking the entire provision down, the majority read in the missing exceptions to bring the provision in line with the *Charter*.

iv. *Khawaja*: Terrorist Activities

Part of the accused's appeal included a claim that the purpose and effect of Part II.1 violated section 2(b). The Court unanimously rejected this argument. Looking purposively at the Part as a whole, the Court found the conduct captured by the impugned provisions to be acts or threats of violence, or acts intimately connected to violence.[20] Thus, the conduct here did not fall within the scope of expression protected under section 2(b), and the Court did not conduct a section 1 analysis.

v. *Zundel*: False News

In *Zundel*, the accused was charged under section 181 of the *Code* for publishing a booklet that denied the Holocaust. In a narrow 4-3 split, the Court struck down the *Code* offence of publishing false statements that could cause injury to public interest because it was overbroad and vague. First, section 181 caught a wide range of speech. Additionally, the qualification that the speech be "false" was unclear and potentially dependant on accepted norms of the day. Finally, the requirement that the speech cause

19 *Butler, supra* note 10 at paras 112-115.

20 *Khawaja, supra* note 7 at para 71.

"injury" or "mischief" could not be sufficiently defined. The legislature's objective at the time of its enactment in 1892 no longer addressed an existing social concern.[21] For these reasons, the limits section 181 presented to freedom of expression could not be justified under section 1 of the *Charter*.

II. DOES SECTION 83.221 INFRINGE SECTION 2(B)?

The Liberal Government should reassess section 83.221 because it potentially implicates the rights and freedoms protected under section 2(b), and this uncertainty about the provision's constitutionality is itself problematic. A law infringes section 2(b) if the prohibited activity is a form of "expression" and if Parliament's purpose in enacting the law is to limit that expression. One of the central issues with section 83.221 is the potential vagueness and overbreadth in some of the offence elements, particularly with the definitions of "advocating" and "promoting". This potential vagueness and overbreadth creates uncertainty about whether the activities prohibited by section 83.221 are constitutionally valid or if they are protected by the *Charter* at all.

A. Is the Activity Caught by Section 83.221 "Expression"?

Prime Minister Trudeau has already identified provisions with overly broad definitions as one of the problematic areas in Bill C-51 his Government will remedy. Section 83.221 should be one of those provisions because available case law do not clearly resolve whether the activity caught by section 83.221 falls within the scope of section 2(b). If the court does not recognize the impugned activity as "expression", section 2(b) will not protect it. A court may be persuaded to find these acts do not qualify as "expressions" if it accepts that "advocating" or "promoting" terrorism offences exist on a continuum that contributes to acts of violence, or that "advocating" or "promoting" terrorism offences are akin to counselling an offence. On the other hand, a court may decide that key elements of the offence are too vague, and the activity caught by the provision fall within the ambit of section 2(b) notwithstanding these arguments.

Historically, courts have interpreted section 2(b) generously. If the impugned activity conveys or attempts to convey meaning, courts start from a presumption that the activity falls under the ambit of section 2(b), regardless of its content.[22] This low threshold means that section 2(b) protects even unpopular and offensive expression, as evidenced in *Sharpe*, *Keegstra*, and *Butler*. Acts of violence are the exception. A court may find that promoting and advocating terrorism offences are closely connected to acts of violence, and should not receive protection under the *Charter*. In a case review of *Keegstra*, law professor, Kathleen Mahoney, cites a social-psychology study that suggests expressions of prejudicial attitudes connect to acts of violence on a continuum scale, and that each stage of the continuum is connected to and dependent on preceding stages.[23] Using this premise, she argues that the Court in *Keegstra* should not have taken a categorical approach that distinguishes based on content and form because, in the context of hate propaganda, content is very much related to form.[24] Similarly, one could argue that advocating and promoting terrorism fall on a continuum of actions that potentially lead to acts of terrorism, and for this reason, should be viewed purposively rather than in dichotomous content and form distinctions. The door may be open for a court to make

21 *Zundel, supra* note 9 at para 54.

22 *Keegstra, supra* note 11 at para 37, citing *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927; *Butler, supra* note 10 at para 69.

23 Gordon Allport, *The Nature of Prejudice* (Cambridge, MA: Addison Wesley, 1954), cited in Kathleen Mahoney, "*R. v. Keegstra*: A Rationale for Regulating Pornography?", online: (1992) 37 McGill LJ 242 at 249 <http://www.lawjournal.mcgill.ca/userfiles/other/4003804-Mahoney.pdf> archived at <https://perma.cc/M8ZY-DK2P>.

24 *Ibid*.

such a conclusion. In the context of a *Charter* analysis of a *Code* provision that prohibits the participation in the activity of a terrorist group, the Court in *Khawaja* noted that "there is substantive harm inherent in all aspects of preparation for a terrorist act because of the great harm that flows from the completion of terrorist acts."[25] If a court agrees that advocating and promoting terrorism is an early participatory stage that culminates in the commission of terrorist acts, it may conclude that the activities prohibited by section 83.221 should not receive *Charter* protection.

At the same time a court may find that the prohibition in section 83.221 encroaches too far into activities protected by section 2(b). Justice McLachlin, as she then was, wrote in her dissenting reasons in *Keegstra,* and in the unanimous *Khawaja* decision that section 2(b) excluded threats of violence because threats of violence "take away free choice and undermine freedom of action."[26] Applying this premise, law professors Kent Roach and Craig Forcese[27] argue that advocating and promoting terrorism offences are distinguishable from expressions that threaten violence because the former do not remove agency from the receiver.[28] Rather, an individual may "advocate or promote terrorism offences" without threatening harm. Arguably, there is nothing inherently violent in expressing one's opinion in favour of terrorism.

A court may find the activity prohibited by section 83.221 outside the protection of section 2(b) by accepting the proposition that advocating or promoting terrorism is akin to counselling. Although statutory interpretation tools presume that three distinct terms each have a distinct meaning, common sense indicates that the verbs "to advocate", "to promote", and "to counsel" bear some relation to each other. According to section 22(3) of the *Code,* to "counsel" means to solicit, procure, or incite.[29] *Keegstra* defined "promote" to mean "active support or instigation […] more than simple encouragement."[30] *Sharpe* noted that the "advocate or counsel" requirement in section 163.1(2) is met if an individual "actively induc[es] or encourag[es]" the described offence.[31] The Court in *R v Hamilton* said liability flows from counselling an offence because it is just as objectionable to "get someone to commit an objectionable act," and in doing so, "increases the likelihood of harm occurring."[32] *Khawaja* also confirmed that threats of violence or offences enumerated under section 83.01(1)(b)(ii),[33] which includes counselling an act, fall under the violence exception to section 2(b) protection.[34] These activities undermine the law, are unworthy of protection, and are antithetical to the underlying purpose for section 2(b), which is to choose between ideas or courses of conduct.[35] The common law definitions of "promoting" and "advocating" suggest a similar culpability as "counselling". Thus, one could argue that section 2(b) should also exclude acts of advocating or promoting an offence.

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25 *Khawaja, supra* note 7 at para 63.

26 *Ibid* at para 71; *Keegstra*, *supra* note 11 at para 237.

27 Professors Roach and Forcese teach in the Faculties of Law at the University of Toronto and University of Ottawa respectively. They are recognized as experts on national security law, and have written extensively on C-51.

28 Roach & Forcese, *supra* note 12 at 21-22.

29 *Criminal Code, supra* note 3, s 22(3).

30 *Keegstra, supra* note 11 at para 115.

31 *Sharpe, supra* note 8 at para 56.

32 *R v Hamilton*, 2005 SCC 47; [2005] 2 SCR 432; [2005] SCJ No 48 (QL) at paras 25-26.

33 Subsections 83.01(1)(b)(ii)(A), (B), (C) and (D) defines 'terrorist activity' to mean an act or an omission that intentionally causes death or serious bodily harm, endangers a person's life, causes a serious risk to the health or safety of the public, or causes substantial property damage likely to result in these bodily harms. See *Khawaja*, *supra* note 7 at para 71.

34 *Khawaja*, *supra* note 7 at para 70.

35 *Ibid* at para 70-71; *Keegstra, supra* note 11 at para 237.

However, Professors Roach and Forcese caution against "plugging-in" judicially defined terms and presuming these definitions apply from one offence to another without also considering their respective contexts.[36] As will be more thoroughly discussed in Part III, unlike in *Sharpe* or *Keegstra*, section 83.221 likely suffers from an overbroad interpretation and application because the prohibited subject matter is also vaguely defined, and the offence lacks statutory defences.[37] The potentially overbroad reach of section 83.221 could mean that legitimate expression could be unwittingly caught by this provision. Thus, a court may be disinclined to exclude *Charter* protection because of the potential it will catch legitimate forms of expression, and may prefer to instead consider if the limit is justified under section 1 of the *Charter*. This uncertainty is also problematic because until a court makes a determination on this issue, section 83.221 may effectively chill free speech. The Liberal Government should reassess section 83.221, and amend the provision with clearer definitions to avoid this.

B. Parliament Intended to Limit Expression

If the activity or conduct qualifies as "expression" within the meaning of section 2(b), the second consideration is whether the government intended to restrict freedom of expression.[38] Here, the government's purpose is clearly to prohibit a certain undesirable kind of expression. Section 83.221 specifically targets expression by referencing section 319(7)'s definition of "statements".

III. IS SECTION 83.221 PRESCRIBED BY LAW AND DEMONSTRABLY JUSTIFIED?

If section 83.221 violates section 2(b), the government must justify its limits under section 1 of the *Charter*. Section 1 requires a court to determine whether the impugned provision is prescribed by law and whether it is demonstrably justified in a free and democratic society. The Liberal Government should reassess section 83.221 because if this provision is indeed *Charter* protected, a court may find section 1 cannot save it. Based on the five comparison cases, a court may not find section 83.221 prescribed by law because it is too vague. Although a court may find that Parliament had a pressing and substantial objective and that section 83.221 is rationally connected to that objective, it may conclude that section 83.221's limitations are not proportionate to its effects because its limitations do not minimally impair.

A. Section 83.221 may not be Prescribed by Law because it is Vague

Impermissibly vague laws frustrate the fundamental principle of justice that an individual should be able to know that a given act is criminally prohibited at the time he or she commits the act.[39] The constitutional doctrine against vagueness also dictates that laws be sufficiently clear to limit law enforcement discretion.[40] This means a legally prescribed limit cannot be so obscure that it is "incapable of interpretation with any degree of precision" with "no intelligible standard."[41]

Section 83.221 can be contrasted against sections 163, 163.1, and 319 of the *Code*. The subject matter of these prohibitions have distinct and narrow definitions. For example, section 163(8) defines "obscene" to mean "any publication a dominant characteristic of

36 Roach & Forcese, *supra* note 12 at 11.

37 *Ibid.*

38 *Keegstra, supra* note 11 at para 31.

39 *R v Levkovic*, 2013 SCC 25; [2013] 2 SCR 204; [2013] SCJ No. 25 (QL) at para 3, citing *R v Mabior*, 2012 SCC 47 [*Levkovic*].

40 *Ibid* at para 2, citing *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123.

41 *Butler, supra* note 10 at para 74.

which is the undue exploitation of sex, or of sex and any one or more of the following […] crime, horror, cruelty and violence."[42] Expressions that do not meet this definition are not "obscene". Similarly, section 163.1(1) specifies the expressive vehicle and what must be depicted for an expression to come within the definition of "child pornography". The requirement that the "dominant characteristic" of the expression depict a sexual organ "for a sexual purpose" precludes, for example, family pictures of babies in the bath.[43]

The courts do not always strike down all imprecise laws, as they recognize precise technical definitions may not always be possible.[44] In such circumstances, the judiciary must interpret undefined terms based on Parliament's intent. Section 319(2) criminalized wilful promotion of "hatred". The Court in *Keegstra* interpreted the word "hatred" in context with Parliament's purpose rather than strike it down, and concluded that based on the way the term was used in the provision, "hatred" denoted a limited range of identifiable emotions.[45] One of the criticisms of section 83.221 is that unlike section 319(2) where "hatred" had a narrow range of meaning, the potential vagueness in section 83.221 may not be as easily remedied. In the context of terrorism offences, it is unclear here what it means to "advocate" or "promote", and what needs to be advocated or promoted.[46]

As raised in Part II, the provision is also vague because the difference in meaning between "counselling", "advocating", and "promoting" terrorism is unclear. The modern statutory interpretation approach presumes Parliament avoids redundancy.[47] This then suggests that "advocating" and "promoting" are not synonymous with each other, or with "counselling". Minister Blaney said section 83.221 targets the "idea of counselling or inciting," and pointed to *Sharpe* and *Keegstra* as instructive to clarify any potential vagueness in its meaning.[48] The definitions in *Sharpe* and *Keegstra* also seem to suggest "advocate", "promote", and "counsel" have similar meanings. How do "actively inducing and encouraging"; "actively supporting and instigating that is more than mere encouragement"; and "procuring, soliciting, and inciting" differ from each other in meaning? If they do in fact mean the same thing, why did Parliament enact an offence that already exists in the *Code*? Why did Parliament include both "advocate" and "promote" as the actus reus elements of the offence? If these words do not mean the same thing, how are they different? This imprecision in a key element of the offence makes section 83.221 vague.

Secondly, the nature of the subject matter caught by this offence is also vague. The prohibited content is "terrorism offences *in general*." As aforementioned, section 2 of the *Code* defines "terrorism offences" very broadly. "Terrorism offences" include any indictable offences in the *Code* committed for or in association with a terrorist group; any indictable offence that is also "terrorist activity"; a series of specific offences under Part II.1; and conspiracy, aiding after the fact, or counselling any of the above. Definitions that cite provisions with definitions that refer to yet other provisions with definitions reduce the likelihood of finding an intelligible standard. The Canadian Bar Association ("CBA") criticized Parliament's decision to use "terrorism offences" as the content matter, instead of the less broad term, "terrorist activity", which is more clearly defined in section 83.01(1).[49] "Terrorism offences" is already vaguely and broadly defined, and the words "in

42 *Criminal Code*, *supra* note 3, s 163(8).

43 *Sharpe*, *supra* note 8 at paras 49-51.

44 *Butler*, *supra* note 10 at para 76.

45 *Keegstra*, *supra* note 11 at paras 116-117.

46 Roach & Forcese, *supra* note 12 at 7.

47 Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law Inc, 2007) at 167.

48 Public Safety March 2015, *supra* note 18 at 0935 (Hon Steven Blaney).

49 Bill C-51, Anti-terrorism Act, 2015" (March 2015), *The Canadian Bar Association*, online: <http://iclmg.ca/wp-content/uploads/sites/37/2015/03/15-15-eng.pdf> archived at <https://perma.cc/M98C-Z6EJ> at 22 [*Bill C-51*].

general" add even more uncertainty.[50] Minister MacKay's comments suggests Parliament intended this vagueness:

> […] the focus of the proposed new offence is to cover the situation where the active encouragement lacks the specific detail that would link the encouragement to the commission of a specific terrorism offence, although in the circumstances, it is clear that someone is actively encouraging to commit any of the terrorism offences in the *Code*.[51]

Although Parliament clearly intended to enact a provision that could adapt to the ever changing counter-terrorism landscape, this approach potentially violates the fundamental principle of justice that individuals must be able to know that a particular act is a criminal offence at the time he or she commits it.[52] A law cannot prohibit an act if that law is unclear about what the prohibited act is, which section 83.221 attempts to do.

It is possible for section 83.221 to fail at this stage of the section 1 analysis. However, a court may also, as it did in *Zundel*,[53] presume the offending provision meets the low vagueness threshold in order to consider the matter on its merits at the next section 1 stage.

B. Is the Limitation of Advocating or Promotion Terrorism Offences Demonstrably Justifiable?

A limit that infringes the *Charter* may be demonstrably justifiable if the government can show Parliament had a pressing and substantial objective, and that the means chosen are proportionate to this objective.[54] The law is proportionate if the means chosen to achieve it are rationally connected, if the law impairs as minimally as necessary, and if the benefits of the law are proportional to its deleterious effects.[55] Drawing on analogous considerations from the five comparison cases, a court may conclude that although Parliament had a pressing and substantial objective that is rationally connected to the means adopted, section 83.221 does not minimally impair in its limits, and the provision is therefore not demonstrably justifiable.

i. Parliament had a Pressing and Substantial Objective

A court will likely find that Parliament had a pressing and substantial objective in enacting section 83.221 because Parliament's purpose in enacting section 83.221 is well documented. Ministers Blaney and MacKay make it very clear at various stages of the legislative process that Bill C-51 targets the very real threat of terrorism in Canada, and that the purpose of the new offence is to give law enforcement more powers to combat the concerning trend in militant radicalization in Canadians. At the second reading, Minister Blaney pointed to the international jihadist movement and the danger it poses to Canada. Minister MacKay said Bill C-51 was "aimed specifically at protecting Canadians from the evolving threat of terrorism."[56] The former Government was also clear that the amendments to the *Code* collectively and individually gave law enforcement

50 Roach & Forcese, *supra* note 12 at 14.

51 Public Safety March 2015, *supra* note 18 at 0915 (Hon Peter MacKay).

52 *Levkovic*, *supra* note 39.

53 *Zundel*, *supra* note 9 at para 41.

54 *Carter v Canada (Attorney General)*, 2015 SCC 5; [2015] 1 SCR 331; [2015] SCJ No 5 (QL) at para 94, citing *R v Oakes*, [1986] 1 SCR 103.

55 *Ibid*.

56 *House of Commons Debates*, 41st Parl, 2nd Sess, No 176 (20 February 2015) at 1125 (Hon Peter MacKay).

power to pre-empt, prevent, and thwart terrorist activities.[57] Minister Blaney compared terrorism to the Holocaust, saying, "[V]iolence begins with words. Hatred begins with words […] extremist speeches, the language that undermines Canadian values, basically hate propaganda has no place in Canada […] we must not tolerate incitement to violence."[58] These statements align with the Government's Counter-terrorism Strategy, which identifies prevention as a significant element.[59]

Minister Blaney's reference to hate propaganda also reminds us that this particular criminalized limit to free expression successfully withstood a constitutional challenge. The Court in *Keegstra* reviewed the provision's detailed history, which was an essential element when the Court considered Parliament's objective in enacting the offence. In 1966, with the atrocities of Nazism still fresh in mind, Parliament appointed the Cohen Commission to study the state of hate propaganda in Canada.[60] The Committee identified potential societal harms associated with hate propaganda and recommended the subsequently enacted offences.[61] This contrasts with *Zundel*, where the Court struck down the false statements offence. Here, the Court's inability to pinpoint an objective that addressed an existing social harm was fatal to the provision. Section 181 did not have well-documented history of debates, committee recommendations, or international obligations.

The Court in *Butler* and *Keegstra* found Canada's international obligations important when considering whether Parliament's objectives were pressing and substantial. The specific international agreements and resolutions in which Canada participates are beyond the scope of this paper, but it is worth noting that Canada contributes to a variety of international counter-terrorism initiatives. For example, Canada helps develop legal instruments and international standards with organizations such as the UN Counter Terrorism Implementation Task Force and NATO.[62] These activities support the former Government's contention that section 83.221 contributes to Canada's domestic and international counter-terrorism strategies.

A court would certainly find the former Government's objective to prevent and respond to terrorist threats pressing and substantial because of the grave harm associated. Since the events of 9/11, law enforcement in Canada have responded to a handful of known terror related plots, and have successfully interrupted the execution of several plots.[63] However, the increased number of "lone wolf" attacks pose a risk that is more difficult for law enforcement to detect. For example, the two terrorist attacks that precipitated the enactment of Bill C-51 in October 2014 included a Quebec man who drove his vehicle into two members of the Canadian military, killing one. Two days later, an Ontario man fatally shot a reservist officer on Parliament Hill and stormed the Parliament building

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57 *House of Commons Debates*, 41st Parl, 2nd Sess, No 174 (18 February 2015) at 1715 (Hon Peter MacKay).

58 Public Safety March 2015, *supra* note 18 at 1000 (Hon Steven Blaney).

59 Public Safety Canada, "Countering Violent Extremism", *Government of Canada*, online: <http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/cntrng-vlnt-xtrmsm/index-eng.aspx> archived at <https://perma.cc/Q38X-99X2>.

60 Kent Roach & David Schneiderman, "Freedom of Expression in Canada" (2013) 61 Sup Ct L Rev (2d) 101 at 462 [Roach & Schneiderman].

61 *Keegstra, supra* note 11 at paras 60-62.

62 Global Affairs Canada, "Terrorism", *Government of Canada*, online: <http://www.international.gc.ca/crime/terrorism-terrorisme.aspx?view=d&lang=eng> archived at <https://perma.cc/3D7V-BLQG>.

63 In June 2005, a series of police raids in Ontario resulted in the arrest of 18 people later charged with conspiring to carry out terrorist activity: *R v Amara* 2010 ONSC 441. In 2010, an individual, after pledging allegiance to Osama Bin Laden, promised to recruit others to coordinate attacks. He had been making terrorism related plans at the time of his arrest: *R v Alizadeh* 2014 ONSC 1907.

before being fatally shot himself. Both "lone-wolf" attacks were allegedly linked to Islamic State of Iraq and al-Sham ("ISIS") ideology.[64] Further, the radicalization of young Canadians is alarming and more prevalent than before, as evidenced by the number of individuals travelling to join terrorist groups abroad.[65] Based on the available evidence about the prevalence and graveness of terrorist threats to Canada and Canadians, and the former Government's clear indication that Bill C-51 was meant to respond to these threats, a court will very likely find this arm of the section 1 analysis is met.

ii. Limiting this Expression may be Rationally Connected to Parliament's Objective

The key question in this portion of the analysis is whether the limits posed by section 83.221 constitute a rational means to meet the objective. Based on *Keegstra, Butler*, and *Sharpe*, and the standard of proof the Court accepted in those cases, a court may find a sufficient nexus between the limit in section 83.221 and the objective.

A limit must be rationally connected to Parliament's pressing and substantial objective. This means the law should be a rational means for Parliament to meet its objectives, and the law's effect should relate to its purpose.[66] Courts do not require conclusive, definitive, or causal evidence connecting a limit to a known social harm, because they recognize this standard is often difficult or impossible to meet.[67] Instead, the Crown's standard of proof for demonstrating harm is to show an activity creates a "reasoned apprehension of harm," based on common sense and experience.[68] In the above cases, although the social science evidence linking obscenity and child pornography to a social harm were inconclusive, available evidence and common sense suggested a rational link between the activity and the social harm existed. For example, the Court in *Keegstra* accepted the Cohen Committee's findings that hate propaganda existed in Canada at a level sufficient to warrant concern.[69] In *Butler*, the Court accepted evidence suggesting a correlative relationship between exposures to obscene content and reinforcing gender stereotypes.[70] The Court also accepted evidence showing a link between viewing child pornography and child sexual abuse in *Sharpe*.[71] The Court's findings in these cases show its willingness to find a rational connection between the means taken and Parliament's objectives based on a reasoned apprehension of harm, and a court will likely do the same when considering section 83.221.

Some studies place more weight on interpersonal relationships in the radicalization process than on Internet incitement.[72] However, while one cannot conclude that advocating or

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64 Stewart Bell, "ISIS takes credit for inspiring terrorist attacks that killed two Canadian soldiers", *National Post* (21 November 2014), online: National Post <http://news.nationalpost.com/news/canada/isis-takes-credit-for-inspiring-terrorist-attacks-that-killed-two-canadian-soldiers> archived at <https://perma.cc/LL9Z-6CKV>.

65 David Ljunggren, "Spy agency sees sharp increase in Canadians joining Islamic State" (20 April 2015), *Reuters Canada*, online: <http://ca.reuters.com/article/topNews/idCAKBN0NB2DV20150420> archived at <https://perma.cc/QU55-6Z28>.

66 *Canada (Attorney General) v Bedford*, 2013 SCC 72; [2013] 3 SCR 1101, [2013] SCJ No. 72 (QL) at paras 111, 126 [*Bedford*].

67 *Sharpe*, *supra* note 8 at para 85; *Butler*, *supra* note 10 at para 103; *Keegstra*, *supra* note 11 at para 114.

68 *Sharpe, supra* note 8 at para 85; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11; [2013] 1 SCR 467, [2013] SCJ No 11 (QL) at para 132 [*Whatcott*].

69 *Keegstra, supra* note 11 at para 60.

70 *Butler, supra* note 10 at paras 103, 107-108.

71 *Sharpe, supra* note 8 at para 88.

72 Craig Forcese & Kent Roach, "Terrorist Babble and the Limits of the Law: Assessing a Prospective Canadian Terrorism Glorification Offence" (2015) *Canadian Network for Research on Terrorism, Security and Society*, online: <http://library.tsas.ca/media/TSASWP15-02_Forcese-Roach.pdf> archived at <https://perma.cc/7WYH-RUPK> at 10.

promoting terrorism *causes* terrorist acts, propagating terrorism may help to normalize terrorist driven violence.[73] The Court in *Sharpe* accepted the potential for normalization of harm as a factor in finding a rational connection between the objectives and the means chosen to meet them.[74] The Internet can facilitate radicalization by providing forums for communication and coordination, and instructive material. Post attack analyses generally show individuals involved in terrorist activity consumed terrorist media. This is all the more prevalent in the current media landscape, where terrorist organizations, such as ISIS and al-Qaeda, employ more sophisticated propaganda tactics than other terrorist groups before it. A 2011 report to the US National Institute of Justice suggests two-thirds of radical discussions online include an explicit call for jihad.[75] Jim Berger, an expert analyst on extremism at Brookings Institute in Washington, DC, estimated Twitter had over 40,000 accounts promoting ISIS.[76] Additionally, a Harvard study showed about 10 percent of the violent participation in the Rwandan genocide was directly attributable to violent hate propaganda, because one of the national Rwandan radios called for "pre-emptive violence" which was necessary for "self-defence".[77] Radicalization depends on individuals propagating and disseminating a violent and radical ideology, and incitement is used as a tool of mobilization.[78] This suggests that inciting terrorism is a key component to the eventual materialization of terrorist acts. Given the lower threshold set in *Keegstra*, *Butler*, and *Sharpe*, a court may choose to defer to the Government's decision to employ this particular limit to meet its objective.

iii. Section 83.221 may not Minimally Impair Freedom of Expression

The third stage of this analysis asks whether the limit minimally impairs. A limit need not be the least restrictive, but it must be rationally tailored to Parliament's objective "in the context of the infringed right,"[79] and impair no more than reasonably necessary.[80] A court will consider two elements at this stage: overbreadth and alternative methods to achieve Parliament's objectives. An overbroad limit does not minimally impair, and a court may find section 83.221 overbroad because vague elements of the offence possibly captures activities beyond those intended, and because the provision lacks reasonable defences to restrict its application. Additionally, a court may consider whether the limits imposed by section 83.221 fall within the range of reasonable alternatives, although it is unclear whether a court would interfere with a reasonable method even if other alternatives exist.

a. Section 83.221 may be Overbroad

A limit is overbroad when it "goes too far and interferes with some conduct that bears no connection to its objective."[81] In this case, Parliament intentionally kept the wording of section 83.221 broad to cast a wider net than existing provisions in the *Code*. Unlike in

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73 Laura Huey, "This is Not Your Mother's Terrorism: Social Media, Online Radicalization and the Practice of Political Jamming", online: (2015) 6:2 J Terror Res at 3, <http://jtr.st-andrews.ac.uk/articles/10.15664/jtr.1159/> archived at <https://perma.cc/34CT-W5QP>.

74 *Sharpe, supra* note 8 at 88.

75 Forcese & Roach, *supra* note 72 at 10-11.

76 Canada, Parliament, Senate, Standing Committee on National Security and Defence, *Evidence*, 41st Parl, 2nd Sess, No 16 (27 April 2015) at 147 [Security and Defence April 2015].

77 David Yanagizawa-Drott, "Propaganda and Conflict: Evidence from the Rwandan Genocide", online: (2014) 129:4 Q J Econ 1947 at 1953, 1989 <http://qje.oxfordjournals.org/content/early/2014/08/21/qje.qju020.full.pdf+html>.

78 Yaël Ronen, "Incitement to Terrorist Acts and International Law" (2010) 23 Leiden J Int'l L 645 at 655-656.

79 *Butler, supra* note 10 at para 110, citing *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927.

80 *Sharpe, supra* note 8 at para 96.

81 *Bedford, supra* note 66 at para 101.

Butler, where the obscenity provision narrowly restricted its application to sexually explicit material, or in *Sharpe*, where the definition of child pornography specified particular attributes, key elements of the section 83.221 offence cannot be defined with sufficient precision. The provision, therefore, has the potential to catch activities Parliament never intended to be caught. In *Zundel*, the Court cited overbreadth as the "fatal flaw" of the false information offence.[82] An undefined and overreaching provision leaves open the possibility of the state restricting constitutional rights in circumstances that may not be justifiable.[83] Given the social and political context in which Parliament enacted section 83.221, it was clearly intended to target militant terrorist groups, such as ISIS and al-Qaeda. To this point, Jim Berger, reminded the Senate Committee that anything done as a response to Islamic extremism would have the same application to other groups and individuals.[84] Professors Roach and Forcese seconded this caution, noting that while law enforcement could apply the provision straightforwardly in cases of ISIS extremism, application to other groups, such as pipeline protesters or Ukrainian rebel supporters, would be less clear.[85] Jim Berger succinctly commented that "one person's terrorist is another's freedom fighter."[86] The Canadian Civil Liberties Association advances a scenario in which a journalist in favour of providing resources for Ukrainian insurgents against Russian troops could fall under the new offence.[87] The CBA posed a similar question, noting civil activists like Nelson Mandela could have also been caught by section 83.221.[88] One common theme is a reliance on prevailing societal norms to inform what constitutes "legitimate" expression. The vagueness of section 83.221 leaves open the possibility for law enforcement to apply the provision arbitrarily. This level of discretion can be troubling because the very purpose of section 2(b) is to protect all expression, regardless of the popularity of their content.

Additionally, Parliament set the mental fault element of the section 83.221 offence at a lower threshold than other expression limiting offences. As discussed in Part I, section 83.221 captures those individuals who *knowingly* advocates or promotes, rather than a higher mental fault element of *wilful* advocating or promoting. Professors Roach and Forcese note that the Court narrowly upheld section 319(2) in *Keegstra* in part because section 319(2) required "wilful" promotion of hatred.[89] This mental fault element in section 83.221 increases the potential that individuals may be caught by the offence, even though their actions do not produce the harm Parliament intended to address with this offence.

Further, unlike other criminalized limits to freedom of expression, section 83.221 does not provide any statutory exceptions or defences. *Keegstra* noted that when considering overbreadth, statutory exceptions show the government took steps to avoid intruding on a protected right more than necessary.[90] For example, section 163 exempts obscene materials kept only for personal consumption. Section 319(2) allows an individual to promote hatred against an identifiable group in the context of a private conversation. In *Sharpe*, the Court read in the exception of possessing child pornography created by the possessor and kept for personal use only to section 163.1(4). For each provision,

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82 *Zundel, supra* note 9 at para 62.

83 *Ibid* at para 58.

84 Security and Defence April 2015, *supra* note 76 at 149.

85 Roach & Forcese, *supra* note 12 at 13.

86 Security and Defence April 2015, *supra* note 76 at 148.

87 "Understanding Bill C-51: The Anti-Terrorism Act, 2015" (19 May 2015), *Canadian Civil Liberties Association*, online: <https://ccla.org/understanding-bill-c-51-the-anti-terrorism-act-2015/> archived at <https://perma.cc/Q7NC-64T6>.

88 *Bill C-51, supra* note 49 at 23.

89 Roach & Forcese, *supra* note 12 at 17.

90 *Keegstra, supra* note 11 at para 107.

the Court noted the availability of exceptions or defences as an important restraint on potentially overbroad applications. Section 83.221 does not include a private use exception. On one hand, the lack of a "private conversation" exception for advocating or promoting terrorism makes sense. If one interprets "advocate" and "promote" to mean "incite" or "counsel", this act should be limited whether one expresses it in private or in the public sphere. There is no "private conversation" exception for counselling an offence, and rightly so. However, because key elements of section 83.221 are vague and therefore likely to capture legitimate expressive activities, the absence of exceptions only compounds the overbroad nature of the provision.

b. Considering Other Reasonable Alternatives

Predicting whether a court will find section 83.221 minimally impairs under this consideration is difficult because of the degree of deference courts accord to Parliament. A court may find that a *Charter* infringing limit minimally impairs if that limit falls within the range of reasonably supportable alternatives.[91] Professors Roach and Forces believe other less impairing methods to prevent or forestall acts of terrorism exist,[92] and there may be some truth to this proposition. For example, on July 10, 2015, the RCMP arrested a British Columbia man under section 83.2, which prohibits the commission of an indictable offence for the benefit of a terrorist group, and for counselling to commit murder and assault by posting pro-ISIS terrorism propaganda that encouraged and provided instructions to commit murders in the name of jihad.[93] This arrest suggests that law enforcement could use existing *Code* provisions to capture the same activities targeted by section 83.221, thereby making section 83.221 superfluous and unnecessary. However, courts are mindful of Parliament's role in selecting a particular scheme to meet its intended objectives, and a court may be more inclined to accord deference to the method Parliament chooses, even if other less impairing schemes exist.[94] The Court in *Sharpe* said that a legislative scheme does not have to be "perfect", as long as it is "appropriately tailored in the context of the infringed right."[95] Thus, the court's conclusion on the potential overbreadth of section 83.221 may influence whether it finds the provision to be a scheme within the range of reasonable alternatives. Given the above discussion about overbreadth, the Liberal Government should reassess section 83.221 and make necessary amendments to increase the likelihood that this provision will meet the minimal impairment test.

iv. Are the Potential Harms Caused by Limiting Expression Proportionate to the Benefits of Preventing Terrorism?

At this stage of the analysis, a court will assess whether the benefits of employing section 83.221 as a counter-terrorism tool outweigh the deleterious effects of limiting freedom of expression. In order to properly weigh these, the court will assess and balance all the section 1 considerations discussed above.[96] In this case, the final balance between the beneficial and detrimental effects of section 83.221 may be greatly influenced by the court's view on the potential vagueness and overbreadth of the provision.

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91 *Whatcott, supra* note 68 at para 101.

92 Roach & Forcese, *supra* note 12 at 23.

93 Royal Canadian Mounted Police, News Release, "Man Arrested by RCMP in BC for Terrorism Offences" (10 July 2015), online: Royal Canadian Mounted Police <http://bc.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=2087&contentId=42610> archived at <https://perma.cc/H7C7-JUT9>.

94 *Whatcott, supra* note 68 at paras 78, 101.

95 *Butler, supra* note 10 at para 110.

96 *Sharpe, supra* note 8 at 102.

Undoubtedly, Parliament's objective to prevent terrorism at all stages is pressing and substantial. The failed terrorist plots and recent attacks in Canada, and the increasing number of terrorist attacks internationally, highlight the import of this objective. The former Government clearly articulated these concerns and explicitly pointed to section 83.221 as a response tool. Advocating or promoting terrorism alone may not cause an individual to move to acts of violence, but may be a strong contributing factor. The Rwandan radios' contribution to increased violence suggests this kind of expressive activity at least relates to the incitement of actual violence. Since the standard of proof for rational connection is a "reasoned apprehension of harm", a court could defer to the government and move on to the next stage of the analysis.

The problem arises under minimal impairment, because as a vague and overbroad provision, section 83.221 will likely capture more than Parliament intended. Limits on expressions should be drafted "with the greatest precision possible",[97] and Parliament could have drafted section 83.221 with some more precision. In *Keegstra* and *Sharpe*, the Court compared the expressive activities caught by the impugned provisions against the core values associated with freedom of expression. Section 2(b) protects expressions that enhance democratic participation, truth seeking functions, and self-fulfilment.[98] On the narrowest reading of section 83.221, the expression prohibited is of low value, and not the kind of expression society wants to protect. However, the potential vagueness and overbreadth of section 83.221 invites the possibility of including other expressive activities that are more intimately connected to these core values, particularly the enhancement of democratic participation.

In *Khawaja*, the Court also considered whether an impugned provision dealing with terrorism in the *Code* violated the accused's section 7 *Charter* rights. In its proportionality analysis, the Court concluded that while the *Code* provisions at issue "captured a wide range of conduct", when the "tailored reach [of the provision] is weighed against the objective [of preventing devastating harm that may result from terrorist activity]" the means were not overbroad and the impact not disproportionate.[99] Specifically, the Court concluded the narrow scope of the impugned provision ensured that truly innocent individuals would not be caught.[100] The Court's comments in *Khawaja* suggest its willingness to accord a high degree of deference to Parliament's choice of counter-terrorism schemes, but only once it is satisfied that Parliament sufficiently tailored the impugned scheme to avoid overbreadth. If a court considering section 83.221 concludes the provision does not minimally impair for reasons discussed above, it may distinguish *Khawaja*.

IV. POTENTIAL REMEDIES

If a court finds that section 83.221 cannot be justified by section 1 of the *Charter*, it will consider an appropriate remedy. It may choose to strike the provision entirely, as the Court did in *Zundel*, or to read in or down elements to make the provision constitutionally valid, as the Court did in *Sharpe*.

In *Sharpe*, the Court was hesitant to strike down the entire law because it was valid in most of its applications, and because the *Code* would be left with a gap until Parliament legislated a new provision.[101] This hesitance may not be applicable to section 83.221. As a newly enacted offence, section 83.221 has not yet been applied, and there can be no comparison between valid and invalid applications. The aforementioned example of the

97 *Keegstra, supra* note 11 at para 293.
98 *Butler, supra* note 10 at para 95.
99 *Khawaja, supra* note 7 at para 62.
100 *Ibid* at paras 53-54.
101 *Sharpe, supra* note 8 at para 111.

recent RCMP arrest suggests the possibility of covering the social harm without the use of section 83.221. It is possible that a court will strike section 83.221 and leave it to the government to re-enact a more constitutionally sound provision.

At the same time, section 83.221 is not quite as egregious as section 181. The Court struck down section 181 in *Zundel* because the vagueness and overbreadth prevented the Court from ascertaining Parliament's objective and a rational connection. Professors Roach and Schneiderman also note a trend in section 2(b) cases where courts tend to avoid striking down a law if possible.[102] A court may choose to read in narrower definitions to avoid striking down a provision enacted by an elected Parliament. Unlike in *Sharpe*, however, reading in or down elements may not be possible for section 83.221 because of the high level of vagueness and overbreadth. As mentioned above, Minister MacKay indicated that Parliament intended to leave section 83.221 vague in order to cover the broadest range of conduct necessary. A court may be disinclined to step on the toes of the legislature by reading in interpretations that the court cannot comfortably conclude Parliament intended.

CONCLUSION

The Liberal Government has already indicated its intention to address problematic elements of Bill C-51. Section 83.221 should be one of the areas addressed. At a quick glance, section 83.221 appears to address a grievous social evil, and this danger to society alone should justify a minor infringement on freedom of expression. After all, other *Code* offences prescribe limits on free expression, and the Court has justified them. A deeper analysis breaks down the smoke screen and presents a more problematic provision. Section 83.221 potentially violates section 2(b) of the *Charter* and may not be justified under section 1. A law violates section 2(b) if it limits expression, and if the government intended to limit expression. Courts broadly interpret "expression" to include all activities that convey or attempt to convey meaning, except acts or threats of violence. A court could exclude advocating or promoting terrorism from the scope of section 2(b) because these activities are too intimately connected to violence, or it may choose to presume protection under section 2(b) in order to consider the limits in a more thorough section 1 analysis. Section 83.221 is inundated with vague terms, such that the elements of the offence cannot be interpreted with an intelligible standard. Although section 83.221 could fail at this stage, the threshold at this stage is low, and a court may choose to weigh the advantages and disadvantages of the law in the next stage. Legislative history clearly establishes an unambiguous objective to prevent terrorism. The gravity of harm to the public makes this objective pressing and substantial. The lower threshold of finding a reasoned apprehension of harm between advocating or promoting terrorism and the harm of terrorist-related violence suggests a court may find a rational connection exists between Parliament's objective and the means taken to achieve it. However, a court may not find that the means taken in section 83.221 minimally impair. The provision likely suffers from overbreadth, which potentially captures more legitimate expressive activities than Parliament intended without exceptions to restrict its application. If a court so finds, it may conclude that the benefits of section 83.221 are not proportional to its detrimental effect on freedom of expression, and find section 83.221 unconstitutional. True freedom balances between competing interests – in this context, between national security concerns and a fundamental freedom. This analysis shows the answer is not clear-cut one way or the other, with analogous precedents weighing in favour of both sides. Parliamentary intervention on this provision could eliminate uncertainty in the provision, and potentially avoid a successful constitutional challenge when section 83.221 appears before the Court.

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102 Roach & Schneiderman, *supra* note 60 at 520.

ARTICLE

REVISITING CIVILITY AFTER *GROIA*

Duncan Melville*

CITED: (2016) 21 Appeal 99

INTRODUCTION

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court […] he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes."
>
> — Lord Reid (1967)[1]

The Rules of Professional Conduct (the "Rules") require practicing lawyers in Ontario to behave in a civil manner with clients, opposing counsel, the public and the courts.[2] An admirable goal in theory, opponents of the Law Society of Upper Canada's ("LSUC") emphasis of civility focus on two main threads of argument. First, that civility is so poorly defined to be devoid of meaning. In particular, opponents ask how lawyers can realistically balance their obligation to zealously defend their client with the duty to act in a civil manner, and whether these duties can coexist. If so, at what point do lawyers' actions breach the civility obligations under the Rules? The second thread of argument is that, even if properly defined, civility adds little value to the profession and takes time away from debates on other more pressing ethical matters—even wasting judicial time and resources. In contrast, proponents of civility view it as an essential aspect of the functioning of the legal system.

The two arguments by critics of the civility agenda deserve to be revisited in light of the disciplinary proceedings against Joseph Groia, related to his successful 2007 defence of former Bre-X officer John Felderhof.[3] Following the 2013 LSUC appeal decision,[4] and the 2015 Ontario Superior Court of Justice decision ("OSCJ Decision"),[5] it is now easier to define, with precedential certainty, when a lawyer's courtroom behaviour breaches the civility obligations under the Rules. While the LSUC has favoured uniformity in the application of the Rules between solicitors and litigators,[6] the cogent arguments in favour of requiring litigators to be civil now appear far weaker when applied to the realities of

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1 *Rondel v Worsely*, [1967] 3 WLR 1666 (HL).

2 The Law Society of Upper Canada, Rules of Professional Conduct, Toronto: Law Society of Upper Canada, 2000 (amendments current to September 24, 2015) [*LSUC Rules*].

3 *R v Felderhof*, 2007 ONCJ 345, OJ No 2974 [*Felderhof*].

4 *Law Society of Upper Canada v Joseph Groia*, 2013 ONSLAP 0041 [*LSUC Decision*].

5 *Joseph Groia v The Law Society of Upper Canada*, 2015 ONSC 686, 124 OR (3d) 1 [*OSCJ Decision*].

6 *LSUC Rules, supra* note 2.

work by transactional solicitors. Moreover, after *Groia,*[7] (which provides little guidance for transactional solicitors), a reform of the uniform application of the civility obligations of all lawyers is increasingly necessary. This paper draws a middle line between and opponents and supporters of civility with two main arguments. First, civility has become increasingly well defined. Second, civility is considerably more important for litigators than solicitors.

I: DEFINING CIVILITY AFTER GROIA

Undefined in the Rules, the conception of civility in the legal context has evolved over time. The initial emphasis centered on striving to find an exhaustive definition for the term to provide certainty and clarity to lawyers. It is therefore not surprising that dictionary definitions of civility, which are replete with broad references to politeness and courtesy,[8] were followed by legal bodies. For instance the Nova Scotia Barristers Society clearly took comfort in the judgement of the lexicographers when crafting their own, very similar, definition of civility as "akin to notions of courtesy, politeness, good manners and respect".[9] Courts and disciplinary bodies responded to criticisms by narrowing the scope of civility and required uncivil behaviour to involve an unfounded personal attack on opposing counsel.[10] Past literature on the subject has identified that "tactics tending to demean or degrade one's opponent are the hallmark of incivility".[11] *R v Dunbar et al*, (a case in British Columbia almost 10 years prior to *Groia)*, was decided on the basis of this rationale.[12]

Consistent with prior judgements, *Groia* also illustrates the increasing comfort of lawmakers with an imperfect definition for civility, one which will never fully encompass the breadth of its application.[13] For instance, Alice Wooley noted that while civility provides a useful short form term it is not sufficiently broad to fully describe the professional obligations of lawyers' behaviour.[14] In the recent OSCJ Decision, Justice Nordheimer echoed this view by saying that civility does not lend itself to a fixed definition; the concept is best assessed on a case-by-case basis.[15] Justice Nordheimer cited *Doré* in support of his position that findings of professional misconduct will always require "a fact-dependent and discretionary exercise".[16]

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7 The LSUC Decision and the OSCJ Decision are collectively referred to as *Groia*.

8 Three provisions within the Rules require lawyers to act in a civil manner: 3.2-1 (when working with clients), 5.1-5 (when dealing with tribunals) and 7.2-1 (generally with all people in practice). Any demonstrated breaches of these sections is deemed professional misconduct and subject to discipline by the law society under 7.8.2-2 of the Rules, a power granted by section 34 of the *Law Society Act*, RS0 1990. The jurisdictional right of LSUC to prosecute uncivil behaviour as professional misconduct was also more recently acknowledged by the Ontario Court of Appeal in *Marchand (Litigation guardian of) v Public General Hospital Society of Chatham*, (2000) 51 OR (3d) 97 (CA).

9 Alice Wooley, "Does Civility Matter?" 46 Osgoode Hall LJ 175 at 177 [Wooley, "Does Civility Matter?"].

10 Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can Crim L Rev 97 at 102.

11 RR Sugden QC, "Civility in the Legal Profession" in Jack Giles, ed, *The Splendour of the Law*, (Toronto: Dundurn Press, 2001) at 93.

12 *R v Dunbar et al*, 2003 BCCA 667, [2003] BCJ No 2767 at paras 331-333.

13 *OSCJ Decision, supra* note 5 at para 68.

14 *LSUC Decision, supra* note 4 at para 210.

15 *OSCJ Decision, supra* note 5 at para 58.

16 *Doré v Barreau du Québec,* 2012 SCC 12 at para 66, [2012] 1 SCR 295 [*Doré*].

Despite the increasingly consistent message from lawmakers, critics continue to claim that civility is too discretionary as to have clear meaning in the legal context.[17] Such critics' arguments are aided by the fact other professional obligations of lawyers are more objectively defined; for instance in *R v Neil* the Supreme Court of Canada developed a *bright line test* for determining if lawyers were representing a client while operating in a conflict of interest.[18] These critics argue that the contextual nature of civility, combined with frequent calls to punish uncivil lawyers, creates a troubling position for the profession.[19] These arguments are however unfounded as a closer analysis of the LSUC and OSCJ decisions indicate that "a line" has now emerged for determining uncivil behaviour, at least within the context of a courtroom.

A. The LSUC Decision

Joseph Groia was prosecuted by the LSUC for his actions during the 2007 *Felderhof* trial. In *Felderhof*, a former officer at the gold mining company Bre-X (a company at the centre of what is widely viewed as one of the largest frauds ever perpetrated in Canadian securities markets),[20] was prosecuted, but ultimately cleared, of violations of the *Securities Act* (Ontario) related to insider trading and authorizing misleading new releases about Bre-X.[21] Mr. Groia was successful in defending his client against the charges presented by the Ontario Securities Commission but was accused of repeated instances of incivility towards opposing counsel. Joseph Groia was originally found guilty of professional misconduct for his actions during the *Felderhof* case by an LSUC hearing panel in April 2013.[22] Mr. Groia appealed the decision of the hearing panel to an LSUC appeal panel. The appeal panel paid little deference to the reasons of the hearing panel in relation to Mr. Groia's conduct during *Felderhof* and undertook its own analysis of the accusations.[23] In undertaking their own analysis the appeal panel focused on nine instances of alleged misconduct by Mr. Groia throughout the particularly acrimonious period in the trial. While indicating their willingness to review the entire surroundings, the LSUC proceeded to analyze and review each action, or instance, in chronological order and on an independent basis.[24] The LSUC's analysis of the nine actions revealed three important factors in assessing whether behaviour constitutes professional misconduct, namely (1) whether the actions were part of a wider "pattern", (2) if the comments were directly aimed at questioning the honesty and integrity of opposing counsel, or alleged deliberate prosecutorial misconduct, and (3) whether there was no objectively reasonable basis for making the statements. If all three could be answered in the affirmative then the action was viewed as professional misconduct, and if one was answered in the negative then the analysis for the LSUC became more complex.[25]

The appeal panel made clear that while all actions were part of a wider pattern of behaviour, some actions by Mr. Groia were less civil than others. It is therefore illuminating to view each of the actions on a spectrum from those which were most civil to those which were least civil. Consistent with the way many academics view administrative law decisions,[26]

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17 *OSCJ Decision, supra* note 5 at para 58.

18 *R v Neil*, 2002 SCC 70 at para 29, 3 SCR 631 [*Neil*].

19 Don Bayne, "Problems with the Prevailing Approach to the Tension between Zealous Advocacy and Incivility" (2013) 4 CR-ART 301 at 312.

20 David Usborne, "Bre-X 'world's greatest mining scam", *The Independent* (6 May 1997), online: <www.independent.co.uk> archived at <https://perma.cc/3JA5-JML9>.

21 *Felderhof, supra* note 3 at para 5.

22 *OSCJ Decision, supra* note 5 at para 5.

23 *LSUC Decision, supra* note 4 at para 237.

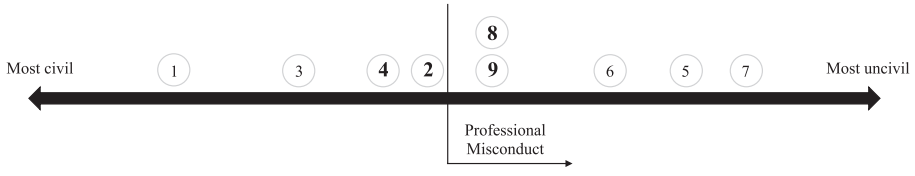
24 *Ibid* at para 242.

25 *LSUC Decision, supra* note 4 at para 235.

26 See e.g. Susan Gratton, "Standing at the Divide: The Relationship between Administrative Law and the Charter Post-Multani" (2008) 53 McGill LJ 477.

a spectrum-based analysis also makes it easier to determine an answer to the key question for many Ontario lawyers: at what point does uncivil behaviour "cross the line" and become a breach of their civility obligations under the Rules? It is appropriate to analyze in greater detail the "border line" actions (those emboldened below in *Figure 1*):

Figure 1: A spectrum analysis of the LSUC Decision[27]



During action 2, referred to as the *Stinchcombe* motion, Mr. Groia directed a number of accusations at the OSC prosecutors including an allegation that the prosecutors tried to overwhelm the defence with certain disclosure while subsequently failing to comply with disclosure requests in other areas. Mr. Groia acknowledged that he was making deliberate accusations of prosecutorial misconduct, and was found by the appeal panel to have made these accusations without foundation.[28] On review of this action, the appeal panel stated that this "might not amount to professional misconduct" on its own.[29] The LSUC statements recognize the emotions in a court case, and the according need to excuse or forgive isolated instances of incivility. This is consistent with the guidance in 5.1-5 of the Rules that there should be a "pattern" of incivility to constitute professional misconduct.[30] For this reason, action 2 standing alone, was not deemed to be professional misconduct.

While not considered close to the border, in analysing the behaviour in action 3 the appeal panel makes an important clarification. They confirm that civility, as is relates to professional misconduct, is distinct from the concept of "politeness" often provided by dictionary definitions. The appeal panel makes this distinction by saying that "aggressive" submissions examined in the appropriate context will not constitute professional misconduct.[31] It is therefore possible that in relation to the Rules, a lawyer's behaviour be polite but uncivil, and similarly impolite yet civil.

Action 4 (referred to as the "Placer Dome Document" in the LSUC Decision), involved Mr. Groia seeking to question a witness about a letter from senior officers of the gold mining company Placer Dome. Though Mr. Groia made incorrect legal submissions in this action, he made no allegations of prosecutorial misconduct,[32] therefore this action did not constitute professional misconduct.

Actions 8 and 9 occurred near the end of the trial and involved unjustified personal attacks on the prosecution's integrity, but were not direct accusations of prosecutorial misconduct.[33] Consistent with the guidance from action 4, where the appeal panel indicated that impugning the integrity of the prosecutors, even if not alleging

27 Each action was plotted on this spectrum based on the author's own reading of the appeal panel's written decision.

28 *LSUC Decision*, *supra* note 4 at para 264.

29 *Ibid* at para 270.

30 *LSUC Rules*, *supra* note 2.

31 *LSUC Decision*, *supra* note 4 at para 274.

32 *Ibid* at para 280.

33 *Ibid* at para 316.

prosecutorial misconduct, could be a breach of the civility standards, actions 8 and 9 were sufficient to qualify as professional misconduct. The panel's briefer analysis of these actions suggests that the three requirements need not co-exist within the same action. For example, if an unjustified accusation of prosecutorial misconduct had previously been alleged, later acts of rudeness or incivility, irrespective of whether such instances, also individually qualified as prosecutorial misconduct accusations, could be considered breaches of the Rules. In this case, because Mr. Groia made unjustified personal attacks on opposing counsel, actions 8 and 9 were sufficient to constitute breaches of the Rules.

One substantive point Mr. Groia himself raised in lectures since *Felderhof*, but dealt with only in passing by the appeal panel, was that Mr. Naster, the lead OSC prosecutor, was equally blameworthy.[34] In support of this argument, in *Felderhof,* the trial judge felt neither side had a "monopoly" over uncivil behaviour.[35] No investigations were brought against Mr. Naster but it was noted in the LSUC Decision that provocation, while not a complete defence, is a relevant consideration.[36] We should therefore reasonably expect future decisions on civility to pay greater attention to this factor.

B. The OSCJ Decision

Mr. Groia was unsuccessful in his appeal to the Ontario Superior Court of Justice in 2015. In upholding the reasonableness of the LSUC Decision, Justice Nordheimer engaged in extensive discussion regarding civility and its relationship with the Rules. Although not materially different from the LSUC Decision, Justice Nordheimer makes three important clarifications.[37]

First, by referring to the cumulative effect of the actions, as opposed to any single action, Justice Nordheimer emphasises the need to examine the entire context of events rather than considering each action individually.[38] While the LSUC Decision also considered the broader context of the case by including actions which had previously taken place, Justice Nordheimer's approach is less systematic than the path followed by the appeal panel and considers actions happening both prior to and after in time.

Second, Justice Nordheimer devised a novel two-part test for assessing if the behaviour of a lawyer breaches the Rules. In part one, a lawyer's behaviour must be found to be "rude, unnecessarily abrasive, sarcastic, demeaning, abusive or of any like quality",[39] in other words, uncivil in the common sense. It is at this point Justice Nordheimer believes the frequency of actions should be assessed, and that single instances are unlikely to ground liability unless particularly egregious.[40] If this first part is met, the second stage involves assessing whether the incivility of the lawyer has a "realistic prospect" of bringing the administration of justice into disrepute.[41] With the second part of the test, Justice Nordheimer took a similar view to the appeal panel but broadened the requirement from alleging prosecutorial misconduct to any disruptions to the administration of justice. Justice Nordheimer's test therefore offers greater precedential value while also reaffirming that incivility under the Rules is a higher standard than its ordinary meaning.

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34 Anita Anand, "Ethics in the Business Law Setting" (Lecture delivered at the Faculty of Law, University of Toronto, 19 November 2014), [unpublished].

35 *Felderhof, supra* note 3 at para 264.

36 *LSUC Decision, supra* note 4 at paras 7, 233.

37 *OSCJ Decision, supra* note 5 at para 78.

38 *Ibid* at para 94.

39 *Ibid* at para 74.

40 *Ibid*.

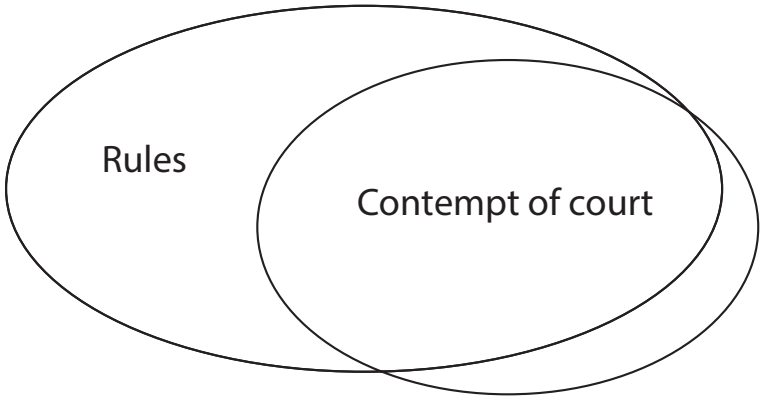
41 *Ibid* at para 76.

Third, Justice Nordheimer makes the clarification that a good faith belief in making accusations of prosecutorial misconduct by a lawyer is an insufficient defence to uncivil behaviour.[42] To excuse such behaviour a good faith belief must also be found to be objectively reasonable.[43]

II: THE IMPORTANCE OF CIVILITY

Arguments that civility is unimportant, or so significantly less important than defending ones client as to be irrelevant, trace back as far as the 19th century declarations of Lord Brougham in the *Queen Caroline* case.[44] More contemporary critics have noted that civility detracts from more important ethical duties,[45] is a waste of judicial time and resources[46] and is a method of elitism.[47] The merits of linking civil behaviour with social class are questionable but a potential argument can be made that it may streamline a certain type of behaviour, referred to by Alice Wooley, an expert witness in the *Groia* case, as the "gentleman lawyer",[48] to the disadvantage of other personality types. However, in the LSUC Decision, the appeal panel took steps to distance civility from such claims, reiterating that the Rules do not mandate politeness.[49] Alice Woolley has also found that incivility is unlikely to result in judicial unfairness (i.e. see *Felderhof* case).[50] On this issue Rule 5.1-5 defines contempt of court and professional misconduct, while overlapping, as not identical, and that even if unpunished in court such actions may still constitute misconduct (and vice versa). In this respect, as depicted in *Figure 2*, LSUC retains the ability to take a differing view of lawyer's conduct than determined by a court.[51] With an increasing portion of lawyers' work being done outside of a courtroom, this flexibility is clearly necessary for the LSUC to effectively regulate the behaviour of Ontario lawyers.

Figure 2: Interrelationship between the Rules and contempt of court



42 *Ibid* at para 71.

43 *Ibid* at para 74.

44 Monroe Freedman, "Henry Lord Brougham and Zeal" (2006) 34:4 Hofstra L Rev 1319 at 1319.

45 Wooley, "Does Civility Matter?", *supra* note 9 at 185.

46 Joseph Groia, Nic Wall & Elizabeth Carter, "Shades of Mediocrity: The Perils of Civility" (Paper delivered at the Canadian Bar Association Legal Conference, 17 August 2004) at 3 [Groia, Wall & Carter, "Shades of Mediocrity"].

47 Wooley, "Does Civility Matter?", *supra* note 9 at 183.

48 Alice Wooley, "'Uncivil by too much civility'? Critiquing Five More Years of Civility Regulation in Canada" (2013) 36 *Dal LJ 239* at 253.

49 *OSCJ Decision, supra* note 5 at para 6.

50 Wooley, "Does Civility Matter?", *supra* note 9 at 182.

51 *OSCJ Decision, supra* note 5 at para 56.

Proponents of civility have argued that civil behaviour promotes the efficient functioning of the justice system while also fostering public trust in lawyers.[52] Stephen Goudge, a supporter of civility requirements for lawyers, argues that it is possible to be an effective litigator when acting civilly.[53] Connie Reeve, recipient of the 2012 Catzman Memorial Award for Professionalism & Civility, argues that civility is strongly preferred and that judges respond positively to lawyers who take the "high road" and maintain civility in court.[54] Justice Morden takes an even broader view and metaphorically defines civility as the "glue" holding the field of litigation together.[55] Typically cited reasons for requiring litigators to be civil include the potential for becoming distracted, lengthening proceedings or losing the confidence of the judge or jury, all likely to be detrimental to the client.[56] Based on these views it seems reasonable to believe that lawyers and their client are best positioned by ensuring civility in court.

Most discussion and literature on the importance of civility has, perhaps unsurprisingly, focused on the adversarial trial setting.[57] In contrast, the applicability of civility to solicitors, in particular those doing corporate transactional work, has received very little critical discussion. Predictably, Mr. Groia has been an outspoken critic of civility in the corporate law setting, reasoning that since other professional service businesses operating in the corporate context don't require civility, incivility should be forgiven in the legal industry.[58] Both the rationale and factual basis for Mr. Groia's arguments are questionable however. On a normative level, the applicability of certain policies in one setting or profession do not justify the use of the same policies in another; rather policies should be crafted to fit the situation in which they are meant to relate. Mr. Groia's argument is also flawed given many professional services companies now place great importance on civility in the workplace and even tie compensation of senior managers to the results of "360-degree feedback" review processes where all employees, regardless of seniority, provide feedback on the conduct and effectiveness of their managers.[59] Such firms encourage open dissent but they often require such dissent to be in a civil manner. It is therefore misguided for Mr. Groia to argue that requiring civility comes at the expense of open debate and dissent.[60]

Mr. Groia would however have been right to point out that the reasons discussed in support of civility in the courtroom are far less applicable to the boardroom. For example, while civility may be necessary for the efficient functioning of the judicial system, a common argument raised in favour of civility in the courtroom, this is a far less relevant concern for much work carried out by solicitors. During commercial negotiations, parties may actually seek lawyers who are more assertive, emotional, abrupt or forthcoming to advance their interests and extract more favourable terms. The famed book *Getting to Yes*, used to teach negotiation in many Canadian law schools, even contemplates the

52 Stephen Goudge, "Ethics in the Business Law Setting" (Guest Lecture, delivered at the Faculty of Law, University of Toronto, 8 October 2014), [unpublished].

53 *Ibid*.

54 Janice Tibbetts, "Keeping a civil tongue: How to win cases and impress people" (October 2014), *The Canadian Bar Association*, online: <http://www.cba.org/> archived at <https://perma.cc/954C-T569>.

55 The Honourable JW Morden, "Call to the Bar Address," *Law Society of Upper Canada* (22 February 2001) at 4.

56 Wooley, "Does Civility Matter?", *supra* note 9 at 181.

57 See for instance Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can Crim L Rev 97.

58 Groia, Wall & Carter, "Shades of Mediocrity", *supra* note 46 at 9.

59 Jack Zenger & Joseph Folkman, "Getting 360 Degree Reviews Right" (7 September 2012), *Harvard Business Review*, online: <https://hbr.org/2012/09/getting-360-degree-reviews-right/> archived at <https://perma.cc/3HJC-MWQN>.

60 Groia, Wall & Carter, "Shades of Mediocrity", *supra* note 46 at 3.

common occurrence of such behaviour and advises on how one might seek to turn such behaviour to one's advantage in a negotiation.[61] Lawyers may even receive instructions directly from clients about the style and demeanor they should adopt, and may be under threat of losing a retainer or future business if they do not follow such wishes. Moreover, many solicitors do not act in a "public" forum and are more likely to be judged based on their results, rather than their general cadence. Finally, it is less likely for the reputation of the profession to be damaged by the behaviour of a corporate solicitor, as confirmed by a 2010 LSUC report which found that trial and family law settings were most likely to result in complaints for uncivil behaviour,[62] a fact which likely indicates its lower importance, rather than objectively superior behaviour of such lawyers. Interestingly, a bold interpretation of the two-part test outlined by Justice Nordheimer may even suggest that the professional obligations of civility have little application to corporate transactional lawyers. The second part of Justice Nordheimer's test, that a lawyer's uncivil conduct has a reasonable chance of bringing the administration of justice into disrepute,[63] would likely be significantly more difficult to prove for corporate transactional lawyers.

It is worth clarifying that the arguments above should not be interpreted to mean that the author is advocating for less civility in the field of corporate law. There are many studies illustrating the improvements to workplace environment, efficiency and profitability that emerge from civility, all things that would support individual firms promoting civility within their organization.[64] Rather, the author is merely advocating for the LSUC to not place blanket restrictions on the profession and lawyers. As Lorne Sossin, Dean of Osgoode Hall Law School, has stated, a single rule of civility can do damage if applied in ways that do not account for the realities of the profession.[65] A more refined approach to civility is preferred.

The obvious effects litigators' behaviour can have on their clients and the outcome of a case suggests that civility remains an important concept. However, to have significant value it must have consistent meaning, especially since the instigation of LSUC proceedings has immediate financial and professional impacts on those under investigation.[66] A lack of clarity on the civility requirements may have previously encouraged lawyers to "err on the side of courtesy",[67] but in light of *Groia* the argument that civility is devoid of meaning in the courtroom has little basis. Litigators can now be assured, thanks to the clarity provided by the LSUC appeal panel and Justice Nordheimer, that providing they do not make allegations seeking to undermine the credibility of opposing counsel, or allege prosecutorial misconduct without an objectively reasonable basis, they will not be

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61 Roger Fisher & William Ury, *Getting to Yes*, (New York: Penguin Books, 2011) at 33.

62 "Report to Convocation: Treasurer's Report on the Civility Forum" (27 May 2010), *Law Society of Upper Canada*, online: <http://www.lsuc.on.ca/media/convmay10_treasuers_report.pdf> archived at <https://perma.cc/5F48-DQNX> at 9.

63 *OSCJ Decision, supra* note 5 at para 75.

64 Christine Porath & Christine Pearson, "The Price of Incivility" (January-February 2013), *Harvard Business Review*, online: <https://hbr.org/2013/01/the-price-of-incivility> archived at <https://perma.cc/ZK6H-RQFQ>.

65 Justin Ling, "Has the so-called civility movement already won?" (January 2015), *CBA National*, online: <http://www.nationalmagazine.ca/Articles/January-2015-Web/Out-of-order.aspx> archived at <https://perma.cc/2SYX-Q3M2>.

66 For example, Darren Sukonick and Beth DeMerchant were investigated for their involvement in the sale of the Hollinger Group of Companies between 2000 and 2003 but were ultimately found not guilty of professional misconduct. Despite this the pair suffered significant professional costs associated with the investigations, see Yamri Taddese, "LSUC to appeal Sukonick and DeMerchant decision" (January 10, 2014), *Canadian Lawyer Magazine*, online: <http://www.canadianlawyermag.com/legalfeeds/1879/lsuc-to-appeal-sukonick-and-merchant-decision.html> archived at <https://perma.cc/YQE4-LMA2>.

67 Wooley, "Does Civility Matter?", *supra* note 9 at 178.

found guilty of incivility. There are far less compelling reasons for continuing to force the civility agenda on solicitors. While civility may be something lawyers may strive for, requiring it does not recognize the reality of corporate transactional work and the considerations in favour of civility in the solicitor setting are not ones a governing body like the law society should be concerned with. This reasoning may favour a re-evaluation by the LSUC of the Rules' uniform application in favour of a more tailored approach similar to the regulation of legal professionals in England and Wales. Even if a more refined approach is not adopted, Mr. Groia's recent election to the bench by LSUC members, and the upcoming judgment by the Ontario Court of Appeal on *Groia*, increases the likelihood of debates over civility in the profession continuing.[68]

68 Sean Fine, "Joe Groia elected to Law Society governing body", *The Globe and Mail* (1 May 2015), online: <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/joe-groia-elected-to-law-society-governing-body/article24225404/>.

ARTICLE

33 YEARS LATER: REVISITING SECTION 33 IN THE CONTEXT OF THE NEWLY CONSTITUTIONALIZED RIGHT TO STRIKE

José (Bill) Olaguera*

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INTRODUCTION

Finding a new constitutional right is a delicate task, one that the Supreme Court of Canada ("Supreme Court") must cross a high threshold to justify. The task is delicate because when the bench does so, the legislative branch must abide by that judge-made decision, even if it concerns an issue that an individual legislature, with its own unique struggles, might be better positioned to tackle. Restraint in creating a new constitutional right is particularly important in the field of labour relations, where legal certainty is not only desirable, but indeed a keystone in ensuring stability and balance with respect to employer and employee rights.

The Supreme Court's decision in *Saskatchewan Federation of Labour v Saskatchewan* ("*SFL*")[1] engages the ongoing public debate about which branch–the legislative or the judiciary–is most appropriate to create law. In *SFL*, the Supreme Court constitutionalized a new right to strike under *Charter* section 2(d). This follows very recent Supreme Court jurisprudence that constitutionalized a right to collective bargaining, also under section 2(d), in *Mounted Police Association of Ontario v Canada (Attorney General)* ("*Mounted Police*").[2] Both decisions impose positive duties on employers to bargain in good faith and signify a new direction in Canadian labour law, one that has sparked considerable controversy. A particular concern is that public sector employees (and the government's mobilization of public sector employees) perform a key role in ensuring public safety. When these workers have a constitutional right to strike, the government's ability to legislate on such matters may be unduly restrained.

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1 *Saskatchewan Federation of Labour v Saskatchewan,* 2015 SCC 4, [2015] 3 WWR 1 [*SFL*].

2 *Mounted Police Association of Ontario v Canada (Attorney General),* 2015 SCC 1, 380 DLR (4th) 1 [*Mounted Police*]. A Supreme Court majority (Chief Justice McLachlin and Justices LeBel, Abella, Cromwell, Karakatsanis and Wagner concurring; Justice Rothstein dissenting) affirmed *Health Services* and *Fraser* and declared a new constitutional right to engage in meaningful collective bargaining under s. 2(d) of the *Charter*. By striking down the *Public Service Labour Relations Act*, SC 2003, c 22, s 2, which prevented members of the RCMP from forming unions or engaging in collective bargaining, the court moved Canadian labour law in the direction of a "generous and purposive approach" from the "restrictive approach" previously followed (para 30).

In light of these current issues, critics such as Asher Honickman,[3] Andrew Coyne[4] and Conrad Black[5] have discussed the role of the courts in constitutionalizing new rights. While there is little doubt that the Supreme Court is empowered to recognize rights as they develop in society,[6] interpret the constitution and determine whether statutes are valid,[7] much of the current criticism addresses how the Supreme Court majority came to their decision in *SFL*. While Justice Rothstein and Justice Wagner's dissent in that case attacks it most directly, University of Saskatchewan constitutional law professor Dwight Newman calls the majority decision an "unjustified departure from precedent"[8] and criticizes it for falling short of the standard the public ought to expect from such a monumental decision. Indeed, he suggests that such an impoverished decision may warrant use of *Charter* section 33, the rarely invoked legislative override provision.

Also called the "notwithstanding clause", section 33 is not without controversy and was hotly debated both before and following its inclusion in the *Charter*.[9] In 1990, John Whyte and Peter Russell debated the merits of section 33. Whyte considered it an impediment to constitutional democracy, an anachronistic holdover from British Imperial times whose removal from the *Charter* is at least as well supported as its retention.[10] Russell supported section 33, arguing that in a constitution that had the potential for making

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3 Asher Honickman, "A Troubling Decision on the 'Right to Strike'", *National Post* (5 February 2015), online: <http://news.nationalpost.com/2015/02/05/asher-honickman-a-troubling-decision-on-the-right-to-strike> archived at <https://perma.cc/9ZWA-439U> [Honickman].

4 Andrew Coyne, "Imperious Conservatives and runaway Supreme Court set to collide", *National Post* (9 March 2015), online: <http://news.nationalpost.com/2015/03/09/andrew-coyne-imperious-conservatives-and-runaway-supreme-court-set-to-collide> archived at <https://perma.cc/FT5F-NLS2> [Coyne].

5 Conrad Black, "Supreme Court on the loose", *National Post* (14 February 2015), online: <http://news.nationalpost.com/2015/02/14/conrad-black-supreme-court-on-the-loose> archived at <https://perma.cc/YLL9-RVJ9> [Black].

6 *Vriend v Alberta*, [1998] 1 SCR 493 at para 198, 156 DLR (4th) 385 [*Vriend*].

7 Peter Hogg, *Constitutional Law of Canada*, student ed (Toronto: Thomson Carswell, 2010) [Hogg] at 12-7.

8 Dwight Newman, "A court gone astray on the right to strike", *National Post* (26 February 2015), online: <http://news.nationalpost.com/2015/02/26/ed022715-newman> archived at <https://perma.cc/93NH-HNST> [Newman]. Newman is not the only critic who has suggested the use of the override clause. See also Coyne, *supra* note 4 and Black, *supra* note 5.

9 Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol 2 (Toronto: McGraw-Hill Ryerson Limited, 1989). Early drafts of the *Charter* proposed an override clause for each particular freedom, as evidenced in Bill C-60 of the 1979 Federal-Provincial First Ministers' conference (568). In a July 1980 report, the Sub-Committee of Officials on a Charter of Rights considered "the practicability of including an override (non-obstate) clause in an entrenched *Charter*, thus allowing jurisdictions to enact laws that would expressly supersede particular rights" (661). Most jurisdictions opined that a suitable override clause, when found, might be an acceptable compromise to an entrenched *Charter*. In November of 1981, during the First Ministers' Agreement, the governments of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland, and the Federal Government agreed to add the notwithstanding clause to the nascent *Charter* "[i]n an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments" (904-905). Soon after, in the November 23, 1981 House of Commons debates, subsection 33(1) in its present form was added to the Amendments to the Proposed Resolution for a Joint Address to her Majesty the Queen Respecting the Constitution of Canada. The decision passed unanimously with 222 yeas (921).

10 John Whyte, "On Not Standing for Notwithstanding" in Christian Leuprecht & Peter H Russell, eds, *Essential Readings in Canadian Constitutional Politics* (Toronto: University of Toronto Press, 2011) at 373-381.

fundamental rights ultimately justiciable,[11] the override gives the elected Parliament and Legislatures the necessary flexibility to govern.

These issues are just as relevant today as they were in 1990. In this paper, I side with Russell and argue that section 33 is not a dead letter, and explore, in the context of *SFL*, what may justify its use and how that might draw away from the distracting, misunderstood and misapplied issue of judicial activism.[12] Instead of lambasting the institution of the judiciary,[13] I suggest that the notwithstanding clause is best used in two circumstances. Firstly, it may be helpful to invoke it where a court judgment demonstrates improper use of legal principles or is questionably reasoned, with the result that it is incongruous with clear, established precedent from which there does not appear to be sufficient rationale to depart. In the wake of a ruling such as *SFL* that introduces grave uncertainty into a sensitive and delicate area of the law, section 33 may be an effective way to sustain public dialogue regarding the issue and can help shed light on the scope of a newly found constitutional right.

Secondly, the override clause may be used where the government perceives such a pressing public need that it decides that the impugned legislation shall operate notwithstanding a *Charter* right in order to achieve this objective. From a practical perspective, section 33 gives a government the required flexibility to tackle and resolve issues quickly (such as public safety) that other measures (such as constitutional amendment) would be too slow to ameliorate.[14]

SFL presents an opportunity to test an application of the override clause: the majority decision contains puzzling judicial decision-making and an unjustified departure from precedent. Uncertainty results from this and the issue concerns a pressing need, namely public safety and essential services. Plainly, *SFL* does not appear to be a good example of the "living tree" doctrine in action. "Living tree" is an interpretive doctrine arising from the 1930 *Edwards v Canada* ("*Persons*") case that proposes to strike a balance between two seemingly paradoxical goals of constitutional lawmaking: predictability and flexibility.[15] Simply, the constitution is "a living tree which, by way of progressive interpretation,

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11 For a lengthier discussion of the term "ultimately justiciable", see Peter Russell, "Standing Up for Notwithstanding" in Christian Leuprecht & Peter H Russell, eds, *Essential Readings in Canadian Constitutional Politics* (Toronto: University of Toronto Press, 2011) at 383 [Russell].

12 Some commentators have embellished their criticisms of *SFL* and other recent Supreme Court decisions with the term "judicial activism". This is not particularly useful, since over time the term has taken on many different, competing meanings. Like the word "terrorism", persons asserting a strong political point and wishing to generate outrage often wield it. Calls to restrain or overthrow a Supreme Court "gone wild" are not productive, particularly since in circumstances such as these, section 33 remains a legitimate tool of governance that can alleviate concerns of the court overreaching its authority. For an example, see Andrew Coyne, "Supreme Court euthanasia ruling marks the death of judicial restraint", *National Post* (13 February 2015), online: <http://news.nationalpost.com/2015/02/13/andrew-coyne-supreme-court-euthanasia-ruling-marks-the-death-of-judicial-restraint> archived at <https://perma.cc/VD3F-CVFD>.

13 For a blistering criticism of the Supreme Court, see Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined our Law and Our Democracy* (Montreal: McGill-Queen's University Press, 2003).

14 For example, Jean Chrétien suggests a use of the notwithstanding clause: "Under the *Charter*, for example, Canadians have freedom of speech […] But what if the Supreme Court were to rule that freedom of speech took precedence over any laws against hate literature or child pornography? I would have no problem if the government of the day used the notwithstanding clause in order to prevent the spread of discrimination or to protect the innocence of children." Jean Chrétien, *My Years As Prime Minister* (Toronto: Knopf Canada, 2010) at 392.

15 Centre for Constitutional Studies, "Living Tree Doctrine" (2016), *University of Alberta*, online: <http://ualawccsprod.srv.ualberta.ca/ccs/index.php/i-o/795-living-tree-doctrine> archived at <https://perma.cc/ZKU8-QEA6>.

accommodates and addresses the realities of modern life".[16] When deciding whether the constitution should evolve or not, the court must seek to further the *Charter* framers' intent and not hold dogmatically to the strict formality of the legislative text.[17]

Among other things, *SFL*'s dissenting opinion states that the *Charter* framers did not intend to embed a constitutional right to strike in the constitution.[18] This observation, in conjunction with others detailed below, supports the contention that the majority decision is a sharp departure from precedent instead of a carefully pruned and cultivated outgrowth of the constitutional "living tree". I begin by discussing section 33 itself and follow with an examination of *SFL*. I then analyze the impact of the decision and present some conclusions regarding the use of section 33 in the modern, Canadian legal context in light of *SFL*.

I. WHAT IS SECTION 33?[19]

When Canada adopted the *Charter* in 1982, it limited the power of the federal Parliament and the provincial legislatures[20] to intrude on certain civil liberties. These liberties include freedom of religion, freedom of expression, freedom of assembly and association, voting and mobility rights, and new language rights. The constitutional entrenchment of the *Charter* transformed Canada from a system of parliamentary sovereignty into one of constitutional supremacy.[21] In short, with respect to the civil libertarian values constitutionally protected by the *Charter*, theoretically the last word rests with the courts and not with the legislative branch.

The *Charter* is a cousin of the American Bill of Rights, which emerged in 1789 from the ten amendments to the American Constitution.[22] As with the *Charter*, the executive and legislative branches protect the rights enumerated within the Bill from abridgment. Unlike the *Charter*, however, the rights in the American Bill of Rights cannot be altered except by constitutional amendment,[23] practically giving the United States Supreme

16 *Reference Re Same Sex Marriage*, 2004 SCC 79 at para 22, [2004] 3 SCR 698 [*Same-Sex*]. See also Centre for Constitutional Studies, *supra* note 15.

17 Centre for Constitutional Studies, *supra* note 15.

18 *SFL*, *supra* note 1 at para 158.

19 The section states:

Section 33.

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this *Charter* referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

20 Hereafter, where the words "legislature" or "legislatures" are used, they will refer to both the provincial and territorial legislatures.

21 Hogg, *supra* note 7 at 12-5.

22 *Ibid*.

23 *Ibid*.

Court "final adjudicatory power in interpreting the constitutionality of legislative acts".[24] Thanks to the notwithstanding clause, this is not the Canadian experience. Section 33 states that the Parliament and any legislature can enact legislation notwithstanding sections 2 and 7 to 15 of the *Charter*. This gives an elected government the power to override a substantial portion of the *Charter*, so long as it expressly declares within the statute that it is overriding the *Charter* rights enumerated in section 33.[25] If a government meets these low threshold requirements, that statute is subject to a five year "sunset clause". Since an election will invariably be held by the end of the five years, the public can express its opinion of the *Charter*-infringing law by voting. Additionally, it allows the government to observe how that statute impacts society. As Peter Hogg notes, the notwithstanding clause "thus preserves parliamentary supremacy over much of the *Charter*".[26]

In practice, however, the notwithstanding clause has rarely been used. The federal Parliament has never invoked it.[27] Outside of Quebec, only the Yukon Territory, Alberta and Saskatchewan have invoked it, and these hardly qualify as examples.[28] Of the three, Saskatchewan's invocation of section 33 is the most relevant for this paper. In a 1985 case,[29] the Saskatchewan Court of Appeal struck down a piece of back-to-work legislation, ruling that it infringed a constitutional right to strike. Soon after, the government of Saskatchewan anticipatorily invoked the notwithstanding clause in *The SGEU Dispute Settlement Act* to protect it from the Court of Appeal's adverse decision in *Dairy Workers*. Considering *SFL*, it is ironic that in 1987, the Supreme Court eventually upheld[30] the government's position, overturning the finding of the Court of Appeal and affirming their ruling in *Reference re Public Service Employee Relations Act (Alberta)* ("*Reference re Public Service*")[31] that the *Charter* did not protect such a right. While section 33 ultimately proved unnecessary to achieve the government's aim, this example nonetheless illustrates the notwithstanding clause countering what the passing of time revealed was bad law.

II. SECTION 33 AND WHO HAS THE "ULTIMATE SAY"

Without the value of such hindsight, it can be difficult to tell which of the two branches, the legislative or judicial, is ultimately "right" in a given situation. There are competing perspectives on this. Alexander Bickel argues that "the pressure for immediate results" in legislative governance leads legislators to act "on expediency rather than take the long

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24 Caroline S Earle, "The American Judicial Review Quagmire: A Canadian Proposal" (1993) 68:4 Ind LJ 1357 at 1358. This illuminating paper proposes adding an override clause similar to section 33 to the American Constitution. Concerning section 33, Earle asserts that it "represents an appealing solution to the American debate of judicial finality" (1359) [Earle].

25 Hogg, *supra* note 7 at 39-6 to 39-7.

26 *Ibid* at 12-6.

27 David Johansen & Philip Rosen, "The Notwithstanding Clause of the Charter" (17 May 2012), *Library of Parliament*, online: <http://www.parl.gc.ca/content/lop/researchpublications/bp194-e.pdf> archived at <https://perma.cc/M8B5-CJZ5>.

28 *Ibid*. Although Yukon was the first to use the clause, it ultimately never brought into force the statute that included it. Alberta invoked section 33 to legislate an opposite-sex only definition of marriage, but the Supreme Court in *Reference re Same-Sex Marriage* ruled that only the federal Parliament can define the term "marriage".

29 *RWDSU, Locals 544, 496, 635, 955 v Saskatchewan*, [1985] 5 WWR 97, 19 DLR (4th) 609 (WL Can) [*Dairy Workers*].

30 *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277 (WL Can).

31 *Reference re Public Service Employee Relations Act (Alberta),* [1987] 1 SCR 313, 38 DLR (4th) 161 (WL Can) [*Reference re Public Service*].

view".[32] The bench is better equipped to establish principles, values and rights and can apply them consistently.[33] This instinct generally forms the backbone of the argument that constitutional issues should be ultimately justiciable.

However, the fact that the legislative branch is more suited to deal with matters in an expedient manner is also valuable in governance. Canada is not a homogenous society, utterly uniform in each of its provinces and territories. Federalism acknowledges the diversity among provincial and territorial boundaries and gives rise to laws suited for each discrete population. We also have an overarching constitution, interpreted by the judiciary, which sets out the core rights and freedoms belonging to each person, regardless of provincial or territorial borders. As the electorate, we have decided that we must balance these two competing sources of power by empowering local governments to determine policy that, to the fullest extent possible, reflects the protections guaranteed by the constitution.

Section 33 is part of that constitution. By including it, the electorate has also conceded that Parliament and the legislatures may decide if special circumstances or a greater social need require abrogating a liberal right. In circumstances where public safety is at risk, for example, seeking constitutional amendment in order to enact necessary but *Charter*-adverse legislation would be too slow. In this case, an elected government has the expertise and the intimate connection with the issue that one could not expect a court to have, and accordingly can pass the legislation to resolve that problem.

Another benefit to section 33 is its potential to "maximize citizen participation in the processes of government".[34] Caroline S. Earle supports the notwithstanding clause from an American perspective (where constitutional supremacy truly reigns supreme). She asserts that a legislative override like section 33 "suggests that the task of interpreting the Constitution is as fundamental a citizenship duty as voting; constitutional analysis is too important to leave in the hands of a select few"[35]–regardless of how skilled those hands are. This sentiment has a strong appeal, as it emphasizes the influence that each citizen should wield in a democracy.

At the same time, when promoting section 33 as a potentially useful democratic tool, it is important that a defence of its continuing merit is not based on the argument that an elected body must *always* be able to trump the will of appointed judges. As Russell states in "On Standing Up For Notwithstanding", such a conception of democracy is "most simplistic and illiberal", ignores the need for "checks and balances as a condition of liberty" and is oblivious to "the injustices which a majority may wish to inflict on a minority".[36]

Instead, a defence of section 33 should acknowledge that judges are not infallible. While tasked with interpreting and applying the constitution in a case before them, they must exercise considerable care to ensure that their decisions are grounded in proper authority and that they correctly interpret the law. As Bickel states, judges have "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well".[37] Courts, through judicial review, play a

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32 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven: Yale University Press, 1986) at 25 [Bickel].

33 *Ibid*.

34 Earle, *supra* note 24 at 1360.

35 *Ibid*.

36 Russell, *supra* note 11 at 382.

37 Bickel, *supra* note 32 at 25-26.

valuable role in lawmaking, especially since it is in the courts that statutes take on "flesh and blood", and judicial review "provides an extremely salutary proving ground for all abstractions".[38]

Despite their best efforts, however, judges invariably approach cases with particular biases and preformed notions.[39] One need only observe the dissents and split decisions of the Supreme Court to see that the bench does not always operate with one mind. Although educated and often well-informed approximations are possible, from the perspective of a particular judgment the bench is unable fully to grasp the social and economic consequences of its decisions.[40] Another concern is the politicization of the courts. The United States, further along in the democratic experiment than Canada, is currently experiencing that troubling phenomenon.[41] When the courts make a questionable decision, whether or not it is politically motivated, section 33 provides a process that is "more reasoned than court-packing and more accessible than constitutional amendment, through which the justice and wisdom of these decisions can be publicly discussed and possibly rejected".[42,43] This rationalization of section 33 is a pithy summary of the notwithstanding clause's contemporary value. As Paul Weiler adds,

> Under this approach judges will be on the front lines; they will possess both the responsibility and the legal clout necessary to tackle "rights" issues as they regularly arise. At the same time, however, the *Charter* reserves for the legislature a final say *to be used sparingly in the exceptional case where the judiciary has gone awry*.[44]

These observations regarding section 33 place the courts and the elected governments on the equal footing of governing power they are meant to share under the constitution.

III. CHARACTERISTICS OF SECTION 33 THAT EMERGE FROM JURISPRUDENCE

For the most part, when evaluating whether section 33 has been properly exercised, the court will simply ensure that the government followed the formal requirements for invoking it.[45] A few cases, however, have briefly commented on its utility and purpose. In *Black v Law Society (Alberta)* ("*Black*"),[46] the Alberta Court of Appeal acknowledged

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38 *Ibid* at 26.

39 Hogg, *supra* note 7 at 12-8 and 39-11.

40 *Ibid* at 39-11.

41 Earle, *supra* note 24 at 1362. See also note 39.

42 Russell, *supra* note 11 at 382.

43 Hogg, *supra* note 7 also discusses the dangers of court packing: "In the United States, where the Bill of Rights is unqualified by an override power, the political response to a decision considered unjust or harmful is to attack the Court, and to attempt to change is composition" (39-10). For example, in 1937, President Franklin Roosevelt threatened to pack the Supreme Court in order to motivate it to favour his New Deal. More recently, Republic Presidents have appointed judges expressly in order to reverse some of the Warren Court's controversial civil libertarian decisions. Such actions obviously cast doubt on the institutional independence of the judiciary.

44 Russell, *supra* note 11 at 384 [emphasis added].

45 Hogg, *supra* note 7 at 39-8 to 39-9. Since *Ford v Quebec (AG)*, a government does not need to show reasonableness or demonstrate justification apart from following the undemanding, formal requirements enumerated in section 33.

46 *Black v Law Society (Alberta)*, [1986] 3 WWR 590, 27 DLR (4th) 527, 1986 CarswellAlta 48 (WL Can) [*Black*]. The plaintiffs (a group of Ontario lawyers) were barred by the Alberta Law Society from entering into a partnership with practicing members of the Alberta bar who were resident in Alberta. The plaintiffs argued that their section 2(d) *Charter* rights were infringed and successfully brought their appeal to the Alberta Court of Appeal.

that with section 33, majority rule in Canada remains, but suggested that its use could have an undesirable political outcome.[47]

In *R v Ushkowski* ("*Ushkowski*")[48] the Manitoba Court of Appeal seems to agree with the spirit of section 33 in preserving what some have labeled "co-operative federalism".[49] Among other things, the bench evaluated whether the uneven application of law between provinces violated the *Charter*'s section 15 equality rights. Justice Lyon stated that section 33 was intended by the *Charter* framers to allow governments to decide whether federal and provincial legislation could be excluded from *Charter* operation, even when other provinces remained subject to it. In short, "phasing in or opting out of […] constitutional provisions or amendments which may result in the uneven application of laws"[50] is not unconstitutional on its face.

In *Vriend v Alberta* ("*Vriend*"), Justice Major for the Supreme Court (dissenting only on that case's remedy issue) noted that,[51] as per *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc* ("*Southam*"), it is "the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements",[52] and should a legislature decide that a law operate notwithstanding the *Charter*, the choice of invoking section 33 ultimately lies with the Legislature. After all, "[t]hey are answerable to the electorate of that province and it is for them to choose the remedy whether it is changing the legislation or using the notwithstanding clause". Lastly, "[t]hat decision in turn will be judged by the voters".[53]

These cases illustrate three enduring aspects of section 33: the government must exercise diligence and political responsibility in invoking it; our federal system admits of the inherent variability of law across jurisdictional borders; and section 33 is an acceptable tool for governance in our constitutional system, promoting dialogue between the courts and the public (represented by their elected representatives). Having noted the continued usefulness of section 33, I will now discuss some characteristics that make a case like *SFL* a good candidate for applying the override.

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47 "If the majority wish to prevail over individual liberty in such a way, they should be required to face up to it and accept the unequivocal political responsibility which comes upon invocation of section 33." *Ibid* at para 151.

48 *R v Ushkowski*, [1989] 6 WWR 725, 62 DLR (4th) 155, 1989 CarswellMan 188 (WL Can) [*Ushkowski*].

49 *Ibid* at para 32. See also para 29: "[T]he federal nature of the country must be taken for granted as the foundation around which the whole structure and system of government was conceived and implemented in Canada. While individual rights and freedoms are and always have been an integral part of that system, it is impossible to believe that it was ever the intention that the *Charter*, or any provision of it, would override the systematic federal nature of our parliamentary system of government."

50 *Ibid* at para 32.

51 *Vriend*, *supra* note 6 at para 196.

52 *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc*, [1984] 2 SCR 145 at para 44, 11 DLR (4th) 641 (WL Can) [*Southam*].

53 *Vriend*, *supra* note 6 at para 197.

IV. *SFL*, THE IMPUGNED LEGISLATION AND WHAT THE MAJORITY DOES HERE

The *Public Service Essential Services Act* ("*PSESA*")[54] is part of a labour services regime implemented in 2007 by the Saskatchewan government. Essentially, it regulates and limits the striking ability of unionized public sector employees providing essential services. The workers affected by *PSESA* are designated as "essential service employees" unilaterally by the government. If their union strikes, they are prohibited (by threat of a summary conviction offence) from joining in strike action and must continue working under the terms and conditions of their last collective bargaining agreement.

The definition of "essential services" provided in *PSESA* is quite broad, as is the definition of "public employer". When there is a work stoppage, a public employer and the union must negotiate an essential services agreement that will govern how public services will be maintained. If these negotiations themselves break down, the public employer is authorized under the statute to, with notice, unilaterally designate which public services will be considered essential, including the number and names of employees affected. While the Saskatchewan Labour Relations Board, an independent tribunal, can review the numbers of such employees required to work during a strike, it cannot review whether a service is essential or whether the employees chosen to work have been selected reasonably.

In the introduction to the *SFL* majority decision, Justice Abella summarizes the majority's holding in one sentence: "Because Saskatchewan's legislation abrogates the right to strike for a number of employees and provides no such alternative mechanism, it is unconstitutional".[55] In light of current jurisprudence, most notably *Mounted Police*, an employer fails to fulfill its constitutionally mandated duty when it does not engage in a good faith bargaining process. Arguably, in *SFL* (1) unilateral decision-making on the part of a public employer (2) with no adequate review mechanism (3) combined with no alternative dispute resolution mechanism when parties reach an impasse constitutes

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54 *The Public Service Essential Services Act*, SS 2008, c P-42.2 [*PSESA*]. *PSESA* sets out a broad definition of "essential services":

> s. 2(c)
> (i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:
> (A) danger to life, health or safety;
> (B) the destruction or serious deterioration of machinery, equipment or premises;
> (C) serious environmental damage; or
> (D) disruption of any of the courts of Saskatchewan; and
> (ii) with respect to services provided by the Government of Saskatchewan services that:
> (A) meet the criteria set out in subclause (i); and
> (B) are prescribed; […]

Likewise, a "public employer" is defined as:

> s. 2(1)
> (i) the Government of Saskatchewan;
> (ii) a Crown corporation as defined in *The Crown Corporations Act, 1993*;
> (iii) a regional health authority as defined in *The Regional Health Services Act;*
> (iv) an affiliate as defined in *The Regional Health Services Act*; (v) the Saskatchewan Cancer Agency continued pursuant to *The Cancer Agency Act*;
> (vi) the University of Regina;
> (vii) the University of Saskatchewan;
> (viii) the Saskatchewan Polytechnic ;
> (ix) a municipality;
> (x) a board as defined in *The Police Act, 1990*;
> (xi) any other person, agency or body, or class of persons, agencies or bodies, that:
> (A) provides an essential service to the public; and
> (B) is prescribed; […]

55 *SFL*, *supra* note 1 at para 4.

a failure to meet *Mounted Police*'s constitutional standard, and the majority finds that much in its decision. Indeed, at paragraph 81, Justice Abella states that the above three reasons "[justified] the trial judge's conclusion that the *PSESA* impairs the section 2(d) rights more than is necessary".[56] In the majority's summary denouncing *PSESA's* constitutionality, Justice Abella concludes that *PSESA* "impairs the section 2(d) rights of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services. [It] is therefore unconstitutional".[57]

However, the majority takes the issue one step further and declares a constitutional right to strike. Considering paragraphs 77 to 79, it appears as though *PSESA* could have been found unconstitutional without needing to rely on a brand new, stand-alone constitutional right to strike. For example, in paragraph 77, the majority sets out their test for infringement of *Charter* section 2(d). One might presume that they do so in light of the right to strike arguments that they formed in the bulk of the decision prior to this point. Instead, Justice Abella merely paraphrases the rule in *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia* ("*Health Services*")[58] by stating that "section 2(d) prevents the state from substantially interfering with the ability of workers, acting collectively through their union to exert meaningful influence over their working conditions *through a process of collective bargaining*".[59] Immediately afterward, Justice Abella quotes from *Mounted Police*: "[T]he ultimate question to be determined is whether the measures disrupt the balance between employees and employer that section 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining".[60]

I note two observations about these quotations. Firstly, neither *Health Services* nor *Mounted Police*, two very recent cases in labour law, found that a right to strike is essential to collective bargaining. In fact, *Health Services* denied that such a constitutional right to strike existed.[61] Second, it appears that the majority, in declaring *PSESA* unconstitutional, relied solely on finding that the three problems stated above[62] constituted a failure to live up to the constitutional imperative set out in *Mounted Police*. By the substance of the majority's own argument, if the government had only provided an adequate dispute resolution mechanism, it may have been allowed to restrict the public workers' right to strike. This would have followed logically from the court's own recent jurisprudence and the reasoning they applied to the particular issue before them.

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56 According to Justice Abella, the first problem—unilateral discretion—is problematic because such a scheme removes the discussion of what is an essential service from the negotiation agreement. The second problem, that the Saskatchewan Labour Relations Board cannot review that unilateral discretion, compounds the first in that there is no evidence that "the objective of ensuring the continued delivery of essential services requires unilateral rather than collaborative decision-making authority" (para 90). The third problem, the lack of an alternative dispute resolution process, is concerning because of the wide latitude public employers are given under *PSESA* subsection 9(2) to designate which services are essential. This severely limits the leverage these employees have with which to bargain.

57 *SFL*, *supra* note 1 at paras 96-97.

58 *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*Health Services*].

59 *SFL*, *supra* note 1 at para 90 [emphasis added].

60 *Mounted Police*, *supra* note 2 at para 72.

61 Specifically, *Health Services*, along with *Fraser v Ontario (Attorney General),* 2011 SCC 20, [2011] 2 SCR 3, 331 DLR (4th) 64 [*Fraser*] rejected a constitutional right to a dispute resolution process. See *SFL*, *supra* note 1 at para 106.

62 See the third paragraph of this section.

Instead, the majority additionally holds that "[t]he right to strike is […] an indispensable component of [the right to collective bargaining]".[63] This does not follow logically, since it appears that collective bargaining could have been achieved had there been an alternate dispute resolution mechanism in place. It creates a peculiar impression that the majority saw *SFL* as a convenient opportunity to constitutionalize a right to strike, an issue tangential to the case itself.[64] In the words of the dissenting opinion, what Justice Abella appears to have done is "inflate the right to freedom of association to such an extent that its scope is now completely divorced from the words of section 2(d) of the *Charter*".[65]

V. THE IMPACT OF *SFL* AND THE PROBLEM OF UNCERTAINTY

Clearly, if *PSESA* fails the standard found in *Mounted Police*, then it should be amended to bring it up to constitutional compliance (or at least amended to invoke section 33). However, by constitutionalizing a new, stand-alone right to strike, the Supreme Court sets an even higher bar. After *SFL*, how can any government enact legislation keeping workers from striking without running afoul of the constitution? Ultimately, what the majority has done in *SFL* is "[introduce] great uncertainty into labour relations",[66] raising some troubling, unanswered questions.

For example, does this new right require all governments defend under *Charter* section 1 every limit found in statutory conditions detailing when workers can strike? This is not an insignificant concern, as all labour relations statutes impose such limits.[67] On the one hand, the scope of the effect of this ruling may be narrow. This case involved public–not private–sector employees, and more specifically, public sector employees providing essential services. Moreover, section 2(d) of the *Charter* protects freedom of association, which applies to unionized employees representing only 17% of the private sector workforce.[68] In their analysis of these events, Maryse Tremblay and Naomi Chanda assert that *SFL* "is not likely to have a dramatic impact for private sector employers in the absence of some government action".[69]

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63 *SFL*, *supra* note 1 at para 3.

64 Another example of questionable reasoning is the majority's reliance on international instruments that are non-binding (to Canada) sources of law. The court not only departs from precedent, but also relies on these instruments, some of which have not even been determined by their own administering bodies to be definitive statements on a right to strike. Additionally, the majority claims that the constitutions of other nations that have protected a right to strike must have some bearing on the *Charter*, despite the fact that the *Charter* framers already had access to these constitutions and deliberately left out a right to strike when deciding which liberal rights were to be constitutionally protected (*SFL*, *supra* note 1 at para 158). The brevity of this paper precludes a more detailed analysis of these issues. For a more detailed discussion, see the full dissenting opinion. See also Newman, *supra* note 8 for a summary of these concerns.

65 *SFL*, *supra* note 1 at para 136.

66 *Ibid* at para 123.

67 *Ibid*.

68 *Ibid*.

69 Maryse Tremblay, "Supreme Court of Canada Landmark Decision: The Right to Strike is Now Constitutionally Protected" (2 February 2015), *Borden Ladner Gervais*, online: <http://www.blg.com/en/newsandpublications/publication_3972> archived at <https://perma.cc/HHP5-JVJ5> [Tremblay].

On the other hand, *Charter* rights by their very nature apply broadly. The *SFL* majority fails to define the scope of this ruling's application, instead painting the issue with broad brush strokes in paragraphs 4,[70] 56,[71] 61[72] and 75.[73] This omission adds to the uncertainty introduced when a new *Charter* right is found and further illustrates why constitutionalizing a new right ought to be undertaken with great care and deliberation–something that the majority did not seem to exercise in this case. Indeed, Tremblay and Chanda also caution that "special legislation directed towards *private sector employees (such as back-to-work legislation)* will have to be carefully crafted".[74] This implies that this decision, while made in the narrow context of essential public sector employees, may very well impact beyond the niche of the public into the private sector.[75] A likely consequence of this finding is a future increase of costly constitutional labour law cases before the already overburdened courts.[76]

VI. A DELICATE BALANCE: ECONOMIC RIGHTS AND THE *CHARTER*

A strike is an attrition-based tool in labour relations that is meant to test whether the employee can last longer without wages than the employer can last without the ability to conduct business.[77] When the parties involve public-sector workers and the government, a strike takes on a political character. A natural outgrowth of this context is that the additional funds meant to meet employee demands are public funds.[78] Thus, by its very nature, this type of negotiation tends to be complex, involving consideration of fiscal and budgetary issues in addition to social and political ones. In the widely variable field of labour relations, it is particularly important for the law to be as certain as possible. This is further complicated when the employee services involve essential public services. As the *SFL* dissent points out,[79] governments properly perform the delicate balancing required for this task: they must, under section 36(1)(*c*) of the *Constitution Act, 1982*, "[provide] essential public services of reasonable quality to all Canadians". When the

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70 *SFL*, *supra* note 1 at para 4: "The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. […] This applies *too to public sector employees*" [emphasis added].

71 *Ibid* at para 56: "[The dissent's] reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the *entire history of modern labour legislation has been scrupulously devoted to rectifying*" [emphasis added]. This was in response to the dissent's claim that "true workplace justice looks at the interests of all implicated parties" (para 125). Note that in this statement the majority does not differentiate between public or private sector labour relations.

72 *Ibid* at para 61: "The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is therefore, and has historically been, *the 'irreducible minimum' of the freedom to associate in Canadian labour relations*" [emphasis added]. Again, note the conspicuous lack of differentiation here. The majority seems to be suggesting that a right to strike is at the very core of labour relations in general.

73 *Ibid* at para 75: "[A] meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement". To whom exactly does the term "employees" apply?

74 Tremblay, *supra* note 69 [emphasis added].

75 Indeed, the *SFL* dissent points out that, though the majority claims that the right to strike is only protected when it interferes with the right to collective bargaining (a right recognized most recently in *Mounted Police*), in many places it declares the right "essential", "crucial" and "indispensable" to collective bargaining. This indicates that the majority has created a "stand-alone constitutional right to strike" (para 108).

76 Honickman, *supra* note 3.

77 *SFL*, *supra* note 1 at para 127.

78 *Ibid*.

79 *Ibid* at para 105.

court imposes positive duties on only one side of a labour dispute, it restricts the flexibility the government requires to perform its mandate.

Returning to *Dairy Workers*,[80] The Saskatchewan Court of Appeal was asked to consider similar issues to the present case. All three judges wrote their own reasons with Justice Brownridge dissenting. In paragraph 46, he stated, "[l]egislation which restricts or abolishes the right of union members to strike does not, for this reason alone, infringe the guaranteed freedom of association", noting cases such as *Collymore v Attorney-General* ("*Collymore*")[81] and *Dolphin Delivery Ltd v RWDSU Local 580* ("*Dolphin Delivery*")[82] where the court found no constitutionally protected right to strike. In particular, Justice Esson and Justice Taggart of the British Columbia Court of Appeal in *Dolphin Delivery* held that "[i]t does not follow that the *Charter* guarantees the *objects and purposes* of the union, or *the means by which those can be achieved*".[83]

Justice Brownridge ultimately found that "section 2(d) of the *Charter* does not affect laws which limit or control strikes and lockouts".[84] In other words, while the *Charter* protects the rights of persons to enter into consensual relationships to support one another and pool resources, it does not guarantee the *objects and purposes* and the *means* by which an association or union seeks to achieve its aims. Essentially, "[the freedom of association clause] does not include the economic right to strike".[85] Lastly, he quoted with approval Justice Esson in *Dolphin Delivery*, who said, "It is no doubt right to apply the rule of liberal construction to the fundamental freedoms in the *Charter*. *But that does not empower courts to construct edifices of policy without regard for the plain meaning of the words of the Charter*,[86] and Lord Reid[87] in *Jones v DPP* ("*Jones*") who said, "If problems are created by over-expansive judicial interpretation, they cannot be readily remedied by amendment as they can in the case of a statute".[88]

Touching on the same themes considered by Justice Brownridge above, Justice McIntyre in *Reference re Public Service*[89] cautions that the type of principled analysis and application of law that the courts exercise with such skill is nonetheless unequipped to deal with certain questions. These include: considering whether government services are essential; whether alternative arbitration adequately compensates parties for agreeing not to strike; whether harm caused to farmers (such as in *Dairy Workers*) through closure of certain facilities is sufficiently important to justify prohibiting strikes and lockouts; and whether in a particular situation the concern of reducing inflation and growth in government expenses tips the balance between one party and another in litigation. Simply, "[t]here are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the legislature".[90]

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80 *Dairy Workers*, supra note 29.

81 *Collymore v Attorney-General*, [1970] AC 538 [*Collymore*].

82 *Dolphin Delivery Ltd v RWDSU Local 580*, [1984] 3 WWR 481, 10 DLR (4th) 198, 1984 CarswellBC 53 (WL Can) [*Dolphin Delivery*].

83 *Ibid* at para 33 [emphasis added].

84 *Dairy Workers*, *supra* note 29 at para 47.

85 *Ibid* at para 48. Justice Brownridge is quoting Justice Reed in *PSAC v Canada*, [1984] 2 FC 562 at para 64, 11 DLR (4th) 337, 1984 CarswellNat 73 (WL Can).

86 *Dolphin Delivery*, *supra* note 82 at para 37 [emphasis added].

87 *Dairy Workers*, *supra* note 29 at para 54.

88 *Jones v DPP*, [1962] AC 635 at 662, [1962] 1 All ER 569 (HL) [*Jones*].

89 *Reference re Public Service*, supra note 31 at para 185.

90 *Ibid*.

Justice McIntyre worried that if a right to strike were constitutionalized, the courts will be tasked with answering these questions much more frequently, a "legislative function into which [they] should not intrude".[91] He acknowledged that the courts are sometimes called upon to "intrude" into the field of legislation. However, "where no specific right is found in the *Charter* and the only support for its constitutional guarantee is an implication, the courts should refrain from intrusion into the field of legislation. *That is the function of the freely elected legislatures and Parliament*".[92] His prescient words reflect the concerns of the present day.

Indeed, in *Pepsi-Cola Canada Beverages (West) Ltd v RWDSU, Local 558* ("*Pepsi-Cola*"), another Saskatchewan case, a unanimous Supreme Court ruled that balancing the interests of employers and unions is a "delicate and essentially political matter", and that "where the balance is struck may vary with the labour climates from region to region".[93] In the end, the Supreme Court affirmed that the legislatures, and not the courts, are better placed to deal with these issues.

CONCLUSION

SFL has opened up for debate the continuing merits of the notwithstanding clause. The issue centres on a serious public safety issue similar to when section 33 was last used by Saskatchewan. In fact, *PSESA* came into force following a strike in 1999 involving thousands of nurses and another in late 2006 by highway workers and correctional officers.[94] The magnitude of such a cessation of essential services is not an issue resolvable by the courts. That being said, this paper has not been a defence of the legislation itself. A reading of the Saskatchewan legislative debates regarding *PSESA*'s second reading reveals legitimate concerns regarding the scope and one-sidedness of the bill.[95] Instead, I direct my criticism against the *SFL* decision itself, which unjustifiably departs from recent precedent and relies on questionable sources of law, resulting in uncertainty in the realm of labour law with little in the way of direction from the court as to how it will apply. It is not the court's responsibility to set out detailed policy. That is the legislature's proper task. However, the constitutional right to strike established here has the potential for such widespread application that it upsets the delicate balance that the legislature must maintain between employers and employees.

The spirit behind invoking section 33 respects that the judiciary is not infallible. Despite their skill and learning, it is still possible for the bench to employ an ends-focused approach and cherry-pick sources of authority to achieve that end, shades of which appear in *SFL*. A judiciary that conducts radical constitutional revision, seemingly without a careful and reasoned rationale for departing from strong and recent precedent (and thus out of line with the proper constitutional interpretation principle formulated in *Persons*), is a judiciary that oversteps its own constitutional limits. If the Canadian constitution is truly a "living tree", at the very least such drastic pruning may cause it to grow in ways never envisioned by its planters. Invoking section 33 in response to a

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91 *Ibid*.

92 *Ibid* at para 185 [emphasis added].

93 *Pepsi-Cola Canada Beverages (West) Ltd v RWDSU, Local 558*, 2002 SCC 8, [2002] 1 SCR 156 at para 85, 208 DLR (4th) 385 (WL Can) [*Pepsi-Cola*].

94 Mike Blanchfield, "Public Sector Workers' Right to Strike Protected by Constitution: Top Court", *Huffington Post* (30 January 2015), online: <http://www.huffingtonpost.ca/2015/01/30/public-sector-workers-strike-supreme-court_n_6577280.html> archived at <https://perma.cc/395H-4X9L>.

95 Saskatchewan, Legislative Assembly, *Official Report of Debates (Hansard)*, 26th Parl, 1st Sess, No 25A (14 April 2008) at 827-865.

case like *SFL* could send a strong message to the Supreme Court that if their rulings are not made according to established principles of judicial interpretation and respect for precedent, they will not be followed.

Use of section 33 encourages, not ends, dialogue around an issue. A cursory read of the January 31, 1986 Saskatchewan Hansard, in which the 20th legislative assembly debated the *SGEU Dispute Settlement Act*'s second reading and use of section 33, reveals topics ranging from the financial hardship imposed on Saskatchewan families by the strike to the overarching goals of the *Charter* in light of the override provision,[96] demonstrating that a major pronouncement by a court should not stifle public engagement with that issue. Section 33 ensures that an avenue of discussion remains open for persons who disagree with a questionable ruling.

Governments ignore this useful tool at their peril. The American experience, which has resulted in a highly politicized United States Supreme Court, is a warning to Canada that the absence of a legislative override clause tempts the elected branch to pressure the court to interpret the constitution in its favour. This falls far short of the ideal of an institutionally independent judiciary. Far from being a dead letter, the notwithstanding clause provides ample potential for balancing power between the elected and judicial branches—a balance so crucial to a system that cherishes the accountability of those in authority, elected or not. Returning once more to Lord Reid's words in *Jones*, "If problems are created by over-expansive judicial interpretation, they cannot be readily remedied by amendment as they can in the case of statute".[97] Section 33 provides a much-needed alternative.[98]

96 Saskatchewan, Legislative Assembly, *Official Report of Debates (Hansard)*, 20th Parl (31 January 1986) at 1040.

97 *Jones*, *supra* note 88.

98 The scope of this paper precluded an analysis of the social impact that invoking section 33 may have on Saskatchewan's labour environment. This would be a fascinating study and could add to the strength of an argument supporting the use of the legislative override provision. Such a study could be augmented with social science and political science data that could reveal if there is a correlation between use of the notwithstanding clause and subsequent election and poll results. A more fulsome analysis of media responses to the use of section 33 could be useful as well.

ARTICLE

TIPPING THE SCALES IN THE REASONABLENESS-PROPORTIONALITY DEBATE IN CANADIAN ADMINISTRATIVE LAW

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INTRODUCTION

In recent years, there has been considerable debate on the appropriate intensity of, and the proper analytical framework for, judicial review of discretionary administrative decisions[1] that invoke the *Canadian Charter of Rights and Freedoms* ("*Charter*").[2,3] While the proportionality analysis set out in *R v Oakes* ("*Oakes*")[4] is a well-established standard in constitutional adjudication, its embracement in administrative law has not been without practical and theoretical difficulties, nor has it been free of criticism. While many perceived the reviewing courts as having to decide between the administrative law standard of reasonableness and the constitutional law framework of proportionality, in *Doré v Barreau du Québec* ("*Doré*"),[5] the Supreme Court of Canada (the "SCC") has unexpectedly propounded a middle ground and opted for what it called "the reasonableness analysis […] that centres on proportionality".[6]

The question is whether this merging of two normatively distinct standards of review into one is a tenable approach to the review of administrative decisions under the *Charter.* Indeed, can administrative law accommodate such a doctrine? Moreover, are there viable distinctions between reasonableness, proportionality, and "reasonable proportionality"? If so, where does the difference lie? If not, is this proliferation of standards of review anything but just rhetorical flourish?

These are not idle questions. Even a cursory look at case law reveals scant agreement by judges as to which standard of review—reasonableness or proportionality—should be applied to constitutional issues that arise in the administrative context and what the differences between the two are.[7] According to Audrey Macklin, "[t]he rules of the road keep changing, pointing us in one direction (follow the *Oakes* test! says *Multani*) then another (go toward administrative law! says *Doré*)".[8] Post-*Doré,* the SCC remains divided on the appropriate methodology, particularly regarding the scope of *Charter*

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1 Pursuant to the approach adopted in *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038 [*Slaight*], and further affirmed in *Doré v Barreau du Québec,* 2012 SCC 12 [*Doré*], there is a distinction to be made between a *discretionary* administrative decision that engages *Charter* rights (that is, *imprecisely* authorized decisions) and administrative decisions that are *expressly* authorized by a statute to infringe the *Charter* (see e.g. *Slaight*). In the latter scenario, the empowering statute itself must satisfy the requirements of section 1 of the *Charter*; whereas in the case of broad or imprecise grant of discretion, it is the discretionary decision that ought to be tested. This article will focus on the inconsistent judicial treatment of imprecise grants of discretion, as opposed to express grants of authority to infringe *Charter* rights.

2 See e.g. Hoi L Kong, "Doré, Proportionality and the Virtues of Judicial Craft" (2013) 63 SCLR 501; Audrey Macklin, "Charter Right or Charter Lite? Administrative Discretion and the Charter" (2014) 67 SCLR 561 [Macklin]. Joseph Arvay, Sean Hern & Alison Latimer, "Proportionality and the Public Law" (2015) 28 Can J Admin L & Prac 23.

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 [*Charter*].

4 *R v Oakes,* [1986] 1 SCR 103 [*Oakes*].

5 *Doré*, *supra* note 1.

6 *Ibid,* at para 7.

7 See e.g. the decisions in *Stoffman v Vancouver General Hospital,* [1990] 3 SCR 483; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *Little Sisters Book and Art Emporium v Canada (Minister of Justice),* 2000 SCC 69; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6; and *Canada (AG) v PHS Community Services Society,* 2011 SCC 44, where the SCC applied a section 1 analysis.

Cf. Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, where the SCC performed a judicial review on a reasonableness standard.

8 Macklin, *supra* note 2 at 561 (citations omitted).

issues.[9] Although scholarly literature points out the rampant inconsistency in the SCC's approach, most papers do little to explain *why* the SCC ought to adopt reasonableness, proportionality, or some combination of the two.

The purpose of this paper is to fill this gap in the existing literature. By making a case for eliminating the untenable dualism of reasonableness and proportionality in *Charter*-related review, because such dualism contravenes the *Charter*'s requirement of legitimacy, I argue that for administrative decisions involving *Charter* rights, the courts ought to adopt the proportionality framework from *Oakes*. Not only would this afford sufficient protection to *Charter* rights—a standard that reasonableness fails to meet—it would also eschew the current model, whereby the approach to determining the constitutionality of government action arbitrarily depends on whether the action is expressly authorized by legislation.[10]

There is nothing in administrative law except the unfortunate resistance of judges that would be unwelcoming to such a doctrinal shift. Furthermore, as Canadian commentators often forget, the origins of proportionality as a structured legal template can be traced to Prussian administrative law, aspects of which have inspired constitutional tribunals worldwide.[11] Conversely, the current reasonableness approach, even with the proportionality twist, does not withstand scrutiny as a legitimate standard of review for *Charter*-related issues in light of the so-called new "strand of political legitimacy"[12] that is predicated on what David Dyzenhaus, drawing on Etienne Mureinik, terms "the culture of justification".[13]

My argument will be presented in four parts. In Part I, I will outline the current judicial treatment of administrative actions implicating *Charter* rights and briefly canvass the Court's struggle of navigating between reasonableness and proportionality. In Part II, I will explain that underneath their obvious similarities, reasonableness and proportionality are actually fairly distinct standards of review, not only in terms of their institutional

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9 Van Harten et al, *Administrative Law, Cases, Text and Materials,* 7th Ed. (Toronto: Emond Montgomery, 2015) at 890 [Harten et al].

10 Evan-Fox Decent & Alexander Pless rightly observe: "If the correct reading of *Doré* is that express authority to infringe a *Charter* right requires the *Oakes* analysis, but imprecise authority does not, one can legitimately question why, when the Constitution is the supreme law of Canada, there would be two different approaches to determining the constitutionality of government action depending on whether it is expressly authorized by legislation or not." From "The Charter and Administrative Law: Cross-Fertilization or Inconstancy?" in LM Sossin & CM Flood, eds, *Administrative Law in Context* (Toronto: Edmond Montgomery, 2012) at 431.

11 See e.g. Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47:1 Colum J Transnat'l L 72 at 72 [Sweet & Mathews]; Moshe Cohen-Eliya & Iddo Porat, "American Balancing and German Proportionality: The Historical Origins" (2010) 8:2 Int'l J Const L 263 [Cohen-Eliya & Porat Historical Origins]; Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTLJ 383 [Grimm]; Amir Attaran, "A Wobbly Balance? The Comparison of Proportionality Testing in Canada, the United States, the European Union and World Trade Organization" (2007) 56 UNBLJ 260 [Attaran]; Margaret de Merieux, "Establishing the Democratic Credentials of Legislation: *R. v. Oakes* and the Section 4 of the Human Rights Act (1998) (UK)" (2001) 30 Comm World L Rev 193 [de Merieux].

12 Stephen Gardbaum, "Proportionality and Democratic Constitutionalism", in Grant Huscroft, Bradley Miller, & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 259 at 263 [Gardbaum].

13 See, generally, David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 S Afr J Hum Rts 11 [Dyzenhaus]. See also Moshe Cohen-Eliya & Iddo Porat, "Proportionality and Justification" (2014) 64 UTLJ 458 at 463 [Cohen-Eliya & Porat Justification]; Moshe Cohen-Eliya & Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59 Am J Comp L 463 [Cohen-Eliya & Porat Culture]; Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4:2 L & Ethics of Hum Rts 141 [Kumm].

and doctrinal effects, but also in terms of the implicit normative assumptions on which they operate. While the standard of reasonableness is anchored in what Mureinik calls "the culture of authority", whereby legitimacy of the act depends on whether a putative government body is *authorized*, or has jurisdiction, to act, regardless of whether it can justify its decisions or not,[14] proportionality, on the other hand, is grounded in "the culture of justification", which imposes substantive—not only procedural or jurisdictional[15]—constraints on government action.[16] After elucidating the normative and theoretical foundations of the culture of justification in Part III, I will contend in Part IV that only the sequenced and stringent four-pronged proportionality test can provide a sustainable analytical framework for satisfying the requirement of justification. This leads me to the conclusion that if the legitimacy of government action that involves constitutional rights is predicated on the government's ability to demonstrably justify its choices as proportionate to the right infringement, it follows that any administrative body exercising statutory authority is also bound by the same requirements and restrictions. Since the amorphous nature of the reasonableness standard, in contrast to the sequenced and structured proportionality test, does not satisfy this requirement of constitutional legitimacy, it should be seen as an unacceptable standard of review not only in constitutional law, but also in the review of administrative decisions that invoke *Charter* rights. Arguing otherwise would be tantamount to arguing against the rule of law principle.

I. CHARTING THE DIVERSE LANDSCAPE OF REVIEW OF DISCRETIONARY DECISIONS UNDER THE CHARTER

As Macklin highlights, vexing questions about the application of the *Charter* to administrative discretion lurked beneath the SCC judgments well before its pronouncement in *Doré*.[17] Even though the decision in *Dunsmuir v New Brunswick* ("*Dunsmuir*")[18] to reduce the number of standards of review from three to two aspired to provide a coherent and workable framework for judicial review *as a whole*,[19] it became clear that certain questions—especially those concerning the relationship between the

14 Gardbaum, *supra* note 12 at 260.

15 See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978) at 26. Max Weber argues that the existence of law that abides to certain formal and procedural criteria is sufficient for a government action to be considered legitimate.

16 *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], does side with David Dyzenhaus' proposition that the concept of "deference as respect" requires of the courts "a respectful attention to the reasons offered" (at para 48). The court further acknowledges that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (at para 47). It can be argued, however, that in practice, the court rarely demonstrates any meaningful engagement with the concept of justification, consistently diluting what was supposed to be the requirement of providing reasons. See e.g. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, where the court endorsed the approach first introduced in *Dunsmuir* that the administrative decision can be upheld in light of reasons that "could be offered" (at paras 53-55).

17 Macklin, *supra* note 2 at 566.

18 *Dunsmuir, supra* note 16.

19 Van Harten et al, *supra* note 9 at 890.

Charter and administrative discretion—could not easily be subsumed under the headings of either reasonableness or correctness.[20]

The consequence is that judicial treatment of the impugned discretionary decisions has undergone a peculiar evolutionary trajectory. As stated by Justice Abella in *Doré,* while some courts relied on the section 1 *Oakes* test,[21] others have deployed a standard of correctness, or even a classic administrative law reasonableness analysis to determine whether *Charter* values were properly taken into consideration.[22] Furthermore, as the appropriate number of standards evolved, so did the standards themselves, even though the courts typically refuse to acknowledge that the current single standard of reasonableness might evolve into a spectrum of deference.[23] For instance, the traditional standard of review has moved from the reasonableness end of the methodological spectrum towards the correctness end.[24] Reasonableness with a proportionality twist as enunciated in *Doré* and all subsequent cases citing its approach,[25] demonstrates this shift.

The most evident attempt to tread a fine line between reasonableness, correctness, and proportionality for *Charter* decisions[26] has appeared in *Doré.* The court here held that an administrative law framework with quasi-proportionality modifications was in order. Where a discretionary administrative decision engages *Charter* protection—both the *Charter*'s guarantees and the foundational values they reflect—the decision-maker is required to proportionately balance the *Charter* protections with the applicable statutory objectives to ensure that they are limited no more than is necessary.[27] Justice Abella, writing for a unanimous Court, explained that "while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its

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20 In *Dunsmuir*, *supra* note 16, the SCC merged patent unreasonableness with the so-called standard of *reasonableness simpliciter,* thereby reducing the number of standards of review in Canadian judicial review from three to two: reasonableness and correctness. As summarized by the Court (at para 34): "The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of *reasonableness simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review—correctness and reasonableness."

21 *Doré, supra* note 1 at para 23.

22 See e.g. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31; *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

23 This is not to be confused with the SCC's understanding of "spectrum", where a court, having decided to defer, would then need to determine more precisely how much deference should be given. This view of reasonableness as a spectrum was rejected and, as later mentioned by the SCC in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59: "[r]easonableness is a single standard that takes its colour from the context."

24 The true correctness standard—the most intrusive standard of review that will give no deference at all to the decision-maker—would require that the proportionality analysis of the *Oakes* test apply in assessing justifiability of the *Charter* right infringement. See e.g. Van Harten, Heckman, Mullan & Promislow, 7th ed, *Administrative Law, Cases, Text and Materials* (Toronto: Emond Montgomery, 2015) at 874. The standard of reasonableness, on the other hand, would instruct the reviewing court to give considerable weight to the decision-maker. The current methodology for the review of discretionary decisions that affect *Charter* rights, from *Doré*, lies somewhere between the reasonableness and correctness standards, and is now adjusted to incorporate proportionality into the reasonableness standard.

25 See e.g. *Divito v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 47.

26 Admittedly, in *Doré,* the reviewing court employed the notion of *Charter* "values" instead of rights. However, I side with those commentators who treat *Charter* rights and values as analogous and do not welcome the Court's attempt at distinguishing the two. See e.g. Macklin, *supra* note 2.

27 *Ibid* at para 4.

essence works the same justificatory muscles: balance and proportionality".[28] She applied the following test:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. [...]
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. [...]
>
> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. [...]
>
> If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.[29]

It bears noting that while the *Doré* approach sought to bring clarity, in practice it brought more confusion. The Court has never drawn a clear line between reasonableness, proportionality, and a newly adopted reasonableness approach *that centers on proportionality*. What is the "conceptual harmony"[30] between the *Oakes* test and a reasonableness review? Moreover, could the Court fulfill its promise that the new approach would continue to ensure "rigorous *Charter* protection"[31] given that *Doré* did not mandate "demonstrable justification" as enshrined in section 1 of the *Charter*?

Recently in *Loyola High School v Quebec (Attorney General)* ("*Loyola*"),[32] the Court refined the *Doré* analysis to find a ministerial decision unreasonable because it "did not strike a proportionate balance between the *Charter* protection and statutory objectives at stake in this case".[33] The Court drew heavily on *Doré.* Among other things, the Court retained the orthodox two-stage model of *Charter* adjudication, contending that as a "preliminary issue",[34] the reviewing court must determine whether the decision engages the *Charter* by limiting its protections and, if answered in the affirmative, whether proportionate balancing[35] has been achieved:

> The first issue is whether Loyola's freedom of religion was infringed by the Minister's decision. The second issue is whether the Minister's decision —that only a purely secular course of study may serve as an equivalent to the ERC Program—limits Loyola's freedom of religion more than reasonably necessary to achieve the goals of the program. However one describes the precise analytic approach taken, the essential question raised

28 *Doré, supra* note 1 at para 5.
29 *Ibid* at paras 55-58.
30 *Ibid* at para 57.
31 *Ibid* at para 4.
32 *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 [*Loyola*].
33 *Ibid* at para 79.
34 *Ibid* at para 39.
35 *Ibid.*

> by this appeal is whether the Minister's decision limited Loyola's right to religious freedom proportionately—that is, no more than was reasonably necessary?[36]

However, in *Loyola*, the SCC makes two novel assertions. Firstly, it clarifies the nature of "conceptual harmony" between reasonableness and proportionality alluded to in *Doré* by contending that:

> A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under section 1: minimal impairment and balancing.[37]

As the SCC sees it, both *Oakes* and *Doré* require that *Charter* protections be limited as little as reasonably possible in light of the state's particular objectives. As such, *Doré*'s proportionality analysis is robust, and "works the same justificatory muscles as the *Oakes* test".[38]

Secondly, it is asserted that, in the right light, reasonableness can be seen as analogous to proportionality. In coming to this conclusion, the SCC makes a reference to Aharon Barak who, in turn, noted that "[r]easonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality".[39] Against this backdrop, the question necessarily arises—and on this I side with Paul Daly—"why not simply call a proportionality test a proportionality test?"[40]

It is my position that proportionality as an analytical framework carries different normative and institutional implications for the protection of *Charter* rights and values than the administrative law standard of reasonableness. With respect, I believe that the Court's misguided assessment, whereby it confounds these standards, might have a deleterious effect on *Charter* rights. As I shall explain in the next section, there are crucial distinctions between reasonableness (even in the strong, quasi-proportionality sense) and proportionality as standards of review.[41] These differences have a direct bearing on the justifiability and legitimacy of the outcome of the case.

II. REASONABLENESS VS PROPORTIONALITY: AN UNNECESSARY CONFUSION

As mentioned, the SCC appears to treat *Doré*-like reasonableness and *Oakes'* proportionality to be, if not identical, then at least methodologically substitutable standards of review in administrative law. On this account, proportionality is simply

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36 *Ibid* at para 114.

37 *Ibid* at para 40.

38 *Ibid* at para 5.

39 Aharon Barak, "Proportionality", in Michel Rosenfeld and András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 738 at 743.

40 Paul Daly, "Reasonableness, Proportionality and Religious Freedom: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12", *Administrative Law Matters*, online: <http://www.administrativelawmatters.com/blog/2015/03/19/reasonableness-proportionality-and-religious-freedom-loyola-high-school-v-quebec-attorney-general-2015-scc-12/> archived at <https://perma.cc/TD3Z-VNQU>.

41 For a similar view, see Paul Daly, who maintained that "my own view, explained in chapter 5 of A Theory of Deference in Administrative Law, is that reasonableness and proportionality are distinct and should be kept apart. I am also dubious about the sliding scale metaphor", in "You Say 'Tomato', I Say 'Reasonableness': *Pham v Secretary of State for the Home Department* [2015] UKSC 19", *Administrative Law Matters*, online: <http://www.administrativelawmatters.com/blog/2015/04/07/you-say-tomato-i-say-reasonableness-pham-v-secretary-of-state-for-the-home-department-2015-uksc-19/> archived at <https://perma.cc/5P3R-RES3>.

an aspect of the standard of reasonableness—just more "formulaic".[42] As Daly observes, it is difficult to discern how the standard of reasonableness as propounded by Justice Abella in *Loyola* is more deferential than, or analytically distinct from, proportionality as enunciated in *Oakes*.[43] Admittedly, Canadian commentators are not alone in their confusion.[44] On the one hand, as David Feldman highlights, there is certainly a relationship between the doctrines: "Both of them are designed to allow a court to review the balance struck by a public authority between competing interests, while placing limits on the scope of such review".[45] On the other hand, beneath the most general and abstract similarities, there are plenty of drastic differences to be found.

In the following sections, I will not attempt to survey all of the similarities and differences between reasonableness and proportionality. It is neither feasible nor desirable here to capture all conceivable arguments. Instead, I will focus on what I consider to be the three key distinctions between the two standards regarding doctrinal and institutional implications: (i) the intensity of review (or the degree of deference afforded to the decision-maker), (ii) the structure of review, and (iii) what I will call the "weight/scales dilemma".

A. Differences in the Intensity of Review

Before I proceed with my analysis, there are two cursory observations that bear noting. First and foremost, it is sound to refer to reasonableness as a "set of standards" instead of an independent standard of review because, as will quickly become clear, there is no reasonable consensus among judges or academics regarding what this concept actually means or how the single standard should work.[46] Reviewing courts, both domestically and abroad, are still struggling on the intrusiveness of review under the reasonableness standard, which exists on a spectrum,[47] ranging from a very deferential approach (reasonableness in the "weak" sense, that is, reminiscent of the "rational connection" of the proportionality test or rational basis review in American constitutional law) to a quite rigorous and searching examination (what Wojciech Sadurski calls "reasonableness in the strong sense").[48] As Aharon Barak highlights, "[t]he notion of reasonableness has many varieties in several contexts, even within administrative law".[49]

Secondly, it bears noting that the standard of reasonableness always presumes a balancing act. I believe that conceptualizing reasonableness as a balancing standard is important because, as Paul Craig rightly points out, "[t]here is the argument that proportionality is problematic because it involves judicial weighing of incommensurables, but that reasonableness review does not suffer from this infirmity because it does not entail

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42 *Doré, supra* note 1 at para 5.

43 Daly, *supra* note 40.

44 *Cf.* the arguments advanced by British commentators regarding the analytical similarities between reasonableness and proportionality (in The Rt Hon Lord Hoffmann, "The Influence of the European Principle of Proportionality upon UK Law" in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 107-117. See also *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [*Pham*].

45 David Feldman, "Proportionality and the Human Rights Act" in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 127.

46 See e.g. Thomas Hickman, "The Reasonableness Principle: Reassessing Its Place in the Public Sphere" (2004) 63 Cambridge LJ 166.

47 See note 23 and accompanying text.

48 Wojciech Sadurski, "'Reasonableness' and Value Pluralism in Law and Politics", in Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini, eds, *Reasonableness and Law* (Dordrecht: Springer, 2009) at 129.

49 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (New York: Cambridge University Press, 2012) at 374 [Barak].

consideration of weight and balance".[50] However, reasonableness does not prompt the reviewing court to follow a set of steps that would determine an outcome. Quite the contrary, it is a normative concept that is achieved through an evaluative process, rather than a descriptive one. To say that an action is reasonable, as Aharon Barak submits, is to establish the relationships among all relevant factors and assign them proper weight.[51] As Neil MacCormick maintains:

> What justifies resort to the requirement of reasonableness is the existence of a plurality of factors that must be evaluated in respect of their relevance to a common focus of concern (in this case a decision to be made by a public body for public purposes). [...] Even though different people can come to different evaluations in such questions of *balance*, and a variety of evaluations could be accepted as falling within the range of reasonable opinions about that balance, the range has some limits.[52]

Reminiscent of the above is Paul Craig's submission that "[t]he reality is that in making the determination as to whether the contested decision was within the range of reasonable decisions the court is assessing the balance struck by the decision-maker, in the manner exemplified by the preceding cases".[53]

I believe that it is in this balancing exercise or "weight assignment" that the major difference between proportionality and reasonableness lies. Even for reasonableness in the strong sense, the standard still proceeds on the assumption that the scales are always tipped in the state's favour.[54] In other words, it appears that the whole rationale for the reasonableness standard is the notion that, as a general rule, the decision-maker is a reasonable actor and his or her decisions can be quashed only if they are unreasonable. Guy Regimbald goes even further to suggest that the deference to decision makers under

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50 Paul Craig, "The Nature of Reasonableness Review" (2013) CLP 1 at 1 [Craig]. See also, Paul Craig, "Unreasonableness and Proportionality in UK Law" in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 85 [Craig UK].

51 Barak, *supra* note 49 at 374.

52 Neil MacCormick, "Reasonableness and Objectivity" (1999) 74 Notre Dame L Rev 1575 at 1586-1587.

53 Craig UK, *supra* note 50 at 19.

54 Although the standard of reasonableness gives broad deference to an expert's statutory authority and, as such, appears *prima facie* to be much less intrusive than proportionality, the *Doré* approach seeks to bring the two closer together (*Doré, supra* note 1 at para 57):

> Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives.

Is there a tangible difference between the two standards? I believe there is and the devil is in the details. As mentioned above, reasonableness appears to be operating on the assumption that the scales are always tipped in favour of the state, whereas proportionality's default mode (and I am jumping ahead here) is to always side with the individual and their *Charter* rights. I believe the following excerpt from *Doré* exemplifies this nuanced difference (*Doré, supra* note 1 at para 6):

> If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the Charter, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a Charter right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

standard of reasonableness is, by and large, "the right to be wrong".[55] Essentially, the crucial determination is not whether a decision-maker erred, "but more whether or not it is permitted to err. If a tribunal does not have the right to be wrong, the standard of review will be correctness".[56] An argument could be made that the standard of reasonableness is anchored in what Etienne Mureinik calls "the culture of authority", where an action is legitimate because the government body was *authorized* to act, regardless of whether it can justify its decision.[57]

Proportionality, on the other hand, operates on the assumption that the scales are always tipped in favour of protecting constitutional rights.[58] Contrary to the reasonableness standard, proportionality, as Justice McLachlin (as she then was) points out in her dissent in *Cooper v Canada (Human Rights Commission)*, "is about much more than what is usual or 'normal'. The usual practice may be unjustifiable, having regard to the egregiousness of the infringement or the insubstantiality of the objective alleged to support it".[59] Sujit Choudhry emphasizes that in *Oakes*, "rights are of presumptive importance, and limitations… are only acceptable if governments meet a demanding test of justification".[60]

How should we account for these distinctions between reasonableness and proportionality? As I will explain, reasonableness and proportionality should be seen as coming from two opposing ends of the institutional spectrum.

As mentioned, the standard of reasonableness does share certain core elements with the framework of proportionality. An argument could be made that reasonableness is embedded in proportionality given that something that is proportionate cannot be unreasonable.[61] Aharon Barak also points out that "in many common law countries, reasonableness was recognized long before proportionality".[62] In the words of Michael Taggart, when proportionality "knocked at the door" of those legal systems, it was met

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55 Guy Regimbald, "Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review" (2005) 31 MLJ 239 at 254 [Regimbald].

56 *Ibid*.

57 See, generally, Dyzenhaus, *supra* note 13; Cohen-Eliya & Porat Culture, *supra* note 13; Gardbaum, *supra* note 12.

58 According to most German commentators today, it was Carl Gottlieb Svarez (1746-1798) who significantly contributed to the development of proportionality. Svarez notes, as per the principal tenets of Enlightenment, that the state may only deprive the liberty of one subject in order to guarantee the freedom and safety of another or others. Alec Stone Sweet and Jud Mathews provide the translation of his treatise, *Lectures on the State and Law*, where Svarez not only describes the balancing exercise, but also insists that it should proceed with *a thumb on the scale in favor of rights:*

> Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail. . . . The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.

Sweet & Mathews, *supra* note 11 at 91, quoting Carl Gottlieb Svarez, Hermann Conrad & Gerd Kleinheyer, eds, *Vorträge* über *Recht und Staat* (Wiesbaden: Springer Fachmedien Wiesbaden, 1960) at 40.

59 *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 106.

60 Sujit Choudhry,"So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34:2 SCLR 501 at 501-502 [Choudhry].

61 Recent jurisprudence of the SCC appears to approve this assumption. For instance, in *Loyola, supra* note 32, at para 38, quoting *Doré,* "in contexts where *Charter* rights are engaged, reasonableness requires proportionality".

62 Barak, *supra* note 49 at 371.

by the concept of reasonableness.[63] As mentioned, the precise contours of reasonableness have generated debate in both legal practice and academia. The major difficulty stems from the idea behind this standard of review—that "an action is reasonable if it was done by a reasonable person"—is a circular one and, as such, does not advance the discussion. Julius Stone has famously argued that reasonableness belongs to "categories of illusory reference".[64]

Initially, the English courts developed the *Wednesbury* test[65] to facilitate the assessment of proper boundaries of reasonableness within administrative law. As has been summarized by Lord Diplock in this connection:

> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'… It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.[66]

As evident from the above, the court was unwilling to intervene unless the unreasonableness was "outrageous". When would "simple" unreasonableness become "outrageous" unreasonableness?[67] The *Wednesbury* test did not provide any guidance, particularly in the human rights context. Admittedly, this approach has recently changed, especially with regard to legislation involving constitutional rights.[68] As Guy Regimbald points out, the *Wednesbury* unreasonableness test in English law has implicitly given way to an application of the proportionality test.[69] For instance, in the decision in *Pham v Secretary of State for the Home Department*, Lord Sumption noted that in recent decades, English courts have expanded "the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality".[70] Although some laudable changes are discernible, the principle of proportionality in English law, as Tom Hickman observes, still remains "unelaborated, uncertain and its application unstructured".[71]

Turning to historical observations, proportionality, in contrast to reasonableness, has undergone a drastically different evolutionary trajectory. Hailing from German

63 Michael Taggart, "Proportionality, Deference, Wednesbury" (2008) NZ L Rev 423 at 423.

64 Julius Stone, *Legal System and Lawyers' Reasoning* (Stanford: Stanford University Press, 1968) at 263.

65 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation,* [1948] 1 KB 223.

66 *Council of Civil Service Unions v Minister for the Civil Service,* [1985] AC 374 at 410.

67 Barak, *supra* note 49 at 373.

68 The position of the courts since *R v Secretary of State for the Home Department: ex parte Brind* [1991] 1 AC 969 was that discretionary decisions in English law were not subject to review on the basis of proportionality. However, this changed following enactment of the *Human Rights Act,* RSC 1985, c H-6 that introduced rights-based judicial review into English law. With this, the courts struggled to apply abstract norms to concrete cases that were often politically charged. One mechanism of great assistance though was the principle of proportionality. See Alan DP Brady, *Proportionality and Deference under the UK Human Rights Act* (New York: Cambridge University Press, 2012) at 4. In 2001, in *R (Daly) v Secretary of State for the Home Department,* [2001] UKHL 26, proportionality was accepted by the House of Lords as a principle applicable in English law. Drawing on Canadian case law, the Privy Council accepted and adopted a three-step analysis similar to *Oakes*.

69 Regimbald, *supra* note 55 at 262.

70 *Pham, supra* note 44 at para 105.

71 Tom Hickman, "Proportionality: Comparative Law Lessons" (2007) 12 JR 31 at 31.

administrative law of the 19th century,[72] proportionality emerged as a judicial curb on otherwise untrammeled government or police power. In the constitutional law context, it was first invoked by the Federal Constitutional Court of Germany as an unwritten constitutional principle. In a series of constitutional cases, the Court held that the principle of proportionality "was a consequence of the rule of law and derived essentially from the nature of the basic rights, which as an expression of the demand of the individual for freedom vis-a-vis state power could be restricted only to the extent that is indispensable for the protection of the public interest".[73] Following World War II, proportionality was further developed in what Lorraine Weinrib calls the "Postwar Paradigm" of constitutional rights adjudication,[74] or what Sujit Choudhry calls the "shared constitutional discourse".[75]

In addition to the normatively distinct assumptions on which reasonableness and proportionality operate, an argument may be advanced that proportionality is a more intrusive standard of review simply by the fact that it contains three times as many prongs (this argument is further elaborated in Part II, section B of this paper). Practically speaking, this means it would be considerably more difficult for the government to limit an individual's rights than for a rights holder to prove their case. Once the onus is on the government, failure to pass any step of the test means that the court automatically sides with the rights holder. This multi-pronged framework is absent under the reasonableness standard.

B. Difference in Terms of the Structure of Review

The most conspicuous distinction between reasonableness and proportionality is what Paul Craig calls the "architecture of review"—or the structure and refinement of the analysis for administrative decisions.[76] Although the author submits that "both reasonableness review and proportionality involve considerations of weight and balance",[77] reasonableness, unlike proportionality, is not composed of sequenced analytical steps. Chief Justice Dickson (as he then was) in *Slaight Communications Inc v Davidson* notes that patent unreasonableness (which is now part of the general standard of reasonableness),[78] "[i]n contrast to section 1… rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis".[79] While many arguments in favour of a more structured review (in contrast to a more open and relaxed balancing) have been advanced in this paper, some chief propositions deserve reiteration. In the words of Lord Mance:

> The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such

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72 For development of the proportionality principle, see Sweet & Mathews, *supra* note 11; Cohen-Eliya & Porat Historical Origins, *supra* note 11; Grimm, *supra* note 11; Attaran, *supra* note 11; de Merieux, *supra* note 11. For an alternate view, see Bernard Hovius, "The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?" (1985) 17 Ottawa L Rev 213.

73 Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London: Kluwer Law International, 1996) at 42.

74 Lorraine E Weinrib, "The Postwar Paradigm and American Exceptionalism" in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (New York: Cambridge University Press, 2006) at 84.

75 Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (New York: Cambridge University Press, 2006).

76 Craig, *supra* note 50 at 5.

77 *Ibid*.

78 It is worthwhile to mention that although patent unreasonableness is now an obsolete common law standard of review post-*Dunsmuir,* it still lives on in certain provinces by virtue of the statutes that directly enshrine it (see e.g. *BC Administrative Tribunal Act,* SBC 2004, c 45, ss 58, 59).

79 *Slaight, supra* note 1 at 1074.

> as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law.[80]

Even if we are to accept the SCC's argument that the standard of reasonableness is analogous to the last two components of *Oakes* (which I believe it is not, and the Court's elaboration on its submission offers certain insights),[81] the question arises as to what difference the other two sub-inquiries of *Oakes* have. In my opinion, they are an indispensable part of the reasoning because, ultimately, what the reviewing court weighs is the furtherance of government objectives and the effects of intruding on *Charter* rights.[82] As the Court has repeatedly pointed out, the way this objective is framed has a profound bearing on the way a case may be decided. There is a danger that judges may identify the purposes of the right-infringing measure too generally by abstracting particulars of the impugned statute. For instance, if the declared goal of a right-limiting enactment is to combat terrorism—a goal that most certainly may override constitutional freedoms—then just about every statute adopting the foregoing objective would be capable of passing the constitutional muster of section 1. That is exactly why the rational connection component of *Oakes* is necessary. Put bluntly, if the law in question says it is going to combat terrorism, it ought to do so. For instance, the prohibition of religious clothing that covers one's face, which may contribute to alleviating the risks of the terrorist's attacks, in no way offers a complete cure to extremist movement. As such, if the government has a compelling interest in the legislative scheme, it should substantially scale down the law's stated objective, thereby tailoring it to the actual effects of the impugned action.

The same holds true when it comes to the relationship between the pressing and substantial component of the *Oakes* test and its minimal impairment inquiry. In *Alberta v Hutterian*

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80 *Kennedy v The Charity Commission* [2014] UKSC 20 at para 54.

In short, according to Gertrude Lübbe-Wolff ("The Principle of Proportionality in the case-law of the German Federal Constitutional Court" (2014) 34 HRLJ 12 at 16-17), proportionality is "a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction… just a rationalizing heuristic tool".

81 I believe the following excerpt from *Doré* exemplifies this nuanced difference (*Doré, supra* note 1 at para 6): "If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under section 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited."

82 Per Robert Alexy, whenever the reviewing court applies the proportionality analysis, what it does is optimize two constitutional principles at opposing ends of a spectrum. He calls this "Law of Balancing". He provides as follows:

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other… Come to think of it, there is just no other way to administer this balancing other than to evaluate, one-by-one, the degree of non-satisfaction of two principles and then weigh them against each other. This inevitably leaves us with minimum of three consecutive sub-inquires. […] The Law of Balancing shows that balancing can be broken down into three stages. The first stage is a matter of establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first.
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> Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16 Ratio Juris 131 at 136.

Brethren of Wilson Colony ("*Hutterian* "),[83] Chief Justice McLachlin emphasized that the government's pressing and substantial objective should not be altered, that is, it should not be read down when effectuating a minimal impairment analysis.[84] Per her submission, it is the legislative goal—the goal identified in the first stage of *Oakes*—that "grounds the minimum impairment analysis".[85] She further quotes Aharon Barak, who asserts that "the rational connection test and the least harmful measure [minimum impairment] test are essentially determined against the background of the proper objective, and are derived from the need to realize it".[86] Barak describes this as the "internal limitation" in the minimum impairment test, which "prevents it… from granting proper protection to human rights".[87] The decision in *Hutterian* reinforces the importance of formal ascertainment of the objective at the proper level of generality from the very beginning and the negative effects of trying to shift it down the road.[88]

Reminiscent of the above observations regarding the proportionality test as one inseparable whole (that is, as unity of all its sub-inquiries) is a submission by Paul Craig:

> [T]he three-part proportionality inquiry structures and facilitates such reasoned evaluation. It is mistaken to evaluate proportionality solely in terms of the third stage, proportionality *stricto sensu*. This is to misunderstand the nature of the three-part test, which is an integral whole, and the manner of its operation. The three-part proportionality inquiry focuses the attention of the agency being reviewed, and the court undertaking the review. The agency has to justify its behaviour in the terms demanded by this inquiry. It has to explain why it thought that the challenged action was necessary and suitable to reach the desired end, and why the action did not impose an excessive burden on the applicant.[89]

Craig further adds that "[t]his more structured analysis", referring to proportionality, "has a beneficial effect in that it requires administration to justify its policy choice more specifically than under the traditional *Wednesbury* approach".[90] By carefully scrutinizing the pros and cons of proportionality analysis, as well as canvassing some of its alternatives, Craig concludes, albeit not without certain limitations, that proportionality should be adopted as a standard of review in its own right because "rendering government accountable for its actions is worth the difficulties that [adopting proportionality analysis] might entail".[91]

Although the requirement of justification merits special consideration (which will be undertaken in the next part of this paper), some general observations regarding a structured proportionality review are worth noting. As Aharon Barak maintains, the test "stresses the need to always justify limitation on human rights; it structures the mind of the balancer; it is transparent; it creates a proper dialog between the political branches and the judiciary; and it adds to the objectivity of judicial discretion".[92] For Vlad Perju,

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83 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian*].

84 *Ibid* at para 76.

85 *Ibid* at para 54.

86 Aharon Barak, "Proportional Effect: The Israeli Experience" (2007), 57 UTLJ 369, at 374.

87 *Ibid* at 373.

88 Not to be confused with the "shifting purpose" doctrine the court refers to in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295.

89 Craig, *supra* note 50 at 34.

90 Craig UK, *supra* note 50 at 100.

91 *Ibid* at 106.

92 Aharon Barak, "Proportionality and Principled Balancing" (2010) 4:1 Law & Ethics of Human Rights 1 at 14-15.

the algorithmic structure of the proportionality test provides an objective common metric necessary to solve the conflict of norms within any constitutional structure.[93] It would be impossible for courts, as Perju emphatically argues, to adjudicate the validity of myriad governmental limitations on rights without such a common metric. According to Vicki Jackson, one of the most ardent proponents of proportionality on the American side, "structured proportionality review provides a stable framework for persuasive reason-giving, thereby enhancing the transparency of decisions, unlike more opaque forms of balancing".[94] Indeed, by making the procedure transparent and intelligible to decision makers, proportionality would receive praise from even those individuals unsatisfied with a case's outcome. In the metaphorical words of Alec Stone Sweet and Jud Mathews: "In situations where the judges cannot avoid declaring a winner, they can at least make a series of ritual bows to the losing party."[95] Reminiscent of this last point is yet another submission by Vlad Perju that the sequenced, detailed steps in a proportionality analysis help to promote a sense of procedural justice for those who lose, but who can nonetheless see that their positions were taken seriously.[96]

In addition to these benefits, proportionality also creates a sense of coherence in judicial reasoning. According to Alec Stone Sweet and Jud Mathews:

> Under conditions of supremacy (given a steady caseload), fidelity on the part of the court to a particular framework will entrench that mode of argumentation as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it.[97]

Meanwhile, Joel Bakan submits with respect to Canadian constitutional adjudication:

> The translation by the Court of section 1's ambiguous and general language into a neat, four-step test was clearly an attempt to avoid case-by-case evaluation of legislation under vague standards such as "reasonable" and "demonstrably justified in a free and democratic society," which unavoidably would appear to require questioning the wisdom and political desirability of particular laws.[98]

This approach will also foster public appreciation of reasons provided by administrative decision-makers. A structured review, as Vicki Jackson asserts, may increase the persuasive value of the decisions not only to both the parties, but also to the broader public.[99] It is this sociological acceptance of the legal order by the general public that is one of the most agreed-upon preconditions of the order's legitimacy.

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93 Vlad Perju, "Positional Objectivity the Case for Proportionality Analysis" (2009) Comparative Law Work-in-Progress Workshop (Princeton).

94 Vicki Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124 Yale LJ 3094 [Jackson].

95 Sweet & Mathews, *supra* note 11 at 89. C.f. Jackson, *supra* note 94: "The stability of the methodology, and its widespread acceptance, enables the Canadian justices' disagreements to focus on matters that are understandable by the parties as substantively relevant to the contested issue; such opinions also make accessible to readers the nature of the justices' disagreement, and the divergent evaluations they may give to the same factors."

96 Vlad Perju, "Proportionality and Freedom—An Essay on Method in Constitutional Law" (2012) 1 Global Constitutionalism 334.

97 Sweet & Mathews, *supra* note 11 at 88.

98 Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 27.

99 Jackson, *supra* note 94 at 4023.

Last, but not least, Jackson observes that structured proportionality analysis "can reveal process failures, including departures from impartial governance, warranting heightened judicial scrutiny".[100] Jackson's argument echoes the submission of Brannon Denning and Michael Kent, who argue that doctrinally complex methodological frameworks, such as proportionality, "attempt to optimize enforcement of constitutional principles by preventing their easy circumvention".[101] Following the literature on risk regulation, the authors maintain that such "anti-evasion doctrines… reflect a 'mature position' in the enforcement of constitutional principles".[102]

C. The Weight/Scales Dilemma

The third sizable difference between reasonableness and proportionality lies in what I should call the "weight/scales dilemma". Distilled to its pith, this distinction refers to the ways in which both standards deal with the task of operationalizing deference accorded to the original decision-maker. Under the proportionality test (at least as originally enunciated by then Chief Justice Dickson), the level of scrutiny ought to be *unified*—and it ought to be high.[103] Reasonableness, on the other hand, is a sliding scale. It is "a single standard that takes its colour from the context".[104] As pointed out by Chief Justice McLachlin in *Catalyst Paper*, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry".[105]

Simply put, under proportionality, where the Court weighs private and public interests at hand, it does not readjust the scales. Rather, it reassesses the relative, contextual weight of the interests to be balanced.[106] Under the standard of reasonableness, the Court readjusts the scales every time in weighing the contextual factors of a particular case.

Regarding the fact that the intensity of review in proportionality analysis always remains the same in, Justice Bastarache in *Thomson Newspapers Co v Canada (Attorney General),* observes:

> The degree of constitutional protection may vary depending on the nature of the expression at issue. This is *not because a lower standard is applied*, but because the low value of the expression may be more easily outweighed by the government objective.[107]

Within the traditional model of adjudicating rights-based constitutional claims—whereby the court first determines whether the impugned provisions infringe *Charter* rights and, if the answer is in the affirmative, decides whether the infringement can be saved under section 1—there should be no causal relationship between the weight, or value, of the right and the stringency of judicial scrutiny or standard of review. Since

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100 *Ibid*.

101 Brannon Denning & Michael Kent, "Anti-Evasion Doctrines in Constitutional Law" (2012) 4 Utah L Rev 1 at 7.

102 *Ibid* at 6.

103 Some argue that the SCC's shift from a more deferential approach to the *Oakes* test since *Edward Books* "has no foundation in the language or structure of the Charter" (see e.g. Sara Weinrib, "The Emergence of the Third Step of the *Oakes* Test in *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 68 UT Fac L Rev 77 at 91).

104 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59.

105 *Catalyst Paper Corp v North Cowichan (District),* 2012 SCC 2 at para 18.

106 It is worth noting that there is currently a profound methodological confusion in the Court's reasoning regarding the standard of deference in constitutional adjudication, nicely captured by Choudhry, *supra* note 60.

107 *Thomson Newspapers Co v Canada (Attorney General),* [1998] 1 SCR 877, at para 91 (*per* Justice Bastarache) (citations omitted) [emphasis added].

"there is no hierarchy of rights in the *Charter*",[108] I think it is methodologically sound to abstain from differentiating between "more valuable" and "less valuable" rights (or parts of the rights) and, as a corollary of this, subjecting them to different standards of review. Much to my chagrin, this initial approach to *Charter* adjudication did not live long. As Sujit Choudhry observes, the Court almost immediately retreated from *Oakes* in *Edwards Books,*[109] and acknowledged and consolidated its stance soon thereafter in *Irwin Toy Ltd v Quebec (Attorney General)*:[110]

> In the decade following *Oakes*, the Court searched for criteria of deference, to reliably and predictably *categorize* cases where deference was warranted and those where it was not. These categories were not applied consistently by the Court, and, indeed, produced disagreement within the Court over how they should be applied in specific cases. Underlying both trends were concerns regarding the cogency of the distinctions employed by the Court to delineate the boundaries of these categories.[111]

Yet, Jeremy McBride observes:

> The danger that faces the Court, particularly if it allows the margin of appreciation to weaken the test of proportionality without at least articulating more fully the rationale for the differential approaches pursued, is that its own ruling might be seen less as principled evaluation and more as its own arbitrary preference for the balance to be achieved between different rights and interests.[112]

Reminiscent of McBride is an emphatic argument of Justice McLachlin (as she then was), who, dissenting in part in *R v Lucas*, cautioned that: "To allow the perceived low value of the expression to lower the bar of justification from the outset of the section 1 analysis is to run the risk that a judge's subjective conclusion that the expression at issue is of little worth may undermine the intellectual rigour of the *Oakes* test."[113]

She further explains:

> Instead of insisting that limiting the right is justified due to a pressing concern that is rationally connected to the objective, and thus appropriately restrained, the judge might instead reason that any defects on these points should be resolved in favour of justification by the low value of a *Charter* protected activity such as expression. The initial conclusion that it is of low value may thus dictate the conclusion of the subsequent steps in a circular fashion.[114]

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108 The SCC's jurisprudence has repeatedly affirmed its commitments to the principles that "no Charter right is absolute" and that "there is no hierarchy of rights in the Charter". Frank Iacobucci, "'Reconciling Rights': The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 SCLR (2d) 137 at 141.

109 *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713. *Inter alia*, the court held that "[l]egislative choices regarding alternative forms of business regulation … need not be tuned with great precision in order to withstand judicial scrutiny", since "[s]implicity and administrative convenience are legitimate concerns" (at para 130).

110 *Irwin Toy Ltd v Quebec (AG),* [1989] 1 SCR 927. In *Irwin Toy,* the SCC aspired to carve out a category of cases where greater deference towards the legislator was warranted and the categories wherein it was not.

111 Choudhry, *supra* note 60 at 503 [emphasis added].

112 Jeremy McBride, "Proportionality and the European Court of Human Rights" in Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 35.

113 *R v Lucas*, [1998] 1 SCR 439 at 115.

114 *Ibid.*

III. THE CULTURE OF JUSTIFICATION

One of the most laudable effects of a proportionality review is that it constantly pushes the government to justify its policy choices as well as "render government accountable for its actions".[115] The proposition that the government must provide ample justification for its actions underpins the shift from a culture of authority to a culture of justification in the global legitimacy discourse. Stephen Gardbaum states:

> [This] strand of political legitimacy […] is more onerous than the conventional one in modern liberal political theory, because it applies a test of reasonable public *justification* not merely to the basic or constitutional structure of society, but to each and every action of government operating within that structure.[116]

Essentially, this requirement for justification "represents a profound shift in constitutional law on a global level"[117] and according to Etienne Mureinik, signals a shift from what he calls a culture of authority to a culture of justification:

> If the new constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.[118]

David Dyzenhaus maintains that Mureinik succeeds in creating "his own vision of law as justification," that is "both different and more fruitful than the notion of integrity", largely propagated by Dworkin.[119] Mureinik's new paradigm of legitimacy, which imposes substantive—not only procedural or jurisdictional—constraints on government action,[120] gains currency in a modern proportionality discourse[121] and beyond. Its proponents claim that the sequenced and stringent four-pronged proportionality test provides the analytical framework for operationalizing the requirement of justification. The requirement of offering substantial justifications for all actions in terms of rationality and reasonableness is reminiscent of what Habermas would call the force of the better argument. For Habermas, the test for legitimacy, among other things, is the discourse principle, which presupposes people's participation in deliberative process of justification.[122] In his own words: "Deliberative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation that can fulfill its socially integrative function only because citizens expect its results to have a reasonable quality."[123] It is fair to infer that proportionality fits nicely into this conceptual paradigm as the analytical framework that structures deliberative processes (though it bears notice that Habermas himself was an ardent critic of proportionality with balancing at its core, arguing that it leads to the collapse of the "fire wall", "depriving human rights of their normative power").

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115 Craig UK, *supra* note 50 at 106.

116 Gardbaum, *supra* note 12 at 263 [emphasis added].

117 Cohen-Eliya & Porat Justification, *supra* note 13 at 463.

118 Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 S Afr J On Hum Rts 31 at 32 (quoted in Dyzenhaus, *supra* note 13 at 11).

119 Dyzenhaus, *supra* note 13 at 37.

120 Gardbaum, *supra* note 12 at 263.

121 See e.g. Cohen-Eliya & Porat Justification, *supra* note 13; Kumm, *supra* note 13.

122 Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996) at 304.

123 *Ibid.*

In a similar vein, Mattias Kumm argues that proportionality is justified by the concept of legal legitimacy, which is based on state's ability to demonstrate the justifications for its actions—a process which Kumm terms "Socratic Contestation". [124] According to this conception, the courts, using proportionality, push the government to constantly provide a logical basis and coherent reasons for its actions, which are crucial for the legitimacy of those actions. Echoing Kumm's submission are Moshe Cohen-Eliya and Iddo Porat:

> Proportionality, we believe, is essentially a requirement for justification, which represents a profound shift in constitutional law on a global level. […] At its core, a culture of justification requires that governments should provide substantive justification for all their actions, by which we mean justification in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves, i.e., in terms of proportionality.[125]

In sum, to contrast with the old culture of authority and as Stephen Gardbaum maintains, the new constitutional culture treats authority to act as a necessary but not a sufficient condition for legitimacy.[126] An additional step is now required. To claim legitimacy, as Etienne Mureinik asserts, the state ought to fulfill the requirement substantial justifications in terms of rationality and reasonableness. This, in turn, signals the worldwide paradigm shift from the culture of authority to the culture of justification.

IV. REASONABLENESS OR PROPORTIONALITY?

Some curious inferences would emerge as part of this debate. First and foremost, it appears that in order to now satisfy the legitimacy requirement, not only should the standard of review be substantively analogous to proportionality (as, for instance, the *Doré* approach allegedly is), but it also should be framed as a rigorous multi-pronged inquiry that would push the government to constantly provide a logical basis and coherent reasons for its actions. Simply put, the form in which the judicial inquiry is cast also matters.[127]

Secondly, if the legitimacy of government actions that invokes constitutional rights is predicated on the government's ability to justify its choices (failing which the actions or legislative scheme would be deemed disproportionate and, hence, constitutionally invalid), it should follow that any body exercising statutory authority is also bound by the same justifiability requirements and restrictions. Sub-legislative actions can only take effect within the scope of the authority of the legislature itself—for no one can delegate to any one any power that they themselves do not also have. If not, this would defy the rule of law that provides that "[a] decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law".[128] As Guy Regimbald elaborates, "the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions, and all other actions (whether legislative, administrative or judicial) which depends for its validity on statutory authority".[129]

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124 Kumm, *supra* note 13 at 142.

125 Cohen-Eliya & Porat Culture, *supra* note 13 at 463.

126 Gardbaum, *supra* note 12 at 264.

127 For a fuller discussion, see Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harvard L Rev 1685.

128 *Dunsmuir, supra* note 16 at para 29.

129 Regimbald, *supra* note 55 at 275.

From this, if constitutionally validity requires that all government actions invoking *Charter* rights be "*demonstrably justified*", the very same requirement should apply to all sub-legislative actions. Given the amorphous nature of the reasonableness standard, in contrast to the sequenced and structured proportionality test, it does not satisfy this requirement for constitutional legitimacy. It should be seen as an unacceptable standard not only in constitutional law, but also in the review of administrative decisions that allegedly violate *Charter* rights. Arguing otherwise is tantamount to arguing against the rule of law principle.[130]

CONCLUSION

This paper began by recounting the current problem in the judicial review of discretionary administrative decisions that engage *Charter* rights and the rampant inconsistency in the SCC's approach to the analytical framework through which to address *Charter*-related issues. While a *Doré* quasi-proportionality framework sought to bring clarity, in practice, it brought more confusion. The proposed reasonableness approach that centers on proportionality is an untenable standard of review in administrative law because, as explained in Part II, reasonableness and proportionality are distinct standards, not only in terms of their institutional and doctrinal effects, but also in terms of the implicit normative assumptions on which they operate.

Albeit signalling a doctrinal shift in the SCC's reasoning, the amalgamation of the *Oakes* and administrative law approaches remains both unfortunate and illegitimate. Indeed, as argued in Part IV, the amorphous nature of the reasonableness standard, in contrast to the sequenced and structured proportionality test, does not satisfy the requirement of constitutional legitimacy premised on what has been alluded to above as "the culture of justification". It appears that conceptual harmony between the *Oakes* and administrative frameworks remains an illusion and rather than relying on such amorphous standards in their decisions, judges ought to articulate the specific reasons for their conclusions. This can be done by engaging in a sequenced and structured proportionality analysis that requires the government to rigorously defend and justify its choices.

By setting the justificatory burden for the government so high, proportionality can claim institutional legitimacy no other analytical framework for rights adjudication can match. The imposition of a rigid, one-size-fits-all standard to approach *Charter* claims enhances the state's democratic values and principles and, ultimately, affords the rights enshrined in the *Charter* the greatest protection.

130 Apart from the foregoing, there is yet another dimension in which the current application of the standard of reasonableness trenches on the requirement of the rule of law. Specifically, in effectuating the analysis under the amorphous and unpredictable standard of reasonableness, the reviewing courts seriously impair Fuller's desiderata of consistency, stability, and transparency of application. Conversely, proportionality offers an unparalleled discursive frame for norm-based reasoning that facilitates fulfillment of the foregoing requirements.

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