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APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

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The 2011/2012 *Appeal* Editorial Board would like to thank Professors Michael M'Gonigle and Neil Campbell for their help and guidance in producing this Volume. The Board would also like to thank Krista Sheppard for her assistance in development and sponsorship. And finally, the Board would like to thank the entire University of Victoria, Faculty of Law community for its ongoing support of *Appeal*.

PREFACE

by Lyndsey Delamont and Meaghan McWhinnie

This year, the *Appeal* Editorial Board focused on increasing the diversity, quality, and quantity of our student submissions. We made significant progress towards this goal, having received a record number of submissions for Volume 17, including submissions from almost every law school in Canada as well as an appreciable quantity from international common-law schools. Over the years, *Appeal's* mandate has been to operate as a student-run journal that publishes solely student work; *Appeal* is proud to be a forum for presenting strong student writing. This year, we received numerous requests to reproduce our published articles, which is a testament to the ever-increasing quality of student legal scholarship published in the journal.

As part of our effort to further increase the quality of the journal, the Board introduced the 2012 McCarthy Tétrault Law Journal Prize for Exceptional Writing. This $1000 award is bestowed upon the student who in the opinion of the *Appeal* Board, in conjunction with our faculty supervisors, has produced the article that best exemplifies the presentation of a legal topic in an insightful and persuasive manner.

We are pleased to announce that this year's recipient is Rebecca Ross, author of *Blasphemy and the Modern, "Secular" State.* Rebecca's piece asks whether a law against blasphemy can be consistent with freedoms of expression and religion. In doing so, Rebecca thoughtfully illustrates the problems associated with the balancing of competing rights, particularly in a multicultural society like Canada.

It has been an honour to oversee the creation of Volume 17 of *Appeal.* This volume would not have been possible without the ongoing support of our generous sponsors, our faculty supervisors Neil Campbell and Michael M'Gonigle, student volunteers, external reviewers, and the University of Victoria, Faculty of Law. We sincerely appreciate every contribution we received, and we hope you enjoy the finished product.

Winner of the 2012 McCarthy Tétrault Law Journal Prize for Exceptional Writing

ARTICLE

BLASPHEMY AND THE MODERN, "SECULAR" STATE

By Rebecca Ross*

CITED: (2012) 17 Appeal 3-19

> When twenty thousand people gathered on Dam Square on the day of [Theo] Van Gogh's murder to demonstrate their anger, Aboutaleb was one of only a handful of Muslims. This was a disappointment to him. "Even though they might have found Van Gogh an asshole," he says, "they should have been there to defend the rule of law."[1]

INTRODUCTION

Many western countries, including Canada, have a history of legally prohibiting blasphemy. Although rarely enforced in Canada, section 296 of the *Criminal Code*[2] is the product of a particular legal perspective that presumes blasphemy exists, that it can be set apart from criticism of religion "in good faith and in decent language", and that the state has a role to play in its censorship.

In particular, the Canadian blasphemy law rests on certain premises about multiculturalism and freedom of religion that may have been consistent and just in early twentieth century Canadian society; however, they are gradually becoming unstable in the modern era. Can a western, multicultural, ostensibly secular country such as Canada have a blasphemy law on the books without admitting legal inconsistency and political hypocrisy? Answering this question depends upon determining whether the following premises hold true: that a law against blasphemy is consistent with freedoms of expression and religion; that these laws are justified in a multicultural society; and that laws against blasphemy are necessary to prevent public disorder. This paper will examine these justifications in the context of the current socio-political climate, and will argue that they do not justify the current blasphemy laws in Canada.

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* Rebecca Ross graduated from the Faculty of Law at the University of Victoria in 2011, and went on to article at a criminal law firm in Vancouver. This paper was originally written for the course "Law and Religion" taught by Professor Benjamin Berger, and would not have been possible without his support and editorial advice. It was also inspired by her thoughtful and gracious classmates who continue to challenge and encourage her.

1. Ian Buruma, *Murder in Amsterdam*: *Liberal Europe, Islam, and the Limits of Tolerance* (New York: Penguin Books, 2006) at 249.
2. RSC, 1985, c C-46.

Contemporary international law is also wrestling with blasphemy prohibitions; this context, as well as high-profile incidents of supposed-blasphemy, illustrates that the existence of blasphemy laws is more problematic in a globalized world. This wider context includes confrontations between academic theory and practical reality, as well as between religion and expression. The best example of these collisions is the contemporary Western world's response to Islamic concerns regarding blasphemy, and I will use the Canadian blasphemy prohibition as a starting point to examine this larger issue. While the arguments that follow could theoretically apply to any religion, I will focus on Islam. As I will explain, this focus is due to contemporary Islam's pronounced conflict with both the international legal community, and with creative figures in the recent past.

I. CURRENT LAW

A. Canada and the United Kingdom

Section 296 of the Canadian *Criminal Code* prohibits blasphemous libel. The statute reads:

> 296.(1) Every one who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (2) It is a question of fact whether or not any matter that is published is a blasphemous libel.
>
> (3) No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion on a religious subject.[3]

Jeremy Patrick traces the current incarnation of the blasphemy law to a 1676 English case in which the court stated that blasphemous utterances were not merely offensive to God; they were offensive to the state:

> For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.[4]

Despite this rationale, the crime of blasphemy evolved to include only those criticisms of religion that were obscene or offensive,[5] excluding attacks on religion made "in good faith and in decent language", as blasphemous libel has been defined in Canada since its prohibition by statute in 1892.[6]

In England, unlike in Canada, the concept of blasphemy as a crime against the state meant that only Anglican Christianity was protected by the blasphemy prohibition.[7] In

3. *Criminal Code*, RSC 2010, c C-34, s 296.
4. Jeremy Patrick, "Not Dead, Just Sleeping: Canada's Prohibition on Blasphemous Libel as a Case Study in Obsolete Legislation" (2008) 41 UBC L Rev 193 at 198.
5. *Ibid*, at 199.
6. *Ibid*, at 201.
7. Peter Cumper, "The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief" (2007) 21 Emory Int'l L Rev 13 at 14.

1981 and again in 1985, working papers published by the UK Law Commission argued that blasphemy laws should be repealed in England, because they found them to violate freedom of speech.[8] The law was attacked further in the aftermath of the publication of Salman Rushdie's *The Satanic Verses*, a novel that some Muslim communities found blasphemous. This incident led to a *fatwa*, an Islamic religious pronouncement, calling for the author's death, which resulted in a number of violent incidents, including the death of a translator and two attempted murders.[9] British citizens attempted a private prosecution of Rushdie, at which time the court made clear that blasphemy laws were only concerned with the Church of England; since the religion allegedly blasphemed against was Islam, there could be no prosecution under that law.[10] In 2008, after considering expanding the law to include other religions so as to avoid discrimination,[11] the crime of blasphemy was abolished in England altogether, making Canada one of the only remaining Western common law countries with such a law still on the books. [12]

Since the law's codification, there have been five prosecutions for blasphemy in Canada but none since 1936.[13] The law, as it now stands, has been criticized for being too vague because it allows juries to determine what is blasphemous as well as what is "in good faith and decent language". Also, the *mens rea* of the offence is unclear,[14] and the law itself may violate Canada's stated goals of multiculturalism and tolerance.[15] Given that the five prosecutions for blasphemy in Canada involved attacks on the Roman Catholic religion, which is predominant in Quebec, it may be useful to compare the Canadian context to that of Ireland. Ireland too has a religious preface to its constitution (the reference to the Holy Trinity marks the Catholic departure), and it too is facing increasing pressure to secularize.[16] As a result, its blasphemy law becomes more and more outdated, an artifact of a state more entwined with the religious faith of its citizens, although its outright repeal would undoubtedly spark heated debate about the culture of the country.[17]

B. Europe

Denmark, like Canada, has an official prohibition against blasphemy that has not been used since the 1930s. Unlike Canada, however, this law became a topical issue in the wake of the Jyllands-Posten Muhammad cartoon controversy, during which cartoons were published by Jyllands-Posten and other Danish newspapers that portrayed the prophet Muhammad in ways offensive to many Muslims. Despite public calls for the courts to prosecute the cartoonists, charges were never pressed. In her article about the incident, Stephanie Lagouette points out that the last blasphemy prosecution in Denmark saw Nazis convicted of spreading hateful untruths about Jewish men.[18] She goes on to argue that this historical protection of a minority population at the expense of freedom of expression[19] has been overlooked in modern times, resulting in a lack of political

8. Patrick, *supra* note 4 at 204.
9. Christopher Hitchens, *Hitch-22* (London: McClelland & Stewart, 2010) at 268.
10. Patrick, *supra* note 4 at 204-05.
11. Cumper, *supra* note 7 at 33.
12. Patrick, *supra* note 4 at 207, 232.
13. *Ibid* at 201.
14. *Ibid* at 217.
15. *Ibid* at 232.
16. Kathryn A. O'Brien: "Ireland's Secular Revolution: The Waning influence of the Catholic Church and the Future of Ireland's Blasphemy Law" (2002) 18 Conn J Int'L L 395 at 430.
17. *Ibid* at 430.
18. Stephanie Lagouette, "The Cartoon Controversy in Context: Analyzing the Decision not to Prosecute Under Danish Law" (2007) 33 Brook J Int'l L 379 at 379.
19. *Ibid* at 380.

will to prosecute the Danish cartoonists.[20] This raises the question of whether Islam is claiming special treatment to which they, or any cultural group, are not entitled, or whether they are simply attacking the privileged position of most other religions which are typically protected from insult by the conventions of society, if not by legal means.[21] For instance, Cindy Holder frames the issue as such: "what is actually being defended in this case is not civil liberty but civil privilege. In particular, what is at issue is the privilege to exclude and define Muslims."[22] Of course, this does not address the concern that the criminal law is not the proper method to resolve this dispute; however, it does illustrate the complexity of the problem. Blasphemy is not only concerned with religious sensibilities, it is also concerned with the rights of whole segments of the population to be free from discrimination.

Scholars such as Lagouette who believe that blasphemy laws should have been used to protect the European Muslim community frequently refer to the Nazi era, comparing the blasphemy of novels, cartoons and films that are critical of Islam to anti-Semitic propaganda. This is common in many European countries, such as the Netherlands, where memories of past failures to protect one religious community create conflicting feelings towards blasphemy laws. These laws can feel like an imposition on the majority culture, restricting their speech about others' religious faith; however, this imposition may be necessary to protect minorities, especially in light of past atrocities. Ian Buruma discusses this problem in his novel about the murder of Theo van Gogh, a Dutch filmmaker killed for his work on Ayaan Hirsi Ali's critical portrayal of Islam:

> Hirsi Ali spoke out against oppression, not for it. The exclusion of Muslims, or any other group, is not part of her program. And yet to reach for examples from the Holocaust, or the Jewish diaspora, has become a natural reflex when the question of ethnic or religious minorities comes up. It is a moral yardstick, yet at the same time an evasion. To be reminded of past crimes, of negligence or complicity, is never a bad thing. But it can confuse the issues at hand, or worse, bring all discussion to a halt by tarring opponents with the brush of mass murder.[23]

A similar problem with the conflation of blasphemy with racist propaganda is that scholars have argued that the laws were historically developed in order to protect the state (and the majority) religion. For instance, Peter Cumper states that blasphemy laws historically promoted anti-Semitism and the persecution of Catholics.[24] As mentioned, in countries such as Ireland and England, a political push to do away with blasphemy laws was met with resistance by the particular Christian denomination associated with the

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20. *Ibid* at 381.
21. Richard Webster would agree with the latter: "For what students of religious and social history have almost always failed to observe is that the seeming obsolescence of blasphemy laws does not indicate simply that we have grown out of them. Both in cultural and in psychological terms, it might be a great deal more accurate to suggest that we have grown *into* them, and that, behind the change in legal attitudes towards blasphemy, there lies a profound process of cultural and psychological internalization." Richard Webster, "A Brief History of Blasphemy" online: <http://www.richardwebster.net/abriefhistoryofblasphemy.html>.
22. Cindy Holder, "Debating the Danish Cartoons: Civil Rights or Civil Power" (2006) 55 UNB LJ 179 at 179.
23. Buruma, *supra* note 1 at 240. Christopher Hitchens makes the point somewhat more stridently: "Yes, we all recall the Jewish suicide bombers of that period, as we recall the Jewish yells for holy war, the Jewish demands for the veiling of women and the stoning of homosexuals, and the Jewish burning of newspapers that published cartoons they did not like." Christopher Hitchens, "Free Exercise of Religion? No, Thanks" online, Slate Magazine: <http://www.slate.com/id/2266154/>.
24. Cumper, *supra* note 7 at 14.

state,[25] not from small religious minorities, even though these groups have sought to have the laws expanded to include them. If nothing else, this disagreement surrounding the nature of blasphemy laws and their contradictory goals of preserving the state's religion and protecting minorities illustrates the difficulty of analysing such a legal area. [26]

Ultimately, the Danish courts held that the depictions of Muhammad were not sufficiently offensive to warrant prosecution, stating that though the intent of the cartoons was clearly to mock, it did not approach contempt or debasement.[27] Lagouette has argued that this indicates that, to the court, "freedom of expression of the majority outranked the freedom of religion of the minority."[28] Of course, this framing of the issue rests upon the premise that freedom of religion includes being free from unfavourable views being aired regarding your religion, which is problematic, if only because some criticism of religion is done in the name of other religions.[29] Also, the dichotomy Lagouette draws between majority and minority works in the case of the Danish cartoonists, but falls apart when applied to other instances of blasphemy where the blasphemer is him or herself a member (at least originally) of the minority religion.

C. Internationally

Blasphemy resolutions have been passed through the United Nations every year for the past decade.[30] Scholars have argued that these resolutions are largely concerned with Muslim countries, as Western countries rarely vote for their passage.[31] Despite this, it is difficult for countries such as Canada – and, until recently, Britain – to criticize these resolutions without an air of hypocrisy, as their own history of blasphemy prohibition contradicts any argument they may make about blasphemy laws suppressing freedom of speech. Rebecca Dobras argues that these international resolutions offer cover to countries with extremely punitive sanctions for blasphemy, typically designed to protect one religion: Islam.[32] An example she cites is Pakistan where "any kind of direct or indirect action that either defiles Islam's Holy Prophet Muhammad or upsets the religious feelings of Muslims may be punished with life imprisonment or even death."[33] One of the problems with such a law, aside from the infringement of freedom of expression and the extreme punishment, is that many other religions are held to be defaming Muhammad or Islam, simply by promoting certain claims of their own orthodoxy, such as the divinity of Jesus, or the rejection of Muhammad as the last prophet.[34] Much of this is justified in the same way as was the British law of blasphemy; Islam and the state are intertwined in many Muslim countries like Pakistan. Therefore, an attack on Islam is deemed to be an attack on the state and thus necessitates punishment.[35] Also, legal scholars in Pakistan claim that Islamic law takes precedence over international human rights law[36] and so

25. O'Brien, *supra* note 16 at 430.
26. Lagouette, *supra* note 18 at 384.
27 *Ibid* at 390.
28 *Ibid* at 402.
29. Webster states: "As the Bible itself bears witness, one of the distinctive characteristics of Judaeo-Christian monotheism has always been the contempt in which it holds other people's religious faith." Webster, "A Brief History", *supra* note 21.
30. Rebecca J Dobras, "Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws" (2009) 37 Ga J Int'L & Comp L 339 at 342.
31. *Ibid.*
32. *Ibid*.
33. *Ibid* at 343.
34. *Ibid* at 343-44.
35. *Ibid* at 346.
36. *Ibid* at 360.

guarantees of freedom of speech or conscience in earlier UN declarations are irrelevant when in conflict with the protection of Islam. This is also how capital punishment is justified, as it is mandated by S*haria* law, the Islamic legal code.[37] Quite tellingly, the defamation resolutions which began to be passed through the United Nations in 1999 originally named Islam as the only religious beneficiary of the prohibition. Although this wording was eventually changed, critics argue that the laws are still meant to silence legitimate criticism of Islam.[38]

Yet another concern with the blasphemy prohibition is that it seeks, through human rights discourse, to protect the religion, not the individual.[39] Some scholars have claimed that the distinction drawn between individual religion and group rights makes sense only within a Western standpoint, with its Christian concept of a separation of church and state. While this may ignore religion's communal nature,[40] the protection of a belief system, as opposed to individuals, suggests that religious systems are above reproach which threatens to characterize any dissension as discrimination. This protection also violates a typical characteristic of human rights law, which is that while ethnicity and race are protected from harm, opinions and beliefs are not.[41] Here we encounter one of the foundational concerns with religious freedom: is religion a choice, or is it a cultural identity? While some scholars argue that certain faiths like Islam view religion as an identity because of their different philosophical worldview,[42] cultural critics argue that Islam is simply a more coercive form of opinion, due to the serious – and often fatal – consequences of apostasy and the forbiddance of religious critique.[43] While the standard Post-Colonial academic response to such criticism is to argue that the Western world is "othering" a different culture and perpetuating stereotypes of Muslim barbarism,[44] and while it is true that theoretically, any religion could require the same responses to blasphemy, we are still left with the uncomfortable fact that in contemporary society there are different consequences for criticizing Islam as opposed to other religions. This is evidenced by the three incidents already cited: the fatwa against Salman Rushdie for publishing a novel, the death of Theo van Gogh for making a film, and the riots and death threats that accompanied the publication of the Jyllands-Posten cartoons.

Canada's law against blasphemy must be considered within this context; to do otherwise would be to ignore contemporary socio-political reality as well as law's impact on the real world outside of Academia. With this in mind, I now turn to Canadian law to determine whether the blasphemy prohibition is consistent with the stated goals of our own jurisprudence and whether it is defensible in the modern world.

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37. *Ibid* at 360.
38. Ibid at 352.
39. *Ibid* at 367.
40. James Q Whitman, "Separating Church and State: The Atlantic Divide" (2008) 34:3 Historical Reflections 86.
41. Dobras, *supra* note 30 at 367.
42. Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005) at 8.
43. See Salman Rushdie, "Yes, This is About Islam" The Gazette. Nov 10, 2001. p. B5, and Sam Harris, "Bombing our Illusions" online: The Huffington Post, <http://www.huffingtonpost.com/sam-harris/bombing-our-illusions_b_8615.html>.
44. See Natasha Bakht, "Were Muslim Barbarians really knocking on the gates of Ontario?: The religious arbitration controversy – another perspective" (2006) 40th Anniv Ed Ottawa L Rev 67.

II. FREEDOM OF EXPRESSION

Criticism of religion, even if calculated to cause offence, is expression. In the context of hate speech, courts have typically shown deference to those being discriminated against over the freedom of those making derogatory statements, usually in an analysis under section 1 of the *Canadian Charter of Rights and Freedoms*.[45] The Supreme Court of Canada in both *Ross v. New Brunswick School District No. 15 ("Ross")*[46] and *R v. Keegstra ("Keegstra")*[47] took great pains to state that freedom of religion and freedom of expression are not absolute. The fact that this must be made explicit is indicative of the level of hysteria surrounding these particular freedoms. The Supreme Court in *Keegstra* posed several rhetorical questions asking whether wilfully promoting hatred against a minority group is in accordance with certain key principles of Canadian law – such as the supremacy of God, the dignity and worth of the human person, respect for moral and spiritual values, and the rule of law. The Court found that freedom of expression emerged from these foundational values, and an attack upon them can be suppressed not in spite of, but in order to preserve freedom of expression. The Court stated:

> While the questions are posed separately, the principles referred to in each, are not contradictory of one another. The acknowledgment of the Supremacy of God, the dignity and worth of the human person, and respect for moral and spiritual values and the rule of law, having regard to the context in which they are found, are principles which must be regarded as, being harmoniously interwoven for the single purpose of giving a particular and efficacious meaning to the words "rights" and "freedoms" as used in the Bill of Rights and the Charter.[48]

The Court went on to use section 15(1) to show that one acceptable limit on freedom of expression is the well-being of particular ethnic or religious groups.[49] Interestingly, this case found that criminalizing the wilful promotion of hatred is necessary to safeguard freedom of expression, because the other safeguards, such as libel, were not applicable in that case. This included the crime of blasphemous libel, which the Court held only protected an individual, and not "groups distinguished by race or religion".[50] This illustrates the Court's concern with harm as a rationale for limiting expression, yet also shows that the Court considers the Canadian blasphemy provision to provide protection for individuals and not religious groups.[51]

However, this Canadian justification must be examined within the wider, international context of our increasingly globalized world. Within this context, one of the most emblematic clashes of speech and religion was the publication of Salman Rushdie's *The Satanic Verses*. The incident is particularly interesting because theorists continue to frame the events surrounding the publication differently. For instance, Christopher Hitchens, a friend of Rushdie's and an advocate of freedom of speech, remembers the aftermath as a time in which few academics were brave enough to support Rushdie, while the dominant view of both the general public and the academic left was that Rushdie had overstepped

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45. *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
46. *Ross v New Brunswick School District No. 15*, 133 DLR (4th) 1, [1996] SCJ No 40 (QL) (*Ross* cited to QL).
47. *R v Keegstra*, 19 CCC (3d) 254, [1984] AJ No 643 (QL) (*Keegstra* cited to QL).
48. *Ibid* at para 54.
49. *Ibid* at paras 56-59.
50. *Ibid* at para 74.
51. *Ibid* at para 81.

his bounds.[52] Hitchens also remembers how, prior to publication, Rushdie asked his colleague, Edward Said, whether his book may cause offence,[53] thereby obviously not intending to provoke the Muslim community.

On the other hand, one of Hitchens' contemporaries, Richard Webster, frames the incident as a planned provocation,[54] appropriated by a cult of free speech libertarians who would not allow Rushdie to fully retract his novel, castigating him for his half-hearted apology of an essay, entitled "Why I have Embraced Islam". Seemingly without irony, Webster characterizes the academic left as an orthodoxy that cannot be challenged, referring to "the huge pressure there is both on Salman Rushdie and on his publishers to conform to orthodox doctrines of 'freedom of speech'". The enemies of freedom of speech in Webster's view are "the most extreme proponents of the libertarian position … the uncritical defenders of a narrow orthodoxy whose all but universal currency has been taken as a guarantee of its ultimate value" and who have "tended to impose on those who dare to question the sacred doctrine of freedom the sanctions of orthodoxy as they are described by Mill."[55]

Further, he states that "critics of the liberal position have thus frequently been met with the kind of stigmatisation, intolerance and abuse which Mill implicitly identifies as the chief instruments of the modern Inquisition."[56] These are remarkably bold statements to make in light of the fact that, following the publication of Rushdie's novel, it was a religious figure who called for the literal murder of others, and the people who ultimately murdered a translator and attempted to murder others were those on the opposing side of the libertarians with respect to Rushdie's novel. Similarly, Webster ignores the more obvious reason why Rushdie would be so equivocal in his repudiation of the novel: he wrote it under threat of death. In fact, he himself said as much, according to Hitchens, who tells an anecdote in his memoirs in which Rushdie crosses out the offending essay in his own anthology.[57]

However, if Webster has such problems with the "narrow orthodoxy" of libertarianism, and if he has such qualms about Rushdie not being able to fully apologize for his novel, it is unclear how he can argue against freedom of expression, particularly in the face of an orthodoxy calling for the death of an author. That those who originally supported Rushdie would have preferred he not apologize would have been ironic and indicative of hypocrisy had they actually attempted to prevent him from doing so in any way other than by voicing their opinions; however, they did not. Even if Rushdie's supporters had attempted to censor his apology, it would be ludicrous to draw from this the implication that a criminal sanction for the publication of the novel is necessary or productive.

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52. Hitchens, *supra* note 9 at 269: "In Britain, writers and figures of a more specifically Tory type… openly vented their distaste for the uppity wog in their midst and also accused him or deliberately provoking a fight with a great religion. (Meanwhile, in an unattractive example of what I nicknamed 'reverse ecumenicism,' the archbishop of Canterbury, the Vatican, and the Sephardic Chief Rabbi of Israel all issued statements to the effect that the main problem was not the offer of pay for the murder of a writer, but the offense of blasphemy.)… More worrying to me were those on the Left who took almost exactly the same tone."
53. *Ibid* at 267.
54. Webster, "A Brief History", *supra* note 21: "In the particular case of *The Satanic Verses*, we should have no doubt at all that Salman Rushdie's intention was to use blasphemy as a way of attacking unjustifiable forms of political and religious rigidity."
55. Richard Webster, "Reconsidering the Rushdie affair: Freedom, censorship, and American foreign policy" online: <http://www.richardwebster.net/therushdieaffairreconsidered.html>.
56. *Ibid*.
57. Hitchens, *supra* note 9 at 280: "It really read as if it had been written at gunpoint, which of course it had been. … [Rushdie] seized the volume of essays in which this literary abortion was preserved like a nasty freak in a bottle … he then carefully crossed out every page of the 'offensive' piece, signing each one to confirm his own authorial deletion."

This wider context illustrates the problematic nature of attempts to balance freedom of speech and freedom of religion. Paul Kahn argues that issues of freedom and diversity are so difficult to define and protect because of the binary of the universal and the particular – our fears of supporting practices which violate Human Rights (the universal) must confront our fears of privileging our own cultural biases over those of other communities (the particular).[58] However, the Rushdie affair, as well as other incidents involving blasphemy, seems to be better explained with a binary of the academic and the practical. For instance, Webster takes a nuanced, theoretical and wide-sweepingly historical view of the incident, stating:

> What we need is a little less pressure on the trigger of cultural patriotism, and a little more historical perspective. For only then is it likely that we can take a more balanced and considered view of one of the most disturbing cultural clashes there has ever been and of a dilemma which is going to face Western writers and intellectuals for many years to come, whether they like it or not.[59]

For Hitchens, it is this very intellectualizing that is the problem, a point he makes over and over again in his memoirs,[60] feeling that academia is blind to the real problems of cultural conflict, citing both Said and Noam Chomsky as the architects of an ideology that sees America and the Western world as always, definitively in the wrong.[61] Of course, blind cultural patriotism is not helpful – on either side of the issue – but neither is the flight from problems of the present into abstract theoretical arguments revolving around the historical nature of religion itself.

Elucidating a further complication in the law's treatment of freedom of expression, Stanley Fish argues that truly respecting all differences of opinion is impossible, as this would require respecting opinions that wish to abolish others; at some point, the most tolerant multiculturalist must draw a line in the sand. For most libertarians, hate speech is the point at which this line is drawn; however, there remain theoretical problems with such an approach:

> The vocabulary will not stand up to even the most obvious lines of interrogation. How respectful can one be of "fundamental" differences? If the difference is fundamental – that is, touches basic beliefs and commitments – how can you respect it without disrespecting your own beliefs and commitments? And on the other side, do you really show respect for a view by tolerating it, as you might tolerate the buzzing of a fly? Or do you show respect when you take it seriously enough to oppose it, root and branch? … Fiercer disagreements, disagreements marked by the refusal of either party to listen to reason, are placed beyond the pale where, presumably, they occupy the status of monstrosities, both above and below our notice … As a result, the category of the fundamental has

58. Paul Kahn, *Putting Liberalism in its Place* (Princeton, NJ: Princeton University Press, 2005).
59. Webster, "A Brief History", *supra* note 21.
60. Hitchens quotes the following entry from a blog written by an American soldier who died in Iraq, a conversation between the soldier and a Kurdish civilian regarding whether insurgents should be considered freedom fighters or terrorists: "…shaking his head as I attempted to articulate what can only be described as pathetic apologetics, he cut me off and said 'the difference between insurgents and American soldiers is that they get paid to take life – to murder, and you get paid to save lives'. He looked at me in such a way that made me feel like he was looking through me, into all the moral insecurity that living in a free nation will instill in you. He 'oversimplified' the issue, or at least that is what college professors would accuse him of doing." Hitchens, *supra* note 9 at 324.
61. *Ibid* at 394.

> been reconfigured – indeed, stood on its head – so as to exclude conflicts between deeply antithetical positions; that is, to exclude conflicts that are, in fact, fundamental.[62]

The same arguments which apply to hate speech apply to blasphemy: is it more productive to engage with the opinions of those with whom you disagree, in order to achieve a dialogue, or is it more important to stop the opinion from being sounded entirely? This same balancing of expression and avoidance of harm has already been done in the context of hate speech, which, although criticized as an infringement of expression,[63] is typically considered necessary to protect minorities. Even Fish, who believes that multiculturalism is impossible, and who advocates for freedom of speech, finds that hate speech codes are occasionally useful, as a necessary evil to preserve order in society.[64] However, blasphemy laws are obviously something different than hate speech, otherwise their existence would be redundant. Blasphemy, though undefined in the code, must be something other than the wilful promotion of hatred against a group. This requires us to ask: is yet another law necessary for the offence of blasphemy? To answer this question, we must consider the difference between hate speech and blasphemy; namely, religion.

III. FREEDOM OF RELIGION

In a country that guarantees freedom of religion, blasphemy laws are problematic: they may be necessary to protect one religion, yet the law itself may infringe another. Michael Bohlander characterizes blasphemy laws as protecting not the deity – as the deity can protect itself – and certainly not a prophet, as "it should be fairly obvious…that a single human being cannot by right demand the respect of all others, let alone their worship."[65] Of course, this is not fairly obvious to Muslim communities who consider it a religious – if not state – crime to blaspheme against God and Muhammad. Herein Bohlander allows his own cultural biases to show, illustrating the problematic nature of freedom of religion which has led some scholars to believe that it should not even be granted, as it is so difficult to define and defend.[66]

Religious beliefs are protected for a variety of reasons (not the least of which is the fear of violence[67]), but one stated reason is the importance of the religious beliefs to the believer. As Bohlanger states:

> [r]eligious beliefs are by their very nature amongst the most basic foundations of our lives and attacks upon them may lead to personal instability resulting in unhappiness if such attacks are of a severe nature, as they eat into the very roots of our conception of life. Causing a person to doubt his or her faith is an extreme act, cutting the ground from under their feet to speak metaphorically … True believers … therefore feel the force of the attack on their faith in a far more substantial way than if it had

62. Stanley Fish, "Boutique Multiculturalism, or Why Liberals are Incapable of Thinking about Hate Speech" (1997) 23.2 *Critical Inquiry* 378 at 388.
63. *Ibid* at 393.
64. *Ibid* at 394.
65. Michael Bohlander, "Public Peace, Rational Discourse and the Law of Blasphemy" (1992) 21 Anglo-Am L Rev 163 at 164.
66. Sullivan, *supra* note 42.
67. Jeremy Webber, "Understanding the Religion in Freedom of Religion" in Peter Cane, Carolyn Evans and Zöe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 26 at 40: "It was precisely the readiness of people to stick fast to their religious beliefs and defend them to the death that resulted in their religious commitments being recognised as significant."

> only been an attack on their everyday life opinions…it is the threat to the basis of their lives.[68]

This implies that religious belief cannot be defended within the marketplace of ideas, that even if a belief is patently absurd or repulsive, it must still be protected due to the egregious harm that will come from criticizing it. Such an understanding of religious belief becomes apparent when we consider the history of blasphemy, especially with its *mens rea* of strict liability and its original purpose of protecting an established state religion.[69] Rushdie characterizes this as "[r]eligions play[ing] bare-knuckle rough all the time while demanding kid-glove treatment in return."[70]

Canadian courts have defined freedom of religion broadly, allowing a test for what qualifies as religion to be subjective belief in order to avoid adjudicating religious disputes.[71] This means that the right is often limited at the section 1 stage of the *Charter* analysis. At that point, the courts take a more narrow approach, particularly when the issue is one that Canadian culture holds particularly dear.[72] Examples of areas where the court feels obliged to limit religious freedom are children who refuse blood transfusions,[73] marriage commissioners who refuse to marry same-sex couples[74] or Catholic schools who seek to restrict dance attendance to heterosexual couples.[75] In all of these cases, the courts have found that despite the religious freedoms at issue, the equality or right to life concerns outweighed that freedom. These are important principles in society, as stated in *R v Big M Drug Mart Ltd* ("*Big M*"),[76] quoted by Justice La Forest in *RB v Children's Aid Society*,[77] a case in which parents sought to refuse a blood transfusion for their young child:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[78]

Therefore, despite the courts stating that they penalize actions and not beliefs,[79] in essence, a section 1 proportionality analysis does weigh the merits of religious doctrine. In sanctioning certain actions, the court inevitably makes a statement about the state's view of the beliefs that justify those actions to the religious individual. When these beliefs can be shown to harm others at a level the court deems inappropriate, the freedom can be limited. Or, as the court in *Ross* states, "[f]reedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others."[80]

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68. Bohlander, *supra* note 65 at 166. He goes on to state that even this hurt cannot justify blasphemy laws, as a pluralistic society demands dialogue. He instead rests his support of blasphemy laws on the public unrest that blasphemy may cause.
69. Clive Unsworth, "Blasphemy, Cultural Divergence and Legal Relativism" (1995) 58 Mod L Rev 658 at 662.
70. Salman Rushdie, "Give me that old time atheism" *The Gazette* (2005) D8.
71. *Syndicat Northcrest v Amselem,* [2004] 2 SCR 551 at para. 56 *(Amselem).*
72. See Benjamin Berger, "The Cultural Limits of Legal Tolerance" (2008) 21:2 Can JL & Jur 245.
73. *AC v Manitoba (Director of Child and Family Services),* 2009 SCC 30.
74. *Reference Re: Marriage Commissioners,* 2011 SKCA 3.
75. *Hall (Litigation guardian of) v Powers*, 59 OR (3d) 423.
76. *R v Big M Drug Mart Ltd*., [1985] 1 SCR 295.
77. *RB v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 231.
78. *Big M, supra* note 76 at 346.
79. *Trinity Western University v British Columbia College of Teachers,* [2001] 1 SCR 772 at para 36.
80. *Ross, supra* note 46 at para 72.

The *Hutteritian Brethren* case,[81] however, is different. It does involve a limitation of religious freedom using a section 1 analysis, but the harm it seeks to avoid is identity theft, a much lower-stakes issue than the refusal of a blood transfusion, and a much less topical and contentious issue in Canadian culture than same-sex marriage. This case suggests that the communal, isolated nature of the religion was what truly disturbed the court, and the floodgates loomed all too large – considering issues relating to the Bountiful case, Sharia law in Canada, and legal pluralism in general – were the court to acquiesce to the demands of this particular community. And while some scholars argue that this fear of particular religions is indicative of cultural bias,[82] the court has reason to fear particular doctrines which advocate the substitution of state law with religious law.

For instance, how else can a state deal with this: the murderer of Theo van Gogh was prompted to murder because of his subjectively held view that this was his religious duty. As Buruma states:

> [h]e explained to the court that he was obligated to 'cut off the heads of all those who insult Allah and his prophet' by the same divine law that didn't allow him 'to live in this country, or in any country where free speech is allowed.'[83]

This raises a question about the law of blasphemy, which is essentially a law in which the state at least partially condones the above worldview. This requires governmental involvement in religious faith, a situation from which our country has been backpedaling since the 1980s when *Big M* was decided. Hypothetically, if such a murder occurred in Canada, the defendant could point to the blasphemy prohibition that still exists as evidence of the state-sanctioned gravity of the insult that he or she suffered.

Beyond these academic discussions, it would be dishonest to ignore the fact that certain religions mandate death penalties for blasphemy, and certain countries take these religious prohibitions as their secular laws. Considerations of Canada's own laws should not exist outside of this practical context, and the inherent hypocrisy of a country with blasphemy laws speaking out, for instance, about capital punishment for blasphemy in Pakistan, is problematic. Of course, by "certain religions" I am referring to Islam, which means that this issue is not merely about freedom of religion and speech, but it is also about multiculturalism.

IV. MULTICULTURALISM

Charter jurisprudence in Canada considers not simply formal equality or the purposes of legislation, but also the substantial equality involved in adverse effects.[84] Therefore, realizing that blasphemy laws are contributing to a climate that denies the freedom of the dissenters of one particular religion is a valid concern when considering the validity of such laws, regardless of their apparent neutrality. While some scholars argue that blasphemy laws are necessary to keep the level of debate at a rational, inclusive, non-discriminatory level, still others argue that this very law will contribute to a climate of fear that stifles debate, essentially defeating the aims of a tolerant pluralistic society. The court articulates this difficulty in *Ross*:

> Ours is a free society built upon a foundation of diversity of views; it is also a society that seeks to accommodate this diversity to the greatest extent

81. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.
82. Sullivan, *supra* note 42 at 8.
83. Buruma, *supra* note 1 at 189.
84. *Big M, supra* note 76 at para 80.

> possible. Such accommodation reflects an adherence to the principle of equality, valuing all divergent views equally and recognizing the contribution that a wide range of beliefs may make in the search for truth. However, to give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth.[85]

For most liberal multiculturalists, the line is drawn at hate speech. The problem, however, is that what one culture considers hate speech, another may consider an integral part of their own culture. And so we come to Kahn's problem with multiculturalism; we are continually torn between two instincts: one is to protect basic human rights, which must be defined and must therefore be biased and that reek of imperialism; the other is to allow groups to say and do things which we find fundamentally wrong.[86] This is made even more difficult when we are discussing religion, which is more nebulous and complicated than ethnicity, as evidenced by the fact that no one can quite decide whether it is an identity or a choice.

One concern that is rarely discussed in the literature is the growing number of non-religious Canadian citizens. Despite not having a common ethnic or cultural background, this group is technically a minority, and therefore deserves protection.[87] A blasphemy law implies that religious sensibilities ought to be protected from insult; however, these insults may be a secular humanists' only method of anti-religious expression, particularly if the definition of "insult" is left up to the finder of fact. For instance, Unsworth defends the need for blasphemy thusly:

> [F]rom the perspective of militant atheism … if the pervasive social power of religion … its invocation of the supernatural to legitimate the repressive ordering of personal and social relation, is to be defeated, then it might be argued that what is needed is a strategy of demystification which precisely involves taking on the sense of the sacred which is protected by blasphemy law.[88]

If the nation and the court disagrees with this, then they are essentially taking a religious position and not accommodating the plethora of views which they ostensibly respect.

While this argument may not hold water in a country in which the "supremacy of God" is recognized in the Preamble to the *Charter,* blasphemy laws still discriminate against powerless minorities within ethnic and cultural minorities; for instance, the dissenters and the apostates who may seek sanctuary in the state's laws from their own families or communities. Ultimately the problem of religion and culture is that it is complex and fractured; no one is purely and solely a member of one group or faction. As Rushdie says: "The melange of culture is in us all, with its irreconcilable contradictions. In our swollen, polyglot cities…we are all cultural mestizos, and the argument within rages to some degree in us all."[89] With this in mind, it is important to note that two of the three international incidents discussed in this paper – those involving Ayaan Hirsi Ali and Salman Rushdie – involve public figures who were born to Muslim parents. The Canadian blasphemy law makes no distinction between those who criticize others' religions as opposed to those who criticize their own; arguably, a much different state of

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85. *Ross, supra* note 46 at para 96.
86. Kahn, *supra* note 58.
87. The 2001 census is the most recent data on this topic: it found 16.5% of respondents to have no religion. Statistics Canada, online: <www.statcan.ca>.
88. Unsworth, *supra* note 69 at 675.
89. Salman Rushdie, "The Great Debate on Multiculturalism" *The Gazette* (2006) D8.

affairs, although not to those who believe that their God or prophet must be spared the offence of blasphemy.

This is the dangerous territory of religion and multiculturalism: it involves ethnic groups and identities but it also involves culture, and the way it is produced and shared. As Unsworth states:

> The law of blasphemy provides a coercive weapon which can be deployed in this kind of struggle within and between faiths. It is a legal trump card in a contest over how far the sacred images and myths which are the heritage of different elements within the broader culture can be adapted in the depiction of meaning…Believers effectively claim an exclusive intellectual property in these icons deserving of legal protection.[90]

A criminal law determining who can say what about religion may affect society differently than one which protects minority groups from hate speech because the law will in essence be restricting the evolution of the religion itself, intruding into areas the courts have stated that they definitely do not want to go; as in *Amselem,* wherein the court stated: "the State is in no position to be, or should it become, the arbiter of religious dogma".[91]

V. THE THREAT OF PUBLIC DISORDER

Throughout the literature on blasphemy, the fear of violent uprisings is continually used to justify censorship. Bohlander argues that this is the only way blasphemy laws can be justified.[92] It is the only reason Webber offers in support of freedom of religion.[93] In the context of Islamic immigration, negative stereotypes are typically cited as reasons to avoid blasphemy.[94] The Supreme Court of Canada cites this very threat in *Keegstra*,[95] and Patrick identifies this threat as one of the only potential advantages of leaving the blasphemy prohibition on the books:

> For the sake of argument one might imagine a scenario where the use of the statute would be tempting; for example, if the newspaper that printed several depictions and caricatures of Muhammed had originally been Canadian, and Canada suffered the full force of the global public disturbances and threats of violence that were in reality directed towards Denmark. In such a scenario, the *Criminal Code's* prohibition on hate propaganda would probably not be available because the newspaper's intention to incite hatred towards Muslims could be difficult to prove; but proving an intention to insult and disrespect a "religious subject" under the

90. Unsworth, *supra* not 69 at 674-75.

91. *Amselem, supra* note 71 at para 50.

92. Bohlander, *supra* note 65 at 167.

93. Webber, *supra* note 67 at 40.

94. Dobras, *supra* note 30 at 364.

95. *Keegstra, supra* note 47 at paras 81-82: "These effects have been documented throughout history and are self evident. … In my view, it is beyond doubt that breeding hate is detrimental to society for psychological and social reasons and that it can easily create hostility and aggression which leads to violence….The inherent danger of an aggressive response by target groups is self evident with history supplying us with many illustrations. Avoidance of the issue or acceptance of the prejudice can have cruel economic, social and psychological consequences. Such degradation and demoralization should not have to be accepted by any minority group in Canadian society. In my view, such kind of expression must be modified and any bias in favour of maximum rhetoric must give way in view of the serious injury to the community itself and to individual members of identifiable groups innocently caught by such prejudice."

> blasphemous libel prohibition would presumably be much easier.[96]

Cindy Holder also uses the violence that followed the publication of the Danish cartoons as proof of how deeply hurt the feelings of the Muslim community were and therefore how much blasphemy prosecutions are needed.[97]

However, it is possible that the state's public disapproval of blasphemy encourages these uprisings by justifying taking offence to the blasphemy. And despite scholars such as Sam Harris arguing that it is not persecution that causes terrorism, but rather religious fundamentalism,[98] the threat of violence is continually used to promote blasphemy laws and to silence dissenters. Hitchens put it thusly:

> The script is becoming a very familiar one. And those who make such demands are of course usually quite careful to avoid any association with violence. They merely hint that, if their demands are not taken seriously, there just might be a teeny smidgeon of violence from some other unnamed quarter.[99]

Here again we see the blend of religion and politics – in this case, political negotiation – and again it appears that this would be a regression for a country such as Canada that has by-and-large secularized its government. In fact, Rushdie argues that in order to defeat terrorism, religion must cease to mix with politics in order to become more modern and secular, as he believes all nations must become.[100]

Harris similarly believes that modernity requires a lack of blasphemy prohibitions:

> The time for political correctness and multi-cultural shibboleths has long passed. Moderate Muslims must accept and practice open criticism of their religion. We are now in the 21st century: all books, including the Koran, should be fair game for flushing down the toilet without fear of violent reprisal. If you disagree, you are not a religious moderate, and you are on a collision course with modernity.[101]

While there are undoubtedly some critics that would dismiss such a statement – as it endorses a linear, progressive view of history that assumes secularization to be good – it is worth noting that the days of the Canadian state becoming involved in religious disputes are indeed in the past. And countries which regularly prosecute citizens for blasphemy are not countries which Canada seeks to emulate; in fact, they are countries with which Canada fundamentally disagrees about international blasphemy prohibitions. Consider this statement from Holder, writing about the Danish cartoon controversy:

> At the heart of this controversy is an implicit assertion that Westerners

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96. Patrick, *supra* note 4 at 232-33.
97. Holder, *supra* note 22 at 184.
98. "How many more architects and electrical engineers must fly planes into buildings before we realize that the problem of Muslim extremism is not merely a matter of education? How many more middle-class British citizens must blow themselves up along with scores of noncombatants before we acknowledge that Muslim terrorism is not matter of poverty or political oppression?" Harris, *supra* note 43.
99. Hitchens, "A Test of Tolerance", online, Slate Magazine: <http://www.slate.com/id/2264770/>.
100. "The restoration of religion to the sphere of the personal, its depoliticization, is the nettle that all Muslim societies must grasp in order to become modern. The only aspect of modernity interesting to the terrorists is technology, which they see as a weapon that can be turned on its makers. If terrorism is to be defeated, the world of Islam must take on board the secularist-humanist principles on which the modern is based, and without which Muslim countries' freedom will remain a distant dream." Rushdie, "Yes, this is about Islam", *supra* note 43.
101. Harris, *supra* note 43.

> can and should speak with impunity about Islam and its adherents. The violence that has greeted this assertion calls into question whether it is in fact true.[102]

Here Holder frames the issue correctly; it is about who can speak about certain topics. Although her example of the Danish cartoons is a more clear distinction between Westerners and non-Westerners, incidents of blasphemy will not always have such clearly drawn racial and ethnic lines. Blasphemy laws raise the spector of censorship in an area of religion, not race or ethnicity, and the threat of violence in this area should be defined in exactly the way threats of violence in pursuit of political aims are usually defined – as terrorism. The question is: should the state be involved in determining who can speak about religion? According to Canadian notions of freedom of expression, religion and multiculturalism, the answer must be a resounding "No".

CONCLUSION

In order for the blasphemy provision to be considered appropriate in contemporary Canadian society, it must be found to be consistent with freedom of expression. However, courts have been reluctant to limit this freedom except in cases of the promotion of hatred against identifiable groups. Given that there is already a law forbidding hate speech, it seems unlikely that courts would find that blasphemy justified yet another infringement on freedom of expression; particularly because, unlike ethnicity, it is expression itself that creates religious doctrine and tradition. Similarly, courts have stated unequivocally that they do not want to be involved in the adjudication of religious disputes, and that religious freedom can be limited in situations where its expression will compromise the freedom and rights of others in the community. Since situations of blasphemy are conflicts between two different religions or within one religion, it is difficult to justify blasphemy on the basis of freedom of religion because one's freedom of religion may infringe another's by the mere fact that one holds a religious belief that contradicts another's.

Multiculturalism as a concept is fraught with difficulty because it is impossible to always respect every divergent opinion that may be offered. However, in the case of blasphemy, the court would be privileging religious sensitivities over those of the non-religious were it to uphold the current law and prosecute blasphemers, inevitably finding itself adjudicating debates between different religious viewpoints. Similarly, the state which seeks to protect minorities would be siding with the majority in the case of dissenters within a particular religion.

Moreover, the threat of violence as a result of blasphemy is real and is often used as a justification for the law, especially in calls for certain authors and artists to be prosecuted. However, these threats merely illustrate the destructive potential of the privileging of a certain view point above others, and the dangers of imposing state sanctions against opinions. Having a law against blasphemy makes it impossible for the state to honestly speak out against outrageous human rights abuses in the name of religion without an air of hypocrisy.

The Canadian state has been gradually divesting itself of its religious past, seeking to move further and further away from the context in which it first codified its law against blasphemy. Considering that it is no longer used, and that internationally Canada does not support blasphemy prohibitions, it is incongruous for the prohibition to remain. While there is presumably little political will to become involved in repealing such a provision,

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102. Holder, *supra* note 22 at 185.

and while little damage is done to Canadian citizens by its existence at the moment, it remains an example of the convergence of law and religion, and the complexities borne from therein, not the least of which is the collision between contemporary academic ideology and practical consequences of blasphemy internationally. This issue will continue to challenge the current generation of legal scholars, forcing them to confront issues of freedom and diversity both at home and abroad.

ARTICLE

BEYOND *IRWIN TOY*: A NEW APPROACH TO FREEDOM OF EXPRESSION UNDER THE *CHARTER*

By Chanakya Sethi*

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INTRODUCTION

Not all expression is equally worthy of protection.[1] Yet all expression is *prima facie* constitutionally protected.[2] These two simple assertions—and the Supreme Court of Canada's struggle in resolving their inherent tension—are the subject of this paper.

The text of the *Canadian Charter of Rights and Freedoms* leaves much open to interpretation. Section 2(b) protects the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[3] The language, on its face, is broad and without apparent definitional limitations. As a result, picketing outside a business,[4] advertising to children,[5] publishing details of a divorce proceeding,[6] describing Jews to school children as "sadistic," "power hungry" "child killers,"[7] soliciting one's services as a prostitute,[8] denying the Holocaust in a pamphlet,[9] financing election advertisements,[10] creating child pornography,[11] comparing a public personality to Hitler,

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1. *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at para 50 (QL), 64 DLR (4th) 577, Wilson J [*Edmonton Journal*]; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at para 28 (QL), 71 DLR (4th) 68 [Rocket]; and *R v Keegstra*, [1990] 3 SCR 697 at para 83 (QL), 61 CCC (3d) 1 [*Keegstra*].
2. *Irwin Toy v Québec (AG)*, [1989] 1 SCR 927 at para 41 (QL), 58 DLR (4th) 577 ("Activity is expressive if it attempts to convey meaning") [*Irwin Toy*]. The single exception to this general rule, for reasons that are less than clear, is violence. See *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573 at para 20 (QL), 33 DLR (4th) 174 [*Dolphin Delivery*]. See also note 51, below.
3. *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
4. *Dolphin Delivery, supra* note 2.
5. *Irwin Toy, supra* note 2.
6. *Edmonton Journal, supra* note 1.
7. *Keegstra, supra* note 1.
8. *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 (QL), 56 CCC (3d) 65 [*Prostitution Reference*].
9. *R v Zundel*, [1992] 2 SCR 731(QL), 95 DLR (4th) 202 *[Zundel]*.
10. *Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385 *[Libman]; Harper v Canada (AG)*, 2004 SCC 33, [2004] 1 SCR 827 *[Harper]*.
11. *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 *[Sharpe]*.

the Ku Klux Klan and skinheads,[12] and advertising on the side of a transit bus,[13] among other things, have all been held to be protected means of expression under section 2(b).

The state can, however, seek to limit expression. Section 1 of the *Charter* permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[14] Similar to the language used in section 2(b), the constitutional dictate in section 1 is broad, leaving much to be filled in by those charged with interpreting our laws. The result, for example, is that certain limits on advertising to children are constitutionally acceptable,[15] but others on the sides of transit buses are not;[16] denying the Holocaust is permissible,[17] but calling all Jewish people "child killers" is not.[18]

These examples demonstrate that the Court has opted for a structure that defines expression very broadly, with almost every conceivable form of human expression *prima facie* protected under section 2(b).[19] The result is that section 2(b) is "little more than a formal step,"[20] leaving effectively all analysis to section 1. But at the same time, the Court has imposed a single, high bar for justification under section 1. As a result, illegally parking a car in order to make a point[21] and distributing pornography depicting real children[22] are each considered forms of expression that—in theory—require a "pressing and substantial purpose" if they are to be constitutionally limited.[23] Unsurprisingly, the Court has thus struggled mightily in the two decades since its early section 2(b) cases to find meaningful ways to assess limits under section 1. Its solutions to this dilemma include the adoption of a "contextual approach" and "deference" to the legislative branch. However, these solutions have often served to further muddy the jurisprudential waters of section 2(b).

The overall result is a jurisprudence that, according to one scholar, is replete with "contradictions and double standards,"[24] is "capricious, and [is] a captive of instincts which shift from judge to judge, case to case, and issue to issue."[25] In this view, the myth of a monolithic *Oakes* test under section 1 is belied by "case-by-case manipulation"[26] where the Court has "transformed section 1 review into an ad hoc exercise that exalts flexibility

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12. *WIC Radio v Simpson,* 2008 SCC 40, [2008] 2 SCR 420 [*WIC Radio].*
13. *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31, [2009] 2 SCR 295 [*Translink].*
14. *Charter, supra* note 3, s 1.
15. *Irwin Toy*, *supra* note 2.
16. *Translink, supra* note 13.
17 *Zundel, supra* note 9.
18. *Keegstra, supra* note 1.
19. See note 2, above and note 51, below.
20. Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40 Osgoode Hall LJ 337 at 339 [Moon, "Collapse of the General Approach"].
21. *Irwin Toy, supra* note 2 at para 41. As Peter Hogg has cheekily observed, "Fortunately, most drivers are unaware of their constitutional right to disregard parking restrictions of which they disapprove." Peter W Hogg, *Constitutional Law of Canada,* student ed (Toronto: Carswell, 2009) at 987 n 55 [Hogg, *Constitutional Law*].
22. *Sharpe, supra* note 11.
23. See *R v Oakes,* [1986] 1 SCR 103 at 138-9, 26 DLR (4th) 200 *[Oakes]* ("It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important").
24. Jamie Cameron, "Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Vancouver Sun* and *Harper v. Canada*" (2005) 17 NJCL 71 at 103 [Cameron, "Governance and Anarchy"].
25. *Ibid* at 71.
26. Jamie Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R. v. Butler*" (1992) 37 McGill LJ 1135 at 1147. See also *Oakes, supra* note 23.

at the expense of principle."[27] Others express frustration with a highly deferential section 1 analysis that is "unprincipled and unpredictable,"[28] "inherently indeterminate and, consequently, open to manipulation,"[29] and "a highly subjective exercise with little predictability."[30] Lest there be any doubt, these criticisms matter: The Court's struggle in crafting its jurisprudence "has resulted in a lack of transparency and a general state of confusion among lawyers, scholars and *Charte*r litigants."[31] Most troublingly, however, the purported stringency of a single *Oakes* test is contradicted by precedents that confirm the "dominant narrative" of recent scholarship that the Court's section 1 analysis has been weakened over the last two decades.[32] In the expression context, the adoption of the contextual approach and a more deferential posture in applying section 1 has eroded the foundations of expressive freedom, especially in core areas such as political speech.

The purpose of this paper is to suggest a potential solution to the "methodological anarchy" of the Court's section 2(b) jurisprudence.[33] Though there exists ample criticism of the Court's current approach, there has been little in the way of proposed alternatives. This paper is an attempt to fill that void. I argue that a new methodology is needed, one that builds a structure that explicitly contemplates what history and experience have taught us and what the Court itself has recognized on multiple occasions: Not all expression is equally worthy of protection and, consequently, not all expression should be equally protected. The Court's current section 2(b) methodology, including its application of section 1, falls short because it lacks a framework within which to concretely apply that normative judgment. Several piecemeal attempts at reform, as the criticisms above suggest, have also proved wanting.

The foundation of a new methodology lies in a purposive analysis of section 2(b), focusing on which categories of expression lie at the core of the guarantee and which lie farther afield. Those forms of expression closest to the core should be subject to the strictest form of scrutiny under section 1, while those outside the core should be subject to attenuated standards of review. Crucially, these distinctions must be evidenced by explicit tiers of scrutiny. I stress that such an approach weights neither the analysis under section 2(b) nor that under section 1 more heavily than the other, but rather matches the conceptual

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27. Jamie Cameron, "The Past, Present, and Future of Expressive Freedom under the *Charter*" (1997) 35 Osgoode Hall LJ 1 at 5 [Cameron, "Past, Present, and Future"].
28. Hogg, *Constitutional Law, supra* note 21 at 990.
29. Terry Macklem & John Terry, "Making the Justification Fit the Breach" (2000) 11 Sup Ct L Rev (2d) 575 at 593.
30. Christopher D Bredt & Adam Dodek, "The Increasing Irrelevance of Section 1 of the *Charter*" (2001) 14 Sup Ct L Rev (2d) 175 at 185.
31. Christopher D Bredt, "Revisiting the s. 1 *Oakes* Test: Time for a Change?" (2010) 27 NJCL 59 at 66 [Bredt, "Revisiting Oakes"].
32. Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1" (2006) 34 Sup Ct L Rev (2d) 501 at 515-521.

    Our precedents, including for example those concerning hate speech, campaign financing, and defamation, belie the notion that free speech in Canada is more strongly protected as a result of the *Oakes*. On hate speech, *c.f. Keegstra, supra* note 1, with *RAV v St Paul (City)*, 505 US 377 (1992) (a unanimous court struck down a municipal ordinance and in doing so overturned the conviction of the teenaged accused for burning a cross on the lawn of an African-American family). On campaign finance, *c.f. Harper, supra* note 10, with *Citizens United v Federal Election Commission*, 130 S Ct 876 (2010) (a 5-4 majority struck down a federal statute on the basis that corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment). And on defamation, *c.f. Hill v Church of Scientology of Toronto,* [1995] 2 SCR 1130, 126 DLR (4th) 129 [*Hill*] with *New York Times v Sullivan,* 376 US 254 (1964) (a 6-3 majority held that an actual malice standard must be met before press reports about public figures can be considered to be defamation). The *Hill* approach has been somewhat attenuated by two recent cases. See *WIC Radio, supra* note 12; *Grant v Torstar Corp*, 2009 SCC 61, [2009] 3 SCR 640.
33. Cameron, "Governance and Anarchy," *supra* note 24 at 71.

value attached to a category of speech under section 2(b) with an appropriate justificatory standard under section 1. Somewhat like an accordion, when section 2(b) "expands" by virtue of greater value attached to a category of speech, section 1 must similarly grow to accommodate a more searching analysis in the form of stricter scrutiny. Accordingly, the analytical work done under each of section 2(b) and section 1 can be quite unlike that done under the current approach: In some cases, there may be extensive analysis under section 2(b), while in others there may minimal review under section 1.

The proposed approach yields important benefits that address the specific criticisms levelled at the Court's current methodology, including clarity and predictability, prudential limits on the flexibility the Court affords itself, and a more efficient use of the *Oakes* test, especially its third branch. That said, my aim is not to turn the existing jurisprudence on its head. Though I hope to grapple with what I judge are valid criticisms, I hope to do so by harmonizing existing precedent with the proposed methodology to the extent reasonably possible. As I will attempt to show, the basis for the normative judgments contemplated in the proposed tiers can be found in existing jurisprudence. However, where there are inconsistencies between the existing jurisprudence and the proposed approach, they are confronted.

This paper is organized into two principal parts. In Part I, I examine existing theoretical conceptions of section 2(b) and section 1 and lay the groundwork for a new approach by highlighting existing methodological problems. In Part II, I attempt to articulate and explain that new approach. I also suggest several benefits and attempt to rebut potential objections. I conclude by briefly revisiting the Court's precedents in the area of political expression, where I anticipate the methodology proposed here will have the most significant implications. In the interests of brevity, a complete analysis on this aspect, however, is left for another day. Finally, it bears noting that this paper, with its focus only on the prototypical limits on freedom of expression, is limited in its ability to scour the vast expanse of jurisprudence concerning section 2(b). Nevertheless, I hope to offer the beginnings of an idea which can be explored further in subsequent work.[34]

I. *IRWIN TOY* AND ITS PROGENY

The *Charter's* bifurcated structure—first, the right in section 2(b) and, second, any limit imposed upon it under section 1—has resulted in a two-step adjudication process. Each step, as noted, leaves much work to the courts, as the chief interpreters of our laws, requiring that they construct an edifice to rest on the foundation provided by the *Charter*. The two steps, while intellectually distinct, are nonetheless interrelated. Given the realities of our modern regulatory state, widening the ambit of the substantive guarantee in section 2(b) necessarily increases the number of limits that must be justified under section 1. Conversely, interpreting section 2(b) as having a narrower scope would, at least theoretically, yield fewer acts of protected expression that could potentially be limited under section 1. In what follows, I will explore the theoretical background for these two steps and then chart the evolution of the Court's approach to each stage.

A. Definition and Justification

In any system of constitutional adjudication, there are at least two distinct intellectual queries that must be undertaken when the state seeks to limit a putative right: What

34. For example, I do not attempt to grapple with limits on press freedoms, including the open court principle. That said, the principle articulated here—that differentiated standards of review based on the value of the *category* of expression protected under section 2(b)—can and should guide the adaptation of the test proposed here for use in those contexts.

is the scope of the right? And is the proposed limit on it justifiable?[35] This logic, which is expressly recognized in the text of the *Charter* in its separation of the substantive guarantee provisions, such as section 2(b), from the limitations provision in section 1, creates an interpretive dilemma: How much "work" should be done by each section? Phrased another way, the question is whether rights can be restricted "as a matter of definition, or whether restrictions should be imposed exclusively under section 1."[36] The *Charter* itself is equivocal on these questions. It offers a conclusion—collective values can sometimes trump individual rights—but it fails to indicate "how the tension between its rights and limits should be resolved."[37] The language of section 1 is "as flexible as it is blunt."[38]

There are ostensibly two ways in which to approach the question of how to conceptualize the work of section 2(b) and section 1. First, one could adopt a definitional conception that focuses on the meaning of the substantive entitlement. Second, one could adopt a justificatory interpretation that focuses on defining exceptions to a broad substantive entitlement. As Jamie Cameron has noted, "a definitional conception of the rights assumes that the guarantees are themselves qualified by political, social and cultural values."[39] To extend this thought further, a definitional conception is necessarily a *purposive interpretation* because it is founded on the values underlying the right.[40] Even though both the definitional and justificatory conceptions ultimately require normative judgments—which, of course, are inherent in any attempt to balance competing values—by engaging in these analyses at different stages of the adjudication process, each approach reflects a fundamentally different notion about how individual rights are understood and protected.

The American approach to the First Amendment serves as a useful illustration. The *Bill of Rights*, unlike the Canadian *Charter* with its "synergistic" relationship between the rights guarantees and section 1,[41] lacks a limitations clause, leaving the enumeration of rights in unqualified terms to suggest a "rigid presumption in favour of individual liberty."[42] The U.S. Supreme Court, in this vein, has rejected the idea of limiting First Amendment

35. As Hogg has observed, such inquiries are required whether a limitations clause exists explicitly in the text of the constitutional document, as in the case of the Canadian *Charter and the European Convention on Human Rights*, or whether limitations have been implied by the judiciary, as in the case of the American *Constitution*. Hogg, *Constitutional Law, supra* note 21 at 818-19. See also Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 UTLJ 369 at 369-70 [Barak, "Proportional Effect"].
36. Jamie Cameron, "The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd v. Attorney-General of Quebec*" (1989) 35 McGill LJ 253 at 254 [Cameron, "Original Conception"].
37. Cameron, "Past, Present, and Future," *supra* note 27 at 7.
38. Jamie Cameron, "The First Amendment and Section 1 of the *Charter*" (1990) 1 MCLR 59 at 65 [Cameron, "First Amendment"].
39. Cameron, "Original Conception," *supra* note 36 at 260.
40. See Aharon Barak, *Purposive Interpretation in Law*, trans by Sari Bashi (Princeton: Princeton University Press, 2005) [Barak, *Purposive Interpretation*]; *R v Big M Drug Mart*, [1985] 1 SCR 295 (QL), 18 DLR (4th) 321 [*Big M*].
41. *Keegstra, supra* note 1 at para 46.
42. Cameron, "First Amendment," *supra* note 38 at 60.

rights through balancing tests as "startling and dangerous."[43] Such balancing, of course, is routine under the *Charter*; indeed, it is the very purpose of section 1. That said, common sense suggests that a right to "freedom of speech"[44] cannot be absolute, because, "as a matter of practical reality, collective life and an atomistic conception of the individual cannot co-exist."[45] The result, unsurprisingly, has been a definitional limitation of the First Amendment right. In other words, the U.S. Supreme Court has concluded that some speech is not—in law, if not in fact—"speech." In these "discrete, isolated exceptions,"[46] identified with the aid of the nation's history and traditions, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[47] Accordingly, one cannot claim First Amendment shelter for obscenity, fraud, defamation and a host of other forms of expression.[48]

In Canada, the seminal case in the Supreme Court's freedom of expression canon is *Irwin Toy v Québec (AG)*. On first blush, it might have appeared that the initial language of *Irwin Toy* suggested that the Court would also adopt a definitional limitation on section 2(b). The three-judge majority acknowledged that "[c]learly, not all activity is protected by freedom of expression," and "the first step to be taken in an inquiry of this kind is to discover [what activity] may properly be characterized as falling within 'freedom of expression.'"[49] Surprisingly, then, the Court went in the opposite direction in its ultimate decision, adopting an essentially literal interpretation of the guarantee.

In *Irwin Toy,* the Court came to the sweeping conclusion that "[a]ctivity is expressive if it attempts to convey meaning" and thus "prima facie falls within the scope of the guarantee."[50]

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43. Roberts CJ, writing for eight members of the court, concluded in unequivocal terms:

    > The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document prescribing limits, and declaring that those limits may be passed at pleasure [internal citations and quotation marks omitted].

    United States v Stevens, 130 S Ct 1577 at 1585 (2010) [*Stevens*].

44. The relevant portions of the First Amendment to the U.S. Constitution reads: "Congress shall make no law … abridging the freedom of speech, or of the press …" US Const amend I.
45. Cameron, "Original Conception," *supra* note 36 at 257, n 16.
46. Cameron, "First Amendment," *supra* note 38 at 60.
47. Stevens, *supra* note 43 at 1585-86, citing New York v Ferber, 458 US 747 at 763-64 (1982) [Ferber].
48. See e.g., *Roth v United States*, 354 US 476 at 483 (1957) (obscenity); *Beauharnais v Illinois*, 343 US 250 at 254-55 (1952) (defamation); *Virginia Bd of Pharmacy v Virginia Citizens Consumer Council,* 425 US 748 at 771 (1976) (fraud); *Brandenburg v Ohio*, 395 US 444 at 447-49 (1969) (incitement); *Giboney v Empire Storage & Ice*, 336 US 490 at 498 (1949) (speech integral to criminal conduct); and *Ferber, ibid* (child pornography depicting real children).

    The U.S. Supreme Court has permitted qualifications on First Amendment rights in certain instances, effectively creating a common law limitations clause. For a brief overview of this point, see Hogg, *Constitutional Law, supra* note 21 at 819. For a more detailed study, see Cameron, "First Amendment," *supra* note 38.
49. *Irwin Toy, supra* note 2 at para 40.
50. *Ibid* at para 41.

This is the language of a justificatory approach, not a definitional one.[51] Arguably, the Court went even further along the justificatory path when it suggested that the existence of any "meaning" is to be judged not objectively, but subjectively, from the perspective of the person alleging a section 2(b) infringement.[52]

Strong arguments have been advanced in favour of a justificatory approach. In contrast to the "doctrinal subterfuge" of the American approach,[53] the *Charter's* limitations clause legitimized the concept of balancing collective interests against individual rights claims and allowed for the development of a "coherent theory of justification."[54] In doing so, section 1 also brought a kind of "realism" to Canadian jurisprudence.[55] As a corollary, it has been argued that a definitional conception, which necessarily "invokes collective values to restrict the substantive guarantee," is flawed because it "will inevitably conflict with [the *Charter's*] self-conscious separation of the rights and their limitations."[56]

Ultimately, though, the argument in favour of a justificatory approach is unsatisfactory for two reasons. First, the approach is deeply counterintuitive. There is a compelling cultural instinct and a historic orthodoxy that suggest not all speech is created equal.[57] And yet a justificatory interpretation of section 2(b) treats all speech as equal because it must; it is a literal, acontextual reading of the guarantee. This is troubling not only for the speech that lacks relative value, but also for the speech that we purport to hold dear. As Cameron observes, "finding a prima facie violation in *all* cases of interference legitimizes *no* expression because it does not determine the outcome in *any* case."[58] Furthermore, a justificatory approach stage presupposes that a single freedom of expression right actually exists. There is no basis for this conclusion. One cannot reasonably argue that perjury and fraud, for example, have a history of being protected though they are undoubtedly expressive acts.[59] One might reasonably doubt whether framers of the *Charter* intended to constitutionalize such expression and subject it to justification anew. Rather, our legal heritage suggests—and twenty years of *Charter* jurisprudence confirms—that the right

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51. There was one aspect of the decision that was definitional in nature: It was "clear" to the Court that "a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen." *Ibid* at para 42. As authority, the majority cited the opinion of McIntyre J in *Dolphin Delivery*, which merely repeated the same assertion, resulting in a tautology. McIntyre J had said in *Dolphin Delivery* that "freedom [of expression], of course, would not extend to protect threats of violence or acts of violence." The majority in *Irwin Toy* confirmed this by adding that "freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure." Though one can easily infer why a purposive analysis of section 2(b) would result in the exclusion of violence from the right's ambit, neither statement offers a thorough explanation of the exclusion.
52. Three years later, eight justices of the Court, for example, joined an opinion that held:

    > The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which, in some cases, may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression.

    R v Butler, [1992] 1 SCR 452 at para 72 (QL), 89 DLR (4th) 449, Sopkina J.
53. Cameron, "Original Conception," *supra* note 36 at 259.
54. *Ibid* at 258.
55. *Ibid* at 259.
56. *Ibid* at 261.
57. See note 1, above.
58. Cameron, "First Amendment," *supra* note 38 at 64 [emphasis in original].
59. The U.S. Supreme Court, which tends to indulge in historical analysis more than the Supreme Court of Canada, has observed that a few "historic and traditional" forms of expression, including perjury, defamation, and fraud, have never been entitled to any legal protection in the common law world. *Simon & Schuster v Members of NY State Crime Victims Bd*, 502 US 105 at 127 (1991).

to freedom of expression is better conceptualized as a panoply of distinct protections that share a common thread and emerge organically from our legal tradition, even though they may evolve over time.[60]

The second reason a justificatory approach is unsatisfactory is more pragmatic, emerging from two contradictory doctrines that have been "warmly, even fervently, embraced" by the Court.[61] On the one hand, we have the doctrine that rights must be given a generous interpretation.[62] On the other, we have the doctrine from *R v Oakes* that a stringent standard of justification is required under section 1.[63] As Peter Hogg has observed, it is essentially impossible to reconcile these two assertions:

> The broader the scope of the rights guaranteed by the *Charter*, the more relaxed the standard of justification must be. The narrower the scope of rights, the more stringent the standard of justification must be. It is not possible to insist that the *Charter* rights should be given a generous interpretation, that is, wide in scope, and at the same time insist that the standard of justification under section 1 should be a stringent one. One of these two contradictory positions must give way.[64]

Hogg, writing in 1990, was prescient in suggesting that "judicial review [under section 1] will become even more pervasive, even more policy-laden, and even more unpredictable than it is now" were this contradiction to remain unresolved.[65]

The Court would grapple in the years after *Irwin Toy* with the implications of these two criticisms. Though the Court has not adopted a definitional conception of section 2(b), as its American counterpart did with the First Amendment, subsequent cases have seen the generosity of *Irwin Toy* tempered by a halting willingness to distinguish between the value ascribed to different kinds of expression under section 2(b). At the same time, the stringency of *Oakes* has been substantively diluted with the emergence of the contextual approach and a pronounced willingness to defer to the judgement of the legislative branch. These developments, and the Court's attendant struggles with them, are explored in the subsequent two sections.

B. Section 2(b): Finding the Core of the Guarantee

The Supreme Court has long recognized it as "obvious" that the *Charter* is "a purposive document."[66] Justice Dickson (as he then was), writing for a unanimous Court in *Hunter v Southam*, concluded that "[i]ts purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines."[67] In *R v Big M Drug Mart*, decided the next year, Chief Justice Dickson extended that reasoning to conclude that "[t]he meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee."[68] The Chief Justice counselled that the interpretation should be "a generous rather than legalistic one" but at the same time

60. *Keegstra, supra* note 1 at para 192, McLachlin J, dissenting ("The enactment of s. 2(b) of the *Charter* represented both the continuity of these traditions, and a new flourishing of the importance of freedom of expression in Canadian society").
61. Peter W Hogg, "Interpreting the Charter of Rights: Generosity and Justification" 28 Osgoode Hall LJ 817 at 818 [Hogg, "Generosity and Justification"].
62. *Hunter v Southam,* [1984] 2 SCR 145 (WL Can), 11 DLR (4th) 641 *[Hunter]; Big M, supra* note 40.
63. *Oakes, supra* note 23.
64. Hogg, "Generosity and Justification," *supra* note 61 at 819.
65. *Ibid.*
66. *Hunter*, *supra* note 62 at para 19.
67. *Ibid.*
68. *Big M*, *supra* note 40 at para 116.

it should "not … overshoot the actual purpose of the right."[69] It would thus seem that a purposive interpretation of the *Charter*, somewhat like Goldilocks' taste in porridge, should not be too hot or too cold, but just right.[70] It is clear from the Chief Justice's language that generous interpretation is part of a purposive one and not the other way around or, as Hogg has counselled, "[g]enerosity is a helpful idea only if it is subordinate to purpose; otherwise, it is bound to lead to results that are inconsistent with a purposive approach."[71]

Given the importance accorded to a purposive interpretation of rights in early *Charter* cases, it is perplexing that the approach was deemphasized, if not ignored, in the Court's interpretation of section 2(b). Though the Court's decision in *Irwin Toy* does briefly contemplate the purpose of the guarantee, expression itself is defined without "any explicit reference to the values that are said to underlie the freedom."[72] So, while the Court did identify three "principles and values underlying the vigilant protection of free expression in a society such as ours"—namely seeking the truth, participating in social and political decision-making and human flourishing—the Court failed to use values to animate the definition of expression.[73]

The logic of *Irwin Toy* is further disappointing because the same Court just months earlier, in its first interpretation of section 15, had grounded its opinion in an analysis of the underlying purposes of the equality guarantee. In *Andrews v Law Society of British Columbia,*[74] the Court openly tackled the difficult question of "[w]hat does discrimination mean?" and considered multiple potential options along the definition-justification spectrum. On one end of the definition spectrum, Justice McLachlin (as she then was) advocated an approach that would capture only those distinctions that were "unreasonable or unfair," suggesting a heavily values-driven inquiry.[75] On the other end of the spectrum, Hogg argued that "a distinction between individuals, on any ground" was sufficient to constitute a breach of section 15.[76] It is not without some irony, in light of its later holding in *Irwin Toy*, that the Court unanimously rejected the Hogg approach on the basis that "it virtually denies any role for s. 15(1)."[77] The Court ultimately settled on a middle ground, concluding that the now famous "enumerated and analogous grounds" approach "most closely accords with the *purposes* of s. 15."[78] My point here is not to pass judgment on whether the Court's decision in *Andrews* was correct or not, but rather to emphasize that an inquiry as to the purpose of section 15 was the principal guide in that case.[79] Indeed, though the *Andrews* methodology has not survived wholly intact,[80]

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69. *Ibid* at para 117 [emphasis added].
70. See e.g., "The Story of the Three Bears," in Maria Tatar, ed, *The Annotated Classic Fairy Tales* (New York: Norton, 2002) 245.
71. Hogg, "Generosity and Justification," *supra* note 61 at 821.
72. Moon, "Collapse of the General Approach," *supra* note 20 at 341.
73. *Irwin Toy*, *supra* note 2 at para 53. Indeed, the values only come into play, under the *Irwin Toy* framework, if an impugned law infringes expression in effect, but not in purpose, in which case the onus is on the party claiming an infringement to show their expression is tied to one of the three identified values. This purpose/effects branch of *Irwin Toy* has all but fallen into disuse. I see no point in revisiting it.
74. [1989] 1 SCR 143 (QL), 18 DLR (4th) 321 [*Andrews*].
75. *Ibid* at para 42.
76. *Ibid* at para 41. The respective positions of McLachlin CJC and Hogg in the context of section 15 are somewhat ironic, as each has advocated the inverse position in the context of section 2(b).
77. *Ibid* at para 44.
78. *Ibid* at para 46 [emphasis added].
79. *Ibid* at para 32 (citing *Hunter* and *Big M* for their emphasis on a purposive interpretation of *Charter* rights).
80. See generally *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

a purposive interpretation of section 15 is very much alive.[81] Though it was decided only months after *Andrews*, the decision in *Irwin Toy* never explained why section 2(b) must be interpreted more broadly than section 15.[82]

As the contrast between section 2(b) and section 15 illustrates, a "[p]urposive approach will normally narrow the right,"[83] while a generous approach will do the opposite. For this reason, a purposive approach works "in perfect harmony" with a stringent standard under *Oakes*.[84] It is thus perhaps unsurprising that only once in the last decade of section 15 cases has the Court upheld an infringement among all the cases it has considered.[85] That record, of course, stands in marked contrast to the bevy of limits of section 2(b) that have been deemed both reasonable and justifiable.

Though the Court has never backtracked from the assertion in *Irwin Toy* that the purpose of section 2(b) is to protect all expression, it has introduced a unique concept to more closely tie certain forms of speech to the guarantee. In addressing what he called the "lacuna" of section 2(b) jurisprudence, Chief Justice Dickson in *R v Keegstra* concluded that it would be a mistake "to treat all expression as equally crucial to those principles at the core of s. 2(b)."[86] As an example, the Chief Justice noted that he was "very reluctant to attach anything but the highest importance to expression relevant to political matters."[87] The innovation in *Keegstra* of creating a core of the guarantee can be seen as a proxy for a new purposive analysis, much like that advocated here.[88] That political expression lies at the "core" of the section 2(b) guarantee is now—in theory—an article of faith at the Court.[89] In contrast, as the Court would later conclude, "[i]t can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression."

The Court, however, has been highly inconsistent in its application of the "core" concept and, in the process, has undermined the very idea. For example, in *Thomson Newspapers*

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81. *Kapp*, *ibid* at para 14 (discussion concerning "The Purpose of Section 15").
82. I do not mean to suggest, however, that section 2(b) cannot be more broadly interpreted, merely that justification for that conclusion is wanting in *Irwin Toy*.
83. Hogg, "Generosity and Justification," *supra* note 61 at 821.
84. *Ibid*.
85. See *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381. An earlier analysis has shown only once prior to 2000 has the outcome of a section 15 case turned on the application of section 1. See Bredt & Dodek, *supra* note 30 at 179 n 13.
86. *Keegstra*, *supra* note 1 at para 82.
87 *Ibid* at para 92.
88. It is remarkable, however, that a majority of the Court has never actually provided an exhaustive analysis of the purpose of section 2(b). The most significant analysis was offered in *Keegstra* by McLachlin J (as she then was), writing in dissent. See *ibid* at paras 168-93.
89. See *Harper*, *supra* note 10 at para 11, McLachlin CJC & Major J, dissenting ("Political speech, the type of speech here at issue, is the single most important and protected type of expression. It lies at the core of the guarantee of free expression"); *R v Guignard*, 2002 SCC 14 at para 20, [2002] 1 SCR 472 [*Guignard*] ("Some forms of expression, such as political speech, lie at the very heart of freedom of expression"); *Sharpe*, *supra* note 11 at para 23 ("some types of expression, like political expression, lie closer to the core of the guarantee than others"); Thomson Newspapers v Canada (AG), [1998] 1 SCR 877 at para 92 (QL), 159 DLR (4th) 385 ("there can be no question that opinion surveys regarding political candidates or electoral issues are part of the political process and, thus, at the core of expression guaranteed by the *Charter*") [*Thomson*]; *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at para 76 (QL), 77 DLR (4th) 385 ("Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State") [*Committee for the Commonwealth*]; and *Edmonton Journal*, *supra* note 1 at para 3 ("Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions").

v Canada (AG),[90] a case concerning a ban on publishing opinion poll results, Justice Bastarache concluded that "there can be no question that opinion surveys regarding political candidates or electoral issues are part of the political process and, thus, at the core of expression guaranteed by the *Charter*."[91] But a decade later, in *R v Bryan*,[92] a case concerning a ban on publishing election results, Justice Bastarache concluded that such information was "at the periphery of the s. 2(b) guarantee."[93] Two points are notable here: First, no explanation was offered for why election results were at the periphery of the right while opinion poll results were at the core. Second, the dissenting opinion in *Bryan* concluded that the speech in question was "political expression [and thus] at the conceptual core of the values sought to be protected by s. 2(b)."[94] Crucially, while the Court in *Thomson* and the dissent in *Bryan* declined to distinguish between types of political expression (conceptualizing them at a higher level of abstraction), the majority in *Bryan* was willing to conclude that certain political expression is at the core of the guarantee, whereas other types are not (conceptualizing the right at a lower level of abstraction). It is worth noting that in *Thomson*, the opinion poll results were at the core because they were "part of the political process."[95] No doubt it can also be said that election results are part of the political process. It is unclear then why Justice Bastarache and a majority of the Court evolved from conceiving of the right at a higher level of abstraction (as in *Thomson*) to a lower level (as in *Bryan*). It is clear, however, that the impact of this evolution was reduced protection for certain forms of political expression.

Similar problems surface with the Court's analysis in campaign finance cases. In *Libman v Quebec (AG)*,[96] a unanimous Court concluded that "[p]olitical expression is at the very heart of the values sought to be protected by the freedom of expression guaranteed by s. 2(b) of the Canadian *Charter*," with no distinction being drawn between political advertising and other kinds of political expression.[97] Less than ten years later, however, in *Harper v Canada (AG)*,[98] the next major campaign finance case, Justice Bastarache observed for the majority that "[m]ost third party election advertising constitutes political expression and therefore lies at the core of the guarantee of free expression," but that "in some circumstances, third party election advertising may be less deserving of constitutional protection where it seeks to manipulate voters."[99] The Court was silent on the question of what manipulative advertising meant, how it was to be distinguished from merely persuasive advertising which was ostensibly at the core of the guarantee, and on what basis manipulative advertising was outside the core of the guarantee. Again, there is a shift in the conceptualization of the right, evidencing a willingness to confidently slice and dice how the right is conceptualized: In *Libman*, all political expression is at the core; in *Harper, most* political expression is at the core, but *some* is not.

The initial recognition of a core of the expressive right under section 2(b) in *Keegstra* held out the promise that the Court would have a principled means to solve one half of the two-pronged conundrum posed by the breadth of *Irwin Toy* and the stringency of *Oakes*. Core expression, determined based on an assessment of the values underlying section 2(b), could have been met with the most stringent standards of justification under section 1,

90. *Thomson*, *supra* note 89.
91. *Thomson*, *supra* note 89 at para 92.
92. *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527 [*Bryan*].
93. *Ibid* at para 30.
94. *Ibid* at para 99.
95. *Thomson*, *supra* note 89 at para 92 [emphasis added].
96. *Libman*, *supra* note 10.
97. *Ibid* at para 29.
98. *Harper*, *supra* note 10.
99. *Ibid* at para 66.

while expression outside the core could have been met with a more attenuated standard of review. Unfortunately, however, the inconsistent manner in which the Court has gone about determining what lies at the core of the guarantee has left the innovation in *Keegstra* wanting. Moreover, the willingness to exclude certain forms of political expression from the core is especially alarming, because political expression is the prototypical form of core expression.[100] Unfortunately, the Court has fared no better in its approach to section 1, as the next section will attempt to demonstrate. Indeed, the Court's evolving methods under *Oakes* may also suggest why the Court has undervalued specific expression that one would otherwise have assumed lies at the core of section 2(b).[101]

C. Section 1: The Rise of Context and Deference

The first judicial innovation in the Court's approach to section 1 came less than a year after the decision in *Irwin Toy*. Justice Wilson, in a concurring opinion in *Edmonton Journal v Alberta* (AG), identified two potential approaches to the section—the "abstract" and the "contextual"—which she noted "may tend to affect the result of the balancing process called for under s. 1."[102] Justice Wilson observed that the majority and dissenting opinions had conceived of the free expression right at different levels of abstraction. While Justice Cory, writing for the majority, spoke principally of "freedom of expression" at large,[103] Justice La Forest, writing for the minority, spoke of "the right of the individual, even in the open forums of the courts, to shield certain aspects of his or her existence from public scrutiny."[104] Crucially, Justice Wilson, noted:

> It is of interest to note in this connection that La Forest J. completely agrees with Cory J. about the importance of freedom of expression in the abstract. He acknowledges that it is fundamental in a democratic society. He sees the issue in the case, however, as being whether an open court process should prevail over the litigant's right to privacy. *In other words, while not disputing the values which are protected by s. 2(b) as identified by Cory J., he takes a contextual approach to the definition of the conflict in this particular case.*[105]

The lesson was clear: "[O]ne should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case."[106] And so the "contextual approach," whereby "a right or freedom may have different meanings in different contexts," was born.[107] Significantly, Justice Wilson also noted that "[i]t seems entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different."[108]

The contextual approach, as articulated in *Edmonton Journal,* has had profound implications on section 2(b) jurisprudence. The invitation to focus on context necessarily involved subtle normative judgments about the value that should be attached to a particular form of expression—not merely to categories of expression, but to specific

100. See note 89, above.
101. *Prostitution Reference*, *supra* note 8 at para 5.
102. *Edmonton Journal*, *supra* note 1 at para 43.
103. *Ibid* at para 3.
104. *Ibid* at para 79.
105. *Ibid* at para 47 [emphasis added].
106. *Ibid* at para 48.
107. *Ibid* at para 52.
108. *Ibid.*

expressive acts within these categories.[109] The results were two-fold: First, as suggested in the previous section, a contextual analysis had the impact of taking specific instances of expression out of the core of the guarantee identified in *Keegstra*, though apparently not the reverse.[110] Second, and the focus of this section, the rise of the contextual approach required a new mechanism under section 1 through which to filter the results of any such analysis. Under the banner of judicial deference, the Court would announce that there were some matters better left to Parliament. For supporters of an expansive conception of section 2(b), these developments would turn the promise of *Irwin Toy's* broad guarantee into an "empty gesture."[111] More alarmingly, however, there would be no bounds to the scope of this deference. Not only was the Court willing to defer to Parliament's judgments concerning limits on forms of expression farther from the core of section 2(b), but it would do so in cases concerning political expression as well. This approach thus had the effect of diluting the stringency of *Oakes* in the one area it had recognized as absolutely fundamental to the free expression guarantee.

The notion of deference to Parliament, as originally conceived, appeared to have limited application. As early as *Irwin Toy*, the Court had suggested that where Parliament is "mediating between the claims of competing groups," courts "must be mindful of the legislature's representative function."[112] Of some significance, however, the Court suggested only one example of such mediation: where Parliament is "regulating industry or business."[113] The use of deference, however, would soon be expanded. In *Libman*,

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109. For example, the publication of election results would be the subject of an independent contextual analysis; that election results are a form of political expression is not determinative. See e.g., *Bryan*, *supra* note 93.

110. I have been unable to find an example where the opposite happened and a form of expression putatively outside the core of section 2(b) was held to be a part of the core as a result of a contextual analysis. This is not to say, however, that litigants have not tried to achieve such a result. In *Butler,* for example, the intervener British Columbia Civil Liberties Association encouraged the Court to conclude that "sexual norms, behaviours and identities have a bearing on the structure of political life" and, thus, that sexually explicit expression is in fact a form of political expression and thereby at the core. See Choudhry, *supra* note 32 at 517. That argument did not find favour with the Court. See *Butler, supra* note 52 at para 97.

    There is, however, one case where one might argue that the Court *did* expand the core, albeit without saying so. In *Guignard,* it struck down a municipal bylaw restricting certain commercial signage. LeBel J noted that commercial expression has "substantial value" and that the particular counter-advertising in this case "may be of considerable social importance" as "a right not only of consumers, but of citizens." *Guignard, supra* note 89 at paras 21-24. Despite this rhetoric, I think the case is better understood as having hinged not on the importance of the expressive act, but on the silliness of the impugned bylaw. As LeBel J noted, the bylaw "prohibits only those signs that expressly indicate *the trade name of a commercial enterprise* in residential areas" and that "[a]ll other types of signs of a more generic nature are exempt from the by-law" (at para 29 [emphasis added]). This aspect illustrated its "arbitrary nature" and led the Court to conclude that the bylaw failed to meet *any* of the justification requirements under section 1—something that it essentially never does.

111. Cameron, "Past, Present, and Future," *supra* note 27 at 5.

112. *Irwin Toy*, *supra* note 2 at para 79. In contrast, the Court also concluded that where the state is the "singular antagonist" against an individual, no deference is necessary by dint of the Court's ability to adjudicate such claims. At para 80.

    Christopher Bredt has observed that "[t]he distinction drawn by the Court in *Irwin Toy* has frequently been characterized as setting out a higher section 1 standard in criminal law cases than in other contexts." However, as he points out, even if we were to accept this as true, "it is difficult to understand why the criminal law would be considered an area where the 'right choices' are more obvious to the judiciary and thus Parliament's choices entitled to less deference." The bottom line thus is that "[t]he Court's attempt to rationalize its section 1 jurisprudence in *Irwin Toy* arguably raised more questions than it answered." Bredt, "Revisiting Oakes," *supra* note 31 at 63.

113. *Irwin Toy, supra* note 2 at para 79, citing *R v Edwards Books and Art*, [1986] 2 SCR 713 at 772, 35 DLR (4th) 1.

decided less than a decade after *Irwin Toy,* a unanimous Court noted that "in the social, economic *and political spheres*, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, the courts must accord great deference to the legislature's choice because it is in the best position to make such a choice."[114] As a result, even though the campaign finance restrictions at issue "restrict one of the most basic forms of expression, namely political expression, the legislature must be accorded a certain deference to enable it to arbitrate between the democratic values of freedom of expression and referendum fairness."[115]

The Court declined to defer to Parliament on only one occasion—*Thomson*—on the basis that the government had failed to demonstrate sufficient harm to warrant such deference.[116] Though the Court in *Thomson* had concluded unambiguously that lowering the standard for establishing a social harm at the rational connection stage of *Oakes* was limited to low value contexts, such as obscenity and commercial advertising,[117] this conclusion was soon forgotten. In *Harper,* a majority would actually scold the lower courts for "not giv[ing] any deference to Parliament's choice of electoral model" and "demanding too stringent a level of proof."[118] That reasoning was affirmed in *Bryan.*[119]

Justice Wilson's act of judicial innovation in *Edmonton Journal* can be understood as the first attempt to solve the riddle posed by *Irwin Toy's* expansiveness and *Oakes'* stringency by paving the way for bespoke treatments of proposed limits on the section 2(b) right. "To the extent that *Irwin Toy* may have privileged or overvalued section 2(b), the contextual approach provided a corrective."[120] With respect, however, the cure has proven worse than the ailment. Though deference was surely needed in certain contexts—principally where limits on lesser-valued categories of expression were at issue—as the Court's latest treatment of political expression shows, deference now permeates effectively every realm of section 2(b) and operates at every stage of section 1.[121]

II. BUILDING A NEW EDIFICE

In the above discussion, I have endeavoured to survey the evolution of the Court's section 2(b) jurisprudence as it grappled with the challenges created by the methodological approach adopted in *Irwin Toy*. The case of *Irwin Toy* signalled a commitment to a justificatory (and thus inherently generous) interpretative approach over a definitional (and thus inherently purposive) alternative. Though the Court flirted with aspects of a definitional conception in *Keegstra*, it ultimately failed to marry that idea to its approach in *Irwin Toy*. Furthermore, the prevalence of the contextual approach, including an increasing willingness to defer to Parliament, has steadily eroded the expansive protection of freedom of expression that *Irwin Toy* first suggested. That result is unsurprising: *Irwin Toy* attempted to counter powerful cultural and political instincts and a historical orthodoxy that tells us that not all speech is equal. Troublingly, however, the evolution in the Court's thinking, while having created some constitutional space for the regulatory needs of the modern state, has also weakened—intentionally or unintentionally—protection for what it recognises as expression at the core of section 2(b).

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114. *Libman, supra* note 10 at para 59.
115. *Libman, supra* note 10 at para 61.
116. *Thomson*, *supra* note 89 at paras 118-19.
117. *Ibid* at para 115. See also Christopher D Bredt & Margot Finley, "*R. v. Bryan*: The Supreme Court and the Electoral Process" (2008) 42 Sup Ct L Rev (2d) 63 at 81, 85.
118. *Harper, supra* note 10 at paras 64, 104.
119. *Bryan, supra* note 93 at para 41.
120. Cameron, "Past, Present, and Future," *supra* note 27 at 18.
121. See Bredt, "Revisiting *Oakes,*" *supra* note 31 at 62.

The time then has come to look beyond *Irwin Toy* and articulate a new methodology for section 2(b). In order to do so, first, one must reassess the theoretical foundations of section 2(b) and section 1. Second, that theory must be applied to construct an edifice that can rest on that foundation. I will also attempt in this part to explicitly articulate the benefits of the proposed approach and respond to anticipated objections.

A. Reassessing the Foundations of Section 2(b)

A theory of section 2(b) must reconcile the assertions that I began this paper with: Not all expression is equally worthy of protection. Yet all expression is *prima facie* constitutionally protected. The easy answer is to deny the continuing validity of one of these two assertions, thereby allowing the other to stand alone and unhindered. The most obvious candidate, in light of the discussion in the above sections, is the notion that *all* expression is *prima facie* protected under section 2(b). Ridding ourselves of this assertion, however, is unattractive for at least two reasons. First, it runs counter to the actual text of section 2(b), which offers no explicit qualification on its ambit and offers no apparent basis for implying exclusions to the guarantee. In that regard, to imply such exclusions smacks of the "doctrinal subterfuge" that has troubled the American approach to the First Amendment.[122] Second, to exclude certain forms of expression from the ambit of section 2(b) also runs counter to over two decades of precedent, which in itself should give sufficient reason for pause. Recall the goal of this paper is to maintain harmony with the Court's jurisprudence insofar as reasonably possible.

There is, however, an avenue to reconciliation that does not involve the rejection of either of the two assertions. The answer is exceedingly simple: If not all expression is equally worthy of protection, it should not be equally protected, even though all expression may be afforded *some* protection. A purposive interpretation of section 2(b) has suggested that political expression is at the absolute core of the substantive guarantee and that other categories, including commercial expression, lie further afield.[123] Violence, a lone exception, is regarded as wholly anathema to the guarantee's underlying values.[124] These are not my personal views, but conclusions articulated by the Court itself. These conclusions suggest what might be called the triumph of a "soft" definitional conception of the section 2(b) right over an exclusively justificatory alternative.

Such a definitional conception differs markedly from the American definitional approach, in that the Canadian approach need not reject the notion of balancing. Significantly, the Canadian definitional conception is limited to a discussion of section 2(b) alone; it does nothing to limit the application of section 1. In other words, the adoption of a definitional conception under our *Charter* does not end the judicial inquiry as it effectively does in the United States. This is because the definitional approach does not involve the inherent balancing of competing values; it merely speaks to the value that particular expression has independently. As an example, to assign commercial expression lower value is a normative judgment that can be made independently of asking whether competing collective interests can trump such expression.[125] With reference to the text of section 2(b), Canadian history and values, and the larger framework of the *Charter* ,

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122. Cameron, "Original Conception," *supra* note 36 at 259.

123. See note 89, above; *Rocket*, *supra* note 1 at para 14.

124. *Irwin Toy*, *supra* note 2 at para 42.

125. See e.g., Robert J Sharpe, "Commercial Expression and the Charter" (1987) 37 UTLJ 229; Allan C Hutchinson, "Money Talk: Against Constitutionalizing (Commercial) Speech" (1990) 17 Can Bus LJ 2. Though Sharpe does not go as far as Hutchinson, there is basic agreement on the idea that it would be inappropriate to accord commercial expression protection equal to that given to expression closer to the core of the section 2(b) guarantee.

each of which are essential to a purposive interpretation,[126] one can reasonably conclude that advertising is of low value, as the Court has done,[127] without ever getting to the question of whether advertising can be limited by a governmental interest in, say, protecting children. I stress this point to anticipate objections that a definitional approach inherently conflates independent inquiries into rights and limits. Such an approach does no such thing; it merely recognizes that values come into play not only in the balancing of competing interests under section 1, but also in the articulation of rights.

To shift then from the definition of the right to potential limits on it: It is not controversial, in light of the Court's jurisprudence, to suggest that the more valuable a right, the more pressing any interest in limiting the right must be if the limit is to be justified. The more valuable a right is, the more damaging the effects of a limitation on it will be and, as the Court has recognized, "[t]he more severe the damaging effects of the measure, the more important the underlying objective must be in order to be constitutionally justified."[128] The necessary innovation then is to craft a justificatory test under section 1 that aims for symmetry between competing values: A free expression right that is of particular importance can plausibly be limited only by a competing value of equal or greater importance.

In this vein, certain theoretical tiers of justification may emerge. Let us proceed for a moment on the basis that expression at the core of the section 2(b) guarantee (*e.g.*, political expression) is of such importance that only a governmental purpose of *surpassing* importance could justify an infringement, that expression outside the immediate core (*e.g.*, commercial expression) may be limited by a *compelling* purpose, and that content-neutral time, manner, and place limits (*e.g.*, restricting noise levels in urban zones) could be justified where the government has a *reasonable* purpose.[129] Proceeding further on this basis, and in order to map this to the structure of the *Oakes* test, three tiers of scrutiny could emerge: strict scrutiny, intermediate scrutiny, and reasonableness scrutiny. Each of these tiers can be applied under section 1 to ratchet up—or down—the level of scrutiny given by courts to proposed limits on the right, including the appropriate level of deference given to Parliament.

Proceeding still on the assumption that such tiers of scrutiny under section 1 have greater fidelity to the definitional conception of the right under section 2(b), there is still the question of how to harmonize over two decades of jurisprudence that does not—at least explicitly—adopt such a framework. This task, however, does not present an insurmountable challenge. The basis for the normative judgments contemplated in the proposed tiers exists in our jurisprudence both *broadly*, as one charts the Court's acceptance or rejection of proposed limits in various cases in particular categories of

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126. *Big M*, *supra* note 40 at para 117. See also Barak, *Purposive Interpretation*, *supra* note 40 at 377-84.

127. *Canada (AG) v JTI-Macdonald Corp,* 2007 SCC 30 at para 68, [2007] 2 SCR 610 [*JTI-Macdonald].*

128. *Prostitution Reference, supra* note 8 at para 104.

129. I recognize that these labels, without more, are merely labels. Their full definition requires precedent, which can only come with time. In what follows, however, I do attempt to sketch out the contours of each standard. In addition, I note that my use of the label "compelling" should not be understood in the American sense, *i.e.* indicating strict scrutiny in the context of equal protection under the Fourteenth Amendment. Finally, I note that the Court's exclusion of violence from the ambit of section 2(b) is consonant with the approach proposed here. The decision in *Dolphin Delivery* seems to assume that violence is so far removed from the values underlying section 2(b) that it is not worthy of protection. (I say "assume" because neither *Dolphin Delivery* nor subsequent cases explicitly grappled with this point; see note 51, above.) However, even if one were to assert that my approach requires violence's *prima facie* inclusion under section 2(b)'s ambit because violence *is* in fact expressive, the result is the same: Violence is so tangentially related to the values underlying section 2(b), if it is at all, that the most basic analysis under section 1 should be sufficient to satisfy reasonableness scrutiny.

expression, and also *specifically*, in particular cases when one looks at the Court's analysis of the third branch of the proportionality analysis conducted under *Oakes*.

The third branch of the proportionality analysis under *Oakes*, which seeks to weigh the deleterious impact of a particular limitation against its salutary effects, is often ignored.[130] But because this is the only aspect of the Court's existing section 1 analysis to explicitly engage with the deleterious consequences of the proposed limit—the only part to acknowledge that "a constitutional right has been violated"[131]—the Court's conclusions on this branch speak volumes about its conception of the value of particular forms of expression. For example, in *Irwin Toy*, the Court recognized that the "real concern animating the challenge to the legislation is that revenues are in some degree affected."[132] The implication was that concerns motivated by profit were of lesser importance than concerns motivated for other reasons. Crucially, the impact of the limit is assessed in a value-laden context. It is not that a loss of revenue is not important to the *Charter* claimant—no doubt, any commercial enterprise would consider such a loss as quite deleterious—but to what extent Canadian society (through our courts) is willing to recognize that loss as being of normative significance. As is now trite, not all expression is equally worthy of protection. Similar reasoning led to the conclusion in *Canada (AG) v JTI-Macdonald* that "the expression at stake is of low value."[133] In contrast, in *Thomson*, a case that concerned limits on the publication of information concerning poll results, the limit's impact on freedom of expression was "profound."[134] Conversely, one can also look to the salutary effects analysis for the Court's normative judgments about the value of the impugned limit. In *JTI-Macdonald*, for example, Chief Justice McLachlin noted that "the objective is of great importance, nothing less than a matter of life or death for millions of people."[135] In contrast, the salutary effects of limits on political expression have—albeit principally in the early cases—been downplayed.[136] In *Thomson*, Justice Bastarache scoffed at the notion that the government's goal to ensure that "some indeterminate number of voters might be unable to spot an inaccurate poll result and might rely to a significant degree on the error, thus perverting their electoral choice" was a sufficiently salutary effect. Taken together, the Court's analyses of deleterious and salutary factors in these cases offer compelling evidence of the value it ascribes to various forms of expression.

130. Hogg, *Constitutional Law*, *supra* note 21 at 859.

131. Cameron, "First Amendment," *supra* note 38 at 66.

132. *Irwin Toy*, *supra* note 2 at para 89.

133. *JTI-Macdonald*, *supra* note 127 at para 68.

134. *Thomson*, *supra* note 89 at para 127.

135. *JTI-Macdonald, supra* note 127 at para 68. Note that though this language is excerpted from a paragraph concerned with "proportionality of effects," *i.e.,* deleterious and salutary effects, McLachlin CJC speaks of the importance of the "objective," harkening back to the first stage of the *Oakes* test, *i.e.,* a "pressing and substantial purpose."

136. As discussed above, the Court's opinions in *Harper* and *Bryan* downplay the value attached to political expression over the vehement protests of the minority justices.

B. A New Approach

Moving then from the abstract to the mechanics of how the above theoretical framework can be adapted in a new methodology, I propose the following. First, the Court should openly acknowledge its adoption of a definitional conception to the right to freedom of expression under section 2(b). Such an approach acknowledges that normative judgments as to the value of particular speech, as aided by a purposive interpretation of the guarantee, will guide the level of scrutiny that challenged limits are subject to under section 1. The broad contours of two decades of section 2(b) jurisprudence and the specific analysis of deleterious effects under *Oakes* indicate, with a reasonable measure of clarity, which forms of expression are closest to the core of section 2(b). Limits on political expression, as an example of speech at the core of the right, would be subject to strict scrutiny under section 1, requiring a surpassing purpose and a rigorous analysis of minimal impairment. Commercial expression, as an example of speech outside the core, would be subject to intermediate scrutiny, requiring a compelling purpose and a less exacting analysis of minimal impairment, including more deferential standards as to Parliamentary conclusions on social science evidence. Finally, restrictions on time, place and manner, to the extent they are content neutral, would be subject to reasonableness scrutiny, requiring only a reasonable purpose and a heavily attenuated proportionality analysis.[137] To the extent that any proposed limit breaches content neutrality, it would be subject to the subject matter-specific level of scrutiny.[138] Finally, the third branch of the proportionality analysis under *Oakes* would be retired as regard for the deleterious and salutary consequences are, under this new approach, infused into the level of scrutiny applied.[139]

In short, the proposed methodological approach would be as follows:

Section 2(b)

- Is the activity in question *prima facie* expressive?
- How closely tied to the core of the section 2(b) right is the expression at issue? (Accordingly, reasonableness, intermediate, or strict scrutiny will be applied under section 1.)

Section 1

- Is the limit prescribed by law?
- Is the purpose for which the limit is proposed of sufficient importance (*i.e.,* reasonable, compelling, or surpassing importance)?
- Is the limit rationally connected to the purpose?
- Does the limit minimally impair the right?

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137. I have not undertaken a full analysis of time, manner, and place restrictions in this paper, but offer this third category to complete the tiers of scrutiny that I propose. Like the other tiers, I note that the Court has modulated the strength of scrutiny to suit such limits, in this case attenuating it, albeit sometimes without expressly saying so. See e.g., *Montréal (City) v 2952-1366 Québec*, 2005 SCC 62, [2005] 3 SCR 141 [*Montréal*].

138. For example, a time, place, and manner restriction that restricted political expression, but no other form of expression, should be subject to strict scrutiny. For an example with such facts, see *Translink*, *supra* note 13. Of course, courts must be alive to the possibility that content-neutral time, place, and manner restrictions could be used to limit *all* expression so as to benefit from an attenuated form of review. Accordingly, to use the facts of *Translink*, the transportation authority should not be able to turn around and ban all speech on public buses (subject to reasonableness review) instead of banning *some* but not *all* speech (subject to category-specific review). In such cases, the Court's precedents concerning locations continue to be helpful, because they ask whether the place in question has traditionally been a forum for public expression. That approach is fully compatible with the standard of reasonableness review proposed here.

139. Hogg, *Constitutional Law*, *supra* note 21 at 859.

C. The Benefits of the New Approach

The above approach is proposed with several benefits in mind. First, the proposed approach makes explicit the level of scrutiny a court will apply to an impugned governmental act, thereby yielding clarity and predictability to all concerned parties. As previously noted, the evolution in the Court's jurisprudence under section 2(b) suggests a realization that its jurisprudence cannot stray too far from accepted cultural and political orthodoxy, lest the Court voluntarily engender doubts about its democratic legitimacy. And so, notwithstanding the breadth of *Irwin Toy* and the rigours of *Oakes*, the Court adopted the contextual approach and deference to Parliament as indispensable handmaidens to section 2(b) adjudication. But in doing so, it created a black box. Simply too much information concerning the rigour with which the Court will approach a particular case is known only to the Court. The adoption of explicit tiers of scrutiny, which are grounded in a purposive analysis of the section 2(b) right, will allow in some necessary sunlight. Parliament will know, for example, that the Court will be willing to accommodate less-than-definitive social science evidence in commercial expression cases under intermediate scrutiny, but that evidence will be subjected to more rigorous review under strict scrutiny in political expression cases.

Second, the proposed approach will ensure that limits on expression at the core of the section 2(b) guarantee are properly subjected to a heightened level of scrutiny. There is no point in assigning value to the speech if the methodology adopted by the Court does not take account of that value. Members of the Court have spoken eloquently about the dangers in diluting the *Oakes* standard,[140] and I do not disagree. But there *has* been a dilution of *Oakes*. That dilution, however, is problematic not because of its application to low value speech, but because of that diluted standard's application to high value speech, as I have attempted to show. This is broadly apparent from the lower protection given to expression rights in Canada as compared with other Western democracies, most especially our neighbour to the south,[141] but it is also specifically apparent from the recent treatment of limits on political expression, as discussed above. The proposed approach, it is hoped, will serve as a needed corrective because it imposes prudential limits on the flexibility available to the Court: Political expression cases must be subject to strict scrutiny, while commercial expression cases, for example, will be subject to intermediate scrutiny.[142]

Third and finally, the proposed test should serve to make more effective use of the analytical tools available to the Court. Even the Court has recognized that the third branch of *Oakes'* proportionality analysis is not doing much work, instead leaving the

140. See e.g., *R v Lucas*, [1998] 1 SCR 439 at para 115 (QL), 157 DLR (4th) 423 [*Lucas*].

141. See discussion at note 32, above.

142. One might reasonably argue that such limits, while ensuring that political expression cases are subject to maximum scrutiny, improperly impose a lower standard of review on commercial expression cases, for example, when in some instances strict scrutiny is more appropriate. There are two responses to this line of argument. First, I can find no example in the existing precedents where the Court has subjected commercial expression cases to higher scrutiny (with the possible exception of *Guignard,* discussed at note 110, above), suggesting that the normative value ascribed to commercial expression generally does not vary (though the Court has accepted such variation in the cases concerning political expression). Second, subject to further analysis, it may be that the proposed approach here should be seen as a floor and not a ceiling on the standard of review. In other words, perhaps courts should retain discretion to ratchet up the level of scrutiny they subject limits to, but never ratchet that level down. Such a modification, of course, potentially imposes a higher burden on the government, which may, if this view is adopted, lack certainty about which level of scrutiny is applicable to a proposed limit. As clarity and predictability is an expressed goal of the proposed approach here, further discussion of this modification is left for another day.

intellectual heavy-lifting to other branches.[143] Indeed, there is recognition that it is the contextual approach that has rendered the third branch redundant:

> The subsequent development of the *Oakes* test, particularly the broad contextual approach which has been adopted by this Court since the decision in the *Edmonton Journal* case, ensures that the rational connection and the minimal impairment tests are sufficient to determine whether there is a proportionality between the deleterious effects of a measure, and its objective.[144]

The recommendation to eliminate the third branch as it is currently structured thus has basis recognized by the Court itself. This is not to say that the intellectual query intended to be undertaken is without purpose. It is not, but as Justice Bastarache recognized in *Thomson*, the Court has usurped that inquiry under the banner of the contextual approach. The proposed approach merely takes that development one step further by formalizing it as a device to frame the entire inquiry. The third branch, as it stands, is a free-standing cost versus benefits analysis. This approach, however, fails to recognize that the *entire* section 1 analysis is a cost versus benefit analysis with each of its parts serving to provide analytical rigour. There is no need for a free-standing inquiry at the last stage.

D. Anticipating Objections

The principal thrusts of the proposal articulated here—the adoption of explicit tiers of scrutiny and the abandoning of the third branch of the proportionality analysis—are not, on their own, new ideas. Indeed, both have been considered and dismissed, albeit mostly in passing, in the Court's jurisprudence. The more recent case law, however, demands that this alternative approach be given a second look.

The argument against tiers of scrutiny rests on the idea that they hinder the Court's flexibility. Chief Justice Dickson briefly considered and dismissed the possibility of different tiers of scrutiny in *Keegstra*. Instead, he pointed to the contextual approach as a preferable alternative to "inflexible levels of scrutiny," lest courts "become transfixed with categorization schemes risks losing the advantage associated with this sensitive examination of free expression principles."[145] This is a version of the traditional rules versus standards debate.[146] It is perhaps not coincidental that the Chief Justice advanced this line of argument in *Keegstra*: The case concerned the validity of a statutory provision criminalizing hate speech, which may more properly be seen as a form of political expression, as Chief Justice Dickson himself recognized.[147] Too much flexibility, then, can sometimes be a bad thing. One might reasonably wonder whether the impugned

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143. In *Thomson*, Bastarache J commented in an opinion joined by five other justices:

    > This formulation has been criticized as merely duplicating what is already accomplished by the first two stages of the proportionality analysis. As a practical matter, this is confirmed by the jurisprudence of this Court: there appears to be no case in which a measure was justified by the first two steps of the proportionality analysis, but then found unjustified by an application of the third step.

    Thomson, supra note 89 at para 123.

144. *Ibid* at para 124.

145. *Keegstra, supra* note 1 at para 95.

146. See e.g., Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U Chi L Rev 1175; Pierre Schlag, "Rules and Standards" (1985-6) 33 UCLA L Rev 379; Kathleen M Sullivan, "Foreword: The Justices of Rules and Standards" (1992) 106 Harv L Rev 221; and Cass R Sunstein, "Problems with Rules" (1995) 83 Cal L Rev 953.

147. *Keegstra, supra* note 1 at para 90 ("I recognize that hate propaganda is expression of a type which would generally be categorized as 'political,' thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process"). See also Choudhry, *supra* note 32 at 517.

provision in *Keegstra* would have passed muster if held to the same exacting level of scrutiny that the dissent employed.[148]

Though the approach proposed here does, of course, sacrifice some flexibility, it is crucial not to overstate this point.[149] Adopting tiers of scrutiny is not an invitation for judges to shackle their minds. Rather, the tiers approach invites self-imposed prudential limits to ensure that a given category of expression is not under- or over-protected in a specific instance in a manner wholly out of line with the normative value ascribed to it by Canadian society. In time, if a bright-line rule requiring all political speech to be subject to heightened scrutiny is found to be out of step with *Charter* values as may well be the case, for example, with hate speech, the better approach is to carefully define an exception to the rule (effectively, the creation of a sub-category) as opposed to inviting *ad hoc* analyses of particular expressive acts on a case-by-case basis.[150]

More broadly, though, it is important to recognize that the tiers of scrutiny suggested here are not being imposed from above as much as they arise organically from the Court's own jurisprudence. Subjecting limits on political expression to a heightened standard, for example, merely reflects the broader judgment of Canadian society that it values political expression more than it values other forms of expression, as recognized by the Court.[151] A particular level of scrutiny does not suggest a default answer in each case or that no limit will ever pass muster, as seems to be the unspoken fears in the majority opinion in *Keegstra*.

Certain members of the Court have also been severe in their criticism of any variation in the scrutiny applied under section 1, let alone the recognition of category-based tiers. Writing in dissent in *Lucas*, Justice McLachlin (as she then was) cautioned that allowing the "perceived low value of the expression to lower the bar of justification from the outset of the s. 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."[152] She added that such an approach "risks reducing the s. 1 analysis to a function of what a particular judge thinks of the expression."[153] But this criticism is misdirected. First, the adoption of the contextual approach essentially serves as a screen for precisely the kind of subjectivity Justice McLachlin hoped to guard against. Second, there is a principled basis to treat different forms of expression differently, as the Court has repeatedly recognized elsewhere. Third, the proposal advocated herein proposes different standards of section

148. See *Keegstra, supra* note 1 at paras 156-340, McLachlin J, dissenting ("Accepting that the objectives of the legislation are valid and important and potentially capable of overriding the guarantee of freedom of expression, I cannot conclude that the means chosen to achieve them—the criminalization of the potential or foreseeable promotion of hatred—are proportionate to those ends" at para 334).

149. That said, the proposed approach will shift attention to the characterization of speech under section 2(b). There will be easy cases: For example, a television advertisement by a tobacco company encouraging Canadians to encourage their MPs to vote against a new cigarette tax would properly be characterized as political speech. But there may be other facts which pose a more difficult question as the government jockeys to secure a lower level of scrutiny, while the claimant seeks to convince the court that a higher level is called for. This discussion, which places tremendous emphasis on the purposes underlying section 2(b), is a positive development so long as the Court remains faithful to those purposes by continuing to draw clear distinctions between different forms of expression. However, where it begins to conflate the categories, as it sometimes has, even this approach will flounder as previous efforts have. See e.g., Choudhry, *supra* note 32 at 517-19.

150. The Supreme Court will soon have the opportunity to engage in such an analysis. See *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26, 346 Sask R 210 (decision on appeal pending).

151. See note 89, above.

152. *Lucas, supra* note 140 at para 115.

153. *Ibid.*

1 justification based not on subjective perceptions of a particular judge as to *particular* expression, but on broader conclusions as to the value of *categories* of speech as drawn from the Court's own jurisprudence on the purpose of section 2(b). Indeed, the perils which Justice McLachlin was warning about in *Lucas* are in part precisely what this proposal hopes to guard against.

The third branch of the proportionality analysis has been the subject of sporadic defences from the Court. Chief Justice McLachlin offered a defence recently (and rearticulation) of it in *Alberta v Hutterian Brethren*.[154] She noted that while the earlier stages of *Oakes* "are anchored in an assessment of the law's purpose," the third branch is the only analytical element to take "full account of the severity of the deleterious effects of a measure on individuals or groups."[155] There are two responses here: First, the Court's opinions, including at least one crafted by Chief Justice McLachlin, have conceded that the analysis is actually duplicative.[156] Second, and more troublingly, the third branch as currently contemplated amounts to a naked balancing exercise, as apparently conceded by the Court.[157] Indeed, the rearticulation of the third branch points toward *more*, not less, subjectivity in *Oakes* so long as the Court continues to eschew differentiated

154. *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 SCR 567 *[Hutterian Brethren].* The rearticulation of the third branch was heavily influenced by the approaches to constitutional rights adjudication of the Supreme Court of Israel and the Federal Constitutional Court of Germany. See Barak, "Proportional Effect," *supra* note 35; Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTLJ 383. Though the Court adopted much from President Barak's article, it was, unfortunately, less receptive to one of his principal points: that "the object component"—or, in the language of *Oakes,* whether there is a pressing and substantial purpose—"should be given an independent and central role in examining constitutionality" and that "[w]ith respect to the need for realization of the object … the need varies according to the nature of the right" (at 371). In other words, the purpose of an impugned limitation deserves significant attention in the section 1 analysis and the importance of that purpose should depend on the nature of the particular right in question.

155. *Hutterian Brethren, ibid* at para 76. Indeed, the "decisive" analysis fell at the last stage in this case. See the discussion at para 78. I recognize a certain irony in advocating for the abolishment of the third branch of Oakes precisely at the time that the Court is bolstering its significance. As Grimm J observed of the difference between the Canadian and German approaches to rights adjudication (prior to *Hutterian Brethren*): "Perhaps the most conspicuous difference is that in Canada, most laws that fail to meet the test do so in the second step [minimal impairment under Oakes], so that not much work is left for the third step [proportionality] to do, whereas in Germany, the third step has become the most decisive part of the proportionality test." Grimm, *supra* note 154 at 384. In light of *Hutterian Brethren*, I hazard that observation will no longer hold true.

156. In *Harper,* for example, McLachlin CJC and Major J, dissenting in part, wrote as part of their minimal impairment analysis: "The difficulty with the Attorney General's case *lies in the disproportion between the gravity of the problem … and the severity of the infringement on the right of political expression*." Then, under the third branch proportionality analysis, they conclude: "The same logic that leads to the conclusion that the Attorney General has not established that the infringement minimally impairs the citizen's right of free speech applies equally to the final stage of the proportionality analysis, which asks us to weigh the benefits conferred by the infringement against the harm it may occasion." *Harper, supra* note 10 at paras 32, 40 [emphasis added]. In *RJR-MacDonald v Canada* (AG), McLachlin J (as she then was) also noted that "it may not be of great significance where [the] balancing" of the salutary and deleterious effects takes place provided the balancing is done rigorously. *RJR-MacDonald v Canada* (AG), [1995] 3 SCR 199 at para 169, 127 DLR (4th) 1. In fairness, however, this counterargument has less weight in light of the rearticulation of the third branch in *Hutterian Brethren*, assuming the Court remains faithful to its new approach.

157. *Thomson, supra* note 89 at para 126 ("This weighing exercise necessarily admits of some subjectivity").

standards of review.[158] In this regard, strikingly neglected in the Court's defence of the third branch is the dissimilarity in its application from case to case and sometimes within the same case. In *Bryan*, for example, the majority and minority opinions came to fundamentally different conclusions about the deleterious impact of the same impugned law: The majority concluded it had an "extremely small"[159] impact, while the minority countered that with a "profound" harm to "core political speech."[160] A similar dichotomy existed on the salutary effects, where the majority focused on the law's positive impact on the "fairness and reputation of the electoral system as a whole, a pillar of the Canadian democracy,"[161] while the minority "saw speculative, inconclusive and largely unsubstantiated" benefits.[162] The distinction between these conclusions is telling: When a side wanted to emphasize an effect, it identified it at a higher level of abstraction, whereas when it wanted to deemphasize it, it identified it at a lower level of abstraction. In contrast to this see-saw approach to the third branch, the proposed tiers of scrutiny entrench the high-level abstract judgments into the test itself. In other words, under the approach articulated here, accounting for the severity of the infringement is hard-wired into the whole fabric of the section 1 analysis thereby constraining the normative value that can be ascribed to specific deleterious and salutary effects.[163]

The continuing use of the third branch may make some sense if the Court accepted the possibility of American-style as-applied challenges in *Charter* cases,[164] but it has not done so. For example, one might imagine a scenario where the deleterious impact on a particular *Charter* claimant is disproportionate as compared with others. In such cases,

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158. President Barak, whose ideas, as I noted above at note 154, are reflected in the new approach to the third branch, acknowledges this criticism: "The … argument is that the values-based understanding of the third step empties it of any objective standard, turning it into a mechanism for judicial subjectivity and judicial activism." His response to this criticism is that there is, in fact, an objective standard: the requirement that "the greater the limitation of human rights is, *the more important the purpose must be in order to justify it*." Barak, "Proportional Effect," *supra* note 35 at 381-82 [emphasis added]. But this rebuttal falls flat in the Canadian context: Though such differentiated standards may exist in the Israeli jurisprudence, the Supreme Court of Canada has all but neutered the first branch of *Oakes (*the finding of a pressing and substantial purpose). See e.g., *Hutterian Brethren, supra* note 154, LeBel J, dissenting ("In general, courts have only rarely questioned the purpose of a law or regulation in the course of a s. 1 analysis. The threshold of justification remains quite low and laws have almost never been struck down on the basis of an improper purpose" at para 188).

159. *Bryan, supra* note 93 at para 51.

160. *Ibid* at paras 107, 128.

161. *Ibid* at paras 49-50 [emphasis in original].

162. *Ibid* at para 107.

163. It is worth noting that the pattern identified here has continued since the rearticulation of *Oakes*' third branch. See *Hutterian Brethren, supra* note 154, McLachlin CJC ("While the limit imposes costs in terms of money and inconvenience as the price of maintaining the religious practice of not submitting to photos, it does not deprive members of their ability to live in accordance with their beliefs. Its deleterious effects, while not trivial, fall at the less serious end of the scale" at para 102) and Abella J, dissenting ("the constitutional right is significantly impaired; the 'costs' to the public only slightly so, if at all" at para 175); *Toronto Star Newspapers Ltd v Canada,* 2010 SCC 21, [2010] 1 SCR 721, Deschamps J ("I must find that in the context of the bail process, the deleterious effects of the limits on the publication of information are outweighed by the need to … guarantee as much as possible trial fairness and fair access to bail. Although not a perfect outcome, the mandatory ban represents a reasonable compromise at para 60) and Abella J, dissenting ("A mandatory ban on the evidence heard and the reasons given in a bail application is a ban on the information when it is of most concern and interest to the public" at para 76).

164. In the United States, litigants can challenge the constitutionality of federal statutes in two ways: They can bring a "facial" challenge to a law asking a court to hold it unconstitutional in all of its applications or they bring a narrower "as-applied" challenge asking a court to hold the statute unconstitutional *as applied to the particular facts* of the instant case. If the challenge is successful, in the former case the statute may no longer be enforced under *any* circumstances, whereas in the latter case it may still be enforced in circumstances dissimilar to those raised in the challenge. See Michael C Dorf, "Facial Challenges to State and Federal Statutes" (1994) 46 Stan L Rev 235.

the third branch may have some utility by offering an analytical mechanism to recognize claimant-specific consequences unrecognized elsewhere. The concept of as-applied challenges, however, has been rejected in Canada.[165]

Finally, it is worth noting that any suggestion that particular expression should be treated differently than other expression runs up against the long-standing prohibition against content-based distinctions.[166] It is important to recognize, however, that content neutrality actually materializes in two distinct forms: subject matter neutrality (not discriminating between commercial expression and political expression, for example) and viewpoint neutrality (not discriminating between prochoice and prolife advocates, for example). The experience with section 2(b) suggests that the Court has long gotten over subject matter distinctions and that this is no longer a serious concern. Viewpoint discrimination, however, should be guarded against, even though the Court has strayed on this as well.[167]

CONCLUSION

It is surely ironic that Chief Justice McLachlin, who has been one of the most ardent critics of differentiated review standards under section 1,[168] is now ostensibly comfortable with the Court's deferential approach to low value speech, including commercial advertising,[169] yet she appears deeply alarmed by its approach to high value speech like political expression. For instance, the Chief Justice and Justice Major, in their dissenting reasons in *Harper,* implored their colleagues to recognize that "political speech … is the single most important and protected type of expression" under the *Charter.*[170] What that plea could accomplish, however, was severely limited within the framework now employed by the Court: There was no mechanism to recognize the special value they—and the Court—have ascribed to political speech under section 1, including through a higher standard of review. I hope that this paper has suggested a remedy to that dilemma and the one with which I began: When not all expression is equally worthy of protection, not all expression should be equally protected. It is a conclusion that is as simple as it is obvious.

Though the full impact of the methodology proposed here is beyond the scope of this short paper, the most obvious implications are clear. In the realm of political expression, several of the Court's recent precedents would have been decided differently under stricter scrutiny. It is doubtful, for example, that the legislation in *Bryan* could fulfill the requirement of having a surpassing importance or even that the ban was rationally connected to the objective when so many alternative media sources could provide the

165. *Rocket, supra* note 1 at para 45. See also *Montréal, supra* note 137 at para 172, Binnie J ("The *Oakes* test … requires the Court to determine whether the means chosen are proportionate to the legislative objective, not what the effects of the infringing law are in the case of a particular accused. If it were otherwise, a law could be valid in some situations and not others, creating an unpredictable patchwork").

166. *Irwin Toy, supra* note 2 at para 49.

167. See earlier discussion regarding viewpoint discrimination in *Keegstra* at note 147, above.

168. *Lucas, supra* note 140 at para 115.

169. *JTI-Macdonald, supra* note 127 at para 68.

170. *Harper, supra* note 10 at para 11.

public with the targeted information.[171] It is also doubtful that the limits in *Harper* could be held to be minimally impairing. That said, it is difficult to assess such questions in isolation. The precise contours of one tier as compared to another are difficult to explain without a more detailed analysis and I leave for another day—and another paper—the question of how precisely to animate the particular standards proposed here. It also bears noting that I have not discussed how other categories of expression, including, for example, artistic expression and press freedoms, should be adjudicated under this new methodology. Though I will resist the temptation to offer any firm conclusions in the absence of a more rigorous analysis, the suggested approach should not come as a surprise: A purposive interpretation of section 2(b) must guide any determination as to the level of scrutiny to which limits on such categories of expression will be subject.

In an essay so focused on the legacy of a particular case, it is perhaps worth returning to it in closing. Justice McIntyre, in his often-overlooked dissent in *Irwin Toy*, concluded that the Court's decision to uphold limits on advertising to children "represent[ed] a small abandonment of a principle of vital importance in a free and democratic society."[172] He further observed: "Our concern should be to recognize that in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not lightly take a step in that direction, even a small one."[173] Though I would suggest that Justice McIntyre was likely too alarmist, his point nonetheless resonates. The result of steps taken by the Court over the last two decades has been to dilute the protections guaranteed by section 2(b).

It is time then to consider taking a step back.

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171. On 13 January 2012, after this article had been completed, the Minister of State for Democratic Reform announced—via Twitter, no less—that the government would seek to repeal the section of the *Canada Elections Act* that had been unsuccessfully challenged in *Bryan*. The Minister's explanation was telling: "The ban, [enacted] in 1938, does not make sense with widespread use of social media and modern communications technology." Notably, he added in another tweet that "Paul Bryan should be acknowledged for his advocacy on this issue." Tim Uppal's Twitter Feed (13 January 2012), online: <https://twitter.com/#!/MinTimUppal>. Just a few months earlier, the Chief Electoral Officer of Canada, in a report to Parliament, had advised that "the growing use of social media puts in question not only the practical enforceability of the rule, but also its very intelligibility and usefulness in a world where the distinction between private communication and public transmission is quickly eroding. The time has come for Parliament to consider revoking the current rule." *Report of the Chief Electoral Officer of Canada on the 41st General Election of May 2, 2011* (Ottawa: Elections Canada, 2011) at 49. See also Canada Elections Act, SC 2000, c 9, s 329 ("No person shall transmit the result or purported result of the vote in an electoral district to the public in another electoral district before the close of all of the polling stations in that other electoral district").

172. *Irwin Toy, supra* note 2 at para 104.

173. *Ibid.*

ARTICLE

NET-NEUTRALITY REGULATION IN CANADA: ASSESSING THE CRTC'S STATUTORY COMPETENCY TO REGULATE THE INTERNET

By Jeff Miller*

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INTRODUCTION

Established in 1976, the Canadian Radio-television and Telecommunications Commission (CRTC) was conceived as an administrative body concerned with the maintenance of a distinctive Canadian culture and the fostering of a competitive environment for the development of a strong domestic telecommunications industry. Moreover, it was to serve as a regulatory tool to ensure the dissemination of telecommunications and broadcasting services and technologies to all Canadians in a manner that was affordable and reliable.[1] While its initial regulatory purview consisted principally of telephone and broadcasting media, technological advances in the years since its creation have led to new technologies that use these two basic services as a technical foundation, but are distinct in their operations and the content that they provide. Among these, the internet can probably be said to have had the most profound impact on the landscape of mass communication in Canada.

The internet is distinct from prior electronic means of communication for three reasons. First, it is a decentralized medium of mass communication, both in its technical form and in its ownership structure. Unlike broadcasting, the internet does not disseminate its content from a restricted number of hubs. There are no significant points in its architecture from where it can be centrally organized and ownership of the internet and its content is highly dispersed. Second, it is user-centric. In contrast to the mono-directional nature of traditional broadcasting and the single-use function of telephones, the internet is interactive and malleable in its form. Third, the content of the internet is beyond the capacity of any one jurisdiction to effectively regulate.[2] The networks which form the substructure of the internet are transnational in scope. The origins of the internet as a United States Department of Defence initiative in the late 1960's to

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1. CRTC, *CRTC's role in regulating broadcasting and telecommunications systems, online:* <http://www.crtc.gc.ca/eng/backgrnd/brochures/b29903.htm>.
2. McTaggart, Craig, "Net Neutrality and Canada's Telecommunications Act" (Paper prepared for the Fourteenth Biennial National Conference on New Developments in Communications Law and Policy, Law Society of Upper Canada, Ottawa, 25-26 April 2008) [unpublished] at 10-7.

create a computer network capable of surviving catastrophic nuclear attacks is reflected in its current form as highly dispersed and liberated from dedicated infrastructure for its operations. This is unlike traditional telephony and broadcasting media that rely on fixed, central production and transmission infrastructure that is easily subjected to regulation.

As the prevalence of the internet as a form of mass communication has increased, so have calls for the application of regulations to preserve the openness and integrity of the internet in its current form.[3] While it is not practical for the nature of the content transmitted across the internet to be regulated, the operation of the internet across existing telecommunications infrastructure means that the treatment of this information by telecommunications operators can theoretically be subject to regulation. Proposals for so-called "net-neutrality" regulation have emerged which seek to place constraints on the ability of telecom network operators to either constructively or destructively interfere with data traffic on their networks. This proposal has gained significant traction in North America and, in particular, the United States, where the Federal Communications Commission (FCC) has acknowledged the vital importance of such regulation in protecting the essential nature of the internet.[4] In Canada, while public support is strong for net-neutrality regulation, the CRTC has yet to seriously consider it as either necessary or effective. Though this stance is partially informed by the CRTC's established deference to the market in regulatory matters relating to new technologies, it is also influenced by a pervasive belief within the commission that the organization lacks the legal authority to regulate the internet in this way.[5] The CRTC's primary constating statute, the *Telecommunications Act,*[6] makes allowances for the regulation of emergent communications technologies not contemplated when the act was written.[7] Nonetheless, the commission has consistently taken a narrow view to this latitude, characterizing the decision that it would have to make in this instance as one of law that it does not have the capacity to assess. This position has been bolstered by a recent American court decision which found that the FCC did not have the legal jurisdiction to implement net-neutrality regulations.[8]

This paper takes the position that it is likely that the CRTC does indeed have the legal jurisdiction to make such a regulatory decision. This will be evidenced by the Canadian courts' historically deferential approach to the CRTC on matters of substantive review. Through an analysis of the relevant issues and of the case law concerning the regulatory breadth of the CRTC, this paper will demonstrate that the implementation of net-neutrality regulations would likely be treated by the courts as being within the commission's legitimate mandate.

The paper will pursue this argument by first outlining the two theoretical perspectives which will guide its structure: Dialogue Theory and Law and Economics. These perspectives contextualize the legal, economic, and social factors that define the purpose and operation of the CRTC. It will then move into an analysis of the role of the CRTC in regulating Canada's telecommunications industry and a discussion of the issue of net-

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3. Barratt N & Shade LR, "Net neutrality: Telecom policy and the public interest" (2007) 32:2 Canadian Journal of Communication 295 at *296.*
4. Julius Genachowski, FCC Chairman, *Remarks on preserving internet freedom and openness*, online: <http://www.openinternet.gov/speech-remarks-on-preserving-internet-freedom-and-openness.html>.
5. CRTC, *Public Notice CRTC 1999-197*, online: < http://www.crtc.gc.ca/eng/archive/1999/pb99-197.htm>.
6. *Telecommunications Act*, SC 1993, c 38.
7. *Ibid, s* 2 "telecommunications" &"telecommunications service".
8. *Comcast Corporation v. Federal Communications Commission and United States of America*, 08-1291 (DC Cir Ct App 2010).

neutrality. Subsequently, the paper will delve into the general attitudes displayed by the judiciary towards the CRTC on matters of substantive review through the analysis of four significant cases. Finally, the principles and positions elicited through these cases will be applied to the net-neutrality issue to ascertain whether the courts would likely treat such regulation as being within the purview of the commission.

I. THEORETICAL PERSPECTIVES

This paper's arguments will be informed by two theoretical perspectives: Dialogue Theory and Law and Economics.

A. Dialogue Theory

First proposed by Peter Hogg and Alison Bushell, Dialogue Theory conceives of the legislative and judicial branches as being engaged in a dialectical relationship with one another.[9] This relationship causes each body to be responsive to the actions of the other in an ongoing cycle of statute development and judicial rulings. Both parties work mutually to guide legislation toward effectively addressing policy concerns while maintaining fidelity to the precepts of the Constitution. Hogg and Bushell assert that Dialogue Theory is an important normative underpinning of the ability of the courts to engage in judicial review.[10] While this statement was made in regard to the review of legislation that engages *Charter* rights, the general notion that judicial review is part of an ongoing process of dialogue between the two branches serves to legitimate the substantive review of administrative decisions as well.

This theoretical perspective provides a foundation on which the essential nature of this paper's thesis can be understood. The question of whether the CRTC has authority to enforce net-neutrality regulation is premised, in part, on the ambiguity of the articulations made by the judiciary on the breadth of the commission's authority. While the CRTC has adapted its practices to accommodate the limits defined by the courts, the absence of clarity in the courts' communications as to how internet regulation is likely to be treated has prevented the CRTC from confidently moving forward on this endeavour. In this instance, the so-called dialogue between the courts and a delegated decision-making authority has yielded uncertainty due to the absence of a clear signal from the courts to which the CRTC could respond. Despite this lack of a definitive signal, however, this paper will argue that the CRTC already has the legal competency to enter this new regulatory arena.

B. Law and Economics

The paper will also employ theoretical assumptions originating from the Law and Economics school of thought. Drawing from the work of Richard Posner, the Law and Economics theory yields valuable insight as to the relationship between a society's legal structures and its economic practices. It is founded on the assumption that the principal dynamic underlying the evolution of the law is the accommodation and institutionalization of the dominant economic system.[11] The means by which the law is expressive of economic concerns is both direct and indirect. In the areas of law which directly touch upon matters of explicit economic concern, such as contracts and torts,

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9. Peter Hogg and Allison Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75.
10. *Ibid* at 79.
11. Richard A Posner, *Economic Analysis of Law*, 6th ed (New York: Aspen Publishers, 2003) at 3.

this relationship is obvious. But in legal disciplines more grounded in social or political regulation, this relationship is also evident, albeit more implicitly, as a result of the social norms and values perpetuated by the hegemonic economic structure finding expression in judicial decisions on these matters. For example, the tendency of the courts to adopt individualist and market-based solutions to questions of economic concern can be said to reflect the progression of Canada's political economy towards market liberalism.

This theoretical perspective will be used in this paper to explain the approach of the courts towards the substantive review of CRTC decisions over time. While the courts have traditionally granted significant deference to the CRTC, this deference has nonetheless been constrained by the interest of the courts in maintaining the primacy of the market as the principal ordering mechanism in this important industrial sector.

II. THE CRTC AND NET-NEUTRALITY

A. The CRTC: Background

The CRTC was established in 1976 to consolidate the various federal regulatory bodies which had jurisdiction over electronic communication media. Since 1993, its authority has been vested in two federal acts: The *Broadcasting Act* and the *Telecommunications Act*. For the purposes of net-neutrality regulation, the latter act is the most relevant. The 2010 Supreme Court of Canada decision in *Re Broadcasting Act*[12] effectively ruled out the possibility of finding justification in the *Broadcasting Act* for regulations concerning the internet.

Section 7 of the *Telecommunications Act* outlines the broad policy objectives pursued by the Act and, by extension, the CRTC, in the field of telecommunications. These objectives are premised on the acknowledgement by Parliament that the telecommunications industry is a vital component of the integrity and maintenance of Canadian sovereignty: "...telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty."[13] Academics, such as the eminent Canadian economic historian, Harold Innis, have asserted that the historical importance of the communications industry to Canada has been a function of the country's highly dispersed population and close proximity to the United States, the global cultural hegemon.[14]

12. *Broadcasting Act (Can.) (Re)*, [2010] FCJ no 849 (QL).
13. *Telecommunications Act, supra* note 6 at s 7.
14. Innis, Harold, *Essays in Canadian Economic History* (Toronto: University of Toronto, 1956), edited by Mary Q Innis at 220.

Section 7 enumerates nine specific objectives.[15] These goals can be distilled into two broad overarching themes: (i) the effective provisions of telecommunications services to the consumer, and (ii) the facilitation of a robust domestic telecommunications industry. On the first theme, subsections (a), (b), (h), and (i) empower the CRTC to promote the development of consumer services that are affordable, reliable, respective of privacy and social needs, and which provide reasonable levels of service to all areas of Canada's geography. On the second theme, subsections (a), (c), (d), (e), and (g) direct the CRTC to act to preserve domestic control over the industry, enhance the national and international competiveness of the sector, and stimulate research and innovation. Section 7 grants regulatory jurisdiction to the CRTC to ensure that these interests are met, but constrains this jurisdiction by way of subsection (f), which asserts the intention of Parliament "...to foster increased reliance on market forces for the provision of telecommunications services." Regulation is intended to be minimalistic and focussed on instances where the market is patently unable to achieve the desired ends of the Act.

The regulatory tools that the CRTC is vested with to implement these objectives are various, ranging from the setting of rates for consumer services, the granting of licenses to telecommunications operators, and the creation of guidelines for the operation of these companies.

Although the internet as a mode of popular communication was not contemplated at the time of the constating statute's formation and is therefore not mentioned specifically in the Act as a regulated medium, section 7 grants flexibility to the CRTC to discern the appropriate regulations to be applied to new technologies. Putting aside, temporarily, the question of whether the constating statute grants sufficient flexibility to enforce net-neutrality, academics have proposed that the technical grounds for the enforcement of net-neutrality can be found in section 36 of the Act.[16] Section 36 provides an explicit statement against the ability of infrastructure operators to interfere with the content transmitted over their systems on behalf of the public.[17]

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15. *Telecommunications Act, supra* note 6 at s 7:

    7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

    (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

    (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

    (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

    (d) to promote the ownership and control of Canadian carriers by Canadians;

    (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

    (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

    (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

    (h) to respond to the economic and social requirements of users of telecommunications services; and

    (i) to contribute to the protection of the privacy of persons.

16. Adeyinka, Alexander J, "Avoiding 'dog in the manger' regulation – A nuanced approach to net neutrality in Canada" (2008-2009) 40 RD *Ottawa Law Review 1.*

17. *Telecommunications Act, supra* note 6 at s 36:

    36. Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.

B. Net-Neutrality Defined

Historically, telephone networks were heavily regulated in North America by national regulators so as to ensure adequate competition and to foster innovation in the development of new technologies. In Canada, the CRTC and its predecessor agencies used provisions allowing for the prohibition of network operators to interfere with the content moving across their systems to create a "neutral" environment for the growth of new enterprises and technologies.[18] Under this regulatory model, incumbent telecommunications operators such as BCTel and Bell Canada were prevented from discriminating against traffic on their proprietary networks belonging to smaller operators who did not have the resources to construct networks of their own. This promoted diversification in Canada's telecom industry and prompted the development of novel voice and data services by these smaller industry players.

With the proliferation of the internet, however, network operators have called for the restriction of these provisions to solely voice traffic.[19] Voice traffic is in contrast to data traffic, which has expanded exponentially since the popularization of the internet in the late 1990's. Telecommunication operators have argued that this increase has severely strained the capacity of their networks and has diminished the quality of service that they can provide. They have argued that the traditional network neutrality rules that have applied to voice communications are functionally and legally incompatible with data communications.[20] Unlike voice, data traffic is heterogeneous, meaning that it is comprised of multiple types of transmissions which can be prioritized, such as worldwide web traffic and traffic emanating from file-sharing applications like BitTorrent. They also argue that current laws do not grant sufficient discretion to regulatory bodies to regulate data transmissions in the same way as voice transmissions.[21] In regards to the CRTC's competency on this matter, they note that such regulation would, in fact, contradict the broad objectives of the CRTC as enumerated in section 7 of the *Telecommunications Act.* Specifically, they point to subsections (b) and (f), which address consumer interests and regulatory minimalism, respectively.[22]

C. Methods of Regulating Data Traffic

Without a definitive statement from regulators indicating an intention to extend the traditional neutrality provisions to cover data services, four options have emerged which enable network operators to influence the traffic on their networks with the goal of making them more efficient.[23]

The first involves the outright blocking or degradation of content and applications using the network. The possibility of this occurring was made apparent in 2005, when TELUS blocked public access to the then-striking Telecommunications Workers Union's (TWU) website because it contained pictures depicting company employees crossing the union's picket lines.[24] TELUS justified this action by arguing that the display of such pictures jeopardized the safety of those depicted. While this is an extreme example of an operator directly impinging on the content transmitted over a network, it nonetheless indicates that it is well within the technical capacity of an operator to do so and that operators consider this form of interference as a valid option to deploy on their networks.

18. Barratt, *supra* note 3 at 297.
19. Adeyinka, *supra* note 16 at 18.
20. Barratt, *supra* note 3 at 296.
21. McTaggart, *supra* note 2 at 10-28.
22. Barratt, *supra* note 3 at 297.
23. Adeyinka, *supra* note 16 at 14.
24. *Ibid* at 18.

The second option involves the implementation of discriminatory network management practices. This option concerns the preferential treatment of specific classes of data. Without a definitive stance on net-neutrality by the CRTC, Bell Canada has already implemented a technology called Deep Packet Inspection (DPI) to interrogate and classify data on its network. According to Bell Canada's submissions to the CRTC, this technology is specifically targeted at data produced by peer-to-peer file sharing programs, which Bell Canada and other major networks argue are consuming a disproportionate share of network bandwidth relative to the small number of customers actually using it.[25] Once identified, the speed at which this data is transferred over the network is reduced to accommodate conventional internet traffic. Comcast, the largest provider of internet services in the United States, has also implemented this technology on their network.[26]

The third option involves the prioritization of a network operator's own applications and services on its network, thus reducing the amount of bandwidth consumed by non-proprietary applications. It is suspected that this practice has already been adopted by Shaw Communications, which Vonage Canada has accused of "de-throttling" its voice over IP (VOIP) solution in favour of Shaw's own service.[27]

The fourth option that would enhance the ability of network operators to manage their networks is the creation of a tiered service structure. Although this model has not yet been pursued by network operators and internet service providers (ISPs) in Canada, it would allow these companies to exert the greatest control over how their networks are utilized and would be the most lucrative of the four options. Alexander Adeyinka, Vice President of Regulatory Law & Policy at Rogers Communications Inc., proposes that this option would alter the character of the internet.[28] While the basic structure would remain the same, specialized content would be compartmentalized. The provision of the internet to consumers would resemble the way in which cable television is currently provided; access to certain areas of the internet and higher bandwidth utilization caps would be contingent on what tier a customer subscribed to. Davina Sashkin, noted American communications lawyer, remarks that several American telecommunications providers are already actively considering the creation of such a "two-tiered" model for internet delivery whereby content providers would be charged additional fees to have their content made available on the higher speed broadband tier.[29]

D. Arguments in Favour of Net-Neutrality

Proponents of net-neutrality argue that the internet has only developed into its current form because of the now-waning assumption that data traffic was protected by the traditional network neutrality principle. They argue that the assumed neutrality of data networks has facilitated the innovation and entrepreneurship which has come to typify the internet.[30] With network operators being unable to intervene in the content or form of data traffic, no party has been able to exert holistic control over the development of the medium. Unlike more centralized media such as television and radio, where ownership and editorial control can be concentrated, the internet is open to anyone as a platform for communication and innovation. Innovative companies such as Google have only been able to emerge because of the absence of entry barriers, such as expensive

25. *Ibid* at 19
26. *Comcast, supra* note 8.
27. Adeyinka, *supra* note 15 at 15.
28. *Ibid.*
29. Sashkin, Davina, "Failure of imagination: Why inaction on net neutrality regulation will result in a de facto legal regime promoting discrimination and consumer harm" (2006) 15:1 *CommLaw Conspectus* 261 at 265.
30. *Ibid* at 266.

infrastructure or the domination of restrictive ownership conglomerates. Therefore, proponents of network neutrality argue that the continued evolution of the internet as a tool with seemingly infinite applications is driven by the absence of established structures otherwise prohibited by network neutrality regulations.[31]

Proponents also argue that the regulation of data networks by their operators would constrain innovation by positioning network operators as the principal architects of the internet.[32] With only a handful of operators controlling the networks over which the internet predominantly exists, decisions as to the further development of the internet and the applications on it would be made by a concentrated set of interests.[33] For innovations to be successful in this environment, they would have to accord with the interests of the operators in order to receive favourable placement and treatment on the internet. The interests of internet users would still be relevant, albeit filtered through those of the operators. Thus, the growth of the internet would likely be less spontaneous and more homogenous, with spaces for innovation and niche interests being reorganized to agree with the profit motive of the operators.

Proponents of net-neutrality have also argued that the advantages of deregulation proposed by network operators are, in fact, contradictory. Specifically, the arguments made by operators that deregulation would promote greater innovation in content and delivery services are considered by proponents to be untrue for the aforementioned reasons.[34] Proponents contend that the concentration of control and ownership, which would likely occur in the case of a deregulated internet, would suppress innovation and that efficiency arguments are a distraction from the underlying interest of operators to avoid the expense of having to increase network capacity. Sashkin argues that the absence of public regulation would facilitate the emergence of a private regulatory paradigm in which network operators would self-regulate. Industry self-regulation would exclude interests contrary to those of the operators and jeopardize the free-market character of the internet otherwise protected by ensuring that network operators remain neutral entities in the transmission of information.[35]

E. The CRTC's Position on Net-Neutrality

While the CRTC currently lacks a coherent policy position on net-neutrality, it can be deduced from the commission's decisions on internet regulation and policy positions on the internet, generally, that it presently does not favour regulation in this area. This position stems, in part, from the historical predilection of the commission to defer to market forces and the increasing prevalence of a neo-liberal ideology in government that eschews economic regulation.[36] But, also contributing to this position is a belief held by the CRTC that its constating legislations do not grant it the jurisdiction to regulate in the way required to enforce net-neutrality.

This sentiment was expressed in its well-known "New Media" policy paper released in 1999.[37] In it, the CRTC defined its likely jurisdiction as covering only audio and visual services on the internet. This notably excluded primarily alphanumeric services. Given that the bulk of services over the internet at that time were alphanumeric, this lent itself

31. *Ibid.*
32. *Ibid* at 276.
33. *Ibid* at 278.
34. Barrett, *supra* note 3 at 297.
35. Sashkin, *supra note 29 at 298.*
36. Barrett, *supra note 3 at 296.*
37. CRTC, *supra note 5.*

to a policy orientation that was decidedly passive and which remains unmodified today, even despite the increasing availability of audio-visual media online and the opportunities which this would theoretically present for regulation. This limited definition was in line with the CRTC's organizational competency in regulating solely audiovisual mediums, but it was also crafted in response to previous judicial reviews of CRTC decisions, which the board believed limited its discretion to interpret the constating statutes. Their primary concern was that the section 36 constraint on the ability of network operators to interfere in the traffic crossing their networks could only be activated in egregious circumstances, such as where the operator deliberately blocks specific content.[38] This reasoning is based on the type of network neutrality traditionally enforced on voice services. Due to the homogenous nature of voice traffic, operators can only regulate it in a binary fashion: it is either admitted or rejected. Data traffic, conversely, is more diverse and is susceptible to more forms of operator regulation as discussed previously, thus making it unsuited to this rudimentary conception of network interference.

This orientation was operationalized by the CRTC in its 2008 decision on an application by the Canadian Association of Internet Providers (CAIP) against Bell Canada.[39] The subject of this application concerned a complaint regarding Bell Canada's deployment of traffic-shaping technologies on its network. CAIP argued that this technology discriminated against legitimate voice-over IP and file-sharing applications that used the network.[40] They advanced the contention that such intervention by an operator in its network was prohibited under section 36 without explicit approval from the CRTC. In its ruling, the CRTC did not provide direct approval of Bell's measures. Instead, they determined that section 36 of the *Telecommunications Act* was not engaged in this instance for two reasons. First, this action did not entail the exercise of editorial control by Bell over the content on its network and, second, the measures were not targeted at excluding the ability of particular applications to access the network.[41] These conditions represent the extreme end of traffic regulation and prevent the regulation of increasingly popular discrete modes of network regulation, such as Bell's DPI technology, by section 36. This narrow interpretation of section 36 was likely founded in the CRTC's belief that it lacked the statutory authority to interpret the legislative intent of the section as it applied to these more discrete, albeit similarly adverse, means of network management. This ruling was not appealed and, to date, no similar cases have appeared before the commission.

This restrained interpretation of section 36 of the *Telecommunications Act* found further justification in the April 2010 US District of Columbia Circuit Court of Appeal ruling in *Comcast v. FCC*.[42] The subject of this case was a decision made by the American equivalent to the CRTC (the FCC), preventing Comcast from deploying the same traffic-shaping technology that Bell Canada used in the CAIP decision. Appealing this decision to the courts, Comcast argued that the FCC did not have the legal jurisdiction to expand existing neutrality provisions protecting voice traffic to encompass data traffic as well. The court agreed with this statement and rendered FCC regulations targeted at the enforcement of net-neutrality *ultra vires*.[43] While the constating statutes of the FCC and CRTC differ, this case has nonetheless served as a signal to the CRTC of the perils it may potentially face if it pursues the enforcement of net-neutrality.

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38. Adeyinka, *supra* note 16 at 40.
39. CRTC(2), *Telecom Decision CRTC 2008-108*, online: <http://www.crtc.gc.ca/eng/archive/2008/dt2008-108.htm>.
40. *Ibid* at para 13.
41. *Ibid* at para 5.
42. *Comcast, supra* note 8.
43. *Ibid* at para 36.

III. TREATMENT OF THE CRTC BY THE COURTS

Historically, the courts have granted the CRTC broad deference to make decisions and regulations concerning matters under its jurisdiction. However, the question of what constitutes the commission's legitimate jurisdiction is a question on which the courts have yielded mixed results. In this section, four cases will be used to chart the general attitudes of the court in substantive review proceedings concerning the regulatory purview of the commission. Specifically, the courts' treatment of the four factors enunciated in the *Dunsmuir*[44] test for substantive review will be assessed: (i) the presence or absence of a privative clause, (ii) the expertise of the administrative body, (iii) the purpose of the specific provision, and (iv) the nature of the question as being one of fact or law.[45] This will assist in determining whether the courts would approve of the use of section 36 of the *Telecommunications Act* to justify the enforcement of net-neutrality.

A. *Canadian Broadcasting Corp. (CBC) v. Metromedia CMR Montreal ("CBC")*

The first case is a Federal Court of Appeal decision called *Canadian Broadcasting Corp. (CBC) v. Metromedia CMR Montreal*.[46] It concerns an appeal of a CRTC decision wherein the commission rejected the CBC's application for an additional radio station licence in the Montréal market. While the subject matter of this case does not deal with a question of jurisdiction directly, it does serve to outline the general attitude of the courts on two issues that are relevant to the substantive review process as adopted in *Dunsmuir*: expertise and the privative clause.

On the issue of expertise, the Court noted the highly specialized role that the CRTC had in regulating the telecommunications industry in Canada.[47] Recognizing the importance of this industry to the economic and cultural vitality of the country, the Court acknowledged that the expertise required to make decisions on matters within this area required a high level of expertise which the courts did not possess. The highly nuanced nature of the commission's decisions that often entailed the balancing of important competing factors, namely the goods of the public and of the industry, necessitated that these decisions be vested in an organization which had the capability to gather and assess the broad range of facts relevant to the decision. As well, the position of the CRTC as promoting cultural and economic nationalism meant that its activities were inflected by particular ideological elements which were beyond the competency of the courts to objectively assess.[48] Because of the significant weight that courts often assign to expertise in the *Dunsmuir* approach, the highly specialized nature of the CRTC's expertise has resulted in a historical deference towards the commission in instances of judicial review.

On the issue of the privative clause, the Court in *CBC* noted the peculiar absence of a negative privative clause in the *Telecommunications Act* shielding the proceedings of the CRTC from judicial review.[49] They noted that without the explicit intention of Parliament, communicated through the inclusion of a negative privative clause, courts have been considerably less likely to grant such broad deference to administrative bodies. Indeed, the inclusion of a positive privative clause in section 63 of the Act invites the characterization of the CRTC as a quasi-judicial body and thus exposes it to a more

44. *Dunsmuir v New Brunswick*, [2008] 1 SCR 190.
45. *Ibid* at para 64.
46. *Canadian Broadcasting Corp (CBC) v Metromedia CMR Montreal*, [1999] FCJ No 1637 (QL).
47. *Ibid* at para 3.
48. *Ibid* at para 6.
49. *Ibid* at para 3.

rigorous assessment by the judiciary. The Court reconciles this apparent contradiction by emphasizing, once again, the distinctive nature of the expertise possessed by the commission. The weight of this expertise extends to questions of law as well as fact, thereby limiting the viability of section 63 as a successful avenue of appeal.

B. *Barrie Public Utilities v. Canadian Cable Television Association ("Barrie")*

The second case is *Barrie Public Utilities v. Canadian Cable Television Association*.[50] The 2003 Supreme Court of Canada decision regards a determination by the CRTC that it has the jurisdiction to compel utility operators to accept the connection of telecommunications lines to their transmission poles. The CRTC based this finding on section 43(5) of the *Telecommunications Act* which gives the CRTC jurisdiction over "the supporting structure of a transmission line."[51] The commission interpreted this to extend to support structures of all types, not just those specifically used to support telecommunications lines. The Court found that the CRTC did not have such jurisdiction and overturned the original CRTC decision involving the litigants, which was based on this false determination.[52] This case is significant because it demonstrates an important limit to the deference that the courts are willing to grant to the CRTC.

In reaching this verdict, the Court applied the four-factor *Pushpanathan*[53] test, which was the accepted substantive review model at the time, to determine the degree of judicial deference that the CRTC was warranted. On the first factor, the presence or absence of the negative privative clause, the Court did not find one.[54]

On the second factor, expertise, the Court ruled that the CRTC lacked the competency to decide on the question of what constituted a supporting structure for the purposes of the *Telecommunications Act*.[55] While the Court acknowledged the Federal Court of Appeal's characterization of the CRTC's expertise in *CBC*, the Supreme Court held that the question in this case exceeded the commission's core expertise in telecommunications technology. Because utility support structures used for purposes other than supporting solely telecommunications infrastructure are sites of convergence for multiple regulatory arenas, such as electrical and gas, the CRTC's expertise in telecommunications was insufficient to regulate in the interests of these sectors as well.

On the third factor, the purpose of the provision, the Court ruled that section 43(5) did not induce the commission to make a decision that the character of which was polycentric.[56] According to *Pushpanathan*, polycentricity is a condition of administrative decision-making whereby the administrative actor balances multiple interests in making decisions. The Court ruled that section 43(5) does not, in fact, empower the CRTC to decide on what constitutes a "supporting structure"; it does not vest the CRTC with a particular duty that requires the consideration of competing interests prior to its application. Rather, the Court interprets the principal function of the section as granting adjudicative authority to the CRTC to hear disputes concerning the access of telecommunications companies to shared telecommunications infrastructure. The duty explicitly given to the CRTC by this provision is to hear these disputes. The implementation of the commission's discretion as to the balancing of competing interests

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50. *Barrie Public Utilities v. Canadian Cable Television Association*, [2003] SCJ No 27 (QL).
51. *Telecommunications Act, supra* note 6 at s 43(5).
52. *Barrie, supra* note 50 at para 43.
53. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.
54. *Barrie, supra* note 50 at para 11.
55. *Ibid* at paras 12-16.
56. *Ibid* at para 17.

occurs subsequent to this and is influenced by the relevant provisions engaged in the adjudicative process.

On the fourth factor, the nature of the problem, the Court determined that it is a "purely legal" question.[57] What constitutes the "supporting structure of the transmission line" is an interjurisdictional decision that requires input from stakeholders from beyond the telecom sector. While Justice Gonthier notes that "...even pure questions of law may be granted a wide degree of deference where other factors suggest the legislature so intended," the Court determines that the interjursidictional nature of this decision would place it beyond the legitimate purview of the CRTC.[58]

As a result of this test, the Court determined that a correctness standard was appropriate.[59] On this basis, the original decision was overturned.

C. *Re Broadcasting Act*

The third case is more recent, having been decided in 2010 by the Federal Court of Appeal. It is entitled *Re Broadcasting Act*[60] and was a reference case submitted to the Court by the CRTC on the issue of whether the commission could classify network operators and ISPs as broadcasters for the purposes of the CRTC's other constating statute, the *Broadcasting Act*.[61] The CRTC's ground for this proposal was that, since the operators support the transmission of television programs through their networks, they are serving a function analogous to broadcasters as defined by the Act. The case is significant because it deals with a scenario similar to that at issue in the net-neutrality issue; namely, the attempt to use existing statutory parameters to classify emergent communications technologies such as the internet.

In this case, the Court ruled that the CRTC cannot subsume the internet under the regulatory parameters of the *Broadcasting Act* because the Act deals with fundamentally dissimilar subject matter. Here, the Court recognizes that the principal distinguishing trait of the internet is the interactive user-experience that it facilitates.[62] This stands in stark contrast to the mono-directional nature of broadcasting, whereby the user passively receives information transmitted from a central source. Despite the flexibility contained within both of the CRTC's constating statutes to enable it to respond to emergent technologies, the Court emphasizes that it will only permit the extension of the commission's regulatory purview where the type of regulation is supported by a concrete statutory foundation.[63]

D. *Bell Canada v. Bell Aliant Regional Communications ("Bell")*

In the fourth and final case, *Bell Canada v. Bell Aliant Regional Communications*,[64] the Supreme Court of Canada provides timely insight into the type of situation where the CRTC can establish new regulatory tools not specifically contemplated by the constating statute. The dispute at issue concerns the legal jurisdiction of the CRTC to use funds collected from a "deferrals" account paid into by telecom carriers for the purposes of

57. *Ibid* at para 18.
58. *Ibid* at para 18.
59. *Ibid* at para 19.
60. *Broadcasting Act (Can.) (Re), supra* note 12.
61. *Broadcasting Act,* SC 1991 c 11.
62. *Broadcasting Act (Can.) (Re), supra* note 12 at para 59.
63. *Ibid*.
64. *Bell Canada v Bell Aliant Regional Communications,* [2009] SCJ No 40 (QL).

subsidizing broadband internet access for targeted disadvantaged groups. On application of the *Dunsmuir* test, the Court determined that a reasonableness standard applied and ruled that the decision to create this new regulatory mechanism was reasonable.

On the questions of the privative clause and of expertise, respectively, the Court found a positive privative clause and determined that the CRTC possessed a higher degree of competency to evaluate this matter than the courts.[65] The Supreme Court's reasoning on both of these considerations was consistent with that deployed by the Federal Court of Appeal in *CBC*.

On the question of the purpose of the governing statutory provision for this regulatory tool, the Court agreed with the CRTC that the relevant provision of the *Telecommunications Act* was section 7(b), which empowers the commission to ensure the "reliable and affordable" provision of telecommunications services to consumers.[66] The Court also agreed with the commission's assessment that section 7(b) grants it broad authority to balance competing interests in the fulfillment of the objectives put forth by this section. Here, Justice Abella adopts the CRTC's statement in Telecom Decision CRTC 94-19 that "The Act... provides the tools necessary to allow the commission to alter the traditional manner in which it regulates" and interprets a clear intention on the part of Parliament to confer broad authority on matters such as the present one on the CRTC.[67]

Finally, on the inquiry as to the nature of the problem, the Court determined that it was a mixed question of fact and law.[68] The Court reasoned that section 7(b) necessarily gave the commission authority to devise new regulatory tools not specifically provided for in the wording of the statute and that the creation of these tools was contingent on an expertise which was only held by the CRTC.[69] The Court goes on to distinguish this case from *Barrie* by pointing to the fact that the present question is not one purely of law and that even if it was, it deals with "...an authority fully supported by unambiguous statutory language."[70]

IV. ANALYSIS OF POTENTIAL FOR NET-NEUTRALITY REGULATION

Before engaging in an assessment of the legal feasibility of regulations protecting net-neutrality, it would be useful to briefly explain the likely reasons for the CRTC's reticence thus far in pursuing such regulation based on the principles articulated through these four cases. In particular, two principles stand out as being most likely responsible for this restraint.

First, as a matter of institutional practice, the courts have tended to restrictively interpret the constating statutes of the CRTC. The nature of the commission as having to regulate a rapidly transforming industry invalidates some of the assumptions historically employed by the judiciary in its approach to interpreting statute law. Despite Driedger's assertion that provisions are to be interpreted broadly and liberally,[71] the type of change evidenced in the telecommunications sector is incompatible with the judicial assumption

65. *Ibid* at paras 37 - 38.
66. *Ibid* at para 45.
67. *Ibid* at paras 46 & 48.
68. *Ibid* at para 38.
69. *Ibid* at para 55.
70. *Ibid* at para 50.
71. *Barrie*, *supra* note 50 at para 20.

that subject matter is largely stable and unchanging. The emergence of the internet has fundamentally altered the disposition of the industry and has caused the rapid displacement of traditional technologies and business norms.[72] Though provisions, such as section 7 of the *Telecommunications Act*, exist within the CRTC's constating statute to afford regulatory flexibility to the commission, the judiciary seems hesitant to translate this into allowances for expanded authority without a concrete basis for this regulation in existing provisions.

This trend is highlighted in *Barrie* where the Court narrowly construed section 43(5) of the *Telecommunications Act* to apply only to supporting structures used principally for telecommunications purposes. This interpretation was made in spite of the fact that there was no unambiguous specification within the provision qualifying the term "supporting structure" and the otherwise broad regulatory purview given to the CRTC by section 7. This decision does not account for the increasingly common practice of integrating telecommunications infrastructure into hybrid utility systems. Robert Leckey, a leading Canadian administrative law scholar, argues that this interpretation ignored the statutory nuances and technical facts which inflected this decision.[73] On the correctness standard established for this case, Leckey contends that the judiciary is inadequately equipped to manage the deliberate ambiguity of the act, let alone the highly technical nature of the considerations which its implementation requires.

The tendency towards restrictive interpretation is also evidenced in *Re Broadcasting Act* where the Court was averse to accommodating the regulation of television broadcasts over the internet under the *Broadcasting Act* on the grounds that the new medium was insufficiently similar to the ones specifically contemplated by the Act at the time of its formation.

The second principle affirmed through these cases that has likely impacted the CRTC's treatment of net-neutrality regulation is the tendency of the judiciary to favour neo-liberal explanations in its understanding of economic phenomena. In one of the seminal cases typifying this tendency, *RJR-MacDonald*,[74] the Supreme Court of Canada's conceptualization of the role of corporate communication and advertising in society was firmly premised in a neo-liberal understanding of economics.[75] The assertion by the Court that unimpeded corporate advertising was a public good on which educated consumer decisions could be based reflects the fundamental neo-liberal belief in the superiority of the market in determining consumption habits.[76] The restrictive interpretation of the statute in *RJR-MacDonald* denotes the historical inclination of the judiciary to defer to market forces in questions of economic allocation that go beyond the unambiguous intention of Parliament.[77]

This trend has been evidenced at various junctures in the judiciary's treatment of the CRTC's regulatory purview. As canvassed previously, the courts have historically interpreted the CRTC's constating provisions in a narrow fashion, allowing for new regulatory initiatives only where there is a concrete statutory foundation indicating an unambiguous parliamentary intention to allow them. This occurs despite the inclusion of provisions which provide for the expansion of the regulatory purview of the CRTC

72. Sashkin, *supra* note 29 at 295.
73. Leckey, Robert, "Territoriality in Canadian Administrative Law" (2004) 54:327 University of Toronto Law Journal 327 at 342.
74. *RJR-MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199.
75. Schneiderman, David, "A Comment on RJR-MacDonald v Canada (AG)" (1996) 30 UBC L Rev 165-180 at para 32.
76. *Ibid* at para 2.
77. *Ibid* at para 25.

to cover emerging technologies. It is apparent in cases such as *Re Broadcasting Act* and *Barrie* that the courts de-emphasize these expansive provisions in favour of identifying an explicit statement of parliamentary intent. This is consistent with the historical fashion in which the courts have treated statutes of an economic nature, such as the *Telecommunications Act*.

Despite the deterrent effect of these two principles, the CRTC likely does retain the authority to implement regulations enforcing net-neutrality. On conducting a substantive review of the competency of the CRTC to regulate in this manner under section 36 of the *Telecommunications Act*, the courts would likely determine that it is within Parliament's intention, as expressed through the Act, for the CRTC to do so. Since there are no prior decisions which dictate a standard of review for this particular problem, this decision would be reached on the application of the four factor test affirmed in *Dunsmuir*.

On the first factor, the presence of the privative clause, the court would identify a positive privative clause in section 63 of the Act which allows parties the right of appeal to the Federal Court of Appeal. Despite the absence of a negative privative clause providing an explicit indication of Parliament's intent for a high degree of deference to be afforded to the commission, the court would likely interpret this as it has historically done in cases concerning the CRTC – reducing it to a level of secondary importance relative to the remaining three factors.[78]

On the second factor, expertise, the court would likely determine that the problem engages the highly specialized expertise of the CRTC and is beyond the capability of the courts to decide. The issue of whether section 36 of the *Telecommunications Act* can be construed to serve as a foundation for net-neutrality regulations engages the commission's institutional expertise by requiring the CRTC to make two decisions. First, it requires the commission to engage in an assessment of the interests at stake. It must ascertain whether the interference of operators with data traffic on their networks constitutes a legitimate network management practice and, if so, whether the implications to the public outweigh the benefits of doing so. Second, the CRTC must engage in an interpretive exercise to determine whether net-neutrality regulations can be accommodated within the scope of the provision. Specifically, it must ask whether these network management practices "...influence the meaning or purpose of telecommunications carried [on the network] for the public."[79] Both of these decisions require the application of highly specialized technical and legal expertise.

While the Court in *CBC* stated that the CRTC is to be granted a wide deference by the courts in its regulatory endeavours on the basis of its highly specialized expertise, *Barrie* qualified this by deciding that, particularly on questions of law, the authority of the commission is circumscribed where it is not otherwise provided for in unambiguous parliamentary language.[80] *Barrie* can be distinguished from the present case on two grounds. First, unlike the situation in *Barrie*, the question here regarding section 36 is entirely within the regulatory domain of the CRTC. It is a question which strictly relates to matters within the gamut of telecommunications. Second, section 36 explicitly empowers the commission to apply its expertise to a particular problem. This is in contrast to *Barrie* where the Court determined that the impugned provision was principally of an adjudicative character.

On the third factor, the purpose of the particular provision, the court would likely characterize it as highly polycentric and thereby warranting a high degree of deference

78. See *CBC*, for example. *Supra* note 46.
79. *Telecommunications Act, supra* note 6 at s 36.
80. *Barrie, supra* note 50 at paras 25 and 26.

as it did in *Bell*.[81] As discussed in the previous factor, the CRTC's decision requires that it balance an array of interests in determining the relevance of such regulation to section 36. It must weigh the interests of network operators in maintaining the integrity and efficiency of their systems against the interest that the public has in a neutral internet. Because this assessment has multiple likely outcomes based on the diverse array of inputs into the decision-making process, this factor strongly pushes towards a standard of reasonableness, which lends greater deference to the decision of the commission.

On the fourth, and final, factor in the *Dunsmuir* test, the court will likely find that the CRTC is competent to decide this mixed question of fact and law. As canvassed under the second factor, the question requires that two decisions be made. The first, concerning the balancing of the competing interests is technical, while the second, concerning the accommodation of net-neutrality regulation within the wording of the provision, is legal. On questions of mixed law and fact, the court has typically granted the CRTC significant deference, as in *Bell,* for example. However, the caveat provided by the Court in *Barrie*, that the authority to determine questions of law be premised in either an explicit statutory discretion or "...where other factors suggest the legislature so intended," limits this authority somewhat.[82] The present situation would nonetheless likely warrant a high degree of deference for two reasons. First, as mentioned previously, the subject matter in the present case is clearly within the domain of telecommunications. This is in contrast to *Barrie* where the interpretative issue at bar impinged on subject matter outside of the field of telecommunications. Second, it is implied throughout the statute and the provision that the CRTC be able to decide questions of law, such as this, which are within its expressed jurisdiction. For example, section 7 empowers the CRTC with broad authority to execute its statutory mandate, recognizing that the subject matter of the regulation is inherently unstable due to the rapidly evolving nature of the industry. Moreover, the Supreme Court of Canada has explicitly acknowledged in *Bell* that the Act provides for the evolution of the CRTC's regulatory facilities as technology changes.[83]

Cumulatively, the four *Dunsmuir* factors point towards reasonableness as the standard of review for this problem. Given the high degree of deference granted to the CRTC by the courts on the finding of reasonableness,[84] it is likely that the courts would do the same here and would consequently find that the enforcement of net-neutrality regulation under section 36 of the *Telecommunications Act* would be within the statutory jurisdiction of the CRTC.

CONCLUSION

The dramatic growth of the internet as a medium of mass communication has placed the operators of the networks over which internet traffic flows in a powerful position to influence the integrity and structure of the internet in its current form. As a means of maintaining the vitality and openness of the internet, regulations protecting the neutrality of these networks from interference by their operators have been proposed. While the CRTC has been reluctant to adopt such regulation on the grounds of an absence of political will and legal competency, this paper has demonstrated that the latter is not an obstacle to its implementation. Section 36 of the *Telecommunications Act* likely provides a legally sound basis on which such regulation could be promulgated. With this aspect of the regulatory problem settled, the focus of the debate can thus shift to the policies of the CRTC, itself, and, by extension, of Cabinet on this critical issue.

81. *Bell, supra* note 64 at paras 46 & 48.
82. *Barrie, supra* note 50 at para 18.
83. *Bell, supra* note 64 at para 48.
84. For example, *CBC* and *Bell* where original decisions were unchanged.

ARTICLE

OUR DIGITAL SELVES: PRIVACY ISSUES IN ONLINE BEHAVIOURAL ADVERTISING

By Christopher Scott*

CITED: (2012) 17 Appeal 63-82

INTRODUCTION

Canadians are spending more of their lives online than ever before.[1] This trend has profound ramifications across Canadian society, including within the field of privacy law. This paper will examine the privacy implications of two related technologies within the emerging field of online behavioural advertising. The first is the use of tracking cookies to track users' activity across websites, and the second is deep packet inspection ("DPI"). The use of these technologies in the field of targeted advertising has not yet been subject to a finding under the *Personal Information and Protection of Electronic Documents Act ("PIPEDA"* or the *"Act"),*[2] the federal private-sector privacy statute.

The goal of this paper is to survey the application of *PIPEDA* to this yet-nascent field and describe the shape that a *PIPEDA*-compliant use of these technologies is likely to take. For context, I will make reference to two prominent corporations at the forefront of this field: Google and Phorm. These corporations are intended to be viewed as case studies. The goal of this paper is not to catalogue the apparent failures of either organization in the style of a complaint to the Privacy Commissioner, but rather to illustrate the delicate interplay of – and tensions between – privacy rights and legitimate commercial interests.

I. THE TECHNOLOGIES AT ISSUE

Before exploring the legal issues arising from these technologies, it is necessary to have some familiarity with the technical manner in which they operate and an understanding of the kinds of personal information they enable organizations to obtain. Understanding the present and potential use of these technologies is essential to framing the privacy issues they raise.

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1. Statistics Canada, *Canadian Internet Use Survey* (Business Special Surveys and Technology Statistics Division, 2009), online: The Daily <http://www.statcan.gc.ca/daily-quotidien/100510/dq100510a-eng.htm>.
2. SC 2000, c 5.

A. Tracking Cookies

i. How Tracking Cookies Work

When a web browser visits a website, that site may instruct the browser to store a "cookie". A cookie is a small text file containing information provided by the website. If a browser has been given a cookie by a website, it will send the cookie back to the website on every subsequent visit. By placing a unique identifier in each cookie, the website can use cookies to keep track of a particular web browser's comings and goings.[3] This interaction is invisible to the user operating the browser, and typically occurs without his or her explicit consent.[4]

Tracking cookies do more than enable organizations to identify users within the confines of their own websites. Organizations also use them to track browsers across the websites of third parties with which they have partnered (and which have added a piece of code to their own websites to enable this). In this way, tracking organizations can keep track of browsers' activity across extensive networks of partnered sites. These cookies enable the organizations to record information including the time of the access, the IP address of the browser (which may reveal the approximate geographic location of the browser), the URL of the pages visited, the contents of the pages visited and the unique identifier stored in the browser's cookie.[5]

Up to this point, I have referred primarily to "browsers" and only rarely to "users". This is intended to highlight the fact that tracking cookies see only browsers, not people. Generally, a cookie is particular to a single browser on a single computer user account (usually on a single computer). Accordingly, one person may be associated with many tracking cookies, and a single tracking cookie can capture the personal information of multiple individuals. The most relevant example here is of a family computer with a single user account. To the extent that members of the family (as well as any guests) use a common browser on the computer, they will be tracked together, and all of their disclosed personal data will be lumped together under the cookie's common identifier.

Finally, the last relevant consideration regarding browser cookie technology is that cookies have expiry dates. When a cookie expires, it gets deleted, meaning the issuing organization must issue a new unique identifier the next time that the browser visits. Similarly, most browsers allow users to manually delete cookies before their expiry dates. This is an effective *tabula rasa*; having lost the key that ties your browser to your past browsing behaviour, the organization must now start from scratch with a new identifier.

ii. Case Study – Google AdSense

The most prominent system of tracking cookies is Google's AdSense.[6] Google serves advertisements on the websites of its vast network of partners – by some estimates, nearly one in five websites display Google AdSense advertisements.[7] These advertisements are

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3. For instance, my Google Chrome browser on my laptop computer has the unique identifier "aab213735d8023ea".
4. Electronic Privacy Information Center, *Cookies, online: <http://epic.org/privacy/internet/cookies/>.*
5. *C.f.* Google Privacy Center, online: <http://www.google.com/privacy/ads/>
6. References to "AdSense" throughout this paper also refer to DoubleClick, a parallel advertising network owned by Google that is based on the same technology and even uses the same cookie. See also *note 5*.
7. W3Techs, *Usage of advertising networks for websites, online:* <http://w3techs.com/technologies/overview/advertising/all>.

not stored on the webservers of the website that users have chosen to visit; they are served directly from Google's servers to the browser, where they are displayed alongside the contents of the website that was requested. In the process of fetching the advertisement from Google's servers, browsers dutifully send Google their tracking cookies. This interaction provides Google with all of the above-mentioned information, including the URL of the page that the user has chosen to view.[8]

As a consequence, not only can Google mine every search you perform on the Google homepage[9] for information about your interests and browsing habits, but it also knows which of its partnered websites you visit independently. Google collects all of this information and, based on the content of sites that you frequent, infers which "interest categories" consumers might be interested in. On the basis of these categories and the contents of the page that you are presently viewing, Google can tailor the advertisements it sends you on its partner sites.[10] Thus, a user in Canada who frequently searches for travel information on Google and chooses to view a website about Mexican history might see advertisements about travelling to Mexico displayed on that site.

In the context of privacy law, it is significant to note that this browser data can be collected even if the browser has never been to a Google-owned webpage or had the opportunity to agree to Google's privacy policy directly. Google requires that partners provide notice of Google's collection of browsing information from the partner's site as well as other sites across the web for the purpose of serving advertisements based on that behaviour; they also require partners to notify users of cookie management options.[11] This is typically accomplished via the incorporation of Google's privacy policy into that of the partnered website. In addition, because ads are served simultaneously with webpages, users may be required to view ads – and thus disclose personal information – in order to find the third-party's privacy policy. Even if users disagree with the privacy policy of that third party, Google has already collected their personal information.

Prior to 2007, Google's tracking cookie was set to expire in 2038 (in effect, never), but in response to privacy concerns it now has a two-year rolling expiry date that is renewed every time the cookie gets used.[12] In practice, this means that the cookie is unlikely to expire before the user ceases using the browser permanently, either due to switching to a new browser, user account, or computer (at which point a new cookie is created). Google stores user interest information for at least as long as the cookie's active life - but anonymizes server logs (which include IP and URL information) after 18 months as a matter of policy.[13] Google insists that a shorter retention period would reduce their ability to protect user security and may put them in violation of the data retention laws of some countries.[14] Google's retention policies are not codified in its privacy policy.[15]

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8. Google Privacy Center, *supra note 5*.
9. Google, online: <http://google.com>.
10. Google Privacy Center, *supra* note 5.
11. AdSense Terms and Conditions, online: <https://www.google.com/adsense/localized-terms>.
12. Peter Fleischer, "Cookies: expiring sooner to improve privacy" (16 July 2007), online: The Official Google Blog <http://googleblog.blogspot.com/2007/07/cookies-expiring-sooner-to-improve.html>.
13. Peter Fleischer and Nicole Wong, "Taking steps to further improve our privacy practices" (14 March 2007), online: The Official Google Blog <http://googleblog.blogspot.com/2007/03/taking-steps-to-further-improve-our.html>.
14. Google Log Retention Policy FAQ, online: Public Intelligence <http://publicintelligence.info/google-log-retention-policy-faq/>.
15. Google Privacy Policy, online: <http://www.google.com/intl/en/privacy/privacy-policy.html>.

Google provides an opt-out mechanism for users. Users must opt out for each browser on each computer that they use, due to the technical limitations discussed above.[16] Google also provides an interest-management tool that enables users to voluntarily disclose to Google the types of advertisements in which they are interested (referred to as "interest categories") and to remove interest categories from that list of interests.[17] Google is careful to note that no personally identifiable information is collected "without your explicit consent"[18] and that it "will not associate sensitive interest categories with your browser (such as those based on race, religion, sexual orientation, health, or sensitive financial categories)".[19] Google does, however, track user product interests; for instance, a perusal through my own aggregated list of interests revealed that Google was aware of my fondness for purchasing computer hard drives online.

Google's privacy policy states only that Google takes "appropriate security measures" to safeguard data acquired through tracking cookies, that employees and contractors may view it only on a need-to-know basis, and that third parties who do access it on this basis are bound by confidentiality agreements and may even suffer criminal consequences for a breach of security.[20]

B. Deep Packet Inspection

i. How Deep Packet Inspection Works

At a technical level, DPI is quite straightforward. Whenever you do anything on the Internet – such as loading a webpage or sending an e-mail – you either send or receive "packets" of digital information. Every packet you send goes directly to your Internet service provider ("ISP"), which then sends it off in the direction of its intended destination. Similarly, every packet you receive comes first to your ISP, which then sends it straight to you. As a result, your ISP can see all of your unencrypted digital communications directly, without resorting to the use of tracking cookies or the like. This allows for much broader disclosure than tracking cookies, as DPI reveals not only where users go, but also what they do.[21]

On the other hand, DPI is computationally expensive, meaning that it requires substantial equipment and technical expertise to perform effectively. Most ISPs do not have the equipment or the expertise to analyze the entire contents of every packet of information that passes through their networks. Every packet of information contains "header" information and "payload" information. Headers include the packet's source and destination IP addresses, the protocol being used, the port being used (which roughly corresponds to the application that sent it),[22] and other network-related technical information. The payload is the information that is being delivered. This payload may

16. Google Privacy Center, *supra* note 5. Google also offers a downloadable tool that will opt all browsers on a single computer out of AdSense's tracking program.
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. Google Privacy Policy, *supra note 15.*
21. *Assistant Commissioner recommends Bell Canada inform customers about Deep Packet Inspection* (3 September 2009), PIPEDA Case Summary #2009-010 at paras 4-8, online: OPC <http://www.priv.gc.ca/cf-dc/2009/2009_010_rep_0813_e.cfm>. This OPC decision goes into much more technical detail regarding the workings of DPI, but reaches the same conclusion: DPI can give ISPs the technical ability to see nearly everything.
22. I say "roughly" here because, ideally, each port number refers to one application. However, applications can select their own port numbers, meaning that some will "spoof" another application's number in order to get preferential treatment. *C.f.* note 23 at paras 10600-10602.

not be readable on its own, however; a single piece of information can be split up between several packets, so each of those packets can be collected and then read together. Bill Keenan, Director of Technology for CTV, described the technical challenges involved as follows:

> [T]he expense involved in doing true Deep Packet Inspection – which means not just inspecting the headers … which is, functionally, the address on the envelope, but actually opening all of the envelopes and pasting them together and seeing what it reads. Doing that for every piece of content that comes over the network would absolutely be prohibitively expensive.[23]

For this reason, DPI may consist either of merely reading packet headers or reading the entire contents of each packet. Throughout this paper, references to DPI will refer to the latter method. An inspection of a consumer's packet contents may reveal "photo images, [or] financial and contact information",[24] in addition to the information revealed in the packet headers. However, the reading of packets' header information should not be discounted. Canada's Privacy Commissioner has previously noted that headers are rich with personal information – if analyzed, they can identify the use of "most popular services or applications", "[s]ubscriber usage patterns", "[a]pplication usage patterns", "competing services and their presence on the network" and "malicious traffic on the network".[25]

ii. Case Study – Phorm Inc.

DPI provides incredibly detailed information about consumers' lives through their use of the Internet. Accordingly, it can be applied in a variety of circumstances. For instance, some Canadian ISPs routinely use DPI for traffic-management purposes (such as by prioritizing the transfer of time-sensitive packets issued by internet telephony applications).[26] However, no Canadian ISPs are presently using DPI for advertising purposes, and none examine the payload of packets for personal information – they read only the headers.[27] For examples of DPI-enabled advertising, we will need to look beyond our borders.

Phorm Inc. is the one of the most-publicized organizations pursuing DPI-enabled advertising. Phorm contracts with ISPs to do the heavy lifting of DPI for them. In these arrangements, the ISPs send Phorm all of their consumers' packets, from which Phorm generates a profile of a user's interests. This requires performing at least a header-level analysis on all packets sent *by* the user; Phorm also reads the contents of most packets sent *to* the user.[28] This allows Phorm to collect, at a minimum, "website addresses, searches [and] browsing history" as well as the full page contents of nearly everything that users read online.[29]

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23. CRTC, Transcript of Proceedings, *Canadian broadcasting in new media* (10 March 2009) at para 10605.
24. *Assistant Commissioner recommends Bell Canada inform customers about Deep Packet Inspection, supra* note 21 at para 16.
25. *Ibid* at para 15.
26. *C.f.* note 21.
27. CRTC, Transcript of Proceedings, *Canadian broadcasting in new media* (27 February 2009) at para 8051.
28. Chris Williams, "How Phorm plans to tap your internet connection" *The Register* (29 February 2008), online: The Register <http://www.theregister.co.uk/2008/02/29/phorm_documents/>.
29. Technology, online: Phorm Inc. <http://www.phorm.com/technology/>.

To compensate for the broad scope of its data collection, Phorm has taken a strong initiative in limiting the retention and use of this data. The company is careful to note that users' IP addresses, browsing history, search terms and the like are not stored.[30] Phorm analyzes the information for indications of the user's interests, stores that derived user-interest information, and then deletes the information that was originally collected.[31] Like Google, Phorm does not associate "sensitive" user interests (such as medical or adult information) with consumers' accounts.[32] Phorm claims to substantially curtail the invasiveness of its DPI analysis by excluding non-web packets (such as e-mail or VOIP), certain web-based e-mail services and form submissions (that is, user content posted to the web) from its analysis.[33] As a result, although Phorm still collects far more personal information that Google, Phorm uses information in a similar manner to Google and claims to retain less of it.

Much like Google, Phorm uses the information it collects to serve ads on third-party websites. It also offers an opt-in website-recommendation service directly to users (dubbed PhormDiscover) and a security service directed at warning users about potentially fraudulent websites (PhormSecure). Although Phorm originally intended to use the information collected to serve ads as part of an opt-out scheme (rather than opt-in), it has been required by UK regulators to adopt an opt-in program, which it now uses in all markets.[34] Phorm currently operates in Brazil, Korea, the United Kingdom and the United States.[35]

Also similar to Google, Phorm's Privacy Policy promises "security measures", employee training, and contractual safeguards to govern third parties. Phorm is careful to note that no system is 100% safe, but reminds users that no personally identifiable information is stored by Phorm.[36]

II. THE SCHEME OF *PIPEDA*

A. Jurisdiction and Reasons for Focusing on *PIPEDA*

PIPEDA is not the only private-sector privacy statute in Canada, but it is the only one discussed in this paper. Although some provinces have enacted substantially similar legislation that supersedes *PIPEDA* within their jurisdictions, the federal *Act* is generally applied against collection, use or disclosure of information across provincial or national lines.[37] This generally describes the activities of telecommunications and online behavioural advertising organizations such as Google and Phorm. Additionally, since telecommunications and online advertising corporations are often federally incorporated (if they are incorporated within Canada at all), *PIPEDA* is the most consistently relevant

30. Phorm Service Privacy Policy, online: <http://www.phorm.com/privacy_policy/phorm_service_policy.html>.
31. "Andrew Walmsley on digital: Phorm and function fuel privacy fears" *Marketing* (26 March 2008), 14 (CPI.Q).
32. PhormDiscover: How it Works, online: <http://www.phorm.com/consumers/phormdiscover/how_it_works/ >. (*nb:* This page includes information not only on PhormDiscover, but on Phorm's advertising program as well)
33. Brooks Dobbs, "Phorm: A New Paradigm in Internet Advertising", online: Office of Privacy Commissioner of Canada <http://dpi.priv.gc.ca/index.php/essays/phorm-a-new-paradigm-in-internet-advertising/>.
34. "Controversy surrounds Phorm" *Computer Fraud & Security* 2008:5 (May 2008) 4.
35. About Us, online: Phorm Inc. <http://www.phorm.com/about_us/>.
36. Phorm Service Privacy Policy, *supra note 30.*
37. Stephanie Perrin et al, *The Personal Information Protection and Electronic Documents Act: An Annotated Guide* (Toronto: Irwin Law, 2001) at 4-56.

privacy statute with respect to online behavioural advertising carried out by Canadian organizations.

Although it is a federal statute, the Federal Court held in *Lawson* that *PIPEDA* (and thus the jurisdiction that it grants to the Privacy Commissioner of Canada) also applies to extraterritorial organizations that engage in "the transborder flow of personal information",[38] such as Phorm and Google. Accordingly, the jurisdictional waters surrounding foreign-incorporated organizations are less murky: *PIPEDA* plainly applies. In the age of the supranational Internet, this is perhaps the single most compelling reason to focus on *PIPEDA* in the context of online behavioural advertising.

B. Organization of *PIPEDA*

PIPEDA is organized around a set of ten "Principles" adopted from the Canadian Standards Association's *Model Code for the Protection of Personal Information*.[39] These Principles are codified in Schedule 1 to the *Act*, imported into law by s. 5 and modified by ss. 6-9 of the *Act*.[40] Some Principles, such as those mandating consent and limited collection (Principles 3 and 4, respectively), impose broad and foundational obligations on organizations within the behavioural advertising industry. Others, such as those relating to accountability and challenges concerning compliance (Principles 1 and 10), are unlikely to operate differently in the context of behavioural advertising than they do generally. Principles falling under the former class will be described individually, roughly in order of their significance in the context. Principles falling under the latter class will be lumped together and only briefly mentioned.

C. Principle 3 – Knowledge and Consent Respecting Collection, Use or Disclosure

This Principle stipulates that "knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate."[41] The term "inappropriate" is given its meaning exhaustively by *PIPEDA* s. 7.[42] That section permits collection, use or disclosure without knowledge or consent only in certain circumstances, such as where collection is clearly in the interests of the individual and cannot be otherwise accessed;[43] where use is required for action in an emergency that threatens an individual's life, health or security;[44] or where disclosure to a government agency is required for national security reasons.[45] In all other circumstances, some measure of knowledge and consent must be provided.

The question, then, is what form (or degree) of knowledge and consent must be provided in a particular circumstance. Consent may take a variety of forms, ranging from implied consent on the low end (where no actual consent has been provided by the individual affected) to explicit consent on the high end. *PIPEDA* summarizes this range in Schedule 1:

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38. *Lawson v Accusearch Inc*, 2007 FC 125, 2007 CarswellNat 247 at para 51 *[Lawson]*.
39. CSA Standard Q830, online: <http://www.csa.ca/cm/ca/en/privacy-code/publications/view-privacy-code>.
40. *PIPEDA* ss 5-9 and Schedule 1.
41. *PIPEDA* Schedule 1 clause 4.3.
42. *Turner v Telus Communications Inc,* 2007 FCA 21, 2007 CarswellNat 172 at para 23 *[Turner]*.
43. *PIPEDA* s 7(1)(a).
44. *PIPEDA* s. 7(2)(b).
45. *PIPEDA* s 7(3)(c.1)(i).

> The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered **sensitive**. Implied consent would generally be appropriate when the information is less sensitive.[46]

The Privacy Commissioner of Canada has taken the following view as to the distinction between express and implied consent, as a matter of policy:

> Express consent is given explicitly, either orally or in writing. Express consent is unequivocal and does not require any inference on the part of the organization seeking consent. Implied consent arises where consent may reasonably be inferred from the action or inaction of the individual.[47]

The Privacy Commissioner of Canada has expressed a low opinion of "opt-out" program schemes, calling them a "weak form of consent" and observing that "[o]pt-out consent is in effect the presumption of consent."[48] The Commissioner incorporated elements of s. 5(3) of the Act (discussed under Principles 2, 4 and 5 – Purpose, below) in holding that circumstances in which opt-out consent would be appropriate should "remain limited, with due regard both to the sensitivity of the information at issue and to the reasonable expectations of the individual."[49,50] The Commissioner then laid out criteria that an organization would have to meet in order to lawfully pursue an opt-out scheme rather than an opt-in scheme:

> 1. The personal information must be demonstrably non-sensitive in nature and context.
>
> 2. The information-sharing situation must be limited and well defined as to the nature of the personal information to be used or disclosed and the extent of the intended use or disclosure.
>
> 3. The organization's purposes must be limited and well-defined, stated in a reasonably clear and understandable manner, and brought to the individual's attention at the time the personal information is collected.
>
> 4. The organization must establish a convenient procedure for easily, inexpensively, and immediately opting out of, or withdrawing consent to, secondary purposes and must notify the individual of the procedure at the time the personal information is collected.[51]

In *Aeroplan*, the Privacy Commissioner considered the appropriate level of consent regarding Air Canada's sharing of customers' information with Aeroplan, an advertising partner, for the purpose of providing targeted advertisements to consumers. The

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46. *PIPEDA* Schedule 1 clause 4.3.6. C.f. paras 4.3.4 and 4.3.7.
47. Office of the Privacy Commissioner, *Your Privacy Responsibilities: Canada's Personal Information Protection and Electronic Documents Act* - A Guide for Businesses and Organizations, online: <http://www.priv.gc.ca/information/guide_e.pdf> at 2.
48. *Air Canada allows 1% of Aeroplan membership to "opt out" of information sharing practices* (11 March 2002), PIPEDA Case Summary #2002-42, online: OPC <http://www.priv.gc.ca/cf-dc/2002/cf-dc_020320_e.cfm> [*Aeroplan*]. (As early OPC decisions are not given paragraph numbers, no pinpoint has been provided.)
49. *Ibid.*
50. *C.f. PIPEDA* Schedule 1 clause 4.3.5.
51. *Bank does not obtain the meaningful consent of customers for disclosure of personal information* (23 July 2003), PIPEDA Case Summary #2003-192, online: OPC < http://www.priv.gc.ca/cf-dc/2003/cf-dc_030723_01_e.cfm>.

Commissioner concluded that express consent was necessary where there was a potential for "use and disclosure of information customized according to individual plan members' purchasing habits and preferences".[52] Although using personal information for the purpose of advertising is not objectionable *per se*, the Commissioner applied a reasonableness standard in concluding that the potential sensitivity of the information caused that purpose to fall short of reasonableness:

> [A] reasonable person would not expect such practice to extend to the "tailoring" of information to the individual's potentially sensitive personal or professional interests, uses of or preferences for certain products and services, and financial status, without the positive consent of the individual.[53]

Similarly, knowledge must inform consent; an organization's description of the purposes for which information will be used must be "sufficiently conducive to [imparting] knowledge on the part of the individual" or the consent that was provided may be invalid.[54] That is, the organization must "**clearly explain** to all [affected individuals] the purposes for the collection, use, and disclosure of their personal information"[55] [emphasis added]. This requirement draws in elements of Principle 2, which deals with the obligation to identify such purposes.[56]

Organizations may not require consent to the collection, use or disclosure of personal information beyond that required to fulfill the "explicitly specified" and "legitimate" purposes.[57] With respect to marketing, the Privacy Commissioner often draws distinctions between so-called primary and secondary purposes. Primary purposes are essential to the service provided, and therefore organizations are permitted to require consent to those purposes as a condition of service.[58] Secondary purposes are inessential (and additional to the primary purposes), and therefore consent cannot be required as a condition of service.[59] Marketing is commonly considered a secondary purpose, although in *Facebook*, demographically-targeted advertisements were considered a primary purpose on the basis that Facebook provided its services for free and depended on those advertisements for most of its revenue.[60]

In sum, the standard for consent is fairly high. In the field of behavioural advertising, it is likely to default to express consent in the context of fulsome knowledge of the organization's purposes. The consent cannot be mandatory, unless the advertising is essential to the service provided. This standard is based, at least in part, on an assessment of whether the notional "reasonable person" would assume that such purposes (and the methods used to pursue them) are likely to be carried out without their knowledge. In the case of targeted advertising based on personal preferences, the Privacy Commissioner of Canada is of the view that reasonable people do not expect that organizations will use their personal information in this way.

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52. *Aeroplan*, *supra* note 49.
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*
56. *PIPEDA* Schedule 1 clause 4.2.
57. *PIPEDA* Schedule 1 clause 4.3.3.
58. *Report of Findings into the Complaint Filed by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) against Facebook Inc.* (16 July 2009), PIPEDA Case Summary #2009-008 at 130, online: OPC <http://www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.cfm> *[Facebook]. C.f. Chantal Bernier, "Online Behavioral Advertising and Canada's Investigation on Facebook" (Remarks at the Privacy Laws and Business 23rd Annual Conference, Cambridge, UK, 6 July 2010), online: <http://www.priv.gc.ca/speech/2010/sp-d_20100706_cb_e.cfm>.*
59. *Ibid.*
60. *Ibid.*

D. Principles 2, 4 and 5 – Purposes

Organizations must identify the purposes for which they intend to use individuals' personal information no later than the time of collection.[61] They may not use or disclose that information for any other purposes,[62] and they may not collect more information than is necessary for those identified purposes (that is, they may not collect information "indiscriminately").[63] Section 5(3) of the *Act*, referenced above, directly influences the analysis of an organization's stated (or perhaps unstated) purposes. That provision requires that personal information only be collected, used or disclosed "for purposes that a reasonable person would consider are appropriate in the circumstances."[64] As a consequence, *PIPEDA* establishes a system in which organizations' stated purposes define the scope of allowable use, collection and disclosure. Moreover, these purposes may be reviewed on the basis of their reasonableness (or lack thereof).

In assessing reasonableness, the Privacy Commissioner has delineated a four-part test that has been adopted by the Federal Court:

1. Is the measure demonstrably necessary to meet a specific need?

2. Is it likely to be effective in meeting that need?

3. Is the loss of privacy proportional to the benefit gained?

4. Is there a less privacy-invasive way of achieving the same end?[65]

In *Eastmond*, Canadian Pacific Railway had installed security cameras in one of its rail yards. The cameras were installed for the identified purpose of preventing theft and vandalism. The employees' union argued that the resulting surveillance (of employees) was not reasonable. The Federal Court concluded that it was in fact reasonable on the basis that the impact on the employees' privacy was not severe: employees knew which areas were under surveillance, it would only occasionally capture employees' work activities, and, most importantly, CP had put a number of safeguards in place to ensure that the records were not accessible unless an incident was reported. If no incidents were reported, the video would be deleted within 30 hours of its recording, and it could not be used for the purpose of evaluating employee work habits.[66] These safeguards sufficiently mitigated the loss of privacy experienced by the workers to render the surveillance reasonable.

In *Facebook*, the Privacy Commissioner found that Facebook's practice of sharing "potentially unlimited" personal information with application developers without actively monitoring the developers' use of that information was not reasonable in the circumstances. Relevant to the Commissioner's finding was the fact that developers needed much less information than they were given access to, and insufficient safeguards were put in place by Facebook.[67]

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61. *PIPEDA* Schedule 1 clause 4.2.
62. *PIPEDA* Schedule 1 clause 4.5.
63. *PIPEDA* Schedule 1 clauses 4.4 and 4.4.1.
64. *PIPEDA* s 5(3).
65. *Employee objects to company's use of digital video surveillance cameras,* (23 January 2003), PIPEDA Case Summary #2003-114, online: OPC <http://www.priv.gc.ca/cf-dc/2003/cf-dc_030123_e.cfm>, aff'd *Eastmond v Canadian Pacific Railway*, 2004 FC 852, 2004 CarswellNat 1842 at para 127 [*Eastmond*].
66. *Ibid* at para 176.
67. *Facebook, supra* note 59 at para 193.

The requirement that purposes be identified prior to collection is varied when organizations intend to use previously collected information for a new purpose. In these circumstances, the new purpose must be identified prior to the use of that information.[68] Organizations are still required to obtain consent from each individual in the usual way prior to using their information for a new purpose.[69] In any event, whether the purpose is identified prior to collection or prior to use, organizations are obliged to identify the purpose in such a way that the knowledge requirement of Principle 3 is satisfied by the time consent is obtained.[70]

E. Principle 5 – Retention of Information

Although this Principle has been included in the above discussion, retention is a sufficiently significant issue in the context of behavioural advertising that it deserves to be singled out at this stage. Personal information shall be retained only as long as is necessary for the fulfillment of an organization's identified purposes.[71] When this information is no longer necessary, it should be "destroyed, erased, or made anonymous."[72] The Privacy Commissioner requires that organizations set a maximum period of retention, despite the fact that the *Act* frames it as a suggestion.[73] It may also be necessary to institute a minimum length of retention in order to facilitate access to information that was involved in making a decision about an individual,[74] although it is not necessary to preserve that information in its original form.[75]

In *Credit Bureau*, the Privacy Commissioner considered the imposition of a 20-year retention policy for credit-related information to be sufficient for the purposes of the *Act* in light of the fact that an extended retention period benefitted some individuals, whereas others could still request to have their information disposed of prior to that time.[76] In *Facebook*, the organization had instituted an indefinite retention policy for deactivated accounts. The Privacy Commissioner objected to this arrangement even after Facebook created a process for account deletion, despite Facebook's claims that it was merely safeguarding it for users and did not disclose or use that information during the deactivation period.[77]

F. Principle 9 – Individual Access

Individuals may request from an organization confirmation of the existence, use and disclosure of their personal information as well as access to this information.[78] The *Act* permits exceptions to this rule, but requires that the individual be informed of the reasons for denying access.[79] Those exceptions are codified in s. 9(3), which exempts organizations from providing access where it would "reveal confidential commercial

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68. *PIPEDA* Schedule 1 clause 4.2.4.
69. *Ibid.*
70. *Englander v Telus Communications Inc*, 2004 FCA 387, 2004 CarswellNat 4119 at para 58 [*Telus]*.
71. *PIPEDA* Schedule 1 clause 4.5.
72. *PIPEDA* Schedule 1 clause 4.5.3.
73. *Credit bureau sets retention period for positive information* (18 January 2006), *PIPEDA* Case Summary #2006-326, online: <http://www.priv.gc.ca/cf-dc/2006/326_20060118_e.cfm> [*Credit Bureau]*.
74. *PIPEDA* Schedule 1 clauses 4.5.2 and 4.5.4.
75. *Vanderbeke v Royal Bank,* 2006 FC 651, 2006 CarswellNat 1550 at para 20.
76. *Credit Bureau, supra* note 74.
77. *Facebook, supra* note 59 at paras 249-254.
78. *PIPEDA* Schedule 1 clause 4.9.
79. *Ibid.*

information"[80] (which refers here to information relating to commerce, and not merely information with commercial value),[81] along with a variety of other public-policy exceptions, such as where access "could reasonably be expected to threaten the life or security of another individual."[82] In addition, organizations are specifically prohibited from providing individuals with access to their personal information if doing so would reveal personal information about a third party.[83] If the third party's information is severable from the record at issue, then the organization should sever it prior to giving the individual access.[84] If the third party consents, then access may be granted without severing.[85]

Where information is inaccurate or incomplete, individuals have a right to challenge the organization's records and have their personal information amended accordingly.[86]

G. Other Principles

Not all Principles are as central to the issue of behavioural advertising as those listed above. Institutional Principles such as Accountability (Principle 1), Openness (Principle 8) and Challenging Compliance (Principle 10), though relevant to any organization subject to the *Act*, do not take on an appreciably different form in the context of behavioural advertising as they are focused primarily on conventional organizational structures. It is sufficient to note that all organizations subject to *PIPEDA* must provide an apparatus that monitors privacy issues, informs individuals of the organization's practices and enables individuals to make complaints under the *Act*. In addition, although personal information must be as "accurate, complete, and up-to-date"[87] as the organization's identified purposes require (Principle 6), this requirement is directed at "objective, verifiable fact", and not subjective matters such as personality profiles.[88] Organizations must also put in place multi-layered safeguards[89] and follow industry best practices to protect individuals' privacy (Principle 7).[90]

III. THE SOCIAL CONTEXT

The legal analysis presented above draws in elements of the surrounding social context by assessing circumstances on the basis of reasonableness, considering the sensitivity of the information at issue and reviewing common practices and industry standards relevant to the issue. These are all questions of fact arising from the surrounding social context. Accordingly, being familiar with how Canadians behave and how they perceive these issues is a critical part of a complete analysis of privacy issues under *PIPEDA*.

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80. *PIPEDA* s 9(3)(b).
81. *Air Atonabee Ltd v Canada (Minister of Transport)* (1989), 37 Admin LR 245, 27 FTR 194, 27 CPR (3d) 180 at 36 (FC TD) *[Atonabee]*.
82. *PIPEDA* s 9(3)(c).
83. *PIPEDA* s 9(1).
84. *Ibid.*
85. *PIPEDA* s 9(2).
86. *PIPEDA* Schedule 1 clause 4.9. *C.f. PIPEDA* Schedule 1 clause 4.9.5.
87. *PIPEDA* Schedule 1 clause 4.6.
88. *Complaint under PIPEDA against Accusearch Inc., doing business as Abika.com (not dated),* at para 36, online: <*http://www.priv.gc.ca/cf-dc/2009/2009_009_rep_0731_e.cfm*>.
89. *PIPEDA* Schedule 1 clause 4.7.3.
90. *Report of an Investigation into the Security, Collection and Retention of Personal Information (25 September 2007)* at paras 70, 76 and 82, online: *OPC <http://www.priv.gc.ca/cf-dc/2007/TJX_rep_070925_e.cfm> [TJX].*

A. The Internet and Canadian Habits

Canadians are voracious Internet users, with 80% of the Canadian population going online for personal reasons[91] and most of them logging in every day.[92] Thirty-nine percent of Canadians aged 16 or older shop online, collectively placing 95 million orders and spending $15.1 billion.[93] Over a quarter of adult Canadians access educational resources online, as do 80% of students.[94] More than a third of adult Canadians, mostly women, access health-related information online. [95] More than half of these users looked up information on specific diseases or lifestyle information (*e.g.* relating to diet or exercise).[96] Canadians also engage in social, civic and political life online, with half of all home Internet users going online to read about specific social or political issues and 40% of home Internet users researching local community events.[97] In light of the significant portion of Canadians' personal and professional lives spent online, the Privacy Commissioner of Canada has expressed the view that "it is imperative, in our view, that their privacy is protected when engaged in Internet activity."[98]

B. The Public Debate Around Deep Packet Inspection

The debate around deep packet inspection reached a fever pitch during the CRTC's 2009 hearings into ISPs' use of the technology for non-advertising-related, network-maintenance purposes. The Privacy Commissioner of Canada was sensitive to the concerns of the Canadian public (or, at least, vocal parts thereof) and commissioned a collection of essays from interested parties.[99] Many of the essays cited deep reservations about the use of DPI without consent or, worse, without users' knowledge, calling it "spy[ing]",[100] "intrusive",[101] and a violation of the Internet's "presumption of privacy".[102] These deep reservations regarding a technology that the Privacy Commissioner has likened to the steaming-open of sealed letters[103] are indicative of the public's strongly held views about what constitutes a reasonable loss of privacy even in the context of a meritorious purpose (such as maintaining network infrastructure).

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91. *Canadian Internet Use Survey, supra* note 1.
92. *Ibid.*
93. Statistics Canada, *E-commerce: Shopping on the Internet* (Business Special Surveys and Technology Statistics Division, 2010), online: The Daily <http://www.statcan.gc.ca/daily-quotidien/100927/dq100927a-eng.htm>.
94. Statistics Canada, *Study: Using the Internet for education purposes* (Business Special Surveys and Technology Statistics Division, 2005), online: The Daily <http://www.statcan.gc.ca/daily-quotidien/071030/dq071030b-eng.htm>.
95. Statistics Canada, *Study: Health information and the Internet (Business Special Surveys and Technology Statistics Division, 2005), online: The Daily <http://www.statcan.gc.ca/daily-quotidien/080221/dq080221c-eng.htm>.*
96. *Ibid.*
97. Statistics Canada, *Study: Internet use and social and civic participation* (Business Special Surveys and Technology Statistics Division, 2007), online: The Daily <http://www.statcan.gc.ca/daily-quotidien/081204/dq081204d-eng.htm>.
98. Office of the Privacy Commissioner of Canada, Essay, "Review of the Internet traffic management practices of Internet" (18 February 2009) at para 20, online: OPC <http://dpi.priv.gc.ca/index.php/essays/review-of-the-internet-traffic-management-practices-of-internet-service-providers/>.
99. Office of the Privacy Commissioner, "Collection of Essays" (2009), online: OPC <http://dpi.priv.gc.ca/index.php/essays/>.
100. Office of the Privacy Commissioner, "The Greatest Threat to Privacy" (2009), online: OPC <http://dpi.priv.gc.ca/index.php/essays/the-greatest-threat-to-privacy/>.
101. Office of the Privacy Commissioner, "Just Deliver the Packets" (2009), online: OPC <http://dpi.priv.gc.ca/index.php/essays/just-deliver-the-packets/>.
102. *Ibid.*
103. Office of the Privacy Commissioner, "Objecting to Phorm" (2009), online: OPC <http://dpi.priv.gc.ca/index.php/essays/objecting-to-phorm/>.

This debate is not limited to Canada. In the United States, the Federal Communications Commission ("FCC") has stated that the use of DPI in the context of network maintenance must be disclosed to consumers so as to enable them to reasonably recognize the effects of its use.[104] The House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet opined in 2008 that, due to the "obvious sensitivity" of the information being analyzed by DPI systems, consumers deserved "clear, conspicuous, and constructive notice" of the use of DPI, "meaningful" opt-in consent to that use, and no "monitoring or data interception" (*i.e.* collection) for users who had not opted in.[105] The National Advertising Initiative, an American organization that advocates self-regulation in the advertising industry, has recognized the public's uneasy regard for behavioural advertising with DPI by supporting an opt-in standard for such advertising.[106] The U.K.'s Information Commissioner's Office has taken it a step further by requiring Phorm to supply opt-in consent to all of its customers.[107]

C. The Public Debate Around Tracking Cookies

In many respects, the public debate surrounding tracking cookies has been just as impassioned as that surrounding DPI. Much of the controversy began in the United States, where lawsuits against major firms such as Yahoo, Toys-R-Us and DoubleClick (a targeted advertising firm that has since been acquired by Google) prompted those companies to voluntarily update their privacy policies to create opt-out consent schemes.[108] The FCC continues to endorse this self-regulating model.[109] The EU, however, has put regulations in place requiring opt-in consent for the use of tracking cookies.[110]

In Canada, most companies follow the opt-out approach popular in the United States. There has been evidence of a concerted public will to avoid tracking cookies; estimates of the proportion of users who clear their cookies on a monthly basis range from 39 to 50 percent of users, and 13.2 percent of users block third-party cookies outright.[111] Not all cookies are tracking cookies, however, and clearing all of one's cookies actually degrades some browser functionality. Still, this is a more practical route than opting out from every tracking cookie that a user runs across. Tracking cookies are numerous; Yahoo alone operates 34 advertising networks that use different tracking cookies.[112]

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104. US, Federal Communications Commission, *Memorandum Opinion and Order In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications (20 August 2008), File No EB-08-Ih-1518, WC Docket No 07-52 at 40 and 58, online: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.doc>.*
105. US, *Markey: Consumers Have Right to Know What Broadband Providers Know About Web Use: Hearing Before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, 110*th Cong (2008) (Rep Edward J Markey), online: <http://markey.house.gov/press-release/july-17-2008-markey-consumers-have-right-know-what-broadband-providers-know-about-web>.
106. "Network Advertising Initiative Affirms Support for Self-Regulation of Companies Using 'Deep Packet Inspection'" *Marketwire* (25 September 2008), online: Marketwire <http://www.marketwire.com/press-release/Network-Advertising-Initiative-903861.html>.
107. Controversy surrounds Phorm, *supra* note 34.
108. Amir M Hormozi, "Cookies and Privacy" *EDPACS* 32:9 (March 2005) 1 at 9.
109. *Ibid* at 11.
110. *Ibid.*
111. Brian Morrissey, "Wary Consumers Ward Off Tracking Cookies" *Adweek 46:31 (8 August 2005) 10.*
112. *Ibid.*

In response to grassroots user demand, some of the Internet's most popular browsers have added a "do not track" feature (suggested by Stanford University researchers)[113] to allow users to pre-emptively opt-out of some or all tracking cookies by simply requesting of sites that they not track them.[114]

Considering this context, it is clear that the public (in Canada and elsewhere) care deeply about the privacy issues arising from both DPI and tracking cookies.

IV. ANALYSIS

As with the above discussion of the legal scheme, each of *PIPEDA*'s Principles will be considered in turn (though some are grouped together for convenience). Due to the substantial overlap between the use of tracking cookies and DPI, many points of the legal analysis can be applied to both in similar fashions. Accordingly, the technologies will be dealt with together for the most part. Where differences in *PIPEDA*'s treatment of the two technologies are likely to arise, they will be discussed independently.

A. Principle 3 – Knowledge and Consent Respecting Collection, Use or Disclosure

Some form of knowledge and consent is clearly required by the *Act* prior to the time of collection (or use, if tracking for advertising purposes is a new use). In this commercial context, it is unlikely that one of the statutory exceptions to the requirement for explicit consent will apply. The largest question for operators of DPI- and tracking-cookie-based advertising networks is whether opt-out consent satisfies the scheme of the *Act*. On the basis of the Privacy Commissioner's previous findings, this is unlikely in all but the most limited behavioural advertising schemes.

i. The Sensitivity of the Personal Information at Issue

Three of the Commissioner's four preconditions for imposing an opt-out scheme are plainly met, leaving only the sensitivity of the personal information at issue. The information in question must be "demonstrably non-sensitive in nature".[115] This imposes a high bar, in part because it places the burden on the organization to demonstrate the non-sensitive nature of the information, but also because the standard of "sensitivity" is so easy to meet. In *Aeroplan*, the Commissioner held that information regarding an individual's "personal or professional interests, uses of or preferences for certain products and services, and financial status" were "potentially sensitive".[116] Clearly, "potentially sensitive" information cannot be "demonstrably non-sensitive", and yet this is precisely the sort of information that any effective behavioural advertising system is intended to collect and use.

Advertisers such as Google and Phorm are careful to state that no "personally identifiable" information is collected. The *Act* does equate anonymization with disposal of data (under

113. *C.f.* Do Not Track: Universal Web Tracking Opt-Out, online: <http://donottrack.us/>.

114. Jared Newman, "Apple Prepares 'Do Not Track' Feature in Safari" *PCWorld* (14 April 2011), online: PCWorld <http://www.pcworld.com/article/225210/apple_prepares_do_not_track_feature_in_safari.html>.

115. *Bank does not obtain the meaningful consent of customers for disclosure of personal information, supra* note 52.

116. *Aeroplan, supra* note 49.

Principle 5),[117] so it could be argued that non-identifiable information ceases to be sensitive, particularly if the reasonable expectations of the individual are the lens through which sensitivity is adjudged. Generally speaking, there are two issues with this view. The first is that supposedly anonymized data, when voluminous, is actually extremely difficult to anonymize effectively. AOL famously released "anonymized" records of the search history of hundreds of thousands of users, in which each user was identified only by a number (much like Google identifies its users). It was not long before the New York Times started attaching faces to numbers, starting with 62-year-old American widow Thelma Arnold of Lilburn, Ga.[118] This demonstrates the unsurprising proposition that an individual's behaviour can be an effective digital fingerprint. The second issue is that, so long as an IP addresses can be attached to the record, the organization saving the information will still be able to associate the information collected with the household from which it originated, if not the specific person. This is a particularly weak form of anonymity.

Accordingly, the information collected is likely sensitive if it is retained in any commercially useful form. This sensitivity is reinforced by the public's apparent expectation that their browsing habits should not be shared without their consent, as evidenced by the recent shift by mainstream browsers and knowledgeable users towards tracking-cookie avoidance. If so much of the public defaults to denying consent and requiring explicit exceptions to allow organizations to track them, it is likely that the "reasonable expectations" standard militates against an opt-out approach to consent. This is reinforced by the fact that personal information is collected as soon as a webpage loads, even before a user is given the chance to opt-out. This is collection before consent, which the *Act* prohibits. As a consequence, *PIPEDA* likely requires opt-in consent for all but the most limited behavioural advertising services. This consent must be accompanied by a clear explanation of the purposes to which individuals are consenting, which could be as simple as enumerating the types of user activities that are tracked and an explanation that they will be analyzed to infer the user's interests for the purposes of advertising.

ii. Can Consent be Mandatory for the Provision of the Service?

Whether the provision of [opt-in] consent may be a mandatory precondition to service depends on the facts. In the case of tracking cookies, users typically browse a site for the purpose of consuming some content or service, as in *Facebook*.[119] The user's browser receives a tracking cookie that is governed by the terms of the privacy policy on that website, even if the cookie is from a third party (such as Google). In cases where the site depends on that advertising to offer its services for free, this may be considered a primary purpose, and thus consent may be mandatory for visiting users. Although it is possible to advertise without behavioural analysis, *Facebook* reflects a willingness to allow sites to protect their primary revenue streams as primary purposes (if those purposes are themselves reasonable, discussed below).

In the case of DPI, however, it is highly unlikely that consent could be a mandatory requirement for service from an ISP. ISPs charge a fee for access to the Internet, and do not depend on advertising to provide a free service. Accordingly, DPI-based behavioural advertising is, like most advertising,[120] a secondary purpose for which consent cannot

117. *PIPEDA* Schedule 1 clause 4.5.

118. Michael Barbaro and Tom Zeller, "A Face Is Exposed for AOL Searcher No. 4417749" *New York Times* (9 August 2006), online: <http://select.nytimes.com/gst/abstract.html?res=F10612FC345B0C7A8CDDA10894DE404482>.

119. *Facebook, supra* note 59.

120. *Ibid.*

be a mandatory requirement of service. This might change if an ISP chose to offer a free Internet connection on the condition that DPI-based behavioural advertising be built in, but thus far no ISPs have expressed an interest in such a system.

It bears noting, however, that permitting a mandatory consent requirement on most of the web's resources may run afoul of the overarching reasonableness requirement. In a system where all free websites may demand a substantial loss of privacy in order to obtain access, individuals could be left with the choice of surrendering their privacy or surrendering their Internet connections. This ties in to the reasonableness assessment of the purpose itself, below, as it could reduce the benefit to the individual and thus render the purpose for collection, use and disclosure unreasonable.

iii. Case Studies

In light of the above analysis, it is likely that Google is violating *PIPEDA* by providing opt-out (rather than opt-in) consent for its tracking cookie. Google collects personal information across broad regions of the web and, although it does promise to avoid connecting users' identifiers with certain sensitive interests (such as "race, religion, sexual orientation, health, or sensitive financial categories"),[121] it does not avoid all categories that the Privacy Commissioner considers sensitive. Accordingly, it likely fails to meet the criteria for imposing opt-out consent.

Phorm, on the other hand, likely meets its obligations under this Principle of *PIPEDA* by using a system of opt-in consent with appropriate knowledge prior to collection, use or disclosure.

B. Principles 2, 4 and 5 – Purposes

An organization's stated purposes define the scope of their lawful collection, use and disclosure. These purposes must be reasonable, as defined by the Privacy Commissioner's four-part test.[122] Taking the view that an organization adopts behavioural advertising in order to raise revenues, and that many organizations (most notably Google) are highly successful in that pursuit, the first two conditions (necessity and effectiveness) are plainly met. The last condition, that there not be a less privacy-invasive way of achieving the same end, is unlikely to be a serious issue; although it could be argued that organizations could simply charge users directly rather than obtain funding through advertising, the Commissioner declined to dictate radical changes in business models in *Facebook* and is unlikely to start doing so. Accordingly, the crucial consideration is the third.

i. Is the Loss of Privacy Proportional to the Benefit Gained?

This is the question that divides critics of behavioural advertising. Both interests are substantial: The individuals' interest in protecting their privacy online, particularly in light of the sensitivity of the information that behavioural advertising schemes are capable of collecting, is highly compelling. So too is the business model of an entire industry, the Internet, which runs on ads. This latter interest is weakened by the fact that the benefit is merely *increased* revenue, and not the ability to earn revenue *per se* (after all, organizations can always display non-behavioural advertisements). Nevertheless, the commercial interest is not insignificant. Some industry representatives are quick to note that users also derive an indirect benefit in the form of free content and more relevant ads.[123]

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121. Google Privacy Center, *supra* note 5.
122. *Eastmond, supra* note 66.
123. Wary Consumers Ward Off Tracking Cookies, *supra* note 112.

Relevant to this balancing of interests is a consideration of the sensitivity of the information, the safeguards in place,[124] the organization's retention policy, individuals' actual knowledge of the loss of privacy, and the scope of the collection.[125] With both tracking cookies and DPI, the scope of collection is extremely large, so organizations hoping to satisfy *PIPEDA* will need to offset that extensive collection by tightening up the other factors to reduce the degree of privacy loss experienced by individuals.

Arguably, the most significant factor in favour of proportionality is fulsome, meaningful consent obtained through an opt-in scheme. Unlike *Eastmond*, where employees had no say in the matter,[126] users may choose whether to participate and, should they choose to opt-in, they enter the program with full knowledge of their loss of privacy. This consent, along with a robust, multi-level set of safeguards (including encryption and secure storage facilities), a collection policy that avoids collecting the most sensitive types of personal information and a retention policy that emphasizes speedy deletion, may be sufficient to render this purpose reasonable. Note that the imposition of mandatory consent (discussed above) may negatively impact this reasonableness assessment; it is far less likely that a reasonable person would consider such a system appropriate in the circumstances.

As DPI has a greater scope of disclosure, organizations employing DPI-based behavioural advertising will likely need to take the strictest steps to reduce the loss of privacy. In addition to the features mentioned above, such organizations may need to institute an aggressively limited retention policy, where all personal information that is collected is immediately aggregated into interest categories and then deleted, leaving only the aggregate data behind. This is a necessary consequence of such broad collection; even short-term retention can pose serious privacy risks when the data being retained is so voluminous. Similarly, such organizations need to be incredibly delicate in selecting the information that gets aggregated – having access to literally everything that an individual does online makes it necessary to only pick out the least sensitive information available. It is not enough that such organizations avoid serving ads based on a user's financial information, health records, political interests and the like; organizations that take it upon themselves to sift through a person's entire digital life should be careful never to learn these things in the first place.

This places these organizations in a fairly restricted position, as the Privacy Commissioner recognizes broad (and, to some, apparently innocuous) classes of information as "sensitive", leaving a fairly limited class of data eligible for collection without requiring stronger privacy protections than they presently implement. But this is the result of casting a wide net; organizations must normally justify every piece of information that they collect (indiscriminate collection being expressly forbidden),[127] so it is not surprising that a technology that is designed to collect everything will have comparatively onerous restrictions imposed upon it.

ii. Case Studies

Both Google and Phorm have pledged to enforce powerful safeguards. Both companies attempt to avoid associating sensitive interest categories with users' identifiers, although their conceptions of "sensitive information" are far more limited than that of the Privacy Commissioner.

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124. *Facebook, supra* note 59 at para 193.
125. *Eastmond, supra* note 66.
126. *Ibid.*
127. *PIPEDA* Schedule 1 clause 4.4.1.

Google's AdSense is capable of indefinite retention of user interest categories (despite its two-year rolling deletion policy), but only if users are consistently interacting with the system and, as a consequence, interacting with that information. Google collects data from numerous partner websites and retains most of the information it collects, such as browser history and IP addresses, for a period of 18 months prior to anonymization. This pattern of retention is troubling, particularly in light of the *Facebook* decision, which casts suspicion on indefinite retention of personal information. It also lacks an opt-in consent process to mitigate the severity of the privacy loss. However, Google claims to strike a balance between legitimate interests – privacy and security. As in *Credit Bureau*, this may go a long way towards establishing reasonableness (at least with respect to retention). The aggregate interest category information that is indefinitely retained may be sensitive, but it is less sensitive than the browsing history that Google eventually anonymizes, and it likely is the minimal amount of information necessary to provide behaviourally-targeted ads.

Google appears to be treading a thin line when it comes to balancing individuals' privacy interests against the benefits gained. Google anonymizes the most sensitive personal information after 18 months, an apparently reasonable period of time, and retains user interest information for the duration of its use plus two years. This policy satisfied the Commissioner in *Facebook*, but the scope of collection (and thus loss of privacy) in this case is considerably broader. Despite this, Google's balancing appears to be largely reasonable, and thus its purposes are likely *PIPEDA*-compliant. Such a finding is not guaranteed, however; revising its retention policy to store less information for less time or instituting an opt-in consent process would dramatically improve the likelihood that Google's purposes would be found to be in line with *PIPEDA*.

Phorm, in contrast, retains nothing but users' aggregated interest categories and their unique identifiers. The only issues that can be taken with Phorm's approach is that Phorm's definition of sensitive information is much narrower than the Privacy Commissioner's, and it stores users' interest categories indefinitely. This concern is likely resolved by Phorm's opt-in consent scheme, which reduces the severity of privacy loss resulting from the collection, use and retention of sensitive information. Overall, Phorm likely satisfies these Principles of *PIPEDA*.

C. Principle 9 – Individual Access

Access to personal information is a particularly problematic aspect of these technologies. Multiple individuals may contribute personal information to a single identifier, simply by virtue of using the same browser on the same computer (as is common in family homes). As a consequence, it is likely that providing an individual access to his or her personal information would reveal the personal information of a third party that cannot be severed. Worse, if a third party gains access to an individual's computer account they would be able to view the interest categories associated with it even if none of the personal information collected was theirs. To get around this, an individual would have to be able to demonstrate that he or she was the originator of the personal information associated with a particular identifier, and either demonstrate that no other individual had used the same browser on the same computer (or, at least, that such an occurrence was unlikely) or obtain consent from all individuals who were likely to have access to the computer in order to gain access to the personal information. In view of the practical difficulties that arise, the most effective route to ensure *PIPEDA*-compliance is to deny access entirely (absent convincing proof of the above requirements). This is not the only solution; in theory, organizations could allow users to authenticate their identities before browsing, but requiring users to log in to the service is precisely what most behavioural advertisers want to avoid.

Google and Phorm both allow users to view and edit their user preferences by visiting a particular webpage in their browser. The page recognizes the browser and provides access to the associated user interests. Although this functionality is likely provided in an attempt to satisfy access requirements, in many cases it may actually allow individuals to view the personal information of third parties. In order to be compliant with *PIPEDA*, Google and Phorm should either deny access to these records entirely or establish some mechanism by which users can authenticate their identities.

CONCLUSION

PIPEDA anticipates the need for a delicate balance between individuals' reasonable expectation of privacy and organizations' legitimate business interests. In general, it does not aim to prevent consumers from trading their privacy for commercial benefits, but it does demand that individuals obtain fulsome knowledge of the arrangements that they are entering, that the consent they provide be meaningful and that the arrangements themselves strike a reasonable balance between the privacy lost and the benefit gained. Behavioural advertising technologies test this balance by being pervasive, surreptitious and highly invasive by nature. The *Act* is intended to guide organizations through these untested waters by providing a baseline of protection appropriate to the circumstances.

Under *PIPEDA*, users should consent to both tracking cookies and deep packet inspection via an opt-in process due to the sensitive information that these technologies collect and use. Using these technologies for the purpose of targeted, behavioural advertising is not unreasonable *per se*, but failing to adopt stringent retention policies that reduce the amount of information stored and limited collection policies that avoid collecting the most sensitive classes of information may render it unreasonable. Limiting retention is also critical, in addition to the institutional and physical protections that all organizations handling sensitive information should take. Finally, as these technologies cannot distinguish between one individual and another if they are using the same browser, access to personal information should be limited to cases where it can be demonstrated that the only person who has contributed the personal information attached to a particular identifier is the person requesting it (or that all other contributing individuals have consented to the access).

On the basis of the above, I have concluded that Google may be violating *PIPEDA* due to its reliance on opt-out consent despite its collection of sensitive personal information, and its practice of permitting users to access personal information without demonstrating that the personal information of third parties is not likely to be disclosed without their consent. I recommend that Google adopt an opt-in consent process and either deny individuals access to personal information or put in place a process that enables them to authenticate their identities in a manner that satisfies the *Act*. It may also be appropriate for Google to limit its retention and collection of personal information more aggressively (particularly with respect to highly sensitive classes of information), although its current practices likely do not violate the *Act*.

I have also concluded that Phorm may be violating *PIPEDA* (or would be, if it performed business in Canada) on the basis that it too is permitting users to access personal information without demonstrating that the personal information of third parties is not likely to be disclosed without their consent. I recommend that it either deny individuals access to personal information or put in place a process that enables them to authenticate their identities in a manner that satisfies the *Act*.

ARTICLE

APOLOGY ACCEPTED: HOW THE *APOLOGY ACT* REVEALS THE LAW'S DEFERENCE TO THE POWER OF APOLOGETIC DISCOURSE

By Claire Truesdale*

CITED: (2012) 17 Appeal 83-96

INTRODUCTION

"I'm sorry" is an incredibly versatile and powerful phrase. More than an expression of simple sorrow, these words of apology are a social action, and their impact can range from resolving an accidental bump between pedestrians, to healing a deep interpersonal rift, to reconciling a divided nation. It is this power - this function of apology as a moral and social actor - which justifies its protection from interference by another powerful social and moral actor: the law. British Columbia's *Apology Act*[1] safeguards apologetic discourse from the often corruptive force of law that can limit, commodify, or discourage apology. In so doing, the *Apology Act* reveals an instance of the law's humility. By carving out a safe space for alternative methods of negotiating human disputes, we see the law's implicit admission that there are instances in which apology has a superior ability to reinforce moral standards and reconcile damaged social relations. We see a moment of the law embracing an exception to the basic principles of evidence, in order to privilege the important social and moral work of apology over the law's relentlessly logical quest for truth. This paper will demonstrate the ways in which apology is often superior to the law in navigating the realms of the moral and social and how it must be protected from the powerful influence of the law in order to safeguard a discursive process that is vital to a civil society.

I. THE NATURE OF APOLOGY

Although most people may think of an "apology" as simply "being sorry", scholars have argued that true apology contains much more than a simple statement of the speaker's regret. Definitions of apology in the literature of sociology, psychology and law vary, but share many commonalities. Psycholinguists Scher and Darley identified four elements of

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1. *Apology Act*, SBC 2006, c 19. The *Apology Act* is a piece of provincial legislation and applies only in British Columbia, however similar legislation exists elsewhere in Canada. See e.g. *Apology Act*, SO 2009, c 3. As only the federal government has jurisdiction over criminal law, this statute would only apply to civil and regulatory matters (see Section II for a brief discussion of the law's application).

apology that legal scholar John C. Kleefeld calls the "four R's":[2] remorse, responsibility and in some cases, resolution and reparation, with the first two "R's" being definitional. For psychologist Janet Bavelas, apology is framed slightly differently, as entailing remorse plus responsibility for the hurtful act, which necessarily entails naming oneself as the agent of the act, and a clear description of the act.[3] She draws a distinction between expressions of sympathy and apology. Both involve some expression of being "sorry," but for Bavelas, a true apology necessarily also includes a statement of responsibility.[4] For mediator Carl D. Schneider, the core elements of apology are acknowledgement of the speaker's role in inflicting the injury; some display of emotion such as remorse or regret (what he terms "affect") and opening up the offender to vulnerability, as an apology does not include a defence and thus can be refused by the receiver.[5]

From this diversity of perspectives, the definition that can be culled for the purposes of this paper is that a full apology consists of an acceptance of responsibility for a specific act (which necessarily includes agency), acknowledgement of the injury caused by that act, and an expression of remorse or regret. A true apology will expose the offender to some form of vulnerability as a true apology is offered without a defence[6] and thus the offender will, at the very least, face the possibility that the apology offered will be refused. Other vulnerabilities may include shame, embarrassment, social consequences (such as ostracism) and, where legislation does not preclude it, legal liability. Apologies that are missing any of these key elements will be considered "non-apologies": mere expressions of either sympathy, which lack agency, or explanation, which denies wrongdoing. Explanations are often attached to apology but are not part of the apology itself[7] and thus a true apology does not allow escape from responsibility via justification. An apology might also contain an explicit resolution to not commit such acts again or an offer of reparation, but these will not be considered definitional for the purposes of this discussion.[8]

In his extensive work on the sociology of apology, Nicolas Tavuchis recognizes that apology is more than just an expression of feeling; it is a "speech act"[9] that does social and moral work. As Bavelas articulates, apology is "a social action that can only be done with words, and, by corollary, if it is not done in words, it has not been done."[10] The act of apology is "quintessentially social"[11] and does more than assuage the guilt of the offender; it does important social work in maintaining or repairing relationships and restoring the offender's place in the social order.[12] Further, Lee Taft recognizes apology's

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2. Steven J Scher & John M Darley, "How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act" (1997) 26 J Psycholinguistic Research 127, cited in John C Kleefeld, "Thinking Like a Human: British Columbia's *Apology Act*" (2007) 40: 2 UBC L Rev 769 at 789-790 (HeinOnline).
3. JB Bavelas, "An Analysis of Formal Apologies by Canadian Churches to First Nations" (2004) Occasional Paper No. 1, Centre for Studies in Religion and Society (Victoria: University of Victoria) at 2-3 online: Publications: Janet Beavin Bavelas <http://web.uvic.ca/psyc/bavelas/Publications.html>.
4. *Ibid* at 2.
5. Carl D Schneider, "What it Means to Be Sorry: The Power of Apology in Mediation" (2000) 17:3 Mediation Quarterly 265 at 266.
6. *Ibid* at 267.
7. Kleefeld, *supra* note 2 at 789.
8. Tavuchis considers these elements to be necessarily implied by the expression of remorse. Nicolas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: Stanford University Press, 1991).
9. *Ibid* at 22.
10. *Supra* note 3 at 1.
11. Tavuchis, *supra* note 8 at 14.
12. For further discussion of the social import of apology see below, Section IV.

place in not only healing social and emotional rifts, but also restoring "moral balance – more specifically...an equality of regard."[13] The restorative act of apology is a critical element of a socially harmonious and moral society. As this paper will show, through apology legislation such as the BC *Apology Act*, the law admits its own weakness in repairing social rifts. It protects the moral and social nature of apologetic exchange from the influence of the law's blunt and often clumsy attempts to remedy moral and social transgressions.

II. THE *APOLOGY ACT*

The BC *Apology Act* came into force in May of 2006. It is a relatively strong and comprehensive piece of legislation compared to its counterparts in other jurisdictions. This is because it protects not only expressions of sympathy or remorse[14] but also statements that indicate or imply an admission of fault. Section 1 of the Act states that,

> 'Apology' means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate.[15]

This definition clearly goes beyond statements of sympathy to cover full apologies, where responsibility for the act is taken. Also unlike legislation in many other jurisdictions, the *Apology Act* is not limited to certain kinds of civil liability[16] but covers "an apology made by or on behalf of a person in connection with *any matter.*"[17] An apology cannot be used as an admission of fault or liability in connection with that matter,[18] nor can it be considered a confirmation of a cause of action under section 5 of the *Limitation Act.*[19] It "cannot void, impair or otherwise affect" insurance coverage that would be available to the apologiser, but for their apology"[20] and it "must not be taken into account in any determination of fault or liability in connection with that matter."[21] Finally, the Act strongly and vigorously protects apologies from being used as evidence of legal liability in section 2(2) which states,

> Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault of liability of the person in connection with that matter.[22]

The Act thus appears to widely cover any manner of apology, including admissions of fault, from being used as evidence in any civil proceeding. As provincial legislation, it cannot apply to criminal law, which belongs to the federal realm according to the

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13. Lee Taft, "Apology Subverted: The Commodification of Apology" (2000) 109: 5 Yale Law J 1135 at 1137 (JSTOR).
14. Legislation covering only sympathy but not fault can be found in California, Florida, Hawaii, Indiana etc. See Kleefeld, *supra* note 2 at 779.
15. *Apology Act, supra* note 1, s 1.
16. See legislation limited to health care such as in Arizona, Colorado, Delaware, Georgia, Illinois etc. See Kleefeld, *supra* note 2 at 779.
17. *Apology Act, supra* note 1, s 2 (1), [emphasis added].
18. *Ibid,* s 2(1)(a).
19. *Ibid,* s 2(1)(b).
20. *Ibid,* s 2(1)(c).
21. *Ibid,* s (2)(1)(d).
22. *Ibid,* s 2(2).

Canadian Constitution;[23] however, as it applies to "any matter" it would appear to apply to regulatory and quasi-criminal matters within provincial jurisdiction. The *Apology Act* has been only mentioned in passing by the court,[24] so the analysis that follows is dependent on it being judicially interpreted as broadly as it would appear to apply from the wording of the legislation: to exclude all expressions of apology, including admission of fault, from admission as evidence of fault in all civil matters. This broad coverage of admissions of both sympathy and fault protects the important social and moral work of apology, but in so doing flies in the face of foundational principles of evidence law.

III. PRINCIPLES OF EVIDENCE LAW

The discourse of apology is in many ways antithetical to the adversarial system, which pits the parties against each other and rewards a successful individual rather than aiming to repair the relationship between them. This same adversarial system both underwrites and runs through elements of the rules of evidence. In the context of evidence law, apology legislation very clearly contradicts Irving Younger's lawyer's "rule of thumb" for the party admissions exception to hearsay: "anything the other side ever said or did will be admissible, as long as it has something to do with the case."[25] Party admissions are a categorical exception to the rule against hearsay that allows statements by a party to the proceeding to be offered by the opposing party for the truth of their contents.[26] In the common law, a statement of apology would be considered a party admission, and as true apologies by necessity require an acceptance of responsibility,[27] they would appear to be very useful to the court in proving fault. An apology in relation to a material matter at trial would seem to clearly meet two of the most basic concerns of evidence law: reliability and relevance. Using logical reasoning, there appears to be little reason to take responsibility for that which you did not do,[28] and an apology is clearly relevant if it relates to the alleged offence itself. Unless it is somehow irrelevant, highly prejudicial or covered by another exclusionary rule, it is likely to be admitted under common law.

Furthermore, its admittance is supported by the adversarial system. The party admission exception rule is clearly motivated by the adversarial trial process. As the Court stated in *R. v. Evans,*[29] "its [an apology's] admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain about the unreliability of his or her own statements." As Orenstein articulates it, this has less to do with rationality, and more to do with the "law of the sandbox" that comes with an adversarial system, where the guiding principle is, "ha, ha, you said it, now you're stuck with your own admission."[30] It is exactly this principle that the *Apology Act* works against. It protects apologizers from having their expressions of apology used against them at trial. To exclude what is potentially very

23. *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, App II, No. 5.
24. See *Danicek v. Alexander Holburn Beaudin & Lang,* 2010 BCSC 1111, 8 BCLR (5th) 316.
25. Irving Younger, *Irreverent Introduction to Hearsay* (American Bar Association, 1977) at 23-24, as cited in, Hamish Stewart *et al.,* eds *Evidence: A Canadian Casebook,* 2nd ed (Toronto: Edmond Montgomery Publications Ltd, 2006) at 196.
26. Stewart, *ibid at 196.*
27. See above, Section I.
28. This assumption of reliability has not gone unchallenged. Orenstein argues in favour of apology legislation from a feminist perspective and points out that people have many motives to apologize beyond belief in their own wrongful conduct, such as expressing sympathy, acknowledging another person's pain, or to smooth over social relations. Aviva Orenstein, "Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Least Expect It" (1998 - 1999) 28: 2 Sw U L Rev 221 at 250 - 251 (HeinOnline).
29. *R v Evans,* [1993] 3 SCR 653, 108 DLR (4th) 32 as cited in Stewart, *supra* note 24 at 197.
30. Orenstein, *supra* note 28 at 249.

valuable evidence, there must be a powerful motivation. By carving an exception for apology in evidence law, despite the relevance and reliability of party admissions, the law is recognizing the unique importance of the moral and social processes apology facilitates and its own fallibility in these arenas. The moral and social aspects of apologetic discourse are intricately intertwined and it is often difficult to parse out one from the other. Apologies are clearly relational, but even when given in private, take place in a complex social sphere and raise questions about the moral order they seek to sustain.[31] Here, moral and social effects of apologetic discourse are explored separately only for ease of discussion; however, in reality, they are deeply interrelated and mutually informing.

IV. APOLOGY AND MANAGING THE MORAL

An apology acknowledges right and wrong and confirms that a moral norm has been violated.[32] It is what Tavuchis calls "the middle term in a moral syllogism… a process that commences with a *call* [for apology] and ends with *forgiveness*."[33] The moral aspect of apology is both interpersonal and more broadly communicative of moral standards: "it is not easily contained because it inevitably touches upon the lives and convictions of interested others while raising both practical and moral questions that transcend the particular situation that prompted it."[34] The two broad functions of apology then are: upholding moral standards on an interpersonal level, and communicating more broadly to society what constitutes moral or immoral behaviour.

A. Apology and Restoration of Moral Balance – Law as Safeguard or Threat?

Taft articulates the interpersonal work of apology as a restoration of moral balance[35] between the offender and the offended. The offender, by admitting her wrong, puts herself in a vulnerable position, opening herself up to the potential social consequences of admitting that she violated a societal norm. She may be harmed by the refusal of her apology, humiliation, or other consequences.[36] If an apology is successful, on the other hand, this reconciliation results in what Taft calls a "restoration of equality of regard."[37] Taft explains that the offender demonstrates regard in her willingness to apologize, and the offended in turn demonstrates regard in her willingness to forgive. In performing this moral act, they embrace each other's humanity. The moral standards of conduct in the relationship have been reaffirmed and both parties have acknowledged the importance of these standards.

In his criticism of apology legislation, Taft seems to believe that this kind of moral process is only possible with legal consequences there to buttress it. He decries protecting the offender from the legal consequences attached to apology, calling this a subversion of the moral process of apology.[38] He argues that the law acts as a moral safeguard for the integrity of apology[39] and that authentic apology, as an unequivocal acceptance of responsibility for wrongdoing, requires the offender to accept all of the potential

31. Tavuchis, *supra* note 8 at 14.
32. Taft, *supra* note 13 at 1142.
33. Tavuchis, *supra* note 8 at 20.
34. *Ibid* at 14.
35. Taft, *supra* note 13 and accompanying text.
36. See above, Section I.
37. Taft, *supra* note 13 at 1137.
38. *Ibid* at 1156.
39. *Ibid* at 1139.

consequences of the wrongful act, including legal liability. He suggests that if the offender is not willing to accept all consequences of his wrong, including exposure to legal liability, this somehow vitiates the morality of the apology.[40] This proposition that apologetic discourse becomes morally corrupt without the attachment of legal liability is problematic in a number of ways.

First, this view of the law as maintaining apology's morality assumes that the offender's sense of moral culpability, and the victim's sense of the moral wrong, is matched by the law's remedy. In reality, the remedies in law are limited and often inappropriate to rectify the damage done. It is almost absurd how the law's remedies must try to put a dollar figure on incredible emotional pain, or even the value of human life itself. Even Taft admits that financial compensation leaves something wanting:

> The payment of large verdicts of settlement monies failed to heal the deep wounds of many clients; they continued to suffer and express lingering feelings of anger and resentment. I began to think that the missing, necessary piece for healing was an apology from the offender.[41]

There are many cases where a full and heartfelt apology can do much more to heal the offended person and restore moral balance than the forced payment of compensation. The literature contains many anecdotal examples[42] and it is not difficult to imagine others. The magic of apology, as Tavuchis articulates it, is that, "no matter how sincere or effective, [an apology] does not and cannot *undo* what has been done. And yet, in a mysterious way and according to its own logic, this is precisely what it manages to do."[43] By requiring an acknowledgement of wrong, and prompting an exchange of power between the offender and offended, apology can restore moral balance in a way that financial compensation cannot. As Taft admits, "while commodified concepts of compensation may provide financial redress, such concepts do not necessarily restore moral balance".[44] Law cannot be the moral safeguard of apology when its remedies are often so inappropriate for addressing the actual harm, restoring moral balance and bringing healing to the offender. The restoration of moral balance and the adequate resolution of dispute cannot be found in law when the offended, having exhausted the law's remedies, are still left wanting something more.

Taft's view of the relationship between law and morality also assumes we live in an ideal world, where legal remedies affect all individuals equally. Even if legal remedies were always morally appropriate, Taft's proposition ignores the complex moral web of multiple human relationships. In order to accept that the law is necessary to correct the moral balance between the parties and therefore maintains the moral righteousness of apology, we would have to assume one of two things: either that the chief moral duty owed by the offender is to the offended, or that all offenders have the means to provide financial remedy for their wrongs.

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40. *Ibid* at 1157.
41. *Ibid* at 1136.
42. See e.g. Attorney General Wally Oppal's recounting of two women who were surrounded by armed officers and ordered to the ground in a case of mistaken identity, and offended when the officers made light of their mistake. All they wanted in recompense was an apology. (Kleefeld, *supra* note 2 at footnote 26); Former BC Ombudsman Howard Kushner's description of the importance of apologies by public agencies to complainants to the Ombudsman's Office (Kleefeld, *supra* note 2 at 784); Taft's description of a Massachusetts former senator who pioneered apology legislation after his daughter was killed by a car while riding her bicycle and the driver did not apologize for fear litigation (Taft, *supra* note 13 at 1151).
43. Tavuchis, *supra* note 8 at 5.
44. Taft, *supra* note 13 at 1137.

To discount this second assumption, we can examine how, by relying on financial compensation, the civil law has difficulty accounting for the disparate impact of legal remedy. A punishment of $1000 in damages to one is pocket change, but to another may be a fortune. This discrepancy in the true cost of civil law remedy to different offenders can hardly be viewed as a morally balanced resolution. If apology necessitates legal liability, we can end up with a situation where the poor, taking exactly the same moral actions as the rich, suffer greater hardship for their transgression. This hardly seems to safeguard morality; rather it seems to warp it into producing unequal suffering for equivalent transgression. The law, by using financial redress as its remedy in areas such as torts, may upset rather than restore moral balance by using a blunt tool like financial compensation. Such a tool causes some transgressors to suffer more, merely for their poverty, rather than for the actual significance of their transgression to the offended.

To examine the fallacy of the first assumption, take, for example, the situation of a single mother with low income who causes an accident, where she is at fault. She may be incredibly sorry for the damage she caused, but may not be willing to face the financial implications of legal responsibility, especially if doing so would affect the well-being of her child. The woman in this situation has, like all of us, multiple moral relationships to be maintained. If her apology is not protected under law, then she cannot restore moral balance with the offended party by apologizing for fear of upsetting another moral balance: her obligation to provide for her child. If, however, her apology is protected from legal liability, she can apologize as she may strongly desire to, without fear of violating her other moral obligation to her child. This legal protection, or lack thereof, may actually shape her social behaviour. She has a strong disincentive to apologize if she fears it will lead to legal consequences, no matter what ethical desire she might have to do so.

Finally, regardless of whether legal liability attaches, an apology opens up the offender to a wide range of vulnerabilities.[45] Legal liability is far from the only variation. Essentially, the root of vulnerability is that the offended party can ignore or reject the offender's apology, or punish him for it.[46] Legal consequence then, is but *one* method of punishment, and as discussed previously, often an ill-fitting one. There are others such as shame, social ostracism, expulsion from a particular group, or whatever other reparations the offended might demand. As such, even if we assume that in order to uphold moral standards, a transgression requires some consequences to follow, legal liability is not the only option.

In the end, law is only one arbiter of social values. We determine what is moral through both individual and collective expressions of moral consciousness. The law is one instance of this expression, but although it strives to represent society's collective conscience, it often struggles to tailor its remedies to the myriad of complex moral situations that arise. Apologetic discourse similarly outlines the bounds of moral conduct, but allows the offended to set parameters based on the individual situation, with a number of possible responses available to the offered apology. The offended party's possible responses may be restricted to an extent by social norms; however, there is still great flexibility and individual freedom in choosing how to respond. The common law on the other hand, often charges ahead with crudely crafted remedies on behalf of the offended party and society as a whole, leaving in its wake both morally over-punished offenders and morally under-compensated offended. Thus, in the *Apology Act*, we see an effort in statute law to make up for the frailties of common law, by providing a space for socially and morally critical social exchange. The statute may be used to protect the important work of apology from the common law's interference.

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45. Schneider, *supra* note 5 at 267.
46. *Ibid.*

Apology can not only restore moral balance where the law cannot, but in many instances will also require protection from the law in order to perform this important function. Far from morally safeguarding apology, even Taft admits that the law often corrupts the morality of apology. He states that "apology is frequently commodified in the legal arena, where a moral process can become a market trade."[47] That is, where apology legislation does not exist, apologies will be crafted to avoid or limit liability.[48] What results are not true apologies, as they are missing a key component: admission of wrong-doing. Without this admission, there can be no restoration of moral balance - in fact, there is no apology at all. At best, there may be sympathy, at worst, only excuse or explanation. Although in an ideal world a person might be willing to apologize fully and accept the possibility of legal liability, as argued earlier with the example of the single mother, this assumes that people are in a unilateral moral exchange, rather than the complex social reality that exists. It assumes that there are no incentives to avoid legal liability other than lack of true contrition, when in fact there may be numerous reasons why a person who is truly contrite still wishes to avoid legal consequences. Apology legislation, by removing the threat of legal liability, allows apologies to be more freely and naturally made.

Taft fears, however, that such legislation will lead to an increase in insincere apologies, which will instead move apologetic discourse from "potential to actual corruption."[49] This corruption however, is already happening with the use of purely sympathetic or explanatory non-apologies. Apology legislation merely opens up the door to more apologies, and of course some insincere apologies are bound to step in, along with the stampede of sincere apologies previously impeded by fear of legal liability. Rather than corrupting the morality of apology, apology legislation recognizes that this realm of moral exchange is better served by existing safely apart from a legal system that only encourages the use of apology as a tool to reach self-serving ends.

What I propose instead of Taft's view of the law as the moral safeguard of apology, is that the defence against corruption of moral apology can be found within apologetic discourse itself. The final term in Tavuchis' moral equation - forgiveness[50] - is the ultimate arbiter of whether justice has been done by an apology. It is the offended who must decide whether the apology is sufficient and moral balance has been restored, and not the law. An insincere or undeserving apology can always be rejected. Forgiveness, then, is essential to the effectiveness of apology's moral action. Compensation, on the other hand, is not a prerequisite for the moral resolution of dispute. In the realm of morality, there is clearly something more to be said for an apology freely given than financial compensation wrested from a tightly closed fist. As discussed previously, treating the law as the final arbiter of morality is deeply problematic and oversimplifies the complex moral situations civil society creates. Further, apologies, whether sincerely meant or not, have value beyond the interpersonal as communicative devices of moral standards.

B. Apology as Morally Communicative – The Power of Institutional Apology

Both apology and the law are communicative of moral standards. The law does so both proscriptively, via legislation, and by making examples of those it views as stepping outside the boundaries of morally and socially acceptable conduct. However, apology can be communicative of moral standards in a way that the law cannot. The law can only

47. Taft, *supra* note 13 at 1146.
48. See e.g. Taft, *ibid* at 1148. See also section IV. ii. for discussion of equivocal institutional apologies.
49. Taft, *ibid* at 1156.
50. Tavuchis, *supra* note 8 at 23.

represent *the law's* acknowledgement of violation of a moral axiom. It cannot speak for the offender and force his acknowledgement of his violation, and in fact, the adversarial system encourages him to vigorously deny it.[51] Meanwhile, apology, by definition, includes an acknowledgement from the offender that he violated a social norm.[52] This discrepancy is particularly important in the case of institutional apologies for historical wrongs. There is a massive communicative difference between a court chastising an institution for violating human rights and ordering them to compensate those harmed, and the institution itself coming out and offering a full apology, thereby acknowledging and taking responsibility for the wrong. It is particularly striking in the case of government apologies, because we expect the government, as our democratically elected representatives, to uphold societal norms and moral values. There is great restorative power in the exchange that occurs when a government acknowledges its own wrongs via apology. On the other hand, when an institution fiercely denies wrongdoing for fear of legal liability, it must necessarily bring into question either its own moral integrity, or the moral standards it has declined to meet.

One example of the discrepancy between freely made apology and the delayed and reluctant apology that often comes as a result of the fear of legal liability is seen in the Canadian tainted blood scandal. The former CEO of the Canadian Red Cross testified before the Krever Inquiry that one reason the Red Cross refused to apologize to people who had been infected by blood products was that it could be construed as an admission of liability, which would have affected the Red Cross's access to insurance. The liability that the Red Cross was facing would render it insolvent, making such concerns understandable.[53] As discussed earlier, offending parties often face competing moral obligations, and the spectre of legal liability may cause them to neglect the obligation to apologize in order to live up to another obligation, such as to their employees or to people benefitting from the Red Cross's other programs who would suffer if the organization failed. In 2005, 12 years after the Krever Commission investigation into the tainted blood scandal began, the Red Cross finally apologized after pleading guilty to charges of distributing a contaminated drug.[54] James Kreppner, a lawyer who had been infected with HIV and Hepatitis C by the tainted blood products reacted to this outcome by saying, "I wasn't looking for a huge fine. I was looking for them to accept responsibility, which they've done, finally."[55] It was not the law's censure that this victim wanted, but that the institution itself would admit responsibility. The power of the law in condemning institutional action is simply not as reconciliatory, nor as reaffirming of moral precepts, as is an institution itself freely admitting wrongdoing. This is because an apology confirms to both parties that a transgression occurred and validates their shared moral values. Legal condemnation on the other hand, while it may communicate the moral standards of society as a whole, does nothing to confirm that the transgressing institution itself voluntarily approves of and agrees to adhere to those standards.

In order for government or institutional apologies to have reconciliatory power, however, they must be full and unequivocal. The *Apology Act* removes legal liability as a disincentive to apologize fully, thus safeguarding the important communicative work of apology. There is enormous value in allowing governments or other powerful social groups to apologize unequivocally. As Janet Bavelas describes in her analysis of the

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51. For more discussion see below, Section V.ii. on moral community.
52. See above, Section I.
53. *Commission of Inquiry on the Blood System in Canada: Final Report*, vol 3 (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 1038 as cited in Kleefeld *supra* note 2 at 804.
54. "Tainted Blood Scandal" *CBC News* (25 July 2006), online: CBC News <http://www.cbc.ca/news/background/taintedblood>.
55. Tracey Tyler, "Red Cross Admits Guilt" *The Toronto Star* (31 May 2005) A1.

linguistics of church apologies to First Nations, many institutions, seeing negatives in both fully apologizing and refusing to apologize at all, face an avoidance conflict and seek to equivocate.[56] In her analysis of six church apologies between 1986 and 1998, she found that most of the churches avoided adopting agency in reference to offenses.[57] In other words, they acknowledged that wrongs occurred, but did not take responsibility for them. She found that above all else, the threat of legal liability appeared to be the greatest factor in prompting churches to make these non-apologies.[58] The *Apology Act* removes this obstacle, offering a smoother path towards healing, and allowing institutional apologies to be morally communicative to their fullest extent. Although it would be presumptuous to guess what First Nations thought of the equivocal church apologies, it is easy to see how unequivocal apologies, as they accept full responsibility for wrongdoing, are more likely to both promote individual healing and more strongly articulate the moral boundaries of society. The difference between full apologies and those that try to duck responsibility is often as clear to you and I as it is to a psychologist like Bavelas. According to analysis from a historian's perspective, "the coupling of remorse with recognition of one's responsibility distinguishes the apology from simple regret, and it can make expressions of regret seem less heartfelt than outright apologies."[59] We can recognize the difference between an apology that assumes agency and an expression of sympathy that does not. Archbishop Desmond Tutu, at the conclusion of South Africa's Truth and Reconciliation Commission, recognized the wide chasm between equivocal and unequivocal apologies. His anger at the vacant nature of equivocal apologies was made clear when he said,

> Is there no leader of some stature and some integrity in the white community who won't try to be too smart, who is not trying to see how much he can get away with, but who will say quite simply, 'We had a bad policy that had evil consequences. We are sorry. Please forgive us,' and not then qualify it to death?[60]

Unequivocal apologies more strongly communicate to those who have been historically wronged, and to the rest of society, that what happened in the past has not been forgotten, that responsibility is being taken, and that the injury of the transgression is recognized: "that the past is not erased, but the present is changed."[61] The more serious the past transgression, the greater the importance of the *free* ability to apologize becomes for healing. As Weyeneth emphasizes, "when issues are especially intractable or a society fundamentally divided, an apology can offer a starting point for healing, even if reconciliation itself is not possible at the time."[62] Conversely, equivocal apologies can cause further injury, as the anger in Tutu's words indicates. In these scenarios, where the past harm was grave, it is even more vital that the apology be seen as coming from the institution itself. It is critical that the offender, or those who represent offenders of the past, reconfirm to the offended that a moral wrong occurred, and that it will not be repeated.

Apology legislation recognizes that this moral communicative power of apology is in some instances superior to that of the law, but can only be utilized to its full potential

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56. Bavelas, *supra* note 3 at 6-7.
57. *Ibid* at 12.
58. *Ibid* at 13.
59. Robert R Weyeneth, "The Power of Apology and the Process of Historical Reconciliation" (2001) 23:3 The Public Historian 9 at 17 (JSTOR).
60. "Tutu Says Most White Leaders Lied to Truth Panel" *Washington Post* (5 August 1998), A20, as cited in Schneider *supra* note 5 at 277-278.
61. E Kastor, "The Repentance Consensus: A Simple Apology Just Doesn't Cut It." *Washington Post* (19 August 1998), D5, as cited in Schneider ibid at 277.
62. Weyeneth, *supra* note 61 at 24.

when it can be unequivocal, when the inhibiting influence of legal liability is removed. Although authors like Taft might hope for a world in which individuals, corporations and government entities would offer full apologies for the harms they have committed, regardless of what legal consequences might follow, this is not the world in which we live. As Kleefeld articulates, we require "a framework that gets the most out of a second-best world."[63] The moral values that an unequivocal apology communicates are necessary facets of the moral work of apologetic discourse, not only to aid in individual healing and restore moral balance, but also to reconcile present society with its past wrongs, or, in other words; to maintain social relationships and the accompanying social order that would otherwise be threatened if the transgression is ignored.

V. APOLOGY AND THE SOCIAL SPHERE

As was first articulated in the section on the moral nature of apology, apology also plays a significant role in managing social order, and restoring social relationships. Apology acts in two main ways in this context: first, to heal the individual relationship and second, to manage membership in a moral community. As Tavuchis articulates it, apology is "quintessentially social, that is a *relational* symbolic gesture occurring in a complex interpersonal field."[64] In other words, just like apology's moral work, its social function takes place both interpersonally, and in the wider social sphere.

A. Repairing Social Relationships

Law also tries to navigate the social field, but in the end there are ways that it comes up short. Similar to the way in which Taft[65] is jealously protective of the law and the role he envisions for it in protecting morality, Dugald E. Christie defends it as a method of protection for marginalized members of the social order. [66] Christie expresses concerns about the potential negative effects of apology legislation. Primarily, he is concerned about victims who will quit the litigation process upon receiving an apology and so fall prey to more socially powerful actors looking to avoid litigation.[67] While his concerns certainly are troubling, there are other social functions of apology that the law simply cannot replicate. In painting the protection of apology as socially destructive, he ignores two important things: one, that the law is often not the best place to find healing (and so, abandoning litigation is not by necessity a bad thing), and two, the ability of unrestrained apology to mend relationships, unlike the law which promotes continued antagonism.

It is easy to sympathize with Christie's desire to achieve justice for the socially marginalized by defeating the socially powerful in court. This is a great advantage of the law in this realm, as apologies (if accepted) seem to let wrongdoers off the hook. As Tavuchis puts it,

> Contrary to the logic of the economic marketplace or conceptions of social exchange based upon exclusively rational calculation, the apology itself – without any other objective consideration – constitutes both the medium of exchange and the symbolic quid pro quo for, as it were 'compensation'.[68]

Apology offers no more amends than the apology itself. The offender may choose to offer

63. Kleefeld, *supra* note 2 at 804.
64. Tavuchis, *supra* note 8 at 14.
65. *Supra* note 13.
66. See Dugald E Christie, "Gratuitous Apologies: A Discussion Paper on Apology Legislation" (2007) 40: 2 UBC L Rev 761 (HeinOnline).
67. *Ibid* at 762.
68. Tavuchis, *supra* note 8 at 33.

reparation in addition, or the offended may demand it, but at its most fundamental level, apology has only itself to give. It is clear then, that the law can in many cases demand more severe reparation than apologetic discourse and it is tempting to cry out to the law for some sort of retributive vengeance for trespass against what is "right." However, as I discussed earlier,[69] apologies are often preferred to financial compensation and have a way of righting wrong by restoring moral balance that the law cannot match.

It is also true that if we shift the emphasis from the individual to the maintenance of social relationships, we see that there is much to be gained by apology that the law cannot achieve. As Tavuchis points out, an apology is not an action focused on the individual, but a "relational concept and practice...whose meaning resides not within the individual (although its effects may), but in a social bond between the Offender and the Offended."[70] Apologies necessarily privilege the *relationship* between individuals, over the individual himself. Again, as in apology's role in the restoration of moral balance, forgiveness is a fundamental part of the work of apology. The individual offender subjugates herself, for the sake of repairing a relationship, and if successful, the offended offers forgiveness in return. It is the "forgiveness and reconciliation, which effectively transmute trespass and prevent them from becoming permanent obstructions to social relations."[71] Thus, through the process of apology and the acceptance and forgiveness that follows, the relationship between the two parties is restored. The structure of the law on the other hand, generally precludes such reconciliation. By its very nature, it pits the parties against each other and discourages forgiveness by emphasizing the need for financial compensation, for payment from one to the other. The law prioritizes the individual: in every case, there is a winner and a loser. It does not seek to reconcile the relationship, only to reward the successful individual litigant. Rather than bringing people together, it forces them apart.

Further, the law attempts to stand in and apologize on behalf of the offender. As Tavuchis articulates, "an authentic apology cannot be delegated, consigned, exacted, or assumed by the principals, no less outsiders, without totally altering its meaning and vitiating its moral force."[72] There is no way for the court to somehow apologize on behalf of the offender and thereby restore the social relationship. Nor can the court force a truly legitimate apology from the offender, as appellate courts have recognized in striking parts of sentences that mandate a court ordered apology.[73] A relationship can only be restored by the parties in it, and their full cooperation in the "social intercourse"[74] of apologetic discourse. Thus, if apology is hindered by fears of legal liability, then a critical pathway for mending social relationships is lost. By resisting the temptation that Christie's article embodies, to cry out for justice in the form of financial compensation, and shifting from the focus on individuals, we can see that apology has much more to offer than the law in healing relationships and thus aiding both parties. Apology legislation privileges this healing social role of apology over the bloodlust of seeking retributive justice. The law may be much more effective in punishing an offender, but is often inadequate to repair the social relationship that has been ruined by his act.

Finally, it is important to note that the *Apology Act* in no way precludes an offended person from litigating. Christie is right that there may be times where an apology is not enough, and recourse to the courts is justified. But an apology in no way absolves an

69. See section IV.i. for discussion on the problems with financial compensation.
70. Tavuchis, *supra* note 8 at 47.
71. *Ibid* at 6.
72. *Ibid* at 49.
73. See e.g. *R v Pine,* [2002] OJ No 200 (QL) (CA); Re Ouellet (Nos. 1 and 2) (1976), 72 DLR (3d) 95 at 97; *R v Northwest Territories Power Corporation* (1990), 5 CELR (NWTSC) 67 at 77.
74. *Ibid* at 22.

offender from legal liability. Thus, if financial compensation, punishment or deterrence is required, and it is true that the law does often play a crucial role here, the option of litigation remains available. Christie expresses concern that if offended parties drop litigation upon apology and cases are not brought to court, the offender is unlikely to change her ways - particularly in the case of government offences against citizens.[75] This ignores the value that apology has in a communicative role as discussed earlier[76] and it is always open to citizens to demand such an apology. Christie overlooks the way that public apology can also confirm that a government has contravened a social norm and provides a political motive for the institution not to repeat actions they have publicly admitted were wrong. Even if the offended accepts the apology, litigation can always proceed, and it is the attorney's option to implore her client to continue with litigation in spite of an apology. In that way, the legal rights of the offended are still protected and can still be pursued while allowing space for healing of social relationships through apology. Christie's perspective appears to view law as the ultimate tool for cornering socially powerful offenders and altering their behaviour, and perhaps this is true, but his vision neglects the powerful and unique social value of apology in healing relationships that can be sidelined by the threat of legal liability. This social value is one that the law itself, as an adversarial process, cannot replicate.

B. Participation and Community Membership

Apology also plays a distinct social role in managing membership and participation in a moral community. After a transgression, membership in a community may be revoked, suspended or remain intact.[77] Both apology and the law can play a role in determining membership in a community and the consequences of a transgression that, in the mind of the offended, brings into question the offender's place in that community. Where the difference lies is while apology allows the offender an opportunity, despite his transgression, to participate in his reinstatement as a member, the adversarial system of Canadian law explicitly brands an offender as a reluctant participant in the moral community. Rather than repair their transgression themselves, offenders must be summoned to court to rectify it.

This discrepancy occurs because apologies require personal acceptance of responsibility for violation of the community's values, whereas law, while it does reinforce community values, usually does so at the protest of the offender. Authentic apologies constitute "a form of *self-punishment* that cuts deeply because we are obliged to retell, relive, and seek forgiveness for sorrowful events that have rendered our claims to membership in a moral community suspect or defeasible."[78] Conversely, law can be seen as an *imposition* of punishment on the offender, who is forced by the adversarial nature of the court process to deny that he committed the offense or that it was wrong enough to justify sanction. Since the law's remedy is not self-inflicted but imposed, the community is unlikely to see an offender's payment of compensation as morally cleansing, prompting forgiveness and allowing for redemption in the eyes of the community. The view of the offender in the courtroom, except where he admits the offence, is almost necessarily of him as one being held up to the community's moral standards against his will. He is painted as one whose participation in the moral community is forced, and as one who must make reparation for the damage caused, not necessarily be redeemed. The law's primary focus, particularly in areas such as contract and tort law, is on restoring the position of the offended and denouncing the offender's conduct rather than finding a way to redeem him. Apology,

75. Christie, *supra* note 68 at 764.
76. See above, section IV.ii.
77. Tavuchis, *supra* note 8 at 20-21.
78. *Ibid* at 8 [emphasis added].

in contrast, is an act of voluntarily acknowledging one's wrong, and actively confirming one's participation in the moral community. Thus, if accepted, apology has the capacity to heal both the offended and the offender,[79] by restoring the offender's place as a willing participant in the moral community who accepts its standards. This is something that the process of civil litigation, in its current state, does not attempt to do. Apology has an ability to heal relationships, and reconfirm an offender's place in the moral community, in a way that is very different from the law. The *Apology Act* protects this vital function of apology, implicitly recognizing that the law is often inferior in regenerating interpersonal relationships and restoring social harmony.

CONCLUSION: THE "PRIVILEGING" OF APOLOGY LEGISLATION

Although one of the propositions of this paper has been that the *Apology Act* is in many ways contrary to principled evidence law, an analogy can be drawn between apology legislation and a well accepted rule of evidence: the rule against admitting privileged information. Privileges exist to protect communications that are essential to the maintenance of certain relationships, because of their vital importance to our social relationships or moral well-being.[80] Similarly, apology legislation exists to protect apologetic communications because of their integral value in *healing* relationships. This form of communication is protected not to benefit particular relationships, but rather to benefit the social and moral function of society as a whole. Apologies are to be shielded because they "bespeak a more civil and humane society"[81] and are in many instances superior to the law in maintaining moral balance within relationships, communicating moral values, repairing interpersonal relationships and providing for active participation in the moral community.

Thus, although at first glance apology legislation appears to be an abrupt affront to a logical approach to evidence law, the kind of considerations and values that underlie this legislation are not so alien at all. The law has recognized via privileges that there are parts of society that should be protected. It has acknowledged that there are areas into which its often awkward version of social and moral management ought not to tread. It admits that there are aspects of society that are uniquely valuable to social or moral processes, in a way that the law can only struggle to replicate. In this instance of modesty in the law, we see an appreciation that law might do so much damage to these processes if it tries to interfere that it ought to provide them with a safe space. In apology legislation, the law recognizes that because of the superiority of free apologetic discourse for the maintenance of social relationships and moral values, it needs to step back and make room for the powerful potential of that deceptively simple phrase, "I'm sorry."

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79. Taft, *supra* note 13 at 1137, articulates this in relation to restoration of moral balance, but it applies equally to reacceptance into the moral community, which is intricately linked with restoration of moral balance.

80. See generally Stewart, *supra* note 25. In particular, spousal privilege in Canada, and priest-penitent privilege in the U.S. can be seen as driven by a desire to protect the important social and moral functions of these relationships.

81. Orenstein, *supra* note 28 at 254.

ARTICLE

MARGINALIZATION THROUGH A CUSTOM OF DESERVINGNESS: SOLE-SUPPORT MOTHERS AND WELFARE LAW IN CANADA

By Rebecca Crookshanks*

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INTRODUCTION

Despite the reluctance of most liberal states to provide forms of income security and social supports to those in need, some from within their ranks have managed to be seen as more "deserving" of modest forms of support. Canada's welfare system has always been structured using a "custom of deservingness." Historically, sole-support mothers were among those considered, however precariously and unevenly, to merit the status of most "deserving" as recipients of public funding. Unfortunately, however, extensive welfare law and policy reforms since the neo-liberal re(formation) have effectively erased the category of sole-support mothers as being a "deserving poor." By synthesizing welfare law then and now, it is possible to identify the continuities and discontinuities that have shaped and reshaped the lives and experiences of sole-support mothers. Analyses of how increasingly punitive treatment has rendered them undeserving can help illuminate the profound changes that have occurred under neo-liberalism. The path from past to present has been marked by shifts from public responsibility to private self-reliance, and from social welfare entitlement rights to individualized support and workfare obligations aimed at combating dependency. The "custom of deservingness" and workfare system's emphasis on erasing the "dependent" category has resulted in the marginalization of sole-support mothers.

There has been a large body of feminist historical work that has traced the socio-legal roots and administration of mothers' allowances and pensions in British Columbia during the first half of the twentieth century through to the current neo-liberal welfare regime. This paper will adopt a historical, feminist lens in order to understand the changes and content of Canadian welfare law, with a focus on British Columbia legislation, as they relate to sole-support mothers. This article will first examine the current reality of sole-support mothers on income assistance in Canadian society. Next, the historical position of sole-support mothers and the way in which the "custom of deservingness" was emphasized will be traced through the pre-Keynesian, Keynesian and neo-liberal periods, resulting in the classification of sole-support mothers as the never deserving poor, whose bodies are subjected to ongoing moral regulation. Finally, the article will examine reactions against and proposed alternatives to the current welfare system in Canada.

I. CURRENT REALITY

As a result of the economic and political restructuring that marked neo-liberalism's arrival in Canada, women have disproportionately experienced increased and more severe poverty, particularly in female-headed households. The reforms, therefore, have not been gender-neutral in impact. For examples, although 15.6% of all families were lone-parent families in 2001, 81.3% of those families were headed by sole-support mothers.[1] In 2002, 37% of Canadian families headed by sole-parent mothers had incomes that fell below Statistics Canada's after-tax "low income cut-offs", compared with 13% of families headed by sole-parent fathers. In British Columbia, the rate of poverty for sole-support mothers is 49%, which is considerably higher from the national average.[2] It is also important to recognize that welfare, like other governing projects, is often racialized, gendered and classed. Aboriginal women, for example, are twice as likely as other Canadian women to be lone mothers.[3]

The situation of sole-support mothers in Canada has attracted international criticism. In January 2003, the Committee on the Elimination of Discrimination Against Women conducted its fifth periodic review of Canada, and in the report's concluding comments, the Committee expressed astonishment about the "high percentage of women living in poverty."[4] The United Nations Committee on Economic, Social and Cultural Rights made a similar statement in 2006.[5] The current situation of sole-support mothers in Canada, therefore, is an important and disconcerting issue that needs to be examined and addressed.

II. THE 'CUSTOM OF DESERVINGNESS'—SOLE-SUPPORT MOTHERS AND WELFARE: THEN

Canada's welfare programs are centered on a relief custom based on deservingness. A relief custom refers to the unorganized rules that prevail within a welfare system. In Canada, the custom of deservingness derives historically from the fact that its welfare policy has been modeled on the British custom of the Poor Laws.[6] The welfare institution in Canada is dominated by the distinction made between the deserving poor and the undeserving poor, and creates eligibility rules according to these categories.

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1. Canadian Council on Social Development, *CCSD's Stats and Facts: Families: A Profile of Canadian Families*, online: Canadian Council on Social Development <www.ccsd.ca/factsheets/family/index.htm>.
2. Jane Pulkingham, "Bucking the National Trend: BC's welfare cuts and poverty among lone Mothers" (2006) 9 Canadian Centre for Policy Alternatives BC Commentary, 5.
3. Jane Pulkingham, Sylvia Fuller & Paul Kershaw, "Lone Motherhood, Welfare Reform and Active Citizen Subjectivity" (2010) 30 Critical Social Policy, 267 at 273.
4. UN Committee on the Elimination of Discrimination against Women, *Report of the Committee on the Elimination of Discrimination against Women*, 28th Session (13-31 January 2003) UN Doc A/58/38.
5. UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, UN CESC, 36th Sess, UN Doc E/Z/15 (2006).
6. Status of Women Canada, *The Insertion Model or the Workfare Model? The Transformation of Social Assistance within Quebec and Canada* by Sylvie Morel (Ottawa: Policy Research, 2002) at 10.

A. The Pre-Keynesian State and the "Deserving Poor"

Welfare reforms that were implemented from the late nineteenth to the mid-twentieth century collectively reformed the public/private divide. The reforms occurred in the context of massive structural change marked by industrialization, urbanization and the passage of two world wars, which apparently contributed to an increased number of "deviant" families in Canadian society. The existence of these "deviant" families, including sole-support mothers and their children, resulted in perceptions that the (nuclear) family was in crisis and under siege. In order to prevent further increases to the number of such families and in order to rehabilitate those already broken, provincial governments created mothers' allowance or pension legislation aimed at shoring up visions of the nuclear family and providing financial assistance to sole-support mothers.[7] The legislation, therefore, was based on a maternalist ideology, exalting the valuable role of women as mothers and "keepers of the hearth."[8]

The concept underlying the new legislation was that the state should provide single mothers with funding equivalent to the missing husband's contribution to the family wage. The legislation was, therefore, needs-based and means-tested. Along with the provision of missing wages, however, the legislation imposed detailed and demanding conditions for entitlement upon mothers seeking to gain access to the modest allowances provided by the government. In order to benefit from the mothers allowance, the family unit had to include dependent children in the custody of a "fit and proper" mother.[9] The custom of deservingness according to gender, therefore, is expressed by the adoption of these types of rules. Although the legislative criteria for eligibility gradually expanded, so too did the requirements imposed on women, including longer waiting periods and mandatory efforts to pursue absconding husbands for support. During this time, therefore, the state understood welfare as a "residual concept" where social security was only offered as an alternative of last resort. Government intervention was only justified when the usual remedies of the family and the marketplace had been exhausted.[10]

B. Principle of Less Eligibility

The "residual concept" of Canadian welfare programs is demonstrated through the principle of less eligibility. This principle, which had historically characterized the concept of welfare, was left intact through the means-tested nature of the first wave of mothers' allowances and related welfare legislation.[11] The principle implicitly requires that those determined to be deserving of assistance should not be materially better off than the least affluent families among the working poor. Practically, therefore, this meant that the rates of assistance for qualifying mothers remained at subsistence levels. As a result, recipients were generally forced to supplement their state income through home-based or other earnings.

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7. Shelley AM Gavigan & Dorothy E Chunn, "From Mothers' Allowance to mothers Need Not Apply: Canadian welfare law as liberal and neo-liberal reforms" (2007) 45 Osgood Hall LJ 733 at 738.
8. Status of Women Canada, *supra* note 6 at 24.
9. Gavigan & Chunn, *supra* note 7 at 742.
10. Status of Women Canada, *supra* note 6 at 16.
11. Gavigan & Chunn, *supra* note 7 at 747.

III. SOLE-SUPPORT MOTHERS AND WELFARE: THE KEYNESIAN TRANSITION

Even considering the relatively meager and conditional aspects to the assistance for sole-support mothers, however, the allowances did represent a qualitative moment in Canadian welfare's legal history, since provinces assumed a form of direct fiscal responsibility. Some of the reformed legislation, too, incorporated provisions intended to ameliorate some of the forms of social stigmatization that "welfare" mothers faced in society, attempting to categorize sole-support mothers as a class of "deserving" recipients. Sole-support mothers, for example, were not discursively constituted as charity cases, but rather as government employees on contract deemed to be responsible for raising 'good' citizens. Allowance cheques were often mailed, thus sparing sole-support mothers the indignity of having to collect their allowance at the public welfare office.[12]

During the Keynesian transition, which began in the postwar era, Canadians were introduced to the idea of a comprehensive social security system. The welfare policies that emerged during this period were universal in nature, based on a notion of welfare as a right of citizenship rather than a privilege.[13] In 1966, provincial mothers' allowance legislation was incorporated into the federal Canada Assistance Plan Act, which was a federal cost-sharing program that established general criteria for social assistance programs across Canada. The Act was declared to be a "war on poverty" by Prime Minister Lester B. Pearson, and was designed to remove any remaining arbitrary eligibility restrictions in the provincial legislation by removing categories of deservingness.[14] The new federal legislation markedly expanded the scope of social assistance programs beneficial to sole-support mothers across the country, including the inclusion of child welfare benefits. The Keynesian period of welfare "liberalization," however, was relatively short-lived – just under a decade—which is barely long enough to be regarded as an "era." By 1975, there was already a growing concern about budget deficits and increased public spending.[15]

Many welfare scholars see the Keynesian welfare state expansion, although brief, as marking the end of the conditional and moral social programs that defined the pre-Keynesian era. The welfare state, as a result, had become an objective institution through the removal of the historical arbitrary eligibility restrictions. The "residual concept" of welfare programs, in other words, was replaced by an "entitlement concept."[16] As Margaret Little has argued, however, although state administration of welfare during this period appeared less moralistic than that of previous decades, the state continued to play a role in ensuring that moral regulation of welfare recipients continued.[17] A sole-support mother receiving a mother's allowance, for example, was not allowed to have a man living in her home. Provincial administrators generally relied upon a variety of charitable organizations to scrutinize and monitor recipients and to report any unacceptable activity.[18] As Little notes, such organizations played a "vital role in scrutinizing the moral behaviour of public welfare recipients".[19] The regulation of sole-support mothers can be understood as a way to ensure that the recipients continued to be "deserving" of the financial assistance they were receiving.

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12. Gavigan & Chunn, *supra* note 7 at 741
13. Margaret Little, "Claiming a Unique Place: The Introduction of Mothers' Pension in BC" (1994) BC Studies 80 at 97.
14. Gavigan & Chunn, *supra* note 7 at 752.
15. Status of Women Canada, *supra* note 6 at 22.
16. *Ibid*.
17. Little, *supra* note 14 at 98.
18. *Ibid* at 102
19. *Ibid*.

IV. SOLE-SUPPORT MOTHERS AND WELFARE: NOW

A. Neo-liberal Reforms and the "Never Deserving" Poor

With the adoption of neo-liberal reforms at the beginning of the 1980s and the external and internal pressure to reduce welfare costs, the definition of what constitutes a "deserving" recipient of welfare has narrowed. The "residual concept" of welfare, therefore, was re-introduced. The pressure of globalization in Canada has been expressed in consistent cutbacks to the social security net. Indeed, Canada's neo-liberal policies seemed to result in a race to the bottom, reducing women's choices and forcing more and more women into part-time, temporary and low-waged work. In 1984, Brian Mulroney's conservative government imposed a "cap on CAP" payments to the three wealthiest provinces: British Columbia, Ontario and Alberta. The constitutionality of the CAP legislation was unsuccessfully challenged in *Reference Re Canada Assistance Plan* in 1991.[20]

Under Paul Martin's leadership, as well, the Department of Finance redefined the contours of the welfare state. The agenda of this government was clearly more "neo" than liberal, and involved a downsizing and off-loading of welfare responsibilities through a monetarist agenda of policies.[21] For our purposes, the downsizing of federal responsibility is best illustrated by the introduction of the 1995 Canada Health and Social Transfer provisions, which replaced the CAP and reconfigured the nature of the federal transfer payments in Canada. Entitlements to welfare and family benefits were replaced by a form of short-term financial assistance, placing heavy emphasis on individual responsibility and self-reliance through employment.[22] Responsibility for sole-support mothers was first offloaded onto provincial governments, then to municipal governments, and now, in British Columbia at least, to community-based non-profit agencies and individual families.

Through this offloading of responsibility, the federal government reneged on its earlier responsibility of monitoring and evaluating the equality and criteria of provincial government welfare policies. In British Columbia, the restructuring of welfare was legislated almost immediately through the introduction of the *British Columbia Benefits Act*, which cut benefit rates, mandated job participation and forced work searches for single parents.[23] The process of offloading responsibility from the state to individual women and children intensified through the introduction of the *British Columbia Employment Assistance Act* in 2002. Welfare benefit rates for employable single parents were cut by $51 per month, which resulted in a reduction of the support of social assistance in families in which over 60,000 children live.[24] As well, for employable welfare recipients with dependent children, a time limit process was established where recipients are sanctioned through a reduction of support if they remain on social assistance for two years during any five-year period.[25] In the 2006 report "Left Behind: A Comparison of Living Costs and Employment and Assistance Rates in B.C.", the Social Planning and Research Council of British Columbia (SPARC BC) examined the income assistance rates in B.C. and found that current levels do not permit individuals or families, especially sole-support mothers, to meet the basic costs of daily living.

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20. *Reference Re Canada Assistance Plan (BC),* [1991] 2 SCR 525.
21. Gavigan & Chunn, *supra* note 7 at 757.
22. *Ibid* at 758.
23. Jean Swanson, *Poor-Bashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001), at 115.
24. Heather J Michael & Dr Marge Reitsma-Street, "A New Era of Welfare: Analysis of the BC's Employment and Assistance Acts" ("Cutting Welfare" Public Panel, delivered at the University of Vitoria, 13 March 2002), [unpublished] at 23.
25. Pulkingham, Fuller & Kershaw, *supra* note 3 at 269.

B. The Rise of the Workfare Logic of Reciprocity and the "Worker-Citizen" Subject

Through the neo-liberal reforms, a workfare system was introduced in Canada. Workfare is a model of government intervention in the conception and implementation of the contract of reciprocity between the poor and the State. The "recipient-citizen" of workfare is framed as a dependent, who in return for welfare benefits, has a duty to engage in employment integration through job search activities, training and education. Women are now expected to be employed. The workfare legislation is premised on the formal equality and gender neutrality of the freely choosing, self-reliant actor. Thus, like men and fathers, women and mothers are conceptualized and regulated primarily in terms of their relationship to the market. The concept of dependency, however, although framed as such, is not gender-neutral. The discourse surrounding the dependency of female workfare participants often obscures the value of the domestic work they do in raising children alone. Their needs as mothers with responsibility for the care and upbringing of children have become as anachronistic as the very notion of social welfare itself. Now women's relationship to the (private) family is taken for granted and rendered as invisible.[26] A major implication of the welfare reforms, therefore, is that sole-support mothers have disappeared as a category of social assistance recipients.

Social assistance reciprocity is attributable to the establishment of new categories of employable people in the sphere of social assistance. As the National Council of Women has pointed out, the new category of employable people is created through a process of social construction, since employability is not the result of the acquisition of objective characteristics such as skills and qualifications. Rather, it is the result of the evolution of the institution of women's paid work.[27]

There are two main ways in which changes to rates, exemptions, eligibility criteria and duration of benefits transformed the principle of "entitlement" to welfare that was bolstered during the Keynesian era into one of narrow contractualism in which state benefits were made contingent on self-sufficiency and individual responsibility. First, the neo-liberal reforms and cuts to welfare programs have forced sole-support mothers into low-waged, exploitive employment. There has been an assumption that has permeated the development of social policy in Canada that severely inadequate benefit rates will provide an "incentive" for people living in poverty to re-join the job market.[28]

Second, the growing political controversy around welfare has led to legislative mandates aimed at creating "welfare-to-work" programs, where Ministries often require recipients to participate in employment plans. In British Columbia, for example, the government has established a "work first" model of welfare reform.[29] Although welfare rights activists have emphasized the importance of a mother having choice about working inside or outside the home, welfare reforms have delegitimized mothering as both an activity and social identity. Through the reformed 2002 legislation, single parents are categorized as "employable" as soon as their youngest child turns three. When these reforms were passed, the new requirements affected approximately 8,900 single parent families in British Columbia when their status changed from "temporarily excused from work" to "expected to work".[30] Poor mothers have been reconstituted as worker citizens. As Lone as stated, "What is jettisoned in the process of…the neoliberal project of welfare reform is not only particular kinds of spheres of activity…but also the particular subjectivities

26. Gavigan & Chunn, *supra* note 7 at 771.
27. Status of Women Canada, *supra* note 6 at 13.
28. Michael & Reitsma-Street, *supra* note 25 at 23.
29. Pulkingham, Fuller & Kershaw, *supra* note 3 at 276.
30. Michael & Reitsma-Street, *supra* note 25 at 25.

of those who engage in these activities and live in these spheres. The individuals carrying these subjectivities are not erased as person per se, but as particular kinds of persons."[31] Their subjectivities, therefore, are recreated such that they can be seen and treated as possessive individuals who can/must now freely enter the marketplace.

Philosopher Alan Shrift has noted how these neo-liberal reforms have allowed a narrow self-interested form of reciprocal return to dominate current discourses on how the state organizes our obligations to each other. As Shrift writes: "One must wonder what sorts of assumptions regarding gift giving and generosity are operating in a society that views public assistance to its least advantaged members as an illegitimate gift that results in an unjustifiable social burden that can no longer be tolerated."[32] Welfare applicants are viewed as people who take rather than give, who misuse and abuse the welfare system.

The emphasis on self-sufficiency and individual responsibility through the workfare programs have precluded opportunities for full-time education. The employment programs, too, generally only provide minimum-wage positions, especially for women. There is a gender-based occupation streaming through these programs. Two thirds of women, for example, earn less than $299 per week, compared to only 38% of men.[33] In a study done by Jane Pulkingham, Sylvia Fuller and Paul Kershaw, in-depth interviews were generated through a study of lone mothers in receipt of welfare to explore the ways welfare policy is imbricated in their subjectivity and citizenship. Women in the study face competing interpretations of who they are and what their rights and responsibilities as mothers and citizens should be.[34] Many of the women who were interviewed discussed the practical problems they face when participating in the "welfare-to-work" programs. As one woman stated,

> I don't want to go to a pre-employment program because they only find jobs that are minimum wage…they just want you to get off…it's like, get a job—see ya!....but, for somebody that wants some kind of goal or career it's not a good place to go at all. No. Because I mean, once you get out there, you can't get back on social assistance to get that support you're going to need to go for your career. You know, and like, it's going to be tough later on.[35]

Several of the mothers in the study, too, talked about how they feel held back by the emphasis on waiting until their youngest child is three, especially when what they are being held back for is a job, any job, and not meaningful education. For example, one woman was dissuaded from taking technical skills-related courses in favour of attending "self-help' and self-esteem" workshops for sole-support mothers and cashier training. As soon as her child turned 3, *they told her that she had to go and work full-time, without having access to technical* skills courses.[36]

Women, therefore, must contend with contradictory messages from "welfare-to-work" policies that simultaneously demand independence and self-sufficient and unquestioned obedience to welfare rules that seem to preclude opportunities for longer-

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31. C Kingfisher, "Part I The Big Picture: Globalization, Neoliberalism, and the Feminization of Poverty" in C Kingfisher, ed, *Western Welfare in Decline: Globalization and Women's Poverty* (New York: New York University Press) 3 at 38.
32. AD Shrift, "Introduction: Why Gift?" in AD Schrift (ed), *The Logic of the Gift: Towards an Ethic of Generosity* (New York: Routledge, 1997), at 19.
33. Pulkingham, Fuller & Kershaw, *supra* note 3 at 278.
34. *Ibid* at 268.
35. *Ibid* at 276.
36. *Ibid* at 276.

term advancement. As some authors have suggested, however, these assumptions are not contradictory if you understand welfare reforms to be directed at creating deferential and obedient worker citizens and not active citizens.[37] The current system, therefore, succeeds in forcing sole-support mothers into any job, regardless of quality or security.

C. The Sole-Support Mother and Forced Dependency: "Spouse in the House" Rule

As discussed, welfare reforms introduced a shift of focus towards individual rather than state responsibility, which can be understood as encompassing a notion of responsibility for "family." In the context of the reforms to welfare, this has been enacted through the introduction of an expansive definition of "spouse." The 2002 welfare reforms in British Columbia saw an implementation of a two year independence rule, where applicants age 19 and over are required to demonstrate that they have been financially independent for two consecutive years before they are eligible to apply for income assistance. The "fit and proper" requirement from the pre-Keynesian welfare system, therefore, was replaced by a "single person" concept. Although this might initially seem like a more objective and less intrusive test, many authors have argued that this is not the case in fact. Rather, the inquiry now focuses upon whether a woman is involved in a "marriage-like" relationship, which once again subjects women to invasive scrutiny of their intimate relationships and to explicit moralizing. Under section 1.1 of the *British Columbia Employment and Assistance Act*, a spouse is defined as follows:

> **1.1** (2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if
> (a) they have resided together for at least
> (i) the previous 3 consecutive months, or (ii) 9 of the previous 12 months, and
> (b) the minister is satisfied that the relationship demonstrates
> (i) financial dependence or interdependence, and (ii) social and familiar interdependence consistent with a marriage-like relationship[38]

As well, the concept of "marriage-like" is as malleable and ambiguous as that of the "fit and proper" person.[39] In practice, limited attention is paid to the economic, social and familiar aspects of the relationship and instead the focus is on sexual factors in all but the most exceptional cases. If a sole-support mother is not found to be living as a "single person," they are ineligible for benefits. It has mattered little that the spouse has no legal obligation to support her or no financial means to support her.[40] It is clear, therefore, that the "custom of deservingness" is still prevalent in Canadian welfare legislation.

As discussed before, feminist legal scholars have been attentive to the familial and ideological dimensions of welfare law. The definition of "spouse" has been continually expanded to include same-sex relationships and an ever-widening net of cohabitating relationships.[41] As a result, the nuclear form of the family has retained its hegemony. As one author has argued, through its emphasis on marriage and its asserted importance to the children of same-sex couples, the same-sex marriage campaign has in fact contributed to the further marginalization of sole-support mothers. There has been a reformation,

37. *Ibid* at 277.
38. *British Columbia Employment and Assistance Act*, SBC 2002, C40, s. 11
39. Janet Mosher, "Intimate Intrusions: Welfare regulation and women's personal lives" in Shelley A.M. Gavigan & Dorothy E. Chunn, eds, *The Legal Tender of Gender: Law, Welfare and the Regulation of Women's Poverty* (Oregon: Hart Publishing, 2010) 165 at 170.
40. *Ibid*.
41. Gavigan & Chunn, *supra* note 7 at 767.

therefore, of the privatization principle in which patriarchal norms and values have remain unchanged.[42]

Yet for sole-support mothers, forming an intimate relationship—something that is socially valued—has devastating consequences, since it opens them to the risk of being cut off from benefits. The determination of spousal status entails a significant incursion into not only the private lives of sole-support mothers, but also into their day-to-day social interactions. Sole-support mothers are required to fill out a questionnaire about their relationships and cohabitation arrangements. As one mother wrote for a Woman and Abuse Welfare Study:

> I can't begin to tell you how humiliating and intrusive some of the questions were on this form. They asked what I called Reid's mother and what Reid called mine; they asked what my son called Reid, and if Reid ever bought him presents for his birthday; they asked if Reid ever babysat my son and whether he had any contact with my son's school, they asked who did the grocery shopping and who did the laundry.[43]

These invasions of privacy, however, are not only limited to what an applicant is required to personally disclose, since landlords, neighbours and teachers are often asked to provide information and offer their opinions about a recipient's intimate life. A routine letter that is mailed out to solicit information about a neighbour explains:

> We are conducting inquiries relating to a…recipient and require information with respect to the above address. If you have any information regarding the tenants of the above address i.e.: number of occupants, sexes, names, employment, length of residence, or any other relevant information, please do not hesitate to contact me. Your anonymity can be assured in responding to this inquiry.[44]

Although it is beyond the scope of this paper to examine in any detail, it is also important to note that the government cuts to welfare rates and the restructuring of welfare for women has had serious ramifications for women attempting to flee abusive relationships. Inadequate benefits, workfare, increased scrutiny and the changed definition of spouse have all operated to make it even harder for women to leave their abusers and re-establish their lives.[45] The State's offloading of responsibility to the private sphere, in other words, has contributed to a re-creation of situations of dependency and has increased the threat of economic ramifications for women wanting to leave relationships.

V. MORAL REGULATION THROUGH CONCEPTS OF WELFARE AS 'FRAUD'

The shift from welfare as an entitlement to an emphasis on self-reliance, responsibility and accountability to taxpayers, as we have seen, has led to a significant reduction in benefits, the introduction of workfare and a revised definition of "spouse." These three concrete examples have had significant implications for the concept of welfare fraud. There has been an increasingly common discursive construction of welfare recipients, including sole-support mothers, as people who "do nothing" and as a result are "paid

42. *Ibid* at 767.
43. Mosher, in Gavigan & Chunn, eds, *supra* note 40 at 170.
44. *Ibid* at 175.
45. Gavigan & Chunn, *supra* note 7 at 760.

to do nothing".[46] In other words, sole-support mothers are not understood as deserving. Governments have therefore adopted extensive measures to control social assistance fraud in order to address and instill public confidence in the welfare system.[47] The discourse around welfare fraud systematically targets the bodies, social relations and self-identities of women.

This culture of fraud has extended beyond the traditional discourse of "welfare cheats" to encompass everyone who is on welfare. Welfare fraud has come to include all forms of overpayments, whether resulting from administrative errors or not. The discourse and politics of welfare fraud have obscured the imprecision of what is considered to be fraud and by whom. As Dorothy Chunn and Shelley Gavigan have noted, "the government's own 'Welfare Fraud Control Reports' tend to collapse categories, frequently failing to distinguish between benefit 'reduction' and 'termination' and the reasons therefore."[48]

Rules and reporting requirements have become increasingly difficult and intrusive. Many governments have passed "zero tolerance" policies in the form of permanent ineligibility imposed upon anyone convicted of welfare fraud. They have set up anonymous snitch lines that are designed to encourage people to report suspected welfare abuse by their neighbours.[49] Recipients are also required to consent to broad releases of personal information. With this sweep and depth of surveillance, the ready acceptance of demeaning stereotypes and the pervasive characterization of non-criminal conduct as "fraud" has created a dense, intractable surveillance web of control over women's relational lives.

The normative character of welfare "crime" has been identified by Janet Mosher and Joe Hermer in a report prepared for the Law Commission of Canada. As the authors note, this normative character is revealed by the disparities that exist between welfare fraud regulation and other forms of economic misconduct. In almost every respect, tax evasion and employee standards violations are viewed in a much less punitive light in terms of the moral culpability attached to the conduct, the range of detection, the enforcement tools utilized, and the penalties that follow upon conviction. This disparity "suggests a clear normative distinction at work, one that is aligned with neo-liberal values that views poor people as not deserving of support, but rather of intense scrutiny and inequitable treatment".[50] The authors also identify the gendered nature of this criminalization, since the majority of people on social assistance are women and the majority of these women are sole-support mothers.[51]

In 2001, Kimberly Rogers, an eight-month pregnant Ontario woman who had been serving six months of house arrest for welfare fraud, was found dead in her apartment. Ms. Rogers had pleaded guilty to defrauding the government by taking student loans while still collecting welfare cheques. Although her benefits were initially cancelled, they were reinstated at a paltry $468 a month. Her rent was $450, which left her $18 a month. And because she was on house arrest, she was unable to work to supplement her social assistance benefits. Ms. Rogers died of an overdose of a prescription antidepressant. During one of her court appeals earlier that year, Ms. Rogers wrote, "I ran out of

46. *Ibid* at 759.
47. Dorothy E Chunn & Shelley AM Gavigan, "Welfare Law, Welfare Fraud, and the Moral Regulation of the 'Never Deserving' Poor" (2004) 13(2) Social & Legal Studies 219 at 229.
48. *Ibid* at 228.
49. *Ibid* at 220.
50. Janet Mosher & Joe Hermer, "Welfare Fraud: The constitution of social assistance as crime" (Ottawa: Law Commission of Canada, 2005), at 8.
51. *Ibid* at 9.

food this weekend. I am unable to sleep… I am very upset and I cry all the time."[52] A representative of the Elizabeth Fry society who worked on Rogers' case stated that: "The word 'persecution' isn't strong enough to call what happened to her. This tragic case is a symptom of a government putting policies into practice without doing any research."[53]

An inquest into Ms. Rogers' death was started in 2002 and the coroner who presided over the investigation observed that "overpayments…may occur for a number of reasons, most of which are related to administrative items and the settlement of supplementary income received in previous periods; while overpayments are common, overpayments due to fraud are very uncommon."[54] The welfare system is rife with hundreds of complex rules, and errors on the part of both recipients and bureaucrats are not only common but often unavoidable. Yet it is these unintended rule violations that continue to be characterized as fraud within the system.[55]

VI. PUSHING BACK: REACTIONS AGAINST THE NEW WELFARE SYSTEM

A. *Charter* Challenges

In order to push back against the neo-liberal reforms, some groups have attempted to launch *Canadian Charter of Rights and Freedoms* ("*Charter*") challenges against the new welfare legislation. The definition of "spouse" in the Ontario welfare legislation, for example, was constitutionally challenged in the case of *Falkiner et al v. Director, Income Maintenance Branch, Ministry of Community and Social Services and Attorney General of Ontario*.[56] The Ontario Court of Appeal found the definition to be overly broad—capturing relationships which do not resemble marriage-like relationships—and deeply ambiguous. The Court also acknowledged that the sweeping changes to social assistance have had a disproportionate impact on poor women and noted that although women accounted for only 54% of those receiving social assistance, they accounted for nearly 90% of those whose benefits were terminated by the new definition of spouse. The government of Ontario, however, abandoned its appeal to the Supreme Court of Canada, even though leave had been granted, and instead introduced a new definition. The new definition, according to Janet Mosher and Joe Hermer, mirrors its predecessor in most respects and arguably fails to comport with the ruling of the Court of Appeal.[57]

Courts have also been rejecting challenges to social assistance legislation under section 7 of the *Charter*, holding that these challenges in effect seek to entrench the right to receive an economic benefit. In the Ontario case of *Masse v. Ontario (Ministry of Community and Social Services)*,[58] for example, the Court considered whether a reduction in social assistance benefits violated the rights protected in section 7 of the *Charter*, and concluded that section 7 does not provide applicants with any legal right to minimal social assistance nor affirmative right to governmental aid.

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52. Darren Yourk, "Inquest into mother's death begins" *The Globe and Mail* (15 October 2002), online: Prison Justice <www.prisonjustice.ca/politics/1019_kimrogers.html>.
53. *Ibid*.
54. Chunn & Gavigan, *supra* note 48 at 228.
55. Mosher & Hermer, *supra* note 51 at 10.
56. *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR (3d) 481 (CA), at para 77.
57. Mosher & Hermer, *supra* note 51 at 25.
58. *Masse v Ontario*, (1996), 134 DLR (4th) 20 (Ont Div Ct).

B. Welfare Rights Campaigns

Although *Charter*-based litigation has been widely unsuccessful, advocacy campaigns have enjoyed more success. Welfare rights campaigns are often led by sole-support welfare mothers and draw attention to the impact of the extremely low welfare rates and the clawbacks of welfare benefits from the very poorest families. The advocacy groups have attempted to re-assert the need for a mother's allowance in order to meet the needs of children with mothers on welfare, and have re-inserted the relationship between poor mothers and their children into the public discourse about social assistance. In "From Mothers' Allowance to Mothers Need Not Apply: Canadian Welfare Law as Liberal and Neo-Liberal Reforms", Shelly Gavigan and Dorothy Chunn stated that, "These groups have reminded the public of the vulnerability of sole-support mothers who continue to be relegated to the lowest ranks of the poor."[59]

VII. TOWARDS A SOCIAL INSERTION MODEL

Canada's current approach to welfare, which is focused on a custom of deservingness and a workfare model, has resulted in the marginalization of sole-support mothers. Maureen Baker, for example, did a comparative study on patterns of work and economic well-being in three welfare states—Australia, Canada and New Zealand. Her study concludes that although Canada has the highest levels of maternal employment, it also has the highest poverty rates. Furthermore, sole-support mothers lead the households with the lowest earnings and assets and the highest debt level.[60] The intensified individualization of poverty has had major implications and is exacerbated by the retraction from any notion of entitlement to social assistance. Welfare recipients are increasingly being identified as partial or failed citizens through the concept of dependence on the system. The contractual notion of exchange encouraged by the workfare system, and its belief in the solution to poverty being found in the labour market, is displaced. Because *Charter* challenges have been largely ineffective, welfare rights advocates are forced to push for change through the legislative system.

In order to improve the status of sole-support mothers, welfare policies need to be reoriented to adopt more aspects of a social insertion model aimed at combating exclusion and to shift away from a custom of deservingness. A social insertion model differs from a workfare model in that rather than simply being an employment integration model, insertion combines the social and employment dimensions of integration, and as a result, is much less restrictive in terms of integration of the poor into society. The logic of insertion is consistent with a reinforcing of the social rights structure, which is much more likely to increase the economic and social status of sole-support mothers, rather than that of workfare, which is aimed at its gradual dismantling. Insertion legislation should include measures enabling recipients to regain or develop their social autonomy through appropriate ongoing social support, participation in family and civic life, and access to better housing.[61] These social insertion measures would provide women with a gradual process of social integration based on their differentiated needs.

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59. Gavigan & Chunn, *supra* note 7 at 765.
60. Maureen Baker, "Working their Way Out of Poverty? Gendered Employment in Three Welfare States" (2009) Journal of Comparative Family Studies, 617 at 629.
61. Status of Women Canada, *supra* note 6 at 12.

CONCLUSION

Over the last century, there has been a gradual erasure of sole-support mothers as a category of deserving welfare recipients. The "custom of deservingness" structure on which Canada's current welfare programs rest has resulted in sole-support mothers being relegated to one of the lowest economic stratums in society. The neo-liberal restructuring, and the new emphasis on gender-neutral workfare programs, has had disproportionate impacts on sole-support mothers, most notably because the rise in employment of women has not been accompanied by the change in the transfer of family responsibilities. Despite the legislative changes to welfare programs, however, there have been historical continuities between social control and moral regulation as analytic constructs. Women's subjectivities have been continuously regulated through categories of eligibility, like the "fit and proper" and "spouse in the house" rules, and through the expanding emphasis on and regulation of welfare fraud.

To counter this regime of disappearance, and to halt the shift from public responsibility to private self-reliance, changes in both the form and content of Canadian welfare law must occur. The challenge for those who remain committed to the principle of substantive equality and to the possibility of progressive social change is to continue to work to create social conditions and relations in which the poverty of single mothers and their children is neither inevitable nor denied. The hard lives of sole-support mothers and their children impel us to resist any form of welfare program and legislation that is not also attentive to the way in which the jagged edges of previous coercive laws played a central role in condemning them to the ranks of the never deserving poor. The realities and struggles of sole-support mothers need to be made visible.

ARTICLE

CUSTOMARY INTERNATIONAL LAW AND THE *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

By Sarah Nykolaishen*

CITED: (2012) 17 Appeal 111-128

INTRODUCTION

The status of indigenous peoples in international law is a topic of growing interest.[1] One area of debate concerns whether there is an international custom that protects the rights of indigenous peoples to their ancestral territories.[2] This paper seeks to add to this literature by examining the effect of the *Declaration on the Rights of Indigenous Peoples*[3] (the "*Declaration*"), adopted in 2007 by the United Nations General Assembly (UNGA), on customary international law. As a whole, the *Declaration* reflects the view that indigenous rights should be protected under a specific regime, or that indigenous rights cannot be subsumed under general human rights law.[4] The *Declaration* reflects a number of significant principles, including the right to self-determination, the importance of consultation and cooperation between states and indigenous peoples, and recognition of the unique relationship between indigenous peoples and their lands and territories.[5] Specifically, this paper asks, does the *Declaration* provide evidence of an existing

* JD candidate (2012), University of Calgary. I would like to thank Professor Owen Saunders for his valuable advice on this paper, Jonathan Tomm for commenting on an earlier draft, and Rachel Corder for her assistance in getting it ready for publication. Many thanks also to Professor Nigel Bankes for his advice and feedback on an earlier version of the paper, and for his encouragement of my work.

1. See Russel Lawrence Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) 80 AJIL 369; Chidi Oguamanam, "Indigenous Peoples and International Law: The Making of a Regime" (2004) 30 Queen's LJ 348; Nigel Bankes, "International Human Rights Law and Natural Resources Projects Within the Traditional Territories of Indigenous Peoples" (2010) 47 Alta L Rev 457 [Bankes].
2. Two authors look specifically at this question: S. James Anaya, *Indigenous Peoples in International Law*, 2d ed (Oxford: Oxford University Press, 2004) [Anaya], and Seth Korman, "Indigenous Ancestral Lands and Customary International Law" (2010) 32 U Haw L Rev 391 [Korman].
3. GA Res 61/295, UNGAOR, 2008, Supp No 49, UN Doc A/61/49, 15 [*Declaration*].
4. For an overview of the debate on whether indigenous claims are adequately protected under general human rights law see Jérémie Gilbert, "Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples" (2007) 14 Int'l J on Minority & Group Rts 207.
5. The right of self-determination is recognized in Article 3 of the *Declaration*, *supra* note 3, which reads: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 19 reflects the principles of consultation and cooperation and reads: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Indigenous rights to land and resources are protected under Articles 25 through 27, as well Article 32. These articles are discussed in more detail below.

international custom that requires states to recognize the right of indigenous peoples to occupy and benefit from their ancestral territories, and which in turn places limits on how states can deal with lands claimed by indigenous peoples as ancestral territories?

The paper begins by introducing the concept of international custom. It then examines the basis for the existence of an international custom that obliges states to recognize indigenous rights to ancestral territories, particularly in the context of decisions about resource development. A key matter in this debate is the extent to which the *Declaration* should be taken as evidence of customary international law. The case of *Texaco v. Libya*[6] ("*Texaco*"), as well as scholarly commentary, establishes useful criteria to evaluate the strength of UNGA declarations as evidence of customary international law. These criteria include: how representative the signatory states are of the international community as a whole, the novelty of the declaration's contents, and publicly expressed intentions of the states that voted on the declaration in question. Using these criteria, this paper concludes that the *Declaration* itself does not provide strong evidence of an existing international custom respecting the duty of states to recognize indigenous claims to ancestral territories and to limit resource development accordingly. There are, however, signs that the *Declaration* is advancing the development of such an international custom. In particular, jurisprudence from the Inter-American Court of Human Rights, the Supreme Court of Belize, and the Third Section of the European Court of Human Rights refers to specific provisions of the *Declaration* as informing state obligations.

I. INTERNATIONAL CUSTOM

International custom is a formal source of international law.[7] States are bound to comply with custom regardless of whether they are a party to a treaty or other international instrument codifying the rule.[8] In general, writers and jurists agree that establishing customary obligations on states involves demonstrating two elements: general state practice (widespread norm-conforming behaviour) and *opinio juris* (the belief by states that the practice is undertaken as an obligation of international law).[9] Ian Brownlie notes that in many cases, the International Court of Justice ("ICJ") will "assume the existence of an *opinio juris* on the bases of evidence of general practice"; however, the ICJ has also taken a rigorous approach to the element of *opinio juris*, and called for positive evidence showing that states regard certain conduct as a requirement of international law.[10] For example, in the *North Sea Continental Shelf Cases*,[11] the ICJ considered whether a method for delimitating or fixing the boundaries of the continental shelf – "the equidistance principle" – had attained the status of customary international law since the coming into force of the 1958 *Convention on the Continental Shelf* (the "*Convention*"), which

6. (1978) 17 ILM 1(International Arbitral Tribunal).
7. Article 38 (1) of the *Statute of the International Court of Justice*, permits the Court to apply the following to determine the outcome of a dispute in accordance with international law: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, (b) international custom, as evidence of a general practice accepted as law, and (c) the general principles of law recognized by civilized nations. See also Ian Brownlie, *Principles of Public International Law,* 7th ed (Oxford: Clarendon Press, 2008) at 5 [Brownlie] where Brownlie notes that, "Article 38 is generally regarded as a complete statement of the sources of international law."
8. Unless the state can show that it has persistently objected to the rule.
9. Richard Price, "Emerging Customary Norms and Anti-Personnel Landmines" in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 106 at 107. See also *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] ICJ Rep 226 at para 64 [*Nuclear Weapons Case*].
10. Brownlie, *supra* note 7 at 8-9.
11. [1969] ICJ Rep 3 [*North Sea Cases*].

codified the equidistance principle. The ICJ noted that states that were not parties to the *Convention* had applied the equidistance principle on several occasions since the *Convention* came into force. Nevertheless, "there was no evidence that [the states] had acted because they had felt legally compelled to draw [boundaries] in that way by reason of customary international law."[12] Hence, the ICJ was unwilling to infer *opinio juris* from state practice in this case.[13]

In some instances, state practice can be inferred from the *opinio juris* embodied in multilateral treaties and declarations by international organs such as the UNGA. The decision of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*[14] ("*Nicaragua*") exemplifies this way of establishing custom. According to Anthea Elizabeth Roberts, in *Nicaragua* the ICJ focused on UNGA resolutions as evidence of state belief or *opinio juris* respecting the norms of non-use of force and non-intervention.[15] This identification of *opinio juris* was not accompanied by a serious inquiry into state practice. Rather, the ICJ held that it was sufficient for state practice to be generally consistent with statements of rules, "provided that instances of inconsistent practice were treated as breaches of the particular rule rather than as generating a new rule."[16]

A wide variety of material sources can be used to argue the existence of an international custom, including the following items listed by Brownlie:

> … diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and practices, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.[17]

The argument that a particular norm represents an international custom that is binding on all states is strengthened when that norm is reflected or codified in several of the above-listed sources, as opposed to when the norm appears in just one source. Similarly, when a norm is contained in a convention that is binding on a large number of states, it is more likely to be identified as an international custom, as opposed to when the norm exists in a convention to which only a few states are signatories.[18]

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12. *Ibid* at para 78.
13. In this case there may also have been some question as to whether the state practice (i.e. application of the equidistance principle) was widespread enough to give rise to an international custom.
14. [1986] ICJ Rep 14 [*Nicaragua*].
15. Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 American Journal of International Law 757 at 758 [Roberts]. For instance, the ICJ relied on the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UNGAOR, 25th Sess, Supp No 28, UN Doc. A/8028 (1970) 121 [*Friendly Relations and Co-operation among States*].
16. Roberts, *supra* note 15 at 758-759.
17. Brownlie, *supra* note 7 at 6-7.
18. *Ibid* at 13.

II. THE CASE FOR A CUSTOM PROTECTING INDIGENOUS RIGHTS TO ANCESTRAL LANDS

This section reviews material sources, including conventions and international judicial decisions, which form a body of evidence to support the existence of an international custom protecting indigenous rights to ancestral lands.[19] After outlining material sources, this paper considers the significance of the *Declaration* with respect to the existence of a custom that the sources collectively support.

In principle, a convention is only binding on its parties. However, conventions can also provide evidence of customary international law that would apply to all states. As mentioned above, a convention may provide strong evidence of an international custom if it has widespread support and if it can be demonstrated that the parties to the convention accept its provisions as rules of law. Similarly, the existence of several bilateral or regional conventions that embody the same norm can provide strong evidence of a custom.

A. ILO Convention No. 169

The *International Labour Organization Convention on Indigenous and Tribal Peoples, Convention No. 169*[20] of 1989 ("*ILO Convention No. 169*") is an important material source of an international custom respecting indigenous rights to ancestral lands. Key provisions include Article 14(1), which obliges signatories to recognize indigenous peoples' rights of ownership and possession over traditionally occupied lands and to take measures to secure indigenous access to those lands. Article 6(1)(a) requires governments to consult indigenous peoples before implementing legislative or administrative measures that may affect indigenous peoples directly. Article 15 requires consultation with affected indigenous peoples when development projects are proposed that may have an impact on ancestral lands, even when indigenous peoples do not own the resources on those lands.

ILO Convention No. 169 has only been ratified by 20 countries. This may suggest that it carries little weight as a material source of international custom. However, many Latin American countries with large indigenous populations have ratified *ILO Convention No. 169*. Moreover, *ILO Convention No. 169* has, arguably, had a significant impact in some of the signatory countries. For example, in Norway, ratification of *ILO Convention No. 169* led to the creation of domestic laws expanding rights for the Sami people, an indigenous group in the north of the country.[21]

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19. It is beyond the scope of this paper to review the practices of individual states with respect to indigenous property rights, however, it has been argued that state practice also supports such a custom. Korman, *supra* note 2 at 410-442 reviews in some detail the state practice and *opinio juris* of several individual states with large indigenous populations. Korman concludes on page 441: "Unlike the relatively unanimous blanket prohibitions on slavery or genocide that have led to the establishment of international custom or *jus cogens*, each of the aforementioned countries has taken a relatively unique approach in their treatment of indigenous nationals, and each has granted different types and levels of property recognition." Nevertheless, "[T]here is, however, a set of common denominators, certain principles on which most of the aforementioned nations seem to agree. For example, the concept that indigenous peoples have some inherent right to live on their ancestral land may appear overly simple, yet such action is practiced almost uniformly, and many nations… have expressed validation of such a norm in both domestic law and in the international arena."

20. 27 June 1989, 1650 UNTS 383 (entered into force September 5 1991).

21. Korman, supra note 2 at 445. For more on the impact of *ILO Convention No. 169* on Norway's domestic regime see Hans Petter Graver & Geif Ulfstein, "The Sami People's Right to Land in Norway" (2004) 11 Int'l J on Minority & Group Rts 337.

The *UN International Covenant on Civil and Political Rights* ("*ICCPR*")[22] and the *American Convention on Human Rights* ("*ACHR*")[23] are also significant material sources of an international custom protecting indigenous rights to ancestral lands. These conventions differ from *ILO Convention No. 169* in that they protect human rights in general. Neither the *ICCPR* nor the *ACHR* explicitly refer to indigenous peoples, although provisions in both documents have been interpreted (respectively, by the UN Human Rights Committee and the Inter-American Court of Human Rights) as applying protections to indigenous peoples, including their rights to ancestral property.

B. *ICCPR*

Article 27 of the *ICCPR* deals with minority rights and makes no specific mention of the rights of indigenous peoples. It states that, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Article 27 is significant with respect to the case for the customary status of a norm protecting indigenous property rights for two reasons: the UN Human Rights Committee (the "Committee") has adopted a General Comment on the implementation of Article 27 and the Committee has also indicated that resource development on indigenous lands may be in violation of Article 27.

The Committee (a monitoring body created by the *ICCPR* and given the task of reviewing potential violations of the *ICCPR*) has adopted a General Comment[24] on the implementation of Article 27 that emphasizes that the right to culture may entail a connection between a member or members of a minority and a particular territory.[25] It states that aspects of the rights protected under Article 27 "may consist in a way of life that is closely associated with territory and use of its resources" and adds "[t]his may particularly be true of members of indigenous communities constituting a minority."[26] The Committee has also indicated that by conducting resource development within the traditional territories of indigenous peoples, states may risk breaching their duty under Article 27. The Committee considered this possibility in a series of decisions centered on the Finnish government's authorization of resource development projects (quarrying and logging) on lands used by Sami reindeer herders.[27] In three separate decisions, the Committee found that there was no breach of Article 27. In the first case, the Committee's decision was influenced by the fact that the development would have a limited impact on the Sami's way of life, and also that the government had consulted the petitioners about the project, their concerns, and the potential impacts of the project.[28]

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22. 19 December 1966, 999 UNTS 171.
23. 22 November 1969, 1144 UNTS 143.
24. UN Human Rights Committee, *General Comment No. 23: The rights of minorities (Art.27)*, 50th Sess, UN Doc CCPR/C/21/Rev.1/Add.5 (1994) [*GC No. 23*].
25. Bankes, *supra* note 1 at 466.
26. GC No. 23, *supra* note 24 at para 3.2.
27. *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 511/1992, submitted by Ilmari Länsman et al.), UNHRCOR, 52d Sess, UN Doc CCPP/C/52/D/511/1992 (1994) [*Länsman # 1*]; *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 671/1995, submittted by Jouni E. Lansman et al.), UNHRCOR, 58th Sess, UN Doc CCPR/C/58/D/671/1995 [*Länsman # 2*]; *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 1023/2001, submitted by Jouni Länsman, Eimo Länsman and the Muotkatunturi Herdsmen's Committee) UNHRCOR, 83d Sess, UN Doc CCPR/C/83/DR/1023/2001 (2005) [*Länsman # 3*].
28. *Länsman #1*, *supra* note 27 at paras 9.4 and 9.6.

In the second case, the Committee found that the activities in question did not pose a significant threat to material aspects of Sami culture. In the third case, the Committee again found that there had been no breach of Article 27, but it noted that the cumulative impacts of resource development projects must be considered in deciding whether such a breach has occurred.[29]

C. *ACHR*

Article 21 of the *ACHR* protects property rights in general. Like Article 27 of the *ICCPR*, it does not refer specifically to indigenous peoples. However, the Inter-American Court (a creation of the *ACHR*) has interpreted Article 21 as protecting the rights of indigenous peoples to their ancestral lands. The leading case on this point is the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* ("*Awas Tingni*").[30]

For a case to appear before the Inter-American Court it must involve a party or parties to the *ACHR* and can be brought by a state or by the Inter-American Commission on Human Rights (the "Commission"). The Commission brought forward the case in *Awas Tingni* and argued that Nicaragua had violated the property rights of the Awas Tingni community by permitting a foreign company to log on land claimed as ancestral territories by the Awas Tingni. As indicated above, the Inter-American Court of Human Rights interpreted Article 21 as protecting the communal property of indigenous people. The Court found that customary practices and possession of land could serve as evidence that an indigenous community is entitled to certain lands.[31] Further, the Court ruled that Nicaragua was obliged to demarcate the territory of the Awas Tingni, grant the community title to that territory, and in the meantime, abstain from actions that could affect the land.[32] According to Nigel Bankes, the Court's interpretation of the *ACHR* effectively "limit[ed] the power of the state to deal with natural resources within the traditional territories of indigenous peoples without first recognizing, delimiting, and demarcating the land and resource interests of indigenous peoples."[33]

In summary, multilateral and regional conventions and their associated jurisprudence provide important evidence in the case for establishing the existence of an international custom requiring states to recognize indigenous rights to ancestral territories in the context of decisions about resource development. Before considering the effects of the *Declaration* on such a custom, this paper discusses the relationship between international custom and UNGA declarations in general.

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29. *Länsman #3*, *supra* note 27 at para 10. 2. For an overview of the three decisions see Bankes, *supra* note 1 at 469 – 473. At page 473 Bankes describes the effect of Article 27 as demonstrated in the three *Länsman* decisions: "The article does not protect a minority from any interference with a connection with a particular territory, but it does protect the minority from serious interference (whether singly or cumulatively) that amounts to the denial of the opportunity to maintain a connection with a particular territory and therefore the denial of the right to culture."
30. (2001), Inter-Am Ct HR (Ser C) No 79.
31. *Ibid* at para 151.
32. *Ibid* at para 153.
33. Bankes, supra note 1 at 479. The Inter-American Court of Human Rights has interpreted the *ACHR* as providing protection to indigenous land rights in two additional cases: *Case of the Yakye Axa Indigenous Community v Paraguay* (2005), Inter-Am Ct HR (Ser C) No 125, and *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006), Inter-Am Ct HR (Ser C) No 146.

III. UN GENERAL ASSEMBLY DECLARATIONS AND CUSTOMARY INTERNATIONAL LAW

The UNGA has the power to make binding resolutions with respect to budgetary and administrative matters of the United Nations.[34] In general, however, UNGA resolutions consist of recommendations or statements of the international community's views on a subject.[35] These statements often take the form of declarations. Declarations, when they are initially passed by the General Assembly, are not a formal source of international law.[36] Nevertheless, declarations play a part in the development of international customary law.

The most significant way that a declaration can influence the development of customary international law is by providing evidence or confirmation that a particular norm has attained the status of a custom. As discussed above, in *Nicaragua*, the ICJ inferred state practice with respect to the non-intervention and non-use of force from a few sources, including a UN declaration – *Friendly Relations and Co-operation among States*.[37] In that case, the declaration served not only as the basis for an inference about state practice, but was also used to deduce custom itself.[38] A declaration can also serve as evidence of *opinio juris* when accompanied by positive evidence of state practice.[39] In either case, whether a tribunal is willing to infer state practice on the basis of a declaration, or to treat the declaration as evidence of *opinio juris* in combination with evidence of state practice, declarations can assist in proving the existence of an international custom.

A. Factors

A consideration of certain factors can help to determine whether a declaration provides strong evidence of an existing custom. These factors include: voting conditions, the content of the declaration, and the intentions of both the declaration's framers and the states voting on it.

i. Voting Conditions and Content

In *Texaco*, a tribunal (consisting of a sole arbitrator appointed by the President of the ICJ) considered voting conditions and content.[40] Libya had previously granted certain rights, interests, and property under fourteen Deeds of Concession to two international oil companies, Texaco and California Asiatic. The companies claimed that the Libyan government's act of nationalizing their rights, interests, and property violated the terms and conditions of their Deeds of Concession.

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34. Hugh M. Kindred and Phillip M. Saunders, eds, *International Law Chiefly as Interpreted and Applied in Canada*, 7th ed (Toronto: Emond Montgomery Publications Ltd, 2006) at 176.
35. Brownlie, *supra* note 7 at 15. See also Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague: Martinus Nijhoff, 1966) at 6 [Asamoah].
36. *Ibid* at 14. Asamoath notes that Article 38 of the *Statute of the International Court of Justice, supra* note 7, which lists the formal sources of international law, makes no reference to the practices of international organizations.
37. *Nicaragua, supra* note 14.
38. Roberts, *supra* note 15.
39. See *Nuclear Weapons Case, supra* note 9 at paras 65-69. States that argued in support of an international custom banning the threat or use of nuclear weapons pointed to the consistent practice of non-utilization of nuclear weapons since 1945, and to a series of UNGA resolutions dealing with nuclear weapons as confirmation of customary rule. Asamoath, *supra* note 35 at 46, also discusses the possibility of a declaration supplying the *opinio juris* of existing practice.
40. *Texaco, supra* note 6.

To resolve the dispute, the tribunal considered the state of international law with respect to nationalization, and in particular, whether any of a number of relevant UNGA resolutions reflected customary international law. For its part, Libya relied on resolutions that recognized nationalization as a legitimate method of ensuring every state's sovereignty over its natural resources, particularly Resolution 3171 (XXVIII) and Resolution 3201 (S-VI).[41] According to Libya, these resolutions ruled out an injured state's recourse to international law and conferred exclusive and unlimited competence upon the legislation and courts of the nationalizing state.[42] In addition to the resolutions relied on by Libya, the tribunal also considered an earlier UNGA resolution, *Permanent Sovereignty over Natural Resources*[43] ("*Permanent Sovereignty*"), which holds that international law may play a role in determining the compensation to be paid to an owner whose rights are affected by nationalization.[44]

The tribunal found that *Permanent Sovereignty* reflected customary international law and that the two resolutions relied upon by Libya did not. First, the tribunal looked to the voting conditions surrounding the adoption of each resolution. A majority of the General Assembly voted in favour of *Permanent Sovereignty* (87 votes to 2, with 12 abstentions). Just as importantly, this majority was representative in both geographical and economic terms. The tribunal also noted that several of the Western countries that voted in favour of *Permanent Sovereignty* would not have done so if the resolution did not refer to international law, especially in the field of nationalization.[45] As for Resolution 3171 (XXVIII), the General Assembly held a separate vote on one of its paragraphs that stated that any dispute arising in connection with a state's act of nationalization should be settled in conformity with the nationalizing state's own laws. A majority of states accepted the paragraph (86 to 11 with 28 abstentions); however, many Western states voted against the paragraph, including the United States, the United Kingdom, and the Federal Republic of Germany. The tribunal noted, "This specific paragraph concerning nationalizations, disregarding the role of international law, not only was not consented

41. *Ibid* at para 80. *Permanent sovereignty over natural resources,* GA Res 3171 (XXVIII), UNGAOR, 28th Sess, Supp No 30, UN Doc A/9030 (1973) 52, and *Declaration on the Establishment of a New International Economic Order,* GA Res 3201 (S-VI), UN Doc A/RES/3201 (S-VI) (1974). Resolution 3171 (XXVIII) reaffirms the right of every state to adopt the economic and social system which it deems most favourable to its development, as well as the inalienable right of all states to permanent sovereignty over their natural resources. It recalls Resolution 1803 (XVII) (discussed below), but differs from 1803 (XVII) in terms of how to deal with compensation following a nationalization. Resolution 3171 (XXVIII) holds (at Article 3) that the right to nationalization "implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures." Resolution 3201 (S-VI) acknowledges a widening gap between developed and developing countries, and the need to work towards a new international economic order founded on full respect for a number of principles, including "[r]egulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries" (Article 4(g)).
42. *Texaco, supra* note 6 at para 82.
43. GA Res 1803 (XVII), UNGAOR, 17th Sess, Supp No 17, UN Doc A/5217, (1962) 15 [*Permanent Sovereignty*].
44. *Ibid* at Article 4. It reads: "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."
45. *Texaco*, *supra* note 6 at para 84.

to by the most important Western countries, but caused a number of the developing countries to abstain."[46] The General Assembly adopted Resolution 3201 (S-VI) without a vote, although many Western countries expressed opposition to it.

The tribunal then looked to the content of the resolutions under consideration. The tribunal found that *Permanent Sovereignty* contained "rules recognized by the community of nations."[47] The tribunal went on to note that the rules contained in *Permanent Sovereignty* did not create a custom, "but confirm one by formulating it and specifying its scope, thereby making it possible to determine whether or not one is confronted with a legal rule."[48] On the other hand, the resolutions relied on by Libya contained new principles not reflective of an existing custom. The tribunal noted that the supporters of these resolutions would have understood their contents as "having nothing more than a *de lege ferenda* value."[49] In other words, the states that adopted the resolutions were not affirming existing laws, but rather, expressing hope with respect to the development of future law.

Texaco provides a basic framework for determining whether a UNGA declaration is strong evidence of an existing custom. First, the voting conditions must be examined. Majority support for a declaration is important but does not, on its own, provide sufficient grounds to treat a declaration as 'custom-confirming.' The majority's support must indicate that a consensus has been reached among states that have different perspectives on the subject matter of the declaration under consideration. Second, the contents of the declaration must be examined. A declaration that reflects traditional principles is more likely to be evidence of an existing custom. Conversely, a declaration that introduces new principles will rarely be evidence of an existing custom.[50]

ii. Intention

Intention also plays a role in determining whether a declaration is evidence of an existing custom. There are two relevant sets of intentions: the intentions expressed by state representatives during voting, and declarations of intention embedded in the declaration itself. Obed Y. Asamoath uses the factor of intention to explain why the *Universal Declaration of Human Rights*[51] ("*UDHR*") did not evidence international customary law at the time of its adoption. First, Asamoath notes that delegates expressly repudiated the idea of the *UDHR* being imposed on them as a legal obligation. Second, the *UDHR* itself

46. *Ibid* at para 85.
47. *Ibid* at para 87.
48. *Ibid*.
49. *Ibid*.
50. *Nuclear Weapons Case, supra* note 9, also considers when the contents of a declaration may be understood as evidence of an existing custom. At para 70, the ICJ notes that to establish whether a resolution is evidence of customary international law: "it is necessary to look at its contents and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character." Looking to the *Declaration on the Prohibition of the use of Nuclear and Thermo-nuclear Weapons*, GA Res 1653 (XVI), UNGAOR, 16th Sess, Supp No 17, UN Doc A/5100 (1962) 4, the ICJ notes that it expressly proclaims that the use nuclear weapons is contrary to international law, but applies general rules of customary international law to explain why this is so. For instance, Article 1(b) states that illegality is based on the fact that nuclear weapons would exceed the scope of war and cause indiscriminate suffering. The ICJ goes on to explain that the *Declaration on the Prohibition of the use of Nuclear and Thermo-Nuclear Weapons* is not evidence of a custom prohibiting the use of nuclear weapons because: "That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons" (at para 72).
51. GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71 [*UDHR*].

states that it is intended as a "common standard of achievement."[52] Thus, the intentions of the states adopting a UN declaration and of the framers of the declaration itself can have the effect of preventing the declaration from being taken as evidence of customary legal obligations.

However, even UNGA declarations that do not provide evidence of existing customs (i.e. that do not meet the test outlined above in terms of voting conditions, content, and intention) can nonetheless affect the development of customary international law by influencing future state practice, such that norms take shape (or are strengthened) around their provisions. In the *North Sea Continental Shelf Cases*, the ICJ discussed the possibility that a provision in a binding convention, rather than a declaration, could give rise to custom.[53] The Federal Republic of Germany was not a party to the *Convention on the Continental Shelf* and thus it was not required to apply the equidistance principle as a matter of treaty obligation. However, the ICJ considered the possibility that subsequent state practice had taken shape around Article 6 (which refers to the equidistance principle) such that the Federal Republic of Germany was bound to apply the principle as a matter of customary international law. The ICJ noted that a custom can come into existence even a short time after the creation of an international instrument.[54]

More importantly than the passage of time, the ICJ stated, is that state practice subsequent to the arrival of the instrument "should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[55] Clearly, UNGA declarations affect state practice when states choose to apply their provisions.

Alternatively, judicial bodies may rely upon declarations in the adjudication of disputes and require states to implement certain provisions. The latter case, in which a provision is implemented as a result of national or international judicial proceedings, may provide stronger evidence of international custom (than states choosing to implement provisions) because the decision itself may evidence *opinio juris* (the idea that a state is bound to implement the provision as a matter of international law). Thus, UN declarations may come to affect international customary law indirectly by shaping state practice after the declaration is made.

IV. THE *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

A. Background

The UN Working Group on Indigenous Populations (the "Working Group") was established in 1982 as an organ of the Sub-Commission on the Promotion and Protection of Human Rights (the "Sub-Commission"). The Working Group's original mandate was to review developments concerning indigenous peoples and work towards the development of corresponding international standards. [56] In 1985, the Sub-Commission approved the Working Group's decision to draft a declaration on the rights of indigenous peoples for adoption by the UNGA. The Working Group agreed on a final text for the

52. *Ibid* at Preamble. Asamoah, *supra* note 35 at 68-69.
53. *North Sea Cases, supra* note 11.
54. *Ibid* at para 74.
55. *Ibid*.
56. Anaya, *supra* note 2 at 63.

draft declaration in July 1993. The Sub-Commission adopted the text a year later and submitted it to the United Nations Commission on Human Rights ("UNCHR") for consideration.

In 1995, the UNCHR appointed a new working group to achieve a consensus on the terms of a draft declaration. Throughout the next decade, the working group accepted submissions from indigenous peoples as well as governments. There was active participation by states with large indigenous populations, including Canada, Australia, New Zealand, and the United States – the four countries that would later oppose the *Declaration*.[57]

In September 2007, the UNGA passed the *Declaration*. A large majority of states voted in favour of the *Declaration* (144), although many qualified their votes. Eleven states abstained from voting (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine). Four states voted against the *Declaration* in 2007 (Australia, Canada, New Zealand, and the United States). All four have subsequently adopted the *Declaration*, but on qualified terms.

B. Contents

The preamble of the *Declaration* proclaims that the document is a "standard of achievement to be pursued in a spirit of partnership and mutual respect."[58] As a whole, the *Declaration* recognizes the rights of indigenous peoples in many areas – self-determination, political autonomy, cultural integrity, and land and resource rights. Key provisions with respect to land and resource rights include Article 25, which recognizes the right of indigenous peoples to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands."[59] Article 26(1) affirms the right of indigenous peoples "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[60] Subsection (3) of Article 26 requires states to "give legal recognition and protection to these lands, territories and resources… [w]ith due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[61] Article 27 calls on states to implement processes for recognizing indigenous peoples' laws and land tenure systems. Article 32(1) recognizes the right of indigenous peoples to "determine and develop priorities and strategies for the development or use of their land or territories or other resources."[62] Subsection (2) of Article 32 requires states to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[63] The above-mentioned provisions demonstrate respect for indigenous perspectives on property ownership. They also recognize the unique connection between indigenous peoples and their ancestral

57. For more on Canada's role in the negotiations, see "Canada's Position: United Nations Draft Declaration on the Rights of Indigenous People", online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/>. The document discusses Canada's efforts to "reinvigorate negotiations" in 2000 by chairing informal consultations between states. Canadian representatives also participated in discussions in 2003 with representatives from the United States and Australia on alternate language on lands and resources.
58. *Declaration, supra* note 3.
59. *Ibid* at Article 25.
60. *Ibid* at Article 26(1).
61. *Ibid* at Article 26(3).
62. *Ibid* at Article 32(1).
63. *Ibid* at Article 32(2).

lands and territories, as well as the principle that such connections ought not to be diminished or severed without the consent of the indigenous peoples affected.

C. Comments by State Representatives about the Declaration

State representatives made comments about the *Declaration* before and after voting.[64] Representatives from Australia, Canada, New Zealand, and the United States gave reasons as to why their countries could not support the *Declaration*.[65] They objected to the *Declaration* largely on the basis that the document frames indigenous rights to ancestral territories in broader terms than their domestic laws or in terms that were inconsistent with their domestic laws. For instance, the Australian representative stated, "It is important to stress that any rights to traditional lands must be subject to national laws, otherwise the provisions would be both arbitrary and impossible to implement, with no recognition being given to the fact that ownership of land may lawfully vest in others – for example, through grants of freehold or leasehold interests in land."[66] Canada's representative raised the concern that the *Declaration's* broadly framed rights to ancestral lands could "pu[t] into question matters that have already been settled by treaty in Canada."[67] Representatives from all four countries also criticized the right to "free, prior and informed consent" contained in Article 32(2), calling it a right of veto over legitimate democratic decisions regarding land use and resource development. For example, "free, prior and informed consent" is incompatible with Canada's body of law concerning the Crown's duty to consult with Aboriginal Peoples where Crown actions or decisions may adversely affect their interests.[68] New Zealand's representative suggested that Article 32(2) "impl[ies] different classes of citizenship, where indigenous people have a right of veto that other groups or individuals do not have."[69] The American statement held: "We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a "veto" power over the legislative process."[70] Hence, one reason why Australia, Canada, New Zealand, and the United States opposed the *Declaration* was its inconsistencies with their own domestic laws. The above-mentioned comments suggest that the four states were particularly concerned about having limits placed on their authority to develop land and resources claimed by indigenous peoples.

The *Declaration's* approach to indigenous land and resource rights was also a major source of concern for some of the countries that abstained from voting. Russia's representative stated simply, "[W]e cannot agree with the document's provisions relating in particular to the rights of indigenous peoples to land and natural resources, and to the procedure for compensation and redress."[71] Columbia's representative commented that the country's own constitution and *ILO Convention No. 169* (to which Columbia is a party) require the free and informed participation of indigenous peoples in decisions respecting resource exploitation in their traditional territories. They expressed concern, however, that, "The Declaration's approach to prior consent is different and could amount to a possible veto on the exploitation of natural resources in indigenous territories in the absence of an

64. UNGAOR, 61st Sess, 107th Plen Mtg, UN Doc A/61/PV.107 (2007) 11.
65. For the US statement see Robert Hagen, "Explanation of vote," online: United States Mission to the UN Archive http://www.archive.usun.state.gov [Hagen].
66. *Supra* note 64 at 11.
67. *Ibid* at 13.
68. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 48, [2004] 3 SCR 511.
69. *Supra* note 64 at 14.
70. *Hagen, supra* note 65.
71. *Supra* note 64 at 16.

agreement." [72] The provisions of the *Declaration* pertaining to land and resource rights thus concerned not only the countries that voted against the document, but also states that opted to abstain from voting.

Some states that voted in favour of the *Declaration* noted their interpretations of provisions dealing with indigenous land and resource rights. Sweden's representative outlined how various articles of the *Declaration* would apply in Sweden; their effect would be to affirm rights already recognized under domestic law.[73] Mexico's representative stated: "The provisions of articles 26, 27, and 28 relating to ownership, use, development, and control of territories and resources shall not be understood in a way that would undermine or diminish the forms and procedures relating to land ownership and tenancy established in our constitution and laws relating to third-party acquired rights."[74] In other words, Mexico would interpret the provisions as lending support to existing legislation and practices. With respect to the *Declaration's* consultation requirements, Norway referred to its participation in *ILO Convention No. 169* and the fact that it had already implemented the consultation requirements specified in that convention.[75] Thus, Norway implied that it would interpret the *Declaration's* consultation requirements as being equivalent to those of *ILO Convention No. 169*.

Finally, a handful of representatives expressed the view that the *Declaration* is not legally binding. This included the United Kingdom and Guyana, both of which voted for the *Declaration*.[76] Australia and Columbia also commented that the *Declaration* is not legally binding and added that the *Declaration* does not reflect customary international law.[77] Australia went so far as to state that, "As this declaration does not describe current state practice or actions States consider themselves obliged to take as a matter of law, *it cannot be cited as evidence of the evolution of customary international law*."[78] This comment suggests that Australia was deeply concerned that it may, in the future, be bound by the *Declaration* as a matter of customary international law.

V. THE SIGNIFICANCE OF THE *DECLARATION* IN TERMS OF AN INTERNATIONAL CUSTROM PROTECTING INDIGENOUS PROPERTY RIGHTS TO ANCESTRAL TERRITORIES

The final section of this paper considers two effects that the *Declaration* might have on international custom. First it considers whether the *Declaration* is evidence of an existing custom. It then looks to signs of state practice taking shape around provisions of the *Declaration*.

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72. *Ibid* at 18.
73. *Ibid* at 24-25.
74. *Ibid* at 23. See also Japan's statement (at 20), "We are also aware that, regarding property rights, the content of the rights of ownership and others relating to land and territory is firmly stipulated in the civil law and other laws of each state" and Thailand's statement (at 25), "the Declaration does not create any new rights and that the benefits… shall be interpreted in accordance with the Constitution of the Kingdom of Thailand, the domestic laws of Thailand, and international human rights instruments that Thailand is party to."
75. *Ibid* at 22.
76. *Ibid* at 22 and 26.
77. *Ibid* at 12 and 17.
78. *Ibid* at 12 [emphasis added]. See also the comments of New Zealand's representative at 15: "[The *Declaration*] does not state propositions which are reflected in State practice or which are or will be recognized as general principles of law."

A. Analyzing Evidence of Custom

As discussed above, and as set out in *Texaco*, the strength of a UN declaration as evidence of custom depends primarily on three factors - voting conditions, content, and intention.

i. Voting Conditions

With respect to voting conditions, as noted above, a large majority of states voted in favour of the *Declaration*. This majority was geographically representative as it included countries from most continents. However, there is some question as to whether the majority represents a consensus on the subject matter. The fact that Australia, Canada, New Zealand, and the United States voted against the *Declaration* is significant in this respect. A combination of factors set these countries apart in terms of the perspective that they represent: the fact that they are home to large indigenous populations; that the countries have, to varying extents, accepted and tried to reconcile the concept of indigenous title with common law understandings of property and the interests of other groups in their societies; the fact that indigenous peoples within these countries have connections (both historic and continuing) with large amounts of territory;[79] and the fact that their indigenous populations, relative to those of other countries, have the resources to assert their rights in legal and political arenas. This suggests that the representativeness of the *Declaration* is brought into question by the fact that these four countries voted against it.

Yet, even if the objections of these states imply that the *Declaration* was not representative at the time it was passed, it is possible that the *Declaration* has since become representative. This is because all four of the countries that voted against the *Declaration* – Australia, Canada, New Zealand, and the United States – have subsequently signaled their support for the *Declaration*, although with important qualifications. For example, Canada has stated that the *Declaration* will not change Canadian laws.[80] Presumably this means that Canada does not (for the time being) intend to give full effect to Article 32 of the *Declaration*, which requires states to obtain free and informed consent before approving projects that will affect indigenous lands or territories. Upon adopting the *Declaration*, Canada also expressed the view that the document is non-binding and does not reflect customary international law.[81]

ii. Content

The second factor to consider in determining whether a declaration is evidence of an existing international custom is its content. A declaration is more likely to reflect custom if it contains traditional principles as opposed to new principles. It is possible for a declaration to contain both traditional and new principles, in which case some of its provisions might be evidence of custom, while others may not. As for the *Declaration*, the comments of state representatives in the UNGA fall into two categories. There are comments that signal that the articles dealing with indigenous land and resources rights reflect familiar traditional principles, and there are comments that signal that the same articles contain new principles.

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79. See New Zealand's comment with respect to Article 26: "For New Zealand, the entire country is potentially caught within the scope of the article." *Ibid* at 14.
80. "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/>.
81. *Ibid.*

With respect to the first category, states such as Sweden and Norway interpreted the articles dealing with indigenous land and resource rights such that the articles do not impose new obligations on them; the principles embodied in those articles are familiar in the sense that they are already expressed in existing domestic law, which in Norway's case has been developed to comply with *ILO Convention No. 169*.

As to the second category, several states viewed the articles as incompatible with their domestic laws. To these states, namely Canada, New Zealand, and Australia, the principles embodied in Articles 26 and 32 (among others) appeared new, or rather, incompatible, in relation to domestic law and practice. Subsequent adoption of the *Declaration* has not necessarily altered these views regarding the incompatibility of some of the *Declaration*'s articles and domestic law. For example, Canada has stated:

> In 2007, at the time of the vote during the United Nations General Assembly, and since, Canada placed on record its concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations... *These concerns are well known and remain*. However, we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.[82]

Thus, the statements of some countries suggest that provisions of the *Declaration* dealing with indigenous rights to ancestral territories reflect familiar principles. However, it is important to note that while states such as Sweden stated that their domestic laws already accommodate principles in the *Declaration*, they did not say that the principles were familiar to them as requirements of international law. An argument that the contents of the *Declaration* reflects customary international law would be more persuasive if more countries had made statements similar to those of Norway, that the *Declaration* reflects principles enshrined in international law (i.e. *ILO Convention No. 169*).

iii. Intention

Intention is the final factor to consider in determining whether the *Declaration* is evidence of international custom. The preamble of the *Declaration* is significant in this respect because it refers to the *Declaration* as a "standard of achievement," indicating that it is an aspirational document. The statement conveys the intention that states should work toward implementing the *Declaration* over time, not that they should recognize its provisions as being binding upon them.

Intention is also conveyed in statements made in the UNGA during voting. As discussed above, during voting a number of states made it clear that they do not regard the *Declaration* as a legally binding document. States that have subsequently declared their support for the *Declaration* have expressed the same view. For example, Canada's statement of support reads, "[T]he *Declaration* is a non-legally binding document that does not reflect customary international law nor change Canadian laws."[83] Thus, the factor of intention militates strongly against treating the *Declaration* as evidence of custom.

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82. *Ibid* [emphasis added].
83. *Ibid*.

iv. Summary

The above analysis suggests that the *Declaration* provides weak evidence of an existing international custom respecting indigenous rights to ancestral lands. The *Declaration* may have representative support (especially now that Australia, Canada, New Zealand, and the United States have signaled support for the document), however, the factors of both content and intention with respect to the *Declaration* indicate that the document should not, as of yet, be treated as evidence of existing customary international law. This is not to say that indigenous property rights are not protected by international customary law, but merely that the *Declaration* itself is not strong evidence of a custom or customs. Nor does this conclusion mean that state practice will not take shape around provisions of the *Declaration* and expedite the development of custom.

B. State Practice and Judicial Interpretation

i. Inter-American Court of Human Rights

There are already signs that state practice is beginning to mirror the articles of the *Declaration*. For example, in the Inter-American Court of Human Rights' November 2007 judgment in *Saramaka People v. Suriname*,[84] the Court affirmed that Article 21 of the *ACHR* requires states to respect the special relationship between indigenous peoples and their ancestral territories, and to do so in a way that guarantees their social, cultural, and economic survival.[85] The case concerned logging and mineral concessions awarded by Suriname on territory possessed by the Saramaka people. In the course of its judgment, the Court also recognized that Suriname has a right to grant concessions for the exploration and extraction of natural resources. To balance the competing rights of the Saramaka and Suriname, the Court ruled that prior to granting concessions, Suriname is required to consult the Saramaka and ensure they receive a benefit from any resource development. Further, in the case of large-scale resource development projects that would have a major impact on Saramaka territory, the state is required to obtain free, prior, and informed consent from the Saramaka.[86] Importantly, the Court cited Article 32 of the *Declaration* as a source of this duty.[87]

ii. Supreme Court of Belize

The Supreme Court of Belize also invoked specific articles of the *Declaration* related to property rights in the consolidated cases of *Aurelio Cal et al. v. Attorney General of Belize*.[88] The claimants (Mayan members of the Village of Conejo) argued that the government issued leases, grants, and concessions to their traditional lands in violation of rights protected under the *Belize Constitution*. The Court held not only that the government acted in violation of the country's own constitution, but also in violation of customary international law. On this point, the Court referred to Article 26 of the *Declaration* as the source of a state obligation to provide legal recognition and protection

84. (2007), Inter-Am Ct HR (Ser C) No 172.
85. *Ibid* at para 91.
86. *Ibid* at paras 129 and 134.
87. *Ibid* at para 131.
88. (2007) Supreme Court of Belize, Claims Nos. 171 and 172, Judgment 18 October 2007, unreported. Online: Environmental Law Alliance Worldwide < http://www.elaw.org/>. For a more detailed discussion of the case see Maia S. Campbell and S. James Anaya, "The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights" (2008) 8 Human Rights Law Review 377.

to indigenous rights to ancestral territories.[89] Upon noting that Belize voted for the *Declaration*, the Court stated, "I therefore venture to think that [the government of Belize] would be unwilling, or even loath to take any action that would detract from the provisions of this Declaration importing as it does, in my view, significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned."[90] The Supreme Court thus helped to advance the status of the *Declaration* in customary international law by stating that the instrument created an enforceable obligation on the state of Belize.

iii. Third Section of the European Court of Human Rights

Finally, provisions of the *Declaration* were referred to in the 2010 case of *Handölsdalen Sami Village and others v. Sweden*,[91] which was heard before the Third Section of the European Court of Human Rights ("ECtHR"). The case originated in 1990 when landowners in the municipality of Härjedalen sought a declaratory judgment stating that, in the absence of a valid contract, several Sami villages had no right to use their privately held lands to graze reindeer.[92] In response, the Sami villages argued that they had the right to use the lands in question based on prescription from time immemorial, the provisions of the applicable *Reindeer Husbandry Act*, custom, and public international law – specifically Article 27 of the *ICCPR*.[93] At the domestic level, Swedish courts rejected the arguments of the Sami villages and ruled that they were not free to graze on privately held lands without first contracting with the landowners.

In 2004, after Sweden's Supreme Court refused leave to appeal, four Sami villages applied for a hearing before the ECtHR. The villages argued that the state infringed their property rights under Article 1 of Additional Protocol No. 1 of the *European Convention on Human Rights* ("*ECHR*").[94] The villages also contended that the high legal costs of the proceedings resulted in denial of effective access to court, or a violation of Article 6 of the *ECHR*. Finally, they argued that the length of domestic proceedings – spanning from September 1990 to April 2004 – violated Article 6(1) of the *ECHR,* which requires matters to be dealt with in a reasonable period of time. In February of 2009, ECtHR determined that it could only deal with the latter two questions and was unable to deal with the substantive question of whether the Sami's property rights were violated. On the first of these questions, a majority of the Court found that despite the high cost of legal proceedings, the Sami villages nonetheless had a reasonable opportunity to present their case effectively before the national courts.[95] On the second question, the Court found in favour of the Sami villages and determined that the proceedings were not sufficiently expeditious.

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89. *Ibid* at para 131.
90. *Ibid* at para 133.
91. (2010), Application No. 39013/04, Judgment of 30 March 2010.
92. *Ibid* at para 8.
93. *Ibid* at para 10.
94. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5. Article 1 of Protocol 1 reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
95. *Supra* note 91 at para 59.

In her partly dissenting opinion, Judge Ziemele found that Sweden both denied the Sami villages effective access to court and that the length of domestic proceedings was unreasonable. In Judge Ziemele's view, the Sami villages incurred massive legal costs (and thus were denied effective access to court) because Sweden's entire approach to land disputes failed to "take account of the rights and particular circumstances of indigenous people."[96] In particular, the approach disadvantaged indigenous peoples by placing the burden of proving land rights exclusively on their shoulders and presuming at the outset of any dispute that landowners have valid title. Judge Ziemele referred to two articles of the *Declaration* as informing a duty on Sweden to modify its approach to indigenous land claims: Article 26, which requires parties to the *Declaration* to commit to recognizing the traditional territories of indigenous people, and Article 27, which requires parties to commit to using fair processes to adjudicate the rights of indigenous peoples pertaining to their lands, territories, and resources.[97]

iv. Summary

Although it is likely the *Declaration* does not currently provide strong evidence of existing customary international law, courts have nevertheless treated its provisions as informing state obligations to indigenous peoples. These courts, in particular the Inter-American Court of Human Rights and the Supreme Court of Belize, have thus taken an important step towards shaping state practice in accordance with the terms of the *Declaration* provisions. These decisions signal that the *Declaration* may expedite the development or crystallization of international customs based on its principles. It will be interesting to see how courts in Canada will look to the *Declaration* and its principles for guidance in considering issues concerning Aboriginal peoples in Canada and how they may seek to reconcile its articles with the laws of Canada where they appear to be incompatible.

CONCLUSION

UNGA declarations can play a significant role in the development of customary international law. Three considerations help to shed light on the significance of a declaration with respect to customary international law: voting conditions, content, and intention. Applying an analysis of these factors to the *Declaration on the Rights of Indigenous Peoples* reveals that the *Declaration* currently provides weak evidence for the existence of international customs respecting the rights of indigenous peoples to their ancestral lands. However, subsequent practice, both at the inter-state and state level, indicates that the *Declaration* may come to play an important and emerging role in developing international custom and shaping state practices.

96. *Ibid,* Partly Dissenting Opinion of Judge Ziemele at para 10.
97. *Ibid* at para 3.

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