



APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

ARTICLES

Too Much Protection, Too Little Gain: How Official Marks Undermine the Legitimacy of Intellectual Property Law

– DONNA L. DAVIS

Customary Adoption in British Columbia: Recognizing the Fundamental Differences – KISA MACDONALD

Sui Not-So-Generous: The Unconstitutionality of Canadian Court Martial Jury Trials – LIEUTENANT (NAVY) MIKE MADDEN

There was a High Court That Swatted a Fly... But Why? Mental Disability in the Negligent Infliction of Psychiatric Injury and the Decisions in *Mustapha v. Culligan*

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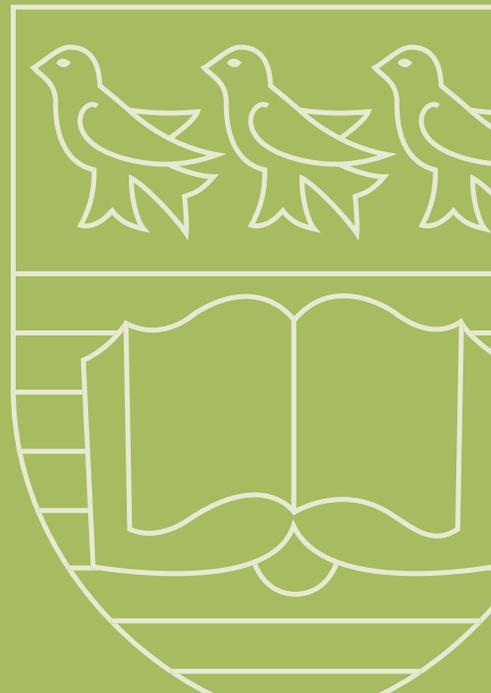
The Edges of Exception: Implications for Indigenous Liberation in Canada – TARA WILLIAMSON

Missing Subjects: Aboriginal Deaths in Custody, Data Problems and Racialized Policing – MANDY CHEEMA

Rethinking the Conclusiveness of Judicial Notice: A Theoretical Approach – FRED GJOKA

Lacking Context, Lacking Change: A Close Look at Five Recent Lower Court Sexual Assault Decisions

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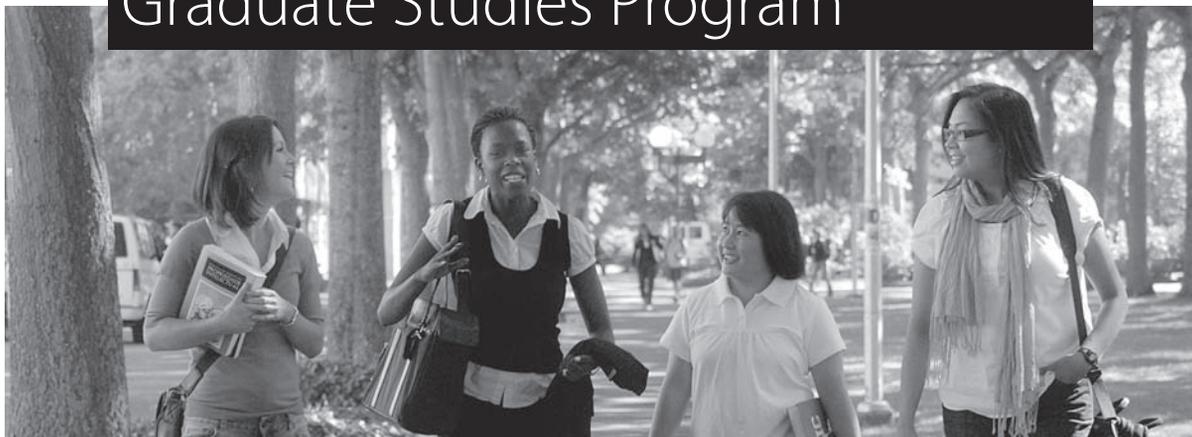
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ARTICLE

TOO MUCH PROTECTION, TOO LITTLE GAIN: HOW OFFICIAL MARKS UNDERMINE THE LEGITIMACY OF INTELLECTUAL PROPERTY LAW

By **Donna L. Davis***

CITED: (2009) 14 Appeal 1-16

I. INTRODUCTION

For decades, courts have defended and public authorities have delighted in the extraordinary protection provided by official marks. This uniquely Canadian creation¹ is protected under s. 9(1)(n)(iii) of the *Trade-marks Act*,² although it is not a trade-mark, nor is it subject to the same rigorous standards of registrability as a trade-mark. Official marks can comprise common words such as “doctor,” “nurse,” “engineer,” and “chartered financial planner”³ as well as common phrases such as “Today’s special,” “Open your ears,” and “Give yourself credit.”⁴ Anything and everything is up for consideration, provided it is neither ob-

* Donna Davis, B.A. Hons. (Memorial), M.A. (Carleton), LL.B. Dalhousie 2010 (expected). Donna would like to thank Dr. Teresa Scassa, Faculty of Law, University of Ottawa as well as Professor Robert Currie and Dr. Chidi Oguamanam, Dalhousie Law School, for assistance and comments on an earlier version of this paper.

1 *Canada Post Corporation v. United States Postal Service*, 2005 FC 1630, 47 C.P.R. (4th) 177 at para. 30 (F.C.T.D.), aff’d 2007 FCA 10, 54 C.P.R. (4th) 121, leave to appeal refused [2007] S.C.C.A. No. 117 (QL) [USPS 2005].

2 R.S.C. 1985, c. T-13.

3 Official marks owned by the Canadian Medical Association, Canadian Nurses Association, Canadian Council of Professional Engineers, and Canadian Institute of Financial Planning respectively (Canadian Trade-marks Database, online: Canadian Intellectual Property Office <<http://strategis.ic.gc.ca/app/cipo/trademarks/search/tm-Search.do?language=eng>> [Canadian Intellectual Property Office]).

While associations may register these designations to prevent misuse of them by those lacking the necessary qualifications, other mechanisms can and do achieve this end without granting such a broad right. The practical effect of this is a secondary system of regulation wielded by the associations. Other means of preventing false advertising by unqualified “professionals” are available. For example, s 33 of Ontario’s *Regulated Health Professions Act, 1991*, prevents misuse of the title “doctor” (Kelly Gill & R. Scott Joliffe, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th ed. (Toronto: Carswell, 2007) at 5-62 [Gill & Joliffe]).

4 Official marks owned by the Ontario Educational Communications Authority (Canadian Trade-marks Database, *supra* note 3).

scene nor contrary to public order.⁵ Official marks are exclusive to public authorities and, once secured, they are “virtually unexpungeable.”⁶

In recent years, however, the federal courts in particular have cast a less accepting, more critical eye on the ways in which public authorities have been using these “super marks.”⁷ Parliament’s original purpose in drafting s. 9(1)(n)(iii) was to remove coats of arms, crests, and royal symbology from the field of trade to protect them from businesses that would exploit the marks to add respectability and cachet to their own wares and services.⁸ The provision fulfils in part Canada’s obligations under the *Paris Convention* to protect armorial bearings, flags, and other emblems from misuse;⁹ in fact, it exceeds those obligations as well as the protections of comparable jurisdictions. This is the root of the problem that has attracted the attention and the active intervention of the Federal Court of Canada.

This paper will argue that official marks protections are overbroad. As public authorities become more deeply engaged in commercial activity, they are using their official marks as trade-marks, and this gives them a tremendous advantage over other commercial actors. Public authorities can not only freeze another party’s rights to a long-standing and potentially valuable mark, they can also prevent all commercial use of the mark in future by anyone without permission. The statute allows these actions, and up until recently there has been little one could do about it.¹⁰

Granting this extraordinary privilege to public authorities places a burden on commercial actors, professionals and ultimately the public, who receive little reciprocal benefit. The exchange that lies at the heart of justifications for intellectual property—the granting of exclusive rights as an incentive to create intellectual products¹¹—does not pertain to official marks. Exclusive rights were given to official marks not to encourage productivity but to identify a public institution or authority and to prevent others from trading on that authority.

Public confidence in government and respect for the laws it builds around intellectual property are adversely affected when deficient legislation remains uncorrected and illegitimate exercise of statutory power goes unchecked. This is evident in the public response to the recent dispute between the Royal Canadian Mint and the City of Toronto in which the mint charged Toronto \$48,000 for unauthorized use of the phrase “one cent” and the image of the Canadian penny in the city’s “One Cent Now” campaign. The dispute sparked a public debate grounded in important normative questions about what should and should not be owned, the legitimacy of intellectual property law, and the ability of government to govern efficiently and wisely.

5 *Mihaljevic v. British Columbia*, [1988] F.C.J. No. 738 (T.D.) (QL) [*Mihaljevic*].

6 Roger T. Hughes, *Hughes on Trade Mark* (Markham, Ont.: LexisNexis Canada, 2005) at 640 [Hughes].

7 See Arnold Ceballos, “Who is a ‘public authority’ and entitled to official marks benefits?” *The Lawyers Weekly* (21 April 2006) (QL); Sander Gelsing, “Now Why Didn’t I Think of That?—A Canadian patent, trade-mark and copyright blog.” Posted 9 May 2006, online: <<http://www.gelsing.ca/blog/?p=187>>.

8 *Techniquip Ltd. v. Canadian Olympic Assn.*, [1998] F.C.J. No. 280 at para. 28 (T.D.) (QL) [*Techniquip*].

9 *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305, art. 6ter, (entered into force 26 April 1970, accession by Canada 26 March 1970), online: World Intellectual Property Organization <http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html>.

10 Although it is beyond the scope of this paper, it is notable that official marks have been used to extend copyright, as was the case in *Anne of Green Gables Licensing Authority Inc. v. Avonlea Traditions Inc.*, [2000] O.J. No. 740 (Sup. Ct.).

11 Edwin C. Hettinger, “Justifying Intellectual Property” (1987) 18 *Philosophy & Public Affairs* 31 at para. 53.

Legal practitioners and scholars have argued for years that s. 9(1)(n)(iii) is ripe for reform.¹² Parliament has remained unresponsive, but the Federal Court has not. Its recent jurisprudence has narrowed s. 9(1)(n)(iii) protections and taken some of the sting out of what had been, for years, a statutorily sanctioned monopoly. This reining in of s. 9(1)(n)(iii) is needed to restore legitimacy to intellectual property law.

In this paper I will discuss the protection afforded under s. 9(1)(n)(iii) and the ways in which the Federal Court has addressed the deficiencies in the statute by narrowing the scope of official marks protection. I will also argue that this reinterpretation is an essential step toward addressing the injustices and the legitimacy problems evident in disputes like “One Cent Now,” where official marks are put to commercial use.

II. THE NUTS AND BOLTS OF OFFICIAL MARKS

A. Defining and Obtaining Official Marks

Section 9(1)(n)(iii) of the *Trade-marks Act* states:

9.(1) No person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for, ...

(n) any badge, crest, emblem or mark ...

(iii) adopted and used by any public authority, in Canada as an official mark for wares or services, in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority as the case may be, given public notice of its adoption and use¹³

Official marks differ from trade-marks in a number of important ways, and the effect is that, in nearly all instances, official marks provide superior protection. Unlike a trade-mark, an official mark is permitted to be both descriptive and confusing with another mark. It can be obtained with greater ease and speed than a trade-mark, and the securing of an official mark prohibits others from using the mark for all wares and services and not just the limited wares and services used by the public authority.¹⁴ Section 9 of the *Trade-marks Act* prohibits the adoption, and s. 11 prohibits the use, of official marks for commercial purposes without the consent of the public authority. The *Trade-marks Act* makes no provision for revoking an official mark. Its term is unlimited and there are no renewal fees.¹⁵

Parties seeking an official mark must make a request to the Registrar of Trade-marks. The public need not be notified of the request. If the requestor meets the statutory requirements set down in s. 9(1)(n)(iii), the registrar must give public notice of the official mark

12 For example, see Gordon F. Henderson, *Intellectual Property: Litigation, Legislation, and Education* (Ottawa: Minister of Supply and Services Canada, 1991) at 52; A. David Morrow, “Official Marks” in Gordon F. Henderson, ed., *Trade-marks Law of Canada* (Toronto: Carswell, 1993) 377 at 382-89; Gill & Jolliffe, *supra* note 3 at 5-61; Teresa Scassa, “Nickled and Dimed: The Dispute Over Intellectual Property Rights in the Bluenose II” (2004) 27 Dal. L.J. 293 [Scassa]; Colin P. McDonald, “Official Marks: Are There Any Limits to This Branding Power?” (2003) 17 I.P.J. 83 at 88-89 [McDonald].

13 *Trade-marks Act*, *supra* note 2 at s. 9.

14 *Ontario Association of Architects v. Association of Architectural Technologists of Ontario*, 2002 FCA 218, 19 C.P.R. (4th) 417 at para. 34; *rev'g* [2000] F.C.J. No. 1743 (F.C.T.D.) (QL) [*Ontario Architects*].

15 Scassa, *supra* note 12 at 301.

by having it published or “advertised” in the *Trade-marks Journal*. The registrar has no discretion to refuse to give public notice of the official mark unless the mark is obscene or contrary to public order.¹⁶ It is usually that simple. However, this simple process gives rise to effects that compel scrutiny for myriad reasons.

B. Freezing Rights

Section 9(1)(n)(iii) prohibits the adoption for commercial purposes of “any mark consisting of, or so nearly resembling as to be likely to be mistaken for” an official mark.¹⁷ The prohibition operates prospectively rather than retrospectively,¹⁸ but its effect is nonetheless especially significant for two user groups: prospective users, who wish to adopt that mark or a confusingly similar one but who have not yet done so, and current users, who have already adopted the mark and who are using it at the time that public notice is given.

Prospective users typically never get past the gate. Once the Registrar of Trade-marks gives public notice of an official mark, no one may adopt that official mark in relation to any wares or services without the consent of the public authority whose exclusive rights to the mark trump all other rights.

The situation is only slightly better for current users. Parties that have registered the mark or a similar one prior to public notice can continue their use, but they cannot extend that use to the marketing of a new and different product developed after public notice.¹⁹ It is immaterial that a party may have been the first to adopt the mark and may have used it to build up decades of good will. Parties that have adopted the mark as a common law mark also can continue to use it, subject to the same limitations. However, pursuant to s. 12(1)(e) of the *Trade-marks Act*, it remains “forever unregistrable.”²⁰ In both scenarios, the rights of the current user are frozen by the official mark.

Dangling between these two extremes is the party whose trade-mark application is pending. This party shares the same fate as the prospective user. Applications that are not disposed of by the Office of the Registrar prior to notice of the official mark will be rejected. The potential for unfairness is obvious. The Office of the Registrar can process the simpler official marks request with greater speed than the more rigorous trade-marks application,²¹ which means that the former is likely to be operational more quickly. The problem for registered trade-mark applicants can be exacerbated by a backlog within the Office of the Registrar.

16 *Mihaljevic*, *supra* note 5. Consideration of public order, a broad concept, gives some scope for the registrar to exercise a discretion not expressly afforded by the statute. The principle of public order may be used to narrow the protections provided to public authorities under s. 9(1)(n)(iii). See discussion of public order below.

17 Pursuant to s. 9(2), the public authority can consent to the “adoption, use or registration” of their official mark by another party, but they need not consent.

18 *Canadian Olympic Assn. v. Allied Corp.*, [1990] 1 F.C. 769 at para. 14 (F.C.A.) (QL).

19 *Magnotta Winery Corporation v. Vintners Quality Alliance*, 2001 FCT 1421, F.C.J. No. 1941 at para. 28 (QL); *Royal Roads University v. Canada*, 2003 FC 922 at para. 16 [*Royal Roads*]; *Ontario Architects*, *supra* note 14 at para. 34.

20 *Canadian Council of Professional Engineers v. APA—Engineered Wood Assn.*, [2000] F.C.J. No. 1027 at para. 67 (T.D.) (QL) [*Canadian Council of Professional Engineers*].

21 Jason Hannibal, “Official marks harder to obtain, easier to challenge” (26 September 2003) *The Lawyers Weekly* (QL) [Hannibal]. The writer’s own unscientific review of the dates listed in the Canadian Intellectual Property Office’s trade-marks database, *supra* note 3, shows that, in late 2006, the Office of the Registrar took 10-11 months to register a trade-mark and only two months to advertise an official mark.

When is a mark likely to be mistaken for an official mark? In comparing the marks, courts forego the test of straight comparison²² and use instead the test of resemblance. This test asks whether a person knowing only Mark A and having an imperfect recollection of it would mistake a second mark (B) for A or be confused or deceived.²³ The test of resemblance increases the likelihood that confusion will be found and that the official mark will prevail. Likelihood that one will be mistaken for the other is what matters. The parties' wares or services "may be completely different, sold to completely different consumers, in completely different settings, through a completely different marketing and distribution system," but that is irrelevant.²⁴ The too-similar mark will not withstand the power of the official mark.²⁵

C. Privilege Reserved for "Public Authorities"

Only a public authority can obtain an official mark, and the registrar requires evidence of public authority status with every request.²⁶ The *Trade-marks Act* does not define "public authority." However, in *Ontario Association of Architects v. Association of Architectural Technologists of Ontario* in 2002 ("*Ontario Architects*"), the Federal Court of Appeal adopted a two-step test for evaluating public authority status: first, government must exercise a significant degree of control over the activities of the body; and, second, the activities of the body must benefit the public.²⁷

1) Governmental Control

In assessing the necessary measure of governmental control, the registrar must be satisfied that government is enabled, "directly or through its nominees, to exercise a degree of on-going influence in the body's governance and decision-making."²⁸ Indications of sufficient control include enabling legislation that confers on the minister power to review the body's activities, to request the body to undertake activities that the minister considers relevant to implementing the intent of the *Trade-marks Act*, and to advise the body on executing the statutory scheme. The enabling legislation might also confer on the Lieutenant Governor in Council power to approve the regulation-making power of the body and to appoint members to the body's committees.²⁹

The fact that a body is created by a statute, which the enabling legislature may amend uni-

22 The test of straight comparison subjects the marks to a careful side-by-side examination (*Techniquip, supra note 8* at para. 12; Gill & Jolliffe, *supra note 3* at 5-56).

23 Hughes, *supra note 6* at 640.

24 *Canadian Council of Professional Engineers, supra note 20* at para. 68.

25 It has been suggested that the Federal Court in *Techniquip, supra note 8*, applied the "resemblance" test in a way that broadened the test by expanding the scope of evidence that could be considered under the test (*McDonald, supra note 12* at 88). However, the same court seems to have retreated somewhat from that decision in *Canadian Council of Professional Engineers, supra note 20* at para. 68.

26 *Stadium Corporation of Ontario Ltd. v. Wagon-Wheel Concessions Ltd. (T.D.)*, [1989] 3 F.C. 132 at para. 18 (T.D.) (QL).

27 *Ontario Architects, supra note 14* at paras. 51, 53. The Canadian Intellectual Property Office's most recent Practice Notice issued on 22 August 2007 reflects the *Ontario Architects* test, online: Canadian Intellectual Property Office <http://strategis.ic.gc.ca/sc_mrksv/cipo/tm/tm_notice/tmn2007-08-22-e.html> [Practice Notice].

28 *Ontario Architects, supra note 14* at para. 62.

29 *Ibid.* at para. 60.

laterally and exclusively, does not constitute significant governmental control.³⁰ The incorporation of the body as a non-profit charitable corporation with charitable objects, tax-exempt status, an ability to issue charitable receipts, or obligation to provide financial and corporate information to government is also insufficient to constitute significant governmental control.³¹

In 2007, the Federal Court of Appeal upheld the finding that a “public authority” must be subject to ongoing governmental control within Canada and that the government exercising the control must be Canadian.³²

2) Public Benefit

“Public benefit” includes a duty to do something of benefit to the public, but it is more than that. In its evaluation, courts should consider the body’s objects, duties, and powers, including the distribution of its assets.³³ It would appear that public benefit includes fulfilling a duty to the public, although this requirement has not always been determinative of public authority status.³⁴ A body that regulates the practice of a profession and is duty-bound to maintain an accurate register of members is just one example of a body that operates for the public benefit.³⁵ Its decisions concerning membership and discipline may be subject to appeal in a superior court on questions of fact and law.³⁶ The fact that the body benefits its members does not preclude a finding that it also benefits the public.³⁷

D. The Only Way to Challenge an Official Mark

The grant of such a broad right to public authorities can be problematic. For example, the protection that Canada Post has acquired for its official marks, including “special delivery,” “post,” and “priority,” allows this Crown corporation to prevent its competitors from using these generic terms to advertise their services accurately. This monopolization of common terms has resurrected a problem that trade-mark law had already resolved: the accommodation and preservation of the informational value of generic and descriptive terms for competitors who need to use them.³⁸ This potential for monopoly is exacerbated by the registrar’s lack of discretion to refuse to give public notice of an official mark at a public authority’s request.³⁹

Previously, it had been thought that there was no way to attack an official mark once it had

30 *Ibid.* at para. 64.

31 Practice Notice, *supra* note 27.

32 *Canada Post Corporation v. United States Postal Service*, 2007 FCA 10, 54 C.P.R. (4th) 121, leave to appeal refused [2007] S.C.C.A. No. 117; *aff’g* 2005 FC 1630, 47 C.P.R. (4th) 177 (QL) [*USPS* 2007].

33 *Ontario Architects*, *supra* note 14 at para. 52.

34 Gill & Jolliffe, *supra* note 3 at 5-56.

35 *Ontario Architects*, *supra* note 14 at para. 17.

36 *Ibid.* at para. 73.

37 *Ibid.* at para. 64; Practice Notice, *supra* note 27.

38 Stacey L. Dogan, “Trademarks and Consumer Information” in Faculty of Law, McGill University, *Meredith Lectures 2006: Intellectual Property at the Edge: New Approaches to IP in a Transsystemic World* (Cowansville, QC: Éditions Yvon Blais, 2007) [*Meredith Lectures 2006*] 321 at 323, n. 4); Gill & Jolliffe, *supra* note 3 at 5-61.

39 Gill & Jolliffe, *supra* note 3 at 5-62.

been advertised in the *Trade-marks Journal*.⁴⁰ However, current jurisprudence has established a way. A party wishing to challenge the validity of an official mark must bring an application for judicial review of the registrar's decision to give public notice under s. 18.1 of the *Federal Courts Act*.⁴¹ Subsection 18.1(1) confers standing on any party who is "directly affected by the matter in respect of which the relief is sought"; that is, any party who "could either benefit from, or suffer a direct adverse impact from a decision."⁴² Although in the past, applicants attempted to appeal the registrar's decision under s. 56 of the *Trade-marks Act*, the Federal Court of Appeal ruled that applicants not party to the original proceedings before the registrar (which normally include only the requestor) do not have standing to appeal.⁴³

Pursuant to s. 18.1(2) of the *Federal Courts Act*, an application for judicial review must be brought within thirty days of the date on which the applicant receives notice of the registrar's decision. Although this is half the time allowed for an appeal under s. 56(2) of the *Trade-Marks Act*, this difference in limitation periods is not significant since the court will typically exercise its discretion to extend the limitation periods.⁴⁴ The two most common bases on which to challenge the registrar's decision are error in determining public authority status and error in determining adoption and use. If the court finds that the registrar has been misled in these determinations, the official mark can be declared ineffective so as to give neither rights nor prohibitions under ss. 9 and 11 of the *Trade-Marks Act*.⁴⁵

III. NARROWING OF OFFICIAL MARKS PROTECTIONS BY THE FEDERAL COURT

The Federal Court has not been blind to the "very substantial" benefits conferred on public authorities by s. 9(1)(n)(iii).⁴⁶ Nor has it resisted commenting on the concomitant "potential for injury to trade-mark owners and to the public."⁴⁷ What has apparently changed in recent years is the willingness of the Federal Court and the Court of Appeal to rein in these substantial benefits by adopting a narrower interpretation both of the provision and of the legal procedure surrounding official marks. In the 2002 *Ontario Architects* case, the Court of Appeal stated that s. 9(1)(n)(iii) should not be given an expansive meaning,⁴⁸ and it seems the courts have remained faithful to this finding.

This recent approach is a significant departure from the view that prevailed in 1980 when

40 Hannibal, *supra* note 21.

41 *Federal Courts Act*, R.S.C. 1985, c. F-7.

42 *USPS 2005*, *supra* note 1 at para. 12.

43 *Ontario Architects*, *supra* note 14 at para. 39.

44 *Ibid.* at para. 32. In *Tall Ships Art Productions Ltd. v. Bluenose II Preservation Trust Society*, 2003 FC 1442, F.C.J. No. 1959 (QL) [*Bluenose II*] the Federal Court held that it served the interests of justice to grant an extension of time for the applicant Province of Nova Scotia to commence proceedings for judicial review, despite the fact that nearly two years had passed since the Registrar of Trade-marks had given public notice of three official marks belonging to the respondent Bluenose II Preservation Trust. In reaching this decision, the Court considered *inter alia* the limited opportunity to question the official marks application process and its results as well as its failure to consider the interests of the province in using the name of this iconic vessel. See generally Scassa, *supra* note 12.

45 *FileNet Corp. v. Canada (Registrar of Trade-marks)*, 2001 FCT 865, 13 C.P.R. (4th) 385 at para. 44 (QL) [*FileNet*].

46 *USPS 2005*, *supra* note 1 at para. 75.

47 *Ibid.*

48 *Ontario Architects*, *supra* note 14 at para. 64. This is echoed in *USPS 2005*, *supra* note 1 at para. 75.

Justice Cattanach of the Federal Court observed:

- [a] public authority may embark upon a venture of supplying wares and services to the public and in so doing adopt an official mark. Having done so then all other persons are precluded from using that mark and, as a result of doing so, on its own initiative, the public authority can appropriate unto itself the mark so adopted and used by it *without restriction or control other than its own conscience and the ultimate will of the electorate expressed by the method available to it*.⁴⁹

Justice Cattanach concluded that this represented the intention of Parliament, clearly expressed in the language of the statute, and “a Court has nothing to do but to obey it.”⁵⁰ It is equally clear, however, that for many years courts have “made” law by using their judicial discretion to determine where on the spectrum of interpretation they will choose to rest their judgment.

Perhaps it is the widespread commercial usage of official marks by public authorities and the consequent unfairness to trade-mark owners that has caused the courts to shift their interpretation of the statute to level the playing field. In these circumstances, narrowing of official marks is bound to assist the interests of trade-mark owners.⁵¹ The courts have accomplished this by giving clear direction on the correct procedure for challenging official marks, by re-evaluating what constitutes a “public authority” and “significant” government control, and by requiring evidence of adoption and use.

The court has sharpened the test for “public authority” to a finer point, limiting its geographical scope and raising the bar with respect to how much control constitutes a “significant” degree of control. For example, in *USPS 2005*, the Federal Court considered the meaning of “public authority, in Canada.”⁵² Earlier decisions had held that public authorities need not be Canadian in order to acquire an official mark,⁵³ and, over time, uncertainty had grown. In this case the Court scrutinized the ambiguous English phrase “public authority, in Canada” and the narrower French version “une autorité publique au Canada” and ultimately adopted the simpler French version. In 2007, the Supreme Court of Canada cemented the finding by upholding the Court of Appeal’s decision to deny leave to appeal.⁵⁴ The effect of this ruling is that official marks are now granted only to public authorities in Canada that are subject to control by a Canadian government. Foreign public authorities, like the United States Postal Service, no longer qualify. What remains to be seen is the impact of this decision on foreign public authorities that currently own official marks in Canada. Faced with the possibility that they may have a hard time enforcing them, more foreign authorities may apply to protect their official marks as registered trade-marks.

A second and earlier example illustrates that the Courts have employed a conservative interpretation of what constitutes “significant governmental control,” the first step in the test for evaluating public authority status. In 2002, the Court of Appeal in the *Ontario Archi-*

49 *Insurance Corporation of British Columbia v. Registrar of Trade Marks*, [1980] 1 F.C. 669 at para. 74 (T.D.) [emphasis added].

50 *Ibid.* at paras. 74-76.

51 “Priority Mail”, online: Cassels Brock <<http://casselsbrock.com/publicationdetail.asp?aid=942>>.

52 *Supra* note 1 at para. 45.

53 *Ibid.* at para. 56.

54 *USPS 2007*, *supra* note 32.

fects case found that the trial judge erred in concluding that a body created by statute is under significant governmental control because its enabling legislation can be amended or repealed by government at any time.⁵⁵ As it now stands, nothing less than “ongoing government supervision of the activities of the body claiming to be a public authority” will satisfy the test for significant governmental control.⁵⁶

This recent fine-tuning of the “public authority” definition may be especially worrisome for charities as official marks owners. In 2002, the Canadian Jewish Congress challenged the registrar’s decision to give notice of an official mark—a stylized menorah—requested by Chosen Peoples Ministries (“CPM”).⁵⁷ Justice Blais of the Federal Court, in concluding that CPM was not a public authority for the purposes of s. 9(1)(n)(iii), observed that the government neither funds, monitors, nor participates in the disposal of CPM’s assets. More broadly, he stated that the “Government of Canada cannot intervene in any way with how churches or charitable organizations like CPM conduct their affairs.”⁵⁸ As a result of this decision, charities, particularly religious charities, may no longer be able to obtain official marks to protect their intellectual property.⁵⁹ Moreover, those that already have official marks may find them vulnerable to attack from third parties.⁶⁰ As in the case of foreign public authorities, charities would be well-advised to protect their intellectual property through parallel registered trade-marks.⁶¹

It appears that, of the two criteria that bodies must meet to establish public authority status (significant governmental control and public benefit), significant governmental control is the most important. The court has put most of its energy into honing that definition and, as discussed above, the meaning of “public benefit” has received comparatively little attention. The threshold for satisfying the “public benefit” criterion seems low and, in recent cases, it has not been determinative of a body’s public authority status.⁶² An organization may benefit the public without being a public authority.⁶³

The final narrowing strategy is engaged at the early stages of the application process when the registrar receives a request for public notice. In *Piscitelli v. Ontario (Liquor Control Board)*, Justice Blais of the Trial Division ruled that in confirming previous adoption and use of the mark, the registrar is entitled to rely on the requestor’s “bald assertion.”⁶⁴ However, where doubt is raised by a third party, the onus is on the requestor to provide evidence

55 *Ontario Architects*, *supra* note 14 at para. 62.

56 *Ibid.* at para. 59.

57 *Canadian Jewish Congress v. Chosen People Ministries, Inc.*, 2002 FCT 613, 214 D.L.R. (4th) 553 [*Chosen People*].

58 *Ibid.* at paras. 57-58.

59 Hannibal, *supra* note 21.

60 Mark Wong & Terrance Carter, “Charities Lose Inherent Right to Official Mark Registrations” *Charity Law Bulletin* (20 December 2002), online: Carters <<http://www.carters.ca/pub/bulletin/charity/2002/chylb18-02.pdf>>.

61 *Ibid.*

62 For a discussion of this point in relation to intellectual property in the schooner *Bluenose II*, see Scassa, *supra* note 12 at 303.

63 In *See You In*, the applicant challenged the Canadian Olympic Committee’s status as a public authority on the grounds that it lacked sufficient governmental control and failed to operate for the public benefit. The Federal Court disagreed, finding that governmental control existed, even if it was exercised more directly in other related organizations (*See You In - Canadian Athletes Fund Corp. v. Canadian Olympic Committee*, 2007 FC 406, F.C.J. No. 541 at paras. 55, 63 (QL) [*See You In*]).

64 *Piscitelli v. Ontario (Liquor Control Board)*, 2001 FCT 868, F.C.J. No. 1243 at paras. 46-47 (QL). See also *FileNet*, *supra* note 45 at para. 8.

of adoption and use since, from a practical perspective, this is easier than requiring the third party to show no adoption and no use.⁶⁵

Federal Court jurisprudence has had a transformative effect on the law and procedure surrounding official marks. Not only has it established judicial review as the appropriate way to challenge established official marks; it has shaped the process by which such marks are acquired so that meritless requests are less likely to result in undeserved protection. This front-end challenge, which is manifested in the registrar's current practice of requiring evidence of public authority status as well as adoption and use, is perhaps the more valuable of the two. It is a pre-emptive strike that ultimately saves time and money that would otherwise be spent challenging an undeserved but advertised mark. It allows the registrar to act as an effective gatekeeper rather than as a "rubber stamp" in the process of securing an official mark.⁶⁶

IV. THE "ONE CENT NOW" DISPUTE

The "One Cent Now" dispute illustrates the power of the official mark as a restraint on the use of a ubiquitous image (the Canadian penny) and phrase ("one cent"), as well as the troubling implications of the use of this overbroad power.

In February 2007, the City of Toronto launched a campaign to lobby the federal government to return one cent of the GST to municipalities across the country. The campaign's mandate is to secure a permanent source of funding to maintain municipal infrastructure and allow investment in new projects. Toronto called the campaign "One Cent Now," and it was endorsed by mayors across the country. The signs, bumper stickers, campaign buttons, website, and toll-free number for this campaign make use of the image of the penny and/or the phrase "one cent." The penny image is an official mark, protected under s. 9(1)(n)(iii) of the *Trade-marks Act* and owned by the Royal Canadian Mint.⁶⁷

The mint, which is a Crown corporation, sent a bill for \$47,680 to the City of Toronto for use of its intellectual property: \$10,000 for using the words "one cent" in the campaign website address (www.onecentnow.ca) and email address (onecentnow@toronto.ca), \$10,000 for using "one cent" in the campaign telephone number (416-ONE-CENT), and \$27,680 for using the image of the Canadian penny in related paraphernalia.⁶⁸

The City of Toronto has resisted the mint's claim, arguing that "One Cent Now" is a "public education campaign," which makes the mint's request for money inappropriate: "One government should not be seeking payment from another government for the use of words and an iconic image in a not-for-profit public education campaign."⁶⁹ It would appear that the statutory language and judicial interpretation of s. 9(1)(n)(iii) support this assertion.

65 *Piscitelli, ibid.* at paras. 46-47.

66 *See You In, supra* note 63 at para. 43.

67 Because this dispute has not proceeded to trial, it is difficult to discuss it in any detail. The writer's repeated requests for information on both parties' positions went unanswered. It is unclear, for example, under what intellectual property scheme the mint claims ownership of the phrase "one cent." Unlike the penny image, it does not appear in the Canadian Intellectual Property Organization's online trade-marks database.

68 City of Toronto, News Release, "Success of Toronto's 'One Cent of the GST NOW!' education campaign brings request for payment from the federal government" (5 October 2007), online: <http://www.onecentnow.ca/newsreleaseoct5_07.html> [One Cent Now].

69 *Ibid.*

The provision prohibits the adoption of an official mark as a trade-mark “or otherwise,” which has been interpreted to mean “or in connection with a business in any other way.” Sections 9 and 11 do not prohibit non-commercial use. In fact, it has been suggested by the Federal Court that the provisions do not even prevent use unless the use is primarily for a business purpose.⁷⁰

The mint includes images of the penny, nickel, dime, and quarter among its official marks. To reproduce them, parties must submit to the mint a detailed application and a non-refundable \$350 fee for a determination on whether use will be allowed and at what cost, if any.⁷¹ The time limitations are short and the royalty fee structure detailed. Parties permitted to use a mark for a fee and those whose have used one without consent must pay royalties upon receiving a bill from the mint or face “suitable measures of recourse.”⁷²

In managing its intellectual property, the mint says that it must ensure tasteful use that is compatible with both the federal government’s public policy objectives and, it would follow, their own public policy objectives.⁷³ Because the mint does not enumerate either set of policy objectives, it is difficult to know whether public education is among them. The fact that the mint offers a free downloadable education program (“Roll a Coin Through the Curriculum”) suggests that it values some forms of public education, although perhaps not the kind of education that puts into question federal government spending choices.

While it would be interesting to debate whether the “One Cent Now” campaign actually is a *bona fide* public education campaign and whether Toronto can prove non-commercial use and thereby avoid paying the mint, those questions are not within the purview of this paper. The “One Cent Now” dispute is relevant to this paper because it raises interesting public policy issues and questions of legitimacy.

The media coverage of the “One Cent Now” dispute has prompted Canadians to articulate their views on Crown intellectual property. The City of Toronto has suggested that the mint, as a federal Crown corporation, is using intellectual property litigation as a threat to subdue a potentially successful campaign to get more money from the federal government.⁷⁴ Similarly, the *Globe and Mail* commented that the mint, motivated by revenge, was “bent on slicing a pound of flesh from Toronto.”⁷⁵ Others decry the mint for exercising “bad judgment” by “going after everyone who uses this ... iconic image.”⁷⁶ A spokesperson for the Toronto mayor observed: “The city has every right to use pictures of the most common of Canadian coins. This is a coin that many people ... won’t even bend over to pick ... up. Let’s be real here.”⁷⁷

70 *Canadian Olympic Assn. v. Konica Canada Inc.*, [1990] 2 F.C. 703 (T.D.) (QL).

71 Royal Canadian Mint, “Customer Services/Intellectual Property Policy: Royalties,” online: <<http://www.mint.ca/royalcanadianmintpublic/index.aspx?requestedPath=/en-CA/Home/default.htm>>.

72 *Ibid.*

73 Royal Canadian Mint, “Intellectual Property Policy: Guidelines,” online: <<http://www.mint.ca/royalcanadianmintpublic/index.aspx?requestedPath=/en-CA/Home/default.htm>>.

74 One Cent Now, *supra* note 68.

75 “Is the Mint pinching pennies for political gain?” *Globe and Mail* (6 October 2007) A19.

76 Gord Steeves, “Squeezing the penny for all it’s worth”, online: Federation of Canadian Municipalities <<http://www.fcm.ca/english/media/press/oct52007.html>>.

77 Chris Wattie, “City outraged over mint fee for one-cent campaign.” *National Post*, online: <<http://communities.canada.com/nationalpost/blogs/toronto/archive/2007/10/05/city-outraged-over-mint-fee-for-one-cent-campaign.aspx>>.

Notwithstanding the fact that those who offer these opinions may not be able to identify the intellectual property rights under which the mint is claiming the money, Canadians are well able to grasp the larger normative issue, Is it fair to allow government to charge the rest of us to use something as commonplace as the image of the penny and the phrase “one cent”? In the context of Crown copyright, government justifies its practice of controlling and supervising the publication of government works for reasons of accuracy and integrity.⁷⁸ Similarly, it justifies official marks as a necessary protection against misleading and fraudulent use by commercial actors who would trade on the authority of public bodies. Unfortunately, official marks protection has grown so broad that it largely defeats its original purpose of removing national symbols from the field of trade. Instead, it allows stronger parties to use intellectual property rights for silencing, vengeful, and threatening predation on weaker, less resourceful parties.⁷⁹ This is fertile ground for political cynicism, and it compromises the integrity of intellectual property as a whole.

V. THE CRISIS OF LEGITIMACY: CAN OFFICIAL MARKS BE JUSTIFIED?

A. The Rule of Law

The rule of law is often defined by stating its purpose, which is to protect against anarchy, to allow people to know in advance the legal consequences of their actions so that they can plan their affairs with reasonable confidence, and to guard against some types of official arbitrariness.⁸⁰ The rule of law requires legislatures to draft clear laws that both target precisely what needs protection and provide a “broad defence for the unexpected and unforeseen cases arising from the grant of unexpected, unforeseen, and probably unnecessary protection.”⁸¹ From this perspective, the increasingly expansive use of official marks undermines the rule of law. No longer does the provision point with a Lord Denning-esque red hand⁸² to “badge, crest and emblem” and say “protect these and these alone.” In the current climate, wherein official marks can be descriptive everyday words, phrases, and images that are far from “official-looking,” there is plenty of opportunity for commercial actors unwittingly to infringe the rights of public authorities. “One Cent Now” is a good example. When the lawyers of the largest city in Canada can fail to be aware of infringement possibilities and to guard against them, it is hardly reasonable to expect better from the average Canadian entrepreneur.

Official marks legislation is “defective.”⁸³ The purpose it was designed to accomplish—to protect authoritative symbology from commercial use—has been eclipsed by the purpose for which such marks are now so highly prized: to provide public authorities with a cheap and effective shortcut for shielding their intellectual property while obtaining an unfair advantage over their less-fortunate fellow competitors in the commercial market. In a

78 Elizabeth F. Judge, “Crown Copyright and Copyright Reform in Canada” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 550 at 553.

79 Although under ordinary circumstances it might be difficult to visualize the City of Toronto as an underdog, here the even wealthier mint is more easily painted as the villain of the piece.

80 Richard H. Fallon, “The Rule of Law as a Concept in International Discourse” (1997) 97 *Colum. L. Rev.* 1 at 7-8.

81 David Vaver, “Does the Public Understand Intellectual Property Law? Do Lawyers?” *Meredith Lectures 2006*, *supra* note 38 at 13 [Vaver].

82 *Thorton v. Shoe Lane Parking Station Ltd.*, [1971] 2 Q.B. 163 at 170 (C.A.).

83 Henderson, *supra* note 12 at 98.

strange about-face, the public authorities have become the very commercial actors from whom this symbology was withheld in the first place. Few would deny the merit in protecting national symbols like the penny or the flag from tasteless, disrespectful, or offensive uses, but such use is not at issue in cases like the “One Cent Now” dispute. What appeared to be at issue from the public perspective was the mint’s taking advantage of a deficiency in the legislation simply to pad its own purse.

Section 9(1)(n)(iii) is “out of touch with both business and ordinary public sentiment.”⁸⁴ Times have changed, and in these times official marks protection is too broad, its justifications are largely meaningless, and the unfair advantage it grants “un-levels” the playing field. In his 1991 report *Intellectual Property: Litigation, Legislation, and Education*,⁸⁵ Gordon F. Henderson recommended that official marks be abolished since registered trademarks and certifications marks could do the same job without granting an overbroad right. The fact that Parliament has no plans to do away with s. 9(1)(n)(iii) makes it all the more important and valuable for courts to put meaningful limits on the ambit of official marks. Perhaps recent jurisprudence is moving in that direction. Some foreign public authorities and Canadian charities already have parallel protection for their indicia under both s. 9(1)(n)(iii) and a registered trade-mark. Official marks protection may yet have a purpose to fulfill, albeit a dramatically narrowed one, in policing use of national symbols. Considering that there exists alternative protection that is perhaps better tailored for commercial use, the overbroad shield of the “super mark” appears, on balance, unwise and unfair.

David Vaver once observed:

[F]or the intellectual property system to survive, it must gain and keep public respect. To be respected, it must be known.... There are now calls that the public should become better educated about intellectual property.... But one must be prepared for the consequence that an educated public is entitled to demand greater coherence and persuasiveness from the intellectual property system than it presently exhibits. If those calls are not met and answered, then greater knowledge will not produce greater public respect, but instead cynicism, disregard and avoidance.⁸⁶

Disputes like “One Cent Now” breed cynicism and disrespect both for the intellectual property regime and for government. Not only are people surprised to learn that the mint (or anyone) has laid claim to the phrase “one cent” or the image of something as common as the penny, they are dismayed that the parties to the dispute—both government bodies—cannot negotiate a reasonable compromise that does not involve demand letters and posturing in the media.

Judges too have difficulty with this concept. In *Royal Roads*,⁸⁷ the university objected to the unauthorized use of their official mark “You can get there from here” by the Crown agent Canada Investment and Savings. In *obiter*, Justice MacKay of the Federal Court commented: “Two agencies, each serving the public in different ways and with different programs, should be able to work out arrangements necessary to discuss contemplated uses of a single mark” Few would disagree with him. Disputes of this kind undermine our confidence in gov-

84 Vaver, *supra* note 81 at 1.

85 *Supra* note 12.

86 David Vaver, “Intellectual Property Law: The State of the Art” (2000) 116 L.Q.R. 621.

87 *Supra* note 19.

ernment to act efficiently and thereby undermine their legitimacy and the rule of law.

B. Public Order

The overbreadth protection afforded under s. 9(1)(n)(iii), and the manner in which this overbreadth affects the rule of law, feeds into the undermining of another essential societal value—public order. Public order has been defined as the values and rules of community life that are embodied in legislation as well as “the fundamental values of the society at a particular point in its development.”⁸⁸ Public order is a motherhood-type concept, one which underpins the entire Canadian legal and constitutional order.⁸⁹ With specific regard to official marks, public order serves as a balancing factor; it is at once the policy justification behind the protection of government bodies for which the marks are designed, and a limited means by which the registrar may narrow the protections under s. 9(1)(n)(iii).⁹⁰

In the intellectual property setting, public order embodies a reasonably fair and even, if regulated, marketplace. Disputes like “One Cent Now” breed fear and anger in the marketplace. They have a chilling effect on weaker parties that have a legitimate interest in an official mark but lack the resources to respond to claims that may in fact have little merit.⁹¹ On balance, it is cheaper to “pay up” or “cease and desist” rather than risk being sued by intellectual property owners like the Royal Canadian Mint and, most notable these days, the Canadian Olympic Committee, who are zealous in policing their official marks and who have deep pockets.⁹²

Not all parties can or will back down, however. Consider the Great Canadian Dollar Store, Dollarama and the other “dollar store” chains, many of whom have protected their name under a registered trade-mark and who would justifiably be ill at ease should the mint decide to claim “dollar” as an official mark. While the City of Toronto may assert that its campaign makes non-commercial use of “one cent” and the image of the penny, there is no way that these Canadian entrepreneurs could hide behind that argument.

Others have little choice but to assume the considerable financial burden of litigation to protect their interests. Such was the case in *Chosen People* where the Federal Court, rec-

88 *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, 210 D.L.R. (4th) 22 at para. 43 (QL).

89 “Canadian ... public order protects the functions of the state (security, morality), but also the citizens against abusive intrusions or omissions of the state that are detrimental to the population and to the promotion of their rights” (L. Lamarche *et al.*, *Retaining Employment Equity Measures in Trade Agreements* (Ottawa: Status of Women Canada, 2005) at 69).

90 *Mihaljevic*, *supra* note 5. See also *Canada Post Corp. v. Canada (Registrar of Trade Marks)*, [1991] F.C.J. No. 1270 (T.D.) (QL).

91 In *Bluenose II*, the Society’s copyright claim over the image of the famous schooner was of questionable merit. However, this did not deter the Society from charging over one hundred local merchants, artisans, entertainment businesses and government bodies for depicting the Bluenose II in their commercial endeavours (Scassa, *supra* note 12 at 297, n. 21).

92 In the past, the Canadian Olympic Committee (COC) has aggressively restricted use of its official marks. In anticipation of the Vancouver 2010 Winter Olympics, the protection already afforded the COC under s. 9(1)(n)(iii) has been augmented by the *Olympic and Paralympic Marks Act*, which received Royal Assent in June 2007. Although the Industry Minister defended the legislation as necessary to protect the COC’s intellectual property from ambush marketers, others have criticized it as overbroad. The legislation departs from trade-mark law in that it does not require the COC, the Canadian Paralympic Committee, or the Vancouver Organizing Committee to show that a competitor has irreparably harmed its reputation or business interests in order to obtain an injunction. (Jeff Lee, “Games trademark law excessive, critics say. Act designed to protect Olympic brand could muzzle free expression, they warn.” *Vancouver Sun* (30 March 2007), online: <<http://www.canada.com/vancouver/news/story.html?id=25fad435-fba6-4e00-b8f7-62e61fdb3e1c>>).

ognizing the menorah as “the official emblem” of the Jewish people and the Jewish faith, took the practical and equitable view that it would be “counterproductive” to prohibit Jewish organizations from using and adopting that mark.⁹³ Is the penny not equally as common, if not equally as ancient, as the menorah or the Bluenose II?⁹⁴

In *USPS*, Canada Post argued that the acceptance of certain marks for publication by the registrar was contrary to the public order because the marks were either generic terms or terms identical to those in common use by other postal authorities. As mentioned above, this points to an important deficiency in the official marks regime. Prohibiting the use of words and phrases essential to the operation of enterprises can seriously threaten their ability to function. Ironically, couriers cannot advertise their “special delivery” and “priority” services without the consent of Canada Post, which owns the official mark.⁹⁵ This is one of many instances in which provincial and national public authorities, in claiming s. 9(1)(n)(iii) rights over generic and descriptive terms, have similarly distorted the market.

VI. CONCLUSION

“In modern times with the growing number of Crown corporations all competing with private industry or, even worse, of a monopolistic nature, these corporations should be able to take their lumps like all others.”⁹⁶ Until recently, Crown corporations and other public authorities have not “taken their lumps” but rather have enjoyed privileges and immunities well beyond the original purpose of s. 9(1)(n)(iii). However, where Parliament has failed to tread, the courts have cleared a path toward a greater measure of fairness through a much-needed narrowing in the interpretation of a provision that is essentially flawed.

The “One Cent Now” dispute illustrates much of what is bad about official marks protection: the overbreadth, the unfair advantage, the potential for abuse, and the commodification of everything and anything including everyday words and national symbols. Although public reaction paid little mind to the legal reasons for the mint’s claim, it defined with precision the question that lies at the heart of the issue, Is a law that makes us pay to use commonplace words and images a justifiable law and, if it is not justifiable, then why is it still law? Provisions like s. 9(1)(n)(iii) that operate inconsistently with society’s fundamental values diminish public respect for government and for intellectual property—which, as argued above, undermines both the rule of law and, ultimately, public order.

The recent jurisprudence of the Federal Courts is to be especially valued because, in upholding the original purpose of s. 9(1)(n)(iii) and in mitigating its deficiencies, it brings the law closer to a state that Canadians can both accept and respect. However, in the face of the clear words of Parliament, the Courts’ effort to narrow the scope of official marks is probably close to reaching its limits. It may be that this jurisprudence can provide impetus toward a more rational regime that comports with the rule of (intellectual property) law and modern notions of public order, even where decades of distinguished commentary has not.

93 *Chosen People*, *supra* note 57 at paras. 62-64.

94 See Scassa, *supra* note 12, in which the author comments on the “intellectual property ‘gold rush’” in which claims are staked in the public domain.

95 *USPS 2005*, *supra* note 1 at para. 4.

96 *W & H Ventures Ltd. (c.o.b. Michel’s Bakery Café) v. Manitoba*, [1999] M.J. No. 533 at para. 23 (Q.B.), quoting *Marion, Marion and Marion v. Western Canada Lottery Foundation and Manitoba Lotteries Foundation* (1984), 28 Man.R. (2nd) 269 at 270 (Man. C.A.).

This could involve requiring public authorities to “take their lumps” with regard to commercial uses of marks that essentially function as trade-marks, while a more restricted group of public institutions (i.e., actual government bodies and agencies) could operate a system of protected symbology that protects Canadian values and institutions, but without market distortion. What is clear is that further discussion and reform are imperative.

ARTICLE

CUSTOMARY ADOPTION IN BRITISH COLUMBIA: RECOGNIZING THE FUNDAMENTAL DIFFERENCES

By **Kisa Macdonald***

CITED: (2009) 14 Appeal 17-23

Jurisprudence in British Columbia reflects a bias against the recognition of customary adoptions. The Court has not recognized customary adoptions where the adoption allows ongoing involvement of a birth parent, cohabiting relationships, or the adoption of adults and elders. This paper argues for a *sui generis* approach to customary adoption, which would consider the cultural and economic context of adoptions within Aboriginal communities.

I. LEGAL FRAMEWORK

In British Columbia, the legal recognition of customary adoptions is set out in s. 46 of the *Adoption Act*¹ as follows:

46 (1) On application, the court may recognize that an adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act.²

The word “may” allows the court to exercise discretion over whether a customary adoption has legal effect. In applying judicial discretion, the court has relied on the common law criteria set out in *Re Tagornak Adoption Petition*³ (“*Tagornak*”):

- a. that there is the consent of both the natural and adopting parents;
- b. that the child has been voluntarily placed with the adopting parents;

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1 *Adoption Act*, R.S.B.C. 1996, c. 5.

2 *Ibid.* s. 46.

3 *Re Tagornak Adoption Petition*, [1983] N.W.T.J. No. 38, [1984] 1 C.N.L.R. 185 (S.C.) [*Tagornak*].

- c. that the adoptive parents are indeed native or entitled to rely on native custom; and
- d. that the rationale for native customary adoptions is present.⁴

In *B.C. Birth Registration No. 1994-09-040339*⁵ (“*B.C. Birth Registration*”), the British Columbia Supreme Court applied a broad interpretation to what may be considered a rationale for customary adoption. Grist J. interpreted the fourth criterion as requiring that “there be a recognized reason within the scope of the custom, whether it be to provide for children without parents, or otherwise, for the adoption to take place.”⁶ The Court also added a fifth criterion to the *Tagornak* test in *B.C. Birth Registration*: “that the relationship created by a customary adoption be fundamentally the same as a statutory adoption.”⁷ In practice, this fifth criterion has allowed the Court to treat customary adoption as identical to statutory adoption. To follow is a discussion of how judicial reasoning has limited the scope of customary adoption by maintaining a notion of severance from the birth parent, while disregarding other contexts for customary adoptions.

II. WHAT IS RECOGNIZED AS “FUNDAMENTALLY THE SAME”?

Judicial interpretation of what kind of customary adoption can be considered fundamentally the same reflects an assumption that an adoption permanently severs the relationship of a child from the birth parent(s). Statutory adoptions under the *Adoption Act* do not necessarily involve severance; a statutory adoption can allow an on-going relationship between the child and the birth parent by the terms of an openness agreement.⁸ However, the presumption of severance can be read into s. 2 of the *Adoption Act*, which states:

(2) The purpose of this Act is to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child’s best interests.⁹

Although the wording of s. 2 does not explicitly require severance, the courts in British Columbia have limited the recognition of customary adoptions to situations where there is little or no relationship between the child and the birth parent(s). For example, in *Casimel v. ICBC*¹⁰ (“*Casimel*”), the British Columbia Court of Appeal emphasized the absence of an ongoing relationship between the child and any birth parent. The Court then found that the adoptive parents met the criteria of “dependant parents” set out in the *Motor Vehicle Act*.¹¹

Similarly, the facts of *B.C. Birth Registration* fit into a model of adoption that permanently removes the child from the birth mother and establishes the primary relationship of the child with the adoptive parents. The unmarried birth mother voluntarily placed the child with the applicants shortly after the birth. There were no claims for paternity. The birth

4 *Ibid.* at para. 20.

5 *B.C. Birth Registration No. 1994-09-040339 (Re)*, [1998] B.C.J. No. 1421, 45 R.F.L. (4th) 458 (S.C.) [*B.C. Birth Registration*].

6 *Ibid.* at para. 13.

7 *Ibid.* at para. 15.

8 *Adoption Act*, *supra* note 1 at ss. 59-60.

9 *Ibid.* at s. 2.

10 *Casimel v. ICBC*, [1993] B.C.J. No. 1834, 106 D.L.R. (4th) 720 [*Casimel*].

11 *Motor Vehicle Act*, R.S.B.C. 1996, c. 318.

mother supported the parents' application for legal recognition of the customary adoption.¹² On these facts, the Court was reasonably satisfied that the customary adoption could have legal effect.

III. WHAT IS NOT RECOGNIZED?

The courts in British Columbia have not recognized customary adoption where the social context of adoption varies from that of a single mother voluntarily giving her child for adoption. For example, in *C.D. v. P.B.*,¹³ where the legal issue was the revocation of consent to adoption by a father, the British Columbia Supreme Court refused to consider expert evidence of a customary adoption.¹⁴ The judicial reasoning in *C.D. v. P.B.* indicates a presumption that statutory adoptions take precedence over customary adoptions. Edwards J. found that the applicants were dealing with an adoption “governed by the generally applicable law under the *Act*, not one according to Tahltan custom.”¹⁵ The basis for this reasoning was the fact that the father had signed a consent order applicable to a statutory adoption. Despite the possibility that a customary adoption may have provided an ongoing relationship between the father and the adopted child, the Court refused to consider the evidence of a customary adoption. The unwillingness of the Court to recognize the principles of customary adoption indicates a clear bias against Aboriginal legal traditions. A more contextual, unbiased approach would have considered the importance of custom in Aboriginal communities.

The Court has also rejected cohabitation as a legal basis for customary adoption. In *Prince v. Duncan (Public Trustee of)*¹⁶ (“*Prince*”), the British Columbia Supreme Court refused to recognize a customary adoption based on the finding that the adoptees were merely cohabiting with the adoptive parent. Meiklem J. reasoned that “[t]here is a fundamental difference between adoption and living together as part of an extended family and to find adoption established on the evidence in this case would demean the importance of customary adoption.”¹⁷ Meiklem J. also rejected the rationale of the customary adoption: “a desire for a lifelong relationship and mutual support.”¹⁸ The refusal to accept the rationale for customary adoption contradicts the broad interpretation provided in *B.C. Birth Registration*. It also contradicts the statutory purpose of adoption, as set out in s. 2 of the *Adoption Act*: to create “permanent family ties.”¹⁹

The reasoning in *Prince* fails to recognize the social and economic interdependence that exists in cohabiting families. It is common practice for partners to form cohabiting relation-

12 *B.C. Birth Registration*, *supra* note 5 at para. 14.

13 *C.D. v. P.B.*, 2006 BCSC 1515, [2006] B.C.J. No. 2657 [*C.D. v. P.B.*].

14 *Ibid.* at para. 47.

15 *Ibid.* at para. 46.

16 *Prince v. Duncan (Public Trustee of)*, 2000 BCSC 1066, [2000] B.C.J. No. 1471 [*Prince*].

17 *Ibid.* at paras. 32, 46.

18 *Ibid.* at para. 43.

19 *Adoption Act*, *supra* note 1 at s. 2.

ships.²⁰ Children of cohabiting partners are generally economically and socially dependent on the cohabiting relationship.

A more appropriate judicial approach would be to consider the customary adoptee's dependency on the cohabitant. The legal issue raised in *Prince* involved the entitlement of two adult daughters to the estate of a cohabiting parent.²¹ As in *Casimel*, this case involved an application for legal recognition of a customary adoption in the context of a civil application for economic benefits. Unlike in *Casimel*, the Court declined to recognize the strong economic dependency that existed between the customary adoptees and the deceased.²²

The result of the approach taken in *Prince* is that the legal framework offers no guarantee of protection for the rights of customary adoptees. Cohabiting customary adoptees do not have the benefit of clear legal steps that could ensure their economic rights. Where cohabiting spouses have a legal option to contract-in to marital property provisions of the *Family Relations Act*, customary adoptees are entirely subject to the discretion of the court.²³ Persons in a common-law spousal relationship have the option of ensuring certain treatment in the division of property. This is presumably because of the widespread social recognition of common-law relationships. In contrast, cohabiting customary adoptees are not able to verify the terms of their adoption in a way that ensures legal recognition.

Jurisprudence in British Columbia has not considered customary adoption of elders. The lack of jurisprudence does not reflect cultural standards of adoption within Aboriginal communities. The rationales for customary adoption of elders include social prestige, economic provision, and maintaining the integrity of a kinship system.²⁴ The customary adoption of elders could provide a potential basis for a challenge under s. 15 of the *Canadian Charter of Rights and Freedoms*²⁵ ("Charter") based on age discrimination. Customary adoption may meet the "integral to distinctive culture" test that has been applied to claims for the recognition of Aboriginal rights protected by s. 35(1) of the *Constitution Act, 1982*.²⁶ However, a successful application would need to overcome the assumptions of the court about the rationales for customary adoption.²⁷

20 Statistics Canada recognized the prevalence of common-law relationships in 2006 statistics which classified marriage and common-law partners in the same category. In 2006, there were 2,147,675 British Columbians living in situations involving a marriage, common-law or lone-parent relationship.

21 *Prince*, *supra* note 16 at paras. 3, 4.

22 *C.D. v. P.B.*, *supra* note 13 at para. 43.

23 *Ibid.* at s. 61. See also *Adoption Act*, *supra* note 1 at s. 46.

24 Cindy Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences" (2006) 39 U.B.C. L. Rev. 63 at paras. 19, 21.

25 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 at s. 15 [Charter].

26 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35 [Constitution Act, 1982]. See also Bill Lomax, "Hlugwit'y, Hluuxw'y –My Family, My Child: The Survival of Customary Adoption in British Columbia" (1997) 14 Can. J. Fam. L. 197 at 206. In this article, Lomax discusses the possibility of customary adoption being recognized as a treaty right under s. 35. Considering recent jurisprudence from the B.C. courts that limit the parameters of customary adoption, as well as Parliament's recent recognition of the destruction caused to Aboriginal communities, a more thorough analysis of whether familial relationships in Aboriginal communities can be protected under s. 35 is warranted.

27 See especially *Prince*, *supra* note 16 at para. 43. In *Prince*, Meiklem J. found "the bold assertion of Majorie Prince that the custom includes the adoption of married adults is unconvincing without corroboration." This reasoning indicates that there is a strong bias against the rationales of customary adoption. If Majorie Prince had been adopted by her stepfather under statute, then the father-daughter relationship would have continued into adulthood and marriage. For additional commentary on *Prince* see Brad Daisley, "B.C. native sisters fail to prove 'customary' adoption" (2000) *The Lawyers Weekly* 13.

There is also no jurisprudence in British Columbia on the customary adoption of single women. In her article “The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences”, Cindy Baldassi notes that single female adoption has been an “integral and distinct” part of some Aboriginal communities:

Since all women traditionally had to be attached to a household headed by a man, single women customary adoptees were relatively common, and the apparent dependence of the relationship was belied by the prestige accorded to this sort of adoption.²⁸

Conceivably, an application could be made to the court that, to be consistent with the *Charter*, s. 46 of the *Adoption Act* should recognize the formation of new and permanent relationships between adults.²⁹ The rationale for single female customary adoption admittedly stems from patriarchal conceptions of the role of women in a community. However, jurisprudence on single female adoptions would likely lead to extensive feminist discourse. Legal recognition of single female adoptions would also indicate a change in societal views about multiple cohabiting adult relationships.³⁰

IV. A NEW APPROACH

There is a clear social, political, and historical basis for applying a *sui generis* approach to customary adoptions. In June 2008, the federal government publicly recognized that government policies that mandated the removal of children from their families in order to attend residential schools had long-term, detrimental effects on Aboriginal communities.³¹ Residential schools systematically forced Aboriginal children to conform to a non-Aboriginal culture.³² The assumption that a customary adoption must be identical to the standards of a non-Aboriginal adoption directly reflects the negative social attitudes that have caused significant damage to Aboriginal communities.

Further, the “in order to be recognized, you must be the same” approach to customary adoption stands in direct contrast to all other areas of Aboriginal law. The Supreme Court of Canada has taken a *sui generis* approach to Aboriginal rights and title.³³ The *Criminal Code* has set sentencing guidelines that take into consideration the circumstances of an Aboriginal offender.³⁴ The Supreme Court of Canada has also developed the “integral to a distinctive culture” test to apply s. 35(1) of the *Constitution Act, 1982*.³⁵ Considering this widespread recognition of the distinct qualities of Aboriginal culture in private and public law, the court will need to justify why Aboriginal adoption should not be recognized as a unique, distinct entity.

28 Baldassi, *supra* note 24 at para. 21.

29 *Charter*, *supra* note 25 at ss. 7, 15. A *Charter* challenge to s. 46 of the *Adoption Act* could involve arguments for a customary adoption right under s. 7's guarantee of security of the person or a challenge based on age and/or gender discrimination under s. 15.

30 Societal views about adult relationships may already be undergoing a shift. The HBO television series *Big Love*, created by Mark V. Olsen and Will Scheffer, may be an indicator of changing social perceptions about adult interdependent relationships. The series has initiated social discourse on the issues of polygamy and multiple cohabitation.

31 *House of Commons Debates*, No. 110 (11 June 2008) at 1519 (Hon. Peter Milliken).

32 *Ibid.* at 1516.

33 See *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, 153 D.L.R. (4th) 193.

34 *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2 (e). See also *R. v. Gladue*, [1999] 1 S.C.R. 688, 23 C.R. (5th) 197.

35 *Constitution Act, 1982*, *supra* note 26. For the Supreme Court of Canada's interpretation of s. 35 see *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289.

V. RECOGNITION OF ABORIGINAL COMMUNITIES

The jurisprudence of customary adoptions raises the issue of whether the Court is able to recognize the role of Aboriginal communities in establishing a legally valid adoption. Although provisions in the *Adoption Act* seek to maintain an Aboriginal child's cultural identity, the interests and unique role of the Aboriginal community are not legally protected. The preservation of an Aboriginal child's cultural identity is explicitly mentioned as a mandatory factor in determining the best interests of the child in s. 3(2) of the *Adoption Act*:

3(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered.³⁶

However, while statutory adoption places primary importance on the "best interest of the child,"³⁷ customary adoption usually considers the social needs of the Aboriginal community.³⁸ In fact, the rationale for customary adoption (which must be present under the fourth part of the *Tagornak* test) often places importance on the interests of the Aboriginal family.³⁹

The practical result of the statutory framework is that Aboriginal communities are consulted about adoption but not entitled to legally validate an adoption. Although s. 7 of the *Adoption Act* requires adopting parties to take reasonable efforts to discuss a potential adoption with a representative of the Aboriginal community, the Aboriginal community is not empowered by the statute to ascribe legal effect to a customary adoption.⁴⁰ Instead, s. 46 requires an application to the court to determine whether a customary adoption has legal effect.⁴¹

Despite the duty to discuss an adoption with the Aboriginal community, the court may choose to rule against the interests of the community. In *S. (S.M.) v. A. (J.P.)*,⁴² the British Columbia Court of Appeal denied custody to an Aboriginal community on the reasoning that an Aboriginal community is not a person eligible to apply for, or be granted, child custody under the *Family Relations Act*.⁴³ Similarly, in *D.H. v. H.M.*,⁴⁴ the Supreme Court of Canada denied custody to a grandfather despite the intentions of the Aboriginal community to be involved in raising the child. Also, as seen in *C.D. v. P.B.*, the court is able to disregard evidence presented by elders on the principles of customary adoption.⁴⁵

VI. WHY IS RECOGNITION IMPORTANT?

Legal recognition of customary adoption triggers a number of broad social and legal issues including how a family is organized (and recognized) within society and the unique relationship that Aboriginal communities have with the nation of Canada. The federal gov-

36 *Adoption Act*, *supra* note 1 at s. 3(2).

37 *Ibid.* at s. 3(1).

38 Baldassi, *supra* note 24 at para. 23.

39 *Ibid.* at para. 21.

40 *Adoption Act*, *supra* note 1 at s. 7.

41 *Ibid.* at s. 46.

42 *S. (S.M.) v. A. (J.P.)* (1992), 38 R.F.L. (3f) 113 (B.C.C.A.).

43 *Family Relations Act*, R.S.B.C. 1996 c. C-128.

44 *D.H. v. H.M.*, [1999] S.C.J. No. 22, 172 D.L.R. (4th) 305.

45 *C.D. v. P.B.*, *supra* note 13 at para. 47.

ernment's "Apology to Former Students of Indian Residential Schools" may indicate a significant shift in Canadian society with respect to recognizing the value of the Aboriginal family. In the apology, Prime Minister Stephen Harper made reference to the need for a new relationship between aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.⁴⁶

In contrast to the apology statements, Mark Walters has summarized the tension between modern legal frameworks and the vibrant culture of Aboriginal people as follows: "Canadian aboriginal law remains a form of Canadian law about aboriginal peoples rather than a form of law of aboriginal peoples, and troubling questions remain about its basic structure and form."⁴⁷

The legal and social framework of customary adoption illuminates the need for a new relationship between Aboriginal communities and the legal system. As the *Adoption Act* currently stands, Aboriginal communities are given the ability to discuss adoptions, but not enforce them. The knowledge and respect for Aboriginal traditions exhibited by the courts has been limited to non-Aboriginal assumptions about the nature of customary adoption.

The Supreme Court of Canada has consistently stated that Aboriginal perspectives must be taken into consideration in Aboriginal law jurisprudence.⁴⁸ However, as seen in *Casimel* and *Prince*, the courts in British Columbia have chosen to apply civil law principles rather than Aboriginal principles. Future judicial discourse on customary adoption will need to consider the rationales of customary adoptions, the economic and social dependency of the adopting relationship, and the interests of the Aboriginal community.

46 *House of Commons Debates*, *supra* note 31 at 1525.

47 Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's L.J.* 470 at para. 51.

48 See *R. v. Van der Peet*, *supra* note 36. See also *Delgamuukw v. British Columbia*, *supra* note 33.

ARTICLE

SUI NOT-SO-GENEROUS: THE UNCONSTITUTIONALITY OF CANADIAN COURT MARTIAL JURY TRIALS

By Lieutenant (Navy) Mike Madden*

CITED: (2009) 14 Appeal 24-36

I. INTRODUCTION

The Canadian military justice system is rarely the subject of academic study, and is therefore unfortunately deprived of beneficial input from many well-qualified sources. However, the realities of contemporary times, including the annually increasing number of courts martial,¹ the annually increasing number of constitutional challenges heard at courts martial,² and the tendency for courts martial to hear increasingly serious charges,³ all suggest that the military justice system is one that deserves careful critical scrutiny.

The constitutionality of certain court martial “jury”⁴ procedures is now a particularly appropriate topic of study in light of the major amendments to the *National Defence Act*⁵ (“NDA”)

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1 There were 56 cases tried by court martial in 2003-2004, 64 cases in 04-05, 39 in 05-06 (One of the three presiding military judges was on sick leave.), and 67 cases in 06-07. Results of courts martial are available online: Department of National Defence <http://www.dnd.ca/cmj/decisions_e.asp>.

2 There were seven applications brought under the *Canadian Charter of Rights and Freedoms* by five different accused members in 2006, while 16 applications were brought by 12 accused members in 2007. This data is also available online at Department of National Defence, *ibid*.

3 For instance, Corporal (Cpl) Matthew Wilcox will soon be tried at court martial for manslaughter—the first time that such an offence will be heard at court martial in recent memory. Cpl Wilcox accidentally shot and killed his friend, Cpl Ronald Megeney, while deployed in Afghanistan. The shooting allegedly took place while they were playing a “game” of “quick draw.” (See online: Department of National Defence <http://www.forces.gc.ca/site/Newsroom/view_news_e.asp?id=2711>).

4 Although civilian juries and court martial panels are not identical, I will often use the terms interchangeably for the purposes of this paper.

5 *National Defence Act*, R.S. 1985, c. N-5 [NDA].

that were enacted with the passing of *Bill C-60* on 18 June 2008.⁶ Prior to the amendments, courts martial could be heard by either a judge sitting alone or a judge with a panel of fact-finders, although the mode of trial was selected by the Director of Military Prosecutions (“DMP”),⁷ rather than by the accused. Since the DMP historically elected Standing Courts Martial (“SCM”), which are trials by judge alone, on almost every occasion,⁸ there was little need or opportunity to consider the fairness of jury procedures within the military justice system. However, in April 2008, the Court Martial Appeal Court (“CMAC”) decided that DMP’s authority to elect mode of trial denied an accused Canadian Forces (“CF”) member his right to a fair trial contrary to ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.⁹

The CMAC therefore declared s. 165.14 of the *NDA* to be of no force or effect, and read into the *NDA* a requirement for accused members to be offered elections as to their modes of trial.¹⁰ Consequently, Parliament amended the *NDA* through *Bill C-60* such that accused members are now offered the ability to elect a General Court Martial (“GCM”), which is a trial by way of panel, under most circumstances.¹¹ This choice is deemed to have been made when an accused fails to make an election,¹² and a GCM is required for the most serious charges.¹³ In other words, *Bill C-60* has created an environment in which military jury trials may become much more prevalent, so all stakeholders within the military justice system now have a renewed incentive to satisfy themselves that such trials adhere to the constitutional principles of fundamental justice, independence, and fairness articulated within ss. 7 and 11(d) of the *Charter*.

Although the primary functions of a GCM panel—determining questions of fact and arriving at a finding—are identical to those of a civilian jury, GCMs are nonetheless distinct from jury trials in a number of ways: the panel comprises only five members as opposed to twelve jurors;¹⁴ the panel composition varies with the rank of the accused;¹⁵ members of the panel cannot be peremptorily challenged; and certain decisions of the panel are made by majority vote,¹⁶ and in the event of a tie,¹⁷ the senior ranking member of the panel casts a second and deciding vote.¹⁸ These important differences between military tribunals and

6 *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, S.C. 2008, c. 29 [Bill C-60].

7 Section 165.14 of the *NDA* was repealed by *Bill C-60* (*supra* note 6 at s. 6), but stipulated that “when the Director of Military Prosecutions prefers a charge, the Director of Military Prosecutions shall also determine the type of court martial that is to try the accused person and inform the Court Martial Administrator of that determination.”

8 The Court Martial Appeal Court, in *R. v. Nystrom*, 2005 CMAC 7, pointed out that, between 1 September 1999 and 20 December 2005, only 4 of the 345 trials at courts martial were heard by a judge sitting with a panel.

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

10 See *Joseph Simon Kevin Trépanier v. Her Majesty the Queen*, 2008 CMAC 3 [Trépanier].

11 *NDA*, *supra* note 5 at s. 165.193(1).

12 *Ibid.* at s. 165.193(3).

13 *Ibid.* at s. 165.191(1).

14 *Ibid.* at s. 167(1).

15 *Ibid.* at ss. 167(2) - (7).

16 *Ibid.* at s. 192(2).

17 A tie could occur in a variety of situations. For instance, if a single member of the panel dies then the court martial is not dissolved, and the remaining four members could find themselves divided on a matter requiring a majority vote. See *NDA*, *supra* note 5 at s. 196.1(1). Likewise, if a panel member is challenged for cause, the issue is heard and determined by the remaining four panel members by majority vote. See *ibid.* at s. 186.

18 *Queen’s Regulations and Orders for the Canadian Forces*, (Ottawa: Queen’s Printer) [QR&O] at s. 112.14.

civilian criminal courts have led the Supreme Court of Canada (“SCC”) to recognize that “a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by ... compelling principles.”¹⁹ In a subsequent decision, the CMAC likewise suggested that “it would be sterile [sic] to attempt an exhaustive catalogue of the similarities and dissimilarities [between military and civilian criminal trials]. Courts martial are *sui generis*.”²⁰

The phrase “*sui generis*” is Latin and means “of its own kind.”²¹ In Canadian jurisprudence, for instance, the term is often used to describe Aboriginal title as an interest in land that is distinct from all other proprietary interests known to the common law—Aboriginal title is something less than ownership in fee simple, but it still encompasses the right to exclusive use and occupation of a tract of land.²² Courts martial are similarly *sui generis*, in that they seek to uphold values of order and discipline in a manner that serves the military’s unique needs. Notwithstanding any justifications for a separate tribunal structure under military law, however, the SCC has made it clear that “any such parallel system is itself subject to *Charter* scrutiny, and if its structure violates the basic principles of s. 11(d) it cannot survive unless the infringements can be justified under s. 1.”²³

As the ensuing discussion will demonstrate, current *NDA* provisions for military jury trials specifically relating to panel composition fail to respect rights and freedoms guaranteed by the *Charter*. I intend to show that military trials by rank-influenced and unrepresentative GCM panels violate accused CF members’ rights to “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”²⁴ My analysis will further point to the conclusion that such *Charter* violations cannot be saved under s. 1 as “reasonable limits prescribed by law” that “can be demonstrably justified in a free and democratic society.”²⁵

II. APPLICATION OF THE *CHARTER* TO MILITARY TRIBUNALS

Before embarking on a discussion of the constitutionality of court martial jury procedures, it is first necessary to consider the extent of the *Charter*’s application to courts martial. The manner in which the *Charter* applies to military tribunals is not intuitive, nor has the subject been frequently discussed in Canadian jurisprudence. One would begin a constitutional analysis by looking to s. 52(1) of the *Constitution Act, 1982*, which states: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”²⁶ Since courts martial are only convened under the authority of the *NDA*, a Canadian statute, it seems self-evident at this stage that court martial procedures must abide by the Canadian Constitution, and must respect the rights and freedoms guaranteed within the *Charter*.

19 *R. v. Généreux*, [1992] 1 S.C.R. 259 at para. 62 (QL) [*Généreux*].

20 *R. v. Lunn*, [1993] C.M.A.J No. 7 at para. 11 (QL).

21 *Black’s Law Dictionary*, 8th ed., s.v. “*sui generis*”.

22 See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 for a summary of the law relating to Aboriginal title in Canada.

23 *Généreux*, *supra* note 19 at para. 65.

24 *Charter*, *supra* note 9 at s. 11(d).

25 *Ibid.* at s. 1.

26 *Constitution Act, 1982*, being Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11.

The next step of the constitutional analysis would lead to the provisions of section 11(f) of the *Charter*:

11. Any person charged with an offence has the right

...

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

It is clear that the above provision guarantees civilians in Canada the right to a trial by jury under certain circumstances, but what does it really mean to military personnel? In *R. v. Généreux*, the SCC held that s. 11(f) of the *Charter* “does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law,”²⁷ but I would suggest that this statement is incomplete: the section does more than simply “contemplate”—it creates substantive rights for civilians that are not afforded to military members.

As a result of the unique s. 11(f) rights that are conferred only upon civilians in Canada, the CMAC in *Trépanier v. R.* was unable to conclude that CF members have the right to elect trial by a panel under s. 11(f) of the *Charter*, in spite of the Court’s obvious determination to somehow reach that conclusion. Instead, the Court relied upon a hybrid reading of ss. 7 and 11(d)²⁸ to determine that, where a choice exists as to the mode of trial, that choice must rest with the accused as part of his or her constitutional right to make a full answer and defence. To be more precise, the CMAC concluded that the existing *NDA* provisions empowering the DMP to select mode of trial violated *Trépanier*’s right to make a full answer and defence, and therefore denied him of his s. 11(d) right to a fair trial in a way that was not in accordance with principles of fundamental justice.²⁹

In the wake of the *Trépanier* decision, I believe it is possible to summarize certain propositions about the way in which the *Charter* applies to military tribunals. First, the only effect of s. 11(f) is that military members have no freestanding constitutional rights to be tried by panels. However, since this type of court martial exists, and since the *NDA* has not specified all circumstances under which a GCM must or must not be convened, an accused military member has a constitutional right to elect a GCM whenever an SCM has not been legislatively imposed. Second, all other *Charter* rights apply equally in the contexts of the military and civilian justice systems. In other words, the military justice system need not be identical to the civilian criminal justice system, but it must conform to the same underlying values, including those of independence, fairness, and fundamental justice, that are articulated within the *Charter*. As one commentator has suggested: “[O]nce a hearing before a de facto jury has been extended to an individual, there is no basis for denying that accused the same procedural safeguards as those that guarantee civilians a fair trial.”³⁰ Thus, where the *NDA* has provided for courts martial with panels, we can conclude that

27 *Généreux*, *supra* note 19 at para. 65.

28 The CMAC’s inter-reliance on ss. 7 & 11(d) in *Trépanier* seems unnecessary in the context of a “full answer and defence” claim. The SCC has inferred that, where an accused is denied the ability to make a full answer and defence, both the principles of fundamental justice and the right to a fair trial are independently violated (see generally *R. v. Rose*, [1998] 3 S.C.R. 262).

29 See generally *Trépanier*, *supra* note 10.

the procedures followed by such courts martial must conform to the *Charter*.

III. THE PROBLEMATIC COMPOSITION OF GENERAL COURT MARTIAL PANELS

Turning to a substantive assessment of the constitutionality of *NDA* jury provisions,³¹ I will now summarize the law regarding membership and composition of GCM panels in an effort to determine whether such panels conform to requirements set forth in s. 11(d) of the *Charter*. As indicated above, a GCM panel consists of five members. The senior member must be an officer of at least the rank of colonel; however, if the accused is a general officer, then the senior member must be of at least equivalent rank.³² If the accused is an officer, then all panel members must also be officers. If the accused is a colonel or general officer, then all panel members must be of at least the rank of lieutenant colonel. If the accused is a non-commissioned member (“NCM”), then two panel members must be senior NCMs, but the other three must be officers.³³ More junior NCMs (ranked sergeant and below) and officers (ranked lieutenant and below) cannot serve as GCM panel members.³⁴

A GCM panel is remarkably distinct in its composition from a civilian jury. While the latter is generally accepted to be a set of fact-triers selected from among the accused’s “peers” in society, the former explicitly *requires or precludes* the inclusion of fact-triers who are “peers,” in the cases of officers and junior NCMs, respectively. As the CMAC pointed out in *Trépanier* (where the Court voiced its concerns on this subject in *obiter*),

[t]he equivalent scheme in a criminal prosecution before civilian courts would be one in which an accused, whose status and rank are those of a member of the upper class in our society, would be tried by a jury ... selected among members of that status and rank in that class while, for the same offence, members of the middle or lower class would be tried by a mixed jury of ... relative status and rank.³⁵

However, while the *NDA* jury provisions are unique, the mere fact that they place restrictions on the composition of a panel does not, in itself, make them unconstitutional: Canadian provinces have also placed limitations on the type of people who are qualified to serve as jurors, and these legislative provisions have apparently not offended the *Charter*.³⁶ It is therefore necessary to look more closely at the likely effects of the *NDA* provisions in order to ascertain whether or not they conform to the *Charter*.

30 Rubson Ho, “A World that has Walls: A Charter Analysis of Military Tribunals” (1996) 54 U.T. Fac. L. Rev 149 at para. 52 (QL) [“World that has Walls”].

31 Henceforward, any reference in this paper to *NDA* “jury” or “panel” provisions, or later to “impugned” provisions, should be taken to refer to the sections of the *NDA* discussed in this paragraph.

32 See attached Rank Chart at Annex A for an explanation of CF rank structure.

33 *NDA*, *supra* note 5 at s. 167.

34 *Ibid.* at ss. 167, 168(e).

35 *Trépanier*, *supra* note 10 at para. 112.

36 See *Juries Act*, S.N.S. 1998, c. 16, s. 4, for an example of the type of people who are disqualified from serving as jurors, including barristers, police officers, and persons who have been convicted of serious criminal offences.

A. The Undue Influence of Rank within a GCM Panel

It is common knowledge that militaries are hierarchical organizations, and the Canadian Forces are no exception to this tradition. Rank within the CF is not merely influential, it is absolutely authoritative; in fact, the *NDA* makes it an offence, carrying a maximum sentence of imprisonment for life, for a service member to disobey a lawful order of a superior officer.³⁷ The concepts of deference to and respect for rank within the military are also somewhat inescapable, particularly when service members interact with one another in uniform, but also in other contexts. For instance, ceremonial protocol within the CF requires subordinate members to pay marks of respect to superior commissioned officers even when both parties are out of uniform, by either removing civilian headdress or by coming to the position of attention. The hierarchical nature of superior-subordinate relations is further reinforced when members interact with one another in uniform, since their ranks are prominently displayed on their epaulettes as reminders of their relative places within the leadership structure of the organization. In other words, the Canadian military's rank hierarchy persistently guides almost all dealings among service members.

As a result of the pervasive influence of rank within the CF, one could infer that a GCM panel that is legislatively structured so as to preserve rank distinctions cannot guarantee an accused a fair hearing—where fact-triers are not unduly influenced in their decision-making processes—by an independent tribunal, that is, a tribunal structured so as to prevent the possibility of undue influence on the fact-triers as required by s. 11(d) of the *Charter*. Although it is difficult to prove this point without empirical evidence, it seems obvious that a warrant officer sitting on a GCM panel could be influenced by the opinions of the colonel who is designated as the panel's "senior member" and who is nine ranks senior to the warrant officer, and that this influence *could stem as much from the colonel's rank as from the persuasive force of his or her argument*. Similarly, it has been suggested that "more obsequious low ranking officers will be very deferential to the opinions of the higher ranking officers."³⁸ Such junior officers would be inclined to accept the opinion of the colonel on the panel either out of habitual obedience or out of fear for the perceived consequences of disagreement with a superior officer.

Several mechanisms are already in place in order to combat these possible sources of undue influence on GCM panel members, although it is unlikely that they could be eliminated altogether. First, military judges provide lengthy instructions to each GCM panel prior to its deliberations, about the duties and roles of panel members, presumably reinforcing individual obligations to "make true findings according to the evidence" in accordance with the oaths sworn by the panel members.³⁹ Second, members of the panel vote on a finding in reverse order of rank from lowest to highest,⁴⁰ but only after deliberations are complete and each panel member, including the most senior member, is likely to have made his or her position well known. Finally, a panel member's chain of command is prohibited from considering the individual's performance as part of a GCM in any promotion or posting decisions relating to that member.⁴¹ In theory, then, there should be no reason for an accused to doubt the independence of a GCM panel by which he or she is tried, irrespective of the

37 *NDA*, *supra* note 5 at s. 83.

38 Ho, "World that has Walls", *supra* note 30 at para. 94.

39 See QR&O, *supra* note 18 at s. 112.17 for the full text of the oath sworn by panel members.

40 *Ibid.* at s. 112.41(2).

41 *Ibid.* at s. 26.11.

ranks held by various members on the panel, since each panel member is expected to individually evaluate the evidence and arrive at a finding, and since each member is protected from discriminatory treatment as a result of his or her involvement on the panel.

Notwithstanding these safeguards, the independence of a GCM panel is questionable. In reality, all military members undergo extensive indoctrination processes that take place over the course of their uniformed careers, often involving intense training and operations, in order to help them internalize and give effect to the values of discipline and obedience that are essential to the function of the CF. In short, military members are perpetually trained to respect the authority of those superior to them in rank. Thus, even if GCM panel members were to consciously recognize the need to disregard the ranks of their colleagues on the panel during the deliberation process, it is conceivable, even probable, that their entrenched indoctrination experiences would still cause them to subconsciously respect and defer to the opinions of higher-ranking panel members. It is almost farcical to suggest that the habit of obedience, built up in a military member over the course of his or her career, can be negated, or even temporarily suspended, by the act of uttering a brief oath at the start of a court martial, or by hearing a few words from a military judge on the subject of impartiality prior to the commencement of GCM panel deliberations. In light of the above realities of military life, it is reasonable to conclude that members of a GCM panel could be unduly influenced by the ranks of their colleagues on the panel.

Is the possibility that the fairness of a hearing could be compromised by the *NDA*'s rank-based jury provisions sufficient grounds for a finding that GCM panels do not meet the independence requirements of s. 11(d) of the *Charter*? The *dicta* of the SCC in *Généreux*, a case relating to the independence of military “judges” who were at that time appointed from among the ranks of general military lawyers on *ad hoc* bases for individual trials, are instructive in answering this question:

I emphasize, however, that the independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator. Practice or tradition, as mentioned by this Court in *Valente* (p. 702), is not sufficient to support a finding of independence where the status of the tribunal itself does not support such a finding.⁴²

This leading decision suggests that neither the historic, *sui generis* roots of the court martial system, nor the fact that many, perhaps most, GCM panels will perform their functions without their members being unduly influenced by one another's ranks, can save the fact that the *NDA* jury provisions admit the reasonable possibility that such undue influence will affect the outcomes of at least some courts martial. The *NDA* provisions therefore fail to guarantee GCMs the minimum level of independence required by s. 11(d) of the *Charter*.

B. The Denial of a “Representative” Panel

As I have suggested above, a GCM panel is far from representative of the military community at large: non-commissioned members of or below the rank of sergeant and officers

⁴² *Généreux*, *supra* note 19 at para. 87.

below the rank of lieutenant are always excluded from service on a panel; all NCMs are excluded from panels that try officers, and an accused NCM will always be tried by a panel consisting of a majority of officers. In other words, the military “jury pool,” or the group of service personnel eligible to be appointed as GCM panel members by the Court Martial Administrator, is significantly restricted by provisions of the *NDA*. However, the value of a set of fact-triers who are representative of the accused’s broad community has long been recognized in Canada. As Justice L’Heureux-Dubé pointed out in *R. v. Sherratt*,

[A] jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place.⁴³

The concept of representativeness was further expanded upon by Justice McLachlin, as she then was, in *R. v. Williams*, where she determined that “a representative jury pool” was an “essential safeguard of the accused’s s. 11(d) *Charter* right to a fair trial and an impartial jury.”⁴⁴ More recently, in *R. v. Gayle*,⁴⁵ the Ontario Court of Appeal affirmed that representativeness is a crucial characteristic of Canadian juries.

The rationale behind the ideal of a representative jury is two-fold: first, “jurors from dominant groups will confront ... biases and prejudices more readily if deliberations are conducted among a ... diverse group,”⁴⁶ and second, “representativeness is essential to the appearance of impartiality.”⁴⁷ Although both of the above justifications were advanced in the context of the *Gayle* case about racial prejudice, the rationales apply equally in a military setting. The “dominant” group in the CF, while the numerical minority, is the group that holds the power—the officers, and particularly the senior officers. It stands to reason that this group, which now legislatively makes up the majority of every GCM panel, would benefit as much from a diversity of perspectives from those of all ranks as would white jurors in the criminal trial of a black accused, as in *Gayle*. Furthermore, the appearance of impartiality is just as essential to the military justice system as to the civilian justice system, especially in light of the fact that “breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.”⁴⁸ In other words, the stricter sentences to which military personnel are necessarily subject⁴⁹ must be meted out by a justice system that is considered to be transparent and fair by all stakeholders if that system is to effectively achieve its purposes within the military.

43 *R. v. Sherratt*, [1991] 1 S.C.R. 509 at para. 35 (QL).

44 *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 47 (QL).

45 *R. v. Gayle*, [2001] O.J. No. 1559 at para. 56 (QL) [*Gayle*].

46 Emily Morton, “Two Conceptions of Representativeness in the Canadian Jury Selection Process: A Case Comment on *R. v. Gayle*” (2003) 61 U.T. Fac. L. Rev 105 at para. 47 (QL).

47 *Ibid.* at para. 50.

48 *Généreux*, *supra* note 19 at para. 60.

49 As I have argued elsewhere, military sentencing principles are unique and must not be diluted by incorrect applications of civilian principles in military cases. See Mike Madden, “First Principles and Last Resorts: Complications of Civilian Influences on the Military Justice System” *Canadian Military Journal* (forthcoming in Vol. 9, No. 3, March 2009).

As the above arguments indicate, a representative jury has a value that transcends the border between military and civilian criminal jurisdictions, so there is no *prima facie* reason why a military tribunal such as a GCM should be exempt from the constitutional requirement of “representativeness” within its pool of fact-triers. *NDA* jury provisions therefore violate s. 11(d) of the *Charter* not only because they fail to guarantee “independent” tribunals, but also because they fail to guarantee “fair” hearings by representative sets of panel members.

IV. GENERAL COURT MARTIAL PANEL PROVISIONS DISPROPORTIONATELY IMPAIR *CHARTER* RIGHTS

Despite the above violations of s. 11(d), it would still be possible for the *NDA* provisions to be found constitutional if they could be saved under s. 1 of the *Charter*. Since the transgressions of s. 11(d) stem from legislative provisions within the *NDA*, any limits on *Charter* rights that result from those provisions are clearly “prescribed by law.” In order for the impugned provisions to be demonstrably justified as reasonable limits on *Charter* rights within our free and democratic society, they must pass the two-stage test from *R. v. Oakes*⁵⁰ (“*Oakes*”) as described by the SCC in *R. v. Chaulk*.⁵¹ Under the *Oakes* test, the impugned provisions must relate to a Parliamentary objective that is pressing and substantial, and they must represent a proportional means of achieving the objective.

A. Pressing and Substantial Objective

Let us now look more closely at ss. 167 and 168(e) of the *NDA* in order to ascertain Parliament’s objective in enacting those provisions. First, the impugned sections of the Act exclude junior NCMs and officers from GCM panels. Based on the minimum time requirements for promotion to the ranks of warrant officer and captain, this exclusion means that only NCMs with at least eleven years of service can sit on a GCM panel,⁵² while officers must have completed at least three years of commissioned service to be eligible for panel duty.⁵³ The inference that can be drawn from this information is that Parliament intended for GCM panel members to be sufficiently experienced in the military. A related inference may be that Parliament intended for GCM panel members to have specific experience with the military justice system, since NCMs above the rank of sergeant and officers above the rank of lieutenant also typically have numerous subordinates, for whom they are administratively and disciplinarily responsible. The inference stems from the fact that, unless they have been charged themselves, NCMs below the rank of warrant officer and officers below the rank of captain are much less likely to have been involved in investigative or adjudicative proceedings as part of their duties.

The impugned provisions of the *NDA* also prevent senior leaders in the CF from being tried by panel members who are significantly junior to them. One inference that can be

50 See generally *R. v. Oakes*, [1986] 1 S.C.R. 103 (QL).

51 *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at paras. 50-75 (QL) [*Chaulk*]. This case outlined the *Oakes* test for the purposes of s. 11(d) challenges.

52 *Canadian Forces Administrative Order 49-4*, Annex A [CFAO]. In practice, it would be exceedingly unlikely for most NCMs to reach the rank of Warrant Officer in such a short time.

53 CFAO 11-6.

drawn from this information is that Parliament wanted GCM panels to have an understanding of the responsibilities and professional circumstances of all accused members, including those of very senior rank. The inference can be supported on the arguable presumption that high-echelon leaders understand all levels of an organization beneath them, but low-echelon workers do not necessarily understand work performed at levels above them. Another possible inference is that Parliament wanted to ensure that the military's hierarchical chain of command was not subverted by granting junior members adjudicative authority over senior members.

On the whole, one can gather that Parliament's objective in enacting ss. 167 and 168(e) of the *NDA* was to ensure that GCM panels were staffed with competent and experienced fact-triers who would not subvert respect for the military's rank hierarchy. I believe that this objective is sufficiently "pressing and substantial" to warrant limiting constitutionally protected rights. The impugned *NDA* provisions therefore pass the first stage of the *Oakes* test.

B. Proportionality Analysis

The second stage of the *Oakes* test requires a proportionality analysis that enquires into the following matters: first, whether the means enacted to advance Parliament's objective is "rationally connected" to the objective; second, whether the *Charter* right is impaired "as little as possible;" and, third, whether the effects of the limitation are "proportional to the objective."⁵⁴

1. Rational Connection Requirement

An analysis of the "rational connection" requirement of the *Oakes* test essentially tries to ensure that Parliament's chosen means of achieving its objective are not arbitrary, unfair, or based on irrational considerations. In the present case, advocates of the *status quo* within the military justice system might argue that *NDA* panel provisions necessarily exclude junior NCMs and officers because a jury must be competent,⁵⁵ and these personnel lack the experience or the education required to perform as panel members. While I acknowledge the requirement for a competent panel, any such argument against expanding the pool of panel members would nonetheless fail. The suggestion that a junior NCM or officer would be an incompetent panel member is both unfair and incorrect.

The threshold ability required of a juror is quite low, and is certainly met by service members who are trusted to handle dangerous weaponry and sensitive equipment in the performance of their duties. As the SCC has pointed out, "most trials require the same competence as is involved in the daily pursuit of one's affairs, and the ability to speak and understand one of the official languages will suffice."⁵⁶ In this respect, certain *NDA* jury provisions would fail the "rational connection" element of the *Oakes* test because they are unfair and are based on irrational considerations. However, if the legislation were challenged,

⁵⁴ *Chaulk*, *supra* note 51 at para. 50.

⁵⁵ See *R. v. Bain*, [1992] 1 S.C.R. 91 at para. 28 (QL): "Jurors should not only be representative and impartial, they should also be able to understand the trial, their role in the trial, the evidence that is presented, the principles they have to apply, among other things." For a summary of the "competency" requirement, see also Peter Sankoff, "Majority Jury Verdicts and the *Charter of Rights and Freedoms*" (2006) 39 U.B.C. L. Rev. 333 at paras. 58-71 (QL).

⁵⁶ *Ibid.* [emphasis added].

I do not anticipate that a final decision would turn on this fact, since the impugned sections also fail subsequent branches of the *Oakes* test in more clear and explicit ways.

2. Minimum Impairment Requirement

An analysis of the “minimal impairment” requirement of the *Oakes* test seeks to establish whether or not Parliament could achieve the same objective by some means that is less intrusive to the accused. Although Parliament is not required to “search out and to adopt the absolutely least intrusive means of attaining its objective,”⁵⁷ the existence of reasonable alternatives to the impugned measures will suggest that the minimum impairment requirement has not been met.

In the present case, obvious solutions come to mind that could guarantee the accused a representative panel that would be free from the undue influence of rank while still meeting Parliament’s objective of providing for a competent, experienced panel that respects the military’s hierarchical structure: simply remove all identifiers of rank from the identities of panel members. Parliament could easily have enacted legislation requiring panel members’ ranks to remain confidential. Such legislation might allow members to dress in civilian attire for the duration of a hearing,⁵⁸ or might provide for some distinct form of “panel uniform,” devoid of all rank insignia, for the members to wear at trial. Parliament could equally make it an offence for a panel member to disclose any information about his or her rank, position, or occupation, in order to preserve individual anonymity during the proceedings. In concert with these measures, Parliament could legislate that only “trained” members of the CF are eligible to serve on GCM panels, so that a certain baseline of experience would be possessed by all fact-triers while still expanding the jury pool to include all ranks. Although training periods vary by occupation, most CF members are considered formally trained within their first three years of service, so such an enactment would generally eliminate the eight-year gap in “length of service” that currently exists between the respective times when officers and NCMs qualify for panel duty.

In the face of such simple and effective means of achieving Parliament’s “pressing and substantial” objective with virtually no impairment of accused members’ *Charter* rights, one must conclude that the impugned provisions of the *NDA* do not pass the minimal impairment requirement of the *Oakes* test.

3. Proportionality of Effects Analysis

The final “proportional effects” element of the *Oakes* test seeks to weigh the importance of Parliament’s pressing and substantial objective against the magnitude of the *Charter* violation created by the impugned legislation, recognizing the fact that some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures that impose the limit intrude upon the integral principles of a free and dem-

57 *Chaulk*, *supra* note 51 at para. 65.

58 Although this suggestion might sound unusual, CF members of the National Investigation Service (military police special investigators) wear civilian clothing in the normal performance of their duties, and Joint Task Force 2 personnel are seldom seen in uniform, presumably to assist them in protecting their identities.

ocratic society.⁵⁹

In the present case, the s. 11(d) right at issue is one that must be regarded as extremely important, since it relates to the life, liberty, and security of the person of anyone tried by GCM. The violation of this right under current *NDA* legislation is also very severe, since it exposes CF members to trials that may be manifestly unfair, and that may result in punishments of up to life imprisonment. As one commentator has observed about existing *NDA* provisions:

Senior officers are responsible for maintaining discipline among their troops, and as a result, they may be more likely to apply a stricter standard of conduct in determining the guilt ... of the accused. Such a situation is analogous to having a panel of police officers act as triers of fact in prosecuting street criminals; there is no separation between the role of enforcing discipline and the role of penalizing breaches of discipline.⁶⁰

When current *NDA* jury provisions that stack GCM panels with senior officers are considered in the context of the above analysis, can it really be said that they “proportionally” deny *Charter* rights to those standing trial by GCM? Could *any* government objective be so pressing and substantial as to permit an accused to be tried in such an unfair way, by such an inappropriately composed panel? I think these questions must obviously be answered in the negative, which leads to the inevitable conclusion that the impugned provisions fail the final element of the *Oakes* proportionality test.

V. CONCLUSION

Although General Courts Martial are recognized as part of a legitimately distinct military justice system that has jurisdiction over elements of Canadian criminal law, the tribunals fail to respect certain rights that are constitutionally guaranteed by the *Charter*. The composition of GCM panels under current *NDA* provisions allows for panel members to be unduly influenced by the ranks of their colleagues in contravention of the s. 11(d) guarantee of an “independent” tribunal, and fails to provide for a representative set of fact-triers in contravention of the s. 11(d) guarantee of a “fair” hearing. These *Charter* violations are not reasonable limits that can be demonstrably justified in a free and democratic society. They are, however, easily correctable. Parliament proved that it has the ability to quickly and effectively remedy unconstitutional elements of the *NDA* when it passed *Bill C-60* a short two months after the CMAC, in *Trépanier*, struck down different provisions of the Act after finding unjustified ss. 7 and 11(d) *Charter* violations in that case. In the present case, Parliament could take similar action to enact modifications to the *NDA* that would allow for GCM panels that are truly representative of the military population and that are not susceptible to undue rank-influence. Such legislative action would help to ensure that military members gain the full benefit of the rights guaranteed to them under the *Charter*, while still respecting the unique needs and objectives of Canada’s *sui generis* military justice system.

⁵⁹ *Oakes*, *supra* note 50 at para. 71.

⁶⁰ “World that has Walls”, *supra* note 30 at para. 94.

ANNEX A

CANADIAN FORCES RANK CHART

Ranks	Navy	Army / Air Force
General Officers	Admiral (Adm)	General (Gen)
	Vice Admiral (VAdm)	Lieutenant-General (LGen)
	Rear Admiral (RAdm)	Major-General (MGen)
	Commodore (Cmdre)	Bridgadier-General (BGen)
Senior Officers	Captain (Capt(N))	Colonel (Col)
	Commander (Cdr)	Lieutenant-Colonel (LCol)
	Lieutenant-Commander (LCdr)	Major (Maj)
Junior Officers	Lieutenant (Lt(N))	Captain (Capt)
	Sub-Lieutenant (SLt)	Lieutenant (Lt)
	Acting Sub-Lieutenant (A/SLt)	Second Lieutenant (2Lt)
Subordinate Officer	Naval Cadet (NCdt)	Officer Cadet (OCdt)
Senior Non-Commissioned Members	Chief Petty Officer 1st Class (CPO 1)	Chief Warrant Officer (CWO)
	Chief Petty Officer 2nd Class (CPO 2)	Master Warrant Officer (MWO)
	Petty Officer 1st Class (PO 1)	Warrant Officer (WO)
	Petty Officer 2nd Class (PO 2)	Sergeant (Sgt)
Junior Non-Commissioned Members	Master Seaman (MS)	Master Corporal (MCpl)
	Leading Seaman (LS)	Corporal (Cpl)
	Able Seaman (AS)	Private (Pte)
	Ordinary Seaman (OS)	Private Recruit (Pte (Recruit))

ARTICLE

THERE WAS A HIGH COURT THAT SWATTED A FLY... BUT WHY? MENTAL DISABILITY IN THE NEGLIGENT INFLICTION OF PSYCHIATRIC INJURY AND THE DECISIONS IN *MUSTAPHA V. CULLIGAN*

By Margo Louise Foster*

CITED: (2009) 14 Appeal 37-67

INTRODUCTION

Since the release of the Supreme Court of Canada's reasons in *Mustapha v. Culligan of Canada Ltd.*¹ (“*Mustapha*”) on 22 May 2008, the case has become fodder for many a guffaw and gibe at the expense of Waddah Mustapha, the man who experienced significant psychiatric injury after seeing parts of two dead flies in a bottle of water. Mr. Mustapha had been a faithful customer for fifteen years, and used Culligan water at both his home and workplace.² The Mustapha family was very concerned with cleanliness, and Mr. Mustapha had been persuaded of the purity and health benefits of Culligan water. After the fly remains were discovered, Mr. Mustapha suffered a severe depression, as well as phobia and anxiety in relation to water.³ In a brief, unanimous decision, the Court denied his claim: although Culligan owed him a duty of care,⁴ his injuries were too remote to warrant compensation.⁵ In the Canadian media, there is near universal support for the Court's decision; but rather than appearing as reasoned argument, it appears as a series of puns—the Court having

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1 *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] S.C.J. No. 27 (QL) [*Mustapha* SCC, cited to SCC].

2 *Ibid.* at para. 3.

3 *Ibid.* at para. 1.

4 *Ibid.* at para. 6.

5 *Ibid.* at para. 18.

“quashed”⁶ and “swatted”⁷ Mr. Mustapha’s claim, and told him to “buzz off.”⁸ There is praise for the Court’s resistance to American-style litigiousness⁹ and for its common sense¹⁰—for upholding axioms like “Life goes on,” or my grandfather’s favourite, “What doesn’t fatten, fills.” Flies are ubiquitous in everyday life, and we are encouraged to think of them as harmless. Therefore, it seems nothing short of ridiculous to many observers that the sight of a fly in his water should have caused Mr. Mustapha such injury. Just as the nursery rhyme’s sarcastic refrain “Perhaps she’ll die!” obscures the (ultimately fatal) escalation of consequences that flow from the swallowing of a fly,¹¹ the mocking response to this case largely masks the implications of the reasons for tort claimants who suffer psychiatric injury.

In this paper, I examine the history and development of the tort of negligent infliction of psychiatric injury—in particular, the way courts have grappled with understanding mental disability in this context. I use the reasons in *Mustapha* at each level of court as a case study to analyze how Canadian courts deal with mental disability in this area of law. The court is confronted with a difficult task when it must grapple with the difference (if any) between physical and mental disabilities, necessarily subjective evidence (especially in the case of depression and anxiety disorders, where diagnosis is inherently subjective), dueling medical experts (there being variations within the medical community about how to appropriately diagnose such conditions), and the contextual determination of what is “reasonable.” My purpose is to critique the courts’ language and its implications. In pursuing this analysis, I hope to identify weaknesses in the courts’ reasoning—such as the influence of inappropriate assumptions and misplaced “common-sense” reasoning—and propose a way of understanding mental disability in the context of this tort that might better respect the equality of mentally disabled plaintiffs. Such a framework would (ideally) maintain justifiable limits on the tort of negligent infliction of mental suffering while respecting the experience and the equality of mentally disabled persons as tort claimants.

I begin by outlining the broad critical framework through which I will read the tort and the *Mustapha* decisions. I put forward a perspective that combines feminist, critical disability and post-colonial analyses. I suggest that the lines between “disability” and “illness,” and “physical” and “mental” are indistinct if not imaginary. In the second section, I review the history, development, and criticisms of the tort of negligent infliction of psychiatric injury through case law, commentary, and law reform efforts, concluding with some of my own critical analysis. I then move to the *Mustapha* decisions, presenting my analysis through the previously described critical framework and in light of the history and development of the tort of negligent infliction of psychiatric harm. Finally, I conclude by suggesting some considerations that might help ensure that the substantial equality and dignity of mentally ill claimants are upheld.

6 “SCC quashes man’s suit over fly in bottled water” *CTV.ca* (22 May 2008) online: CTV Ottawa <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080522/fly_SCC_080522/20080522>.

7 Kirk Makin, “Supreme Court overturns damages for fly in bottled water” *The Globe and Mail* (23 May 2008) A5; Janice Tibbetts, “Court swats fly-in-water lawsuit” *National Post* (23 May 2008) A7 [Tibbetts]; Jim Brown, “Top court swats down fly-in-water lawsuit” *Toronto Star* (23 May 2008) A3.

8 Tracey Tyler, “Court tells fly phobic to buzz off” *Toronto Star* (16 December 2006) A4. This article followed the Court of Appeal’s decision, but still indicates the media’s attitude to the Supreme Court’s decision.

9 Tibbetts, *supra* note 7; “Let’s see more of this justice” *The Province* (25 May 2008) A20.

10 “Common sense prevails” *Toronto Star* (23 May 2008) A4.

11 *There was an Old Lady who Swallowed a Fly* (Singapore: *Child’s Play*, 1973). In this poem, a woman first swallows a fly, and progresses to swallow increasingly larger animals (the refrain, “Perhaps she’ll die!” after each), cumulating when she swallows a horse, after which the poem abruptly ends, “She’s dead, of course!”

II. CRITICAL FRAMEWORK

I propose to analyze the treatment of mental disability in this subset of negligence law by using a framework of critical disability and post-colonial theory. To explain why I believe these approaches are not only useful, but necessary, I will first discuss some broad ideas (that I categorize as feminist theory) about judicial analysis and decision making. These ideas establish the basis for my argument that there is a presumption of unreasonableness in the analysis of psychiatric injury that reveals both societal bias and legally indoctrinated discrimination against those who suffer from mental disabilities. The starting assumption, in Mr. Mustapha's case, is that his reaction is unreasonable, irrational, and exaggerated—or worse, eccentric and abnormal—which gives rise to a presumption against his recovery of damages (except in the trial judgment). The courts assume a community of like-minded readers with whom they reinforce the presumption of unreasonableness. I suggest that this presumption is easily reiterated and reinforced because it is based on broad societal assumptions about, and fear of, mental illness. To some degree, judicial reasoning is about making choices (for example, what counts as an injury, and how that injury can be proven), and while a number of factors influence these choices, I suggest that a critical eye is needed to look for invalid assumptions that may underlie them. In making this claim, I draw on Jennifer Nedelsky's idea of embodied diversity,¹² Mariana Valverde's analysis of common knowledge,¹³ as well as Christine Boyle and Marilyn MacCrimmon's discussion of interdisciplinarity and fact determination.¹⁴ These writers demonstrate modes of analysis that help deconstruct the seeming objectivity, impartiality, and imperviousness of judicial reasoning. The basics of critical disability and postcolonial theory that I will outline are intended to mobilize a critical approach that can interrogate the assumptions (though likely unintentional, they are no less harmful) at work in the judicial development of the tort of negligent infliction of psychiatric harm, and in the *Mustapha* decisions.

A. Embodied Diversity, Common Knowledge, and Disciplinarity (Feminist Theory)

Nedelsky questions the impartiality and neutrality of judicial reasoning, and argues that the dominant concept of impartiality must shift in order to give effect to substantive equality.¹⁵ “Embodied diversity” refers to a process whereby a person becomes aware of his or her own subjective, affective responses to stimuli, recognizes that he or she may experience the world in different ways, and thereby becomes able to accept other responses as valid and transform his or her own response.¹⁶ She brings together the ideas of feminist theorists with neurological research to show that, despite the widespread (and hopefully unconscious) use of “impartiality” as a means to suppress difference,¹⁷ emotion is an integral part of reasoning.¹⁸ To approach impartiality in a way that embraces substantive equality means to view subjective emotion not as a detriment, but as a part of reasoning that cannot be

12 Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill L.J. 91 [Nedelsky].

13 Mariana Valverde, *Law's Dream of Common Knowledge* (Princeton: Princeton University Press, 2003).

14 Christine Boyle & Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 Windsor Y.B. Access Just. 55 [Boyle & MacCrimmon].

15. Nedelsky, *supra* note 12 at 94.

16 *Ibid.* at 109.

17 *Ibid.* at 96.

18 *Ibid.* at 101.

eradicated, only managed—to find community not in static, hierarchical, universality, but in shifting points of commonality.¹⁹ Nedelsky shows the disembodied universality (on which the present concept of impartiality depends) to be a convenient fiction. Subjectivity is not the binary opposite to objectivity, nor is emotion the opposite of reason. Instead, by recognizing and working with our subjectivities, we can recognize our affective responses as specific and individual, and approach reasoning in a much more forthright manner. A person could, it seems, shift his or her affective “starting points” by actively heightening his or her consciousness to the subjectivity of his or her own position in the world.²⁰ In order for judicial reasoning to be impartial, it seems, the decision maker must be able to recognize and situate his or her own subjectivity and affective responses in relation to, and on the same plane as, those of others.²¹

Valverde inquires into the role that common knowledge, as (heuristically²²) opposed to the role expert, or scientific, knowledge plays in judicial reasoning. She describes it as “a quasi-transcendental entity that is nevertheless visible in the courtroom—in ... the reasonable man, ... and in the fair-minded judge.”²³ And, like the “reasonable person,” “common knowledge ... is a necessary legal fiction.”²⁴ I read Valverde as suggesting that legal common knowledge is made up of the legal deductions that are presented as objective truths—as knowledge a legal decision maker thinks it fair to impute to people.²⁵ She draws attention to the way in which “law shapes the world that it then claims to adjudicate”²⁶—that is, the way it constructs knowledges to have legal meaning. Rather than blindly accepting the “truth effects”²⁷ of legal common knowledge, or seeing the marginalized, subaltern viewpoint as one of “Truth,”²⁸ however, she suggests that we should choose to see only small-t truths.²⁹ Valverde outlines an approach to analysis that avoids seeking transcendental meaning, but instead looks at the social effects of purportedly neutral modes of reasoning.³⁰ The common knowledge presumed by the law privileges and empowers certain groups of knowers and excludes others.³¹ I take Valverde’s discussion as a call to identify and investigate how this common knowledge functions in judicial reasoning.

Boyle and MacCrimmon situate law as a discipline in relation to other disciplines, and suggest that a skeptical approach be taken to its forms of reasoning.³² Though their discussion focuses on unpacking the rules of evidence, their comments on the way legal rules function can be applied to other contexts. They see legal rules as a “set of ‘tools of understanding’ for determining knowledge” that “filter the information that can be considered by the

19 *Ibid.* at 96, 108.

20 *Ibid.* at 108.

21 *Ibid.* at 106.

22 Valverde, *supra* note 13 at 22.

23 *Ibid.* at 225.

24 *Ibid.* at 21.

25 *Ibid.* at 21.

26 *Ibid.* at 6.

27 *Ibid.* at 7.

28 *Ibid.* at 10.

29 *Ibid.* at 9.

30 *Ibid.* at 14.

31 *Ibid.* at 24.

32 Boyle & MacCrimmon, *supra* note 14 at 81.

decision maker, determine its form and ... regulate its use.”³³ By increasing attention to the way these tools function, we might see what kinds of knowledge are marginalized, and thereby address any inequity that may result from the unquestioned functioning of those tools. Their commentary on the distinction between what the law categorizes as matters of law and matters of fact is also capable of broad application. Though they suggest that categorization of an issue as a matter of law may give “less opportunity for the operation of egalitarian social knowledge,”³⁴ because of the perceived firmness of that category (“law”), it may also perpetuate the operation of repressive assumptions. An important concept in Boyle and MacCrimmon’s writing is the idea that when judges refer to the objective and ubiquitous “informed and ‘right-minded’ member of the community,” that community should be envisioned as one that “supports the fundamental principles entrenched in the *Constitution* by the *Charter*.”³⁵ Thus, even where judicial decision makers claim to rely on objective standards or common knowledge, they should consider *Charter* values as part of a common or objective perspective.

In my approach to analysis, I am informed by (at least) these three perspectives: From Nedelsky, I take the proposition that subjectivity and objectivity are not opposites—that subjective affective responses are an unavoidable part of human reasoning, and we should therefore be attempting to manage them more directly. From Valverde, I take an analytical approach that examines the effects of modes of reasoning and knowledge production—that seeks to bring knowledge that seems transcendental back to small-t truth status. And from Boyle and MacCrimmon, I take the understanding that law is one of many disciplines whose tools can be examined and adapted to better fit the society it attempts to serve and regulate. Having outlined the broad basis of my approach to analysis, I now turn to discussing the more specific frameworks with which I propose to analyze the judicial treatment of mental disability in the tort of negligent infliction of psychiatric harm and the *Mustapha* decisions. Critical disability and postcolonial theories can provide a framework that converts some of the above concepts into a structure that is more specific to both the tort and the *Mustapha* decisions.

B. Terminology: Illness vs. Disability and Mental vs. Physical

It could seem incongruous to apply critical “disability” theory to judgments (like those in *Mustapha*) that use the language of “illness,”³⁶ and specifically a “mental illness,” given that the theory, like the disability rights movement, has put “an emphasis on physical disabilities, oftentimes to the exclusion of mental ones.”³⁷ However, this terministic dissonance is less divisive than it may first appear. There are advantages and disadvantages to the different terms used to describe experiences of what might commonly be called mental illness.

33 *Ibid.* at 61.

34 *Ibid.* at 63.

35 *Ibid.* at 79; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*.

36 “Illness” is used eleven times in the trial decision, nine times in the Court of Appeal decision, and twice in the Supreme Court of Canada’s decision. “Disability” is used only twice in the trial decision, once in the Court of Appeal decision, and not at all in the Supreme Court of Canada’s reasons.

37 Alison Dundes Renteln, “Cross-Cultural Perceptions of Disability: Policy Implications of Divergent Views,” in Stanley S. Herr, Lawrence O. Gostin & Harold Hongju Koh, eds., *The Human Rights of Persons with Intellectual Disabilities* (Oxford: Oxford University Press, 2003) 59 at 60 [Renteln].

Disability seems to accord the greatest legal recognition to these experiences,³⁸ but it may reinforce the binary able/disabled. Lennard Davis explains the rationale of the binary as follows: “The divisions whole/incomplete, able/disabled neatly cover up the frightening writing on the wall that reminds the hallucinated whole being that its wholeness is in fact a hallucination, a developmental fiction.”³⁹ In other words, the use of disability as a descriptor for a range of experiences fortifies both a belief that there is an ideal being and level of ability that is attainable, and a corresponding fear of disorder, disintegration, and disempowerment. Illness may be a more expansive term, but would only encompass more experiences because it is generally perceived as being less serious or permanent than a disability. Perhaps it is desirable, and more reflective of lived realities, to see these experiences as a spectrum—a “dynamic and contextualized range”⁴⁰ from less to more serious and permanent but without the label of either disability or illness. However, the law strives for certainty and clarity, and so it becomes practical to choose a terminology with the knowledge of its implications. If the choice is between disability and illness, I would propose using disability as the descriptor. Mental illnesses are considered disabilities not only by medical professionals,⁴¹ but also in other areas of the law.⁴² In addition, choosing disability means reflecting more accurately the ongoing nature of many mental illnesses, recognizing the severe impact they can have on a person’s daily life, and respecting “people’s immediate perceptions of their lives, ... their needs and limitations.”⁴³

In addition to this distinction, the extent to which disabilities or illnesses are considered as physical or mental is a complicating factor that impacts this choice of terminology. The distinction between mental and physical experiences is based on a fictional divide between mind and body. Although it has been a powerful heuristic device in much of Western philosophical and religious thought, it is experientially impossible to separate mind from body. Although the functions of the mind may be different than those of the body, as a specialized conglomeration of tissues and fluids, the brain is fundamentally of the body. At the very least, there is a constant interaction and interdependence between what is conceived of as the “mind” and the rest of the “body”. Yet, whereas a person with a physical disability is perceived as not necessarily having control over his or her body, a person with a mental disability is often treated as though he or she should have control over his or her mind.⁴⁴ The concept of a disembodied mind allows a person (and others) to believe that he or she should have omniscient control over his or her thought processes. But in diagnosing and treating mental disabilities, medical professionals are instructed to pay close attention to physical manifestations and symptoms.⁴⁵ The treatment of many mental disabilities by chemical sub-

38 Office for Disability Issues, *Defining Disability: A Complex Issue* (Ottawa: Human Resources Development Canada, 2003) at 13-17, 29-32. “Disability” is the term used in the contexts of income assistance, employment accommodations, and Charter rights [*Defining Disability*].

39 Lennard Davis, “Enforcing Normalcy: Disability, Deafness, and the Body” in Vincent Leitch, ed., *The Norton Anthology of Theory and Criticism* (New York: W.W. Norton, 2001) 2400 at 2403 [Davis].

40 Richard Devlin & Dianne Pothier, “Introduction: Toward a Critical Theory of Dis-Citizenship” in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory* (Vancouver: UBC Press, 2006) 1 at 5 [Devlin & Pothier].

41 For example, at the *Mustapha* trial, Dr. Litman stated that “depression and anxiety are psychological disabilities.” *Mustapha* SCJ, *supra* note 159 at para. 118.

42 *Defining Disability*, *supra* note 38.

43 World Health Organization, *WHO Resource Book on Mental Health, Human Rights and Legislation* (China:N.p., 2005) at 23.

44 Kenneth A. Rasinski, Pamela Woll & Andrea Cooke, “Stigma and Substance Abuse Disorders” in Patrick W. Corrigan, ed., *On the Stigma of Mental Illness* (Washington: American Psychological Association, 2005) 219 at 219.

45 Louise Phillips, *Mental Illness and the Body* (London: Routledge, 2006) at 35.

stances may be cited for proof of the embodied nature of mental illness. Talk therapies (as opposed to physical therapies), which are frequently used to treat mental disabilities, can also be thought of as embodied. I discuss the distinction between mind and body as a preliminary matter, not to show that mental disabilities are necessarily biological in nature, but to show the prejudicial impact of this distinction—and to show that it is not so clear. Even if the reader is unwilling to put mind and body on the same plane so as to consider all disabilities “physical”, I trust that even a skeptical reader would accept the dynamic and indissoluble relationship between that which is understood as mind and that as body. By discussing the distinctions between illness and disability, and between mental and physical experiences, my goal is to highlight the blurriness of the lines that divide these concepts, their cultural specificity, and the assumptions that underlie them.

C. Critical Disability Theory

Critical disability theory has been described as “a self-consciously politicized theory” in that its purpose is not purely philosophical; rather, “it is theorization in the pursuit of ... substantive ... equality.”⁴⁶ Although categorization as “disabled” may confer legally enforceable rights in some areas of the law,⁴⁷ the assumptions that go behind common conceptualizations of disability serve to limit the equality and inclusion accorded to people with disabilities. The basic assumption behind common understandings of disability is that a disability is a personal misfortune. This position corresponds to the biomedical model of disability: the disability is “located in the individual,” who is then constructed as an object of “charity and pity rather than equality.”⁴⁸ Contrary to this common approach, it is possible (and perhaps preferable) to view disability as a social construction: instead of viewing disability as an individual flaw deserving of pity, one might see disability through a lens of human rights, “[a]s a consequence of how society is organized.”⁴⁹ Devlin and Pothier explain that “the abl[e] majority generates an expectation that persons with disabilities should try to pass”: the norm of ability creates an incentive (namely, the avoidance of marginalization and discrimination) for those with invisible disabilities to act as if they do not have disabilities, rather than encouraging them to expect accommodation and equality.⁵⁰

Whether one sees disability as an individual flaw or as a societal failure matters. These conceptual choices underpin how people with disabilities are treated in law: “the norms, standards, values, and biases on which these theoretical concepts are built lead to particular standards and constructs of policy, programs, and legal status ... [which] have an effect on whether the human rights of people with disabilities are respected or abridged.”⁵¹ An individualistic, personal, biomedical approach persists today, reflecting what Susan Wendell calls “the ‘lottery’ approach to life, in which individual good fortune is hoped for as a substitute for social planning,” and perpetuating “fear, based on ignorance and false beliefs about disability.”⁵² Sadly, it is commonplace to observe that the concept of disabil-

46 Devlin and Pothier, *supra* note 40 at 5.

47 *Defining Disability*, *supra* note 38.

48 Devlin and Pothier, *supra* note 40 at 10.

49 Marcia H. Rioux & Fraser Valentine, “Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy” in Devlin & Pothier, *supra* note 40, 47 at 52 [Rioux & Valentine].

50 Devlin and Pothier, *ibid.* at 15.

51 Rioux and Valentine, *supra* note 49 at 56.

52 Susan Wendell, *The Rejected Body* (New York: Routledge, 1996) at 53.

ity as societal rather than individual failure has been “undercut by the forces of neo-liberalism,”⁵³ increasingly leaving the needs of people with disabilities to be met by charitable organizations rather than the state (in its many forms). In cases like *Eldridge v. British Columbia*⁵⁴ (“*Eldridge*”) and *Granovsky v. Canada*⁵⁵ (“*Granovsky*”), the Supreme Court of Canada has recognized the social construction model of disability. In *Eldridge*, the court describes how people with disabilities “have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.”⁵⁶ In *Granovsky*, the court describes the current goal as “seek[ing] to improve the legal position of individuals with disabilities to counteract socially constructed handicaps.”⁵⁷ However, Dianne Pothier reports that in at least one subsequent case where complainants had disabilities, “the social model of disability was not apparent in the court’s analysis.”⁵⁸ It is unclear whether this represents a retrenchment or an oversight, but at the very least it suggests some level of confusion among the judiciary about the appropriate conceptual model of disability.

D. Post-Colonial Theory

While a critical disability perspective draws attention to the theoretical bases that root different understandings of disability, it is also important to pay attention to the cultural perspectives that affect understandings of disability. These perspectives are likely to be entrenched, perhaps because “many ... explanations of disability are based on religious beliefs,”⁵⁹ and not likely to be amenable to paradigm shifts. Still, whether a person is willing or able to change his or her cultural perspective, it may be possible to understand one’s perspective as one among many, and not superior to others. Even this limited level of understanding should “reveal the contingent nature of ‘normalcy.’”⁶⁰ The separation of mind from body (mentioned above) is one example of a Western cultural norm that has been reiterated in Judeo-Christian religious traditions. It is not necessary for a person to abandon his or her religious beliefs, though, in order to see that his or her beliefs are one among many, or in order to realize that his or her own beliefs structure how he or she interprets the world.

The idea of Orientalism, as termed by Edward Said,⁶¹ can give the reader a way to think about how one cultural framework might interpret and represent another. Orientalism is concerned with relations of power between groups, the ways in which one group may represent another, and the (unintentional or not) effects of this representation—namely, that an invisible hegemonic discourse serves to disempower one group and legitimate the be-

53 Rioux and Valentine, *supra* note 49 at 63.

54 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 (QL) [*Eldridge*, cited to QL].

55 *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703. [*Granovsky*, cited to S.C.R.].

56 *Eldridge*, *supra* note 54 at para. 56.

57 *Granovsky*, *supra* note 55 at para. 68.

58 Dianne Pothier, “Legal Developments in the Supreme Court of Canada Regarding Disability” in Devlin & Pothier, *supra* note 40, 305 at 310.

59 Renteln, *supra* note 37 at 64.

60 *Ibid.* at 71.

61 Edward Said, “Orientalism” in Moustafa Bayoumi & Andrew Rubin, eds., *The Edward Said Reader* (London: Granta Books, 2000) 63 [Said].

liefs and perspective of the other. Said's concept of Orientalism emerged from studying the way the East (Orient, Other) was (and continues to be) constructed by the West (Occident, Self). Overall, he argued, the "Orient was almost a European invention ... a place of romance, exotic beings, haunting memories and landscapes"⁶² wherein the behaviours of the Orientals "serve[d] to highlight the sobriety and rationality of Occidental habits."⁶³ Said is seen as one of the founding theorists of postcolonialism, a school of theory that focuses on relationships of power and representation between colonizer and colonized, often highlighting how the colonized have been represented as Other to the colonizer's Self. This concept of the Eastern Other is important to my discussion of the *Mustapha* decisions because the court's view of the plaintiff in what it perceives to be his cultural context influences its assessment of his experience and his claim.

These theoretical models (feminist, critical disability, and postcolonial) help to draw out how certain subjective perspectives can become hegemonic, normalized, and apparently objective. Rather than believing in the authenticity of this objective gaze, I suggest that it be viewed as a rhetorical tool to lend legitimacy to what are subjective views. This is not to say that those subjective views are inherently discriminatory or lead to unjust decisions; rather, it is to say that all views and decisions are based on the subjectivities of the persons who make them. The next step is to view those subjective positions as not necessarily superior to other subjective positions: that is, increased attention must be paid to the marginalized perspectives "othered" by the normative gaze. In the context of the tort of negligent infliction of psychiatric injury where claimants are mentally disabled, I suggest this means valuing the experience of those claimants, recognizing the lenses through which they are interpreted and the modes by which they are disbelieved, disempowered, and dismissed.

Before moving on to read the *Mustapha* decisions through this lens of critical disability and postcolonial theory, I will first outline the tort at issue in the case—in particular, its history, development, and critiques.

III. CRITICAL SUMMARY OF THE TORT

The tort at issue in the *Mustapha* decisions is the negligent infliction of psychiatric injury (also referred to as "nervous shock"). As with other actions in negligence, the plaintiff must show that the defendant owed him or her a duty of care, that the standard of care was breached, that damage occurred, that the defendant's conduct was the cause of the damage, and that the damages are not too remote. It is hardly the only tort where mental disability is at issue, or where entrenched assumptions and cultural perspectives on mental disability matter. For example, the intentional counterpart of this tort, the intentional indirect infliction of mental suffering, is the only intentional tort for which proof of harm is a prerequisite: a plaintiff must prove that he or she has suffered a recognized psychiatric illness if he or she hopes to recover damages.⁶⁴ There is also much discussion of mental disability in

62 Said, *ibid.* at 66.

63 *Ibid.* at 108.

64 Lewis N. Klar, *Tort Law*, 3rd ed. (Toronto: Thomson Carswell, 2003) 73, 76 [Klar]; Allen M. Linden, Lewis N. Klar, & Bruce Feldthusen, *Canadian Tort Law*, 12th ed. (Markham: LexisNexis, 2004) 64-66. I am thankful to the external reviewer who pointed out that the historical development of the tort of intentional indirect infliction of mental suffering (otherwise known as "the tort in *Wilkinson v. Downton*") may also explain this anomaly. As an amalgamation of the approaches to direct and indirect interference with bodily security, proof of harm is still required (an echo of the indirect aspect), but the level of proof required may be questionable.

cases where it is used as a partial defence—in other words, where it is proven that a person’s actions could not have been intentional, or that he or she could not be expected to be held to a duty of care or be liable for breaching a standard of care, because of a lack of mental capacity.⁶⁵ Unfortunately, it is beyond the scope of this paper to address how mental disability is treated in those areas of tort law. In the tort of negligent infliction of psychiatric injury, the “reasonableness” of a claimant’s disability is usually considered at the first stage of the negligence analysis—in determining whether a duty of care is owed—rather than as a limiting factor later in the analysis. Yet, as the Supreme Court of Canada’s decision in *Mustapha* shows, courts also consider the reasonableness of a disability as a limiting factor at the remoteness stage of analysis. Regardless of the stage at which disability is discussed, the courts are vague about what it means to be reasonably disabled.

A. Origins of the Tort

The first cases to deal with the negligent infliction of psychiatric injury came out of Britain and involved claims by pregnant women who sought compensation for physical injury caused by fright.⁶⁶ The earliest case seems to be the Privy Council’s 1888 judgment in *Victorian Railways Commissioners v. Coultas*.⁶⁷ Ms. Coultas was in a buggy with her husband and brother when an employee of the railway negligently signalled the buggy to cross the tracks into the path of an oncoming train. Her husband managed to push the buggy out of the way, but she fainted at the time, later suffered nervous shock and physical illness, and ultimately miscarried. The harm suffered by Ms. Coultas was not considered to be reasonable; that is, “a normal person would not suffer physical injuries as a result of such an incident.”⁶⁸ Twenty years later, in 1901, the Court of the King’s Bench allowed recovery in *Dulieu v. White & Sons*.⁶⁹ Ms. Dulieu was tending the bar in her husband’s public house when the defendant negligently charged his horses into the bar. She suffered from shock and physical illness, which led to the premature birth of her child. The court found that Ms. Dulieu’s statement of claim disclosed a good cause of action against the defendant.⁷⁰ Another twenty years later, in 1924, the English Court of Appeal heard in *Hambrook v. Stokes Bros.*⁷¹ an application by the deceased Ms. Hambrook’s husband under fatal accidents legislation (he had to show his wife would have been able to bring an action for damages had she survived).⁷² An employee of the defendant had left a motorcar running in the street, and as it rolled down the hill, Ms. Hambrook—who knew her three children were in the street, though only one was injured by the renegade motorcar—suffered severe shock. This shock, it was alleged, caused her to miscarry and eventually die of resulting complications. The Court found that the plaintiff was entitled to recover. Two decades later, in *Bourhill v.*

65 See, for example, Kristin Harlow, “Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness” (2007) 68 Ohio St. L. J. 1733.

66 The Honourable Mr. Justice Kenneth C. Mackenzie, “‘Oh, what a tangled web we weave’: Liability in Negligence for Nervous Shock” (2002) 17 S.C.L.R. (2d) 125 at 125-27 [MacKenzie].

67 *Victorian Railways Commissioners v. Coultas*, (1888) 13 App. Cas. 222, 57 L.J.P.C. 69 [Coultas].

68 Martha Chamallas & Linda K. Kerber, “Women, Mothers, and the Law of Fright: A History” (1989-1990) 88 Mich. L. Rev. 814 at 827.

69 *Dulieu v. White & Sons*, [1901] 2 K.B. 669, [1900-1903] All ER Rep. 353 [Dulieu].

70 In these reasons, the court was concerned (in response to the defendant’s demurrer) only with whether there was a cause of action, not with the amount of damages to be recovered if the plaintiff were successful.

71 *Hambrook v. Stokes Bros.*, [1924] All ER Rep. 110, [1925] 1 KB 141 [Hambrook].

72 *Fatal Accident Act 1846*, 9 & 10 Vict, c.93, otherwise known as “Lord Campbell’s Act.”

Young,⁷³ the House of Lords denied recovery for the physical injuries secondary to nervous shock of a plaintiff who was nearby and overheard a traffic accident caused by the defendant's negligence. Ms. Bourhill could not recover for the nervous shock and stillbirth she claimed to experience as a result.

That these foundational cases all deal with similar fact contexts, a frightened pregnant woman who suffers some physical reaction as a result of nervous shock, has not escaped observation. Martha Chamallas and Linda Kerber have noted the gendered nature of the law of fright. They observe that categorizing harm as “emotional” (as opposed to “physical”) has had a detrimental impact on women in that their injuries have been marginalized as “remote, unforeseeable and unreasonable.”⁷⁴ I return to the gendered history later in this paper to suggest that the disparaging approach generally taken to these “feminine” injuries has extended throughout the development of the tort to allow for “common-sense” criticisms of ontologically feminized plaintiffs such as Mr. Mustapha.

B. Development of the Tort

The development of the tort of negligent infliction of psychiatric injury has generally favoured defendants: it has focused on new justifications for restricting the ability of plaintiffs to obtain relief, and has been permeated with anxiety around the legitimacy of mental (as opposed to physical) suffering as compensable damage. Philip Osborne describes “the judicial approach to psychiatric injury” as one which is not only “cautious and conservative,” but which also “reflects a pro-defendant bias that seems out of step with the expansionary trends of modern negligence law.”⁷⁵ The courts have justified their reasoning as limiting the effects that unbridled liability might have on impeding daily activities and on increasing insurance rates, and as limiting the difficulty of having to deal with uncertain science.⁷⁶ Recovery has been limited mainly through restrictions on the duties of care that courts are willing to recognize.⁷⁷ In other words, the range of plaintiffs who are considered reasonably foreseeable—and on top of this, the types of harm that they may reasonably foreseeably suffer—is tightly circumscribed by the courts. Defendant-oriented concerns around the floodgates of liability (the prospect of liability to an unlimited class for an unlimited amount) are what seem to make the courts reluctant to see a plaintiff and his or her damage as reasonably foreseeable.

C. Restrictions: Reasonableness of the Injury

The courts have developed a number of ways to determine (or rather, restrict) foreseeability in the context of psychiatric injury. In a first category, one observes the ways courts interpret the reasonableness of the injury—requiring parameters on the types of situation

73 *Bourhill v. Young*, 1942 SC(HL) 78 [*Bourhill*].

74 Chamallas & Kerber, *supra* note 68 at 816.

75 Philip H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2007) at 82 [Osborne].

76 *Ibid.* at 83; John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: The Law Book Company, 1998) at 174 [Fleming]; Mackenzie, *supra* note 66 at 128; Louise Bélanger-Hardy, “Nervous Shock, Nervous Courts: The Anns/Kamloops Test to the Rescue?” (1999) 37 *Alta. L. Rev.* 553 at para. 63.

77 Osborne, *supra* note 75 at 82.

which could reasonably give rise to psychiatric injury,⁷⁸ and evaluating the authenticity of the injury.⁷⁹ When courts evaluate the reasonableness of the injury, they convert the question of foreseeability to a critique of the plaintiff (that is, was the plaintiff's reaction reasonable?, or was the plaintiff's response normal?) rather than an analysis of the defendant's scope of responsibility (that is, what would a reasonable person foresee as consequences of his or her actions?). While this may be a convenient analytical shift (indeed, there is no claim in negligence until the harm has been suffered), the scrutiny of the plaintiff seems especially pronounced in the case of psychiatric harm. Recovery is permitted only for those plaintiffs whose reactions show "reasonable fortitude and robustness,"⁸⁰ or as Osborne put it, "[n]o recovery is permitted if the injury is triggered by an abnormal sensitivity on the part of the plaintiff or a predisposition to psychiatric injury or illness."⁸¹ Although cases rarely seem to be decided on this issue, the Ontario Court of Appeal's 1999 decision in *Vanek v. Great Atlantic & Pacific Co. of Canada*,⁸² ("*Vanek*") may be considered one such case. The Vaneks alleged they had suffered psychiatric injury as a result of their daughter's consumption of juice negligently contaminated by the defendant. To the Vaneks, whose reactions were characterized as "highly unusual," the Court said, "Life goes on."⁸³ Regardless of one's opinion on whether the case was rightly or wrongly decided, the language of one of Canada's highest courts seems unusually dismissive.

The courts have also restricted recovery by requiring plaintiffs to show that they experienced "nervous shock," "a severe emotional trauma that manifests ... in a physical disorder or in a recognizable psychiatric illness."⁸⁴ The logic seems to be, as Lewis Klar puts it, that the presence of a recognized psychological disorder helps to "verify the reality of the trauma, and make it easier to distinguish trauma from sorrow."⁸⁵ But on the other hand, some observers are hesitant to defer to medical evidence: "[T]here must also be some scope for the exercise of common sense judgment about ... what is and what is not culpable."⁸⁶ Understanding the tort as one about "psychiatric damage," rather than "nervous shock," suggests that recovery may be had for a broader scope of damages, including "all relevant forms of mental illness, neurosis, and personality change."⁸⁷ The modern terminological

78 The following situations were found insufficient: being stuck in the path of an oncoming train (*Coultas*, *supra* note 67), overhearing a car accident (*Bourhill*, *supra* note 73), fear for the health of one's child (*Vanek*, *infra* note 79), watching people one is charged with helping be crushed to death (*White*, *infra* note 100), watching the decline of one's spouse (*Beecham*, *infra* note 94), learning of the death of one's child via radio (*Rhodes*, *infra* note 97), and, of course, seeing parts of two dead flies in one's bottle of water (*Mustapha*). On the other hand, situations found sufficient include the following: a team of horses charging into a bar (*Dulieu*, *supra* note 69), fear for the safety of one's children (*Hambrook*, *supra* note 71), observing one's injured family after a car accident (*McLoughlin*, *infra* note 93), and relapse into a pre-existing condition (*Page*, *infra* note 102).

79 Courts commonly require the plaintiff to prove a recognized psychiatric illness in order to recover for psychiatric damage. For example, see *Vanek v. Great Atlantic & Pacific Co. of Canada*, 48 O.R. (3d) 228, [1999] O.J. No. 4599 at para. 25 (C.A.) (QL) [*Vanek*, cited to QL].

80 *Ibid.* at paras. 58-59.

81 Osborne, *supra* note 75 at 84.

82 *Vanek*, *supra* note 79.

83 *Ibid.* at para. 60.

84 Osborne, *supra* note 75 at 83.

85 Klar, *supra* note 64 at 427.

86 Michael A. Jones, "Liability for Psychiatric Damage: Searching for a Path between Pragmatism and Principle" in Jason W. Neyers, Erika Chamberlain & Stephen G.A. Pitel, eds., *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 113 at 136 [Jones].

87 Klar, *supra* note 64 at 427. Here Klar says that this suggestion is "well taken, since many of the contemporary cases deal more with these latter types of disorders, and less with typical reactions of shock."

change reflects an increasing awareness that “[n]ormality is a biologically indefensible standard and tends to exclude too many deserving plaintiffs from legal protection.”⁸⁸ Still, the language of “reasonableness” and “ordinariness” continues to be juxtaposed with descriptors such as “exaggerated” and “obsessive,”⁸⁹ and proof of a recognized illness is still treated as a requirement.⁹⁰

D. Restrictions: Categories of Proximity

In a second category, one can group the ways courts have restricted the class of plaintiffs who may recover by the use of proximity factors; that is, courts have required that foreseeability of nervous shock be accompanied by a sufficient degree of proximity when plaintiffs are not the principal victims. Such plaintiffs must show that their damage was proximate to the incident from which liability is alleged to stem from one or more of three factors: relation (for example, close family members of a victim), physical location (at the scene or its aftermath), and/or time (that is, the damage arose from the incident, rather than other factors).⁹¹ In *McLoughlin v. O'Brian* (1983),⁹² for example, the House of Lords found that a woman could recover damages not for explicitly physical injuries, but rather for the depression and personality change resulting from nervous shock. The Court found that Ms. McLoughlin had suffered nervous shock by seeing her injured husband and two children (a third child died from her injuries) at hospital several hours after a serious motor vehicle accident caused by the defendant's negligence. Although not present at the accident, because of her close familial ties to the injured parties and her witnessing of the aftermath of the accident, Ms. McLoughlin fell within the scope of foreseeable plaintiffs. In contrast, in *Alcock v. Chief Constable of South Yorkshire Police* (1992),⁹³ the House of Lords denied recovery to friends and family members of deceased football fans crushed during the Hillsborough Disaster. The chief constable was found to be responsible in negligence for the overcrowding that led to the crushing deaths. Although many of the plaintiffs met the requirement of relational proximity, having watched the incident on live television or having heard about it on radio broadcasts did not bring them within sufficient proximity to the incident. For other plaintiffs, presence at the stadium without sufficient relational proximity was not enough to ground foreseeability. In *Beecham v. Hughes* (1988),⁹⁴ the British Columbia Court of Appeal denied a plaintiff's claim for damages following a car accident in which his wife suffered severe brain damage. Although Mr. Beecham was there and was himself injured, his depression was found to have come about as a result of his “inability ... to accept the fact that his wife w[ould] not again be the person she was before the accident.”⁹⁵ His injury did not meet the requirement of temporal (sometimes called “causal”) proximity because his depression was characterized as “reactive” to his partner's condition, not occurring as a result of the accident. Two years later, in 1990, when the Court of Appeal decided *Rhodes v. Canadian National Railway Co.* (1990),⁹⁶ it used the absence

88 Fleming, *supra* note 76 at 181. Also Bélanger-Hardy, *supra* note 77 at para. 74.

89 Mackenzie, *supra* note 66 at 129.

90 *Supra* note 79.

91 Osborne, *supra* note 75 at 87.

92 *McLoughlin v. O'Brian*, [1983] 1 AC 410 [*McLoughlin*].

93 *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 AC 310 [*Alcock*].

94 *Beecham v. Hughes*, 52 D.L.R. (4th) 625, 1988 CarswellBC 199 (C.A.) [*Beecham*, cited to CarswellBC].

95 *Ibid.* at para. 127.

96 *Rhodes v. Canadian National Railway Co.*, 75 D.L.R. (4th) 248, [1990] B.C.J. No. 2388 (C.A.) (QL) [*Rhodes*].

of temporal and locational proximity to limit recovery. In that case, the plaintiff sought damages for psychological injury that flowed from her son's death in a train accident caused by the defendant's negligence.

E. Restrictions: Primary vs. Secondary Victims

The British case law makes a further distinction between classes of plaintiff by dividing them into primary and secondary victims. A primary victim need only establish foreseeability of physical harm to establish foreseeability of nervous shock, while a secondary victim must show a relationship sufficiently proximate to a primary victim and the foreseeability of nervous shock in order to establish foreseeability at the duty of care stage.⁹⁷ However, many commentators point out that the distinction between these two categories is unclear: to Klar, it seems obvious that the “courts are struggling, with little success, to find words which can clearly explain why, on the basis of arbitrary policy choices, certain types of claim seem to be too remote and uncompensable.”⁹⁸ Or, as Bélanger-Hardy puts it, “[r]esorting to a primary/secondary paradigm simply camouflages the policy choices that must be made.”⁹⁹ Indeed, the policy-driven nature of the distinction can be seen in the House of Lord's 1999 decision in *White v. Chief Constable of South Yorkshire Police*,¹⁰⁰ where police officers present at the Hillsborough Disaster were denied recovery for psychiatric injury caused as a result of futilely trying to rescue people being crushed. The court held that a rescuer who is not at risk of physical injury is a secondary victim, and in this case they were unable to satisfy the additional relational requirement placed on that class. But, more tellingly, it said it would be unjust for the police officers to recover damages when the close family members of the deceased were denied in *Alcock*.

At times, however, this mode of categorizing claimants has worked in the plaintiff's favour. For example, in *Page v. Smith* (1996),¹⁰¹ the House of Lords held that the defendant whose negligence caused a car accident was liable to a plaintiff who was physically unhurt, but who experienced a relapse into his chronic fatigue syndrome as a result. Indeed, given the particular stigma that has surrounded this condition, which is still sometimes dismissed as the “yuppie flu,”¹⁰² being a primary victim worked in the plaintiff's favour in this case because he did not have to prove foreseeability of nervous shock. However, while the distinction between primary and secondary victims exists in the British case law, it has not been adopted in Canada.¹⁰³

F. Criticisms of the Tort

Expressions of confusion and dissatisfaction with the state of the law in this area are ubiquitous. Indeed, the law on the negligent infliction of psychiatric injury leaves many criti-

97 Klar, *supra* note 64 at 431.

98 *Ibid.* at 432 [emphasis in original].

99 Bélanger-Hardy, *supra* note 76 at para. 24.

100 *White v. Chief Constable of South Yorkshire Police*, [1999] 2 AC 455 [*White*].

101 *Page v. Smith*, [1996] 1 AC 155, [1995] 2 All ER 736 [*Page*].

102 Zoe Cormier, “Patient delusion – or medical confusion?” *The Globe and Mail* (20 January 2007) F8.

103 *Mustapha et. al. v. Culligan of Canada Ltd.*, (2006) 84 O.R. (3d) 457, 275 D.L.R. (4th) 473 at para. 36 (C.A.) [*Mustapha CA*, cited to O.R.]. Although the Supreme Court of Canada did not dismiss the distinction outright, the Ontario Court of Appeal rejected the distinction.

cal observers puzzled: “[F]ew observers would claim that negligence law in respect of psychiatric injury is in a satisfactory state.”¹⁰⁴ The state of the law has led one observer to note that “it is difficult to think of another branch of [negligence] that has been subject to such extensive condemnation.”¹⁰⁵ Another has noted a trend in these cases toward a rhetoric of “principle,” which allows the judiciary to legitimate decisions that may really be based on policy: “Once the discourse involves considerations of principle[,] ... there was no exercise of judicial discretion based on the grounds of policy but ... the right answer was already inherent in the principles underlying the law.”¹⁰⁶ In his text, Fleming suggests that the present modes of demarcating claims worthy of compensation from those which are not “are not sufficiently stable as guides to future decisions.”¹⁰⁷ Or, as Lord Hoffman put it, “in this area of the law, the search for principle [has been] called off.”¹⁰⁸ The Honourable Mr. Justice Kenneth Mackenzie has commented that “the foreseeability test alone is inadequate and ... its superficial application may conceal policy considerations that would better be openly admitted.”¹⁰⁹ Some commentators are more direct with their criticism. For example, Osborne makes an explicit criticism of the motivating policy factors behind the restrictions on recovery for psychiatric injury: “The stigma of mental illness ... can produce a visceral discomfort, born of ignorance and anxiety, which may result in a lack of compassion and sensitivity to [its] serious and debilitating consequences.”¹¹⁰ Mackenzie J.A. observes with approval that “[s]ome of the vulgar skepticism about psychiatric illness has been dissipated,” but expresses reservations about the science on which judges are intended to rely: “[T]he science is still soft, and the law, being dependent upon the science, remains in an unsatisfactory state. Nervousness about nervous shock will continue.”¹¹¹

It is safe to say that no one praises the state of the law on negligent infliction of psychiatric injury. The uncertainty comes in what to do about it: should the scope be restricted further, because of the uncertainty of medical evidence and the ubiquitousness of mental illnesses such as anxiety and depression,¹¹² or should we “risk” expanding the scope of liability in order to be more consistent in method and respectful of plaintiffs’ lived realities? These questions and concerns about the state of the law seem to flow from the fact that there are several different ways to approach the foreseeability analysis, whether at the duty of care or remoteness stage of the analysis, and little judicial direction (in Canada) about which route is preferred.

104 Osborne, note 75 at 89.

105 Fiona Leverick, “Counting the Ways of Becoming a Primary Victim: *Anderson v. Christian Salvesen Plc.*” (2007) 11 Edin. L. R 258.

106 Joseph M. Thomson, “Principle or Policy? The Judicial Development of the Law of Delict” (2003) 56 *Current Legal Problems* 123 at 125, 150.

107 Fleming, *supra* note 76 at 179.

108 Mackenzie, *supra* note 66 at 130.

109 *Ibid.* at 133-34.

110 Osborne, note 75 at 83.

111 Mackenzie, *supra* note 66 at 148.

112 Statistics Canada estimates that major depression “affects 1 in 50 Canadians at any moment, 1 in 20 in the course of a year, and 1 in 10 in their lifetime.” Statistics Canada, “Study: A profile of clinical depression in Canada” *The Daily* (9 April 2008) online: Statistics Canada <<http://www.statcan.ca/Daily/English/080409/d080409d.htm>> [Statistics Canada].

G. Proposals for Change: Law Reform

Several Commonwealth states have begun to pursue legislative reform in this area of the law. In 1998, the Law Commission (England and Wales) recommended legislation to codify and deal with limited aspects of the law.¹¹³ The Commission's recommendations would make it somewhat easier for close family members to claim damages, recommending legislation that would permit recovery to those with "tie[s] of love and affection" regardless of locational or temporal proximity.¹¹⁴ The Scottish Law Commission's 2004 report attempts to do away with the terminology of, and distinction between, primary and secondary victims, instead requiring those not directly involved in an incident to show that they had a close relationship with the person injured in the incident and that his or her psychiatric injury was reasonably foreseeable.¹¹⁵ In New South Wales (Australia), the *Civil Liability Act 2002* restricts the scope of recovery for negligently inflicted psychiatric harm by permitting recovery "only if the plaintiff witnessed the incident at the scene, or ... is a close relative of the immediate victim," and to situations where the plaintiff was "of normal fortitude."¹¹⁶ As (Dyanah) Nicole Seeto observes, the legislation thereby reintroduces notions of proximity and normalcy that had been rejected "as irrational and arbitrary by the High Court."¹¹⁷ Prior to the legislative change, the High Court of Australia (the equivalent to the Supreme Court of Canada) had gone so far as to say, "[u]nprincipled distinctions and artificial mechanisms of this type bring the law into disrepute."¹¹⁸

H. Proposals for Reform: Canadian Commentary

In Canada, while there has been much criticism of the state of the law in cases, textbooks, and articles, there have been few proposals for change. Writing prior to the Supreme Court of Canada's decision in *Mustapha*, Louise Bélanger-Hardy observed that there were "three distinct approaches" to negligent infliction of psychiatric injury in Canadian law.¹¹⁹ In "[t]he absence of a uniform analytical framework," she suggests, "policy considerations are not discussed as openly as they should be."¹²⁰ Bélanger-Hardy therefore advocates the use of the two-part *Anns/Kamloops* test,¹²¹ which has been approved by Canadian courts in a number of other areas of negligence law as a test for establishing a duty of care. This test involves looking first for foreseeability based on the relationship between the parties, and second, asking whether there are policy considerations which ought to limit the scope of the duty, the class of persons to whom it is owed, or the damages that may be awarded.¹²² At the first stage, this would mean not only looking for a duty owed to the person either individually

113 The Law Commission (England and Wales), *Liability for Psychiatric Illness*, 1998, HC525.

114 *Ibid.* at 123. It is unclear whether any of these suggestions have been implemented. The draft legislation proposed by the Commission does not appear to have been enacted.

115 Leverick, *supra* note 104 at 264. It does not appear that these suggestions have been implemented by legislation.

116 (Dyanah) Nicole Seeto, "Shock Rebounds: Tort Reform and Negligently Inflicted Psychiatric Injury" (2004) 26 Sydney L. Rev. 293 at 297, 302.

117 *Ibid.*

118 *Tame v. New South Wales* (2002) 191 ALR 449 (HC), (*sub nom. Annetts v. Australian Stations Pty. Ltd.*), at paras. 190. See also paras. 187-91.

119 Bélanger-Hardy, *supra* note 76 at paras. 4, 13-15.

120 *Ibid.* at para. 16.

121 As outlined in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, 129 D.L.R. (3d) 111.

122 Bélanger-Hardy, *supra* note 76 at para. 27.

or as part of a class, but also foreseeability of some form of psychiatric damage¹²³ which, it is suggested, should only be limited where “it is totally unreasonable to conclude that the damage is foreseeable.”¹²⁴ By moving to this test, Bélanger-Hardy’s hope is that “[c]riteria that ... have been used to define the legal test for the duty of care can now be recognized as policy-based ways by which to curtail indeterminate or inappropriate recovery.”¹²⁵

I agree with Bélanger-Hardy that by encouraging the courts to be more explicit about the policy factors that motivate the restriction of recovery under the negligent infliction of psychiatric injury, one can hope to have a clearer understanding of the reasoning that goes into these decisions. Indeed, this is the kind of active reasoning process that might enable judges to be more aware of their affective starting points and assumptions. It is also possible that the *Anns/Kamloops* test may allow the courts more latitude to consider broad social policy, perhaps even the influence of *Charter* rights and values, at the second stage.¹²⁶ Since Bélanger-Hardy’s proposal, however, the Supreme Court of Canada has adapted the *Anns/Kamloops* test in *Cooper v. Hobart* to include policy factors at the first stage of the duty of care analysis.¹²⁷ It is uncertain whether Bélanger-Hardy would advocate for the use of this adapted test. Regardless, by raising the question of foreseeability of psychiatric damage at the first stage of the test, as she suggests, the same policy factors—the floodgates fear of limitless liability, the fear of malingering and unreliability of scientific evidence, and others—can retain a shell of respectable legal principle.

These particular policy factors seem to flow, at least in part, from the gendered nature of this tort. From Chamallas and Kerber’s analysis of the early fright cases, there are at least three aspects that support a view of this tort as gendered: a “belief that only supersensitive or abnormally delicate persons could suffer physical harms from fright,”¹²⁸ “a fear that allowing a cause of action for fright-based injury would open the courts to imaginary claims,” and “a sympathy for the plight of corporate defendants exposed to claims by a potentially large class of persons.”¹²⁹ These assumptions presuppose that the “male” response to certain situations is the norm, that women give unreliable descriptions of their experience (and would even fabricate illness), and the public at large should not be burdened with accommodating women’s private injuries. “Degendered accounts of the evolution of the law,”¹³⁰ as Chamallas and Kerber describe the reporting, have obscured these biased assumptions. By framing the foreseeability of psychiatric injury as a non-policy factor, these gendered assumptions maintain an illegitimate position of authority.

By embracing the test in this form (that is, considering the foreseeability of injury as a non-policy factor at the first stage), we would be upholding an approach that relies on mascu-

123 *Ibid.* at para. 50.

124 *Ibid.* at para. 58.

125 *Ibid.* at para. 60.

126. Here I build on Lewis Klar’s suggestion that the *Anns/Kamloops* test has been to negligence law what the *Charter* has been to public law; that is, an explicit means of considering and valuing social policy making in the law. See Lewis N. Klar, “Judicial Activism in Private Law” (2001) 80 Can. Bar Rev. 215 at 218, 222.

127 *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

128 Chamallas and Kerber, *supra* note 68 at 832.

129 *Ibid.* at 833.

130 *Ibid.* at 823.

line, majoritarian assumptions to denigrate the experience of plaintiffs who are thereby ontologically feminized. There is also a danger that, where plaintiffs are perceived for other reasons as being more delicate or sensitive (or somehow “other”), that those personality traits may funnel judicial reasoning toward these assumptions. While there is some consensus that the line between physical and emotional injury is more blurry than not, the understanding of psychiatric injury as merely “emotional” harm has been another legacy of the gendered nature of this area of the law.¹³¹ And, although the courts may consider more plaintiff-oriented policy concerns (such as the impact of *Charter* rights and values) under the second branch of the test, the development of the tort (as described above) reveals an emphasis on defendant-oriented policy concerns as more legitimate. Finally, the test as suggested by Bélanger-Hardy does not help us address the unpredictability in how courts consider reasonableness of injury at the foreseeability stage of analysis.¹³²

I. Criticisms from Critical Disability Theory

Although critiques of this area of the law have highlighted the arbitrariness, unjustness, and gendered nature of this tort, I have yet to come across one that takes a critical disability perspective. Nonetheless, this analysis and criticism of negligence law would not be the first to adopt a disability rights perspective. Jacobus tenBroek’s 1966 critique of tort law’s treatment of the disabled condemned the disconnect between public policy and private law.¹³³ In order to give full effect to a disabled person’s “entitle[ment] to live in the world,”¹³⁴ tenBroek argued, it is necessary to complete the paradigm shift in private law by recognizing, for example, that the disabled are foreseeable members of society,¹³⁵ and that the fact of their disablement does not constitute contributory negligence.¹³⁶ His writing draws out the importance of subjective experiences of disability, and the practical aspects of the interaction of law with life:

The disabled prospective plaintiff does not wait to read the latest negligence decision before going out. ... Even if he did so and could understand it, the chances are good that he would reject it. The courts’ notions of a reasonably prudent disabled person often do not agree with the notions of the reasonably prudent disabled person himself.¹³⁷

He juxtaposes this subjective experience of the world with what the law supposes is a reasonable person, and suggests that it is impossible for most legal decision makers to properly include the perspectives of the disabled in the reasonable person standard:

However much the courts may instruct juries that the reasonably prudent man is an idealized mortal, possessing human, not superhuman

131 *Ibid.* at 864.

132 I understand that Bélanger-Hardy will be publishing on this area of the law in a special edition of the *Supreme Court Law Review* on Critical Torts (forthcoming in February 2009). That work, however, was not available to me when writing and editing this paper for publication.

133 Jacobus tenBroek, “The Right to Live in the World: The Disabled in the Law of Torts” (1966) 54 Cal. L. Rev. 842 [tenBroek]. See also Adam A. Milani, “Living in the World: A New Look at the Disabled in the Law of Torts,” (1998-1999) 48 Catholic U. L. Rev. 323 at 326 [Milani].

134 William Prosser, *Law of Torts*, 3d ed. (St. Paul, Minn.: West, 1964) cited in tenBroek, *ibid.* at 851.

135 tenBroek, *ibid.* at 875.

136 *Ibid.* at 876.

137 *Ibid.* at 916.

virtues ... [,] when the ... judge has sound if somewhat aging limbs, fair enough eyesight, and, according to counsel, can hear everything but a good argument[,] ... [t]he actions of the reasonably prudent man in like circumstances turn out to be not those taken by the reasonably prudent man actually in the circumstances, but those which a man not in those circumstances imagines he would take if he were in them.¹³⁸

This comment is echoed more recently by Mayo Moran when she notes that the reasonable person “in practice turns out to be deeply indebted to troubling conceptions of what is normal or ordinary.”¹³⁹ Since “the mentally disabled are ... not seen as normal,” the reasonable person standard permits stereotypical thinking about people with mental disabilities, and excludes them from the realm of “normal”—as “idiosyncrasy, ...peculiarity, an[d] abnormality.”¹⁴⁰

Thirty years after tenBroek’s influential analysis, Adam A. Milani undertook to see whether the courts had changed their approach to the disabled in the law of torts, and found that, “with a few notable exceptions, courts have not.”¹⁴¹ Milani found that, overall, disability was still understood by the courts in terms of individualized, medicalized, abnormality: “The focus ... is on how the individual adapts to his or her disability, not [on] how society as a whole should deal with people with disabilities.”¹⁴² He suggests a reciprocal responsibility between the disabled individual and society: “Courts should require not only that people with disabilities take precautions for their own protection, but that society acknowledge their existence and make accommodations for them.”¹⁴³ In the Canadian context, Gerald Robertson suggests that the law has, on the whole, approached mental disabilities with fear (reflected in isolationist and eugenic policies),¹⁴⁴ and paternalism (seeing disabled people as patients in need of help and intervention).¹⁴⁵ At the same time, he also suggests that the law can be an instrument of social change—that it could change entrenched social views and assumptions about disabilities.¹⁴⁶

J. Application of Critical Framework to the Tort

Before moving to the *Mustapha* decisions, I propose to outline two main critiques of the tort of negligent infliction of psychiatric injury from the critical perspective I outlined earlier in this paper. First, I criticize the assumed superiority of legal common knowledges over medical knowledge, and second, I highlight the discriminatory effects of the reasonableness standard. Earlier, I outlined a critique of claims of objectivity, truth, and common sense by paying attention to subjective responses and keeping in mind the disciplinarity of law. I identified a critical disability perspective as one that is self-consciously political, that

138 *Ibid.* at 917.

139 Mayo Moran, *Rethinking the Reasonable Person* (Oxford: Oxford University Press, 2003) at 9.

140 *Ibid.* at 9.

141 Milani, *supra* note 133 at 328.

142 *Ibid.* at 329.

143 *Ibid.* at 417.

144 Gerald B. Robertson, “Mental Disability and Canadian Law” 2:1 (1993) *Health L. Rev.* 23 at paras. 3, 5 [Robertson].

145 *Ibid.* at para. 27.

146 *Ibid.* at para. 1.

draws attention to the contingent nature of “normalcy,” and deconstructs behaviours such as “passing.” (I suggested a view of “disablement,” not as individual flaw, but rather as a social failure to prioritize and operationalize substantive equality for those who have differing levels of ability and need. In addition to these, I outlined the post-colonial idea of Orientalism as a way of understanding the way culture frames and is framed by the law. I have already suggested that the judicial reasoning in this area of the law is neither imperious nor objective, and that its reliance on discriminatory assumptions about mental disability should be interrogated.

I anticipate at least two initial reactions to the critical approach I have proposed. The first might be that, although disability rights are clearly meaningful human rights in the public realm, it would be unjust to expand liability for negligently inflicted psychiatric injury because it would place an undue burden on private litigants. Indeed “if governments were required to provide basic human rights to all citizens, including adequate housing, health care, education, and other services, there would be little need for any definition of disability”¹⁴⁷ – and perhaps even less for private litigation over disablement. However, this attitude overlooks the possibility for private law to lead public policy, and fails to see that, if one is to respect the equality and dignity of people with disabilities, those rights must be respected in all areas of (legal) life if they are to have substantive effect.

Second, there may also be some conceptual difficulty with looking at the treatment of disabled plaintiffs who suffer psychiatric injury, and those plaintiffs who become disabled through psychiatric injury on the same conceptual plane. Although these two kinds of plaintiff may raise different concerns, both are suitable for consideration from a critical disability perspective. The former may be treated as though she is abnormally sensitive or predisposed to injury, while the latter may be accused of exaggerating or fabricating his damages. Both treatments engage assumptions and biases with which critical disability theory is very concerned. In the first case, to reduce liability for injury to a previously disabled plaintiff is to place blame for that disability on the individual, and to lower her legal rights in relation to a (presumably) able defendant. In the latter, to assume that because a disabling condition is not visible it must not be real relies on the Cartesian assumption that the mind is separate and above the body, and also incorporates a moral condemnation of the disabled plaintiff – that is, if he is fabricating or exaggerating, he cheats the system, and if he is genuine, his failure to recover from injury is indicative of his low moral fibre. Although the disability may be interpreted by observers in different manners, both kinds of plaintiff are thus of concern in a critical disability analysis.

K. Medical vs. Legal Knowledges

One of the most challenging aspects of the tort of negligent infliction of psychiatric injury is the interface between medical and legal modes of reasoning. While, on the one hand, the courts require the plaintiff to show that he or she suffered a recognized psychiatric illness, on the other, they are unwilling to accept the subjective tools of analysis and treatment recognized as legitimate in medicine. Plaintiffs are required to show that they have been diagnosed with one of the conditions listed in the *Diagnostic and Statistical Manual of Mental Disorders IV (DSM IV)*,¹⁴⁸ and in the same breath the law requires the injury to have

147 Renteln, *supra* note 37 at 62.

148 *Diagnostic and Statistical Manual of Mental Disorders IV, Text Revision* (Washington: American Psychological Association, 2000) [DSM IV].

been foreseeable in a person of ordinary fortitude. The problem arises when one realizes that the *DSM-IV* diagnoses are built around (often self-reported) subjective criteria, and that the American Psychological Association actually expects practitioners to diagnose and treat conditions on a subjective basis.¹⁴⁹ In addition, there is a long tradition of hesitancy toward expert evidence from other disciplines in the law. J.M. Balkin describes this as “a sort of intellectual rope-a-dope”¹⁵⁰ in which “other disciplines ... punch away until they grow weary and retire exhausted”—presumably leaving legal reasoning, the victor, intact to dissect whatever material is brought before the court in whatever manner it sees fit.¹⁵¹ Lawyers and jurists are somehow content to see their modes of knowing as both superior and more universal than those of other disciplines. The science of psychiatric injury is perceived as “soft” (effeminate, Other), as if the law were “hard” (masculine, Self). For instance, Michael Jones holds steadfast that legal reasoning should not defer to medical evidence, either in the form of diagnoses—because the “*DSM-IV* is a *diagnostic* manual intended for therapeutic and research purposes”¹⁵²—or by way of accepting a less-than-bright line distinction between mental and physical conditions. With respect to the latter, he states:

Whatever the scientific arguments for treating psychiatric harm as simply a form of physical injury, the law is right to hold fast to the Cartesian mind/body dichotomy when it comes to our thinking about legal responsibility for harm, and what that harm involves. Cartesian dualism is embedded in much of lawyers’ thinking about the law and legal responsibility. It is probably how the man or woman on the Clapham omnibus conceptualizes the world.¹⁵³

Thus, lawyers and jurists have justified the re-evaluation of expert medical testimony by deferring to common knowledges and accepting those as authoritative because of their entrenched and omnipresent nature. Requiring the plaintiff to prove a diagnosis as a recognized psychiatric illness, and then proceeding to denigrate that diagnosis based on the very markers that mental health professionals have developed over years of practice and research, is at best unintentionally contradictory, and at worst, ignorant and potentially discriminatory.

L. The Reasonable/Ordinary Person

The second major obstacle in the law on this tort is the standard of the ordinary or reasonable person. Mayo Moran points out the benefit of the reasonable person standard: it can “mak[e] an otherwise abstract ... standard seem ... knowable,”¹⁵⁴ but in order to make it useful, we must “disentangl[e] the reasonable person from the ordinary person.”¹⁵⁵ The reasonable person is not the same as the ordinary person, but in the cases on psychiatric

149 The *DSM IV* particularly encourages practitioners to have regard to subjective experiences and knowledges in its “Outline for Cultural Formulation”, *ibid.* at 897-904.

150 *The Oxford English Dictionary*, Additions Series 1993, s.v. “rope-a-dope”. “A tactic whereby a boxer rests against the ropes and protects himself with his arms and gloves, so goading an opponent to throw tiring, ineffective punches [particularly associated with Muhammad Ali, who is said to have coined the phrase].”

151 J.M. Balkin, “Interdisciplinarity as Colonization” (1996) 53 Wash. & Lee L. Rev. 949 at 966.

152 Jones, *supra* note 86 at 137 [emphasis in original].

153 *Ibid.* at 138.

154 Moran, *supra* note 139 at 301.

155 *Ibid.* at 14.

injury, there is slippage between the two.¹⁵⁶ In addition to the criticisms discussed about reasonableness earlier (from Chamallas and Kerber, tenBroek, and Milani), I wish to emphasize the detrimental effects that arguments about malingering and fabrication have on plaintiffs and the system of justice as a whole. This criticism engages with the concept of “passing”: the process by which the able norm effectively mandates people with invisible disabilities to proceed in their daily lives as though they were not at all disabled (to “pass” as able) instead of expecting accommodation in accordance with their needs and abilities. Because of the pressure on people with disabilities to “pass”, the able majority is able to see the world as one where disability is rare, and to value physical manifestations of disability as more genuine than less visible signs. The able majority thereby develops the assumption that it must be easy to fake an invisible disability—and worse, that a morally reprehensible individual would be able to fake their way into financial gain. Indeed, as one study notes, “[i]n a legal context, more visible injuries and losses create an immediate expectation of impairment and a wish to compensate ... whereas ... the opposite expectation frequently occurs when there is no visible injury.”¹⁵⁷ The starting assumption (at least amongst defendant’s counsel) seems to be that the plaintiff’s injury is not as bad as he or she reports.¹⁵⁸ Given the historically (and perhaps present) dominant gender, race, and culture of the bench in Canada, it does not seem any accident that the groups of people whose reactions are more likely to be seen as irrational or unreasonable are “women more often than men, poor more often than rich, uneducated more often than well-educated, and ethnic minority members more often than Anglo-Saxon majority members.”¹⁵⁹ Indeed, the impact of the majority’s common-sensical reasoning is “demeaning to personhood and human flourishing” of those othered by the normative standard, and surely today, such “rel[iance] on biased assumptions”¹⁶⁰ has no place in the law. The present use of the concepts of reasonableness or ordinariness belittles the subjective experience of a person with mental disabilities and impinges on his or her dignity.

These two critiques—of the assumed supremacy of legal over medical knowledge, and the discriminatory effects of the reasonableness standard—are the central ones I have to make regarding the tort of negligent infliction of psychiatric injury, though more nuance will emerge as I apply the same framework and considerations to the *Mustapha* decisions.

IV. APPLICATION TO THE *MUSTAPHA* DECISIONS

In the Introduction, I suggested that there was a presumption of unreasonableness throughout the judgments that indicated both a societal bias and legally indoctrinated discrimination against not only Mr. Mustapha, but also plaintiffs in psychiatric injury cases more generally. I will now explain where I see this presumption in the judgments, and how it works. It is present in the specific language used to describe Mr. Mustapha and his experi-

156 For example, see *Mustapha CA*, *supra* note 103 at para. 54, and *Mustapha SCC*, *supra* note 1 at para. 14.

157 Judy A. LePage, Grant L. Iverson & Peter Collins, “The impact of judges’ perceptions of credibility in fibromyalgia claims” (2008) 32:30 *International Journal of Law and Psychiatry* at 31.

158 This was the starting assumption of defendant’s counsel in *Mustapha*, who claimed that his symptoms were “exaggerated if not fabricated.” *Mustapha v. Culligan of Canada Ltd.*, [2005] O.T.C. 276, [2005] O.J. No. 1469 at para. 1 (QL) [*Mustapha SCJ*], cited to QL.

159 Jionette Watson Hamilton, “The Use of Metaphor and Narrative to Construct Gendered Hysteria in the Courts” 1:2 (2002) *J.L. & Equality* 155 at 157.

160 *Ibid.* at 201.

ence, in the reliance on concepts of common sense and objectivity, and in the way the courts address a particular audience.

A. The Disabled Claimant as the *Unreasonable Person*

The courts present Mr. Mustapha's claim as "unreasonable" primarily through the language and presumed binary of subjectivity and objectivity. Although the trial judge finds in Mr. Mustapha's favour, he describes his reaction to finding the fly remains in the bottle of water as "objectively bizarre"¹⁶¹ and "certainly unusual."¹⁶² Brockenshire J. notes language of various expert medical witnesses that highlights the subjectivity of Mr. Mustapha's reaction and diagnoses. Mr. Mustapha's family doctor "had never seen anything quite like the symptomatology described by Mr. Mustapha, and ... felt it was highly unusual."¹⁶³ Dr. Clyne, Mr. Mustapha's psychologist, administered tests that "were entirely subjective."¹⁶⁴ Dr. Williamson, a psychiatrist called by the defence, described Mr. Mustapha's presentation as "overly dramatic" and "rather insincere."¹⁶⁵ Dr. Derry, a psychologist called by the defence, thought Mr. Mustapha was "ma[king] a deliberate attempt to make himself look disturbed and disabled"¹⁶⁶ and that "it was neither possible nor logical to attribute Mr. Mustapha's symptoms to viewing the fly."¹⁶⁷ Not only do these descriptions imply that Mr. Mustapha's reaction should be considered individualistic, subjective and strange, but they go further to suggest that they must therefore have some element of dishonesty or falsity. Yet the medical evidence confirmed that Mr. Mustapha suffered from depression and anxiety,¹⁶⁸ and that those conditions "are psychological disabilities."¹⁶⁹ The trial judge concludes by rationalizing Mr. Mustapha's subjectivity, describing him as an acceptable claimant: he was "a person with the sensitivities that ... would make him what he was—a good and faithful customer of the Culligan company."¹⁷⁰

Still, the problem with these statements regarding the subjectivity of Mr. Mustapha's reaction is that they imply the existence of an objective standard for comparison—an objectively rational, logical, reasonable person whose reactions to the stresses of life are predictable. In judicial parlance, this standard has been referred to as that of "the reasonable man," "the man in the street," or "the man in the Clapham omnibus," or ... "the man who ... in the evening pushes the lawn mower in his shirt sleeves."¹⁷¹ The idea seems to be that reactions characterized as "subjective" are idiosyncratic, illusory, too much wrapped up in feelings, and exist only in the mind of the beholder. Yet the hypothetical objectively reasonable person is perhaps more of an illusion. This is especially so where the standard is used to measure the reactions of litigants with disabilities: how can the man on the Clapham omnibus be expected to appreciate the experience of such a litigant when he has no concept of how

161 *Mustapha* SCJ, *supra* note 158 at para. 180.

162 *Ibid.* at para. 191.

163 *Ibid.* at para. 84.

164 *Ibid.* at para. 97.

165 *Ibid.* at para. 131.

166 *Ibid.* at para. 152.

167 *Ibid.* at para. 154.

168 *Ibid.* at para. 110.

169 *Ibid.* at para. 118.

170 *Ibid.* at para. 226.

171 *Hall v. Brooklands Auto-Racing Club*, [1932] All ER Rep. 208, [1933] 1 KB 205 (C.A.), Greer L.J., at 14 (QL).

the world is seen by a person who experiences difficulty in even obtaining carriage on that revered chariot of normalcy? (Indeed, when this standard was conceptualized, it is doubtful that the Clapham omnibus was accessible to people with disabilities.) The use of this objective standard thus serves to devalue the actual experience of people othered by the normative standard.

This rhetoric of objectivity has become ingrained in legal language, and the standard of an objective, reasonable person has been recognized nearly universally as a mark of logic, fairness, and balancing of competing interests. But, as it stands in the context of the negligent infliction of psychiatric injury, the objective reasonable person standard does not adequately incorporate the experience of people with disabilities. Framing the standard as a reasonable person “in the circumstances” of the case does not improve matters: the actions or reactions of a person are still being measured by a standard that does not take their lived experience into account. As tenBroek says, “[t]he actions taken by the reasonably prudent man in the circumstances turn out to be ... those which a man not in those circumstances imagines he would take if he were in them.”¹⁷²

I suggest that the attachment to this language of objectivity and its impact on certain classes of litigant should be more thoroughly investigated. Judges apparently do not feel compelled to justify the use of an objective standard to adjudicate specific contextualized claims: it is presumed that the legal community accepts this standard. In a pattern reminiscent of Valverde’s description of how legal reasoning constructs knowledge, the law thus creates a lens, presumes its legitimacy, and applies it to the claims brought by litigants. In so doing, the law constructs a standard that excludes from its vision (or at least frames as less legitimate) the lived experiences of a class of people. This is problematic in an age when the law (both in statute and common law) claims to afford such classes of litigant—likely those who have been othered in society more generally—equal rights. Incorporating the modifier that the reasonable person should be presumed to “suppor[t] the fundamental principles entrenched in the *Constitution* and the *Charter*”¹⁷³ (along the lines of Boyle and MacCrimmon’s suggestion) may go some way toward equalizing the application of this standard, but in my opinion it does not go far enough. As can be observed in the area of equality jurisprudence under the *Charter*, simply because a right against discrimination is constitutionalized does not mean that it is adequately enforced by the courts. Rather, what is needed is a loosening of the courts’ attachment to the binary of subjectivity and objectivity. This is not to say that the court should simply accept the subjective experience of a litigant as conclusive, but rather that the acceptance of a supposedly objective standard should be actively questioned. Such an approach would implement Jennifer Nedelsky’s idea of embodied diversity: by coming to grips with the reality that there is no such thing as a disembodied objective perspective, judicial reasoning might better protect the right of people with disabilities to be free of discrimination. Similarly, building on Lennard Davis’ approach, by acknowledging the fear that underlies the binaries able/disabled and mind/body, those binaries may lose some of their normative power.¹⁷⁴ As it stands, this objective standard serves to denigrate the claims of mentally disabled claimants before the claim has even been argued.

172 tenBroek, *supra* note 133 at 917 [emphasis added].

173 Boyle & MacCrimmon, *supra* note 14 at 79.

174 Davis, *supra* note 39.

B. *Mustapha* at Three Levels of Court

The irony of the *Mustapha* decisions is that, although the trial judge seems to appreciate the illusory nature of the subjective-objective divide, the very language he uses to express this is what the subsequent courts cite to justify reversing his decision. It was foreseeable to Brockenshire J. that “Mr. Mustapha, and other customers like him, would suffer ‘some degree’ of nervous shock” from finding parts of dead flies in their bottled water.¹⁷⁵ Although Mr. Mustapha’s reaction is perhaps not what a person not in the circumstances would expect, the trial judge notes that “for this particular man, the reaction was real, and turned into a recognizable psychological illness.”¹⁷⁶ That is, for a man actually in the circumstances of the plaintiff, this reaction was real—genuine and foreseeable. Despite the very subjective language of the expert medical evidence, Brockenshire J. accepted the evidence as establishing that Mr. Mustapha suffered from a legitimate psychiatric injury. He contextualized Mr. Mustapha’s reaction more thoroughly than do the subsequent courts by valuing (at least somewhat) subjective experience and reports. He found Mr. Mustapha’s testimony credible.¹⁷⁷ He even went so far as to criticize one of the defence’s medical experts for “citing the uniqueness of the incident as a reason for declining to make [a] diagnosis.”¹⁷⁸ In so doing, Brockenshire J. seems to accept the approach the medical community takes to diagnosis and treatment of mental disabilities. Indeed, what basis would there be for contradicting an approach wholeheartedly endorsed by a variety of professional medical associations?

I disagree with Michael Jones’ suggestion that the *DSM-IV* is less authoritative because it is a diagnostic manual (indeed, it is unclear what kind of guidelines would be preferable), or that legal knowledges are more preferable because they have been embedded—accepted as legitimate and true for so long. I do not mean to suggest that the effective requirement of a *DSM-IV* diagnosis in psychiatric injury cases is defensible; but rather that the courts should not require, and subsequently denigrate such diagnoses so eagerly. The trial judge in *Mustapha* seems to recognize the wide acceptance and value placed on subjective experience in treatment and diagnosis of psychiatric conditions. By the same token, he refuses to see Mr. Mustapha’s claims as fabricated simply because his symptoms and diagnoses may be described as subjective.

However, this acceptance of the value of subjective experience does not carry through to the Court of Appeal or the Supreme Court of Canada’s decisions. The Court of Appeal held that Brockenshire J. erred by failing to hold Mr. Mustapha’s reaction to an objective standard, and by being too lenient in his determination of foreseeability (relying on the possibility rather than the probability of damage).¹⁷⁹ The Court emphasized the subjectiveness and individuality of Mr. Mustapha’s reaction: “[T]his reaction, and the psychiatric injuries ... sustained, were a function [of] specific ... personal sensibilities.”¹⁸⁰ It described Mr. Mustapha as “an obsessive person of particular sensibilities.”¹⁸¹ It focused on language of

175 *Mustapha* SCJ, *supra* note 158 at para. 226.

176 *Ibid.* at para. 180.

177 *Ibid.* at para. 191.

178 *Ibid.* at para. 203.

179 *Mustapha* CA, *supra* note 103 at paras. 53-54.

180 *Ibid.* at para. 19.

181 *Ibid.* at para. 20.

the trial judge, such as describing Mr. Mustapha's reaction as "objectively bizarre,"¹⁸² or accepting as valid the subjective experience of Mr. Mustapha "and other customers like him."¹⁸³ But rather than giving any value to that subjective experience, the Court quotes the brash statement it made in *Vanek*: "Life goes on."¹⁸⁴ By ruling in this manner, the Ontario Court of Appeal follows the accepted legal language and standard, but fails to adequately contextualize its reasons. Further, it denigrates the medical evidence given at trial (though it is widely acknowledged that diagnosis and treatment of many mental disabilities are subjective) by stating that the medical experts "characterized Mr. Mustapha's reaction in individualistic terms and ... as unique and strange."¹⁸⁵ It would appear to me that the Court of Appeal, rather than really investigating what it would mean to take an objective perspective on Mr. Mustapha's situation and reaction, accepted the starting point available to those not in Mr. Mustapha's position that his reaction was "exaggerated" and "obsessive," and that the incident of finding the fly parts in the bottle of water was "in reality ... a relatively minor or trivial incident."¹⁸⁶

The assumption at work in the Court of Appeal's reasons might be described as the belief that mental disability is rare and only caused by the most traumatic events. However, the fear that underlies this assumption is neatly covered by the supposedly objective legal standard. As part of failing to adhere to an objective standard, Blair J.A. notes that Brockenshire J. had erred when he spoke of the "possibility of damage, including psychological damage" as sufficient to ground foreseeability.¹⁸⁷ Yet, the distinction between the probability and possibility of damage would normally be factors that a court would consider at the remoteness stage of the negligence analysis. This is significant because at this stage of the negligence analysis, the court is not concerned with liability itself, but with the extent of liability. That is, it would consider whether the extent of liability should be limited on the basis of a variety of policy factors, rather than by declining to recognize a duty of care.

At the Supreme Court of Canada, McLachlin C.J.C. (for the Court) continues to criticize the trial judge's application of a subjective standard. On its face, this judgment seems to recognize some of the peculiarities and contradictions of this area of law: for example, the court notes that "[t]he distinction between physical and mental injury is elusive and arguably artificial in the law of tort."¹⁸⁸ It takes a tone of clarifying the law, saying that a duty of care was clearly owed to Mr. Mustapha, as the consumer of a manufactured consumable good,¹⁸⁹ and that the duty of care was obviously breached by the presence of foreign elements that contaminated that product.¹⁹⁰ In acknowledging that Mr. Mustapha did in fact suffer psychiatric injuries, the judgment appears to defer to the medical evidence.¹⁹¹ However, the Court proceeds to simply state that he suffered those injuries in fact, but not in law: they were "unusual or extreme reactions," and although they were "imaginable," they were

182 *Ibid.* at paras. 13, 19.

183 *Ibid.* at para. 51.

184 *Ibid.* at para. 65.

185 *Ibid.* at para. 52.

186 *Ibid.* at para. 20.

187 *Ibid.* at para. 54.

188 *Mustapha SCC*, *supra* note 1 at para. 8.

189 *Ibid.* at para. 6.

190 *Ibid.* at para. 7.

191 *Ibid.* at para. 10.

“not reasonably foreseeable.”¹⁹² On the one hand, this reasoning does not shy away from recognizing a duty of care, but on the other hand, it flatly asserts that although injury was caused by the defendant’s negligence in fact, it was not caused in law. One explanation for this distinction is that the tort system cannot be expected to act as an insurance scheme. Such injuries as these might be recoverable if they could be expected of a person of ordinary fortitude, or if the defendant knew “the plaintiff was of less than ordinary fortitude.”¹⁹³ Thus, not only is Mr. Mustapha’s reaction presented as unusual, peculiar, even strange, but he himself is characterized as a deficient human being, “less than” some standard of ordinariness or normalcy. One might suggest that it would be helpful for the Court to offer some advice on who will be considered sufficient to meet the standard of ordinariness so that we know who among us should try to obtain insurance for psychiatric harm. Or, on the other hand, I would suggest that this uncritical reliance on a standard of ordinariness, of objectivity, itself appears to be unreasonable. Indeed, this supposedly objective standard appears not to be a vehicle of critical analysis, but rather a way of allowing entrenched assumptions about mental disability and ordinariness to maintain a cloak of authority—to appear as policy factors rather than as discrimination. Just as the early claimants in psychiatric injury cases saw their injuries feminized and downplayed, so the injuries of those who present as mentally disabled are ontologically feminized and othered by an able norm. Thus, the objective standard allows subjective assumptions (though unfortunately held throughout broader Canadian society) to appear as reasoned and objective, and as superior to the subjective experience of others. Mr. Mustapha, the “urban, and urbane hairstylist,”¹⁹⁴ is othered not only by his effeminacy (his sensitivity and occupation), but also by his national and ethnic origins.

C. Claimant as Other

Running parallel to the courts’ (mis)use of an objective standard to measure the reasonableness of Mr. Mustapha’s reaction, the treatment of his national origin and ethnicity is an important and troubling aspect of these decisions. At trial, the first background fact Brocksenshire J. notes about the plaintiff is that he “was born and raised in Lebanon,” and moved to Canada at the age of sixteen.¹⁹⁵ Mr. Mustapha’s psychiatrist gave evidence at trial that “people from the mid-east somatize depression”;¹⁹⁶ that is, there appears to be a tendency to experience and describe depression through physical symptoms. This assertion is supported by the research that has gone into the *DSM IV*’s guidelines on treatment.¹⁹⁷ In addition, the American Psychological Association has recently published guidelines specifically on multiculturalism and its importance and effects on psychological practice, including the need to be aware of the ways in which people of a variety of backgrounds may present symptoms.¹⁹⁸ Dr. Rai’s comment seems to give support to Mr. Mustapha’s diagnosis in that it explains how some of his more physical reactions—perhaps the vomiting, the difficulty sleeping, sexual dysfunction, etc.—are not exaggerations or performances, but

192 *Ibid.* at para. 15.

193 *Ibid.* at para. 17.

194 *Mustapha SCJ*, *supra* note 158 at para. 226.

195 *Ibid.* at para. 38.

196 *Ibid.* at para. 102.

197 *DSM IV*, *supra* note 148.

198 Nadya Fouad, Patricia Arredondo & Allen Ivy. *Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists* (Washington: American Psychological Association, 2002).

rather are symptoms of his depression. While the acceptance of this observation may be strange to those untrained in psychological practice, it is at least supported by practical experience.

In contrast, Brockenshire J.'s generalizations about Mr. Mustapha's culture may be more troubling. For instance, he states that for people of Middle Eastern descent "devotion to and concern for the family is at a higher level than is found in North America," and that they maintain a "higher level of cleanliness and avoidance of insects."¹⁹⁹ Thus, Mr. Mustapha's cultural background "predisposed [him] for the reaction that occurred."²⁰⁰ At the Court of Appeal, these observations are reframed: they are no longer mere generalizations about a cultural or ethnic community, but rather serve to make Mr. Mustapha and his reactions appear even more ridiculous. Blair J.A. interprets Mr. Mustapha's cultural background as something that makes him "unusual."²⁰¹ And, at the Supreme Court of Canada, McLachlin C.J.C. asserts that the trial judge erred when he took Mr. Mustapha's cultural background into account.²⁰²

There does not appear to be a satisfying solution to whether or not Mr. Mustapha's cultural background should have been factored into the reasonableness of his reaction. If it is, then the court risks relying on generalizations and assumptions about cultures which, given the historical (and perhaps present) composition of Canadian benches, will often be cultures other than their own. The court thus risks relying on discriminatory beliefs about other(ed) cultures. One solution might be Chief Justice McLachlin's—to not consider culture at all. However, by not considering cultural influences on reactions in psychiatric injury cases, judges still risk relying on outmoded assumptions by relying simply on their own understandings of what is reasonable. The court thus risks holding all plaintiffs to a standard of ordinariness that is itself culturally shaped. One result of this approach could be that courts will fail to take into account the relevant context of an incident or injury—which could itself result in discrimination against entire classes of plaintiffs.

I propose that the most satisfactory solution may be to take a cautious approach to including culture as a factor to consider in determining the foreseeability of a person's reaction. In a country that officially endorses multiculturalism as a policy, and has constitutionalized the right to freedom from discrimination on the basis of race, ethnicity, or national origin, it is unacceptable that the foreseeability of a plaintiff's reaction is judged from a majoritarian cultural perspective. Our courts seem to project the idea that people should display "a stiff upper lip" in the face of adversity, thus proving their ordinariness, robustness and fortitude—an assumption of decidedly British heritage. Although British culture may appear neutral because of its colonial relationship with Canada, this does not mean that it is impartial to apply that standard to all citizens who may appear as plaintiffs.²⁰³ As Boyle and MacCrimmon suggested, the objective standard that the courts purport to use should be one that supports the fundamental rights and principles of the Canadian constitution. Thus, if courts mean to protect the equality of people who appear before it, they must consider

199 *Mustapha* SCJ, *supra* note 158 at 211.

200 *Ibid.*

201 *Mustapha* CA, *supra* note 103 at para. 13.

202 *Mustapha* SCC, *supra* note 1 at para. 18.

203 The prevalence of mental disabilities (such as clinical depression, see Statistics Canada, *supra* note 112) should perhaps make us reconsider the meaning of "ordinary fortitude." If one in ten Canadians is expected to suffer from clinical depression in their lifetimes, it would seem incongruous to assume that a person suffering from clinical depression is of less than "ordinary" fortitude.

how culture may influence the way a person experiences the world.

Having discussed the largest assumptions that ground the courts' ability to presume the ridiculousness of Mr. Mustapha's injuries, I want to suggest a further factor that may be at work—that may make it even easier to persuade legal readers of Mr. Mustapha's unreasonableness.

D. Subtext of *Mustapha*: Creating an Audience

Although it is not explicit, I suggest that the factual similarity to *Donoghue v. Stevenson* (“*Donoghue*”)²⁰⁴ operates as a subtext throughout the *Mustapha* decisions. This helps create what I alluded to earlier as the community of like-minded readers. Although the argument in the *Mustapha* decisions focused on the tort of negligent infliction of psychiatric injury, the factual circumstances of the case bring together two areas of negligence law: both a manufacturer's liability in negligence to a consumer, and the infliction of psychiatric harm. Indeed, the fly in the bottle bears a striking factual resemblance to the snail in the bottle in *Donoghue*—a milestone of tort law in which the House of Lords found that a manufacturer of goods owed a duty of care to its ultimate consumer (not just the purchaser), and which marked the beginning of modern negligence law. In *Donoghue*, the plaintiff became ill after drinking a bottle of ginger beer in which there floated the remains of a snail. This case is already fodder for many a joke or parody among lawyers and law students—indeed, it was used as a case study and bonding mechanism during my first week at law school. The amusement seems to arise from the fact that the most famous case in tort law arose from the most bizarre set of circumstances (a snail in a bottle of ginger beer) and out of relatively mundane damage (a stomach flu). Thus, if this subtextual parallel operates as I suggest, it would not be a challenge to convince the legal community of the ridiculousness of the facts of Mr. Mustapha's case.

E. After *Mustapha*

One of the curious commonalities of both the Court of Appeal and Supreme Court of Canada's decisions is the presence of a caveat. At the beginning of his reasons, Blair J.A. states, “Nothing I say in these reasons is intended to minimize or belittle the difficulties [Mr. Mustapha] has experienced.”²⁰⁵ Similarly, McLachlin C.J.C. says that her reasons do “not ... marginalize or penalize those particularly vulnerable to mental injury.”²⁰⁶ However, even to a novice of law, it should be clear that simply saying does not make it so. In addition, one might suggest that these statements reveal a concern on the part of the courts that their reasons do appear discriminatory. Although I do not believe it is intentional on the part of the justices of the Ontario Court of Appeal or of the Supreme Court of Canada, I have suggested the means by which their reasons—and also those of Brockenshire J., although he found in favour of the claim—presume the ridiculousness of Mr. Mustapha's claim. In short, the judgments rely on broad, culturally influenced, assumptions about mental disability and about what it means to be ordinary. The effect of these assumptions is that a different standard applies to a class of plaintiffs in psychiatric injury cases because of their positions in the world. Moreover, the bases of the differential treatment are (in

204 *Donoghue v. Stevenson*, [1932] All ER Rep 1, [1932] AC 562 (HL).

205 *Mustapha CA*, *supra* note 103 at para. 18.

206 *Mustapha SCC*, *supra* note 1 at para. 16.

Mustapha) the ability and ethnicity of the plaintiff—things that it may not be in the immediate power of the plaintiff to control. Because of the effect of the legal standards at work, whole classes of people will be subject to a standard that does not take into account their context. These legal standards, therefore, may rightly be thought of as discriminatory.

After the Supreme Court of Canada's decision in *Mustapha*, plaintiffs bringing claims for the negligent infliction of psychiatric injury still face much uncertainty. Although the court seems more willing to recognize a duty of care, the factual situation of the *Mustapha* case may be unique in that it involves the duty of care owed by a manufacturer of consumable goods to the consumer. Thus, the decision may not settle much of the law about the duty of care stage of the analysis in negligent infliction of psychiatric injury cases. Although the Court of Appeal declined to apply the distinction between primary and secondary victims, the Supreme Court of Canada neither approved nor dismissed the distinction. Nor did it explicitly approve the use of the proximity factors. In terms of bringing clarity to the law on the negligent infliction of psychiatric injury, the Supreme Court of Canada's judgment is thus not terribly helpful. Indeed, all that it does make clear (to this reader) is that plaintiffs have an inordinately high bar to pass in order to hope for success in such a claim, and will be judged by an allegedly objective standard that in fact glosses over a series of assumptions and culturally inflected perspectives on mental disability. Going forward, one might predict that only the most sympathetic cases will be successful, and that those who are perceived as unreasonable—those whom the court is able to frame as ridiculous from the start—will pay heavily for their attempt to seek justice through the civil justice system.²⁰⁷

V. CONCLUSION: A FLY ON THE WALL

I am reluctant to give an opinion on whether the Supreme Court of Canada came to the “right” decision in *Mustapha*. Whether or not Mr. Mustapha should have been successful matters a great deal in one respect (in that it has practical consequences for the real people involved), but on the other hand, it would tend to “flatter[n] the complexity of the case in ways that make it difficult to engage in a constructive discussion.”²⁰⁸ In this paper I have focused instead on the systemic problems that are visible in the history of the tort of negligent infliction of psychiatric injury, and in the *Mustapha* decisions themselves. If Mr. Mustapha had been successful—but the courts still relied on the same binary language of subjectivity and objectivity (along with the language of reasonableness and ordinariness), presumptively privileged legal assessments over medical ones, and othered Mr. Mustapha in the same ways (because of his perceived effeminacy and ethnicity)—much of my analysis would have been the same. My project has not been to advocate for one side or the other, but to show that, when dealing with claims of negligent infliction of psychiatric injury, courts effectively discriminate against people with mental disabilities. The reasonable person standard, as a norm, excludes the experience of people with disabilities—it diminishes the worth of their experiences and denigrates their position as equal members of society. Disability is largely perceived as an individual flaw, something that makes a person less than ordinary. The modes of restricting liability in this tort have only compounded the arbitrariness at its core. Like the Old Lady herself,²⁰⁹ the courts have struggled to create new

207 Indeed, Mr. Mustapha now faces a substantial costs order. Makin (*supra* note 7) notes that the costs for both sides could amount to \$500,000.

208 Rebecca Johnson, *Taxing Choices* (Vancouver: UBC Press, 2002) at 175.

209 That is, the one who swallowed the fly. *Supra* note 11.

solutions, but rather than resolving the original problem, they have only produced more uncertainty. In the age of the *Charter*, a legal standard that discriminates against people and functions to preclude them from ever reaching a legal remedy is indefensible. Some observers are content to chuckle at the Supreme Court of Canada's reasons, and to applaud its final swat at an annoying claimant. However, as I have suggested, when one looks beyond the presumption of unreasonableness at work in the court's reasons, she may see the inegalitarian assumptions that are perpetuated.

The solution to this problem is not necessarily to completely subjectify the reasonable person standard. Indeed, such a standard can be useful when it helps articulate a baseline standard of behaviour to be expected by all members of society²¹⁰—and to make it an entirely subjective standard would make it difficult to privilege one kind of behaviour over another. Yet, a certain degree of subjectiveness seems necessary to temper the discriminatory effects of this legal standard. If I could be a fly on the wall observing the discussion between judges or lawmakers about the proper scope of liability for negligent infliction of psychiatric injury, there are three points I would offer as reminders.

First, in order to give effect to substantive equality in Canadian society, we must keep in mind that our own subjective experiences of the world are not necessarily superior to others. It is essential that adjudicators not just pay lip service to non-discrimination; rather, they must be encouraged to reflect on their affective starting points and the origins of what they perceive as “common” knowledge—not only, but especially when confronted with marginalized litigants. Second, the dominant understanding of reasonableness has become an idea of ordinariness, and the latter does not reflect the experiences of large segments of society who are othered by normative standards. In particular, the equal status of people with disabilities in Canadian society (especially those who are perceived to have “mental” disabilities) continues to be threatened by individualizing concepts of disability. Third, the fact that methods of diagnosis and treatment of certain mentally disabling conditions are subjective does not necessarily render them unreliable. This is not to say that legal decision makers should defer to medical knowledge; but rather, that legal assumptions about the untrustworthiness of subjective standards should not necessarily result in the denigration of those diagnoses. This will become increasingly important if litigants who suffer from conditions like anxiety and depression seek legal remedies. By keeping these three points in mind, I suggest, the courts might hopefully produce reasons that are still fair to defendants, but that also preserve the equality and dignity of mentally disabled claimants.

210 Moran, *supra* note 139 at 301.

ARTICLE

THE EDGES OF EXCEPTION: IMPLICATIONS FOR INDIGENOUS LIBERATION IN CANADA

By Tara Williamson*

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I. INTRODUCTION

In his work *Homo Sacer: Sovereign Power and Bare Life*, Giorgio Agamben proposes a radical theory of sovereignty that builds upon ideas from ancient Roman law and the political theorist Carl Schmitt. Agamben's work first casts a light on the obscure figure in ancient Roman law of the *homo sacer*, a person whose life is without political and legal worth. Agamben then builds upon Schmitt's theory of sovereignty, as captured in Schmitt's infamous phrase: "sovereign is he who decides on the state of exception."¹ Taking these ideas together, Agamben proposes that the *homo sacer* is an accurate portrayal of the person who occupies the state of exception. The state of exception refers to the capacity of the sovereign to create a legally condoned "lawless" state by suspending the law as it pertains to certain peoples. However, this lawlessness does not exist outside of the law, it exists precisely *because* of the sovereign's ability to make and determine who will—and who will not—be subject to the law. In this way, the *homo sacer* "is included solely through its exclusion."² Agamben refers to this inclusive exclusion as the "relation of exception."³ This is indeed the ultimate exercise of sovereign power because it is through this action that the sovereign "proves itself not to need law to create law."⁴ The all-powerful creation of a state of exception "creates and guarantees the situation the law needs for its own validity."⁵

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1 Carl Schmitt, *Politische Theologie* (1922) [Schmitt], quoted in Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1995) at 11.

2 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1995) at 18 [Agamben].

3 *Ibid.* at 18.

4 Schmitt *supra* note 1 at 19.

5 Agamben *supra* note 2 at 17.

The concept of *homo sacer* contains assumptions about human life. Most importantly, it assumes that biological life is distinct from political life. This assumption can be linked to Greek philosophy and the terms *zoe* and *bios*. *Zoe* can be understood as bare biological life that is common to all living things. *Bios* encompasses a richer understanding of life and includes political citizenship. The two terms are both separate and also connected in that the prerequisite to *bios* is *zoe*.⁶

Canada was founded as a sovereign nation-state largely because of the colonization of Indigenous peoples. At first contact, the colonizer (Canada) perceived Indigenous people as simple and savage. As Agamben would say, they were perceived as lacking a well-defined *bios*; hence Indigenous life was not considered worthy of political recognition. This perception had two effects: First, Indigenous-run political organizations were seen as impossible, and so sovereign, self-governing nations were also impossible. Second, Indigenous peoples, existing without nations of our own, were renamed Indians and unilaterally declared subjects of the Crown.

The Canadian state created a state of exception from each of these effects. In the first instance, a state of exception was created when the colonizing state used the myth of *terra nullius* and the doctrine of discovery to circumvent the rule of law to impose their own sovereignty on already sovereign peoples. In the second instance, a state of exception was created via numerous racist and oppressive laws, policies, and attitudes that denied civil liberties and full Canadian citizenship to Indians. This dual state of exception means that, in the current colonial framework, Indians in Canada exist on the edges of realizing both an Indigenous liberation and full status as Canadian citizens.

II. THE FIRST STATE OF EXCEPTION

When explorers representing colonizing European nations arrived at the shores of North America, they were confronted by peoples they did not comprehend. This created a dilemma: In the spirit of imperialist expansion the choice inevitably involved the relation of Self to an Other, or of the centre against the margins. This is because imperialism requires “binary oppositions that establish a relation of dominance. A simple distinction between centre and margin, colonizer and colonized, metropolis and empire, and civilized and primitive represents very efficiently the violent hierarchy on which imperialism is based and which it actively perpetuates.”⁷ As a result, explorers could postulate only two possible answers to this question: “[E]ither the Indians were as human beings equal to or identical with the [settlers]...; or else they were radically different, in which case they were reduced to savages and on the same level as animate or inanimate objects of nature.”⁸ The latter option provided for an Indigenous *zoe* (which explained the seeming humanity of these inhabitants). And, it simultaneously denied an Indigenous *bios*. The Indian became the “paradigm example of humanity in its pure, unadulterated savage state.”⁹ The political and legal incapacitation of Indians as people allowed settlers to name North America as un-

6 For a fuller discussion of the concepts of *zoe* and *bios*, see *ibid.*, “Introduction.”

7 Bill Ashcroft, Gareth Griffiths & Helen Tiffin, *Post-Colonial Studies: The Key Concepts* (New York: Routledge, 2000) at 24 [Ashcroft, Griffiths & Tiffin, *Concepts*].

8 Fred Dallmayr, *Beyond Orientalism: Essays on Cross-Cultural Encounter* (Albany: State University of New York Press, 1996) at 5 [Dallmayr].

9 Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005) at 33.

inhabited or empty. Although Indigenous people clearly *existed*, their existence was limited to a state of nature. For the purposes of political expansion and economic imperialism, the Indians were not legally persons. North America was *terra nullius* and officially open for settlement.

This distinction is important because of the settlers' commitment to the rule of law. If colonizers acknowledge the political and legal legitimacy of Indigenous peoples, they would be bound to honour the legal standards established by their systems of law. Although there is not one definitive authority on the contents of the rule of law, the Supreme Court of Canada has defined it as 1) precluding arbitrary state power, and 2) requiring the maintenance of a positive legal order.¹⁰ John Borrows, a leading scholar on Indian/Aboriginal rights in Canada, uses the Supreme Court's definition of the rule of law to demonstrate how those legal principles were violated in the process of colonization:

Canada's assumptions of underlying title and sovereignty throughout its claimed territory violates both of these fundamental principles. It is an arbitrary exercise of power aimed at dismantling Indigenous systems of law and normative order. Canada substantially invalidated Aboriginal peoples' territorial rights in the absence of informed consent, or persuasive legal explanation. Furthermore, Canada's declaration of exclusive sovereignty over Aboriginal peoples violates the second principle of the rule of law because, in the process of this declaration, the Crown suppressed Aboriginal governance and denied these groups indispensable elements of law and order.¹¹

Borrows' interpretation of the Canadian colonial endeavour demonstrates the first state of exception experienced by Indigenous nations. This state started at contact, when the settlers established a "temporary suspension of the juridico-political order"¹² on the racist justification that Indigenous people were savages and thereby deserved a lower standard of liberty. This eventually led to "a new and stable spatial arrangement"¹³ in the creation of the sovereign state of Canada. As states of exception, the sovereign Canadian state "proves itself not to need law to create law."¹⁴ This first state provided the foundation and pre-requisite for the second state of exception.

III. THE SECOND STATE OF EXCEPTION

The perception of Indigenous peoples as having no recognizable national identity and therefore being "weaklings" and "backward"¹⁵ gave rise to an attitude of paternalism and protectionism. Nowhere is this better demonstrated than in the text of the *Royal Proclamation of 1763* ("Royal Proclamation"), in which it is claimed that the "Tribes of Indians ... live under our Protection."¹⁶ The assumptions underlying the process of the creation of a dual state of exception can be found in the infamous Canadian work, *Citizens Plus*. The position is well summarized by Dale Turner:

10 *Reference Re: Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721 at 748-49 (QL).

11 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 113 [Borrows].

12 Agamben *supra* note 2 at 174.

13 *Ibid.*

14 Schmitt, *supra* note 1 at 19.

15 Albert Memmi, *The Colonizer and the Colonized* (Boston: Beacon Press, 1965) at 81 [Memmi].

16 *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*].

The sovereignty of the Canadian state is absolute and not up for negotiation

Because the sovereignty of the Canadian state is absolute, Aboriginal peoples are first and foremost citizens of the Canadian state

Because Aboriginal peoples are full citizens of the Canadian state, the special rights they possess are bestowed upon them by the state.¹⁷

A bestowed sense of special citizenship gave rise to numerous racist and oppressive laws and policies. One of the most significant racist colonial accomplishments of this time occurred in the re-naming of Indigenous Peoples as “Indians.” Renaming is significant to colonialism because “language is a tool of power, domination and elitist identity.”¹⁸ Renaming functions as “[o]ne of the most subtle demonstrations of the power of language ... [as] a technique for knowing a colonized place or people. To name the world is to ‘understand’ it, to know it and to have control over it.”¹⁹

At the time of contact, the population of North America is estimated to have been at least 1.5 million Indigenous Peoples.²⁰ However, it is speculated that this number is actually very conservative. The highest precontact population estimate for what is presently named Canada and the United States is 12.2 million.²¹ There were at least 300 spoken languages within approximately 60 distinct language groups.²² The term “Indian” came to encompass all of these people. Arguably, the creation of a generic group via the use of a homogenous, generic term was an issue of practicality: for the settlers to address the Indigenous people, they must know them, and to know them, they had to name them in a manner that was recognizable.²³ The parameters of the state of exception are defined only insofar as the inhabitants of the state are defined. Defining Indian-ness has been (and continues to be) a legal conundrum for Canada.

The first attempt came in the form of the 1850 *Act for the Better Protection of the Lands and Property of Indians in Lower Canada*²⁴ in which “Indianness” was based on “blood, intermarriage, residence on Indian lands, and adoption.”²⁵ In 1857, the *Act to Encourage the Gradual Civilization of the Indian Tribes*²⁶ allowed “upstanding” Indians to become non-Indian. The post-confederation *Indian Act* definition of Indian also included a list of who was not an Indian,²⁷ likely in the face of a growing “half-breed” population who had the “ability to

17 Dale Turner, *This Is Not a Peace Pipe: Toward a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 42-43.

18 Braj B. Kachru, “The Alchemy of English” in Bill Ashcroft, Gareth Griffiths & Helen Tiffin, eds., *The Post-Colonial Studies Reader* (New York: Routledge, 1995) 291 at 291 [Ashcroft, Griffiths & Tiffin, *Reader*].

19 *Ibid.* at 283

20 “North American Indian Languages: Introduction,” *Encyclopaedia Britannica*, online: *Encyclopaedia Britannica* <<http://search.eb.com.ezproxy.library.uvic.ca/eb/article-75305>>.

21 See Henry F. Dobyns, *Their Number Become Thinned: Native American Population Dynamics in Eastern North America* (Knoxville: University of Tennessee Press, 1983).

22 “North American Indian Languages” *supra* note 20.

23 Jacques Derrida, *Politics of Friendship* (London: Verso, 1997), quoted in Mika Ojakangas, “Carl Schmitt’s Real Enemy: The Citizen of the Non-Exclusive Democratic Community?” (2003) 8 *The European Legacy* 411 at 411.

24 S.C. 1850, c. 42, 13&14 Vic., s. 5.

25 Renisa Mawani, “In Between and Out of Place: Mixed-Race Identity, Liquor, and the Law in British Columbia, 1850-1913” in Sherene H. Razack, ed., *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 47 at 55 [Razack].

26 S.C. 1857, ch. 26 [*Gradual Civilization Act*].

27 *Indian Act: An Act to Amend and Consolidate the Laws Respecting Indians*, R.S.C. 1876 (39 Vict.), c.18 at s.3 [*Indian Act*].

transgress race and space ... [which] could potentially undermine state initiatives [of] control²⁸ and undermine the definition of inhabitants necessary for the state of exception to exist. The effect of re-naming is a rift in the identity of Indigenous Peoples. In the history of Canada, distinct Indigenous peoples (e.g., Anishinaabeg, Nehayowak, Haudenashonee) do not exist. For the purposes of the Canadian sovereignty project, Indigenous *zoe* and *bios* amount only to Indianness. The constitutional inclusion of a definition of Indian reflects the State's decision "to assume directly the care of the nation's biological life as one of its proper tasks."²⁹ The term "Indian" thus serves as a locally conditioned Canadian synonym for *zoe*.

Section 91(24) of the *British North America Act, 1867* states that the exclusive legislative authority for "Indians, and Lands reserved for the Indians"³⁰ rests with the federal Parliament. The inclusion of s. 91(24) in Canada's first constitution holds particular significance in light of a theory of the sovereign. Schmitt postulated that the modern nation state is an intersection of three relations: 1) the taking of land, 2) the determination of a juridical order, and 3) the determination of a territorial order.³¹ Agamben adds to this trinity the "taking of the outside"³² or the creation of a state of exception. At confederation, it was necessary to make official that which had been unofficial since the time of contact— power over *homo sacer*. Interestingly, part of the state of exception includes "land reserved for the Indians" undoubtedly so as to reinforce the sovereign's "taking of land" and to establish that the actual physical space designated to Indians also fell within the realm of exception. What was previously policy was now law under a sovereign state. And, the law, being premised on violations of the rule of law and the racist and differential treatment of Indigenous Peoples, was illegal. The exception became the rule.

IV. THE CANADIAN INDIAN/ABORIGINAL EXPERIENCE

The state of exception has often been referred to as the concept of "second-class" citizenship. The franchise, a critical element of liberal democratic citizenship, was not extended to Indians until 1960.³³ Section 12 of the 1876 *Indian Act* stated: "A person means an individual other than an Indian."³⁴ Indians have been subject to government oppression "through the denial of land, the forced taking of children, the criminalization of economic pursuits, and the negation of the rights of religious freedom, association, due process, and equality."³⁵ By a process called involuntary enfranchisement, if an Indian knew how to read,³⁶ married a non-Indian, or attended university,³⁷ to name a few conditions, he or she

28 Mawani, *supra* note 25 at 51.

29 Agamben, *supra* note 2 at 174.

30 *Renamed Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 s. 91(24).

31 Agamben *supra* note 2 at 174-75.

32 *Ibid.* at 19.

33 *Canada Elections Act*, S.C. 1960, c. 39. Recently, amendments to the *Canada Elections Act*, (Bill C-31, 55-56 Elizabeth II, 2006-2007, *An Act to amend the Canada Elections Act and the Public Service Employment Act* which was given Royal Assent on June 22, 2007 as S.C. 2007 Chap. 21) have called into question the right to vote for Status Indians by providing in sections 143 (2)(a) and 143(2)(b) that certain pieces of identification are required to vote in federal elections. The effect of the legislation is to make voting impossible for those Status Indians who have no other form of identification except a Certificate of Indian Status that is issued by the federal government.

34 *Indian Act*, *supra* note 27 at s. 12 [*Indian Act*].

35 Borrows, *supra* note 11 at 132.

36 *Gradual Civilization Act*, *supra* note 26.

37 *Indian Act*, *supra* note 27 at s. 86.

would cease to be an Indian; that is, his or her Indian status would be revoked. These laws and policies all reflect the assimilation-focused attitudes of successive Canadian governments. The definition of assimilate is to “absorb and integrate into a people and culture.”³⁸ This process, if pursued to its logical end—the elimination of Indians from the Canadian imagination—leaves a seeming emptiness in the state of exception. If there ceases to be Indians, does there cease to be a state of exception?

Interestingly, the answer must be no. Because the state of exception is premised on absolute state power and sovereignty. It can only stop existing when that fundamental dominance, or “power-over” relationship also ceases to exist. Yet, assimilation through the enfranchisement of Indians does not present an affront to state power. It actually affirms state power by allowing a state-imposed definition of bare-life (*zoe*) to continue. Whether the label is Canadian or Indian, the sole determinant of Indian existence would continue to be at the pleasure of the Crown. In the spirit of paradox, the apparent void in an enfranchised state of exception is actually full of unrestrained state power. Assimilation fulfills the sovereign’s goals of exclusion and power-over relationship more effectively than any racist and unequal policy.

Even though twenty-first century Canadian Indian policy has become much more subtle and polite than it has been in the last four hundred years, it is still true that many of the social situations existing in Indian communities today arise as a result of deliberate government action. For example, the federal government is responsible for building houses on reserve. It is well-known that the Indian Affairs houses (sometimes called “Hydro” houses because the provincial crown corporation built them so natives could relocate when large areas of their traditional territory was being flooded)³⁹ are prone to mould and mildew, might not have running water, and are poorly insulated, if at all. Deliberate government action in the public realm activates rights under the *Charter of Rights and Freedoms* (“*Charter*”).⁴⁰ Section 15 of the *Charter* reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁴¹ The test for evaluating equality claims under s. 15 was articulated in *Law v. Canada (Minister of Employment and Immigration)* (“*Law*”).⁴² Arguably, a legal challenge would ultimately fail because of the nature of the s. 15 test for violation of equality rights. The *Law* test stipulates that a comparator group is necessary to prove inequality. Yet, who would be the comparator group in an example of sub-par housing? The only other group for whom the federal government builds houses is the military. An equality claim with military housing as the comparator group would be incomplete in that, if it succeeded, it would prove only that Indians receive disparate treatment as compared to military officers. Such a claim could never draw the conclusion that Indians receive unfair treatment as compared to non-Indians as a whole. The placement of s. 91(24) in the *Constitution Act, 1982*⁴³ (“*Constitution Act*”) guarantees that, for this and other examples pertaining to differential treatment by the state, no comparator group exists. This is because, by virtue of the constitutionalized state of exception (s. 91(24)), it is both natural and expected that Indians receive differential treatment. Truly,

38 *The Oxford English Dictionary*, s.v. “assimilation” online <<http://www.oed.com>>.

39 See Geoffrey York, *The Dispossessed* (Toronto: Little Brown & Co, 1990), ch. 3.

40 Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

41 *Ibid.*

42 [1999] 1 S.C.R. 497, (1999), 170 D.L.R. (4th) 1, (1999), 43 C.C.E.L. (2d) 49.

43 *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* c. 11, Part II. [“*Constitution Act*”].

that is the purpose of s. 91(24). Herein lies the tautology of the state of exception. Differential treatment and power-over since the time of contact gave rise to a state of exception. This state of exception as the rule continues to justify differential treatment.

Excepting the *Indian Act* and ss. 91(24) and 88 of the *Constitution Act*, most differential treatment of Indians occurs in day-to-day existence in the Canadian state. Canadian Indians have higher rates of suicide, disease, and infant mortality than any other segment of the Canadian population. They also have lower rates of employment, income, and education.⁴⁴ Sherene Razack uses the term “spatialized justice” to describe geographic and racialized locations of states of exception. While some of these spaces are explicitly legislated (i.e., Indian reservations) many come to exist with nuisance and zoning laws that have the similar effect of creating boundaries of who is within and who is without the space. Razack argues that colonial power and violence “has not only enabled white settlers to secure the land but to come to know themselves as entitled to it.”⁴⁵ Space is viewed as “innocent. ... In the same way that spaces appear to develop organically, so too the inhabitants of spaces seem to belong to them.”⁴⁶ These two ideas taken in praxis mean that, not only do Indians naturally belong to reserves and inner-city slums, but they are there at the whim of the colonizer who ultimately owns his own space and the Indian space. Razack refers to the rape and murder of Pamela George to emphasize this point. Pamela George was a sex-trade worker in Regina in 1995. She was murdered by two young white men from the suburbs of Regina after they picked her up in their car. They were charged with manslaughter after the jury was instructed by the judge to only consider that charge in light of the “pretty darn stupid things” the boys did.⁴⁷ Razack argues that “bodies in degenerate spaces lose their entitlement to personhood through a complex process in which the violence that is enacted is naturalized.”⁴⁸ One need look no further than similar cases of murders of Indians to find similar language in cases and reports—Helen Betty Osborne, J.J. Harper, Dudley George, and Matthew Dumas to name a few. The latter three deaths are especially tied to sovereign power because they were at the hands of police officers. The Canadian conception of title reflects the exact same principle: title to land exists as a burden on the Crown’s allodial title.⁴⁹ The colonizer is entitled to the land. Aboriginal people exist on the land at the pleasure of the Crown. Whatever is done to the land and to Aboriginal peoples within those spaces is a legal exercise of Crown sovereignty.

This sentiment is found again in the interpretation of s. 35(1) of the *Constitution Act*. Section 35(1) reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”⁵⁰ The rights contained in this section are not absolute. They are subject to infringement by the government on the basis of a two-part test laid out in *R. v. Sparrow* (“*Sparrow*”).⁵¹ The first part of the test requires that the government justify its infringement if there is a “valid legislative objective”⁵² that is both “substantial and compelling.”⁵³ In *Delgamuukw*,⁵⁴ the Supreme Court of Canada elaborated on

44 For a good summary of these statistics see Assembly of First Nations, “Fact Sheet: Top Misconceptions About Aboriginal Peoples” online: Assembly of First Nations <<http://www.afn.ca/cmslib/general/FS-TM-e.pdf>>.

45 Sherene H. Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George” in Razack, *supra* note 25, 121 at 129.

46 Sherene H. Razack, “Introduction” in Razack, *ibid.*, 1 at 7.

47 Razack, *supra* note 44 at 124.

48 *Ibid.* at 125.

49 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

50 *Supra* note 43.

51 [1990] 1 S.C.R. 1075.

52 *Ibid.* at 1113.

the types of objectives that would qualify under this test: “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.”⁵⁵ These objectives form part of the “reconciliation”⁵⁶ of Crown sovereignty and the prior occupation of Canada by Aboriginal peoples. It is fairly clear from the expansive list of possible valid infringements that reconciliation is a one-way street—Aboriginal peoples must reconcile themselves to Canada’s sovereignty.

The second part of the *Sparrow* test asks for proof that the manner of infringement (the pursuit of the valid and compelling objective) is consistent with Canada’s fiduciary obligation to Aboriginal peoples.⁵⁷ On its face, it is puzzling how any infringement of a right can be consistent with a fiduciary duty if that duty is interpreted to mean acting in the best interests of Aboriginal peoples. *Sparrow* and *Delgamuukw* both demonstrate that Aboriginal rights are not worthy of protection in the face of colonial objectives like hydroelectric power. The cases also effectively view colonization through the lens of infringement “as if the interference with another nation’s independent legal rights were a minor imposition at the fringes of the parties’ relationship.”⁵⁸

The dynamics of Canadian sovereignty and the state of exception define the scope and limit the meaning of Aboriginal rights in both a legal and everyday sense. Aboriginality is nothing more than a politically correct discourse that promises liberal legal ideals. The state of exception, being the primary and foundational of those ideals, is thus embedded and inseparable from Aboriginality.

V. THE LIBERATION OF THE CANADIAN INDIAN?

If this is truly the state of affairs for an Indian person in Canada, then can political liberation for Indians be found within the Canadian legal system? A sense of Indigenous liberation differs from the more traditional civil rights discourses in that, instead of making demands for integration and equality, Indigenous peoples seek to be recognized as distinctive and deserving of compensatory differential treatment in the name of past wrongs. Indigenous liberation means “an honourable relationship with states in which their rights to land are affirmed and compensation for their losses and suffering is honourably provided. Liberation means the ability to exercise self-determination, to develop culturally distinct forms of education, spirituality, economic development, justice, and governance.”⁵⁹ And, more meaningfully, to know “the liberatory effects of experiencing whole health, personal fulfillment, and the ability to express ourselves and flourish as human beings.”⁶⁰ Indigenous peoples not only need to have control over our lives, but also need to reap the benefits that accompany such control. In the realm of Canadian Indianness and citizenship,

53 *Ibid.*

54 *Supra* note 49.

55 *Ibid.* at 165.

56 *Ibid.*

57 *R. v. Sparrow*, *supra* note 51 at 1114.

58 Borrows, *supra* note 11 at 99.

59 Ronald Niezen, *The Origins of Indigenism; Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003).

60 Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview, 2005) at 187 [Alfred].

there are three possibilities for realizing liberation: as Canadian Indians, as Canadians, or in a full rejection of Canadianness.

The first option has proved to be impossible because Canadian Indians do not enjoy the same degree of civil rights as other Canadians. With the addition of s. 35 of the *Constitution Act*, many Indian people thought that a new political space was being created in which full membership in one of the wealthiest countries in the world could be realized. Although it created a new language of “Aboriginal,” it did not fundamentally alter the relationship of the state as the re-namer of Indigenous *zoe*, and the interests of the Canadian state continue to take precedence over Aboriginal rights.

Because the sovereignty of the Canadian state rests on the exertion of power over Indians, Indians can never be full participants in the Canadian political and legal arenas. For Indians to accept “Indianness” or “Aboriginality” as the proper scope of their own *zoe* only accepts and affirms the power-over relationship. For true liberation to happen, Indians must shake off that label and return to a self-defined *zoe* and corresponding *bios* of Indigeneity. However, to demand that the Canadian government recognize this definition as worthy of political interaction is an impossible demand. If the Canadian government recognized Indigeneity as possessing political worth, then the very foundation of Canadian sovereignty—the suspension of the rule of law and the subversion of Indians as quasi-Canadians—must be acknowledged as being illegitimate. If the state of exception which has become the new rule is undone, then so too is sovereignty. It is impossible for there to simultaneously exist a sovereign Canadian state and a fully politically/legally liberated Indian.

The second option for Canadian Indians is to become politically liberated as Canadians. This is problematic for two reasons: Firstly, to abandon Indianness is not Indian liberation; it is just the adoption of Canadian liberation. Secondly, to become Canadian means to become assimilated, the consequences of which have already been explored in the discussion of enfranchisement. Yet, a kind of voluntary enfranchisement is even more problematic because it validates the sovereign’s power. It is debatable whether true liberation can be conceived within a power-over relationship. Furthermore, as Albert Memmi argues, real assimilation is an impossible goal because the internal psychological struggle that the colonized must reconcile is insurmountable. In assimilating, the colonized is forced to assume “all the accusations and condemnations of the colonizer” and be “ashamed of what is most real in [her or him].”⁶¹ And, even when successful, the colonized faces the next challenge of being faced with the colonizer’s rejection.⁶²

The third and final possibility of liberation for the Canadian Indian is to revolt against any type of Canadianness.⁶³ But revolt entails “rejecting all the colonizers en bloc.”⁶⁴ This type of rejection verges on xenophobia, or racism, because it requires “delusions about oneself, including absurd and unjust aggressions toward others.”⁶⁵ The problem with unreflective revolt is that it maintains the imperial dichotomy of colonizer and colonized, sovereign and *homo sacer*. Bare life (*zoe*) and political existence are still tied up in the colonial relationship and are not liberated any more than in the initial set-up.

61 Memmi, *supra* note 15 at 123.

62 *Ibid.* at 124.

63 *Ibid.* at 127.

64 *Ibid.* at 130.

65 *Ibid.*

VI. LIBERATION VIA ABORIGINAL SELF-GOVERNMENT?

There is still another conception of liberation that exists outside of the individual. This is in the realm of the nation-state, as Indigenous groups seek liberation through a nationalist movement. The United Nations International Covenant on Economic, Social, and Cultural Rights in Art has articulated the importance of self-government in art. 1, s. 1: “All 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.”⁶⁶ There is debate about the source of Aboriginal self-government, but the main sources usually cited are instruments such as the *Royal Proclamation*, treaties, and the fact of prior occupation.

The *Royal Proclamation* is assumed to recognize self-government because the text acknowledges “nations” of Indians.⁶⁷ Similarly, treaties are also considered as sources because they are characterized as “nation-to-nation” agreements. There is also a claim that self-government is an inherent right in all Indigenous communities and is therefore protected under s. 35 of the *Constitution Act*. The difficulty with all of these interpretations is that they are sources of self-government without a Self. These sources of a right to self-government are ineffective because they rely entirely on the Other and the Other’s discourse of rights and interpretation of history. This is seen in how these instruments can be invoked: to activate the rights contained in them, Indians bear the evidentiary burden of proving that they exist. Succumbing to this demand by the colonizer only reinforces the idea that Indian rights and government belong to the Canadian state and can be discharged only as measured against the Crown’s uncontested sovereignty.

The actual phrase that is referred to in the *Royal Proclamation* is “those Nations or Tribes.”⁶⁸ The added qualification of the word “Tribe” as joined by the connector “or” as opposed to “and” suggests that the Tribe, for the purposes of defining Indians, is synonymous with the Nation. The notion of “tribal” relates to the perceived savagery of the Indians, and assumes “the West as norm and define[s] the rest as inferior, different, deviant, subordinate, and subordinateable.”⁶⁹ The subordinateability of Indian nations is clearly stated in the subsequent phrasing of the *Royal Proclamation*. The Indian nations are deemed to “live under our protection.”⁷⁰ It is a strange national identity that finds its source of self-determination in a document that has been unilaterally drafted by a colonizing nation that is responsible for the colonization of another nation and has declared that nation to be beneath the protective realm of the colonizer. To interpret the tribal nation as defined in the *Royal Proclamation* as a source of real nationhood is to be blind to the true nature of imperialism.

A claim is also made that the numerous treaties signed throughout Canada demonstrate the existence of a “nation-to-nation” relationship between First Nations and colonizing nations. However, most treaties are interpreted by Canadian governments and courts to be “friendship agreements or land transactions.”⁷¹ In *Simon v. The Queen*,⁷² the Supreme Court of Canada defined Indian treaties as being of a *sui generis* nature, but not of being on par

66 December 16, 1966, 999 U.N.T.S. 171.

67 *Royal Proclamation*, *supra* note 16.

68 *Ibid.*

69 Ashcroft, Griffiths & Tiffin, *Concepts*, *supra* note 7 at 209.

70 *Royal Proclamation*, *supra* note 16.

71 Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) at 163.

72 [1985] 2 S.C.R. 387 at 404.

with other international treaties. And the history of treaty relations shows that the Canadian government agrees. John Borrows notes: “In almost every treaty negotiation one can detect dishonesty, trickery, deception, fraud, prevarication, and unconscionable behaviour on the part of the Crown.”⁷³ For these reasons, treaty negotiations and agreements never really equate to “mutual engagement, but [are] placed entirely in the service of the pursuit of economic wealth, of subjugation, and ultimately of physical destruction.”⁷⁴

The final source of self-government is derived from pre-contact occupation of North America by Indigenous Nations. This is often referred to as an inherent right to self-government and it has been claimed to be entrenched in s. 35 of the *Constitution Act* as an “existing” Aboriginal right. This interpretation⁷⁵ was advanced by the *Penner Report*⁷⁶ to Parliament in 1983. It was ultimately rejected at the first minister’s conferences that followed the 1982 partition of the *Canadian Constitution*. The Supreme Court of Canada has yet to rule specifically on the issue of inherent self-government, but lower courts have stated clearly that “Indian nations or bands were not sovereigns.”⁷⁷ However, in *R. v. Pamajewon*,⁷⁸ the SCC did entertain the possibility that an inherent right to self-government could exist and its content could be found in s.35 via the standard Aboriginal rights test, the test from *R. v. Van der Peet*⁷⁹ (“*Van der Peet*”). The *Van der Peet* test consists of four components, one of the more problematic being the continuity requirement. Continuity requires a connection between the current practice of the right being claimed and its historical, pre-contact integrity to Aboriginal. Lamer C.J. (as he then was) concedes that there may be a broken chain of continuity in the exercise of a right, but as long as an Aboriginal group “resumed the practice, custom or tradition at a later date,”⁸⁰ that would suffice to demonstrate a continuous, and therefore recognizable right under s. 35. But, it is not only possible, but also probable that the right of self-government cannot meet this test. The *Indian Act* imposed chief-and-council systems of government which replaced traditional practices with contemporary ones. As a result, a court will likely find any Aboriginal group’s claim that they have a right to self-government as nonexistent because they currently operate on political institutions imposed during colonialism, thus breaking from their traditional modes of government.

There is potential for another predicament to arise in the use of s. 35 to secure a right to self-government. *Delgamuukw*⁸¹ has set out the test for title, a specific type of Aboriginal right that entails control over land. This test might need to be considered in thinking about the future development of the right to self-government in Canadian constitutional law. The predicament arises in relation to an inherent limit placed on title by the courts. An inherent limit can be likened to the notion of equitable waste from common law property doctrines. The use of Aboriginal title land is limited to activities that “must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s Aboriginal title.”⁸² To apply a notion of equitable waste to a right of self-government under

73 Borrows, *supra* note 11 at 113.

74 Dallmayr, *supra* note 8 at 6.

75 McNeil *supra* note 71 at 169.

76 Canada, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen’s Printer, 1983) [*Penner Report*].

77 *Supra* note 75 at 82.

78 [1996] 2 S.C.R. 821 quoted in *ibid.* at 85.

79 [1996] 2 S.C.R. 507 [*Van der Peet*].

80 *Supra* note 78 at 65.

81 *Supra* note 49.

s. 35 means that all claims to self-government must fail because of the contradiction in claiming that a right is inherent but reliant on an outside sovereign to validate it. It is impossible to simultaneously accept that the right is inherent and that it is within the legal realm of the Canadian state. If it is inherent then it should rely on nothing except its own sovereign legitimacy. Accepting that the right is located in s. 35 of the *Canadian Constitution* is irreconcilable with the claim that it is inherent and so upon claiming the right, the foundation of the right actually ceases to exist.

The most fundamental problem with all of these claims to nationhood is that they are premised on the belief that Canada is a legitimate sovereign with the volition to acknowledge sovereign Indigenous nations. It is not in the interest of the Canadian state to undo the state of exception that was originally created when the rule of law was suspended, because the suspension of the rule of law is the very foundation of the sovereignty of Canada. It is also suspect to assume that Indigenous “nationhood” is even the best way to pursue Indigenous liberation.

VII. AN INDIGENOUS NATION?

The nation as a means of social and political organization must be recognized as a creation of people, not as a natural and inevitable reality. The roots of the nation can be found in an “interaction between a system of production and productive relation (capitalism) [and] a technology of communications (print).”⁸³ The emergence of the nation-state is therefore inextricably tied to the rise of capitalist economies and more specifically to imperial-capitalist economies.⁸⁴ The Canadian nation-state is fraught with such ties, brought over by European settlers who acted through imperialism and nationalism. The birth of the colonial “national culture is the whole body of efforts made by a people in the sphere of thought to describe, justify, and praise the action through which that people has created itself and keeps itself in existence.”⁸⁵ The colonial nation celebrates its existence as the offspring of imperialist hegemony. Part of this national identity includes the colonization of Indigenous peoples. If we accept the nation as a viable form of organization then we are also accepting the legitimacy of our own colonization. Yet, acknowledging that the modern nation-state does not have a history in Indigenous political tradition does not make it any easier to conceptualize an alternative. One of the most sinister aspects of colonialism is that it is “not simply content to impose its rule upon the present and the future of a dominated country. ... By a kind of perverted logic, it turns to the past of the oppressed people, and distorts, disfigures, and destroys it.”⁸⁶ Our political memories have been subsumed by colonialism, which makes a search for true Indigenous liberation all the more difficult.

VIII. INDIGENOUS LIBERATION

With failed attempts at achieving respect and self-determination through state mechanisms like rights discourses and constitutional protection combined with a lack of Indigenous po-

82 *Ibid.* at 111.

83 Benedict Anderson, *Imagined Communities* (London: Verso, 1983) at 46, quoted in Partha Chatterjee, “Nationalism as a Problem” in Ashcroft, Griffiths & Tiffin, *Reader*, *supra* note 18, 164 at 164.

84 Ashcroft, Griffiths & Tiffin, *Concepts*, *supra* note 7 at 152.

85 Frantz Fanon, “National Culture” in Ashcroft, Griffiths & Tiffin, *Reader*, *supra* note 18, 153 at 155.

86 *Ibid.* at 154.

litical memory, Indigenous peoples face a struggle to define self-determination and liberation in a way that is truly “Indigenous” and tailored to specific individual and collective experiences of colonization. Linda Tuhiwai Smith articulates this idea by stating that “new ways of theorizing by indigenous scholars are grounded in a real sense of, and sensitivity towards, what it means to be an indigenous person. ... Contained within this imperative is a sense of being able to determine priorities, to bring to the centre those issues of our own choosing, and to discuss them amongst ourselves.”⁸⁷ Taiaiake Alfred suggests that Indigeneity entails “an actual reconnection with our lands and cultures.”⁸⁸ Although these descriptions are powerful and compelling, they are empty without a sense of what Indigeneity is and what that definition means for Indigenous peoples in the twenty-first century.

The concept of Indigeneity as a reconnection to land and culture should not be confused with nostalgia for the Indian who is essential and universal, primitive, without agency, and pre-colonial. Accessing political memory is not about confining identity to the past or to a static historical state. Instead, political memory can be described as “reflexive” and as containing an “ability to reconstruct.”⁸⁹ It is an active process whereby the present rememberer engages differently with the memory than other rememberers across geographical and temporal divides. Pierre Nora eloquently compares memory and history:

Memory is life, borne by living societies founded in its name. It remains in permanent evolution, open to the dialectic of remembering and forgetting, unconscious of its successive deformations, vulnerable to manipulation and appropriation, susceptible to being long dormant and periodically revived. History, on the other hand, is the reconstruction, always problematic and incomplete, of what is no longer.... Memory is blind to all but the group it binds—which is to say ... that there are as many memories as there are groups, that memory is by nature multiple and yet specific; collective, plural, and yet individual. History, on the other hand, belongs to everyone and to no one, whence its claim to universal authority.⁹⁰

The violent assault on Indigenous political memory began with the initial state of exception where Indigeneity as a recognizable *bios* was overlooked. Because it was totally disregarded by the state, there is a sentiment that Indigeneity as a concept has the characteristic of not being subject to a binary. In a sense, it is like a sense of Self without Other. The sources of Indigeneity can be found in those things that have survived the assault of colonization—primarily language, ceremonies, and stories.

Language is of utmost importance because “it is the vehicle by which our culture is transmitted from one generation to another.”⁹¹ A good example is the word *mino-ayaawin*, which translates from Anishinaabemowin⁹² to English as “good life.” However, the connotations it holds are much deeper. The prefix “*mino*”- is used only before a verb and therefore in-

87 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books, 2001) at 38.

88 Alfred, *supra* note 60 at 33.

89 Jan Assmann & John Czaplicka, “Collective Memory and Cultural Identity” (1995) 65 *New German Critique* 125.

90 Pierre Nora, “Between Memory and History: Les Lieux de Memoire” (1989) 26 *Representations* 7 at 8.

91 Patricia Ningewance, *Anishinaabemodaa: Becoming a Successful Ojibwe Eavesdropper* (Winnipeg: Aboriginal Languages of Manitoba, 2004) at 7.

92 The Ojibwe language.

herently contains a dynamic understanding of goodness. “*Ayaa*” is a verb meaning “to be.” Adding the suffix “-*win*” to a verb creates a noun, in this case a “state of being.” Understanding an Anishinaabe state of being requires complex understanding of a human’s place in creation and implies principles of life that include wholeness, balance, harmony, growth, and healing.⁹³ These principles are complemented by many other sacred teachings that each individual brings to the word. Furthermore, *mino-ayaawin* can only be realized by the choices each individual makes in her or his own life. Just this one Indigenous word contains a fluid understanding of goodness; an understanding of the world and of the Self; an understanding of values and teachings; and an understanding of choice and free-will. By learning Indigenous languages “we therefore [learn] to value words for their meaning and nuances. Language [is] not a mere string of words. It [has] a suggestive power well beyond the immediate and lexical meaning.”⁹⁴

Ceremonies and stories, although not entirely separate from language, are other sources of Indigeneity. These two sources are linked directly to spirituality, which Vine Deloria Jr. has defined as “how spirit manifests itself in the physical world.”⁹⁵ He argues that an “uncritical acceptance of modernism has prevented us from seeing that higher spiritual powers are still alive in the world.”⁹⁶ Ceremonies and stories constitute much more than mere activities and myths. They contain histories about “empirical observation of the physical world and the continuing but sporadic intrusion of higher powers”⁹⁷ in Indigenous life. Furthermore, they encourage a way of understanding through direct experience that is “not only intellectual but intuitive and practical, involving the sense and the heart as well as the rational mind.”⁹⁸ Indigenous explanations of the world are at the heart of ceremony and stories and are necessary in defining the principles that will guide future Indigenous peoples in understanding the surrounding world.

The commonality of the sources of Indigeneity is that they require active, reflexive participation: languages must be spoken with each other, ceremonies must be performed and shared with each other, and stories must be told to each other. It follows that Indigeneity is also an active and reflexive process. This is echoed in Taiaiake Alfred’s understanding that “a meaningful concept of Onkwehonwe⁹⁹ identity . . . must go beyond reflective practices to an actual political and social engagement with the world based on consensus arrived at through broad conversation among people who are part of that culture.”¹⁰⁰ Indigeneity thus transforms from a static conception of common existence to “an experience—not, perhaps, an experience that we have, *but an experience that makes us to be.*”¹⁰¹

In seeking a form of liberation that is principled, active, and reflexive, two good examples

93 Michael Hart, *Seeking mino-pimatisiwin: An Aboriginal Approach to Helping* (Halifax: Fernwood, 2003) at 40-44.

94 Ngugi Wa Thiong’o, “The Language of African Literature” in Ashcroft, Griffiths & Tiffin, *Reader*, *supra* note 18, 285 at 287.

95 Vine Deloria Jr., *The World We Used to Live In: Remembering the Powers of the Medicine Men* (Golden: Fulcrum, 2006) at xxix.

96 *Ibid.* at xix.

97 *Ibid.* at xxiv.

98 Rupert Sheldrake, *The Rebirth of Nature: The Greening of Science and God* (New York: Bantam Books, 1991) at 213, quoted in *ibid.* at xxxi.

99 “Original people”.

100 *Supra* note 60 at 139.

101 Jean-Luc Nancy, *The Inoperative Community* (Minneapolis: University of Minnesota Press, 1991) at 26, quoted in Linnell Secomb, “Fractured Community” (2000) 15 *Hypatia* 133 at 140 [emphasis in original].

are found in the methods of the Ejército Zapatista de Liberación Nacional (“EZLN”). Although there is debate on the principled position of using arms to effect political change, these examples could be used in both armed and unarmed resistances. The first example is found in a “new political culture.”¹⁰² The EZLN is distinct in its tactics of engaging mainstream government in “its professed refusal to contemplate taking over the government of the country.”¹⁰³ In the words of Subcomandante Marcos, the spokesperson for the EZLN, “the point is not to seize [it], but to revolutionize its relationship to those who exercise it and those who suffer it.”¹⁰⁴ This technique avoids the problems with revolt—that a reaction to the current system ultimately just re-inscribes the colonial relationship by placing the colonized in the place of the colonizer. This “new political culture” rejects the idea that liberation and sovereignty rely on a relationship of power-over and therefore also rejects the legitimacy of the state’s use of violence to oppress. This attitude would allow Indigenous peoples in the nation now known as Canada to reject the state of exception and thus bring about a collapse of the ideological foundations of the state. What happens when *homo sacer* refuses his or her place in the state of exception and by her own actions exists outside of it?

The second example of principled, active, and reflexive liberation methodology has been called “ordering with obedience.”¹⁰⁵ The people make the decisions about the orders they will follow. The idea is to practice and articulate “power in terms of the power to do or to accomplish, that is, of power as exercised in the actual fulfillment of the people’s decision and with the people’s willing participation.”¹⁰⁶ The source of political power is found not in a sovereign’s capacity to exercise hierarchical power-over people but in the people’s engagement with each other and the day-to-day living of their lives on their own terms.

The techniques of the EZLN reflect Memmi’s proposition that, when it comes to the colonial relationship, “there is no way out other than a complete end to colonization. The refusal of the colonized cannot be anything but absolute, that is, not only revolt, but a revolution.”¹⁰⁷ Revolution in the face of the state of exception begins with Indigenous existence. We must exist in the face of the state of exception that claimed we did not exist. It means we must relearn our languages. We must relearn the land. We must relearn our place in the world. In relearning, we must also remind ourselves that Indigeneity is not a static concept, stuck in a time before European influence. The beauty of cultural recognition is the capacity of culture to be fluid and hold relevance for us today.

Although it may seem that merely existing cannot solve the problems that hundreds of years of colonization have imposed, it must be the prerequisite to any other dialogue that occurs between ourselves, and between us and the Canadian state. It is from the sources of Indigeneity that we can answer the questions that precede liberation: Who are we? Who do we want to become? Without this knowledge we are merely Indians or Aboriginals spewing the rhetoric of rights and politics. Indeed, we will be pressured to frame our claim to freely be Indigenous in the language of Canadian legal rights and politics. We must resist and remember that the Canadian legal system is incapable of acknowledging Indigeneity

102 Subcomandante Marcos quoted in Valerie Wagner and Alejandro Moreira, “Toward a Quixotic Pragmatism: The Case of the Zapatista Insurgency” (2003) 30 *boundary 2*, 185 at 189.

103 *Ibid.* at 190.

104 Subcomandante Marcos quoted in *ibid.* at 188.

105 *Ibid.* at 190.

106 *Ibid.*

107 Memmi, *supra* note 15 at 150.

as an identity worthy of recognition. Indigeneity threatens the sovereignty of Canada. Ultimately, the actions of the Canadian state are outside of our control. This does not preclude engagement with the Canadian state or public; rather, it means that any engagement must occur on our own terms.

Perhaps it is anti-climactic that a critical debasement of the colonial legal relationship between the Canadian state and Indigenous peoples ends without a legally recognizable solution. But, in the sense that Indigeneity exists outside of that framework, so too must the work toward reclaiming Indigeneity. It is no longer enough that Indigenous people tread precariously on the edges of a state-defined existence that upholds the power and legitimacy of the Crown. We must ground ourselves firmly in the centre of our own definition based on values, principles, and methods that have survived the colonial machine. Only then will the edges of the state of exception be truly transformed.

ARTICLE

MISSING SUBJECTS: ABORIGINAL DEATHS IN CUSTODY, DATA PROBLEMS, AND RACIALIZED POLICING

By **Mandy Cheema***

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With so much discrimination occurring against our people, it is often amazing how accepting we are of our situation. We know that without tolerance there can be no justice. Without understanding there cannot be justice. Without equality there can be no justice. With justice we can begin to understand each other. With justice we can work and live with each other. Aboriginal people want a judicial system that recognizes the native way of life, our own values and beliefs, and not the white man's way of life.

— Elijah Harper, speaking before the Aboriginal Justice Inquiry of Manitoba.¹

INTRODUCTION

Years after Elijah Harper spoke before the Aboriginal Justice Inquiry of Manitoba, Aboriginal people in Canada continue to be entrapped by a criminal justice system that fails to recognize their native way of life. It is a system characterized by Aboriginal over-incarcer-

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1. Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991); Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Death of Helen Betty Osborne*, vol. 2 (Winnipeg: Queen's Printer, 1991) [collectively, *Aboriginal Justice Inquiry of Manitoba*]. The Government of Manitoba established this inquiry after numerous incidents of violence directed towards its Aboriginal population.

ation in prisons and discriminatory bail, trial, and sentencing outcomes.² While these are the common manifestations of interactions between Aboriginals and law enforcement officials, they are symptomatic of the broader systemic problem: an institutionalized failure to respond to the numerous other Aboriginal Canadians who have been missing subjects.³ In spite of the fact that there have been numerous police-related incidents of Aboriginal deaths, there remains a dearth of data in the role race plays in the police use of excessive force, specifically in cases of death while in police custody.⁴ The lack of data broken down along racial and ethnic lines makes it challenging to assess the number of Aboriginals killed in police custody and to make a comparison with their non-Aboriginal counterparts. A partial solution in monitoring police activity over racialized groups is to mandate a national policy where all police agencies across jurisdictions have a legal responsibility to collect data based on the race and ethnicity of individuals who die as a result of police contact.⁵ The foregoing thus informs the analysis in this paper, which considers two questions: First, do more Aboriginals die as a result of being in police custody than do non-racialized groups? Second, if this is the case, can this reality be explained by the existence of systemic institutionalized racism, or is this higher rate better explained by greater contact of Abo-

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- 2 See David M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008), 40 S.C.L.R. (2d) 655 [Tanovich, *Whiteness*]. The author advances the argument that twenty-five years after its adoption, the *Canadian Charter of Rights and Freedoms* has had very little impact on ameliorating racial injustice in the criminal justice system. However, in *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 58-65 (as per Cory and Iacobucci JJ.), the Supreme Court recognized the institutional failures of the criminal justice system, specifically making reference to bail and sentencing provisions for Aboriginals. *R. v. Gladue* provides for a different sentencing regime for Aboriginal offenders, in which the sentencing judge has the obligation, under the Criminal Code's section 718.2 (e) sentencing provisions, to take into account historical marginalization of Aboriginal people in Canadian society.
- 3 See *Aboriginal Justice Inquiry of Manitoba*, vol. 2, *supra* note 1 at 91 where the Commission observes that "Aboriginal peoples have experienced the most entrenched racial discrimination of any group in Canada." See also the discussion of the relevant literature in the following: Amnesty International, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada* (AI Index 20/003/2004, October 2004) online: Amnesty International <<http://www.amnesty.ca/stolensisters/amr2000304.pdf>>; Saskatchewan, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Regina: Queen's Printer, 2004) [*Stonechild Inquiry*]; Saskatchewan, Final Report of the Commission on First Nations and Métis Peoples and Justice Reform: *Legacy of Hope: An Agenda for Change*, vol. 1 (Regina: Queen's Printer, 2004); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice Canada* (Ottawa: Minister of Supply and Services, 1996) [RCAP]; *Aboriginal Justice Inquiry of Manitoba*, vol. 2, *supra* note 1; Aboriginal Justice Implementation Commission, *Recommendation on Policing*, (Winnipeg: Queen's Printer, 1991); Alberta, Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, *Justice on Trial* (Edmonton: Province of Alberta, 1991); Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (Research Paper Commissioned by the Ipperwash Inquiry) online: The Ipperwash Inquiry <http://www.ipperwashinquiry.ca/policy_part/research/index.html> [*Aboriginal Peoples and Criminal Justice*].
- 4 For further detail on the role race plays in death in police custody cases, see *infra* note 8. See also Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 222-32, 256-58, in which the author similarly argues that Aboriginals have been subjected to racial profiling, most clearly in the West. See generally Stansfield, *infra* note 8 at 117: "[A] study in Toronto found that of the seven fatal police shootings in that city during 1978-1980, 28.6% of the victims were racial minorities. Also, in a study of fourteen police shootings in Toronto during 1988-1992, 28.6% of the victims were racial minorities."
- 5 See generally Ontario, Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination*, (June 9, 2005), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy/pdf>> [OHR *Policy & Guidelines*]. The Ontario Human Rights Commission ("OHRC") has taken the position that the failure to collect data where it is warranted is not only an institutional failure, but also dispositive of the issue of wrongdoing: "[A]n organization that chooses not to collect data in situations where data collection is warranted may not be able to make a credible defence that it did not discriminate."

iginals with law enforcement officials? The thesis of this paper is that stereotyping by individual police officers, and more specifically, the broader systemic racism prevalent in policing, have resulted in greater numbers of Aboriginal deaths in police custody than of non-Aboriginal individuals.

Part I sets the context for the paper through an overview of the intersections between institutionalized stereotypes in policing and Aboriginal-police relations. Part II provides a definitional framework for death in custody. The argument is that a more expansive interpretation of what constitutes death in custody is necessary to rebut the more narrow approach many law enforcement agencies have traditionally adopted. The second part of the section delineates the scope of the problem of by conceptualizing it through case studies. Part III examines the efficacy of the recommendations that resulted from a *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild*⁶ (“*Stonechild Inquiry*”) through an examination of the shortcomings of the inquiry, and recommendations from major studies and reports that have examined Aboriginal-police relations in the context of the use of force. Part IV, advances the argument that systemic racism in policing is greatly hindered by the lack of race-based data and statistical information. The bulk of this section is devoted to advancing the argument that the manifestations of racial profiling make it imperative to establish a mandatory national data collection system across the various policing agencies to monitor and reduce the incidence of Aboriginal deaths in custody. Part V, a rights-based discourse, provides the conclusion to this paper.

I. RACIALIZED POLICING THROUGH STEREOTYPES

Upon seeing Harper, he (Cross) approached him and asked for identification. According to Cross, Harper realized that he did not have to tell Cross anything. Cross said Harper then started to walk past him. Cross reached out, placed his hand on Harper’s arm and turned him around. At that point, Cross said, Harper pushed him, causing him to fall backward onto the sidewalk. As he fell, he grabbed Harper, pulling him down on top of him. Cross testified that while he was on his back, he struggled with Harper and felt a tugging at his holster and, therefore, he reached down to grab his revolver. He said the gun came out of the holster with his and Harper’s hands on it. He testified that he and Harper both were tugging at the gun when it went off. The blast hit Harper in the middle of the chest.⁷

John Joseph (J.J.) Harper died shortly after being shot by Constable Cross during a routine police-civilian interaction on 8 March 1988. A constellation of factors help delineate the racial stereotypes at play: the discord between the police and Aboriginals, J.J. Harper’s lawful right to refuse to give personal identification and Constable Cross’s sense of entitlement

6 *Supra* note 3.

7 See *Aboriginal Justice Inquiry of Manitoba*, *supra* note 1 at 11 discussing the police-related death of John Joseph Harper. On March 8, 1988, Constable Cross and his colleagues of the Winnipeg City Police had arrested Native men in the area for “joyriding,” or stealing cars. Constable Cross subsequently stopped J.J. Harper, who was walking home, for questioning. Cross’s inability to move beyond pre-conceived notions, conditioned by his experiences with other native men in the area earlier in the night, resulted in the fatal shooting of an innocent Aboriginal man. For further discussion on racialized stereotypes in policing, see *infra* note 10.

to such private information, and most problematic, the absence of a clear outer limit to police use of excessive force.⁸ Indeed, the availability of empirical evidence on the intersection between systemic racism and police practices vis-à-vis Aboriginals establishes that Aboriginal-state relations are characterized by a form of “internal colonialism,” where “contemporary practices of over-policing, under-protection, and repression of Aboriginal peoples show that systemic failure in both policing and its governance continue to be real, live, and ever-present risks in complex unequal societies.”⁹ Policing Aboriginals is thus permeated by perceptions about Aboriginal people’s behaviour and mannerisms. Gestures such as looking sideways, or failing to make eye contact with the police are often criminalized. It is not necessarily the overt but the more subtle stereotypes that shape these police reactions and promote misconceptions that are a manifestation of what David Tanovich calls “policing race in Canada.”¹⁰ Tanovich makes the argument that policing through this race-based lens goes virtually unchecked among and within police forces, an argument that is especially relevant when considering the deaths of Aboriginals while in police custody.

II. WHAT IS DEATH IN CUSTODY? A DEFINITIONAL FRAMEWORK AND CONCEPTUALIZATION OF THE PROBLEM

A. Definition

Each provincial coroner in Canada is responsible for providing a definition of what constitutes death in custody. On a general level, a death in custody is one in which the individual dies while in prison or when there is direct police involvement or action.¹¹ In British

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- 8 Robert Stansfield, *Issues in Policing: A Canadian Perspective* (Toronto: Thompson Educational, 1996) at 127. The author argues: “Canadian police are authorized by law to use force, including lethal force, to resolve conflict. Attempts to systemize the use of force by some Canadian police have produced a situation in which police training in the use of force emphasizes violent conflict resolution strategies rather than non-violent conflict resolution strategies, and police-civilian conflicts tend to be escalated rather than de-escalated.” He writes that “a study in Toronto found that of the seven fatal police shootings in that city during 1978-1980, 28.6% of the victims were racial minorities. Also, in a study of fourteen police shootings in Toronto during 1988-1992, 28.6% of the victims were racial minorities” (at 117).
- 9 Gordon Christie, “Police-Government Relations in the Context of State-Aboriginal Relations” (Background paper written for the Ipperwash Inquiry, 2005), online: <www.ipperwashinquiry.ca/policy_part/relations.crp.html> [Christie, “Ipperwash”]. Professor Christie recommends a different framework with respect to policing Aboriginal communities. See also RCAP, *supra* note 3 where the commission concluded that “all the inquiries concur that Aboriginal people who encounter the justice system are confronted with both overt and systemic discrimination and that this discrimination is one reason why many Aboriginal persons have not received due justice.”
- 10 For a comprehensive discussion of systemic racism in the criminal justice system, see David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) [Tanovich, *Colour*]. Tanovich discusses the institutionalization of racial stereotypes in police forces across the country. See also David M. Tanovich, “Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 *Osgoode Hall L.J.* 145-187 [Tanovich, “Profiling”]. The author conceptualizes racial profiling vis-à-vis the over-surveillance of racialized communities as follows: “[R]acial profiling is implicated in this context because assumptions about race and crime play a role, along with other race-neutral behaviour, in creating a suspicion in the mind of the police officer that the individual has engaged in, or is currently engaging in, criminal activity. Even in circumstances where an officer can point to other conduct that raised his or her suspicions, when properly analyzed through a race-neutral lens, this conduct may actually turn out to be entirely innocuous.” For further discussion on the intersections between racism and the law, see also Carol Alyward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999).

Columbia, while the regulations under the *Coroners Act*¹² mandate an automatic inquest after a death in custody,¹³ the interpretation of what constitutes “death in custody” is often narrowly construed. In the Frank Paul inquiry in B.C., the Coroners Office argued that the reason an inquest was not held was because Mr. Paul was not immediately in the physical custody of the police officer and, thus, the death was precluded from being deemed a death in custody.¹⁴ The Coroners Office’s limitation of death in custody to those circumstances in which the individual is in the physical care and control of the officer just prior to the death is problematic; it creates a threshold for establishing that police actions contributed to the death that is high and potentially misleading.

The Royal Commission into Aboriginal Deaths in Custody in Australia (“RCIADIC”) recommended that the definition of what constitutes death in custody be broadened to include exceptional situations in which a person dies in the process of arrest or while escaping, or sustains an injury in custody that subsequently causes the death of a person.¹⁵ For the purposes of this paper, it is the foregoing RCIADIC definitional framework that will serve in this analysis of “death in police custody”. The RCIADIC rationalized the need for an inclusive definition as follows:

The essential quality which attracts the public interest in reviewing the circumstances of death is the exercise of powers conferred on officers entrusted with a public duty. ... It is imperative to review the use of powers conferred by the State to ensure that they have been exercised in a reasonable, justifiable way and have not been abused. When considered in this perspective, coronial jurisdiction to inquire into the circumstances of death should not be confined to situations where the deceased has actually been taken into custody.¹⁶

Circumstances of death should not be limited to physical or imminent custody over the individual, such as a police chase or police shooting. Rather, unforeseen situations where ac-

11 BC Coroners Service. *BC Coroners Service Annual Report 2005* (British Columbia: Ministry of Public Safety and Solicitor General: 2005). Types of deaths classified as “custody” deaths are those classified as “police custody”: arrest-no lock-up, arrest-cell lock-up, drunk tank, police shooting, and pursuit, and those classified as “custody in federal correctional facilities.”

12 *Coroners Act*, S.B.C. 2007, c. 15.

13 See the RCMP in B.C. publication, “Response to National In-Custody Death Report” (2008), online: RCMP in B.C.) <www.bc.rcmp.ca>. The Coroner in British Columbia determines what incidents will be deemed “In-Custody-Death” (“ICD”).

14 See Bob Kennedy, “The Death of Frank Paul,” *Turtle Island Native Network News* (26 January, 2008), online: Turtle Island <<http://www.turtleisland.org>>. See also Camille Bains, “Advice against inquest wasn’t based on race, ex-coroner insists” *The Canadian Press* (18 February 2008) A4. After public outcry and the Aboriginal community’s persistence, the Frank Paul Inquiry was finally established ten years after the death of this Mi’kmaq man. A brief synopsis of the events of December 1998 is as follows: Frank Paul was intoxicated and taken to the Vancouver Police Department. He was later dropped off in the Downtown Eastside. However, he was picked up again and placed in a drunk tank and then once again dropped off in the Downtown Eastside—only this time he was dropped off in an alley where he died of hypothermia shortly thereafter. This death-in-custody case magnifies the difficulty of seeking resolution for victims and their families. Constable David Instant, who dropped Paul off in the alley that night, was neither penalized nor sanctioned by the Vancouver Police Department.

15 Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol. 1 (Canberra: Australia Government Publishing Service, 1990) at 2, [RCIADIC]. See also *ibid*, where the application of the Frank Paul case to the RCIADIC definition outlined herein is the more plausible definitional framework for coroners and police agencies to adopt.

16 *Ibid*.

tions of the police predate the death, as in the Frank Paul case, should be included in a broader interpretation of death in custody. Thus, an expansive interpretation, as advanced by the RCIADIC, should be used by the coroner's services across jurisdictions in this country so as to encapsulate the different circumstances in which individuals die.

B. Missing subjects: Case studies on Aboriginal Deaths in Custody

While there is no official data broken down on racial and ethnic lines, anecdotal and other evidence indicates that the issue extends beyond the greater number of Aboriginal deaths. Subsequent investigations into these deaths are not deemed to be a significant priority as they are either not initiated in a timely manner or not carried out expeditiously.¹⁷ Indeed, findings from a study in Saskatchewan show that, on average, it took 517 days to launch an inquiry into the death of an Aboriginal male, whereas inquiries were established soon after for white males.¹⁸

1. British Columbia, Saskatchewan, and Alberta

B.C. Coroners Office statistics reveal that from 1992-2007, 28 of the 267 police custody deaths are listed as Aboriginal, which is more than 10 per cent of the total, although Aboriginals form less than 4 per cent of the B.C. population.¹⁹ A project by the Native Courtworkers and Counselling Association of B.C. recorded the custodial deaths of Aboriginals in B.C. and Saskatchewan and found the following:

The B.C. Coroners Service show[s] that while 60% of all First Nations deaths while incarcerated during 1993-2003 happened while in police custody, for the non-Aboriginal population the figure is much lower, at 25%. In Vancouver, during the period from about 1993-2003, when an Aboriginal person died in custody, the coroner ruled that the cause of death was undetermined in 20% of the cases, while the undetermined rate for the non-Aboriginal inmate population was 8%. Accidents were ruled the cause of death in 40% of the cases but only 28% for non-First Nations. In Saskatchewan, the Coroners reported 27 Abo-

17 Armina Ligaya, "Deaths in custody, the case histories," *CBC News* (25 September 2007), online: <<http://www.cbc.ca/news/background/policing/>>. See also Suzanne Fournier, "267 cop-related deaths in B.C. over past fifteen years" *The Province* (25 January 2008), online:

<<http://www.canada.com/theprovince/news/story>>. See also Am Johal, "Native Group Questions Custodial Deaths" *IPS News* (8 November, 2007), online: Inter Press Service <www.ipsnews.net>. See generally *infra* note 59. Over the years, Aboriginal organizations and communities have recorded Aboriginal deaths in custody. This is especially true with respect to those provinces with the largest Aboriginal population: Saskatchewan, Manitoba, Alberta, and B.C. In interviews, the interviewees all expressed the need for a mandatory data collection system that systematically tracks the Aboriginal status of victims of police-related deaths. See also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. 94th 193, where the Court held that oral testimony of Aboriginals was admissible as evidence. Aboriginal traditions and cultures are integral to the native way of life and are retold through oral stories. Historically, Aboriginal societies did not keep written records; rather, the elders retold oral histories to younger generations, thereby renewing their culture and traditions. The significance of this with respect to this paper is that acceptance of anecdotal evidence is imperative fill in gaps where there is no data collection.

18 Warren Goulding, *Just Another Indian: A Serial Killer and Canada's Indifference* (Calgary: Fifth House, 2001) at 188. Goulding explores the context for the murders of Aboriginals and concludes that institutional failures (public, political, media apathy) are a significant factor in the inability, or unwillingness, of authorities to take the appropriate measures to investigate these murders.

19 BC Coroners Service. *BC Coroners Service Statistics 1992-2007, BC Custody/Police-Involved Deaths* (British Columbia: Ministry of Public Safety and Solicitor General, 2007). British Columbia is unique with respect to being the sole jurisdiction in the country where the Coroners Office records custodial deaths of Aboriginals with reference to the type of incident and circumstances surrounding the death.

iginal deaths in custody from 1995-2002 and 3 police shootings of Aboriginal people during that period.²⁰

In Alberta, a government inquiry found that over a 20-year period, 43 per cent of people shot and killed by the RCMP in Alberta were of First Nations ancestry.²¹

a. Ontario and the Toronto Census Metropolitan Area

A study by Scot Wortley found that Aboriginals are vastly overrepresented in investigations conducted by the Special Investigations Unit (“SIU”) in the province of Ontario:

Although Aboriginals represent 7.1% of all SIU investigations, they represent 7.7% of all investigations in which injury or death was directly caused by the police. According to SIU data, the Aboriginal residents of Ontario are also over-represented in police shootings. Although Aboriginal people represent only 1.7% of the provincial population, they represent 6.8% of all civilians involved in SIU shooting investigations. The Aboriginal police shooting rate of 2.66 per 100,000 is 4.1 times greater than the White rate (0.48). Over the study period, the police shot one Aboriginal civilian for every 37,593 Aboriginals in the general population. Although Aboriginals are only 1.7% of the provincial population, they represent 5.8% of all SIU investigations into civilian deaths. The Aboriginal SIU death rate is 3.4 times the provincial rate and 4.6 times the White rate. Although Aboriginals are only 1.7% of the provincial population, they represent 8.1% of all deaths caused by police use of force. The Aboriginal rate of death by police use of force (1.59) is 4.8 times the provincial rate and 7.12 times greater than the White rate.²²

Regarding Aboriginal representation in SIU investigations in the Toronto Census Metropolitan Area (“CMA”), Wortley stated:

Although Aboriginals represent 0.45% of all SIU investigations, they represent 1.8% of all investigations in which injury or death was directly caused by the police. Furthermore, a comparison of the Aboriginal rate (14.78) with the White rate (2.57) suggests that Aboriginal civilians are 5.7 times more likely to become involved in a SIU use of force investigation than their White counterparts.²³

This comparative data magnifies the extent to which race has been a critical factor in the

20 Nancy Hannum, Native Courtworkers and Counselling Association of British Columbia, “Aboriginal Deaths and Injuries in Custody and/or with Police Involvement: An initial look at information and incidents in British Columbia, Saskatchewan, Manitoba and Ontario” (Prepared for the First Nations Summit Chiefs in Assembly, British Columbia, 2003). The Native Courtworkers are similar to the Toronto-based *Gladue* courtworkers who prepare sentencing reports for Aboriginal offenders. In B.C., the Native Courtworkers usually live in the community and play the role of both counsellor and advocate for the Aboriginal individual in criminal proceedings.

21 Robert Kiyoshk, April Arsenault & Lynda Gray, *Family Violence in Aboriginal Communities* (Aboriginal Nurses Association of Canada and RCMP: Alberta, 2001) at 2.

22 Scot Wortley, “Police Use of Force in Ontario: An Examination of Data from the Special Investigations Unit” (Prepared on behalf of the African Canadian Legal Clinic for submission to the Ipperwash Inquiry) [“Police Use of Force”]. In 1999, Ontario established the Special Investigations Unit (SIU) to investigate deaths or serious bodily harm that may have resulted from criminal offences caused by police officers.

23 *Ibid* at 20.

custodial deaths of Aboriginals, rebutting the presumption that police operate through a race-neutral lens.²⁴ These statistics have led some observers and academics to advocate not only for a reconceptualization of Aboriginal-police relations, but also a more comprehensive model of accountability for police actions. Christie sees the form and function of police accountability as follows:

The value in police accountability is grounded in recognition of the role police play in liberal democracies, recognition which demands that the police be both directed by the public good and overseen in its efforts to promote that good. *Forms* of oversight are essential in providing protection from “rogue” police elements and in fostering democracy notions of accountability.²⁵

The necessity of forms of oversight is a useful paradigm shift in conceptualizing the nature of Aboriginal-police relations and was one of the focal points for the *Stonechild Inquiry*.

III. THE NEIL STONECHILD INQUIRY

The *Stonechild Inquiry* was a government-led inquiry with the specific mandate of discovering the facts about the tragic freezing death of seventeen-year-old Neil Stonechild and the subsequent police investigation.²⁶ Stonechild’s frozen body was found on the outskirts of Saskatoon in 1990.²⁷ In 2003, Justice David Wright found that Neil Stonechild was in the custody of two police officers before he died and that they tried to conceal this fact when they testified at the inquiry.²⁸ Most damaging, Justice Wright concluded that the police had prematurely closed the investigation because of their suspicion that the lead detective was aware that members of the police force could have been involved in Stonechild’s death.²⁹ The following discussion centres on shortcomings in the *Stonechild Inquiry* and recommendations for more appropriate ways to address the issue of Aboriginal deaths while in police custody.

A. Shortcomings of the *Stonechild Inquiry*

Recommendations from the *Stonechild Inquiry* failed to adequately address the need for comprehensive monitoring systems to enforce compliance. Nonetheless, there were some

24 Donna Coker, “Addressing the Real World of Racial Injustice in the Criminal Justice System” (2003) 93 J. Crim. L. & Criminology 827 at 870, cited in *Whiteness*, *supra* note 2 at 675. Coker conceives of the police presumption of race neutrality as being “white privilege,” saying “Whites seldom think of themselves through the lens of race; whiteness is invisible to most whites. Rather, whites see themselves and other whites as individuals. Because they cannot see the privilege that protects them from police maltreatment and suspicion, they have difficulty believing that such treatment is not in some way invited or provoked when it happens to others.”

25 Christie, “Ipperwash”, *supra* note 9 at 148 [emphasis added].

26 *Stonechild Inquiry*, *supra* note 3.

27 Susanne Reber & Robert Renaud, *Starlight Tour: The Last, Lonely Night of Neil Stonechild* (Toronto: Random House Canada, 2005). The phenomenon of picking up Aboriginals, mostly males, and leaving them in the outskirts of the city is commonly referred to as a “Starlight Tour.” In another case, Darryl Knight survived a similar “tour,” which subsequently led to numerous complaints. For further discussion, see also Todd Gordon: “[T]he sheer number of complaints suggested that there had been more incidents of Starlight Tours than those few that had made news headlines.” *Cops, Crime and Capitalism: The Law-and-Order Agenda in Canada* (Halifax: Fernwood, 2006) at 23 [Gordon].

28 *The Stonechild Inquiry*, *supra* note 3.

29 *Ibid.*

useful recommendations, such as the proposal for the integration of police training with greater cultural sensitivity training and allowing for a better understanding of Aboriginal culture. In addition, the Saskatoon Police Services established a Sudden Death Review Committee which must give its approval before investigations into sudden deaths are concluded.³⁰ However, recommendations for reforms to the complaints process did not take into account the need for external oversight by Aboriginal communities and organizations, both in terms of accountability measures and in program implementation and delivery.³¹ Failure by the Saskatoon Police Services to mention improvements in interactions between Aboriginals and other groups in their submissions before the inquiry is problematic as it points to a lack of commitment by the Saskatoon police to improve relations with the Aboriginal community.³² Additionally, no Aboriginal police models were mentioned as alternative forms of governance. The most significant weakness of the report was its failure to recommend a national mandatory data collection system. As we will see in the forthcoming discussion, the practicality of this system is illustrated not only by its ability to track Aboriginal deaths, but also its function as a preventative measure to deter race-based police practices.

B. Recommendations

Numerous government reports and studies document the problems relating to accountability in cases of police use of deadly force vis-à-vis Aboriginals.³³ The internal investigation process in these cases should be reformed or supplemented by a public and/or Aboriginal model, providing for a more robust public account and audit system.³⁴ An external civilian complaints process and an independent Aboriginal investigation board could also augment the aforementioned internal investigation procedures.³⁵ Establishing an Office of Director of Public Prosecutions would be the most effective method of ensuring that complainants are not deterred from coming forward.³⁶ In addition, establishing investigative boards to implement recommendations through greater public and Aboriginal control of inquests can also serve as a form of external oversight. Video equipment should be used

30 *Aboriginal Justice Inquiry of Manitoba*, *supra* note 1.

31 See generally Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan: A Progress Report, Year One* (Ottawa: Public and Services Canada, 1998). The government responded to the recommendations of the RCAP by setting out the framework for government action, emphasizing a commitment to renewing a partnership with Aboriginal communities, and greater models of Aboriginal self-governance that are inclusive of Aboriginal traditions.

32 See generally Joyce Green, "From Stonechild to Social Cohesion: Anti-Racist Challenges for Saskatchewan" (Paper presented to the Canadian Political Science Association, University of Western Ontario, 2-4 June 2005) at 7. The author stated that Neil Stonechild's death and the investigation were the result of "a manifestation of structural and individual racism in institutional culture," and that "the report documents the obdurate denial of this by especially the Saskatoon Police Force."

33 See generally *Recommendation on Policing*, *supra* note 3.

34 See also John Hylton, "Canadian Innovations in the Provision of Policing Services to Aboriginal Peoples" (Research paper commissioned by the Ipperwash Inquiry, 2005); and Rick Linden, "Aboriginal Policing in Manitoba: A Report to the Aboriginal Justice Implementation Commission" (Prepared for the Police Futures Group of the Canadian Association of Chiefs of Police, 2001).

35 See also Christie, "Ipperwash," *supra* note 9 at 19, where the author states: "[W]ithout meaningful civilian oversight to address concerns about police practices, one can assume that many potential complaints go unrecorded."

36 See generally *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989), [*Donald Marshall Commission*]. In addressing the need for balancing police accountability and independence, the Commission into Donald Marshall's wrongful conviction recommended the creation of a director of public prosecutions who would ordinarily be independent from the attorney general but could be subject to written directives that would be published in the Gazette.

to record statements and police interactions in cases of deaths in custody. Aboriginal organizations have suggested that the taping record the totality of each interview, including all introductory comments, explanations, and warnings given by the police, and including any formal statement or other comments that result.³⁷

Establishing an SIU modeled after Ontario's would provide greater accountability in the investigations of civilian deaths implicating police officers. The Director of the SIU, who must not be a serving or former police officer, maintains the discretion to begin an investigation.³⁸ The Aboriginal Justice Implementation Commission Recommendation on Policing called on the government to aid in the development of an SIU or similar independent review agency to conduct police complaints and implement an effective complaints system for Aboriginal victims of police violence or, in the alternative, for the families of victims of death in police custody.³⁹ The RCIADIC in Australia discussed six pertinent factors for understanding death-in-custody cases that provide a useful framework for a critical review of both the surrounding circumstances of the death and the subsequent investigation. These factors include the racial, ethnic, religious, and social background of the individual; the location of the death and circumstances surrounding the death; the cause and manner of death; the response from public authorities; the efficacy and accountability of an internal as opposed to an external investigation, and any disciplinary action advanced against the police officer alleged to have caused the death; and, finally, the difficulty for Aboriginal families in advancing a criminal investigations and/or civil lawsuit.⁴⁰

IV. DE-RACIALIZING POLICING THROUGH RACE-BASED DATA

A. A Mandatory Data Collection System: Solutions and Challenges

The most significant shortcoming of the *Stonechild Inquiry* was the failure to recommend a mandatory data collection system. There is currently no systematic compilation of data and statistical information about Aboriginal deaths in custody. These deaths need to be closely monitored through what Scot Wortley refers to as "race-based statistics."⁴¹ The dearth of such statistics makes it more difficult for racialized individuals and Aboriginals to advance complaints of systemic racism by the police. The Ontario Human Rights Commission ("OHRC") has stated that:

Numerical data that demonstrates that members of racialized groups are disproportionately represented may be an indicator of systemic or institutional racism and the following factors may warrant data collection

37 See also Thomas Gabor's report to the Office of the Correctional Investigator, *Deaths in Custody* (Ottawa: Office of the Correctional Investigator, 2007). Video surveillance was identified as one of the issues raised in the findings and recommendations of boards of investigation and coroners following Gabor's report.

38 Dianne Martin, "Accountability Mechanisms: Legal Sites of Executive-Police Relations-Core Principles in a Canadian Context," in Margaret E. Beare & Tonita Murray, eds., *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007) at 264. See also "Police Use of Force," *supra* note 22.

39 See *Recommendation on Policing*, *supra* note 3.

40 See generally RCIADIC, *supra* note 15.

41 See "Police Use of Force," *supra* note 22 at 25. See also Harris, "The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection" (2003) 66 *Law & Contemp. Probs.* 71.

and analysis: persistent allegations or complaints of discrimination or systemic barriers; a widespread public perception of discrimination or systemic barriers; data or research studies demonstrating discrimination or systemic barriers; observed inequality in the distribution or treatment of racialized persons within an organization; or evidence from other organizations or jurisdictions that a similar policy, program or practice has had a disproportionate effect on racialized persons.⁴²

While there have been numerous commissions and inquiries over the past thirty years, they have not addressed the underlying problems and concerns facing the Aboriginal community. Hence, adopting the Commission's recommendations on data collection, particularly where there is strong reason to believe the community is being marginalized due to systemic racism, would serve to raise "race awareness" among police. Wortley summarizes the current limitations of Canadian research of police violence vis-à-vis racialized groups as follows:

Canadian research on police violence has been greatly hindered by the fact that police services in this country do not routinely release official statistics on police shootings or other use of force incidents. Moreover, research on racial differences in police use of force is almost impossible to conduct because there is an informal ban on the release of any type of information that breaks down criminal justice statistics—including police shootings—by civilian racial background.⁴³

Some federal and provincial agencies have statistics about deaths in custody or reviews of police incidents. However some agencies rigorously avoid the identification of racial origin, while others correlate racial origin for some statistics but not death statistics.⁴⁴ Where statistical information on race exists, variations in the reporting and collection of data about racial origin make it problematic to develop a streamlined race-based model that could collect this data across the country and use similar tools for monitoring and evaluating purposes. As we will see below, streamlining is important due to jurisdictional and other differences across the country.

1. The Structure and Function of a Mandatory Data Collection System

Police services across Canada should report to a national data collection service that records the race, ethnicity, and/or ancestry of the deceased. A national archival data system would encompass the identification, classification, and collection of this information. Guidelines developed by Manitoba Justice for data collection and approved by the province's Aboriginal community outline the following framework:

Ask the individual if he/she identifies himself/herself in being of Aboriginal ancestry. If the individual affirms that he/she is Aboriginal, the

42 See *supra* note 5 at 1. The OHRC has also argued in this report and elsewhere that "statistics collected in an appropriate manner on a periodic or on-going basis can provide an effective means of monitoring for and preventing social phenomena widely recognized as discriminatory such as profiling" ... "on the basis of race...and "where problems are identified, data analysis can provide useful direction for remedies to ameliorate systemic dissemination as well as evaluate the success of such measures." See generally *supra* note 3.

43 See "Police Use of Force," *supra* note 22 at 7.

44 See Statistics Canada, *Aboriginal Peoples in Canada* (Ottawa: Minister of Industry, 2001).

police officer should ask their status. Status would be identified as status (i.e. First Nations), non-status or Métis. If the individual declares himself/herself as status, have them identify his/her band.⁴⁵

This process would enable an assessment of how the information about racial origin is determined by police agencies, permit a detailed analysis of individual deaths, and establish a typology of patterns for these deaths. For comparative purposes, this data would allow the analysis of the data-reporting capacity of police forces, as the system could collect and identify which relevant information police agencies do and do not report. We now turn to some of the difficulties in collecting data in the following section.

B. The Challenges Of Collecting Data

There are numerous challenges in establishing a mandatory data collection system that is national in scope and application. First, a brief discussion is warranted about the significance of integrating Aboriginal views in meeting these challenges. A fundamental objective would be to contextualize the program by taking into account the Aboriginal community's historically disadvantaged position in Canadian society. The Aboriginal community should be informed that the purpose of ameliorating systemic discrimination underlies the collection, use and disclosure of the data. Comparative research from Australia has emphasized the merits of establishing a race-based data system that integrates the views of Aboriginals.⁴⁶ Collaboration and information sharing across jurisdictions, and between police agencies and Aboriginal communities, are essential for a national data system.

1. Problems With Police/Aboriginal Identification, Data Compliance, and National Standards And Tracking Systems

a. Police Errors In Racial Identification

The potential inaccuracy of police identification of Aboriginals, coupled with the reluctance of Aboriginals to self-identify out of fear of reprisal and mistrust of the police, means that many deaths may continue to go unreported and undocumented. *Collecting Data on Aboriginal People in the Criminal Justice System* summarizes some of the challenges police encounter in collecting race-based data:

With perhaps the exception of the corrections intake process for those entering custody, there are presently no standards or guidelines to ensure that people in contact with the justice system self-identify as Aboriginal or non-Aboriginal. Therefore, some justice personnel, particularly those in the policing sector, may report a person's Aboriginal identity based on their own visual assessment, a method which is subject to error and

45 Rebecca Kong & Karen Beattie, *Collecting Data on Aboriginal People in the Criminal Justice System: Methods and Challenges* (Ottawa: Canadian Center for Justice Statistics, 2005) at 21 [*Collecting Data on Aboriginal People in the Criminal Justice System*].

46 See generally OHR *Policy & Guidelines*, *supra* note 15. See also, *Guidelines for Collecting Data on Enumerated Grounds Under the Code* (Ontario: Ontario Human Rights Commission, 2003.). The OHRC has also advocated consultation with affected communities with respect to the need for data collection and appropriate methodology where public interest allegations are involved. A comparative analysis illustrates the benefits of consistent and expanded quality data on race and ethnicity. See generally *ibid* at 24, where the authors state: "in some parts of the world where Aboriginal identity or race/ethnicity are collected, there is an increasing recognition of the need for these data to inform social policy questions."

lacks support by national Aboriginal groups.⁴⁷

b. Mandatory Self-Identification

The historical marginalization of Aboriginal peoples, and the discord between Aboriginals and policing services, means that Aboriginal people may not self-identify as such when the police do take the initiative to inquire about their race or ethnicity. While self-identification is viewed as the preferred method of identification, it is not without its difficulties because Aboriginal people can be influenced by changes in ethnic affiliation, meaning changes in peoples' sense of belonging and identification with their ancestry.⁴⁸ Most problematic is that once the police officer inquires into the race or ethnicity of the individual, "individuals may choose to misidentify themselves, particularly in the context of criminal justice."⁴⁹ Compounding this problem is the reality that "individuals who fear discrimination may be unwilling to identify themselves as Aboriginal."⁵⁰

Thus, the Manitoba Justice Guidelines mentioned earlier may be too comprehensive for specific application in the context of Aboriginal-police interactions. Such interactions are often very brief and intense, and lack an efficient means for documenting information. In the design and delivery of a data program, it is imperative to take into account that "policing is a crucial focal point for any alienation, cultural insensitivity or systemic racism which Aboriginal people might encounter in their dealings with the criminal justice system."⁵¹ Most interactions between Aboriginals and the police take place while the police are on patrol, and are often tainted by police perceptions about Aboriginals. As Gordon states, "given the amount of police attention they receive, it is not surprising to find that Aboriginals have in turn experienced a disproportionate amount of the more aggressive forms of contemporary policing."⁵² Many Aboriginals with no personal experience with police are preconditioned by an awareness of interactions that other members of their community have had with the police. Further, many of these interactions may be situations where "patrol officers have been found to act on the basis of stereotypes and discriminatory views of people and circumstances."⁵³ Stand-offs such as Oka, Ipperwash, and Caledonia continue to serve as painful reminders about the chasm between Aboriginals and the police.

c. Automated Tracking Systems

Automated tracking systems that systematically track and monitor the race and ethnicity of individuals may allow some agencies to generate race-based information internally. The availability of these tracking systems provides a variety of options for data collection. In

47 *Supra* note 45 at 8.

48 Eric Guimond, "Fuzzy Definitions and Population Explosion: Changing Identities of Aboriginal Groups in Canada" in D. Newhouse & E. Peters, eds., *Not Strangers in These Parts: Urban Aboriginal People* (Ottawa: Policy Research Initiative, 2003).

49 *Supra* note 44 at 20.

50 *Ibid.*

51 See also *Report of the Saskatchewan Indian Justice Review Committee*. (Saskatchewan: Department of Justice, 2004).

52 See Gordon, *supra* note 27 at 23.

53 John Hylton, "The Justice System and Canada's Aboriginal Peoples: The Persistence of Racial Discrimination," in Wendy Chan & Kiran Mirchandani, eds., *Crimes of Colour: Racialization and the Criminal Justice System in Canada* (Peterborough: Broadview Press, 2002) at 143.

some cases it may require searching individual case files to identify Aboriginal persons. The agency would have to undertake more statistical analysis to correlate cause of death or nature of police actions with the Aboriginal or racial dimension of this information, and would require direction from senior officials to collect and release this information. Several agencies have suggested that this would create difficulties as a result of freedom of information legislation.⁵⁴ Many government agencies claim that they cannot release race-based statistics, let alone collect these statistics, because of privacy interests. Requests for information, mandated by such legislation, are generally time-consuming and there is no assurance that information will be forthcoming. If there is no identification of racial origin in the internal files, the permission of senior officials may be needed to allow researchers to view the files of persons who have died or were seriously injured to identify whether they were Aboriginal.

d. Data Compliance and National Standards

An evaluation component is essential to implement the objectives of a comprehensive “race-based” data collection system. As Wortley has stated: “[W]ithout collecting data on civilians killed or injured by the police, how can we really determine the effectiveness of programs designed to reduce racial bias in the police use of force?”⁵⁵ The availability of this data places the onus on police departments to directly face issues and allegations of racialized policing within their forces. The issue becomes one of co-opting the various police services across jurisdictions to collect and report data. Coordination of policy and external review of the quality of data produced by police services will require some degree of standardization.

While these national standards for collection methods are pertinent to informing policy and research analysis, compliance with national standards is difficult to maintain because jurisdictions have different standards and regulations. For example, with respect to data on Aboriginals in the criminal justice system, while some jurisdictions, such as Manitoba, report complete, consistent data, there are variations in levels of reporting and the quality of data among several other jurisdictions.⁵⁶ Further, a definition of what constitutes death in custody requires a streamlined process, which would ideally look to all provincial coroners services to standardize a more comprehensive definition. Another jurisdictional issue is that the various police services may very well need to make specific amendments to their respective police services legislation to give effect to reporting requirements. Perhaps the most important factor in determining the success of such a system is,

ultimately, the development of a structure to govern how the police interact with Aboriginal peoples [that] will not turn on details of institutional design but on an honest and sincere commitment to a *decolonizing* framework of action, a framework that embodies the core values iden-

54 See *supra* note 45 at 10, where Kong and Beattie explain how “there exists a perception among police that privacy laws prohibit police from sharing, for national statistical purposes, data which they are already collecting for other legitimate purposes such as investigation.”

55 See “Police Use of Force,” *supra* note 22 at 80. See also Scot Wortley, “Policing the Usual Suspects: Evidence, Consequences and Policy Implications of Racial Profiling in Canada” [unpublished]. In this study, Wortley outlines the findings of a pilot study undertaken in Kingston, Ontario, where police officers had collected the race/ethnicity of every individual they stopped, as well as the location and reason for the stop. The findings confirmed the author’s hypothesis that African-Canadians, especially males, were disproportionately stopped in comparison to their white counterparts.

56 See *supra* note 44 at 24.

tified by Aboriginal peoples: truth, reconciliation, reparation, and the reconstruction of the relationship between Aboriginal peoples and the Canadian state.⁵⁷

e. A Model for Death-In-Custody Litigation

The misuse of police force has resulted in numerous custodial deaths in the Aboriginal community. However, there is a dearth of death-in-custody litigation, likely because of the numerous difficulties in advancing investigations or seeking a remedy through the criminal or civil courts. For example, most criminal investigations into police misconduct are internally investigated, and in cases where criminal charges have been laid, they have often been subsequently dropped.⁵⁸ Similarly, seeking a remedy through the civil system is difficult, as the “uncertainty of damage awards, coupled with the loser-pays-costs rules used in civil litigation, may not make protracted litigation worthwhile; deterring victims of profiling and their families from bringing civil actions against police officers.”⁵⁹ Most problematic is the failure or indifference of lawyers to engage in what David Tanovich calls “race talk” in the courts.⁶⁰ Engaging in a race-based model for litigation through a conception of equality rights can provide lawyers with an opportunity to renew their commitment to advocate for accountability in policing.

V. CONCLUSION: A RIGHTS-BASED DISCOURSE TO ABORIGINAL DEATHS IN CUSTODY

Eighteen years after the death of Neil Stonechild, numerous inquiries, commissions, and reports have not reduced police violence in relation to Aboriginal people. While Darryl Knight survived the Starlight Tour, others have not been as fortunate. Stonechild, along with numerous others such as J.J. Harper, Helen Betty Osbourne, Rodney Naistus, Lawrence Wegner, Lloyd Dustyhorn, Darcy Ironchild, and Frank Paul have all died under suspicious circumstances.⁶¹ This highlights the reality that current policing practices are not only deeply racialized, but are an extension of the racialization of notions of public disorderliness and criminality. The intersections between race, public disorderliness, and criminality were made clear in a 1967 Canadian Corrections Association publication *Indians and the*

57 Margaret E. Beare & Tonita Murray, eds., *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007) at 176 [emphasis added].

58 Tanovich, *Colour*, *supra* note 10 at 45. In advancing his argument that institutional failures are largely to blame for lack of accountability to racialized communities, the author chronicles cases where officers have been acquitted after being charged with the use of deadly force. See also, on the issue of police use of deadly force, Gabriella Pedicelli, “When Police Kill: Police Use of Force in Montreal and Toronto” (Montreal: Vehicule Press: 1998).

59 Sujit Choudhry & Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability” (2003) 41 *Osgoode Hall L.J.* 1 at 21. The authors argue that alternative remedies may be the best means to combat racial and ethnic profiling in law enforcement agencies.

60 Tanovich, *Whiteness*, *supra* note 2 at 685. Tanovich points out that defence lawyers are not alone in the justice system in failing to advance racial profiling arguments. In making his argument, he points to *R. v. S. (R.D.)*, where an allegation of reasonable apprehension of bias was directed to Justice Corrine Sparks, an African-Canadian judge, after she pointed out that systemic racism was a problem in Halifax. See *R. v. S. (R.D.)*, [1995] N.S.J. No. 184 (S.C.), and the discussion of the case in Tanovich, *Colour*, *supra* note 10 at 125-30.

61 See generally Christie, “Ipperwash,” *supra* note 9. Darryl Knight was also subjected to a starlight tour by the police, but survived to tell his story. After Knight came forward, many Aboriginals who claimed to have been subjected to starlight tours came forward with their experiences.

Law:

The constant surveillance sometimes required by the Indian and Métis people can, under these circumstances, harden into open dislike on the part of the police It is obvious that the Indian people, particularly in the cities, tend to draw police attention to themselves, since their dress, personal hygiene, physical characteristics and location in run-down areas make them conspicuous. This undoubtedly results in more arrests.⁶²

This abhorrence towards Aboriginal people, perpetuated by racialized policing practices, continues to present grave danger to the physical, psychological, and human dignity of Aboriginal people. Aboriginals have been historically marginalized by these entrenched stereotypes in policing services across the country—attitudes and stereotypes that are largely unchecked by our legislators, the courts, and policing organizations. Leaving these stereotypes of Aboriginals—as symbolic assailants and criminal suspects until they prove otherwise—unchecked only heightens the discord among Aboriginals and police forces.⁶³ The institutionalization of racism manifested in Starlight Tours in the Prairie provinces and the over-surveillance of Aboriginal people in the Downtown Eastside in Vancouver has made Aboriginals prime targets for police misuse of force.

Inadequate legislation and an equally inadequate response from lawyers and police services are highlighted by the dearth of death-in-custody litigation in our courts. While there were some useful recommendations arising from the *Stonechild Inquiry*, there was no recommendation for a mandatory data collection system. Mandatory data collection is imperative in the Aboriginal death-in-custody context for a number of reasons: It can lead to greater Aboriginal-police relations by illustrating to these agencies the epidemic through the collection of race-based data, thereby, leading to greater police accountability. Most significantly, such a system can pave the way for remedies for the Aboriginal community. While litigation of death-in-custody cases is one remedy, the implementation of a national data collection system provides a long-term remedial solution to account for these missing subjects. Documenting incidents along with race-based statistics, and the processes of how different agencies across the country collect information pertaining to the race of people killed in police-related actions, can aid in the development of a data model that rebuts the presumption that police use of force is always race-neutral. In this way, empirical evidence can add greater weight to what Aboriginal communities have felt for a long time: that Aboriginal deaths go largely unnoticed, unrecorded, and unaccounted for.⁶⁴ To stymie the racial injustice prevalent in policing, the collection of race-based data is necessary to de-racialize policing practices and interactions that have resulted in disproportionate numbers of Aboriginal deaths in custody.

62 Canadian Corrections Association, *Indians and the Law* (Ottawa: Canadian Welfare Council, 1967), cited in Jim Harding, "Policing and Aboriginal Justice" in Robynne Neugebauer, ed., *Criminal Justice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars' Press, 2000) at 212.

63 See generally Gordon, *supra* note 27 at 23.

64 Interview of Grand Chief Stewart Phillips, president of Union of B.C. Indian Chiefs (29 February 2008) at Union of B.C. Indian Chiefs, Vancouver, B.C. Interview of Don Bain, executive director, Union of B.C. Indian Chiefs (29 February 2008) at Union of B.C. Indian Chiefs, Vancouver, B.C. Interview of David Dennis, vice-president of United Native Nations (27 February 2008) at United Native Nations, Vancouver, B.C. Interview of Christine Smith-Parnell, chair of Vancouver Working Group on Aboriginal Deaths in Custody (27 February 2008) at Vancouver Aboriginal Transformative Justice Services, Vancouver, B.C.

ARTICLE

RETHINKING THE CONCLUSIVENESS OF JUDICIAL NOTICE: A THEORETICAL APPROACH

By Fred Gjoka*

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I. INTRODUCTION

This is a theory-oriented paper which takes a normative stance. Its central submission is that judicial notice of adjudicative facts in criminal cases should not be conclusive when such notice operates to the prejudice of the accused. Instead, defence counsel should be able to rebut judicially noticed facts in formal court proceedings. This alternative approach is in accordance with procedural fairness, permitting the defendant to make full argument before the jury.

In advancing this submission, the paper proceeds as follows: Section II defines terms and sets the parameters of the analysis. Section III provides a brief picture of the current Canadian position on the conclusiveness of judicial notice. Section IV argues that the finality of judicial notice is merely an invention by a certain segment of American legal academia—an invention which runs against the bulk of American jurisprudence, both past and present. As such, it is misleading for Canadian courts to regard the conclusiveness of judicial notice as the generally accepted, modern approach. Section V asserts that the argument for the finality of judicial notice is based on premises that are at least as weak as those that support the argument against it. Section VI proposes that a departure from the conclusiveness of judicial notice is required in order to preserve the fairness of criminal trial proceedings and to avoid counterintuitive fact-related results. Section VII provides a brief conclusion.

II. SPECIFIC TERMS AND THE SCOPE OF ANALYSIS

In the common law system, judicial notice generally refers to “the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the

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truth of a particular fact or state of affairs.”¹ One category of facts commonly subject to judicial notice is that of adjudicative facts. The phrase “adjudicative facts” was originally coined by K.C. Davis² as meaning those facts that concern the “immediate parties” and deal with questions such as “who did what, where, when, how, and with what motive or intent.”³ Davis contrasted these with “legislative facts,” which he interpreted to be “ordinarily general,” and whose role is to assist the court in determining “the content of law and policy and to exercise its judgment or discretion in determining what course of action to take.”⁴

This dichotomy of facts drawn by Davis has been widely accepted by Canadian courts, and the Supreme Court of Canada recently confirmed its usefulness in *R. v. Spence*⁵ (“*Spence*”). Speaking for the Court, Justice Binnie added only that non-adjudicative facts now include “social facts,” in addition to “legislative facts.” The former relate to the “fact-finding process” whereas the latter concern “legislation or judicial policy.”⁶ Important as non-adjudicative facts may be to the treatment of the conclusiveness of judicial notice, they are beyond the scope of this paper. Hence, the focus of this paper will be exclusively on the effect of the judicial notice as applied to adjudicative facts during criminal proceedings.⁷

III. CURRENT POSITION OF CANADIAN COURTS ON THE EFFECT OF JUDICIAL NOTICE

In *R. v. Find*⁸ (“*Find*”), the Supreme Court of Canada removed any potential ambiguities about how Canadian courts are to approach the effect of judicial notice, when it stated:

Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. *Nor are they tested by cross-examination.* Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.⁹

1 John Sopinka *et al.*, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths Canada, 1999) at 1055.

2 K.C. Davis, “Judicial Notice” (1955) 55 Colum. L. Rev. 945 [Davis].

3 *Ibid.* at 952.

4 *Ibid.*

5 *R. v. Spence*, [2005] 3 S.C.R. 458 at para. 60 [*Spence*].

6 *Ibid.* at para. 56. The following would be an illustration of adjudicative facts as compared to non-adjudicative facts: The offence of insider trading under Ontario’s *Securities Act* requires, *inter alia*, that a person in a *special relationship* with a *reporting issuer* (i.e., a publicly held company) trades in the securities of that issuer, with knowledge of an undisclosed material change or material fact. If the other *actus rea* elements of this offence are established, but the accused contests the status of the company as a reporting issuer, then that becomes an adjudicative fact that has to be determined. If, by contrast the accused simply argues that he or she was not in a special relationship with the company, then whether the company was a reporting issuer is a non-adjudicative fact (legislative or social). Hence, whether or not a fact is adjudicative is likely to depend on the way each issue is argued before the court. As Richard M. Fraher has noted in “Adjudicative Facts, Non-evidence Facts, and Permissible Jury Background Information” (1987) 62 Ind. L.J. 333 at 344, “It is the parties and the court who make facts ‘adjudicative’ by identifying contentious issues and presenting all the evidence they regard as relevant to those issues in an effort to convince the jury”.

7 As implied in *Spence*, adjudicative facts are almost always close to centre of the controversy. Thus, any reference to adjudicative facts in this paper is in effect a reference to dispositive adjudicative facts, unless specified otherwise.

8 *R. v. Find*, [2001] 1 S.C.R. 863 [*Find*].

9 *Ibid.* at para. 48 [emphasis added].

The pronouncement that judicially noticed facts are not open for rebuttal by the prejudiced party confirmed the earlier position of the Ontario Court of Appeal in *R. v. Zundel* (“*Zundel*”) that “[t]he generally accepted modern view ... is that where the court takes judicial notice of a matter, the judicial notice is final.”¹⁰ *Spence* further solidified this position by holding that if the “strict” criteria identified in *Find* are met, “the ‘fact’ will be judicially noticed, and that is the end of the matter.”¹¹ In short, when a Canadian court takes judicial notice of an adjudicative fact during a criminal proceeding, defence counsel will not have an opportunity to challenge it.

IV. IS THE FINALITY OF JUDICIAL NOTICE A GENERALLY ACCEPTED POSITION?

It was the American legal scholar E.M. Morgan who originally developed the position adopted in the leading Canadian cases.¹² According to Morgan, judicial notice is warranted only with regard to “what is so notoriously true as not to be subject of reasonable dispute, or what is capable of immediate and accurate demonstration by resort to sources of indisputable accuracy.”¹³ Given this “high” threshold, Morgan concluded that “no evidence to the contrary is admissible.”¹⁴ Many respected authors have subscribed to Morgan’s thesis, most notably C.T. McCormick, who wrote: “[A] ruling that a fact will be judicially noticed precludes contradictory evidence and requires that the judge instruct the jury that they must accept the fact as true.”¹⁵

However, given that Morgan is largely responsible for injecting the conclusiveness of judicial notice into Canadian jurisprudence, it is reasonable to ask whether he based his position on existing authorities, or whether this was simply his personal theory. On this point, Davis has astutely observed that the American jurisprudence did not support the conclusiveness of judicial notice regarding adjudicative facts at the time Morgan initially advanced his position, despite Morgan’s claim to the contrary.¹⁶ Of the seven cases relied upon by Morgan,¹⁷ three do not involve judicial notice of adjudicative facts at all,¹⁸ three additional cases only address the issue of whether a fact can be judicially noticed, not whether it can

10 *R. v. Zundel* (1987), 31 C.C.C. (3d) 97 at 150 [*Zundel*]. More on this case later.

11 *Spence*, *supra* note 5 at para. 61.

12 E.M. Morgan, “Judicial Notice” (1943-1944) 57 Harv. L. Rev. 269 [Morgan].

13 *Ibid.* at 273.

14 *Ibid.* at 279.

15 C.T. McCormick, “Judicial Notice” (1951-1952) 5 Vand. L. Rev. 296 at 322. Other authors embracing Morgan’s position include: J.A. Keeffe *et al.*, “Sense and Nonsense About Judicial Notice” (1950) 2 Stan. L. Rev. 664; R.E. Knowlton, “Judicial Notice” (1955-1956) 10 Rutgers L. Rev. 501; J.T. McNaughton, “Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy” (1961) 14 Vand. L. Rev. 799; S.A. Schiff, “The Use of Out-of-Court Information in Fact Determination at Trial” (1963) 41 Can. Bar. Rev. 335; and Sopinka, *supra* note 1 at 1067.

16 Davis, *supra* note 2 at 980.

17 See Morgan, *supra* note 12 at 283-285.

18 These three cases are: *Lane v. Sargent*, 217 Fed. 237 (1st Cir. 1914) (dealt with judicial notice of law—i.e., the court of appeals rejected a contention that the law of Massachusetts “must be proved as a fact” at 242); *Laubenheimer v. Factor*, 61 F.2d 626 (7th Cir. 1932) (dealt with judicial notice of law, too—i.e., the district court was held to be in error in holding that testimony of legal experts should be received as to the law of Illinois); *State v. Cromwell*, 6 N.J. Misc. 221 (Sup. Ct. 1928) (also dealt with judicial notice of law whereby the court held that a tribunal may take judicial notice of the New York case law and that “the testimony of the member of the New York bar could not avail to establish the law of that state to the contrary” at 223).

be rebutted once it has been judicially noticed,¹⁹ and the final case suggests that the conclusiveness of judicial notice is the exception.²⁰

By contrast, the alternative view, which holds that judicial notice is not conclusive, has been more influential on American jurisprudence, before and after the time Morgan expressed his views. This alternative position was first articulated by J.B. Thayer who wrote that “[t]aking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a *prima-facie* recognition, leaving the matter still open to controversy.”²¹ Thayer’s view was later shared by another great evidence scholar, J.H. Wigmore, who commented:

That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that it will not be disputed. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable.²²

Preference for the Thayer-Wigmore position has been, and continues to be, pervasive among American courts at both the federal and state levels. The leading American case on the effect of judicial notice remains the U.S. Supreme Court decision in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*.²³ Speaking for a unanimous court, Mr. Justice Cardozo said that “[judicial] notice even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence.”²⁴ Quoting from Wigmore, he then added that the prejudiced party should not be prevented from challenging the matter if he thinks it disputable.²⁵ When one surveys the long list of American authorities that have adopted the Thayer-Wigmore position on the effect of ju-

19 These three other cases are: *Beardsley v. Irving*, 81 Conn. 489, (Sup. Ct. Err. 1909) (Court of Common Pleas should have taken judicial notice of the fact that June 3, 1906 was a Sunday, rather than have the interested party establish this through evidence); *Commissioners of Hendersonville v. Prudden*, 180 N.C. 496 (Sup. Ct. 1920) (“[I]t is undoubtedly safe to assume, and we judicially know that there are several newspapers in this State having an extensive and general circulation in which advertisements for sales of bonds of this character are customarily made” at 499); and *La Rue v. Kansas Mut. Life Ins. Co.*, 68 Kan. 539 (Sup. Ct. 1904) (“Courts take notice, without proof, of the acts of the different political departments of the government” at 541).

20 That case being *Commonwealth v. Marzynski*, 149 Mass. 68 (Sup. Jud. Ct. 1889). Morgan seems to have fixated too heavily on the following statement by the court: “The court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinion of witnesses who offer to testify that they are” at 72. For one thing, this is simply an illustrative *obiter dicta*; for another it is stated in permissive language (i.e., “may”), hence implying that courts usually do not consider judicial notice as final but “may” in certain cases, which means that this case is more likely to hurt rather than support Morgan’s thesis.

21 J.B. Thayer, “Judicial Notice” (1889-1890) 3 Harv. L. Rev. 312 at 309.

22 John Henry Wigmore, *Wigmore on Evidence*, 3d ed. (Boston: Little & Brown, 1940) at § 2567. See also Davis, *supra* note 2 at 978 for a similar view.

23 *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937).

24 *Ibid.* at 302.

25 *Ibid.*

dicial notice,²⁶ it is difficult to see how the Ontario Court of Appeal in *Zundel* could so easily conclude that it is now generally accepted that judicial notice of an adjudicative fact is final. The most that can be said about Morgan's thesis on the conclusiveness of judicial notice is that it has been influential within some academic circles, but it does not represent the modern judicial approach.²⁷ Seen in this way, there is no apparent justification for Canadian courts to consider this issue as closed to further debate.

V. THE QUESTIONABLE PREMISES OF THE ARGUMENT SUPPORTING MORGAN'S THESIS

Another reason why Canadian courts should reconsider their subscription to Morgan's position has to do with the dubious premises they have used in explaining why this approach is preferable to that of Thayer and Wigmore. This is especially evident in *Spence*. There, Binnie J. identified three pitfalls within the Thayer-Wigmore formulation, which he said resulted from its low threshold as to what judges can take judicial notice of, namely, that which "everybody knows." One of the problems he identified is that "what 'everybody knows' may be wrong."²⁸ A second problem is that "judges occasionally contradict each other about some 'fact' that 'everybody' knows, even on the same court in the same case."²⁹ The final problem is that the prejudiced parties cannot rebut what "everybody knows" unless "a plausible source is put to them for their comment and potential disagreement."³⁰ While Justice Binnie is correct to point out that some of these problems may arise under the Thayer-Wigmore formulation, he provided no compelling reasons for believing that they cannot also arise under Morgan's framework, which he adopted. It is quite conceivable that these problems may just as well arise under the Morgan formulation with even more fatal consequences for trial fairness.

Let us consider each of these problems. Morgan elevates the threshold of judicial notice from that which "everybody knows" to that which is "reasonably indisputable" or that which is "readily demonstrable." From the outset, it is hard to see how the latter criteria re-

26 Here is a non-exhaustive list: *People ex rel. Domingo v. French Bottling Works*, 259 N.Y. 4 (App. Ct. 1932) ("While these definitions of saccharin are not conclusive on the fact, the people made out a *prima facie* case and the burden of going on passed to defendant to meet the evidence against it. As it offered no evidence, the conviction was proper" at 8); *In re Bowling Green Mill. Co. v. U.S.*, 132 F.2d 279 (6th Cir. 1942) (adopted Wigmore's view verbatim at 284); *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("We could not constitutionally substitute it [judicial notice] for the findings of a court after a trial: facts which a court may judicially 'notice' do not for that reason become indisputable" at 446); *Makos v. Prince*, 64 So.2d 670 (Fl. Sup. Ct. 1953) (adopted Wigmore's view at 673); *Nielsen v. Carney Groves, Inc.*, 159 So.2d 489 (Fl. App. Ct. 2d Dist. 1964) (adopted Wigmore's view at 491); *Wells v. Pittsburgh Bd. of Public Ed.*, 31 Pa.Cmwlth. 1 (1977) ([J]udicial notice "should not operate to deprive the opposing party of the opportunity to disprove the fact" at 5); *In Interest of Johnson*, 134 Ill. App.3d 365 (App. Ct. 4th Dist. 1985) (followed *Ohio Bell* at 375); *220 Partnership v. Philadelphia Elec. Co.*, 437 Pa. Super. 650 (1994) ("[J]udicial notice may not be used to deny a party an opportunity to present contrary evidence" at 656); *DeMatteo v. DeMatteo*, 749 N.Y.S.2d 671 (Sup. Ct. 2002) ("The party contesting the matters judicially noticed herein shall have the burden of proof and must demonstrate by a preponderance of the evidence that the matter judicially noticed is incorrect" at 679). It is conceded that some of these cases consider the effect of judicial notice in the context of civil proceedings. However, since they suggest that even a prejudiced party to a civil dispute is entitled to rebut judicially noticed facts, it goes without saying that they support the cross-examination of judicially noticed facts by an accused in criminal proceedings. More will be said about this in Section V.

27 Formidable English judges have also embraced the Thayer-Wigmore position. See, for instance, the approach of Denning L.J., excerpted in *Preston-Jones v. Preston-Jones*, [1951] 1 All. E.R. 124 at 127 (H.L.).

28 *Spence*, *supra* note 5 at para. 51.

29 *Ibid.*

30 *Ibid.*

ally differ from the former, other than semantically. However, even assuming that the Morgan criteria are stricter in substance, it does not follow that they are immune to the problems identified by Binnie J., above. Firstly, things that are “reasonably indisputable” or “readily demonstrable” can be just as wrong as those which “everybody knows.” The example given by Binnie J.—that a sixteenth-century judge would have taken judicial notice of the “fact” that the sun revolves around the earth³¹—can help illustrate this. The belief that the sun revolves around the earth was not only a “fact” which “everybody knew,” but also one which people of that time considered to be either “reasonably indisputable” or “readily demonstrable.”³² Second, judges can disagree with each other about what is “reasonably indisputable” or “readily demonstrable” just as they may disagree about what “everybody knows.” In fact, Morgan himself admits to this possibility when he writes: “Whether or not the truth of a given proposition is disputable may itself be the subject of a dispute among reasonable men.”³³ As to the third problem, Binnie J. says that trial fairness is compromised under the Thayer-Wigmore approach because the prejudiced parties are ill-positioned to rebut facts whose “plausible source” is not “put to them.”³⁴ While this observation raises a valid issue, it overlooks the fact that trial fairness is compromised far more severely under Morgan’s approach, which denies the right of rebuttal altogether. In short, all the pitfalls identified as inherent in the Thayer-Wigmore approach are at least equally present in the Morgan approach. Consequently, there is no apparent justification for Canadian courts adopting Morgan’s approach over the approach of Thayer and Wigmore. In fact, as the following section argues, the Thayer-Wigmore formulation is more justifiable on at least two grounds.

VI. APPEARANCE OF JUSTICE, ABSURD RESULTS AND JUDICIAL NOTICE

It may be true that in most cases the right to rebut judicially noticed facts is unlikely to change the trial outcome in favour of the prejudiced party. Some authors have suggested that this makes the right to challenge such facts pointless.³⁵ However, a more careful analysis should be undertaken. In a criminal trial context, this involves examining the position of the party that is seeking to challenge the judicially noticed facts. For the reasons that follow, it is submitted that when the prejudiced party happens to be the accused, the right of rebuttal is necessary in order to preserve trial fairness. This is so notwithstanding the inherently low probability that such a right may change the trial outcome in the accused’s favour.

In *R. v. Barrow*, the Supreme Court of Canada held that one “of the most basic aspects of

31 *Ibid.*

32 Some elaboration is warranted here in order to make this illustration more meaningful. It is true that some great minds such as Copernicus and Galileo had started to refute the earth-centred doctrine around that time, but that did not make the rest of the populace unreasonable for thinking otherwise. Reasonableness is a parochial concept, judged contextually. By 16th-century standards, earth-centrism was a reasonably indisputable fact, and so were the means used to demonstrate it. People like Copernicus and Galileo can be viewed as experts on the matter, above the level of reasonable people.

33 Morgan, *supra* note 12 at 274-75. For an illustrative example supporting Morgan’s admission, see *State v. Damm*, 62 S.D. 123 (Sup. Ct. 1933).

34 Spence, *supra* note 5 at para. 51.

35 See Sopinka, *supra* note 1 at 1067.

a fair trial” is the “appearance of justice.”³⁶ Speaking for the majority, Dickson C.J. said that the appearance of justice is concerned with “the effect of the proceedings ... as they would appear to the average citizen.”³⁷ Regard for the appearance of justice is crucial despite the type of trial or the position of the party that appears to have been prejudiced by the proceedings. However, the appearance of justice is especially imperative when the seemingly prejudiced party is the accused in the course of a criminal trial.³⁸ Is the appearance of justice compromised if an accused is prevented from rebutting adjudicative facts that have been judicially noticed? How would such a refusal appear to the “average citizen?” Common sense suggests that the “average citizen” would view such denial with suspicion.

In fact, the concern that the conclusiveness of judicial notice is inimical to the appearance of justice (when used against an accused) has been shown to run deep in judicial thought. Nowhere is this more apparent than in *Zundel*. This infamous case involved a polemicist charged with spreading false news contrary to the Canadian Criminal Code by publishing a pamphlet denying the existence of the Holocaust. One of the issues at bar was whether the court could take judicial notice of the existence of the Holocaust, in which case the falsity of the accused’s pamphlet would have been established *a priori*. Affirmatively paraphrasing the trial judge’s decision, the Court of Appeal wrote: “[H]owever tempted he might be to grant the Crown’s application [to take judicial notice of the Holocaust], it would have the effect, *in the eyes of the public*[,] ... of not providing the accused with the opportunity to make full answer and defence.”³⁹ As a consequence, the trial judge did not take judicial notice of the existence of the Holocaust, and the Court of Appeal agreed. However, this cannot be correct. As one author has commented on *Zundel*, “[i]t is a somewhat strange application of judicial discretion to insist on proof when judicial notice will do, in the name of avoiding prejudice to the accused.”⁴⁰

The courts at both levels in *Zundel* chose the wrong path to preserve the appearance of justice. By agreeing with Morgan that judicial notice is final, the courts found themselves in an unpleasant dilemma: either take judicial notice of the Holocaust, thereby largely establishing the guilt of the accused, or preserve the appearance of justice while refusing to judicially acknowledge one of the most well-documented events in recent history. The courts managed to avoid this dilemma in *R. v. Zundel (No. 2)*⁴¹ (“*Zundel (No. 2)*”), by taking judicial notice of the existence of the Holocaust. But they did so only in general terms, and at a time when the accused was no longer contesting the existence of the Holocaust *per se*, but only some of its details. Had the existence of the Holocaust still been a dispositive mat-

36 *R. v. Barrow*, [1987] 2 S.C.R. 694 at para. 38. This maxim is well-entrenched in Anglo-Canadian jurisprudence, as is illustrated by the oft-quoted statement of Lord Hewart C.J. in *R. v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256 at 259: “It is of fundamental importance that justice should not only be done, but it should manifestly and undoubtedly be seen to be done”.

37 *Ibid.* at para. 33.

38 This extra caution in favour of the accused during criminal proceedings is not exceptional. A case in point is the way courts have treated evidence which may have some prejudicial effect. This was clearly demonstrated in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, *as per* McLachlin J. (“The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law” at para. 43.)

39 *Zundel*, *supra* note 10 at 149 [emphasis added].

40 R.J. Delisle, “Judicial Notice of the Holocaust” (1987) 56 C.R. (3d) 93 at 94.

41 *R. v. Zundel (No. 2)* (1990), 53 C.C.C. (3d) 161.

ter in *Zundel (No. 2)* (as opposed to a background fact), the courts would have been faced with the same dilemma seen in *Zundel*, and most likely would have refused to take judicial notice of that event again for similar reasons. In effect, what *Zundel* and *Zundel (No. 2)* seem to suggest is that judges will shy away from taking judicial notice of dispositive facts if that would compromise the appearance of justice, notwithstanding the indisputability of such facts. This is absurd, but understandable if judges view judicial notice as conclusive.

By contrast, under the Thayer-Wigmore model such absurdity would be eschewed and the appearance of justice would not be compromised. If the accused is permitted to rebut judicially noticed facts (be they dispositive or peripheral), judges are not faced with the unfortunate dilemma of either sacrificing the appearance of justice or facing embarrassment by failing to take judicial notice of notorious facts. By adopting the Thayer-Wigmore position, judges can breathe more easily when taking judicial notice of a dispositive fact, because the accused's right to challenge such fact would serve to preserve the appearance of justice.

It is quite fair for a judge to say "X fact is reasonably indisputable in this community and the jury will notice it as such, until you (the accused) can convince the jury otherwise." If, on a balance of probabilities, the accused cannot prove the contrary, the fact would remain as judicially noticed, and the "average citizen" would not sense any prejudice toward the accused. If, on the other hand, the accused succeeds in convincing the jury of the contrary, then all the better. In short, the Thayer-Wigmore approach, which permits the accused to challenge judicially noticed facts during formal trial proceedings, provides the best possible balance between a regard for the appearance of justice and the judge's responsibility to judicially acknowledge that which is reasonably indisputable.

VII. CONCLUSION

Perhaps the best way of characterizing the goal of this paper is to view it as an effort to create an exception to the position taken by Canadian courts that judicial notice is final. Such an exception would allow an accused to rebut adjudicative facts that have been judicially noticed by the trial judge.⁴² This narrow exception is especially warranted considering (1) that the conclusiveness of judicial notice is by no means a universally-accepted position, (2) that Canadian courts have presented unpersuasive rationales for its adoption in the first place, and (3) that the appearance of justice and judicial consistency are better served by having this exception available for those criminally accused.

42 Perhaps a strong argument can be made for the cross-examination of judicially noticed facts in other contexts as well (e.g., civil proceedings). However, such a proposition can only be the subject matter of another paper.

ARTICLE

LACKING CONTEXT, LACKING CHANGE: A CLOSE LOOK AT FIVE RECENT LOWER COURT SEXUAL ASSAULT DECISIONS

By **Jessica Derynck***

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It has been routine for me since starting law school to ask myself what I am doing, why I am here. Now I ask what I have gotten myself into with this paper. Not that my chosen topic doesn't fascinate me—it does. I have more than enough to say about rape, could talk about it for hours if only it were a more acceptable topic of conversation. The problem lies with attempting to reconcile frameworks of sexual assault law with lived experiences of rape—mine and others whom I know. It seems impossible. Why didn't I choose to write about something extremely boring in a very removed way? Better yet, I should have stayed far away from law school. Perhaps I should have studied molecular biology. There I could hide from the lawyers, law professors, fellow students, and friends who, when I tell them that the law continues to fail women who experience sexual violence, sincerely reply that things have changed and they are now better. Words catch in my throat and I am unable to express to them, convince them, that they are missing something. My experiences and the experiences of many others do not tell me that anything is effectively changing.¹

In “The Discursive Disappearance of Sexualized Violence,” Lise Gotell writes about how current legal treatment of sexual violence involves its “re-privatization” and depoliticization.² In examining 106 sexual assault cases decided from 1999 to 2004, Gotell finds that the gendered nature of sexual assault is rarely acknowledged and there is resistance to the fem-

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1 The style of this paper was inspired by Rebecca Johnson, “Blurred Boundaries: A Double-Voiced Dialogue on Regulatory Regimes and Embodied Space” (2005) 9 *Law Text Culture* 157.

2 Lise Gotell, “The Discursive Disappearance of Sexualized Violence” in Dorothy E. Chunn, Susan B. Boyd & Hester Lessard, eds., *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 127 at 127-28.

inist discourses that fueled the 1990s sexual assault law reforms.³ In this paper I look at Gotell's research, paying particular attention to her findings on cases that have "consent" as an issue and apply *R. v. Ewanchuk* ("Ewanchuk").⁴ I then assess five more recent cases that follow *Ewanchuk* and are focused on the issue of consent.

Sexual violence has been virtually dismissed as an equality issue in Canada. This has happened partially because of an assumption that the 1992 feminist-inspired amendments to the *Criminal Code* which elaborate on the meaning of consent,⁵ combined with the *Ewanchuk* case several years later, have positively affected how criminal law responds to sexual assault. At the same time, recent cases demonstrate the need to contextualize sexual violence as a gendered issue affected by intersecting factors such as race. Judgments in these cases focus on behaviour and characteristics of complainants in their reasoning. Gotell writes about the evolution of an "ideal victim" defined by reason, self-discipline, and an experience of rape that fits with judicial narratives.⁶ Our neo-liberal political climate involves less and less support for social programs, and encouragement of the idea that people are responsible for their own situations. This has led to the "responsibilization" of women when it comes to sexual assault, and the "ideal victim" is one who demonstrates rationality and minimizes risk to avoid sexual violence.⁷

I come to this paper from the point of view of someone who is relatively new to the experience of reading judgments and attempting to understand the law, but has long been assessing the effects of sexual assault on women's daily lives, before and since experiencing it myself. I have always, on some level, understood sexual assault as an equality issue. I have realized it affects the way I live in the world since I was six years old and read about police using women as bait to catch a rapist.⁸ Interest in contemporary legal treatment of the issue led me to look at five cases from 2007 for examples of how our criminal law system is currently dealing with sexualized violence. I found that the credibility of women is attacked in the process of negating the requirement of lack of consent for the *actus reus* of sexual assault. I found that the requirement of an accused person to have taken reasonable steps in ensuring consent is downplayed by judges, making it relatively easy for the accused to raise an "air

3 *Ibid.* at 127, 153.

4 *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 169 D.L.R. (4th) 193, 1999 CarswellAlta 100 (WLeC) [*Ewanchuk*, cited to WLeC]. In this case the Supreme Court of Canada elaborated on the meaning of consent as it is defined in the 1992 amendments to the *Criminal Code*.

5 *Criminal Code*, R.S.C. 1985, c. C-46 at ss. 273.1-273.2.

6 Gotell, *supra* note 2 at 144, 150-51.

7 *Ibid.* at 128, 144, 151. Gotell further discusses neo-liberalism, responsibilization, and sexual assault in two articles: Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 *Akrón L. Rev.* 865; Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2005-2006) 43 *Alta. L. Rev.* 743. Responsibilization is described as a discourse that arises out of neoliberal practices and pushes people to become 'enterprising selves', shifting responsibility for social problems onto individuals. See Nikolas Rose, *Inventing Our Selves: Psychology, Power, and Personhood* (Cambridge: Cambridge University Press, 1998); and Thomas Lemke, "'The birth of bio-politics': Michel Foucault's lecture at the Collège de France on neo-liberal governmentality" (2001) 30 *Economy and Society* 190, both cited in Katherine Teghtsoonian, "Managing Workplace Depression: Contesting the Contours of Emerging Policy in the Workplace" in Pamela Moss & Katherine Teghtsoonian, eds., *Contesting Illness: Processes and Practices* (Toronto: University of Toronto Press, 2008) 69 at 71-72.

8 Jane Doe successfully sued the Metro Toronto Police for negligence and gender discrimination, on the basis of their investigation into her attack by a serial rapist in 1986. Part of her argument was that the police used women as bait to catch the rapist instead of warning them, and this issue was publicized in newspapers at the time. She writes about her case in Jane Doe, *The Story of Jane Doe* (Toronto: Vintage Canada, 2004) [Doe]. Her case is cited as *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 160 D.L.R. (4th) 697, 39 O.R. (3d) 487, 1998 CarswellOnt 3144 (Ct. J. Gen. Div.) (WLeC) [*Jane Doe*].

of reality” of mistaken belief in consent and potentially negate the *mens rea* of the offence. I saw that the complainant’s behaviour can be relevant in this assessment. I saw evidence of the construction of the “ideal victim” described by Gotell, and of a high degree of responsibility placed on women to repeatedly and consistently articulate their experiences of violence. I observed that decisions fail to acknowledge gender discrimination, racism, and colonialism as contributing to the continued problem of sexual violence.

The consent provisions amending the *Criminal Code* in 1992—I was twelve years old at the time—were described by Judy Rebick as law that says “no’ means ‘no’ and ‘yes’ means ‘yes’ and before you initiate sexual contact it is your responsibility to find out whether it’s yes or no.”⁹ The provisions define consent as “the voluntary agreement of the complainant to engage in the sexual activity in question.” They set out specific situations in which consent cannot be obtained, including where: (i) someone other than the complainant agrees to the conduct in question, (ii) the complainant is incapable of consenting, (iii) the accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority, or (iv) the complainant expresses through words or conduct lack of agreement to engage or to continue to engage in the sexual activity. They require an accused person to have taken “reasonable steps” to ensure that consent has been given.¹⁰ Gotell describes these law reforms as a “textual residue” of a time when the interests of both government and feminist actors included “violence against women” initiatives, the acknowledgement of the gendered nature of sexual violence, and the objective of improving reporting rates.¹¹

Kevin Bonnycastle questions whether amendments to sexual assault laws aimed at increasing reporting, charging, and conviction rates can help women by actually reducing occurrences of sexual assault.¹² Bonnycastle quotes Lauren Snider’s assertion that empowering women or improving their lives “must be the prime, if not the only criterion for evaluating the success or failure of law reform.”¹³ Snider is pessimistic about the potential for criminal law reforms to create real change in women’s lives.¹⁴ Gotell writes about how the interpretation of these provisions now occurs in a neo-liberal context where “the recognition of sexual violence as a dramatic social problem has all but disappeared.”¹⁵ Based on my experiences and those of women I know who also lived their teenage and young adult years immediately after the amendments, my thoughts are that they have not resulted in real and substantial change by reducing the impact of sexual violence on our lives.

Gotell writes that when the Supreme Court of Canada elaborated on the legal meaning of consent in *Ewanchuk*, some suggested that the case “ushered in a new era of legal interpretation based upon the equitable treatment of complainants and the rejection of rape mythology.”¹⁶ She notes that this view comes mainly from criminal law experts, whereas feminist analyses tend to recognize inconsistencies, seeing the decision as less of a feminist victory.¹⁷

9 Sheila McIntyre, “Redefining Reformism: The Consultations That Shaped Bill C-49” in Julian V. Roberts & Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293 at 302.

10 *Criminal Code*, R.S.C. 1985, c. C-46, ss. 273.1-273.2.

11 Gotell, *supra* note 2 at 131.

12 Kevin Bonnycastle, “Rape Uncodified” in Dorothy E. Chunn & Dany Lacombe, eds., *Law as a Gendering Practice* (Toronto: Oxford University Press, 2000) 60 at 62 [Bonnycastle].

13 Lauren Snider, “Feminism, Punishment and the Potential of Empowerment” (1994) 9:1 C.J.L.S. 75 at 85, cited in Bonnycastle, *ibid.* at 62.

14 Bonnycastle, *ibid.* at 63.

15 Gotell, *supra* note 2 at 132.

16 *Ibid.* at 134.

I find that the case, decided in 1999 when I was nineteen and five years before I experienced rape,¹⁸ is not the victory that some make it out to be in the sense of having real and positive effects on women's lives. Many women carry a doubt that "the system" can help us when we experience sexual assault.¹⁹ Entering the legal world, first by circumstance when I experienced rape and then by choice in coming to law school, and being told by lawyers and professors that positive changes have happened in the area of sexual assault law, sharply contradicts my sense of the way legal responses to rape are actually experienced. It signifies for me that sexual assault is a social and political issue that affects women's equality, and to characterize it as anything else, to view it and treat it out of context, is a problem.²⁰

As a child reading about women being used as bait by the police, I pictured the police hiding on balconies watching rapes happen, waiting for rapists to finish so they could arrest them. I grew up considering the possibility of being raped on a semi-regular basis. In 2001, when I was 21, the existence of rape almost kept me from working the night shift at my film post-production job—the shift with the 16 per cent wage premium and the higher degree of independence. My boss, a well-meaning British man who could have been my grandfather, didn't like to "put ladies on the midnight shift." Either the hard glare I gave him in response or the fact that I was the only employee eager to do it led him to put me on it anyway. I biked to work through downtown Toronto to arrive at midnight, aware that stranger rape is rape of the rarest kind, but also mindful that I was following a routine and that it would be relatively easy for someone to attack me as I got off my bike and locked it up at 11:45 p.m., Sunday to Thursday. I always checked out the area, planned to use my U-lock as a weapon if I were caught by surprise.

I wasn't thinking about rape in 2004 when, walking on a beach in a world that I thought was safe, I was stopped by a man with a machine gun and ordered around and controlled. It was a sinking feeling knowing I was about to experience something that I had read about, that some of my friends had experienced but rarely talked about, that I knew on some level was bad and would affect me. The sinking feeling in the gut came with tightness in the chest, and then I felt nothing but was still thinking, my mind racing the whole time. I had broken unwritten laws that apply to women by travelling alone and walking at night. I had thought specifically about the possibility of being raped travelling alone as a woman, had on some level decided it was "worth the risk." This was not about willingness to accept the risk of rape, but about wanting a world where

17 *Ibid.* at 155, n. 10.

18 My experience with rape happened in 2004 when I was travelling in Cambodia. The experience led to a court case and a conviction that was upheld on appeal, a result that was heavily informed by my white privilege, my status as a Canadian tourist in Cambodia, and the fact that it was an atypical rape situation involving an armed stranger. While the circumstances surrounding my very unique case are not relevant here, my thoughts and reactions upon experiencing the rape do relate, as they were informed by how our legal system and we as a society in Canada deal with sexual assault.

19 See Lee Lakeman, *Obsession, With Intent: Violence Against Women* (Montreal: Black Rose Books, 2005). Lakeman reports on 100 cases in which women affected by violence attempted to get help from the system and were ignored. She also notes that most women who are affected by male violence do not report it to police or voluntarily involve the state in any way, at 148.

20 See Gotell, *supra* note 2 at 127.

women can walk and travel alone as we please. In the face of rape, I figured I had taken an unfair gamble and lost.

I. METHODOLOGY: USE OF GOTELL'S WORK AND ASSESSMENT OF FIVE 2007 SEXUAL ASSAULT DECISIONS

Gotell writes that to assess the impact of reforms we must focus our attention on trial-level decisions.²¹ To assess the impact of the 1992 amendments and the *Ewanchuk* decision on recent sexual assault cases centring on the issue of consent, I use Gotell's findings from researching the cases on this specific issue, then independently look at five cases from 2007. Gotell examined 48 cases from British Columbia, Alberta, Ontario, and Newfoundland following *Ewanchuk*. This was 41 per cent of the total sample across Canada from 1999 through to early 2004.²² Five of these were applications arising out of a preliminary hearing. Out of the remaining trial and Court of Appeal decisions, convictions resulted or were upheld in 31 cases, or 72 per cent.

To get a random sample of five recent cases I used the WestlawCarswell database and chose the five most recent cases that "followed" *Ewanchuk* according to the database designations.²³ The five decisions were rendered between 23 May 2007 and 24 August 2007. They come from British Columbia,²⁴ Nova Scotia,²⁵ Newfoundland,²⁶ Nunavut,²⁷ and Manitoba.²⁸ Respectively, two are trial court decisions resulting in acquittals, one is a preliminary hearing disposition resulting in the discharge of the accused, one is a Court of Appeal decision setting aside a conviction and ordering a new trial, and one is a Court of Appeal decision affirming a conviction.

II. PROBLEMS OBSERVED IN RECENT SEXUAL ASSAULT DECISIONS: THE "IDEAL VICTIM" AND RESPONSIBILIZATION

The high conviction rate in Gotell's sample of consent-centred cases does not lead her to conclude that there has been great improvement for women in this area, or that consent-focused cases no longer need to be scrutinized. She notes that a "sexual assault trial must be viewed as a disciplinary matrix with constitutive effects."²⁹ Gotell points out Wendy Larcome's argument that in sexual assault law the wins are often just as problematic for feminist critics. Cases affirm a narrow and individualized understanding of sexual violence and construct the changing characteristics of the "ideal victim," who then functions as the measure of any complainant's credibility. Larcome writes that consistency, rationality, and self-discipline are replacing virtue and sexual morality as requirements for legal credibility.³⁰

21 *Ibid.* at 134.

22 *Ibid.* at 154-55, n. 9.

23 Online: WestlawCarswell <<http://www.westlawecarswell.com>>. These were the five most recent cases following *Ewanchuk* on the WestlawCarswell database when I accessed it on 28 November 2007.

24 *R. v. Annett*, 2007 BCSC 1279, 2007 CarswellBC 1952 (WLeC) [*Annett*, cited to WLeC].

25 *R. v. Mosher*, 2007 NSSC 189, 2007 CarswellNS 291 (WLeC) [*Mosher*, cited to WLeC].

26 *R. v. R. (R.H.)*, 2007 CarswellNfld 260 (Prov. Ct.) (WLeC) [*R. (R.H.)*, cited to WLeC].

27 *R. v. Tookanachiak*, 2007 NUCA 1, 2007 CarswellNun 15 (WLeC) [*Tookanachiak*, cited to WLeC].

28 *R. v. B. (A.J.)*, 2007 MBCA 95, [2007] 9 W.W.R. 617, 2007 CarswellMan 300 (WLeC) [*B. (A.J.)* cited to WLeC].

29 Gotell, *supra* note 2 at 134.

30 Wendy Larcome, "The 'Ideal' Victim versus Successful Rape Complainants: Not What You Might Expect." (2002) 10 *Fem. Legal Stud.* 131 at 132., cited in Gotell, *ibid.* at 149.

Gotell did observe some trends in the cases applying *Ewanchuk* that she describes as positive. They include evidence of a shift away from analysis of consent and towards analysis of the accused's mistaken belief in consent, which Gotell notes takes attention away from the behaviour of complainants and focuses it more on the actions of the accused in securing consent. She also observed that many decisions articulated a "very stringent definition of consent," some stating that it must be "freely given" and some adopting a standard of "informed consent."³¹ Gotell also found that the cases she researched demonstrated "a marked expansion of the range of situations that are seen to constitute 'legitimate' sexual assault," and that there was a tendency to convict in cases where the complainant was drunk, drugged, or passed out.³²

These positive trends appear in only one out of the five of the cases I look at—the Manitoba Court of Appeal decision affirming a conviction.³³ An explanation for this fact, and for the low conviction rate in the five recent cases in my sample, is not readily apparent.³⁴ I certainly would not suggest that looking at a small sample of five cases in any way undermines the findings of Gotell's extensive research. My sample simply demonstrates that the positive trends are not universal and provides examples of problems. In Gotell's work and in my sample of cases there is evidence of responsabilization of women when it comes to sexual violence. This, along with the characterization of an "ideal victim" of sexual assault, creates difficulty for women who for various reasons do not fit the mold.

Jane Doe, at a lecture at the University of Victoria's Faculty of Law, spoke of a new way of blaming women for their experiences with sexual violence, moving away from scrutiny of their dress and sexual behaviour and toward claiming they "weren't careful enough."³⁵ Gotell writes about how complainants are expected to minimize their risks of sexual assault. In judicial decisions on sexual assault cases, the ideal, responsabilized victim emerges as someone who is security conscious and prudent, someone who acts to "minimize her own sexual risk." This ideal is then compared to women who are portrayed as not appreciating the sexual risks inherent in social situations through their own fault, so are seen as behaving stupidly and dangerously. We have moved from being characterized as "asking for it" through our behaviour and manner of dress to being viewed as responsible for our attacks if we have not displayed appropriate caution.³⁶

It is noteworthy that the sexual assault trial is a process that continues to be a difficult one for complainants, who face extremely high expectations when it comes to recounting assaults. As in the past, sexual assault complainants must produce detailed and consistent testimony and endure cross-examination that is "often intense." They are asked to describe "in vivid detail" the removal of clothing and placement of body parts.³⁷ Cross-examination can resemble the domination involved in sexual violation, and the woman's ability to resist

31 Gotell, *ibid.* at 147.

32 *Ibid.* at 146.

33 *B. (A.J.)*, *supra* note 28.

34 Possible explanations could include the fact that my sample of cases includes three from jurisdictions that were not represented in Gotell's sample, the fact that Ontario is not represented in my sample of cases while 23 out of 48 decisions Gotell assessed were from Ontario, the possibility that something has caused a negative impact on cases centering around this issue between 2004 and 2007, or the possibility that I randomly pulled up a set of bad decisions.

35 Jane Doe, lecture delivered at the Faculty of Law, University of Victoria, 19 September 2007.

36 Gotell, *supra* note 2 at 151.

37 *Ibid.* at 149.

it and “stick to her version of the events against explicit attempts to trip her up” is what makes her a “successful” complainant.³⁸

Rape involved long periods of numbness. Intermittent were feelings of fear-for-life and simple disgust. After some unknown period of time came the realization that my actions during this rape would affect people’s perceptions of what happened—whether they’d believe me, how seriously they’d take me and how bad they’d think it was if they did believe it. I’d already “messed up” by stepping outside of the bounds of what women are supposed to do to make sure things like this don’t happen to us. I pictured myself being cross-examined on a witness stand—what would I not want to have to tell a court I’d done during this crazy and surreal experience?

And then, after some other unknown period of time, I was hit with the realization of responsibility. If I did not get killed and I spoke of this rape, people would ask me questions and I would be expected to have answers. I was supposed to be paying attention, a hard thing to do when what’s happening is so awful and dissociation is so automatic. I forced myself into reality so I would have something to remember and something to say. I picked up on little details about the rapist’s body shape and the piece of waist jewellery he wore. I did this consciously, feeling the sense of responsibility. I only realized the risk involved when I tried to look directly into his face and he noticed, immediately pointing the gun at me and ordering me not to look at him. That was the end of my purposeful observations.

III. EXAMPLES OF ATTACKS ON WOMEN’S CREDIBILITY TO NEGATE THE “LACK OF CONSENT” REQUIREMENT FOR SEXUAL ASSAULT

In the *Ewanchuk* decision, Major J. lays out the three elements required for the *actus reus* of sexual assault: (i) touching, (ii) the sexual nature of that touching, and (iii) the absence of consent. He then states that the absence of consent is subjective and therefore dependent on the complainant’s state of mind towards the touching at the time it occurred.³⁹ This latter point is a main reason why *Ewanchuk* has been seen as a positive decision for women.⁴⁰ The decision goes on to say that when the complainant’s testimony is the only source of evidence as to her subjective state of mind, her credibility must be assessed by the trial judge or jury in light of all evidence, including any “ambiguous conduct” and whether the “totality of her conduct” is consistent with her claim of non-consent.⁴¹ If the defence can establish a reasonable doubt as to the credibility of the complainant’s statement that she did not subjectively consent, the accused will be acquitted on the basis of this requirement for the *actus reus* of the offence not being met.

38 *Ibid.* at 150.

39 *Ewanchuk*, *supra* note 4 at paras. 25-27.

40 For example, the Ontario Women’s Justice Network, an organization that provides legal information to women who have experienced sexual violence, describes *Ewanchuk* as “a very positive decision for women.” See Pamela Cross, “Defining Consent: What Does *R. v. Ewanchuk* Mean for Us?” (March 2000), online: Ontario Women’s Justice Network <<http://www.owjn.org/issues/assault/consent.htm>>.

41 *Ewanchuk*, *supra* note 4 at paras. 29-30.

In the two recent trial judgments *R. v. Annett* (“*Annett*”)⁴² and *R. v. Mosher* (“*Mosher*”)⁴³, the accused testifies and the judge, unable to decide who to believe, acquits.⁴⁴ Both courts apply the case *R. v. W. (D.)*⁴⁵, which sets out the test a court must go through when an accused testifies. According to the test, the judge or jury must acquit if they believe the evidence of the accused or if they do not believe the evidence of the accused but it nevertheless gives them a reasonable doubt as to his guilt. If they are not left in doubt by the evidence of the accused they must then ask whether, on the basis of the evidence, they are convinced beyond a reasonable doubt by that evidence of the guilt of the accused and if not, they must acquit.⁴⁶ What is problematic in these two cases is how the testimony of the accused leads the judges to question and doubt the credibility of the complainants.⁴⁷

In *Annett*, the complainant’s testimony describes a rape committed by a man she had known for about one year, at his apartment. She speaks of falling and the accused getting on top of her and describes him holding her down by her shoulders and pulling down her pants. She explains that she was squirming when he attempted to penetrate her vagina so he flipped her over and entered her from behind while she was “crying and freaking out.” He told her to shut up and that she was “going to like this,” stopping only after he noticed that she was crying.⁴⁸ The accused’s description of the same incident is that the complainant sat on his lap and they “got it on,” taking off each other’s pants and falling to the carpet where they “had sex in the missionary position.” In his version the complainant was not crying.⁴⁹

In a discussion of credibility, the judgment cites the 1950 case *Brethour v. Law Society (British Columbia)* which states that “the real test of the truth of a story of a witness [in a case where there is conflict of evidence] must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and under those conditions.”⁵⁰ The place and conditions in *Annett* consist of a small gathering at the accused’s apartment where both he and the complainant have consumed alcohol. Of the only other two people present, one is passed out in the bathroom and the other is watching television in a room separated from the living room by two closed doors.⁵¹ What would be recognized as “reasonable” seems to be informed by sexist assumptions about sexual activity and sexual assault and the reliability of a woman who has been drinking. Gotell writes that through sexual assault trials we can “observe the endless repetition of heteronormativity’s key scripts” including “the incredibility of sexual coercion” and the

42 *Annett*, *supra* note 24.

43 *Mosher*, *supra* note 25.

44 *Annett*, *supra* note 24 at paras. 42-43; *Mosher*, *ibid.* at para. 12.

45 *R. v. W. (D.)*, [1991] 1 S.C.R. 742, 46 O.A.C. 352, 1991 CarswellOnt 80 (WLeC) [*W. (D.)*, cited to WLeC]. This is a sexual assault case in which the accused appealed his conviction and the appeal was dismissed.

46 *Ibid.* at para. 11, cited in *Mosher*, *supra* note 25 at para. 6; and *Annett*, *supra* note 24 at para. 34.

47 I would prefer to use the phrase “the woman who was raped” to describe the women involved in these cases. This is also the preferred phrase in Diana Majury, “Seaboyer and Gayme: A Study InEquality” in Julian V. Roberts & Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 268 at 287, n. 3. However, I understand that I could be criticized for using this phrase when referring to women in specific cases where the accused rapist has not been convicted, and it is also a wordy phrase to repeat over and over in a paper. I use the word “complainant” for simplicity’s sake, but I don’t like how it fails to give effect to women’s experiences or to the systemic nature of sexualized violence.

48 *Annett*, *supra* note 24 at paras. 2, 16, 17.

49 *Ibid.* at para. 21.

50 *Reference Re Brethour and Law Society of British Columbia*, 1 W.W.R. (N.S.) 34, 1950 CarswellBC 11 (C.A.) (WLeC) at para. 16 [cited to WLeC], cited in *Annett*, *supra* note 24 at para. 36. *Brethour* involved the credibility of a witness whose testimony was the basis for the appellant’s disbarment.

51 *Annett*, *ibid.* at paras. 6, 8.

construction of women as “more emotional, less rational, and less reliable than men.”⁵² In this decision the accused is simply described as a “credible witness,”⁵³ while the complainant’s testimony is detailed and scrutinized and discredited throughout the judgment. One long paragraph of the case outlines all of the “critical areas” where the complainant’s evidence was inconsistent with what she told the police, what she said at the preliminary hearing, and what she testified to at trial. Much of this testimony is mentioned elsewhere in the judgment; here it is laid out and emphasized. Her areas of inconsistency include explanations of how much she drank, “exactly” how she ended up on the floor, whether she was sure about how many people were in the apartment, and “most significantly,” exactly how the assault occurred—exactly how and when she was in various positions and penetrated.⁵⁴ The Court found that the evidence of the two other men present in the apartment and the police officer who interviewed the complainant lent credence to the testimony of the accused.⁵⁵ Another factor working to the complainant’s discredit was the fact that a doctor’s “head-to-toe” examination of her did not find evidence of bruising, scraping, or injury to her body except for two small abrasions on her lower back. The Court noted that she could not have been penetrated from behind as there was no bruising to “that area” of her body.⁵⁶ It is also pointed out that the complainant “agreed” (presumably during cross-examination) that someone in the apartment suite who was screaming or shouting for help should have been heard by another person in the suite, and that the roommate who was home (and watching television behind two closed doors) did not hear anything.⁵⁷

The complainant in this case does not meet the criteria of an “ideal victim”. The judgment notes that she “admitted the plan for the evening was to go to Mr. Annett’s place to drink and have some fun.” It is also noted that the accused is 13 years older than the complainant, who was a teenager at the time of the assault.⁵⁸ The potential power imbalance between them is not acknowledged and she is portrayed as the opposite of a responsible woman who would protect herself from sexual harm. Perhaps most distressing is the emphasis placed on the differences in her statements between the police interview, the preliminary hearing, and the trial. The trial took place two years and eight months after the events occurred.⁵⁹ This judgment focuses heavily on the complainant’s testimony and the various ways it can be discredited. It implies a very high standard for a woman to meet when it comes to remembering and explaining intricate details. The judge finds it easy to discredit the complainant, and to believe that in these circumstances it is more likely that two people “got it on” than an assault occurred.

Mosher also sets a high standard for the complainant to meet when it comes to consistency between statements made at various stages. The decision includes the same quotation about credibility as *Annett*, namely that for testimony to be plausible it should be “in harmony with the preponderance of the probabilities which a practical and informed person would

52 Carol Smart, *Law, Crime and Sexuality* (London: Sage, 1995) at 84., cited in Gotell, *supra* note 2 at 134.

53 *Annett*, *supra* note 24 at para. 42.

54 *Ibid.* at para. 38.

55 *Ibid.* at para. 40.

56 *Ibid.* at paras. 30, 40. Jane Doe details problems with medical examinations of women who have been raped. See *Doe*, *supra* note 8 at 13, 304-10.

57 *Annett*, *supra* note 24 at paras. 8, 24.

58 *Ibid.* at paras. 1, 7.

59 *Ibid.* at para. 1. Similar to my discomfort with the use of the word “complainant” is my reluctance to describe what happened in these cases as anything but assaults. I reluctantly use words like “event” and “incident,” realizing they do not do justice to women’s experiences, because I realize that my preference for describing a case in which the accused has been acquitted of the charge as an assault would leave me open to criticism.

readily recognize as reasonable in that place and in those conditions.”⁶⁰ “Tools” for assessing credibility are listed, and include the ability to consider inconsistencies and weaknesses in the complainant’s evidence. These may be internal inconsistencies, prior inconsistent statements, or inconsistencies between the complainant’s testimony and the testimony of other Crown witnesses. The Court also notes that they are able to review independent evidence that confirms or contradicts the complainant’s testimony, or the absence of independent evidence.⁶¹ The 2005 Ontario Court of Appeal case *R v. Howe* is cited as highlighting the importance of considering any motive that witnesses might have to fabricate evidence in assessing their credibility.⁶²

The facts of *Mosher* involve the complainant driving with the accused and his three-year-old son to a reservoir where they spent two hours together. The complainant testified that near the end of this period of time, while the son was playing outside of the car, the accused moved to the back seat where she was sitting and “without any sexual foreplay, grabbed her arms, held them down and forced himself into her vagina. She says *during the entire time* that he had intercourse with her, she was sitting upright against the back seat and he was sitting on her legs.”⁶³ The complainant also described the accused’s son as coming in and out of the car and turning it on and off with the keys, which the accused had left in the ignition.⁶⁴

The judgment states that the complainant’s “description of the time she spent with the accused and of the sex act was improbable.”⁶⁵ There is also considerable time spent discussing the complainant’s “possible motive for fabricating her story.”⁶⁶ The “possible motive” involves a woman named Kate, who is the mother of the accused’s son and not involved in the case. It is explained that she lost custody of and access to her son in a court battle, apparently uses drugs, and is obsessively jealous of anyone who spends time with the accused. The complainant is a friend of this woman and also describes having been threatened by her for spending time with the accused. The judge decides that the “evidence leaves open the possibility that the complainant may have consented to sex with the accused, and either being a good friend of Kate and knowing how she felt, was afraid to admit that the event was consensual, or as a good friend of Kate, she may have been attempting to assist her in recovering access or custody of her son.”⁶⁷

Eight paragraphs out of this 25-paragraph judgment were spent discussing the possible motives for fabrication. It is interesting how the two possible motives are so far apart from each other. They are very speculative, yet are given a great deal of consideration and weight. This is problematic not only because this speculation adheres to the long-standing myth of women filing false sexual assault complaints for various reasons,⁶⁸ but because of the way

60 *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, [1952] 2 W.W.R. 171, 1951 CarswellBC 133 (C.A.) (WLeC) at para. 10, cited in *Mosher*, *supra* note 25 at para. 9. In *Faryna* the defendant appealed a judgment finding him liable for libel based on a letter suggesting that the plaintiff had gone away because of a pregnancy, “imputing unchastity” to her. The appeal centred on the credibility of one of the witnesses.

61 *Mosher*, *ibid.*

62 *R. v. Howe*, 192 C.C.C. (3d) 480, 2005 CarswellOnt 44 (C.A.) (WLeC), cited in *Mosher*, *ibid.* In *Howe* the Ontario Court of Appeal overturned convictions of sexual assault and assault, sending the case back to trial. The appeal was based on the trial judge failing to give effect to his implicit finding that the complainant had motive to falsely accuse the defendant.

63 *Mosher*, *ibid.* at para. 14 [emphasis in original].

64 *Ibid.* at para. 14.

65 *Ibid.* at para. 14.

66 *Ibid.* at para. 15.

67 *Ibid.* at paras. 15-22. Kate is not the woman’s real name. She is not anonymous in the judgment, but I wanted to give her anonymity in this paper.

the two women are characterized. Kate is described as a bad mother and a drug user and someone who is either scary enough to frighten someone into filing a false rape charge or manipulative enough to collude in one. The complainant comes across as someone who would do something as egregious as file a false claim either out of fear or out of manipulation or collusion, and as having done poorly even at this task since the alleged “sex act” was found to be “improbable.” The unexplained characterization of the complainant’s testimony as improbable is also interesting, demonstrating how easily a complainant can be dismissed if her experience does not conform to what decision makers expect a sexual assault to look like.

As well as highlighting these problems in these two judgments, it is important to note what is missing from them entirely. Gotell describes how the 1992 law reforms were timed with the emergence of neo-liberalism and with a backlash against feminist anti-violence activism and understandings of sexual assault.⁶⁹ She writes that with a lack of political discourses recognizing sexual violence as a systemic problem, criminal law tends to decontextualize the issue.⁷⁰ There is no hint that sexual violence is a gendered political and social issue in these two cases. The complainants are the main focus throughout the judgments. There is no discussion of the feminist background behind the 1992 amendments, no acknowledgment of the myths surrounding sexual violence.

While a thorough analysis of the effects of intersections of race and gender on sexual assault decisions is beyond the scope of this paper, it is important to note the lack of context in judgments when it comes to race. Gotell writes about how dominant understandings of sexual assault have been created in the contexts of racism and colonialism. The result is that the rape of a white woman is the archetypal rape in judicial discourse. In only four out of 106 cases in her research was the race of either the complainant or accused noted. Race was absent from *Annett* and *Mosher* as well, and from the other three cases discussed below. While the gender of the accused and the complainant are always obvious in judgments, the context of gendered power relations involved in sexual violence is hidden, and race is completely absent.⁷¹

Mixed in with the fear, numbness, surprise, disgust, and responsibility that came along with rape was anger. I wanted to “get him.” I knew that my moves were important to my goal of “getting him.” I did not want to make things easier for him by doing anything that could hurt my credibility. I remembered a story, a case that was the topic of discussion at recess in grade seven or eight, in which a woman begged a rapist to put on a condom and a court interpreted this as consent. I empathized with the woman at the time, and during my own rape I wondered what actions I could take that might make people believe that I was actually consenting to the craziness that was happening? How ridiculous. Considering what was happening, I had more important things to worry about.⁷²

68 Jane Doe writes about the myth that women file false rape reports. See Doe, *supra* note 8 at 315-21.

69 Gotell, *supra* note 2 at 127-28.

70 *Ibid.* at 132-33.

71 *Ibid.* at 135.

IV. AN EXAMPLE OF A SEXUAL ASSAULT CASE THAT DID NOT PROCEED TO TRIAL DUE TO LACK OF SUFFICIENT EVIDENCE

The purpose of a preliminary hearing is to review whether there is sufficient evidence to proceed to trial. The purpose is also described in *R. v. R. (H.)* (“*R. (H.)*”),⁷³ the third case in my sample, in regard to protecting the accused from a “needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process.”⁷⁴ The decision in this case to discharge the accused instead of committing him to trial for sexual assault is based on the judge’s position that there was not sufficient evidence to establish the *mens rea* for the offence.⁷⁵ *Ewanchuk* explains the *mens rea* for sexual assault as requiring (i) intent to touch the complainant and (ii) knowing of, or being reckless or wilfully blind to, a lack of consent on the part of the complainant.⁷⁶ The accused can dispute the Crown’s evidence of *mens rea* by asserting an “honest but mistaken belief in consent.” To do so the accused must show a belief “that the complainant *communicated consent to engage in the sexual activity in question.*”⁷⁷ According to the 1992 amendments, the accused is required to take “reasonable steps” to ascertain that the complainant was consenting,⁷⁸ and it is no defence if an accused believed that the complainant’s expressed lack of agreement was actually an invitation to persist. An accused cannot establish honest but mistaken belief by saying that he thought “no” meant “yes.”⁷⁹

In the circumstances leading up to *R. (H.)*, the accused, a professor, invited the complainant TW over for dinner with him and his wife and three children. After dinner was over and the accused’s wife and children had gone to bed, he and TW stayed up and talked, having normal conversation about TW’s studies until the accused told her she was “elementary sexy” and “placed his hands on one of her breasts and on her behind.”⁸⁰ TW did not react, and described herself as being “shocked” and “stunned.”⁸¹ The accused followed her to another room where he kissed her on the mouth, and she said nothing. When he asked her to kiss him, a kiss occurred; in her testimony she could not be sure who initiated it. He tried to take her pants off, but she told him to stop and he did. When she went into the room she was sleeping in—it is apparent from the judgment that it had been planned for her to sleep there—the accused followed her again, and again started to kiss her. He asked

72 Curious about what this “condom case” was as I was writing, I googled “rape” + “condom” + “consent.” The first result that came up was “Man Is Convicted of Rape In Case Involving Condom” *The New York Times* (14 May 1993), online: The New York Times <<http://query.nytimes.com/gst/fullpage.html?res=9F0CE4DD1739F937A25756C0A965958260&sec=&spon=&pagewanted=print>>. In this case from 1993, when I was 13, the rapist broke into a woman’s apartment and attacked her at knifepoint; she asked him to put on a condom as she felt she could do nothing to prevent what was about to happen and wanted to protect herself from pregnancy and HIV. The rapist was acquitted at his first trial. As it turns out, a second grand jury indicted the accused on aggravated sexual assault and burglary charges. I don’t remember that update to the story from my childhood, and wonder if the first decision got more vocal media attention at the time. I do remember being appalled at the first decision, and adamant in my view that the woman was of course still raped. Others were not so sure, and I am concerned with what ideas a group of boys and girls in a schoolyard were left with from this case.

73 *R. (R.H.)*, *supra* note 26.

74 *Ibid.* at para. 18.

75 *Ibid.* at paras. 49-50.

76 *Ewanchuk*, *supra* note 4 at para. 42.

77 *Ibid.* at paras. 43, 46. [emphasis in original].

78 *Criminal Code*, R.S.C. 1985, c. C-46, s.273.2.

79 *Ewanchuk*, *supra* note 4 at para. 51.

80 *R. (R.H.)*, *supra* note 26 at para. 7.

81 *Ibid.* at para. 7.

her to take off her shirt, she said no, he asked again, and somehow her shirt ended up off. The accused ultimately took off her pants and performed “oral sex” on her and took her hand and placed it on his penis; when she “left it there” he put his hand on top of hers and moved it back and forth. TW did not respond. She described herself as laying on the bed “lapsed into apathy”, and stated at the preliminary hearing that she did not consent.⁸²

The judge considered whether there was evidence upon which a jury could reasonably infer that the accused knew of or was reckless or wilfully blind to TW’s lack of consent, and decided there was not.⁸³ It is noted that the role of the preliminary inquiry judge is not to draw inferences or assess credibility; however, when the Crown’s case is based on circumstantial evidence, limited weighting of that evidence is required to assess whether the evidence, if believed, could reasonably support an inference of guilt.⁸⁴ It is specified that a preliminary inquiry judge should not discharge an accused simply because the Crown’s evidence is weak.⁸⁵ The Supreme Court of Canada decision *R. v. Ferras* (“*Ferras*”) states that an accused should not be committed to trial if the Crown’s evidence is “so manifestly unreliable that it would be unsafe to rest a verdict upon it.”⁸⁶ The judge in *R. (H.)* interprets this as saying that in rare cases the preliminary inquiry judge has the discretion to discharge the accused even though there is some evidence, if it is not direct evidence, on each element of the offence, if that evidence is manifestly unreliable.⁸⁷

TW testifies to verbally resisting the “sexual contact.” It is hard to believe that a jury could not possibly infer that the accused was at least reckless or wilfully blind in proceeding when the complainant was verbally resisting. The judge’s observations in assessing TW’s evidence are troubling. He states that TW testified that she did not consent to any of the sexual activity, “though if her evidence is accepted, she actively participated in it, including kissing R and possibly removing some of her clothing.”⁸⁸ He goes on to note that

TW consistently informed R that considering the circumstances, they should not be engaging in any sexual activity. This, however, related to the presence of R’s wife and children in the same house. R’s moral obligations as a husband and a professor must not be confused with his obligations as set out in the *Criminal Code*.⁸⁹

This is difficult to understand, as TW’s reasons for not wanting to engage in the activity should not be relevant. It should be questioned whether the judge attributes TW’s resistance to the circumstances, then infers that she really and truly wanted to engage in sexual activity and that the accused had no reason to believe otherwise. The judgment states that TW “at no time, by words or actions, if her evidence is accepted, indicated to R that she did not wish to participate in the sexual activity which she engaged in with him. There is no evidence of lack of consent, other than her statement that she did not consent.”⁹⁰ Seemingly reluctantly, as it is not his place to discredit testimony at a preliminary inquiry, the judge accepts her evidence that “despite her actions to the contrary, she was not consent-

82 *Ibid.* at paras. 8-12.

83 *Ibid.* at paras. 49-50.

84 *Ibid.* at para. 31.

85 *Ibid.* at para. 38.

86 *United States v. Ferras*, 2006 SCC 33, [2006] S.C.R. 77, 2006 CarswellOnt 4451 (WLeC) at para. 40.

87 *R. (R.H.)*, *supra* note 26 at para. 38.

88 *Ibid.* at para. 46.

89 *Ibid.* at para. 47.

90 *Ibid.* at para. 48.

ing” as meeting the lack of consent requirement for the *actus reus*.⁹¹ He appears hesitant to accept her evidence and gives no explanation for why he finds that a jury could not reasonably infer knowledge or recklessness or wilful blindness as to lack of consent despite the fact that she repeatedly verbally communicated it.

This also seems to be a case where the complainant was “tripped up” during her cross-examination. She “agreed” to the defence lawyer’s suggestion that the accused might have viewed her actions as indicating that she was consenting, even though she told him they “could not be at this.”⁹² It is also noted that TW drank about four glasses of wine and one or two of port,⁹³ and that a classmate, in whom she confided, testified that she was “conflicted and confused.”⁹⁴ While it is not stated in the judgment, there are implications that TW put herself in this situation and shouldn’t have. There is also no context of any kind discussed, including any potential power imbalances in the relationship between a professor and a student. It appears that TW does not fit the “ideal victim” mould, her assault does not coincide with what the judge would accept as sexual violence, he simply does not believe the case should go forward, and he works to find a way to dismiss it.

Apathetic, emotionless, removed, spiritless, numb. A feeling—or non-feeling—with which I am familiar. Shocked and stunned too, because no one is ever prepared for rape, even if we have been conditioned to expect it our whole lives. Forced “oral sex,” the placing of one’s hand on a penis and the movement of it back and forth when you leave it there in apathy, in numbness—these are actions that we do not think of when we imagine rape, yet I am too familiar with these as well.

There were many factors around my rape experience that made me an “ideal victim.” People believed that I was raped. However, even as they believed me, they still didn’t really believe it when it came down to what happened. Friends, usually after the consumption of much alcohol, would sometimes express to me their distress about what they imagined had happened during my rape. One friend in particular carried images of a man twice my size throwing me down, tearing off my clothes and raping me “roughly” in the “missionary position”. I corrected him, watching him grow suspicious and uncomfortable, as I told him that I took off my own clothes and did everything the rapist said, moving into many different positions when I wasn’t laying in numbness, in apathy.

V. AN EXAMPLE OF THE DOWNPLAY OF THE “REASONABLE STEPS” REQUIREMENT CAUSING A CASE TO BE SENT BACK TO TRIAL TO CONSIDER “MISTAKEN BELIEF IN CONSENT”

The short judgment in *R. v. Tookanachiak* (“*Tookanachiak*”),⁹⁵ the fourth case in my sample, does not give us much in the way of facts. What we do know is that the complainant was unconscious “by reason of being asleep or otherwise passed out” at a time when the

91 *Ibid.* at para. 48.

92 *Ibid.* at para. 9.

93 *Ibid.* at para. 6.

94 *Ibid.* at para. 16.

95 *Tookanachiak*, *supra* note 27.

accused was “engaged in oral sex upon her,” and that she was “easily awoken when the sexual activity was discovered by her friend.”⁹⁶

The accused was acquitted in summary proceedings. The Crown appealed and the summary conviction appeal judge entered a conviction, finding that the trial judge had erred by not applying the section of the *Criminal Code* that states that no consent is obtained where the complainant is incapable of consenting.⁹⁷ The accused then appealed to the Court of Appeal where the conviction was overturned. The Court of Appeal accepted the accused’s argument that because the evidence given at trial did not disclose whether the “sexual activity” commenced prior to the complainant falling asleep and if so, whether the accused was aware that she fell asleep, there is an “air of reality” of honest but mistaken belief in consent.⁹⁸

In the *Ewanchuk* decision, Major J. said the *mens rea* for sexual assault is satisfied when it is shown that the accused knew the complainant was not saying “yes” as well as when he knew she was not saying “no.” However, as L’Heureux-Dubé J. pointed out in her concurring judgment, Major J. downplayed the importance of the requirement of the accused to take “reasonable steps” to ensure there was consent. This essentially ignored how the “reasonable steps” requirement, added as part of the 1992 law reforms, was supposed to modify the test for mistaken belief, as Major J. held on to the idea that an “air of reality” for mistaken belief can exist even when the accused has not taken steps to ensure consent.⁹⁹ *Tookanachiak* is a case that demonstrates the effects of Major J.’s adherence to the old common law “air of reality” test.¹⁰⁰

The evidence in this case established that the complainant was asleep and therefore incapable of consenting at a time when “sexual activity” was occurring, and the summary court appeal judge entered a conviction on this basis. This result makes sense if the accused is required to take “reasonable steps” to ensure that the complainant has consented and has not withdrawn consent by falling unconscious.¹⁰¹ The Court of Appeal’s decision to remove the conviction and send the case back to trial along with the possibility, according to the Court, that the accused had an honest but mistaken belief hints that the accused was not expected to have taken “reasonable steps” to ensure the continuation of consent. The possibility that an accused can have mistaken belief when a complainant is unconscious, instead of an inference that he is at least reckless or wilfully blind in such a situation, tells us that the “reasonable steps” requirement is not being given much weight.

The lack of social context in *Tookanachiak* is also glaring. The complete absence of discussion regarding gendered and racial contributing factors or of sexual violence as an equality issue is problematic in all decisions, but is especially so in one from Nunavut. The sexual

96 *Ibid.* at para. 3.

97 *Ibid.* at para. 4. See *Criminal Code*, *supra* note 5 at s.273.1(2)(b).

98 *Tookanachiak*, *supra* note 27 at para. 9.

99 *Ewanchuk*, *supra* note 4 at para. 45 and paras. 98-101, L’Heureux-Dubé J., concurring; and Hester Lessard, “Farce or Tragedy? Judicial Backlash and Justice McLung” (1999) 10:3 *Constitutional Studies* 65 at 71, both cited in Gotell, *supra* note 2 at 145-46.

100 The test was articulated in *R. v. Pappajohn*, [1980] 2 S.C.R. 120, 111 D.L.R. (3d) 1, 1980 CarswellBC 546 (WLeC). It defined mistaken belief in consent as subjective and said that the defence must have an “air of reality” but need not be reasonable. See Gotell, *supra* note 2 at 145-46.

101 *Tookanachiak*, *supra* note 27 at para. 4.

assault rate in Nunavut is reported at almost nine times the national average.¹⁰² This context is not remotely hinted at in the Court of Appeal judgment. There is no mention of whether the complainant is an Inuit woman, no mention that Inuit women experience high rates of sexual assault, and no mention of colonialism as a factor.¹⁰³

It is questionable whether judgments such as this one are affected by ideas of what conduct constitutes a “real rape”. In both this case and *R.H.* an “oral sex” act was involved, and both cases appear dismissive of the act as a crime. In writing about the “archetypal rape” in legal discourse as the rape of a white woman, Gotell comments that Black and Aboriginal women are portrayed as “unrapable.”¹⁰⁴ While we don’t know the identity characteristics of the women in either of these cases, I wonder whether the act that was committed also factors into whether the complainant was seen as “rapable” or not. If an act of “oral sex” is not considered something that typically happens during a rape or something that women would be inclined to resist, this may cause women who experience this form of assault to fall outside of the “ideal victim” category.

A friend told me of how she once woke up to a man performing “oral sex” on her. The phrase does not accurately explain what happened or how it affected her still, years later, when she told me her story. Jane Doe writes of being instructed to say “cunnilingus” on the witness stand at her rapist’s criminal trial. Can we not come up with another word, or phrase? I think of “oral rape,” but then we might confuse this act with a rapist forcing something into a woman’s mouth.

Nothing I can think of conveys the feeling of having this act forced on you when it is not desired. Would any word or phrase bring decision makers and others closer to understanding? More than once I have sat and listened to well-meaning friends and fellow students opine that it is hard to see “oral sex” as rape. Like when I was confronted with my rapist, I can only shake my head and cannot speak. It is hard to explain that “oral sex” can be a violation, a rape, and what it can feel like.¹⁰⁵

VI. AN EXAMPLE OF AN “IDEAL VICTIM” AND OF PROBLEMATIC ASPECTS TO A DECISION WITH A POSITIVE RESULT

R. v. B. (A.J.) (“*B. (A.J.)*”),¹⁰⁶ the final case in my sample, is another case where the accused

102 Northwest Territories Bureau of Statistics, *Crime in Canada’s North: A Relative Perspective* (October 2007), online: Northwest Territories Bureau of Statistics <http://www.stats.gov.nt.ca/Stainfo/Justice/Crime%20in%20Canada’s%20North_Oct2007.pdf> at 16. The statistical report does not mention any gendered or colonialist reasons for the problem. A *New York Times* article ignores the systemic gendered and racial factors that contribute to sexual assault and attributes this high rate to alcoholism, high unemployment, and crowded housing. See James Brooke, “Long Nomads, the Inuit Find a Settled Life Unsettling” *The New York Times* (1 September 2000), online: *The New York Times* <<http://query.nytimes.com/gst/fullpage.html?res=9904E5D81530F932A3575AC0A9669C8B63&sec=&spn=&pagewanted=all>>

103 For a discussion of sexual assault on Inuit women that factors in race and gender bias and colonialism, see Teresa Nahanee, “Sexual Assault of Inuit Females: A Comment on ‘Cultural Bias’” in Julian V. Roberts & Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 192.

104 Gotell, *supra* note 2 at 135.

105 See Doe, *supra* note 8 at 65-66.

106 *B. (A.J.)*, *supra* note 28.

testified, but here the complainant is viewed as a credible witness. The accused's testimony does not create a reasonable doubt as to her statement that she did not consent, and does not provide basis for an "air of reality" for honest but mistaken belief.¹⁰⁷ An expansion of the range of situations that are viewed as "legitimate" sexual assault is evident in this case.¹⁰⁸ The complainant and the accused had a four-year relationship, lived together, and had two children together. There was also a "lack of medical evidence" to support parts of the complainant's testimony.¹⁰⁹ These are factors that could potentially have directed a court to the conclusion that the "sexual activity" was consensual. The positive result is worth celebrating as a sign of some progress; however, the way the conclusion was reached by both the trial court and Court of Appeal still signifies problems.

Although the complainant was ultimately viewed by the court as credible, it is problematic that her sexual history was discussed in the accused's testimony at trial. The 1992 amendments to the *Criminal Code* prohibit admission of evidence of a complainant's sexual history, with the accused or any other person, to show that she was more likely to have consented or less worthy of belief. In order to be admitted, sexual history evidence must be of specific sexual activity, be relevant to an issue at trial and have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. In determining admissibility, a judge is supposed to consider factors including society's interest in police reporting and the importance of eliminating discriminatory beliefs from the fact-finding process.¹¹⁰ An accused is required to make an application for a hearing to determine whether sexual history evidence is admissible.¹¹¹ The Supreme Court of Canada upheld the constitutionality of these provisions in 2000.¹¹² In Gotell's work, she looked at 22 cases about admissibility of sexual history evidence; 53 per cent were successful in having the evidence admitted, which suggests that the test is "highly permeable through judicial interpretation."¹¹³ In *B. (A.J.)*, the accused's testimony included evidence of past sexual history between him and the complainant. No application was made for permission to include the evidence. The Crown did not object, and the trial judge did not comment on the fact that this evidence was given without the defence having made the application required by the *Criminal Code*.¹¹⁴ The accused's appeal was then based on this evidence, as he claimed that it created a basis for an air of reality for mistaken belief in consent.¹¹⁵ While it is positive that the Court of Appeal pointed out the mistake in admitting the evidence and did not allow it to support the mistaken belief argument,¹¹⁶ it is prob-

107 *Ibid.* at paras. 25, 54, 60.

108 Gotell, *supra* note 2 at 146.

109 *B. (A.J.)*, *supra* note 28 at paras. 7, 28, 57.

110 Gotell, *supra* note 2 at 154, n. 2. See *Criminal Code*, *supra* note 5 at ss.276(1)-(3). Other factors the judge is to consider include the risk that the evidence will arouse prejudice, the prejudice to the complainant's privacy and dignity, the right to personal security and protection of the law, and the right of the accused to make full answer and defence.

111 *Criminal Code*, *ibid.* at, s.276.1.

112 *R. v. Darroch*, 2000 SCC 46, [2000] 2 S.C.R. 443, 2000 CarswellOnt 3322 (WLeC).

113 Gotell, *supra* note 2 at 133, 136. Gotell also discusses these 22 cases in Lise Gotell, "When Privacy is not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2005-2006) 43 Alta. L. Rev. 743, calling the legislative restrictions on sexual history evidence a "permeable sieve," at 756.

114 *B. (A.J.)*, *supra* note 28 at paras. 15-17, 20.

115 *Ibid.* at paras. 42, 48-49.

116 *Ibid.* at paras. 48-51, 54.

lematic that the evidence was brought up at the trial level without the defence going through the required process. This suggests that the test for admissibility is not only highly permeable, it is sometimes ignored altogether.¹¹⁷

It is also important to consider the factors that may have led the court to conclude that the complainant was a credible, “ideal victim” in this case. It is the only one out of the five cases I looked at that involves physical violence, displays of anger, and threats by the accused. The acts making up the assault included forcing the complainant to perform “oral sex,” and anal penetration that continued until the accused ejaculated.¹¹⁸ It is noted that the complainant begged the accused not to perform the anal penetration, and that she was pregnant at the time of the assault.¹¹⁹ The Court of Appeal decision to affirm the conviction must be praised as a positive one. At the same time, the decision may have been influenced by ideas that the acts involved are acts that women are more likely to not consent to (as opposed to “receiving” “oral sex”), especially when pregnant. The threats, the physical violence and the begging all create an image of a horrible situation for a woman to endure, which this no doubt was. This is more in line with what is seen to be a “real rape” than what happened in the other four cases. Comparatively, women with experiences like the first four discussed will have a harder time being taken seriously as having experienced assault.

One of my many reactions to rape was surprise. It sounds simple, but rape was not what I expected. It definitely was not like rape that happens “in the movies.” I noticed how my rapist spoke and worried that when I told police and lawyers what he said they would never believe he was a rapist. I ran adjectives through my head trying to think of how I’d describe his voice, making a note that the word “soothing” was probably not a good choice of words. We do not think of rapists as making conversation with the women they are attacking, or speaking in soft voices.

What is a “real rape”? People expect physical violence. They do not expect that rape will happen without a fight. Even from my rape, where I was ordered around by the man with the machine gun, people expected a fight. Police officers and lawyers commented that it was “too bad” that I was not bruised and torn. Friends marvelled at how this could happen without a fight. One asked why I didn’t try to grab the gun.

I hated my rapist. I fantasized about fighting, about kicking him to break each of his wrists, but in reality I did every single thing he said with no resistance. When I sensed he was looking for a reaction, I pretended to cry, calculatingly playing the part of the “good rape victim.” When he was finally “done” I knew that he was done, and he gestured to my clothes and I knew he was letting me go. I dressed, the gun was in my face and he ordered me not to tell. I kept my head down, whimpered, promised, pleaded and lied “No, no, I won’t tell.” And he let me go.

Maybe I should have gone to acting school instead of law school.

117 In a conversation with a friend before I came to law school, in 2004, we discussed whether a woman reporting a rape in Canada risked having any of her sexual history exposed in court. Neither of us understood the answer to this question. I thought there was no protection for women in this area and she thought that provisions were in place that prevented such evidence from being brought up at all.

118 *B. (A.J.)*, *supra* note 28 at paras. 1, 9-11.

119 *Ibid.* at paras. 7, 14.

After, I speculated on my response and the gun. It would be too simple to say it was just the gun that informed my reaction. It is natural to freeze when we sense danger, gun or no gun, and it is sensible to work ourselves out of it with our wits and our minds instead of using our bodies in an attempt to fight. I wondered about women who endure rapes involving unexpected, “unbelievable” acts and no physical violence—and no gun. The gun was one of my “real rape” cards, it made me the “ideal victim.” I wondered about women whose rapists didn’t have a gun, and I worried about them.

VII. CONCLUSION

The small sample of recent judicial treatment of sexual assault I have examined in this paper provides examples of major problems that continue to affect sexual assault decisions. This sample of judgments would have us believe that women lie about assaults, that certain “sex acts” are improbable, and that others are unlikely to occur in an assault context. Women are expected to consistently and in detail relive their traumatic experiences, experiences which are not viewed in their social and political context. Convictions in sexual assault cases appear to be based on the ability of complainants to stand up to cross-examination and on whether they fit the mould of ideal victims who experience an archetypal rape. This is all very disturbing and highlights the need to continue to assess sexual assault cases. We must continue to question whether changes in this area of law such as the *Ewanchuk* decision and the 1992 amendments to the *Criminal Code* actually make a difference at lower levels of court, and in women’s lives.

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