



# APPEAL

## REVIEW OF CURRENT LAW AND LAW REFORM

### ARTICLES

*Perry v Schwarzenegger: An Opportunity to “Do” Law Differently*

Jasreet Badyal

*Ownership of Rainwater and the Legality of Rainwater Harvesting in British Columbia*

Katie Duke

*“None of that Paper Stuff Works”: A Critique of the Legal System’s Efforts to End Domestic Assault in Nunavut*

Chris Durrant

*Bill C-14: A Step Backwards for the Rights of Mentally Disordered Offenders in the Canadian Criminal Justice System*

Lisa Grantham

*Milestone or Missed Opportunity? A Critical Analysis of the Impact of *Domotor* on the Future of Human Trafficking Cases in Canada*

Bethany Hastie & Alison Yule

*Probate Actions and “Suspicious Circumstances”: A Third Standard of Proof for Allegations Involving Moral Guilt*

Louise Mimmagh

*Interpreting the *Charter* with International Law: Pitfalls and Principles*

Benjamin Oliphant

*Can Water be a Human Right?*

Kirsten Snell

### CASE COMMENTARY

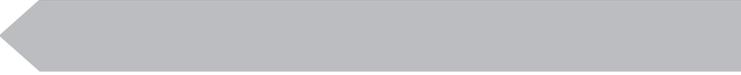
*The Prude in the Law: Why the *Polygamy Reference* Is All About Sex*

Dana Phillips





# APPEAL



REVIEW OF CURRENT LAW AND LAW REFORM

**VOLUME 19 ■ 2014**

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# TABLE OF CONTENTS

---

## PREFACE

Glynnis Morgan and Xiaoshan Zheng .....	1
---	---

## ARTICLES

<i>Perry v Schwarzenegger</i> : An Opportunity to “Do” Law Differently Jasreet Badyal .....	3
--	---

Ownership of Rainwater and the Legality of Rainwater Harvesting in British Columbia Katie Duke .....	21
--	----

“None of that Paper Stuff Works”: A Critique of the Legal System’s Efforts to End Domestic Assault in Nunavut Chris Durrant .....	43
---	----

Bill C-14: A Step Backwards for the Rights of Mentally Disordered Offenders in the Canadian Criminal Justice System Lisa Grantham .....	63
---	----

Milestone or Missed Opportunity? A Critical Analysis of the Impact of <i>Domotor</i> on the Future of Human Trafficking Cases in Canada Bethany Hastie & Alison Yule .....	83
--	----

Probate Actions and “Suspicious Circumstances”: A Third Standard of Proof for Allegations Involving Moral Guilt Louise Mimmagh .....	95
--	----

Interpreting the <i>Charter</i> with International Law: Pitfalls and Principles Benjamin Oliphant .....	105
--	-----

Can Water be a Human Right? Kirsten Snell .....	131
--	-----

## CASE COMMENTARY

The Prude in the Law: Why the <i>Polygamy Reference</i> Is All About Sex Dana Phillips .....	151
---	-----

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The *Appeal* Editorial Board wishes to congratulate

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winner of the

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

The *Appeal* Editorial Board is also pleased this year to recognize Katie Duke as the runner-up.

# PREFACE

by Glynnis Morgan and Xiaoshan Zheng

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First and foremost, we acknowledge with respect the history, customs, and culture of the Coast Salish and Straits Salish peoples on whose traditional lands the University of Victoria, Faculty of Law, and *Appeal* reside.

*Appeal* is a student-led journal that publishes exclusively student work; this emphasis on the category of authorial experience invites a wide variety of paper topics and styles. This year, we introduce authors from the University of Victoria, the University of British Columbia, Osgoode Hall Law School, the University of Toronto, and McGill University. The papers in this volume provide insightful analyses of alternative pedagogies, rainwater harvesting, recent trends in criminal law, probate actions, *Charter* interpretation, domestic violence policies in Nunavut, and the criminalization of polygamy. These masterfully written papers open new doors in familiar subject matters, or introduce us to unique topics that we had not previously considered.

Publishing *Appeal* is a team-effort, and we thank the Faculty of Law at the University of Victoria for providing such a supportive home to *Appeal*. This volume would not be possible without the constant and continued support of the many faculty members who share their insights and experience with our Editorial Board in formal and informal capacities. In particular, we would like to extend our appreciation to Neil Campbell, who has been a steadfast supporter of *Appeal*. We are also grateful to Rod Hayley and Ted McDorman for their guidance in the publication process.

We thank our patrons and sponsors, whose financial support make publishing *Appeal* possible. Their ongoing support ensures that *Appeal* continues to be a home, both online and in print, for outstanding student legal scholarship.

We would also like to thank the many students and faculty members who review papers for *Appeal*. Their thoughtful comments assist our Editorial Board in selecting great papers, and guide our authors in their editing prior to publication. We appreciate their generosity during the busy academic year.

Finally, we would be remiss not to thank our outstanding Editorial Board for their dedication to producing this volume. It has been our privilege to serve as this year's Editors-in-Chief.

We hope that you enjoy the papers in Volume 19 of *Appeal*.

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ARTICLE

# ***PERRY V SCHWARZENEGGER: AN OPPORTUNITY TO “DO” LAW DIFFERENTLY***

**Jasreet Badyal\***

**CITED:** (2014) 19 Appeal 3–20

## **TABLE OF CONTENTS**

INTRODUCTION . . . . .	4
I. SETTING THE STAGE . . . . .	6
A. The Classroom Experience . . . . .	6
B. Methodology . . . . .	7
II. TRADITIONAL LEGAL PEDAGOGY . . . . .	9
III. LAW, EMBODIMENT, AND THEATRE . . . . .	10
A. Embodiment and Law . . . . .	10
B. What Does Theatre Give Us? . . . . .	12
IV. EMPATHY, OUTSIDER SPACE, RELATIONAL POLITICS, AND MAPPING . . . . .	14
A. Importance of Emotion and Empathy . . . . .	14
B. Outsider Space and Relational Politics . . . . .	15
C. Mapping . . . . .	16
V. SOME REFLECTIONS AND DOUBTS. . . . .	17
LOOKING FORWARD . . . . .	18

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\* Jasreet Badyal is a third year law student at the University of Victoria. She wrote this paper for the course “Sexual Orientation and the Law.” She would like to thank Professors Gillian Calder and Sharon Cowan for creating safe spaces and having the courage to do theatre in law school. She would also like to thank her classmates who made themselves vulnerable and showed strength in confronting difficult processes of learning about and combating structures of power. Finally, she is immensely grateful to Xiaoshan Zheng and Sarah Jones for their faith in this paper, patience, and commitment throughout the editing process.

## INTRODUCTION

*For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.*

Audre Lorde<sup>1</sup>

HULK SUPPORT QUEER AND FEMINIST CHALLENGES TO MARRIAGE AS INSTITUTION. HULK ALSO CHAMPION SAME-SEX MARRIAGE. HULK VAST, CONTAIN MULTITUDES.

Feminist Hulk<sup>2</sup>

Written in response to the Supreme Court of the United States' hearings on same-sex marriage equality,<sup>3</sup> Feminist Hulk's tweet succinctly and with nuance captures the critical debates and discussions that progressives have about the subject.<sup>4</sup> In less than 140 characters, this tweet illustrates how language can be used differently. It can be viewed as an example of applying Lorde's assertion that true change requires moving beyond dominant approaches. With these ideas in mind, my aim in this paper is to uncover and apply alternative approaches to learning law. I use *Perry v Schwarzenegger* ("The Case")<sup>5</sup> as an entry point for exploring what is gained (and what may be lost) by "doing" law differently and by understanding law to go beyond simply legislation and jurisprudence. The following are questions that guide my inquiry: what happens when we put our bodies, minds, and souls into learning law? Can this different way of learning pave the way for change?

As a law student in the course Sexual Orientation and the Law, I had the opportunity to actively engage in various forms of embodied pedagogy.<sup>6</sup> The course was co-taught

- 
- 1 Audre Lorde, *Sister Outsider* (Trumansburg: The Crossing Press, 1984) at 112 [emphasis in original].
  - 2 Feminist Hulk, (26 March 2013), online: Twitter <<https://twitter.com/feministhulk/status/316565626359533569>>. As of 9 February 2014, this tweet had been retweeted (shared) 4,642 times and marked as a favourite 1,808 times. Feminist Hulk is a Twitter account that employs the voice and style of a comic book character (Hulk) to articulate feminist perspectives. The account writes in all capital letters to signify Hulk's voice. For instance, in response to the media controversy surrounding the response to the Steubenville rapists, Feminist Hulk wrote: "NO RAPIST IS TRAGIC HERO. HULK SMASH BULLSHIT MEDIA FOR THEIR COMPLICITY IN SEXISM AND RAPE CULTURE!" Feminist Hulk, (19 March 2013), online: Twitter <<https://twitter.com/feministhulk/status/314134202717192192>>.
  - 3 "Hollingsworth v Perry: Full Transcript of Oral Arguments on Gay Marriage Released (Audio)" *The Huffington Post* (26 March 2013), online: Huffington Post <[http://www.huffingtonpost.com/2013/03/26/hollingsworth-v-perry\\_n\\_2952605.html](http://www.huffingtonpost.com/2013/03/26/hollingsworth-v-perry_n_2952605.html)>.
  - 4 For examples in the Canadian academic context, see generally Susan Boyd & Claire Young, "Losing the Feminist Voice? Debates on Legal Recognition of Same-Sex Partnerships in Canada" (2006) 14 *Fem L S* 213; Suzanne J. Lenon, "Marrying Citizens! Raced Subjects? Rethinking the Terrain of Equal Marriage Discourse" (2005) 17 *CJWL* 405.
  - 5 *Perry v Schwarzenegger*, 704 F Supp (2d) 921 (ND Cal 2010). This is the lower court decision of the case that Feminist Hulk is referencing; see Feminist Hulk, *supra* note 2.
  - 6 In using the term "embodied", I am referring to the concept of using, engaging, and being aware of our bodies. Embodiment reflects a feminist methodology, which recognizes the complex lived experiences of oppression as inseparable from bodies. It requires moving beyond traditional approaches, which are oriented around text (either written or verbal) and, thus, disembodied. See Gillian Calder & Sharon Cowan, "Re-Imaging Equality: Meaning and Movement" (2008) 29 *A Fem LJ* 109 at 117; Elizabeth Adjin-Tettey et al, "Postcards from the Edge (of Empire)" (2008) 17 *Soc & Leg Stud* 5 [Postcards from the Edge]. Given this definition of "embodied", when I use the term "embodied pedagogy," I am referring to a teaching approach that requires students to employ and be conscious of their bodies. In contrast, I use the term traditional legal pedagogy to refer to a teaching approach that is text-oriented. In law schools, the traditional approach involves case law methodology, which is the process of learning the law by reading seminal cases, generally exclusively from the appellate level.

by Professors Gillian Calder and Sharon Cowan at the Faculty of Law, University of Victoria.<sup>7</sup> A central component of the embodied pedagogy in the course was Dustin Lance Black's play, "8" ("The Play").<sup>8</sup> The Play drew heavily on the transcripts of *The Case*, while weaving in the narratives of the gay and lesbian plaintiffs. These plaintiffs were challenging Proposition 8, which had removed California's recognition of same-sex marriage through a popular referendum.<sup>9</sup> As a class, we staged a reading of *The Play*, which was open to the public.<sup>10</sup> We did this in the largest lecture room of the law building and garnered an audience of over a hundred people, including individuals who were not directly connected with the law school.

While same-sex marriage equality is the primary issue in *The Case* and *The Play*, my focus is more on how we learn law. As such, my exploration necessarily implicates questions about the purpose of legal education.<sup>11</sup> I am struck by how often law students and the legal profession see substantive content as the *raison d'être* of legal education, as if mastery of a relevant section of legislation or a ratio of a case is all it takes to be a good legal advocate. I see embodied pedagogy as pushback against such an understanding of legal education. An embodied pedagogical approach makes learning the law a more fully human experience and brings to light questions regarding equality, justice, and lawyering that are often neglected or cannot be seen through traditional legal pedagogy. In particular, embodied pedagogy opens up the imaginary<sup>12</sup> of what is possible and forces us to think beyond our current limitations. I will present a case for how engaging in embodied legal pedagogy can help us learn important skills for lawyering, such as empathy and critical awareness of our positions in structures of power.

7 For an example of their collaborative work, see e.g. Calder & Cowan, *supra* note 6.

8 Dustin Lance Black, "8" (Burbank: Hungry Jackal Productions, 2012) [Playscript].

9 The Play is based on the trial level decision. The case was ultimately appealed to the Supreme Court of the United States with a decision rendered June 26, 2013. The 5-4 judgment was decided on the narrow grounds of standing instead of the bigger question of equal protection and the definition of marriage. See generally Bill Mears, "Supreme Court dismisses California's Proposition 8 Appeal" *CNN* (27 June 2013), online: CNN Politics <<http://www.cnn.com/2013/06/26/politics/scotus-prop-8/>>. Regardless, the majority decision dismissed the appeal, which ultimately means California is once again a state that permits same-sex marriage.

10 We advertised our staged reading on the campus radio station and in the City of Victoria's mainstream newspaper. See Amy Smart, "UVic Law School Sponsors Reading of Same-sex Marriage Play" *Times Colonist* (12 March 2013), online: Times Colonist <<http://www.timescolonist.com/entertainment/uvic-law-school-sponsors-reading-of-same-sex-marriage-play-1.90054>>. We also produced a video invite that we used to create awareness of *The Play*. BoxxerRebellion, "8 Video Invite" (2013), online: Youtube <<http://www.youtube.com/watch?v=vrfossflsM&feature=youtu.be>>.

11 I see this paper as contributing a student perspective to existing literature on legal pedagogy, specifically critical work that uses perspectives from feminism, queer theory, and intersectionality. See e.g. Kim Brooks & Debra Parkes, "Queering Legal Education: A Project of Theoretical Discovery" (2004) 27 *Harv Women's LJ* 89; Natasha Bakht et al, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45:4 *Osgoode Hall LJ* 668; Maneesha Deckha, "Teaching Posthumanist Ethics in Law School: The Race, Culture, and Gender Dimensions of Student Resistance" (2009-2010) 16 *Animal L* 287; Gillian Calder, "Guantánamo: Using a Play-Reading to Teach Law" (2010) 142 *Can Theatre Rev* 44 [Guantánamo].

12 By imaginary, I am referring to the creative space of what is possible. Hegemonic ideas generally form the boundaries of one's imaginary. In this way, it becomes impossible to even conceive of something different. The most effective way that existing power structures perpetuate themselves is through constraining the imaginary. As such, opening up the imaginary is integral to produce change. This understanding is informed by Rebecca Johnson's lectures on judicial dissent and the imaginary. See generally Rebecca Johnson & Ruth Buchanan, "Getting the Insider's Story Out: What Popular Film can tell us about Legal Method's Dirty Secrets" (2001) 20 *Windsor YB Access Just* 87; Suzi Adams, Jeremy C A Smith & Ingerid S Straume, "Political Imaginaries in Question" (2012) 13:1 *Critical Horizons* 5.

My overarching purpose in critically exploring this different pedagogical approach is both to articulate my thoughts for others but also to have space to reflect on my experiences for myself. With this in mind, I will first outline the context and methodology of this paper in Part I. I will then summarize how a traditional legal pedagogical approach would have addressed The Case in Part II. Then, I will explore the significance of embodiment and the role of theatre in relation to law in Part III. After this, I will consider the role of emotions and empathy, the creation of outsider spaces, relational politics, and mapping in Part IV. Once I have explored what can be gained through this pedagogy, I will reflect on doubt and the purpose of my paper in Part V. To conclude, I will note the shifts that may be important for future embodied legal pedagogical approaches.

## I. SETTING THE STAGE

### A. The Classroom Experience

Alongside *The Play*, in *Sexual Orientation and the Law* we engaged in collaborative discussions, utilized our bodies through various activities, and employed artistic tools to create representations. The collaborative discussions reflected some traditional seminar styles in that we all read mostly the same articles and engaged critically with them. However, we shifted that traditional approach by creating a congenial and respectful environment that focused on learning from each other. Rather than speaking with the intention of converting others to our own perspective, our starting point was that we each brought different and valuable perspectives. Moreover, we used our bodies, individually and collectively, to produce sculptures and representations of moments of oppression and counter-oppression. We also used art as part of our seminars and discussion. Lastly, we ended the course by mapping moments of queer legal history that each of us had chosen.<sup>13</sup>

Many of my classmates employed non-traditional methods to produce their final projects, such as scrapbooks and portraits. I am fortunate to have participated in some of these methods and they are an integral part of the experiences that I am analyzing in this paper. In particular, I am inspired by Siddharth Akali's "(I)dentify Burlesque," in which I acted the role of an "identity gatekeeper." In his piece, he beautifully and physically deconstructed the power and constraints of identity.<sup>14</sup> In light of the importance of collaboration in this class, I will often use "we" and related terminology in my discussion below. I do this acknowledging that the ideas that I express are reflective of my personal experience and may not necessarily reflect the experiences of my classmates.<sup>15</sup>

Significantly, our class was composed of mostly (perhaps entirely) outsider students who reflected a range of intersectional axes of oppression: gender; sexual orientation; race; nationality; language; single parenthood status; class; and likely many others that I cannot say for certain.<sup>16</sup> It should also be noted that we all have varying degrees of privilege, especially as law students, which interact in complex and nuanced ways with our intersecting oppressions. My particular self-identification is important to understand

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13 See Appendix A for a picture of our map.

14 Siddharth Akali, "(I)dentify Burlesque" (Performance delivered at the Faculty of Law, University of Victoria, 27 February 2013) [unpublished].

15 Further research to engage in the perspectives of the rest of the class may present important perspectives that are missing from this paper.

16 I have chosen to only list the ones that I am certain of to avoid essentialist assumptions about my classmates.

my engagement with the projects.<sup>17</sup> I am female-identifying, female-bodied, able-bodied, Indo-Canadian, brown, agnostic Sikh, and queer.<sup>18</sup> While these are not my only salient identity markers, they are the ones that I am most regularly reflecting on and were the ones I felt activated in my learning.

In addition to this course, I took courses during law school on feminist legal theories, Indigenous law, Inuit law and film, and administrative law. All except the last were outsider courses, and the last was taught using outsider pedagogy.<sup>19</sup> These courses have presented me with different methodologies and perspectives, including canvassing the broader contexts informing the law, unpacking power relations underlying law's purported neutrality, exploring alternative legal regimes, using law-and-film approaches, and learning collaboratively.<sup>20</sup> An example of applying these alternative methodologies is my video blog that engaged personal narratives with questions of law, identity, oppression, and feminism.<sup>21</sup> The overarching lesson for me is that law is more than statutes and cases; rather, it includes all of our daily interactions and societal norms.<sup>22</sup>

## B. Methodology

How do we assess what happens when we put our bodies into learning the law? I have lately become obsessed with questions of methodology. The 'how' and 'why' fascinate me more than the 'what.' In some ways, this paper is borne out of the desire to experiment

- 
- 17 This recognition of my subjectivity is resistance against treating myself as a neutral "colourless legal analyst." Brooks & Parkes, *supra* note 11 at 108, citing Kimberle Williams Crenshaw, "Foreword: Toward a Race-Conscious Pedagogy in Legal Education" (1994) 4 S Cal Rev L & Women's Stud 33.
- 18 I have slowly come to identify as queer. I hold the position that a person's genitals are not a relevant characteristic for determining whether I would love them or not. However, I am not sure if this requires "coming out," especially because I do not appreciate the current constraints of sexual orientation. I also do not accept gender dichotomies. As a result, I am settling on the term "queer" because its ambiguity is comforting and it does the job of questioning heteronormativity. This paper was the first time that I wrote out "I am queer" and found it a liberating experience. One of my first and only experiences of explicitly explaining this philosophy towards my own sexuality led to a complete breakdown in a friendship, which has made me apprehensive about openly articulating myself. On the other hand, I have over time found that most people close to me understand this identification and are very thoughtful.
- 19 My understanding of "outsider" is informed by the following definition that Bakht et al employ, which draws on Mari Matsuda's work: "We use the term outsider to describe those who are members of groups that have historically lacked power in society or have traditionally been outside the realms of fashioning, teaching, and adjudicating the law." Bakht, *supra* note 11 at 672. See also Mari J Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich L Rev 2320 at 2323. I use the term "Othered" with similar understandings. The outsider methodology employed in administrative law involved critically analyzing the impact of legal doctrines on vulnerable groups and one of our assignments was a collaborative paper.
- 20 I am grateful for the bravery of the following professors who have exposed me to alternative pedagogies: Gillian Calder; Freya Kodar; Judith Sayers; Maneesha Deckha; Sharon Cowan; and Rebecca Johnson. They have taken on the risks and backlash that comes with challenging norms of legal education. I am struck by the time, energy, and constant reflection that each puts into their work. Many of them have produced work that illustrates alternative approaches to teaching and understanding law. See e.g. Postcards from the Edge, *supra* note 6; Deckha, *supra* note 11; Elizabeth Adjin-Tettey et al, "Using Film in the Classroom: The Call and the Responses" (2009) 21 CJWL 197 [Using Film]; Guantánamo, *supra* note 11; Judith Sayers, "First Nations in British Columbia," online: First Nations in British Columbia <<http://fnbc.info/blogs>>.
- 21 Jasreet Badyal, "Tumb(l)ring at the Edge of Empire," online: Tumblr <<http://edgeofempire.tumblr.com>>. An integral inspiration behind this project (and the title of the blog) was the work of feminist law professors at the University of Victoria, see Postcards from the Edge, *supra* note 6.
- 22 Julie Lassonde's work in particular has opened my mind to what can be considered law. She presents how different daily interactions are representative of the law and that all of our activities and ways of being represent legal interactions. See Julie Lassonde, *Performing Law* (LLM Thesis, University of Victoria Faculty of Law, 2006), online: UVic Faculty of Law <<http://law.uvic.ca/lassonde>>.

with a particular methodological approach. Along these lines, Brooks and Parkes discuss how a feminist approach of reflecting on methods can lead to a better overall understanding of what is being done and why: “Thinking about method is empowering. When I require myself to explain what I do, I am likely to discover how to improve what I earlier may have taken for granted. In the process, I am likely to become more committed to what it is that I have improved.”<sup>23</sup>

For this paper, I have decided to experiment with a range of critical theoretical tools. To this end, I have chosen academic articles that relate to the following aspects from legal perspectives:<sup>24</sup> narrative;<sup>25</sup> emotions; empathy;<sup>26</sup> affect;<sup>27</sup> embodiment;<sup>28</sup> mapping;<sup>29</sup> space;<sup>30</sup> performance;<sup>31</sup> theatre;<sup>32</sup> outsider and queer pedagogy; and epistemology.<sup>33</sup> I chose mostly recent articles that deal with these questions, as they are likely to draw on and summarize earlier scholarship. Furthermore, I chose a wider selection so that I would have many different ways of analyzing the embodied pedagogy of Sexual Orientation and the Law instead of focusing narrowly (but more in-depth) on fewer aspects. There are obvious trade-offs between these options.

I envision these articles as theoretical tools that I have gathered to build my own toolbox. My objective is to try these relatively new (for me) tools to lay the groundwork for deeper scholarship in the future. As they are brand-new and I have never used tools like them before, I find myself picking them gingerly, tentatively trying to figure out the ways that they work and the purposes for which they can be used. Therefore, I do not write this paper with a sense of reaching conclusive and overarching assertions. Instead, I see it as a process of reflecting and sharing one way of understanding alternative pedagogies.<sup>34</sup> In so doing, I will use the theoretical tools to analyze how embodied pedagogy permits space for a more fully human approach to learning and sheds light on questions that are otherwise left out.

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23 Brooks & Parkes, *supra* note 11 at 90, fn 6, citing Katherine T Bartlett, “Feminist Legal Methods” (1990) 103 Harv L Rev 829 at 831.

24 For the purposes of clarifying the perspectives that I am drawing, I have chosen to footnote the articles alongside words that capture key aspects the article. However, it should be noted that many of these articles cut across these different topics.

25 Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” (1989) 87:8 Mich L Rev 2411.

26 Susan A Bandes & Jeremy A Blumenthal, “Emotion and the Law” (2012) 8 Annu Rev Law Soc Sci 161.

27 Rebecca Johnson, “Living Deadwood: Imagination, Affect, and the Persistence of the Past” (2009) 42:4 Suffolk U L Rev 809 [Living Deadwood].

28 Gillian Calder & Sharon Cowan *supra* note 6; Ruth Fletcher, Marie Fox & Julie McCandless, “Legal Embodiment: Analysing the Body of Healthcare Law” (2008) 16 Med L Rev 321; Patrick Hannifan, “Voicing Embodiment, Relating Difference: Towards a Relational Legal Subjectivity” (2008) 29 Austl Feminist L J 77; Margrit Shildrick, “Transgressing the Law with Foucault and Derrida: Some Reflections on Anomalous Embodiment” (2005) 47:3 Crit Quarterly 30.

29 Bela Chatterjee, “Text and Terrain: Mapping Sexuality and Law” (2006) 17:3 Law and Crit 297.

30 Lolita Buckner Innis, “‘Other Spaces’ in Legal Pedagogy” (2012) 28 Harv J Racial & Ethnic Just 67.

31 Lassonde, *supra* note 22.

32 A G Boss, “(Un)Related Purposes: Theatre and Law” (2010) 142 Can Theatre Rev 30; Gillian Calder, “Embodied Law: Theatre of the Oppressed in the Law School Classroom” (2009) *Masks: Online Journal of Law and Theatre* 1 [Theatre of the Oppressed]; Guantánamo, *supra* note 11.

33 Using Film, *supra* note 20; Bakht et al, *supra* note 11; Brooks & Parkes, *supra* note 11.

34 In taking this approach, I am inspired by feminist process-oriented approaches: Postcards from the Edge, *supra* note 6; Calder & Cowan, *supra* note 6 at 111-112.

Throughout my analysis, I will employ narrative methodology.<sup>35</sup> This approach is inspired by critical race theory.<sup>36</sup> I have embedded my narrative within the text, as it forms the subject matter of my analysis. My narrative captures moments that I have experienced while attending law school. Each moment reflects some of the complex negotiations of privilege, power, and marginalization, which result from being an Othered law student. I deliberately chose moments that reflect my everyday experiences, so each should be understood as a common and frequent situation in my life. The purpose of this is to illustrate and centralize stories that are otherwise unheard or silenced in the legal environment. Moreover, it demonstrates how everyday situations can often be sites where systems of power are produced and reproduced, as opposed to sensationalized or heightened situations of overt oppression.<sup>37</sup> In so doing, I also want to present a fulsome picture of the process of studying law and how embodied pedagogy fits within it.

## II. TRADITIONAL LEGAL PEDAGOGY

With the above methodological approach in mind, I will summarize and apply a traditional legal pedagogical approach to the study of *The Case*.<sup>38</sup> Brooks and Parkes note that despite years of talk of reform, North American law students have been educated roughly the same way for over a hundred years.<sup>39</sup> This approach is focused simply on gleaning the relevant facts, issues, and reasoning from any case. Legal thinking continues to be stuck in this framework of case law methodology. I even encountered a recent article that suggested under “Radical Solutions” using case law to engage questions of ethics and inject soul into learning.<sup>40</sup>

I will outline a traditional pedagogical approach to provide background and context for understanding how the embodied approach is different. A traditional approach would likely leave us only with the understanding that Proposition 8 was unconstitutional, under any standard of review, on the grounds that “it denies [the] plaintiffs a fundamental right without a legitimate (much less compelling) reason.”<sup>41</sup> We may have explored the question of due process and the Fourteenth Amendment. In so doing, we may have inquired into the historical trajectory of the jurisprudence in this area. We could have gone in-depth into questions of evidence and witness credibility, as much of Justice Walker’s decision discussed these issues.<sup>42</sup> An interesting aspect of Sexual Orientation and the Law was reading the decision after performing in *The Play*. Done in this order, the judgement echoed many of the memorable lines from *The Play*, which seemed to

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35 Delgado, *supra* note 25.

36 In particular the following pieces have inspired my understanding of the purpose of narrative methodology and how to apply it: Delgado, *supra* note 25; Lassonde, *supra* note 22; Postcards from the Edge, *supra* note 6; Patricia J Williams, “The Death of the Profane” in *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 44-51; Patricia Williams, “On Being the Object of Property” in *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 216-230; Patricia A Monture, “Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah” (1986) 2 CJWL 159; Rebecca Johnson, “Law and the Leaky Woman: the Saloon, the Liquor License, and Narratives of Containment” (2005) 19:2 J of Media & Cultural Stud 181; Ruthann Robson, “Beginning from (My) Experience: The Paradoxes of Narrative” in *Sappho Goes to Law School* (New York: Columbia University Press, 1997) at 87-103.

37 Lassonde, *supra* note 22 at “Spider 1, What is Performing Law?: Performing the Law”. Her analysis draws on Judith Butler’s concept of performativity. See generally Judith Butler, “Gender as Performance: An Interview with Judith Butler” (1994) 67 Radical Philosophy 32; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

38 *Perry v Schwarzenegger*, *supra* note 5.

39 Brooks & Parkes, *supra* note 11

40 Steve Sheppard, “Teach Justice” (2008) 43 Harv CR-CL L Rev 599 at 603.

41 *Perry v Schwarzenegger*, *supra* note 5 at 994.

42 *Ibid* at 935-946.

attempt to provide depth and recognition to the voices in *The Case*, particularly the gay and lesbian plaintiffs.<sup>43</sup> I elaborate more on this below when I inquire into the usefulness of theatre in understanding law.

### III. LAW, EMBODIMENT, AND THEATRE

In comparison to traditional pedagogical approaches, by using our bodies, we learn more about the law and ourselves than we may have otherwise, especially as outsider students. To this end, I will first explore the importance of embodiment for learning law. I will then reflect on the significance of theatre in this context. In some ways, these sections are artificial divisions as much under this section relates to Part IV of this paper as well. They are useful, however, to frame my analysis.

#### A. Embodiment and Law

During our first-year moots, all of us eagerly put on our “lawyer clothes.” In some sense, it was one of our first exercises in performing the identity of “lawyers.” I, too, put on my suit and fondly remembered how my cousins and aunts had helped me pick it out. As I walked the halls of the law building, I saw my white male colleagues and thought to myself “wow, they truly look like lawyers.” I felt a sinking feeling as it dawned on me that when I looked in the mirror, I saw myself as a “receptionist” or “secretary.” I did not see a lawyer.

This realization very aptly captures that regardless of how cerebral we conceive of our profession, we are embodied as lawyers. In this sense, an embodied engagement with learning the law is necessary as it makes us aware of ourselves, as legal professionals, and the ways that we produce law in our daily interactions. Furthermore, embodied understandings of law can help create more just and equitable legal regimes.

Calder discusses the difference between teaching rock climbing and teaching law. She notes that while both involve “making complex and often dangerous ideas accessible to students,”<sup>44</sup> teaching the former involves embodiment whereas the latter does not. Furthermore, she points out that “[m]uch of law involves embodied concepts, yet we rarely ask our students to put their bodies into the learning of law.”<sup>45</sup> Thus, she explores the need for teaching law in an embodied manner. What precisely do we get by learning with our bodies? My contention is that using our bodies makes us aware of our powers, oppressions, and the ways that we create law through our interactions.

In the first few weeks of law school, I was regularly introducing myself to everyone in my immediate vicinity. As I went to sit down in the lounge, I saw an older white male sitting near me. I reached out my hand and told him my name. He responded: “oh, I’m not anyone important. I’m not a law student, just a groundskeeper.” I was surprised. How could a couple of weeks in law school leave people feeling so insignificant near me?

These moments illustrate aptly how much of our power and oppression is expressed in embodied ways. Furthermore, they demonstrate how our bodies are integral to being lawyers. In some ways, I have experienced privilege that legal education creates, which alters the way that I interact with others and the ways that my body is perceived. However, as a racialized woman, I sense that mine is not a body that produces legal knowledge or

43 For instance, Justice Walker shared Zarrillo & Katami’s story about going to the bank and facing the difficulty of conveying that they were a couple and Perry describing Stier as “maybe the sparkliest person I ever met.” *Perry v Schwarzenegger*, *supra* note 5 at 933, 939. These lines mirrored *The Play*, see *Playscript*, *supra* note 8 at 7.

44 Theatre of the Oppressed, *supra* note 32 at 2.

45 *Ibid* at 3.

has that sort of power. I was especially struck at the deference that this older white male gave me simply because of my being a law student. While my race and gender mark me as an outsider in legal contexts, my able-bodied self makes me an insider and, thus, easier for me to negotiate the space of the law school both physically and metaphorically. I was able to be in the law school lounge, while students with mobility concerns may have a more difficult time simply entering that space. I have heard expressed by some that it is challenging to navigate with a wheelchair, especially as able-bodied students often unintentionally leave tables and chairs astray that create various obstacles. Another complicating aspect is my sexual orientation. I am often assumed to be heterosexual and, as such, do not face the immediate or direct status of outsider due to that identity. Nevertheless, this means it is a constant negotiation as to when to voice my status as queer and how to respond to heteronormative assumptions. Embodied pedagogy can be a tool to more fully understand these complex interactions of power and oppression because it requires us to recognize ourselves and our positionality.

Embodied pedagogy may also be a way of combatting oppression, especially internalized forms of oppression. Delgado argues that outsiders use stories as forms of survival from and resistance to subordination.<sup>46</sup> He also discusses how counter-stories aid members of the dominant group to become aware of their power and interrogate perceived neutrality.<sup>47</sup> Similarly, perhaps we can use our bodies to learn law, to help us counter the sensation that our bodies are not worthy of legal education. As Boal has stated, “the whole body thinks.”<sup>48</sup> In this sense, we need to use our bodies to think that we have power. We can use these techniques to also become aware of privilege.

In addition to the ways our bodies are important in becoming aware of privilege and oppression, we can learn how we create law through our body. Lassonde articulates the idea that daily actions involving our bodies are a form of law.<sup>49</sup> For instance, she uses the example of coming out as queer in a hockey change room. This space is defined by certain norms or invisible societal rules, which vary depending on a person’s positionality. As a queer femme,<sup>50</sup> the expectations of her based on appearance do not align with her self-identification. Her femme identity lends herself to be read as heterosexual when she is not. Moreover, she discusses how difficult it is to unlearn these daily norms as she finds herself repeating rituals that make her feel uncomfortable, reflecting their daily coercive power. In this way, they function as laws by regulating behaviour.

The ways that our bodies create law are important to learning it and are integral to opening up our imaginary. This opening up can be conceptualized as “a politics of experimentation and imagining otherwise.”<sup>51</sup> To this end, Calder and Cowan discuss how focusing primarily on cerebral understandings of equality fail to capture the complexity of the embodied experience of inequality.<sup>52</sup> They discuss how feminists have challenged the dichotomy between mind and body, and the ways this dichotomy has

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46 Delgado, *supra* note 25 at 2436.

47 *Ibid* at 2417-2418.

48 Living Deadwood, *supra* note 27 at 816, citing Augusto Boal & Adrian Jackson, *Games for Actors and Non-Actors*, 2d ed (London: Routledge, 1992) at 62.

49 Lassonde, *supra* note 22 at 22 at “Spider 1, What is Performing Law?: Performing the Law”.

50 Queer femme refers to an expression of identity that appears normatively feminine, but is not heterosexual. Therefore, people who identify as queer femme are frequently assumed to be heterosexual due to stereotyping and heteronormativity. For discussions on gender performance and sexual orientation, see Heidi M Levitt & Sharon G Horne, “Explorations of Lesbian Queer Gender: Butch, Femme, Androgynous or ‘Other’” (2002) 6:2 *J of Lesbian Stud* 25; Lisa Walker, “The Future of Femme: Notes on Femininity, Aging and Gender Theory” (2012) 15:7 *Sexualities* 795.

51 Living Deadwood, *supra* note 27 at 815.

52 Calder & Cowan, *supra* note 6 at 115.

been employed to marginalize Othered individuals, especially women.<sup>53</sup> However, they note that participation in academic conventions may reproduce those dichotomies. As a result, embodiment is seen to be a way of disrupting the dichotomy. They also argue that using our bodies helps us understand inequality as a dynamic and changing process instead of a static concept.<sup>54</sup>

Furthermore, the law explicitly and implicitly regulates bodies. Thus, awareness of bodies is necessary to fully learn law. Fletcher, Fox, and McCandless have presented how an embodied perspective towards healthcare law would better uncover the way that law regulates and (de)values bodies.<sup>55</sup> They suggest that we should employ approaches that consistently recognize people as embodied and to not shy away from addressing difficult embodied experiences, such as pain and sex.<sup>56</sup> In particular, the fact that laws regulate bodies suggests that we should learn to engage with our own bodies. In these ways, we may be more aware of the bodily implications of our work as legal professionals and able to relate to the lived experiences of our clients.

To counter some of my own internalized oppressions, I deliberately took an “affirmative action” approach and chose courses taught by professors who I think are female-identifying (it also helped that the subjects that I was interested in were taught by these professors). These professors have offered me role models of legal professionals. Also, by using my body to learn, I am gradually embracing my racialized female self as having power and value. Recently, I was preparing for an interview and put on my “lawyer clothes.” As I stood in front of the mirror, I thought to myself “you look like a lawyer. One who actively reflects on her power and privilege and aims to be empathetic. Basically, you look like a lawyer who wants to do law differently.”

## B. What Does Theatre Give Us?

Considering the importance of embodiment to the law and learning the law, the question of theatre’s value in this context remains. Arguably, embodiment could be practiced in other ways and, indeed, I have engaged in these alternative ways as well, such as a video blog.<sup>57</sup> However, theatre can offer a different way of thinking about justice. I will explore one element of this by extending White’s analysis of justice as translation to theatre.<sup>58</sup>

Calder discusses how using a play-reading provokes future legal advocates to rethink what constitutes law, and how narratives influence our understanding of law.<sup>59</sup> Through embodied engagement in theatre, we are exposed to more complex narratives and nuances. In this way, we are better able to effectively apply “a postmodern lens that prefers specific and local analyses to grand theories of how oppression occurs.”<sup>60</sup> Thus, theatre offers a new way of understanding power relations permeating throughout our legal system.

With this theoretical lens in mind, did this happen when we staged *The Play*? In many ways *The Play* perhaps fell short of a truly embodied experience. We performed it

53 Calder & Cowan, *supra* note 6 at 117.

54 *Ibid* at 128.

55 Fletcher, Fox & McCandless, *supra* note 28 at 321.

56 *Ibid* at 322, citing Alan Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997) at 6.

57 Badyal, *supra* note 21.

58 James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990).

59 Guantánamo, *supra* note 11 at 48.

60 Brooks & Parkes, *supra* note 11 at 115, citing Banu Ramachandran, “Re-Reading Difference: Feminist Critiques of the Law School Classroom and the Problem With Speaking from Experience” (1998) 98:7 *Colum L Rev* 1757 at 1786.

through a staged reading in the largest lecture room of the law building. The set-up of the room involved Justice Walker in the center and the other characters seated on both sides. Individuals rose when it was a scene involving their characters. Therefore, we did not engage in much movement or use of our bodies. The Play itself is very text heavy. However, our bodies were present and we had to use them to project our voices and animate our lines with integrity. Nevertheless, in comparison to our other embodied exercises of forming sculptures and Akali's performance,<sup>61</sup> The Play seemed to lack a deeper engagement with our bodies. In some sense, we could fall back to our comfort zone of text, particularly text set in a legal context.

Furthermore, The Play focused exclusively on the experiences of privileged white queer people. We are asked by The Play to sympathize with the plight of the plaintiffs on such normative grounds as the fact that they pay their taxes. On the other hand, our embodiment as characters in The Play presented an interesting challenge. In most of the cases, we acted parts that did not align with our racialized and gendered bodies. This presents the question of how our audience may have perceived these differences. Our circumstances could be contrasted to an all-star Hollywood cast, which performed "8" and showcased it online.<sup>62</sup> In their performance, the actors' visible presentation aligned with the people that they were playing whereas ours did not. Perhaps the whiteness presented in the narrative became more apparent because of our visibly Othered bodies. In a different context, Calder and Cowan discuss how their metaphorical representation of inequality did not lead many people to reflect on questions of race and ethnicity, which may have been a product of their white bodies.<sup>63</sup> Thus, perhaps our embodiment was present in The Play and made apparent who it privileged.

To a certain extent, "8" represents a piece of theatre that was not as transgressive as it could have been. The Play is designed to appeal broadly and aims to fundraise for advancing same-sex marriage equality. In some sense, this play mirrors the "strategic litigant."<sup>64</sup> I wonder what would have happened if we had done a different piece of theatre that represented more women and bodies of colour. Thus, while the potential for learning through theatre is clear, perhaps this piece did not give us the opportunity to more fully explore this potential.

An interesting angle to view theatre that represents jurisprudence is through the idea of translation. White presents the idea of treating justice as translation; he posits that the job of a lawyer is to translate the story of their client into the language of the law.<sup>65</sup> In The Play, we did the reverse, translating the language of the law into a story. As law students, we kept questioning the representation as it seemed "too one-sided," and some members of our audience had a similar critique during discussions after the performance. The desire seemed to be for a play that better represented more convincing arguments from both sides. This may have reflected the fact that we were doing this piece in a law school. However, having read The Case as the original text before translation,<sup>66</sup> I am

61 Akali, *supra* note 14.

62 American Foundation for Equal Rights, "8: A Play about the Fight for Marriage Equality" (2012), online: YouTube <<http://www.youtube.com/watch?v=qlUG8F9uVgM>>.

63 Calder & Cowan, *supra* note 6 at 127.

64 In using the term "strategic litigant," I am referring to how judges may be more responsive to certain individuals over others. Specifically, they will respond better to people who are closer to the norm, which is white, male, able-bodied, and so forth. Crenshaw exposed this concept in her initial work on intersectionality in the context of antidiscrimination doctrines and how Black women are excluded due to their intersecting experiences of race and gender. Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti Racist Politics" (1989) U Chi Legal F 139.

65 White, *supra* note 58 at 260-261.

66 Perry v Schwarzenegger, *supra* note 5.

struck by how the discourse in *The Case* was in many ways similar to the one presented in the court scenes of *The Play*. In our class, we had not read the case prior to performing *The Play*. Perhaps if we had, that may have altered how we perceived *The Play* as being too “one-sided.” It also would have provided an interesting backdrop for analyzing the process of translation and how it applies to law.

In short, embodiment is integral to learning to be a lawyer. It makes us aware of our bodies, privileges, and oppressions. Furthermore, we create law through our bodies and the law regulates bodies. In this way, our work as lawyers require us to be intimately aware of bodies. One avenue through which to learn about embodiment is theatre. Through plays and acting, we can view the law with different lenses.

#### IV. EMPATHY, OUTSIDER SPACE, RELATIONAL POLITICS, AND MAPPING

Along with these aspects of embodiment and theatre, we gained other insights that made this experience more human and we learned more than we would have through traditional legal pedagogy. In particular, the importance of emotion and empathy came to light, as they are tools for combatting oppression and for better lawyering. Furthermore, we created outsider space and practiced relational politics, which in particular made our experiences in the classroom more human. Lastly, we engaged in mapping, which offers another way of expanding our imaginary of what can be done with and through the law.

##### A. Importance of Emotion and Empathy

While working on this paper, I made some flippant remark on Facebook about how I kept wondering what “white male privilege” would think about outsider pedagogy and perspectives. The partner of a friend, an older white male, took it upon himself to tell me that he found the term “white male privilege” offensive and equated it with the n-word and a derogatory term for women. I was deeply shaken and upset. I am struck by how we do not think through oppression. I did not pause, think in the abstract about what happened, and conclude that “yes, this is a circumstance of being oppressed.” I felt it.

It is through emotions that we experience oppression, so should emotions not also be integral to overcoming oppression? Johnson captures this idea in the legal context: “Justice is not simply ‘an idea.’ It is something felt deeply.”<sup>67</sup> Similarly, Bandes and Blumenthal discuss how legal doctrine is deeply implicated in implicit and explicit ways with emotions. However, they note that the law prefers to conceive of a baseline that is neutral and emotionless.<sup>68</sup> In this way, the law falls short of grappling with the complexity of emotions.

The role of empathy in particular has been debated, especially in the context of judging.<sup>69</sup> Empathy has some competing definitions and, thus, it is important to figure out what it is before debating its role. Bandes and Blumenthal posit one perspective: “if empathy consists of understanding the thoughts and feelings of another, then it is, arguably, an essential capacity for judges.”<sup>70</sup> I would go further and say this understanding of empathy should be an essential capacity for all legal actors, particularly lawyers. Strangely, the

67 Living Deadwood, *supra* note 27 at 817.

68 Bandes & Blumenthal, *supra* note 26 at 165, citing Susan Bandes, “Empathy, Narrative, and Victim Impact Statements” (1996) 63:2 Univ Chic Law Rev 361 at 370.

69 Bandes & Blumenthal, *supra* note 26 at 170.

70 *Ibid.*

question remains open as to whether empathy is an important skill for lawyers.<sup>71</sup> In our work, we have great power in relation to individual clients but also in defining broader societal norms, especially as future legislators and leaders in our communities. For us to do our work with sufficient understanding of those who will potentially feel its impacts, we need to be able to relate to them and see more than just our own perspectives. As such, empathy should be integral to legal education.

Empathy can be engaged and learned through embodied pedagogy, especially theatre. In the different context of narrative, Delgado describes how “one acquires the ability to see the world through others’ eyes.”<sup>72</sup> Similarly, Brooks and Parkes discuss how storytelling produces empathy, especially providing an avenue to relate to the marginalization that the law produces.<sup>73</sup> Applying these understandings in narrative to theatre, we can see that theatre gives us even more space to take on ideas that may not align with our own. To present a character with integrity, we are required to “see the world through others’ eyes,” perhaps even more so in acting than in narrative. Along these lines, Calder discusses how a play-reading on Guantánamo helped students develop “a more empathetic understanding of both the privileges and the challenges of being a *Charter* society.”<sup>74</sup> Moreover, in using our bodies to play the parts of characters in *The Play*, we become more intimately aware of the sensations and emotions that a different character must be feeling. For myself, as I played Elliot, I found myself understanding that he was a good kid, but he could not understand why his mothers would make the decision to disrupt their lives by putting themselves in the center of media and legal scrutiny through the legal case against Proposition 8. While this realization may not help me directly understand what the relevant legal arguments are, it does help me understand what is at stake and makes me aware of the significance that legal work would have in this context. In this sense, empathy is a legal skill and embodied learning through theatre is a useful way of practicing it.

## B. Outsider Space and Relational Politics

Along with learning empathy as a legal skill, we also learned to create empathy in our classroom and, in so doing, disrupted the usual law school environment. Drawing on lived experiences of queer students and faculty, Brooks and Parkes discuss how marginalized members of law schools are left with a sense of isolation, alienation, and subjectification.<sup>75</sup> In contrast to this, the space in *Sexual Orientation and the Law* was very much an outsider space because of who we were and what we were doing. This fostered a sense of community and coalition.

One particular activity that aptly illustrates this is how we signed play programs for each other in a “yearbook” fashion. The messages that I received from my classmates have left me feeling cared for and sensing that we truly shared something. In particular, I think pushing ourselves out of our comfort zone by staging a reading in front of a large audience was a visceral experience that brought us all together. We recognized the ways in which we all need to grow and learn. This reflects the idea of how critical courses can be seen as an “oasis within or respite from the traditional law school classroom.”<sup>76</sup> Furthermore, I found myself carrying this energy to my other classes and in my daily living. This is not to say that our space was perfect. We had moments where the conversations that we

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71 Sarah E Wilson, Julie Prescott & Gordon Becket, “Empathy Levels in First- and Third-Year Students in Health and Non-Health Disciplines” (2012) 76:2 *Am J Pharm Ed* 1 at 2.

72 Delgado, *supra* note 25 at 2439.

73 Brooks & Parkes, *supra* note 11 at 112.

74 Guantánamo, *supra* note 11 at 45.

75 Brooks & Parkes, *supra* note 11 at 106-107.

76 Innis, *supra* note 30 at 83.

were having and the complicated questions of oppression that we were addressing led to challenges and discomfort. Nevertheless, the space was unique and created a remarkable opportunity to learn.

We had in-depth conversations to collaboratively make decisions about the way we were going to conduct elements of our course. In particular, we cast ourselves for roles in *The Play*. This was a difficult process as we had conflicting ideas of the roles that would best suit others and ourselves. Moreover, we became anxious about this process and the impact that it would have on our staged reading. Partially this reflected how the process disrupted the usual top-down decision-making that characterizes classroom spaces. Our anxiety also may have been a response to the bigger picture of law that we are accustomed to seeing. We are taught and we see law conducted in a hierarchal model, where judges and politicians construct law. In creating this outsider space, we were forced to think differently about how law can be created.

Moreover, by staging the reading in the largest lecture room in the law building, we disrupted the rituals of that space and the building itself. This disruption is particularly important when we consider the way that rituals build and reinforce power relations. Pertti Alasuutari captures this precisely as follows: “In various ways rituals contribute to legitimizing and routinizing social hierarchies and power relations. It must also be remembered that practically no power relations are ‘put to use’ without the support of rituals.”<sup>77</sup> Hence, disruption of space is integral to creating change.

### C. Mapping

The last activity we did together was mapping queer legal history.<sup>78</sup> Over the term, we began each class with someone presenting a moment that they considered important to queer legal history. Most of these were from the Canadian context, but some were from other jurisdictions such as India, New Zealand, and Norway. We chose explicitly queer moments, such as Stonewall,<sup>79</sup> but also less obvious moments, such as the creation of national healthcare.<sup>80</sup> These decisions show the ways that we learned to think beyond a narrow understanding of what constitutes law and what counts as “queer experience.”<sup>81</sup> Furthermore, in our mapping we resisted the urge to follow narrow techniques of mapping, such as a timeline. Instead, we chose to see how all these moments are connected in a myriad of ways. Moreover, we understood them as being interlinked and

77 Boss, *supra* note 32 at 31, citing Pertti Alasuutari, *Social Theory & Human Reality* (London: Sage, 2004) at 103.

78 See Appendix A for a picture of our end result.

79 The Stonewall riots took place at the Stonewall Inn in New York City in June 1969. They were spontaneous demonstrations by queer people and mark a significant point in the queer rights movement. For an intersectional and contextual discussion on the Stonewall riots, see Elvia R Arriola, “Faeries, Marimachas, Queens and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots” (1995-1996) 5 *Colum J Gender & L* 33.

80 The creation of a national healthcare system is a queer experience in the sense that it has a significant impact on the lives of queer individuals. The idea of viewing this as a moment of queer legal history acknowledges that even universal programs are relevant to queer people. As queer people are often financially disadvantaged because of their Othered status, a publicly funded universal system may provide access to healthcare that would otherwise not be available. Moreover, queer people have different experiences with regards to access and needs, both in comparison to other queer people and heterosexual people. For instance, trans people still face many barriers in accessing healthcare. See Lane R Mandis, “Human Rights, Transsexed Bodies, and Health Care in Canada: What Counts as Legal Protection?” (2011) 26:3 *CJLS* 509; Marianne LeBreton, “The Erasure of Sex and Gender Minorities in the Healthcare System” (2013) 2 *Bioéthique* 17; Andrea Daley, “Lesbian and Gay Health Issues: OUTside of Canada’s Health Policy” (2006) 26:4 *Critical Social Policy* 794.

81 This reflects concepts of queer legal pedagogy that Brooks & Parkes have articulated. See Brooks & Parkes, *supra* note 11 at 120.

ourselves as being implicated in these events in complicated ways. An example that best captures this process of locating the self within the bigger context is that one student included his own picture as part of his representation of a moment. He incorporated a photocopy of his healthcare card, which had his picture on it but also illustrated the moment of the creation of a national healthcare system.

Chatterjee's discussion on mapping, sexuality, and the law is helpful to theoretically conceptualize what we did through this project.<sup>82</sup> She argues that the law is characterized by mapping. The law functions to render certain bodies and practices (in)visible.<sup>83</sup> Both maps and the law are not neutral.<sup>84</sup> She demonstrates how mapping requires an awareness of the distortions and the inherent constraints of never being able to accurately represent reality.<sup>85</sup> She argues that the law similarly should "recognise where the distortions, scales and projections lie, and accept that true reflection is impossible."<sup>86</sup> Moreover, she discusses how queer identities provide alternative mappings and destabilize the privileged state of heteronormativity.<sup>87</sup> In this way, mapping may open up new possibilities for the law.<sup>88</sup> She goes on to say rather eloquently that "[a]fter all, sexual *orientation* speaks fundamentally of the *direction* of desire, and its position within society: this is the very language of cartography."<sup>89</sup> Beyond the value of reconceptualising the law in a broader sense, mapping also relates to lawyer-client relationships. Chatterjee references Emily Grabham to discuss how the way lawyers map their client's experiences into something legally intelligible can leave clients feeling "disauthenticated."<sup>90</sup> Our mapping activity reflects these theoretical concerns. Furthermore, by placing our map in a main hallway of the law school, we disrupted the broader space.<sup>91</sup>

To summarize, empathy is an important legal skill and we have learned ways to exercise it through our embodied engagement with theatre. In *Sexual Orientation and the Law*, we created a unique outsider space that made learning the law a more human experience. Furthermore, we engaged in a mapping of queer legal history that opened up new ways of thinking about the law and the way that it regulates bodies.

## V. SOME REFLECTIONS AND DOUBTS

With all of the above valuable experiences and analysis in mind, I will explore some doubts and reservations about this embodied pedagogical approach. In particular, I am concerned about doubt, the difficulty of explaining what we did and why, and reflecting on those concerns as they relate to this paper.

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82 Chatterjee, *supra* note 29.

83 *Ibid* at 310.

84 *Ibid* at 298-299.

85 *Ibid* at 312.

86 *Ibid*.

87 *Ibid* at 311-312.

88 *Ibid* at 302.

89 *Ibid* at 319.

90 *Ibid* at 300, citing Emily Grabham, "Taxonomies of Inequality: Lawyers, Maps and the Challenge of Hybridity" (2006) 15:1 *Social and Legal Stud* 5 at 7.

91 This parallels the disruption created by holding the staged readings in a law lecture hall. See Part IV-B, above. In many ways the course was characterized with various forms of unsettling the norms of the law school. Another activity that we engaged in was to place signs that challenged the need for gendering over the bathroom door symbols. For instance, one of the signs placed over the gendered symbols was "this is a room full of toilets." For an in-depth discussion on bathrooms, sexuality, and transgender lived experiences, see Sheila L Cavanagh, *Queering Bathrooms: Gender, Sexuality, and the Hygienic Imagination* (Toronto: University of Toronto Press, 2010).

I was having coffee with two white male friends and classmates on campus. As I broke a piece of my chocolate bar, I excitedly told them about the latest Inuit film that I had watched and how the preparation for *The Play* was going. One of them gave me a bemused look and said that “your law classes are, well, something else...” I sensed his scepticism and intuitively jumped to an enthusiastic defense of what we were doing: “It’s amazing. I’ve learned more than I ever have before in such a short time. And we employ a number of skills that will definitely be helpful for being a lawyer. In some sense, lawyers are actors. I’m practicing my advocacy skills!” As I walked home afterwards, I wondered to myself if I was making a mistake. What if I am not learning the “right” kind of law? What if I never become a lawyer? I paused. And it struck me, “wait, a second, I have a summer law job. I’ll be fine. And, perhaps, not becoming a lawyer wouldn’t be too great of a loss, if being a lawyer means giving up on what I believe.”

A remarkable aspect of engaging in non-traditional or radical pedagogy is the reflexivity and self-doubt that these processes produce. This stands in stark contrast to traditional legal pedagogies. We are constantly questioning whether what we are doing is achieving our goals, whether it is worthwhile, and how to frame it in ways that will be perceived by the broader legal community as legitimate.<sup>92</sup> This self-doubt parallels the lived experiences of marginalized people in relation to the dominant society. In this way, our self-doubt is compounded by both our pedagogical choices and our experiences as Othered individuals. Calder and Cowan discuss this sense of discomfort, as they were concerned their embodied contribution was seen to be just a moment of entertainment or lightness, not to be taken seriously.<sup>93</sup>

An integral component of this doubt is the difficulty in explaining what we are doing and why we are doing it. To this end, my purpose in writing this paper has been to answer for myself and to have something to say when people ask “but, why?” At first I was afraid of writing this paper. I questioned whether it reflected the academic rigor of a paper that was more doctrinally focused and used extensive case law. However, I felt I had to push myself and write this, especially to use narrative methodology.<sup>94</sup> Furthermore, I needed to write to sort out my thoughts on the value of embodied pedagogy. Most of the time I feel dehumanized when I write papers. I find myself feeling like I am chopping off bits of myself with the hopes of sounding somewhat articulate and veiling the whole thing with a cover of objectivity or neutrality, to essentially produce a privileged white male voice. In writing this paper, I felt whole and I felt present as myself. This experience parallels the value of embodied pedagogy discussed above.

## LOOKING FORWARD

In some sense, this project of embodied pedagogy faces the real constraint of being conducted in a context where legal education continues to be taught in the same way in which it has always been taught. Brooks and Parkes confront this in their attempts to create a queer legal pedagogy. They choose to sidestep the question of broader reform of legal education, so as to begin the project of a shift.<sup>95</sup> What we did in *Sexual Orientation*

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92 Lassonde reflects on her experience of doing a graduate thesis that combined law and theatre. She writes that “[t]he most difficult part of my work this year has been to explain what I was doing. Despite this difficulty and although many people expressed their resistance to my thesis, these same people did not ignore it. They seem insistent on trying to understand it.” Lassonde, *supra* note 22 at “Spider 3, Conclusion: Justification and Resistance”.

93 Calder & Cowan, *supra* note 6 at 126.

94 Delgado, *supra* note 25.

95 Brooks & Parkes, *supra* note 11 at 117.

and the Law pushed the boundaries of how we learn law. However, as discussed above, *The Play* felt very normative. It did not question the purpose of marriage. While we had those conversations in our classroom, I wonder if our staged reading would have been more powerful if we could have questioned the focus on marriage itself.<sup>96</sup> Moreover, the question remains as to whether legal education and law even has the potential to create change, or if it is too inherently constrained to reproducing the existing system.

As we cannot completely overhaul legal education overnight (although it would be amazing if we could), it is valuable to continue taking these steps, which make learning law a more fully human experience and draw attention to questions regarding equality and justice that are missed in traditional legal pedagogy. I wish that we had more of the theoretical tools to express to our colleagues and the broader community what we were doing. Although, as I reflect on this paper and the semester, it strikes me that perhaps we had been learning how to articulate what we were learning all along and this paper is a final manifestation of that for me. To a certain extent, I just want some privileged elite white male academics to name drop, so that we can easily end questions about our credibility and legitimacy. However, reaching a point where that is not required would be the aim of true equality. Moreover, I am aware that legal education has increased my credibility and legitimacy. As Calder captures it, “[l]earning law is a privilege. The more conscious and active law students are with that privilege and its potential, the more open the possibilities are for the active use of law as a transformative tool of social change.”<sup>97</sup>

I was inspired by the legal scholarship cited in this paper that challenged the boundaries of normative ways of knowing and learning.<sup>98</sup> We have to take risks, critically reflect on what is gained, and learn what can be done differently for the future. I have employed this process in my paper to reflect on embodied pedagogy and to reflect on the paper itself. While some aspects of embodiment simply cannot be translated onto paper, my aim has been to articulate what we did and try to explain what happened as a result of doing law differently. I wanted to attempt to put into words my experiences.

Ultimately our engagement with embodied pedagogy in *Sexual Orientation and the Law* did many things for us. We learned law in a more fully human way and opened up our imaginaries to the different understandings of what equality can entail. In using our bodies to learn, we became more aware of our privileges and oppressions. It has empowered me to unlearn and combat my own internalized oppression. Furthermore, the use of theatre as an embodied exercise expanded what we think is possible through the law and what counts as law. It also was a useful tool to explore the way in which judicial decisions are constructed in contrast to playwriting. We practiced the important legal skill of empathy. In so doing, we created a unique outsider space in our class, which was integral to the process. While I have expressed doubts about learning the law differently, the whole process of engaging in embodied pedagogy in *Sexual Orientation and the Law* has been invaluable to my legal education and has left me feeling more whole.

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96 Calder and Cowan’s work can be seen in contrast as an example of using embodiment to question the purpose of marriage itself. See Calder & Cowan, *supra* note 6.

97 Theatre of the Oppressed, *supra* note 32 at 26.

98 In particular, I value the following work: Lassonde, *supra* note 22; Postcards from the Edge, *supra* note 6; Calder & Cowan, *supra* note 6. Lassonde explicitly questions what is conceptualized as rigor in the following: “In other words, organizing text differently does not necessarily result in a reduced amount of text. Neither does it result in less rigorous analysis.” Lassonde, *supra* note 22 at “Spider 1, Question of Form: Thesis Format”.

## APPENDIX A

### Mapping our Queer Legal History



A collaborative media project created by the students in Sexual Orientation and the Law (Spring 2013). Photograph courtesy of Jasreet Badyal.

ARTICLE

# OWNERSHIP OF RAINWATER AND THE LEGALITY OF RAINWATER HARVESTING IN BRITISH COLUMBIA

Katie Duke\*

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## INTRODUCTION

In recent years, a growing number of individuals and municipalities have become interested in rainwater harvesting.<sup>1</sup> The practice is part of a larger shift towards sustainable building practices and stormwater management.<sup>2</sup> However, the legality of rainwater collection in British Columbia is uncertain. At the same time, freshwater resources in the province are increasingly under stress from heavy use and climate change.<sup>3</sup> As water scarcity increases, conflicts over rainwater harvesting may result. It is therefore pertinent that the legality of rainwater harvesting be considered so that possible conflicts can be anticipated and areas in need of law reform can be addressed. This paper addresses the issue of whether landowners or occupiers have the legal right to capture rainwater falling onto their property and the nature of that right.<sup>4</sup> Upon review of the relevant water-related legislation and applicable common law, it is most likely that rainwater is common property subject to the law of capture. Effectively, rainwater belongs to no one and everyone until it is captured. While landowners do not have a property interest in water until it is captured, their right to harvest rainwater is likely unrestricted and is not subject to concerns of downstream water users.

This inquiry into the right to capture rainwater is divided into four parts. Part one reviews the nature of rainwater harvesting, its benefits, and its potential impacts. While rainwater harvesting has many benefits, it also has the potential to adversely affect instream flows and other water users. Part two considers the statutory framework of water allocation in the province and whether it affects the legality of rainwater harvesting. Although the legislation is not unambiguous, the right to collect rainwater does not appear to be

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1 Khosrow Farahbakhsh, Christopher Despins & Chantelle Leidl, *Evaluating the Feasibility and Developing Design Requirements and Tools for Large-scale Rainwater Harvesting in Ontario* (Ottawa: Canada Mortgage and Housing Corporation, 2008) at 1.

2 *Ibid* at 1.

3 Oliver Brandes & Deborah Curran, *Water Licences and Conservation: Future Directions for Land Trusts in British Columbia* (Victoria: POLIS Water Project, 2008) at 4.

4 This paper addresses the legality of rainwater harvesting in British Columbia. For an excellent discussion of the right to harvest rainwater in the context of Alberta's and Ontario's water rights legislation, see Arlene J Kwasniak & Daniel R Hursh, "Right to Rainwater – A Cloudy Issue" (2009) 26 Windsor Rev Legal & Soc Issues 105.

affected by the *Water Act*<sup>5</sup> or the *Water Protection Act*.<sup>6</sup> Part three of this paper considers the historical common law position on water-related rights. While there is some support for the proposition that a landowner has a proprietary interest in rainwater before it is captured, the most likely common law position is that rainwater is common property and subject to the old common law concept of the law of capture. Since this common law framework provides no redress to those who are adversely affected by rainwater harvesting, part four briefly addresses possible avenues for legal reform of the right to capture rainwater.

## I. THE POSSIBILITIES OF RAINWATER HARVESTING

Rainwater harvesting is re-emerging as a legitimate response to concerns surrounding water scarcity. Rainwater harvesting can capture water for a variety of different purposes, including domestic uses, irrigation, aquifer recharge, and stormwater reduction.<sup>7</sup> While there are a variety of different rainwater capture methods of varying complexity, at their core all methods involve a wide catchment surface and a device to store captured water.<sup>8</sup> Common forms include micro-catchment earthen dug-outs, rooftop systems, and artificial recharge pits that encourage percolation of rainwater into the aquifer below.<sup>9</sup> For the purposes of this paper, only the legality of rainwater harvesting that catches precipitation before or as it hits the earth's surface is considered.

Rainwater harvesting is an ancient practice. For thousands of years, indigenous cultures in arid regions around the world developed methods to capture, store, and use rainwater for agricultural and domestic uses.<sup>10</sup> In drought-prone areas of India, for example, rooftops and earthen pits were traditionally used to divert and store heavy monsoon rains in tanks and wells.<sup>11</sup> While modern-day western cultures have traditionally relied on government controlled surface and groundwater supplies, there has recently been a large increase in the number of rainwater projects around the world as the potential benefits of rainwater harvesting are being rediscovered.<sup>12</sup>

Generally recognized as a “green” water management practice,<sup>13</sup> there are numerous benefits to the implementation of rainwater harvesting systems.<sup>14</sup> Rainwater is free and since it can generally be captured on the same site as where it is needed, the distribution costs are low.<sup>15</sup> As well, it generally requires little treatment in order to meet drinking water quality guidelines.<sup>16</sup> In urban settings, rainwater harvesting can reduce the pressure on municipal utilities in peak summer months.<sup>17</sup> Rainwater is also a better source of water for landscape irrigation and can reduce the amount of water going into stormwater systems.<sup>18</sup> Additionally, in areas where water is scarce or groundwater extraction is not

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5 *Water Act*, RSBC 1996, c 483.

6 *Water Protection Act*, RSBC 1996, c 484.

7 Texas Water Development Board, *Texas Manual on Rainwater Harvesting*, 3d ed (Austin: Texas Water Development Board, 2005) at 5.

8 Troy L Payne & Janet Neuman, “Remembering Rain” (2007) 37 *Envtl L* 105 at 107-108.

9 *Ibid* at 108-111.

10 Texas Water Development Board, *supra* note 7 at 1.

11 Payne & Neuman, *supra* note 8 at 114.

12 *Ibid* at 106, 112.

13 Daniel Findlay, “Rainwater Collection, Water Law, and Climate Change: A Flood of Problems Waiting to Happen” (2008-2009) 10 *NC JL & Tech* 74 at 74-77.

14 Kwasniak & Hursh, *supra* note 4 at 108.

15 Texas Water Development Board, *supra* note 7 at 1.

16 *Ibid* at 1-2.

17 *Ibid* at 1.

18 Kwasniak & Hursh, *supra* note 4 at 108, citing Texas Water Development Board, *supra* note 7 at 1-2.

practical, rainwater harvesting provides an alternate source of water supply.<sup>19</sup> As climate change and population growth place increasing stress on surface and groundwater sources, rainwater harvesting is being increasingly promoted as a green alternative.<sup>20</sup>

Rainwater harvesting systems have the potential to divert and use significant quantities of water. With 6.5 acres of roof-surface, the United States' Army's Kilauea Military Camp in Hawaii collects about 11.5 million gallons of water every year.<sup>21</sup> Above-ground tanks are able to store three million gallons of water that provide water for the camp's needs.<sup>22</sup> Even more modest-sized buildings in more arid locations can collect significant amounts of water. A study of experimental residential rainwater harvesting systems in Guelph, Ontario found that a residential system could collect about thirty percent of the annual amount of water used by a five-person household.<sup>23</sup> Implemented on a larger scale, rainwater harvesting has the potential to significantly reduce demand on municipal water supply systems.

While the water diverted by a small number of residential users is unlikely to have a large effect on the hydrological cycle, larger rainwater harvesting systems have the potential to impact both environmental flows and downstream water users. Rainwater, surface water and groundwater are all interconnected within the hydrological cycle.<sup>24</sup> The potential effects of rainwater harvesting on a watershed are complex and not fully understood.<sup>25</sup> In some cases, rainwater evaporates before reaching streams or other watercourses.<sup>26</sup> However, cumulative effects of substantial rainwater harvesting for agricultural and other uses could be significant.<sup>27</sup> As Arlene Kwasniak and Daniel Hursh note, if rainwater was harvested for oil and gas activities, large quantities of water would be permanently removed from the hydrological cycle, since the water that is used for these activities is generally not returned to the water cycle.<sup>28</sup> The impacts on the hydrological cycle would compound if rainwater harvesting were to grow in popularity within a watershed.

An increase in rainwater harvesting has the potential to affect downstream water users. This is particularly true in systems where surface water and groundwater sources are already under stress. While most of British Columbia is not yet facing severe water scarcity issues, water scarcity in the province is likely to increase due to climate change and other factors.<sup>29</sup> The Okanagan region is already experiencing water shortages. In the Okanagan region, 89.5% of the surface water sources are currently subject to water licencing restrictions.<sup>30</sup> Many of these streams are already over-allocated, meaning that the Government of British Columbia has issued licences for more water than the volume

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19 Farahbakhsh, Despina & Leidl, *supra* note 1 at 12.

20 See e.g. Alexandra Dapolito Dunn, "Siting Green Infrastructure: Legal and Policy Solutions to Alleviate Urban Poverty and Promote Healthy Communities" (2010) 37 BC Env'tl Aff L Rev 41.

21 Harley Diamond, "Schofield's rainwater harvesting project yields water, energy savings" (25 October 2010), online: US Army <<http://www.army.mil/article/47134/>>.

22 *Ibid.*

23 Farahbakhsh, Despina & Leidl, *supra* note 1 at iv.

24 Canada, *The Hydrological Cycle*, online: Environment Canada <<http://www.ec.gc.ca/eau-water/default.asp?lang=En&n=23CEC266-1>>.

25 Stephen N Ngigi, "What is the Limit of Up-scaling Rainwater Harvesting in a River Basin?" (2003) 28 *Physics and Chemistry of the Earth, Parts A/B/C* 943 at 954.

26 Findlay, *supra* note 13 at 86.

27 Ngigi, *supra* note 25 at 954.

28 Kwasniak & Hursh, *supra* note 4 at 110.

29 Brandes & Curran, *supra* note 3 at 4 (these other factors include increased usage of land for agricultural and industrial purposes as well as expanding urban communities).

30 Johannus Anthonius Janmaat "Parrying Water Conflicts in the Okanagan: The Potential of a Water Market" (2010) 168 *BC Studies* 21 at 22.

that actually flows in the stream.<sup>31</sup> A significant increase in rainwater harvesting could result in real reductions to the amount of water available to downstream licence holders.

It is therefore critical that the legality of rainwater harvesting be considered. Rainwater harvesting has the potential to be a sustainable response to water scarcity. However, it also has the potential to affect ecosystem flows, groundwater aquifers, and downstream water users. This raises some important questions regarding the regulation of rainwater harvesting. Does the current water licensing regime incorporate rainwater? Could the Government of British Columbia request that a person stop collecting rainwater if instream flows were being affected? Is there a remedy available to a surface water licence holder whose water entitlement is being negatively affected by rainwater collection upstream? These are all questions that are likely to become relevant as conflicts over water scarcity increase in the province. Indeed, certain American jurisdictions, such as Colorado, are already grappling with some of these considerations.<sup>32</sup> Before considering the common law position on the right to capture rainwater, the current legislative framework is considered below.

## II. THE STATUTORY WATER LAW FRAMEWORK AND PROPERTY RIGHTS IN RAINWATER

The Crown in right of British Columbia asserts proprietary rights to water within two acts, the *Water Act* and the *Water Protection Act*. Pursuant to these acts, the Government of British Columbia regulates the effects of surface water withdrawals through a licensing regime.<sup>33</sup> Like the other western provinces, surface water in British Columbia is regulated through the principle of prior allocation.<sup>34</sup> Under the *Water Act*, the ownership and the right to use surface water is vested in the provincial government.<sup>35</sup> Those wishing to use water may apply for a licence to do so under the Act.<sup>36</sup> Licenses are assigned priority based on the date of issuance.<sup>37</sup> Thus older licenses receive priority over newer licenses. In times of shortage, a senior licence holder may divert all of the water to which that person is entitled before junior licence holders on the same watercourse may take any water.<sup>38</sup> The underlying ownership right to the water remains with the Crown.

Additionally, the *Water Act* requires that all diversions or uses of water have a licence,<sup>39</sup> provided however that a person may, without a licence, divert water for extinguishing fires, domestic use, and prospecting for a mineral.<sup>40</sup> Any unlicensed diversions for domestic or prospecting uses are only permitted if the water is unrecorded, meaning that there is no licence holder entitled to it.<sup>41</sup>

If property in rainwater were vested in the Crown pursuant to the *Water Act* and *Water Protection Act*, rainwater harvesting would fall under the same statutory regime as surface water. Non-domestic uses of rainwater would require a licence. In over-allocated basins,

31 Janmaat, *supra* note 30 at 22 (The reason that there is still water in these streams is that licence holders are not withdrawing all the water to which they are entitled).

32 David Beaujon, "Rainwater Harvesting in Colorado", Legislative Brief (1 August 2009), online: Colorado Legislative Council <<http://www.colorado.gov/>>.

33 *Water Act*, *supra* note 5 at Part 2.

34 Brandes & Curran, *supra* note 3 at 9, citing *Water Act*, *supra* note 5, s 15.

35 *Water Act*, *supra* note 5, s 2(1).

36 *Ibid*, ss 7, 10.

37 *Ibid*, s 15.

38 *Ibid*.

39 *Ibid*, s 4.

40 *Ibid*, s 42.

41 *Ibid*, s 42(2).

licenses for rainwater collection might not be available. In times of shortage, rainwater harvesting could be prohibited in order to ensure sufficient water for downstream senior licence holders. Even domestic rainwater collection systems would be affected if someone else were already entitled to the water. As discussed below, however, the Crown does not explicitly claim ownership rights to rainwater in either act. Although there are a number of ambiguities in the *Water Act* and the *Water Protection Act*, rainwater does not appear to be implicitly included within the Crown's assertion of ownership in either act. Therefore the right to capture rainwater is likely governed by the common law.

When discussing Crown assertions of ownership of water in British Columbia, the issue of underlying aboriginal title cannot be ignored. In most of the province, the Crown's assertion of sovereignty has not yet been reconciled with unextinguished aboriginal title through either treaty or common law recognition.<sup>42</sup> The common law courts have not yet definitively recognized an aboriginal property right in water. However, there is dicta that suggests that this recognition may be coming. In *Halalt First Nation v British Columbia (Minister of Environment)*, the British Columbia Supreme Court indicated that the Halalt First Nation had "an arguable case" for a proprietary interest in the groundwater aquifer underlying their territory.<sup>43</sup> However, the British Columbia Court of Appeal later overturned the decision on another point.<sup>44</sup> While it did not engage in an assessment of the strength of the Halalt Nation's claim, it cautioned that the Chambers judge should not have engaged in such a significant analysis of aboriginal title in the context of a judicial review.<sup>45</sup> Crown assertions of ownership over the territory comprising British Columbia and its water resources remain problematic because many indigenous nations have never ceded rights to their territory or the water within it.<sup>46</sup> As the case law on aboriginal rights to water develops, the claim of the Government of British Columbia to ownership of water may be called further into question.

## A. The British Columbia *Water Act*

As referred to above, the Crown asserts ownership of surface water within the province by virtue of section 2(1) of the *Water Act*, which states:

2 (1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.<sup>47</sup>

Groundwater is explicitly excluded from this section pursuant to section 1.1 of the *Water Act*, which excludes groundwater from application of sections 2 – 50 of the Act.<sup>48</sup>

42 British Columbia Treaty Commission, *Why Treaties?* (February 2014), online: BC Treaty Commission <[http://www.bctreaty.net/files/pdf\\_documents/why\\_treaties\\_update\\_Aug08.pdf](http://www.bctreaty.net/files/pdf_documents/why_treaties_update_Aug08.pdf)>; Government of British Columbia, "Treaty Frequently Asked Questions", online: Ministry of Aboriginal Relations and Reconciliation <<http://www.gov.bc.ca/arr/treaty/faq.html>>; Hamar Foster, "We want a strong promise: The Opposition to Indian Treaties in British Columbia, 1850-1990" (2009) 18 *Native Stud Rev* 113 at 114-116.

43 *Halalt First Nation v British Columbia (Minister of Environment)*, 2011 BCSC 945 at para 562, [2011] BCJ No 1343, rev'd 2012 BCCA 472, [2012] BCJ No 2419 (QL), leave to appeal to SCC refused, 35179 (July 11, 2013) [*Halalt First Nation* (BCSC)].

44 *Halalt First Nation v British Columbia (Minister of Environment)*, 2012 BCCA 472, [2012] BCJ No 2419 (QL), leave to appeal to SCC refused, 35179 (July 11, 2013).

45 *Ibid* at para 126.

46 Merrell-Anne Phare, *Denying the Source: The Crisis of First Nations Water Rights* (Surrey, BC: Rocky Mountain Books, 2009) at 49-54.

47 *Water Act*, *supra* note 5, s 2(1).

48 *Ibid*, s 1.1.

On a superficial review, section 2(1) would not appear to extend to rainwater. However attention must be paid to the broad definition accorded to the word ‘stream’ within the Act. Section 1 of the *Water Act* defines ‘stream’:

“stream” includes a natural watercourse or source of water supply, whether usually containing water or not, and a lake, river, creek, spring, ravine, swamp and gulch.<sup>49</sup>

The expansive meaning attached to the word ‘stream’ necessitates a more detailed examination of the provision. Specifically, the meaning of the words ‘source of water supply’ may be broad enough to encompass captured rainwater. As well, the word ‘includes’ indicates that the meanings listed are non-exhaustive. ‘Stream’ in the context of the *Water Act* may include other water bodies or sources of water than those that are listed.

The current approach to statutory interpretation is Elmer Driedger’s modern principle.<sup>50</sup> The wording of a provision must be considered within its entire context.<sup>51</sup> This is consistent with section 8 of the *Interpretation Act*, which requires legislation to be read in a purposive way, giving it the “fair, large and liberal construction and interpretation” necessary to obtain its purpose.<sup>52</sup> Driedger’s modern principle suggests that while the ordinary and grammatical meaning attached to the phrase ‘source of water supply’ is relevant, it is not the only factor that must be considered. Attention must also be paid to the scheme and purpose of the act as well as the legislative intent informing both the provision in question and the act as a whole.<sup>53</sup> In the sections that follow, the meaning of “source of water supply” is analyzed in the *Water Act* in accordance with the above noted components of Driedger’s modern principle.

#### i. Ordinary and Grammatical Meaning

Whether the ordinary meaning of ‘source of water supply’ includes rainwater is largely dependent on the context in which the words are assessed. “Ordinary meaning” is generally defined as the competent reader’s first impression of the meaning of the words when read within their immediate context.<sup>54</sup> This meaning is presumed to be the correct interpretation, although this presumption may be rebutted when the words are considered within the entire context.<sup>55</sup>

In order for rainwater to be within the scope of s 2(1) of the *Water Act*, rainwater must be “in a stream.”<sup>56</sup> Rainwater that is harvested before it reaches the ground can be ‘in a’ water supply source. Yet this interpretation does not seem consistent with the description of the other water sources listed as being included in the definition of ‘stream.’ A “lake, river, creek, spring, ravine, swamp and gulch”<sup>57</sup> are typically all natural water-holding formations. However, a rainwater harvesting system is an artificial water storage device.<sup>58</sup> In addition, it is ambiguous whether the word “natural” in the definition

49 *Water Act*, *supra* note 5, s 1.

50 *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, 154 DLR (4th) 193, 1998 CarswellOnt 1 (WL Can) at 21.

51 *Ibid*, citing Elmer Driedger, *Construction of Statutes* 2 ed (Toronto: Butterworths, 1983) at 87.

52 *Interpretation Act*, RSBS 1996, c 238, s 8.

53 Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) at 1-3.

54 *Ibid* at 25-26.

55 Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law, 2007) at 49 [Sullivan, *Statutory Interpretation*].

56 *Water Act*, *supra* note 5.

57 *Ibid*, s 1.

58 See Payne & Neuman, *supra* note 8 at 107-108; Texas Water Development Board, *supra* note 7 at 5-19.

modifies “watercourse” and “source of water supply,” or whether it only is relevant to the interpretation of “watercourse.”<sup>59</sup> Rain falling from the sky might qualify as a natural source of water supply. Rainwater is ‘in’ airspace, but it does not make sense to say water is ‘in’ this source of water supply (airspace), the way one could say that water is ‘in’ a stream. Although there is considerable ambiguity, the ordinary meaning of water found in a ‘source of water supply’ does not seem to include rainwater.

## ii. Scheme of the Act

A review of the entire scheme of the *Water Act* suggests that rainwater is not included. There is no express reference to rainwater in the entirety of the Act. In contrast, some parts of *Water Act* do apply to groundwater.<sup>60</sup> As well, the *Ground Water Protection Regulation* prescribes requirements for groundwater wells and is authorized under the *Water Act*.<sup>61</sup> No other provisions in the Act suggest that the Legislature intended rainwater to be captured within the realm of the *Water Act*’s application.

## iii. Purpose of the Act

According to the modern approach to statutory interpretation, the purpose of the *Water Act* must be considered. Consistent with section 8 of the *Interpretation Act*,<sup>62</sup> this factor is given significant weight in any exercise of statutory interpretation by the courts.<sup>63</sup> While there is no stand-alone purpose section within the *Water Act*, upon review of the Act as a whole it is fairly clear that one of the primary purposes of the *Water Act* is to establish a prior allocation licensing system to facilitate the beneficial use of surface water. This is consistent with the listed purposes for which a water licence may be granted. These listed purposes include conservation purposes, domestic purposes, industrial and irrigation purposes, energy generating purposes, and mining purposes, among others.<sup>64</sup> As noted above, rainwater is integrated within a complex hydrological cycle.<sup>65</sup> It is therefore possible to argue that the purpose of the *Water Act* implies that the Crown claims ownership in rainwater in order to effectively regulate the use of water resources in the province.

This argument is rebuttable by way of analogy to the lack of regulation of groundwater in the *Water Act*. Significantly, the licensing scheme contained within Part 2 of the Act explicitly does not apply to groundwater.<sup>66</sup> The Act was amended to regulate groundwater in 1960.<sup>67</sup> However, these provisions have never been brought into force.<sup>68</sup> By explicitly not regulating groundwater withdrawals, it is unlikely that the purpose of the *Water Act* is to enable the beneficial use of water in the province through Crown ownership of all water resources, including rainwater.

As part of a purposive approach to statutory interpretation, the implications of possible interpretations may also be considered.<sup>69</sup> Considering the importance of rainwater to the hydrological cycle and the interconnection between surface water, groundwater and

59 *Water Act*, *supra* note 5, s 1.

60 *Ibid*, ss 51-101.

61 *Ground Water Protection Regulation*, BC Reg 299/2004.

62 *Interpretation Act*, *supra* note 52, s 8.

63 Sullivan, *Statutory Interpretation*, *supra* note 55 at 194-195.

64 *Water Act*, *supra* note 5, ss 1, 4.

65 Canada, *supra* note 24.

66 *Water Act*, *supra* note 5, s 1.1.

67 British Columbia, *A Water Sustainability Act for B.C.: Legislative Proposal* (October 2013), online: [http://engage.gov.bc.ca/watersustainabilityact/files/2013/10/WSA\\_legislative-proposal\\_web-doc.pdf](http://engage.gov.bc.ca/watersustainabilityact/files/2013/10/WSA_legislative-proposal_web-doc.pdf) at 3.

68 *Ibid*.

69 Sullivan, *Statutory Interpretation*, *supra* note 55 at 209.

rainwater, it could be judged absurd that the water licensing system contained within Part 2 of the Act does not also apply to rainwater.<sup>70</sup> However, British Columbia remains the only Canadian jurisdiction to not impose licensing requirements for groundwater use above a certain amount.<sup>71</sup> Heavy, unregulated use of groundwater in some densely populated areas of the province is already causing concern over decreasing groundwater levels.<sup>72</sup> In practical terms, the lack of regulation over rainwater cannot be more absurd than the lack of regulation over groundwater.

One could argue that the express exclusion of groundwater indicates an intention to regulate, and by implication claim ownership of, rainwater. Known as the implied exclusion rule, this argument suggests that when some members of a category are set out explicitly, all other members of that category are necessarily excluded from the provision.<sup>73</sup> Following this line of reasoning, the express exclusion of groundwater in section 1.1 of the *Water Act* necessarily implies that the Legislature intended all other forms of water within the province to fall within Part 2, and therefore section 2(1), of the *Water Act*. It is therefore arguable that the *Water Act*'s purpose includes an intention to regulate rainwater falling within British Columbia.

#### iv. Legislative Intent

Legislative intent is a valid tool for discerning a statute's purpose, and can be determined by considering the "mischief" or problem that a statute was designed to address.<sup>74</sup> In light of the legislative history of the *Water Act*, the argument that rainwater is implicitly included within the *Water Act*'s statutory scheme is questionable. Although the early colonial government had imported the common law doctrine of riparian rights into British Columbia, it was soon realized that the doctrine was ill-suited to the achievement of widespread colonization and settlement.<sup>75</sup> Under the riparian rights doctrine, water rights are restricted to those owning property that borders water.<sup>76</sup> The riparian rights doctrine was therefore incompatible with the expansion of mining and agriculture in drier areas of the province, which often required water to be diverted from elsewhere.<sup>77</sup> Beginning in 1859, the colonial government began altering the common law doctrine in order to facilitate expansion of the Gold Rush.<sup>78</sup> Pursuant to the *Water Privileges Act* of 1892, which was the precursor of the *Water Act*, the Crown first declared that "[t]he right to the use of all water at any time in any river, water-course, lake or stream," other than those waters that were under the jurisdiction of the federal government, was vested in the Crown in right of British Columbia.<sup>79</sup> None of these terms were defined, and considering the usual meaning of the words 'river,' 'water-course,' 'lake,' and 'stream,' it appears that the section did not intend to capture rainwater.

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70 Noting the potentially significant impact that unregulated rainwater collection could have on the hydrological cycle in Alberta, Arlene Kwasniak and Daniel Hursh argue that the exclusion of rainwater from the water-licensing scheme undermines the purpose of a legislative scheme that purports to sustainably manage water resources (Kwasniak & Hursh, *supra* note 4 at 119).

71 Linda Nowlan, "Out of Sight, Out of Mind? Taking Canada's Groundwater for Granted" in Karen Bakker, ed, *Eau Canada: The Future of Canada's Water* (Vancouver: University of British Columbia Press, 2007) at 64.

72 *Ibid* at 58.

73 Sullivan, *Statutory Interpretation*, *supra* note 55 at 190.

74 *Reference re Firearms Act (Can)*, 2000 SCC 31 at 17, [2000] 1 SCR 783.

75 David R Percy, *The Framework of Water Rights Legislation in Canada* (Calgary: Institute of Resources Law, 1998) at 3-5.

76 *Ibid* at 3.

77 *Ibid* at 3-5.

78 *Ibid* at 5-6.

79 *Water Privileges Act*, SBC 1892, c 47, s 2.

The first *Water Act* was enacted in 1909. In section 2 of the Act, “water” or “stream” was defined as including “all natural water-courses or sources of water supply, whether usually containing water or not, and all rivers, lakes, creeks, springs, ravines and gulches, and all water-power.”<sup>80</sup> The Preamble included the broad claim that all unappropriated or unrecorded water in the Province, not subject to the exclusive jurisdiction of Parliament, was vested in the Crown in the right of British Columbia on April 23, 1892 (the date that the earlier *Water Privileges Act* was declared law).<sup>81</sup> This could be read as suggesting that the province was making a broad claim to all water, including rainwater, in the province. However, the Preamble goes on to state that the new *Water Act* was motivated by confusing and mistake-filled water rights records, and a desire to consolidate and expedite the licensing process.<sup>82</sup>

Since the *Water Act* was a response to the inadequacies with the common law and earlier government efforts to regulate surface water rights, it is unlikely that the drafters intended to also include rainwater within the meaning of ‘sources of water supply.’ The Legislature’s approach to groundwater was similar. As the elements of the riparian doctrine that were inhibiting settlement of the province did not involve groundwater, the initial *Water Act*’s purpose did not involve the regulation of groundwater. This suggests that the Act’s purpose, and in particular the purpose of the phrase ‘sources of water supply,’ was not to regulate all water in the province but rather was a reactive response to the issues surrounding surface water use in British Columbia at the beginning of the 20th century.

Considering both the entire context and the ordinary meaning of the words ‘source of water supply,’ it does not appear that rainwater is included within the definition of “stream” in section 1 of the *Water Act*. By implication, it appears that the government has not asserted proprietary rights in rainwater pursuant to section 2(1) of the Act.

## B. The *Water Protection Act*

The *Water Protection Act* reinforces the proposition that rainwater is excluded from the government’s water regulation scheme by virtue of the implicit exclusion of rainwater from subsection 2(1) of the *Water Act*. Similar to its claim in subsection 2(1) of the *Water Act*, the province also claims ownership rights to water in section 3 of the *Water Protection Act*:

3 (1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under this Act or under licences issued or approvals given under the *Water Act* or a former *Water Act*.

(2) The property in and the right to the use, percolation and any flow of ground water, wherever ground water is found in British Columbia, are for all purposes vested in the government and are conclusively deemed to have always been vested in the government.<sup>83</sup>

Subsection 3(1) essentially reaffirms the Crown’s ownership claim to water made pursuant to the *Water Act*. While ‘stream’ is not defined within the *Water Protection Act*, there is a strong case for application of the *in pari material* principle. This principle implies that statutes addressing the same subject matter may sometimes be read as an

80 *Water Act*, SBC 1909, c 48, s 2.

81 *Ibid.*

82 *Ibid.*

83 *Water Protection Act*, *supra* note 6, s 3.

integrated legislative scheme.<sup>84</sup> The proposition that the word ‘stream’ in subsection 3(1) of the *Water Protection Act* should be accorded the definition attributed to the word ‘stream’ in the *Water Act* is strengthened by the similarity in wording of subsection 3(1) of the *Water Protection Act* to subsection 2(1) of the *Water Act*, and the express reference to the *Water Act* in subsection 3(1) of the *Water Protection Act*. Further, the inclusion of a separate ownership claim to groundwater in subsection 3(2) suggests that the intention of the Legislature was not to assert ownership of *all* water in the province, but rather to expand ownership from the limited claim in the *Water Act* to also include groundwater.<sup>85</sup>

It is arguable that the stated purpose of the *Water Protection Act* captures all water in the province. Section 2 of the *Water Protection Act* states that the Act’s purpose “is to foster sustainable use of British Columbia’s water resources in continuation of the objectives of conserving and protecting the environment.”<sup>86</sup> The inclusion of rainwater, groundwater, and surface water within the government’s water protection scheme would align with the stated purpose. Upon reviewing the entire context, however, it does not appear that rainwater is included within the ambit of the *Water Protection Act*. The Act was enacted following public outcry over a plan by several corporations to use a *Water Act* licence to export large amounts of water from Canada via marine transport vessels.<sup>87</sup> The remainder of the Act is calibrated to prevent large-scale bulk water removal from the province or the major watersheds. When introducing the bill in the British Columbia Legislature, the Minister characterized one of its purposes as confirming the Government’s “ownership of surface water and groundwater in the province.”<sup>88</sup> There is nothing to suggest that the *Water Protection Act* contemplates a more expansive meaning of the word ‘stream’ than what is already included in the definition contained within the *Water Act*.

Considering both the entire context and the ordinary meaning of the words ‘source of water supply,’ it does not appear that rainwater is included within the definition of “stream” in section 1 of the *Water Act*. By implication, it appears that the government has not asserted proprietary rights in rainwater pursuant to subsection 2(1) of the Act. As there are a number of ambiguities, however, this conclusion is far from certain.

### III. THE COMMON LAW POSITION ON THE RIGHT TO USE AND MANAGE RAINWATER

Assuming that the right to harvest rainwater is not addressed by statute, the common law on the issue continues to apply. Although dicta on the subject is sparse, it appears that the common law position regarding rainwater is that it is a common resource subject to the law of capture. With regards to whether a landowner has a proprietary interest in the rainwater falling on his or her property, the likely common law position in Canada is that the landowner does not have a property interest in the rainwater before it is captured. However, the law is uncertain, as the issue has not yet been directly considered in Canada. In jurisdictions in the United States that continue to follow the riparian rights doctrine of water entitlements, the topic has rarely been considered.<sup>89</sup> Although legal reasoning on the issue is sparse, the American legal academic Joseph Dellapenna

84 Sullivan, *Statutory Interpretation*, *supra* note 55 at 149.

85 *Water Protection Act*, *supra* note 6.

86 *Ibid.*

87 David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: University of British Columbia Press, 2003) at 56.

88 British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, 35th Parl, 4th Sess, Vol 19, No 9 (27 April 1995) at 13757 (M Sihota).

89 Joseph W Dellapenna, “Related Systems of Water” in Amy K Kelley, ed, *Water and Water Rights*, 5th ed, loose-leaf (consulted on 18 December 2012), (New Providence, NJ: LexisNexis/Matthew Bender, 2011), vol 1 at 10-109-110.

suggests that the right to exploit diffused surface waters in these jurisdictions is likely governed by the law of capture.<sup>90</sup> The issue is complicated by the fact that despite the interconnectivity of the hydrological cycle, the law surrounding water entitlements has developed differently for different forms of water. Historically, legal doctrines have developed separately for flowing surface water, other surface water, and groundwater percolating under the earth.

When classifying rainwater into a legal category, it is not necessary to distinguish between rainwater that is collected before it touches the earth's surface, and diffuse surface water running on the ground before it reaches any sort of defined channel or body of water. At common law, ownership of a piece of land also confers rights to the air space above it, although property rights in airspace do not extend indefinitely.<sup>91</sup> They are limited to a certain level above the ground where a property owner can no longer usefully occupy the space.<sup>92</sup> Therefore, absent any legal doctrine that has developed to separate them, rainwater within a property owner's airspace and rainwater freely flowing outside of any defined channel on the surface can be considered together.

The case law concerning rights over rainwater in British Columbia is limited. In the 1906 case of *Graham v Lister* ("*Graham*"), in a judgment of the BC Supreme Court (Full Court), Justice Irving stated that "[b]y the common law the water falling from Heaven on the surface of the earth, so long as it does not flow in some defined natural watercourse, is the property of the owner of the soil it falls on."<sup>93</sup> Justice Irving took this proposition to inform his decision that a lower proprietor owes no duty to an upper landowner to receive the natural flow of diffuse surface water.<sup>94</sup> A lower proprietor may block the natural flow of rainwater runoff to the detriment of the upper proprietor.<sup>95</sup> The other two judges hearing the appeal also reached the same conclusion, although based on different reasoning.<sup>96</sup> In *Scott (Rural Municipality) v Edwards* ("*Scott v Edwards*"), the Supreme Court of Canada confirmed that property owners may prevent rainwater runoff from entering their property to the detriment of a neighbour.<sup>97</sup> This rule from *Graham* and *Scott v Edwards* remains the law in British Columbia.<sup>98</sup>

It is unclear, however, whether the statement in *Graham* concerning absolute ownership of water on a landowner's property is an accurate reflection of the current law in British Columbia, or whether it was only *obiter dicta* that should be disregarded. Certainly as *Graham* was decided before the enactment of the *Water Act*, the statement is limited by the expanded definition of 'stream' contained in the Act.<sup>99</sup> Whether the assertion of absolute ownership applies to rainwater, or whether rainwater is owned in common before it is captured, necessitates a more fulsome inquiry into the history of water-related rights at common law.

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90 *Ibid.*

91 Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Thomson Reuters, 2010) at 92.

92 *Didow v Alberta Power Ltd*, 60 Alta LR (2d) 212, [1988] AJ No 620 (QL) (CA), leave to appeal to SCC refused, 21199 (October 28, 1988) [*Didow*].

93 *Graham v Lister*, 14 BCR 211, [1908] BCJ No 70 (QL) at para 1 (Full Court) [*Graham*].

94 *Ibid* at para 2.

95 *Ibid.*

96 *Ibid* at paras 9, 16.

97 *Scott (Rural Municipality) v Edwards*, [1934] SCR 332, aff'g [1934] 3 DLR 793, [1933] SJ No 76 (QL) at para 22 (SKCA) [*Scott v Edwards*].

98 *Caplin v Gill*, 84 DLR (3d) 765, [1977] BCJ No 1268 (QL) at para 8; *Nyffenegger v Chand*, 2011 BCSC 1857 at para 79, [2011] BCJ No 2691 (QL).

99 *Water Act*, *supra* note 5, s 1.

## A. The Doctrine of Riparian Rights

The development of the riparian rights doctrine suggests that at common law, rainwater is a common pool resource, meaning that it is owned by no one until it is captured.<sup>100</sup> This is in contrast with Justice Irving's statements in *Graham*, which suggest that uncaptured rainwater is owned absolutely by the particular owner of the land on which the rain falls.<sup>101</sup> The doctrine of riparian rights, which at common law governs entitlements to flowing surface water, is unlikely to directly apply to rainwater. This is because riparian rights have always been restricted to land owners or occupiers occupying land adjacent to inland watercourses or other defined bodies of water.<sup>102</sup>

In the 18th century, the influential legal theorist William Blackstone provided a theoretical framework for English law concerning water rights.<sup>103</sup> Drawing from old Roman law concepts of communal property, Blackstone theorized that certain elements, including light, air, and water, were common property.<sup>104</sup> Similar to the law regarding wild animals, Blackstone argued that an individual possessing water had a qualified property interest in the water.<sup>105</sup> The individual may possess water and may enjoy and use it without interference, but once the water escapes and possession is lost, the water returns to the common pool and is owned communally until captured once again.<sup>106</sup>

Rainwater appears to fit within Blackstone's category of common property. The transient nature of rainwater places it in what Blackstone saw as the category of common things that were of a "vague and fugitive nature."<sup>107</sup> Rainwater is even more transient than flowing water in a stream, as the timing and quantity of its arrival is not always predictable and it is generally not present within the boundaries of a landowner's property for long before it enters a watercourse or water body, percolates into groundwater, or evaporates into the atmosphere.

With regards to the common law position on rights to flowing surface water, Blackstone's theory of water rights was largely supplanted by the riparian rights doctrine. One of the founding cases of the riparian rights doctrine is *Mason v Hill*.<sup>108</sup> In this decision Lord Denman distinguished a number of the earlier cases that had relied on Blackstone's theory of water as common property subject to usufructuary property rights.<sup>109</sup> Under the riparian rights doctrine, appropriation and use of water could now no longer establish a

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100 Anthony Scott uses the term "common pool resources" to refer to resources that are "fluid" or "fugacious," meaning that they are not easily "bounded spatially" (*The Evolution of Resource Property Rights* (Oxford: Oxford University Press, 2008) at 55 [Scott, *Resource Property Rights*]). Common law courts generally treated natural resources falling into this category as being owned by no one until they were physically constrained (Scott, *Resource Property Rights*, *Ibid* at 55).

101 *Graham*, *supra* note 93 at 1.

102 Kwasniak & Hursh, *supra* note 4 at 120; Percy, *supra* note 75 at 3.

103 Scott, *Resource Property Rights*, *supra* note 100 at 74-76; see e.g. *Liggins v Inge* (1831), All ER Rep 754, 7 Bing 682 (QL).

104 Sir William Blackstone, *Commentaries on the Law of England*, vol 2, 15th ed by E Christian (London: 1809) at 14, cited in Joshua Getzler, *A History of Water Rights at Common Law* (Oxford: Oxford University Press, 2004) at 173.

105 Blackstone, *supra* note 104 at 395, cited in Getzler, *supra* note 104 at 176.

106 Blackstone's category of common property differs somewhat from the Roman category of *res communes*. Roman law conceptualized flowing water as a common good, but generally considered elements in the category of *res communes* as being incapable of ownership (Getzler, *supra* note 104 at 67). Unlike the Roman category of *res communes*, Blackstone categorized flowing water as subject to a qualified form of corporeal property that could be acquired through appropriation (*Ibid* at 177).

107 Blackstone, *supra* note 104 at 395, cited in Getzler, *supra* note 104 at 176.

108 *Mason v Hill* (1833), 110 ER 692 (KB), cited in Scott, *Resource Property Rights*, *supra* note 100 at 80.

109 Scott, *Resource Property Rights*, *supra* note 100 at 74-76, 80-82, citing *Mason*, *supra* note 108.

right to water.<sup>110</sup> Instead, usufructuary rights in flowing water, beyond the “public” right to use water for domestic purposes, became land-based rights.<sup>111</sup> As well, the riparian doctrine is limited to water flowing in defined channels. The 1843 case of *Acton v Blundell* (“*Acton*”)<sup>112</sup> is traditionally cited as authority for the proposition that the riparian doctrine does not apply to groundwater unless it flows in defined underground channels.<sup>113</sup>

In the 1856 case of *Broadbent v Ramsbotham* (“*Broadbent*”), the Court also held that the riparian doctrine did not extend to limit the actions of property owners when dealing with rainwater runoff that had not yet reached a defined watercourse.<sup>114</sup> The plaintiff in *Broadbent* was the owner of a mill that used water from a stream called Longwood Brook.<sup>115</sup> Before one of the defendants constructed drainage works, a heavy rainfall would cause water to overflow from a basin on the defendant’s land and to run down a hill into Longwood Brook.<sup>116</sup> The Court dismissed the plaintiff’s claim that his riparian rights extended to the runoff water.<sup>117</sup> Writing for the Court, Baron Alderson stated:

No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the [brook] but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives as such a channel.<sup>118</sup>

Despite the acknowledgment that the natural flow of water in the stream would be diminished through the efforts of the defendants to drain their property,<sup>119</sup> the right of property owners to improve their lands through the drainage of standing water bodies was prioritized over the rights of a riparian landowner. While the Court held that landowners have the right to use and divert diffuse surface water as they please,<sup>120</sup> the case does not go so far as to stand for the proposition that a landowner has a proprietary interest in the water before it is appropriated. This is consistent with Blackstone’s theory of common property, which only enabled a person to acquire a qualified property interest in water through use and possession, and not before.<sup>121</sup> Therefore, while Justice Irving relied on *Broadbent* in his reasoning in *Graham*,<sup>122</sup> it is arguable whether the reasoning in *Broadbent* is authority for Justice Irving’s statement that a landowner has a proprietary interest in rainwater that is on his or her property.

*Broadbent* does suggest, however, that entitlements to rainwater are probably not restricted by the doctrine of riparian rights and are more likely governed by the common law position on the right to extract and use groundwater. Just as a landowner’s property

110 Scott, *Resource Property Rights*, *supra* note 100 at 82, citing *Mason*, *supra* note 108 at 699.

111 *Ibid.*

112 *Acton v Blundell* (1843), 12 M & W 324; 152 1223 (Ex CH) [*Acton*], cited in Getzler, *supra* note 104 at 261.

113 Getzler, *supra* note 104 at 261-264.

114 *Broadbent v Ramsbotham* (1856), 11 Exch 602, 156 ER 971 at 976 (available on CommonLII).

115 *Ibid* at 976.

116 *Ibid* at 973-74, 977.

117 *Ibid* at 976.

118 *Ibid.*

119 *Ibid.*

120 *Ibid.*

121 Getzler, *supra* note 104 at 176, citing Blackstone, *supra* note 104 at 391, 393, 395.

122 *Graham*, *supra* note 93 at para 4.

extends into the airspace above it, a grant of land also includes the earth beneath it (although it is unclear to what depths).<sup>123</sup> Parallels between rainwater and groundwater can be drawn as they are both excluded from application of the riparian doctrine when they travel in undefined channels. With regards to non-domestic water uses, the doctrine of riparian rights requires riparian owners to maintain the quantity of the water flow for downstream users.<sup>124</sup> However, at common law those extracting groundwater are under no requirement to consider the effect of their actions on the water supply of their neighbours. At common law, it appears that those harvesting rainwater are also under no compulsion to consider the impact of their actions on others.

## B. Groundwater and the Law of Capture

At common law, entitlement to rainwater, like most groundwater resources, is likely governed by the law of first capture. The riparian rights doctrine does apply to underground water moving in defined channels.<sup>125</sup> However, most groundwater sources are excluded from the riparian doctrine since groundwater does not typically travel in defined underground watercourses.<sup>126</sup> In *Chasemore v Richards* (“*Chasemore*”), Lord Chelmsford reasoned that because groundwater “has no certain course and no defined limit,” it was “of a very uncertain description” and the riparian doctrine was not applicable.<sup>127</sup> Therefore, the owner of the land above ground had the right to appropriate groundwater beneath the surface even if doing so would deprive a neighbour of water.<sup>128</sup> The rule of capture has its origins in even older common law rules regarding the capture of wild animals.<sup>129</sup> This rule gave a landowner the right to take any amount of water or animals as they passed through his or her land without regard for the interests of others.<sup>130</sup> If the water or the animal crossed property boundaries before it was captured, the right to take it was lost to the adjacent landowner.<sup>131</sup> In many ways, rainwater may be analogized to wild animals, the original resource to which the law of capture was applied.<sup>132</sup> Like wild animals, the appearance of rainwater within a property owner’s land boundaries may occur regularly but with what exact timing and what frequency it cannot be known.

Until the provincial government claimed ownership in groundwater pursuant to subsection 3(2) of the *Water Protection Act*, the traditional common law approach to groundwater continued to operate in British Columbia.<sup>133</sup> In *Steadman v Erickson Gold Mining Corp*, the British Columbia Court of Appeal cited *Chasemore* with approval.<sup>134</sup> Anyone had the right to appropriate groundwater from what was a common pool beneath the earth’s surface.<sup>135</sup> Although liability in nuisance could be found against a person found to have contaminated the common pool, a landowner could withdraw an unlimited amount of groundwater, even if it would cause their neighbour’s well to run dry.<sup>136</sup>

123 Ziff, *supra* note 91 at 94.

124 Percy, *supra* note 75 at 3-4 (there are two versions of the riparian rights doctrine, earlier cases speak of a duty to maintain the “natural flow” of the stream, while later cases discuss a theory that riparian owners are entitled to “reasonable use” of the watercourse).

125 Nowlan, *supra* note 71 at 59.

126 *Ibid.*

127 *Chasemore v Richards* (1859), All ER Rep 77 at 82, 29 LJ Ex 81 (QL).

128 *Ibid.*

129 Scott, *Resource Property Rights*, *supra* note 100 at 367.

130 Blackstone, *supra* note 104 at 395, cited in Getzler, *supra* note 104 at 176.

131 Blackstone, *supra* note 104 at 367.

132 Scott, *Resource Property Rights*, *supra* note 100 at 55.

133 *Halalt First Nation* (BCSC), *supra* note 43 at paras 507-508.

134 *Steadman v Erickson Gold Mining Corp*, 56 DLR (4th) 577, 1989 CarswellBC 34 at para 5 (WL Can) (CA).

135 *Ibid* at paras 7-10.

136 *Ibid* at para 6.

If applicable to rainwater harvesting, the common law rule of capture and Justice Irving's statements in *Graham* would both confirm an unlimited right on behalf of landowners to capture and use rainwater. The distinction between the law of capture and the principles cited in *Graham* is whether the property owner has a proprietary interest in uncaptured rainwater or whether the water is more properly conceptualized as common property where the right to take is limited to those who can capture it. The statements of Justice Irving suggest that it is a case of absolute ownership where all water on a property or in its airspace that is not in a defined watercourse is owned by the landowner while it is present on his or her land.<sup>137</sup> However, the weight of authority with regards to other fugacious resources suggests otherwise.

Besides water, the law of capture has also been applied to other fugacious resources, such as oil.<sup>138</sup> Under the law of capture in this context, no ownership interest is gained until the item or resource is possessed.<sup>139</sup> As the English common law was unfamiliar with oil resources, North American courts applied the rule of capture, as it existed in relation to groundwater, to this previously unknown migrating and transitory resource.<sup>140</sup> In *Berkheiser v Berkheiser* ("*Berkheiser*"), the Supreme Court of Canada confirmed that at common law, an oil and gas lease is best characterized as a profit à prendre.<sup>141</sup> In a concurring judgment, Justice Rand commented on the fugacious and "fugitive" nature of oil and the conceptual difficulty with assigning ownerships rights to it while it remained in a common pool beneath the earth's surface.<sup>142</sup> He stated: "[t]he proprietary interest becomes real only when the substance is under control, when it has been piped, brought to the surface and stored."<sup>143</sup> Previously, it was unclear whether under the law of capture a landowner gained a temporary proprietary interest in a resource while it was located, but not captured, on his or her property, or whether no proprietary interest in the resource could be gained until the resource was captured.<sup>144</sup>

This principle from *Berkheiser*, that no proprietary interest in an underground, fugacious resource is gained until the resource is captured, is likely applicable to groundwater and can thus be analogized to rainwater as well. As discussed above, the law surrounding surface water flowing in defined channels developed separately from the law of other water resources.<sup>145</sup> Although in some ways rainwater is more "knowable" than groundwater or oil since it can be seen, its appearance is uncertain and a consequence of weather patterns that cannot be predicted with certainty.<sup>146</sup> Although rainwater is above the surface, it is still more properly grouped with groundwater and oil resources rather than flowing surface water above-ground.

### C. Absolute Ownership Theory

*Graham*, as noted above, could be read as meaning that landowners have an absolute proprietary interest in rainwater as soon as it reaches their airspace. This reasoning has not been directly considered by other Canadian courts. There is also American authority for the proposition that the right to take rainwater landing on a landowner's property is a private property right that accompanies a grant of land. In *Turner v Big Lake Oil*

137 *Graham*, *supra* note 93 at 1.

138 Scott, *Resource Property Rights*, *supra* note 100 at 367-68.

139 *Berkheiser v Berkheiser*, [1957] SCR 387, 1957 CarswellSask 60 at 10 (WL Can) [*Berkheiser*].

140 Scott, *Resource Property Rights*, *supra* note 100 at 367-68.

141 *Berkheiser*, *supra* note 139 at 11-12, 32.

142 *Ibid* at paras 9-11.

143 *Ibid* at para 10.

144 Scott, *Resource Property Rights*, *supra* note 100 at 368.

145 Nowlan, *supra* note 71 at 59.

146 See Findlay, *supra* note 13 at 83.

*Company*, the Supreme Court of Texas stated “[n]o citation of authority is necessary to demonstrate that the right of a land owner to the rain water which falls on his land is a property right which vested in him when the grant was made.”<sup>147</sup> Presumably, this would also extend to rainwater within a landowner’s airspace, since airspace would also be included in the grant of land. This reasoning implies that a property owner has a right to expect a certain quantity of rainwater and has a claim in it before the water reaches the ground. It therefore goes farther than the conception of rainwater as common property and claims an ownership right, not merely a usufructuary right, to rainwater if it happens to enter a property owner’s land.

Some American legal scholars have also determined that rainwater in clouds belongs to the landowner beneath them.<sup>148</sup> It has been argued that landowners have an absolute right to the natural amount of rainwater that falls on their property.<sup>149</sup> As well, in the 1940s and 1950s, some American courts adopted this assumption in order to adjudicate the claims of landowners who asserted damages from weather modification.<sup>150</sup> Various legal questions follow from this line of reasoning, including whether one can sue a landowner for damage caused by flooding from rainwater.<sup>151</sup> Due in part to the legal implications that follow from this approach, this line of reasoning has receded in popularity.<sup>152</sup> The concept of absolute ownership in rainwater by those owning land beneath the clouds is also inconsistent with the common law principle that a landowner’s airspace only extends to a level that could be enjoyed by the landowner, and does not extend indefinitely into space.<sup>153</sup> Therefore this position is likely inconsistent with Canadian law.<sup>154</sup>

Overall, while dicta in *Graham* and *Broadbent* could be read to mean that at common law a landowner has a proprietary interest in the water itself, this reading likely extends too far. The fugacious nature of rainwater means that rainwater is more appropriately characterized as common property. Before legislative intervention, the common law, principal was that although rights to use flowing water were restricted to riparian owners,<sup>155</sup> no one had actual proprietary rights in the water.<sup>156</sup> Similarly, at common law groundwater is a common pool resource until it is captured.<sup>157</sup> *Graham* and *Broadbent* should also be read in light of *Berkheiser*, which confirms that no ownership interest in a common pool resource is established until the resource is captured and possessed.<sup>158</sup>

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147 *Turner v Big Lake Oil Company*, 128 Tex 155 at 169-170, 96 SW 2d 221, 1936 Tex LEXIS 398 (QL).

148 Tarek Majzoub et al, “Cloud Busters’: Reflections on the Right to Water in Clouds and a Search for International Law Rules” 20 *Colo J Int’l Env’tl L & Pol’y* 321 at 328.

149 “Rainmaking Part One: Who Owns the Clouds” (1948) 1 *Stan L Rev* 43 at 56.

150 Majzoub et al, *supra* note 148 at 328.

151 *Ibid* at 331.

152 *Ibid* at 329.

153 Ziff, *supra* note 91 at 92-93; *Didow*, *supra* note 92.

154 While *Graham* and *Broadbent* discuss an absolute right to appropriate water that has not yet reached a stream or percolated into the ground, neither case suggests that a property owner’s interest in water extends into the clouds. See *Graham*, *supra* note 93 and *Broadbent*, *supra* note 114.

155 Percy, *supra* note 75 at 3.

156 *Ibid* at 13.

157 *Halalt First Nation (BCSC)*, *supra* note 43 at 50.

158 *Berkheiser*, *supra* note 139 at paras 9-12 (while in his concurring judgment these statements by Justice Rand were made in the context of a dispute over underground mineral resources, his reasoning may be extended to other common law resources as it is based on the “fugitive nature” (para 9) of mineral resources, which are “fluid substances,” “something by its nature generally ready for flight” (para 12)—all typical characteristics of common pool resources more generally).

## D. The Public Trust Doctrine

The potential applicability of the public trust doctrine to Canadian natural resources has received much attention as of late.<sup>159</sup> Therefore its potential applicability to rainwater merits some consideration. The public trust doctrine has its origins in Roman law and has been revived and modified by American law.<sup>160</sup> Although the public trust doctrine has not been applied in Canada, the Supreme Court of Canada has signified it may be open to recognizing a version of the doctrine.<sup>161</sup> While the exact origins and character of the doctrine are debatable, at its core is the concept that the state holds certain natural resources in trust for the public interest.<sup>162</sup> Although the distinctions between the Roman concepts of *res publicae* and *res communes* have been blurred in the American doctrine, the public trust doctrine is dependent on both the state and the public holding rights-based interests in the resource.<sup>163</sup> The distinction between public resources and common pool resources is important. With public property, even if ownership of the resource ultimately belongs to the public, the state has the ability to manage it and exclude others.<sup>164</sup> In contrast, no one owns or has the ability to exclude others from pure common property.<sup>165</sup> Therefore, as rainwater at common law is likely a common pool resource until it is captured, even if the public trust doctrine was recognized in Canada, rainwater is not a likely candidate for application of the public trust doctrine. While recognition of rainwater as public property managed by the state in the public interest may be a positive step towards sustainable water laws, it would likely require legislative intervention to transform rainwater from a resource held in common, to one held by the state on behalf of the public.

In summary, at common law, rainwater is likely considered a common pool resource subject to the law of capture. Rights to its use are not governed nor constrained by the riparian rights doctrine. Therefore, although property owners have no proprietary interest in rainwater until it is collected, they appear to have an uninhibited right to appropriate it while it is on their property. The right to capture rainwater is therefore only limited by access to the property in which it happens to be located.

## IV. POSSIBLE AVENUES FOR RAINWATER MANAGEMENT

The law of capture is generally recognized as a poor system for sustainable resource management.<sup>166</sup> When it operates in the context of a valued resource, such as oil, it inevitably leads to the resource's overexploitation.<sup>167</sup> Those wishing to exploit the

159 See e.g. Jane Matthews Glenn, "Crown Ownership of Water in situ in Common Law Canada: Public Trusts, Classical Trusts and Fiduciary Duties" (2010) 51 C de D 493 (QL); Matthew Aragorn Park, *The Public Trust Doctrine: Ensuring the Public's Natural Right of (Perpetual) Access to Common Resources* (LLM Thesis, Faculty of Law, University of Victoria, 2007) [unpublished]; Sarah Jackson, Oliver M Brandes & Randy Christensen, "Lessons from an Ancient Concept: How the Public Trust Doctrine will meet obligations to protect the environment and the public interest in Canadian water management and governance in the 21st Century" (2012) 23 JELP 175.

160 Glenn, *supra* note 159 at 502-503.

161 *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at paras 72-84, [2004] 2 SCR 73 (the Court held that the case before them was not the appropriate case to determine the applicability of the public trust doctrine in Canada, as the issue had not been fully argued in the courts below).

162 Glenn, *supra* note 159 at 501-502.

163 *Ibid* at 504-506.

164 Scott, *Resource Property Rights*, *supra* note 100 at 56.

165 *Ibid* at 56-57.

166 See e.g. Scott, *Resource Property Rights*, *supra* note 100 at 368; Nowlan, *supra* note 71 at 59-60; Cecilia A Low, "The Rule of Capture: Its Current Status and Some Issues to Consider" (2009) 46 *Alta L Rev* 799 at 800.

167 Scott, *Resource Property Rights*, *supra* note 100 at 368.

resource compete with each other to exploit as much as they can before somebody else takes it.<sup>168</sup> In response to the waste and environmental degradation brought on by the doctrine in the context of oil and gas exploration, the law of capture has been modified and restricted in Canada through legislation.<sup>169</sup> Canadian legislation has introduced the concept of correlative rights in order to preserve resources and reduce waste.<sup>170</sup> Although its mechanisms of implementation vary across provinces, correlative rights offer some protection to neighbours sharing rights to a common pool resource from indiscriminate drilling by another oil-rights holder.<sup>171</sup> Many of these mechanisms, such as those that establish buffer zones around wells or take orders that apportion production, are inapplicable to rainwater, where the common pool is much larger.<sup>172</sup> However, the concept of correlative rights, which states that those with shared-access to a resource must consider the rights of others, is a useful starting point for considering how entitlements to rainwater harvesting are best determined.

The concept of correlative rights in fugacious resources is already well established in the United States for groundwater.<sup>173</sup> The doctrine was first developed in a dispute over groundwater extraction.<sup>174</sup> In *Katz v Walkinshaw*, the Supreme Court of California considered the English law of capture as set down in cases such as *Chesmore* and *Acton*.<sup>175</sup> However, the Court held that the law of capture was inapplicable to California.<sup>176</sup> Instead, a doctrine of reasonable use emerged, which limited a landowner's right to extract groundwater to an "ordinary" or "reasonable share" of the resource.<sup>177</sup> Although it may be difficult to determine what is a 'reasonable share' in the context of such a large and uncertain pool as rainwater, a system of resource allocation premised on the doctrine of reasonable use is a more equitable approach than a strict application of the law of capture. Under this approach, any individual user is prohibited from monopolizing the common pool resource to the exclusion of others.<sup>178</sup> Conservation focused legislation that recognizes correlative rights in all those sharing the common resource of rainwater would provide more certainty as to what amount of private use is reasonable than judge-made law.

The regulation of rainwater in Colorado provides a cautionary tale regarding the dangers of including all types of rainwater harvesting within the general water rights framework. Colorado operates under a presumption that all rainwater is presumed to be tributary to a stream.<sup>179</sup> This presumption has been applied to rainwater that is collected off a roof, even where the rainwater would likely have evaporated or percolated into the ground before reaching a stream.<sup>180</sup> As most streams in Colorado are over-appropriated,<sup>181</sup> until

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168 Scott, *Resource Property Rights*, *supra* note 100 at 368.

169 Low, *supra* note 166 at 816-17.

170 *Ibid* at 817-18.

171 *Ibid*.

172 *Ibid* at 818.

173 Dellapenna, *supra* note 89, vol 1 at 10-97.

174 Scott, *Resource Property Rights*, *supra* note 100 at 369.

175 *Katz v Walkinshaw*, 141 Cal 116 at 147-148, 1903 Cal LEXIS 486 (QL) (SC) [*Katz*].

176 Scott, *Resource Property Rights*, *supra* note 100 at 369, citing *Katz*, *supra* note 175.

177 Scott, *Resource Property Rights*, *supra* note 100 at 370.

178 *Ibid*.

179 Beaujon, *supra* note 32 at 2.

180 Findlay, *supra* note 13 at 86, citing Dan Fitzgerald, "Who Owns the Rain that Falls on Your Roof?" (May 2008), online: Colorado Central Magazine <<http://cozine.com/2008-may/who-owns-the-rain-that-falls-on-your-roof/>>; Stephen N Bretsen, "Rainwater Harvesting under Colorado's Prior Appropriation Doctrine: Property Rights and Takings" (2010) 22 *Fordham Env'tl L Rev* 159, at 170; Beaujon, *supra* note 32 at 2.

181 Beaujon, *supra* note 32 at 2.

recently all individuals wishing to collect rainwater had to rebut the presumption that rainwater collection would cause injury to prior water right holders by assuring a court or the State Engineer that there would be no impact.<sup>182</sup> Since this would likely involve a costly hydrological assessment, the cost and effort involved makes legal rainwater harvesting impractical for most people.<sup>183</sup> In response to the widespread public outcry over the realization that rainwater harvesting was effectively illegal, in 2009 the Colorado General Assembly passed two bills that provide limited exceptions to this rule.<sup>184</sup> However, because of concerns that wider acceptance would lead to claims of regulatory takings, the exceptions are limited.<sup>185</sup> Applicants applying for an exception must not already be connected to a water supply system that serves more than three households and must already be entitled to extract groundwater.<sup>186</sup> The second exception allows for up to ten residential or mixed-use developments to incorporate rainwater capture systems as part of a pilot project.<sup>187</sup>

A legislative response to rainwater harvesting in British Columbia would not need to be as concerned about claims of regulatory takings. In Canada, individuals are not protected from the indirect extinguishment of property rights to the same degree as they are in the United States.<sup>188</sup> As well, commenters generally consider water licence entitlements in prior allocation provinces to be statutory rights rather than true property rights.<sup>189</sup> Water entitlements issued under the *Water Act* are already limited by other provisions of the Act, regulations, and orders issued under it.<sup>190</sup> The Colorado example is, however, a reminder of the difficulty involved in crafting legislation concerning rainwater harvesting that effectively considers and balances the interests of different groups of water users. While an individual rain barrel is unlikely to impact other water users, rainwater harvesting does have the potential to have adverse cumulative impacts on other water users.

While a legal framework for rainwater harvesting should support and encourage this practice, limits should be placed on the law of capture. The justification for treating different parts of the same hydrological cycle separately is eroding in light of increasing scientific understanding of the interdependency of the hydrological cycle.<sup>191</sup> The law of capture is at present likely preferable to the highly regulated system in Colorado, since water scarcity in British Columbia is not yet a widespread concern.<sup>192</sup> Therefore, the environmental degradation and waste that usually accompanies application of the law of capture to scarce resources has not yet occurred.<sup>193</sup> However, water scarcity in the province is increasing.<sup>194</sup> While water in British Columbia is currently available for not much more than a nominal cost,<sup>195</sup> it is integral to life. If its availability is scarce, it is of a

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182 *Ibid.*

183 Bretsen, *supra* note 180 at 171; Beaujon, *supra* note 32 at 2.

184 Bretsen, *supra* note 180 at 160.

185 *Ibid* at 189.

186 *Ibid* at 172-173.

187 *Ibid* at 173-174.

188 Ziff, *supra* note 91 at 86-7.

189 Kwasniak & Hursh, *supra* note 4 at 112-13.

190 Deborah Curran, *When the Water Dries Up: Lessons from the Failure of Water Entitlements in Canada, the US and Australia*, (Victoria: POLIS Project on Ecological Governance, University of Victoria, 2012) at 4.

191 Nowlan, *supra* note 71 at 59.

192 Canada, "Water Availability," (February 2014), online: Environment Canada <<http://www.ec.gc.ca/eau-water/default.asp?lang=En&n=2DC058F1-1>>.

193 Scott, *Resource Property Rights*, *supra* note 100 at 367-369.

194 Brandes & Curran, *supra* note 3 at 4.

195 See British Columbia, *Annual Rental Rates for Water Licence Purposes by Sector*, online: Ministry of Environment – Water Stewardship Division: Water Rental Rates <[http://www.env.gov.bc.ca/wsd/water\\_rights/water\\_rental\\_rates/cabinet/new\\_rent\\_structure%20\\_revised\\_feb-2013.pdf](http://www.env.gov.bc.ca/wsd/water_rights/water_rental_rates/cabinet/new_rent_structure%20_revised_feb-2013.pdf)>.

fundamentally greater value than other natural resources can ever be. British Columbia is not the only jurisdiction that will need to address this issue in the coming years. As water scarcity becomes a reality across the globe, the question “who owns the rain?” is one of future international relevancy.<sup>196</sup>

The provincial government has recently released a legislative proposal to replace the *Water Act* with new proposed legislation titled the *Water Sustainability Act*.<sup>197</sup> The proposed legislation includes a number of proposals that support sustainable use of water in the province, such as regulating large-scale groundwater extraction<sup>198</sup> and a requirement that licence holders use water efficiently.<sup>199</sup> However, the Government intends to incorporate Parts 1 and 2 of the *Water Act*, which address ownership of water and the surface water licensing scheme, into the legislation with few changes.<sup>200</sup> The legislation does not fundamentally shift the prior allocation system towards an ecosystem-based approach. In addition, the current proposal does not clarify the ambiguity surrounding the legality of rainwater harvesting.

An ideal system of water management would incorporate all forms of water in the province, including groundwater, surface water, and rainwater. While rainwater should be incorporated into the management framework of the *Water Sustainability Act*, sufficient exemptions for rainwater harvesting systems would need to be included to allow for small-scale, sustainable collection. However, since rainwater harvesting has the potential to adversely affect instream flows and other water users, limits should be placed on rainwater appropriation. A possible solution would involve requiring licences for rainwater capture systems that exceed a certain size. Ideally, the licencing threshold sizes would be tailored to the hydrology of different watersheds. In addition, a sustainable water law framework would prioritize ecosystem flow needs over other water uses.<sup>201</sup> Sarah Jackson, Oliver Brandes, and Randy Christensen argue that the public trust doctrine should be explicitly included in water-related legislation.<sup>202</sup> This approach would be able to respond flexibly to the uncertain nature of water resources while prioritizing public uses and the protection of the resource for future generations.<sup>203</sup> Although a more fulsome discussion of the attributes of an ideal system of water management are outside the scope of this paper, this system would involve an ecosystem-based approach that prioritizes sustainability and considers all aspects of the hydrological cycle.

## CONCLUSION

Use of rainwater harvesting methods is on the rise as knowledge of the beneficial impacts of rainwater harvesting spreads.<sup>204</sup> As the legal framework of rights to capture rainwater has received little judicial or statutory attention, the legality of a property owner’s ability to capture rainwater is somewhat uncertain. However, a review of the statutory and

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196 In his review of future challenges to water scarcity in the international context, Professor Falkenmark, a scholar in the field of hydrology, identifies the question “who owns the rain?” as a question that the global community will need to address (“Water Scarcity – Challenges for the Future” in Edward HP Brans et al, eds, *The Scarcity of Water: Emerging Legal and Policy Responses* (London: Kluwer Law International, 1997) at 38-39).

197 British Columbia, *supra* note 67.

198 *Ibid* at 33.

199 *Ibid* at x.

200 *Ibid* at 16-17.

201 Oliver Brandes et al, *At a Watershed: Ecological Governance and Sustainable Water Management in Canada* (Victoria: POLIS Project on Ecological Governance, 2005) at 34.

202 Jackson, Brandes & Christensen, *supra* note 159 at 192.

203 *Ibid* at 192-9.

204 Heather Kinkade-Levario, *Design for Water: Rainwater Harvesting Stormwater Catchment and Alternate Water Reuse* (Gabriola Island, BC: New Society Publishers, 2007) at 7.

common law frameworks informing water-related rights in British Columbia suggests that the most likely common law position is that rainwater is common property subject to the law of capture. While those capturing rainwater in the province may be pleased that their ability to harvest rainwater is not fettered by the rights of other water users, this is not the best method of ensuring that rainwater harvesting continues to be practiced sustainably. As rainwater is likely not included in the *Water Act's* system of prior allocation, the Government and downstream senior surface water licence holders likely have no remedy if the cumulative impacts of rainwater harvesting adversely affect stream flows. The likely common law position does not recognize correlative rights of other users to share equitably in the common resource of rainwater, which is only one part of a complex and increasingly scarce systems of water resources. Since rights over rainwater collection have not yet become controversial in British Columbia, now is the ideal time to enact statutory change.<sup>205</sup> Although it may involve difficult determinations concerning the relative hierarchy among rainwater and surface water users, a sustainable *Water Modernization Act* would anticipate that future conflicts over rainwater harvesting are likely to ensue, and implement a framework for balancing the rights of rainwater harvesters with other water users.

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205 Kwasniak & Hursh, *supra* note 4 at 128.



ARTICLE

# “NONE OF THAT PAPER STUFF WORKS”: A CRITIQUE OF THE LEGAL SYSTEM’S EFFORTS TO END DOMESTIC ASSAULT IN NUNAVUT

Chris Durrant\*

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INTRODUCTION . . . . .	44
I. NUNAVUT AND THE INUIT COLONIAL EXPERIENCE . . . . .	46
A. Foreign Justice . . . . .	48
II. LEIGH GOODMARK’S ANTI-ESSENTIALIST FEMINISM . . . . .	49
A. Taiaiake Alfred’s Anti-colonial Prescriptions . . . . .	50
III. THE PUBLIC PROSECUTION SERVICE OF CANADA’S NO-DROP POLICY . . . . .	51
A. No-Drop prosecution . . . . .	51
B. Diversion Skepticism . . . . .	52
C. Reluctant Witness Support . . . . .	53
D. The “Special Circumstances” of the Territories . . . . .	53
IV. <i>FAMILY ABUSE INTERVENTION ACT</i> . . . . .	54
A. Evaluation: EPOs . . . . .	55
B. Evaluation: CIOs . . . . .	56
C. Conclusions on the FAIA . . . . .	58
V. RANKIN INLET SPOUSAL ASSAULT PROGRAM . . . . .	58
A. Evaluation . . . . .	59
FURTHER STEPS AND CONCLUSIONS . . . . .	60

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## INTRODUCTION

On April 1, 1999, Canada's newest territory, Nunavut, came into existence. The division of the Northwest Territories into two jurisdictions was the result of more than a decade of negotiations between Inuit representatives and the federal government. In the new eastern Arctic territory, Inuit would make up the vast majority of the population as opposed to the previous situation of sharing the Northwest Territories with sizable First Nations and European populations.

The hope of the Inuit who negotiated the agreement was that Nunavut's new government would incorporate traditional Inuit values into its institutions and processes.<sup>1</sup> The goal was a poignant one. During the twentieth century, the Canadian government's colonial and assimilating policies as well of the deployment of the Royal Northwest Mounted Police drastically changed the Inuit way of life. Decisions were taken without any consideration of Inuit traditions, and institutions reflecting European values were imposed. The creation of Nunavut represents the potential to decolonize the territory.

Though the Inuit are now in control of the formal mechanisms of government in the territory, the colonial period has left deep scars. The territory struggles with high levels of suicide and substance abuse. Among the most troubling are the territory's rates of family violence. Based on police-reported data, 1,132 Nunavummiut<sup>2</sup> were victims of family violence in 2010.<sup>3</sup> Half of those victimized were assaulted by their spouse.<sup>4</sup> The rate of family violence is the highest in Canada, and a Nunavummiuq is 17 times more likely to be a victim of family violence than someone who lives in Ontario, Canada's province with the lowest rate of family violence.<sup>5</sup> Surveys have shown that women disproportionately bear the burden of this violence. Fifty-two per cent of women have experienced at least one act of physical violence in their adulthood (as opposed to forty-six per cent of men), and twenty-seven per cent have experienced forced sexual activity or attempted forced sexual activity (compared with five percent of men).

In light of the drastic statistics, a variety of organizations in the territory have attempted to address the problem through legal means. The territorial government has passed the *Family Abuse Intervention Act*,<sup>6</sup> which created both new legal procedures for addressing domestic abuse, and the position of Community Justice Outreach Worker to help facilitate the use of the procedures. The Public Prosecution Service of Canada (PPSC), which continues to act in the territory independently of the Nunavut government, has also addressed the problem through a set of policies specific to domestic violence and the North.<sup>7</sup> Additionally, Rankin Inlet's Pulaarik Kablu Friendship Centre has launched a

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1 Graham White, "Governance in Nunavut: Capacity vs. Culture" (2009) 43 *Journal of Canadian Studies* 57.

2 Nunavummiut is the plural demonym for the residents of Nunavut. Nunavummiuq is the singular demonym. Use of the word Nunavummiut implies that numbers include Nunavut's non-Inuit residents as well the Inuit population. According to the 2011 census, Inuit make up 85.4 percent of Nunavut's population (Statistics Canada, *2011 National Household Survey: Aboriginal Peoples in Canada: First Nations People, Metis and Inuit*, online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/130508/dq130508a-eng.htm>> [Statistics Canada, *2011 National Household Survey*]).

3 Nunatsiaq News, "Nunavut's sky-high family violence rates tops in Canada" *Nunatsiaq News* (23 May 2012), online: NunatsiaqOnline <<http://www.nunatsiaqonline.ca>>.

4 *Ibid.*

5 *Ibid.*

6 *Family Abuse Intervention Act*, S Nu 2006, c 18.

7 Public Prosecution Service of Canada (PPSC), *The Federal Prosecution Service Deskbook* at ch 28, online: PPSC <<http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/toc.html>> [PPSC, *Deskbook*].

spousal-assault pilot project, which among other things provides a counseling program for those who have plead guilty to domestic assault.<sup>8</sup>

Attempting to address the problem is commendable, but addressing the high rates of domestic violence requires sensitivity to the particular situation of the territory and its residents. Female Inuit survivors of spousal abuse experience marginalization based on both their gender and indigeneity, and often other factors like poverty and disability. Legal reforms intended to combat spousal abuse in Nunavut face an intersectional challenge; they must simultaneously strive to overcome the complex challenge of addressing both the patriarchal as well as colonizing nature of the justice system in Canada. A project that ignores either element, or the interaction between them, is likely to end in failure or even exacerbate the problems it aims to solve.

Given the high-stakes the issue, the guiding question of this paper is whether these organizations have designed their programs to suit the gendered nature and colonized location of the problem at hand. To evaluate, the aforementioned programs will be assessed through two different lenses. The first is feminist scholar Leigh Goodmark's anti-essentialist lens.<sup>9</sup> Rather than reducing women's narratives into a unitary universal female experience, Goodmark recognizes the intersectionality of different sites of subordination. Consequently, though her writing focuses on critiquing laws aimed at decreasing domestic assault in the American context, her theory is easily adapted to the colonial context in which Nunavut's Inuit women live.

The second lens is that of anti-colonialism, as explored through Mohawk scholar Taiaiake Alfred's conceptions of decolonization and colonialism's relationship with spousal abuse.<sup>10</sup> Inuit elders are clear that the current generation experiences much more domestic violence than they did prior to colonization.<sup>11</sup> As the colonial experience has corresponded with the development of domestic violence in Nunavut, anti-colonial theory will be used to assess whether domestic violence initiatives address the historical and political background of the current crisis. Given how crucial the colonial context is to this analysis, a short history of the Inuit colonial experience is given at the beginning of the paper.

The end result of applying both a feminist and anti-colonial lens is that none of the current initiatives are without their faults, though some are far more problematic than others. Anti-essentialism effectively highlights when the state restricts women's agency, while the anti-colonial perspective is particularly critical of the existence of the state in its current form. How Nunavut could better shape the legal system's response to domestic violence is explored in the conclusion.

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8 Pauktuutit Inuit Women's Association, *Research Report: Applying Inuit Cultural Approaches in the Prevention of Family Violence and Abuse* (30 April 2005), online: Pauktuutit <[http://pauktuutit.ca/wp-content/blogs.dir/1/assets/InuitAbusePrevention\\_e.pdf](http://pauktuutit.ca/wp-content/blogs.dir/1/assets/InuitAbusePrevention_e.pdf)>.

9 Leigh Goodmark, "Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases" in Leigh Goodmark, *From the Selected Works of Leigh Goodmark* (February 2009), online: SelectedWorks <[http://works.bepress.com/leigh\\_goodmark/6](http://works.bepress.com/leigh_goodmark/6)> [Goodmark, "Autonomy Feminism"]; Leigh Goodmark, "Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal" (2009) 31:39 *Journal of Law and Policy* 39 [Goodmark, "Reframing"]; Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System* (New York: New York University Press, 2012) [Goodmark, *A Troubled Marriage*].

10 Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 2009) at 59.

11 Janet Billson, "Shifting gender regimes: The complexities of domestic violence among Canada's Inuit" (2006) 30 *Etudes/Inuit/Studies* 73.

## I. NUNAVUT AND THE INUIT COLONIAL EXPERIENCE

High rates of violence are not the only problems plaguing Nunavut. On almost every measure of human development Nunavut ranks far behind the rest of the Canadian population. Life expectancy in the territory is 73 years, far below the Canadian average of 81.6 years.<sup>12</sup> Nunavut also has the lowest average years of schooling in the country, with an average of 10.9 years per person, compared to the Canadian average of 12.5.<sup>13</sup> The education numbers likely don't accurately reflect the real situation; some Inuit graduates report their education doesn't compare to the educations obtained by non-aboriginal Canadians.<sup>14</sup> The result is that the issues in the educational system compound into other problems. Since becoming a territory separate from the Northwest Territories, Nunavut's government has been trying to decrease dependency on southern professionals, and build its administrative capacity. The Canadian Auditor-General reported however that twenty-three percent of public service positions go unfilled while the territory has a twenty per cent unemployment rate.<sup>15</sup> This capacity deficit will have to be fixed if Nunavut is going to meet other growing problems. The territory has the highest birthrate in Canada, with half the territory's population under the age of twenty-five.<sup>16</sup> Among other things, this population boom as caused a housing crisis. Nunavut Tunngavik Inc. has warned that social problems to become "exponentially worse" if housing is not able to keep pace with population growth.<sup>17</sup> Additionally, other reports indicate that 7 in 10 preschoolers come from houses without adequate food.<sup>18</sup> It is very likely that many of Nunavut's biggest challenges lie ahead of it.

From an outsider's perspective, it is easy to dismiss the hardships faced by the people of Nunavut as a result of their isolated location and the area's daunting climate. It is easy to forget that prior to contact, the Inuit thrived on the land.<sup>19</sup> The territory's current conditions can only be explained through the story of contact and colonization. Interactions with Canada's southern population literally reshaped the Inuit's way of life. Before contact, the Inuit lived in nomadic communities consisting of a few families, totaling around 40 or 50 people.<sup>20</sup> In contrast, the population of Nunavut now lives in just 27 communities, with populations ranging from 200 to 7000 people.<sup>21</sup> Many factors combined to end the nomadic way of life, including trade, an influx of southern labourers, residential schools, forced relocation and the slaughter of sled dogs.

The Inuit had been trading furs at European whaling camps since the early nineteenth century. The introduction of rifles caused the loss of some traditional hunting techniques,

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12 Elspeth Hazell, Kar-Fai Gee and Andrew Sharpe, *The Human Development Index in Canada: Estimates for the Canadian Provinces and Territories, 2000-2011* (Centre for the Study of Living Standards, May 2012) at 23-24, online: Centre for the Study of Living Standards <<http://www.csls.ca/reports/csls2012-02.pdf>>.

13 *Ibid* at 26.

14 National Committee on Inuit Education, *First Canadians, Canadians First: National Strategy on Inuit Education 2011* (Inuit Tapiriit Kanatami, May 2011) at 67, online: <<https://www.itk.ca/publication/national-strategy-inuit-education>>.

15 Patrick White, "The Trial of Nunavut: Lament for an Arctic nation" *The Globe and Mail* (1 April 2011), online: *Globe and Mail* <<http://www.theglobeandmail.com>>

16 *Ibid*.

17 Nunavut Tunngavik Incorporated, *2010-2011 Annual Report on the State of Inuit Culture and Society: The Status of Inuit Children and Youth in Nunavut* (Nunavut Tunngavik Incorporated) at 40, online: <<http://www.tunngavik.com/files/2012/11/2010-11-SICS-Annual-Report-Eng.pdf>>.

18 *Ibid*.

19 John Roy Bennet and Susan Rowley, *Uqalurait: An Oral History of Nunavut* (Montreal: McGill-Queen's University Press, 2008) at xxv.

20 Billson, *supra* note 11 at 4.

21 *Ibid*.

and trade also changed some food and clothing preferences.<sup>22</sup> Eventually, a decline in the price of furs affected the Inuit's ability to obtain needed goods. In 1949, the Government of Canada began paying family allowances to the Inuit in the form of credit at trading posts. This had the effect of incentivizing settling near town, which in turn increased competition for game and other resources.<sup>23</sup> These events not only fundamentally changed the Inuit way of life, but put them in constant contact with a government that has rarely understood Inuit interests.

Between 1950 and 1957, 1,646 Inuit residents of the Northwest Territories attended residential school.<sup>24</sup> While the shift to permanent settlements facilitated access to day schools, many families were forced to send their children to boarding schools, often by government agents who threatened to cut off the Family Allowance if children did not attend.<sup>25</sup> Those who experienced the residential school system are called the “lost generation.”<sup>26</sup> They underwent a “loss of culture, family-bonding, self-esteem as a result of government and paternalism and prejudice”<sup>27</sup> and returned home struggling to cope with the “physical, sexual, psychological and spiritual abuse” they had suffered.<sup>28</sup> Residential schools also introduced the practice of physically disciplining children into the culture.<sup>29</sup> Prior to settlement, children were disciplined without corporal punishment or verbal derision.<sup>30</sup>

Another example of the Canadian government's colonial influence over the Inuit is the forced relocation program of the 1950s. In an effort to protect sovereignty over its arctic possessions, the Canadian government pressured a number of Inuit families from northern Quebec and the hamlet of Pond Inlet to relocate to barely habitable land above the Arctic Circle, creating the communities of Resolute and Grise Fiord. When some families asked to be returned to their original homes, the government refused. The Royal Commission on Aboriginal Peoples called the relocation “one of the worst human rights violations in the history of Canada.”<sup>31</sup> Martha Flaherty, relocated at the age of five, likened the experience to “having her childhood taken away.”<sup>32</sup>

Finally, the presence of government officials in the Inuit communities had traumatizing effects. In the 1950s, the construction of the Distant Early Warning Line radar devices

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22 Shelagh D Grant, *Arctic Justice: On Trial for Murder, Pond Inlet 1923* (Montreal: McGill-Queen's University Press, 2002) at 22-23.

23 *Ibid* at 250.

24 David King, *A Brief Report of the Federal Government of Canada's Residential School System for Inuit*, (Aboriginal Healing Foundation, 2006), 5.

25 *Ibid* at 15.

26 *Ibid* at 17.

27 *Ibid* at 16.

28 Marius Tungilik, “Survivor Stories” in *We Were So Far Away: The Inuit Experience of Residential Schools*, online: We Were So Far Away <<http://weweresofaraway.ca/survivor-stories/marius-tungilik/>>.

29 King, *supra* note 24 at 16.

30 Uqsuralik Ottokie, born in 1924 near Cape Dorset, Nunavut, articulated her views on child rearing as “[when] you show the child pure, unconditional love, without raising your voice to them, without being physically abusive, they grow beautifully.” Given the high rates of violence experienced by children in Nunavut, Ottokie's words speak to a drastically different pre-colonial experience (Naqi Ekho and Uqsuralik Ottokie, *Interviewing Inuit Elders Volume 3: Childrearing Practices*, ed by Jean Briggs (Iqaluit: Nunavut Arctic College, 2000) at 70). See also Janet Billson & Kyra Mancini, *Inuit Women: Their Powerful Spirit in a Century of Change* (Plymouth: Rowman and Littlefield Publishers, 2007) at 79.

31 Nunavut Tunngavik Incorporated, “Background” in *The Arctic Exile Monument Project*, online: Tunngavik <<http://www.tunngavik.com/current-initiatives/past-projects/arctic-exile-monument-project/background/>>.

32 Marquise Lepage, director, *Martha of the North* (National Film Board of Canada, 2009).

caused an influx of southern laborers to the territory, which in turn led to an increased police presence.<sup>33</sup> Soon after, the Inuit witnessed a rapid decline in the population of their qimmut, or sled dogs. While the spread of communicable dog diseases and the increasing presence of snowmobiles were connected to the decline, the RCMP also shot many of the highly-prized dogs to enforce a government-imposed ordinance that had no connection to the needs of the community, or simply as a tactic to intimidate and coerce the Inuit.<sup>34</sup> It is estimated that at least 1,200 dogs were killed in the Baffin Region alone.<sup>35</sup> The loss of dogs meant a life-long end to hunting for some individuals.<sup>36</sup>

## A. Foreign Justice

Before considering the way in which the law could play a role in ending domestic violence in Nunavut, the historical interaction of the residents of the territory and the law itself must be understood. Traditionally, behaviour was regulated through the distinct, but interrelated concepts of Tirigusuusiit (things that have to be avoided), Maligait (things that have to be followed) and Piquajait (things that have to be done).<sup>37</sup> These concepts related not only to social relations, but to subjects like the treatment of wildlife and proper behaviour in relation to the weather.<sup>38</sup> Prior to contact, the small size of Inuit communities meant that disputes were settled using “informal law-ways.”<sup>39</sup> Elders recall that bad behaviour was corrected through counseling the offender.<sup>40</sup> While elders were highly respected, they did not occupy formal roles<sup>41</sup> and they did not consider themselves agents of social control.<sup>42</sup> Nonetheless, because an individual could endanger a community’s survival, people who were unwilling to listen to the elders were sometimes killed, often by close kinsmen taking responsibility for their relative’s actions.<sup>43</sup>

These traditions were disturbed when the RCMP began to set up detachments in the region in 1903.<sup>44</sup> By the 1920s, a string of detachments were set up in the Eastern Arctic region, and the clash of justices began.<sup>45</sup> The way Canadian law ran roughshod over Inuit society is exemplified by one of the first murder trials held in the territory. In 1922, an Inuit man named Nuqallaq killed a deranged trapper who had threatened to shoot people’s dogs unless they handed him their furs. Nuqallaq acted with the permission of his community, in conformity with the Inuit practice of killing those who endangered the group’s survival. In an effort to display sovereignty over the territory, the RCMP charged Nuqallaq with murder and he was convicted of manslaughter.<sup>46</sup>

33 Dorothy Harley Eber, *Images of Justice* (Montreal: McGill-Queen’s University Press, 1997) at 16.

34 Qikiqtani Truth Commission, “Inuit Sled Dogs in the Baffin Region, 1950 to 1975”, online: Qikiqtani Truth Commission <<http://www.qtcommission.com/actions/GetPage.php?pagelid=39>>.

35 *Ibid*

36 *Ibid*.

37 Mariano Aupilaarjuk et al, *Interviewing Inuit Elders Volume 2: Perspectives on Traditional Law* (Iqaluit: Nunavut Arctic College, 1999) at 13.

38 *Ibid* at 5

39 Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut* (Toronto: University of Toronto Press, 2007) at 102.

40 Aupilaarjuk, *supra* note 37 at 43.

41 *Ibid* at 2.

42 *Ibid* at 3.

43 Eber, *supra* note 33 at 15.

44 *Ibid* at 14.

45 *Ibid*.

46 After serving more than a year in prison in Manitoba, some officials involved in his prosecution secured an early release for Nuqallaq based on the fact he had become severely ill. He was returned to Baffin Island, a move that accidentally introduced tuberculosis to the area (Grant, *supra* note 22 at 5, 244).

Not all cases ended so unjustly. The first Chief Justice of the Northwest Territories (as Nunavut was then) was known for his attempts to fit the law to the realities of the territory. He would hold jury trials, exercise his discretion in sentencing, and rarely accepted guilty pleas.<sup>47</sup> However, even with attempts at adaptation, the end result was still one culture forcing its law on another. Interviews with Inuit elders have found them disappointed with the emphasis on punishment in the system, and longing for a synthesis of Western and Inuit culture in the law.<sup>48</sup> Additionally, none of the judges of the Nunavut Court of Justice are Inuit,<sup>49</sup> and there are only two practicing Inuit lawyers in the territory.<sup>50</sup> The majority of Nunavut's legislature may be Inuit, but the federal government still controls the criminal law.<sup>51</sup> Former Crown prosecutor Pierre Rousseau has stated, "Nunavut's dysfunctional justice system destroys lives, ignores Inuit culture and is a major cause of inter-ethnic conflict"; he suggests that the Inuit should be allowed to solve their problems at the community level.<sup>52</sup> Therefore, any efforts to curb domestic violence through the law must be cognizant of the fact that Nunavut's justice system began as a colonial imposition, which often operated in contradiction to Inuit values.

## II. LEIGH GOODMARK'S ANTI-ESSENTIALIST FEMINISM

Just as the Inuit have had to cope with institutions that operate using inappropriate assumptions, many women have faced similar struggles. Anti-essentialist feminism recognizes this situation and responds by rejecting the notion of a unified female experience. Critical of theories that privilege a white, middle-class experience, anti-essentialist feminists recognize that women's experiences are complicated by race, ethnicity, class, sexuality and disability.<sup>53</sup> Anti-essentialists argue that women must be seen as individuals whose identities are constructed by the interplay of these and other characteristics.<sup>54</sup>

Feminist scholar Leigh Goodmark has written persuasively on the importance of applying an anti-essentialist lens to domestic violence policies. Goodmark points out that early in the battered women's movement activists identified six goals that legal reform ought to pursue: (1) increasing victim safety; (2) stopping the violence; (3) holding perpetrators accountable; (4) divesting perpetrators of control; (5) restoring women who have been battered; and (6) enhancing agency of women who have been battered.<sup>55</sup> For Goodmark, policy-makers' ultimate goal when it comes to domestic violence should be to enhance women's agency.<sup>56</sup> Goodmark is clear that women should not have their choices made for them, or even be forced to choose from a prescribed set of choices, but instead be allowed to create and define their own choices.<sup>57</sup> She acknowledges that prioritizing agency over stopping the violence means that some women will be revictimized, but counters that others will be empowered by the ability to make choices for themselves.<sup>58</sup>

The emphasis on agency comes from anti-essentialist skepticism over policy-makers' ability to craft policy with appropriate goals. When policies don't promote a woman's ability

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47 Eber, *supra* note 33 at 24-25. The Inuit of the time had difficulty with the concept of moral or legal guilty because their language had no word that corresponded to guilty (Eber, *ibid* at 25).

48 Aupilaarjuk, *supra* note 37 at 7.

49 Nunavut Court of Justice, "Meet the Justices", online <<http://www.nucj.ca/judges.htm>>.

50 Mandy Samurtok, personal communication, 2 August 2012.

51 White, *supra* note 1 at 64.

52 Loukacheva, *supra* note 39 at 100.

53 Goodmark, "Autonomy Feminism", *supra* note 9 at 68

54 *Ibid*.

55 *Ibid* at 5-6.

56 *Ibid*.

57 *Ibid* at 48.

58 *Ibid* at 71-72.

to make a choice, but instead craft predetermined goals, these goals reflect the white, middle-class experience, and consequently force an outcome that is only appropriate for addressing a narrow range of lived realities. The end result of essentializing policies is that women who have different goals and experiences because of their race, class, sexuality, disability and other sites of subordination are unable to pursue their own interests.<sup>59</sup>

Goodmark has written specifically on some policies that are currently in place in Nunavut. Her emphasis on agency is particularly poignant when discussing Inuit women facing the challenges of having their agency denied because of their gender and indigeneity. Therefore Goodmark's anti-essentialist lens is appropriate for examining Nunavut's policies regarding domestic violence. Additionally, to ensure a full picture of the effects of the assessed policies, in addition to agency, the other five goals of the early battered women's movement will be referenced as well.

### A. Taiaiake Alfred's Anti-Colonial Prescriptions

Mohawk scholar Taiaiake Alfred work is an excellent compliment to Goodmark's focus on agency. Alfred is a major proponent of the idea that Canada's relationship with aboriginal people should be characterized as an ongoing colonialism and that colonialism is reproduced through aboriginal government organizations based on settler governance concepts.<sup>60</sup> Of Nunavut, Alfred says "the Inuit people are now the titular heads of government, but the apparatus of government is staffed and controlled mainly by white southerners, and it operates in much the same way as the Canadian territorial government did in the period of open colonization."<sup>61</sup> This observation does not just apply to the government structure in Nunavut, but as described earlier, the justice system as well. According to Alfred, Nunavut's problems cannot be fixed by staffing positions with Inuit employees alone, because there is limited potential for state apparatuses to foster decolonization. For Alfred, the decolonization process is not a collective or institutional one, but instead a shift "in thinking and action that emanate[s] from recommitments and reorientations at the level of the self that, over time and through proper organization, manifest as broad social and political movements to challenge state agendas and authorities."<sup>62</sup>

According to Alfred's writings, domestic violence is one of the outcomes of the ongoing colonial experience. "Many men have added to Native women's oppression by inflicting pain on their wives[...] [o]nce we fully understand the idea of oppression, it doesn't take much further insight to see that men's inability to confront the real source of their disempowerment and weakness leads to compound oppression for women."<sup>63</sup> Alfred suggests three prerequisites for recovery: "awareness of the pain's source; conscious withdrawal from an isolated unfocused state of rage; and the development of a supportive community and the courage to begin attacking the causes of discontent and deprivation."<sup>64</sup>

Alfred's focus on colonial oppression as the source of domestic violence among First Nation peoples is what makes his theories relevant to other indigenous contexts. Worldwide there has been a correlation between the imposition of a colonial state on indigenous peoples and an increase in domestic violence in that community. Rates of

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59 *Ibid* at 68.

60 I choose to use the word 'settler' to represent European or non-aboriginal Canada ideas and populations throughout this essay in lieu of terms like 'western.'

61 Alfred, *supra* note 10 at 27.

62 Taiaiake Alfred & John Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism" 40:4 *Government and Opposition* 597 at 611-612.

63 Alfred, *supra* note 10 at 59.

64 *Ibid* at 60.

spousal violence are high among the Navajo and the Maori despite a traditional respect for women.<sup>65</sup> Inuit women who remember the time before resettlement recount that “people considered family violence despicable” and while violence was not unknown at the time, the women believe there has been a “substantial increase in the rate of spousal abuse since resettlement.”<sup>66</sup> Given that the Inuit suffered through the same colonial oppression Alfred proposes as the cause of domestic violence, his prescriptions are highly relevant to the context, even if they were not directed specifically at the territory.

Alfred’s theories are also helpful because they address men’s role in domestic violence in a way anti-essentialist theory does not. It is notable that of the six goals of domestic violence policy identified by the battered women’s movement, only “stopping the violence” could involve changing the behaviour of abusive men, and the goal is not explicit that changing or healing men is part of the process. Consequently, Alfred’s anti-colonial analysis and his prescriptions for recovery compliment the battered women’s movement’s goals when analyzing policy. This added perspective informs much of the commentary and possible solutions discussed below.

### III. THE PUBLIC PROSECUTION SERVICE OF CANADA’S NO-DROP POLICY

The Public Prosecution Service of Canada (PPSC) has policies on how to handle cases of domestic violence that are specific to Canada’s three territories. Three particular policies contained within the prosecutors’ policy manual (“the Deskbook”) guide prosecutors’ handling of domestic violence and have the effect of minimizing women’s agency in the context of domestic violence.

#### A. No-Drop Prosecution

The first anti-essentialist critique of the Deskbook is that complainants and victims are not able to have the charges against the alleged abuser dropped. The PPSC has sole discretion on whether to place and proceed with charges. The Deskbook’s policy does not remove prosecutor’s discretion on whether to proceed. Instead, it firmly reminds prosecutors of “the strong public interest in the denunciation and deterrence of spousal violence.”<sup>67</sup> According to the Deskbook, the following two considerations should not be taken into account when making decisions about pre-trial detention: 1) the likelihood of a victim cooperating with prosecution and 2) whether a couple will continue a relationship if the accused is granted bail. Instead prosecutors are to “consider any and all terms of release which are necessary to preserve the evidence, protect the complainant, and avoid

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65 Traditionally among the Navajo, women shared equal and sometimes superior rights to men, rape was an almost unknown phenomenon, and “domestic violence and child abuse were known, but were an aberration” (Diane McEachern, Marlene Van Winkle & Sue Steiner, “Domestic Violence Among the Navajo” (1998) 2:4 *Journal of Poverty* at 35). In 1999, thirty-two percent of 600 major crimes reported on the Navajo reservation involved domestic violence (“Navajo Nation to Focus on Domestic Violence”, *Daily Courier* (Arizona) (1 November 1999) 3A, online: Google News <<http://news.google.com>>). Maori society traditionally held violence towards a woman as an affront to her and her extended family. Incidents were rare, and when they did occur, resulted in costly punishments to the abusive man’s extended family (Stephanie Milroy, “Maori Women and Domestic Violence: The Methodology of Research and the Maori Perspective” (1996) 4:58 *Waikato L Rev* at 71.). In 2010, fifty per cent of New Zealanders arrested for male on female violence were Maori even though the Maori only make up fifteen per cent of the country’s population (Heather Sharpe, “New Zealand Faces Its Dark Secret”, *BBC News Online* (29 January 2007), online: *BBC News Online* <<http://www.bbc.co.uk/news/>>).

66 Billson & Mancini, *supra* note 30 at 290.

67 PPSC, *Deskbook*, *supra* note 7 at ch 28, s 28.2.

the commission of any further offence.<sup>68</sup> This policy prevents the victim from having any influence on the bail process.

Taking the victim's discretion out of both the bail hearing and prosecution is a violation of women's agency. While the woman's safety is ostensibly protected, other interests she might have placed above her safety may suffer. The loss of the male member of the family can mean a loss of income, or for families where hunting is a crucial part of the home economy, food. Even when an unemployed man is arrested, it can mean deprivation as social assistance payments are not paid when a person is incarcerated.<sup>69</sup> While domestic violence does occur in financially secure families,<sup>70</sup> financial insecurity is often cited as a catalyst to domestic violence in the Inuit context.<sup>71</sup> Thus, in the Inuit context specifically, the temporary absence of the abuser may create a situation more likely to encourage violence when he returns.

Beyond financial issues, the loss of the abuser can mean other deprivations. Abusive relationships are complicated and offenders often provide victims with emotional support as well as abuse.<sup>72</sup> Some literature characterizes the detention of the offender as a second loss for the victim, the loss of the family member being its own calamity.<sup>73</sup> It may also deprive women of a tool in mediating their relationship; some women use police intervention as a signal to their husband that he has crossed a line and then drop the charges when the message has been received. No-Drop prosecution ends women's ability to act in this way.<sup>74</sup>

While the idea of violence is hard to stomach, No-Drop prosecution makes the assumption that women aim to sever ties with their abuser. Considering how interconnected people are with their partners through finance, children and family, this is not always a reasonable option. Given the small size of communities in Nunavut, interpersonal bonds may be life-long and very difficult to break. Taking choices away from women living in situations that are far from the experience of policy makers is paternalistic and fails to acknowledge the diversity of women's interests.

## B. Diversion Skepticism

The second PPSC policy related to domestic violence is that prosecution is seen as "usually" in the public's best interest. Diversion programs are only to be considered in "exceptional circumstances." The Deskbook requires that the complainant be willing to consider an alternate to prosecution, the violence was minimal, the offender has no record of previous violent offenses, the offender is willing to change, and a program that is likely to reduce violence is available.<sup>75</sup> While only the complainant's willingness to have the case go to a diversion program appears to be mandatory, the long list of factors makes it seem as if diversion is a very limited option.

## C. Reluctant Witness Support

Finally, the Deskbook instructs prosecutors to put a "reluctant witness" in contact with a victim witness assistant or another support person early in the process, and to consider

68 *Ibid* at ch 28, s 28.4

69 Statistics Canada, 2011 National Household Survey, *supra* note 2.

70 Billson, *supra* note 11 at 8.

71 Pauktuutit Inuit Women's Association, *supra* note 8 at 4; Billson, *supra* note 11 at 8.

72 Arlene Weisz, "Legal advocacy for domestic violence survivors: The power of an informative relationship" (March/April 1999) 80:2 *Families in Society* 139.

73 Pauktuutit Inuit Women's Association, *supra* note 8 at 14.

74 Leigh Goodmark, *A Troubled Marriage*, *supra* note 9 at 140-141.

75 PPSC, *Deskbook*, *supra* note 7 at ch 28, s 28.3.

measures such as barring the public from the court and placing a publication ban on the victim's identity.<sup>76</sup> Considering some jurisdictions force women to testify against their partners by holding them in contempt of court if they do not, it is encouraging that PPSC has chosen a less coercive approach. The policy appears to incorporate the conclusion of multiple studies that found women who receive advocacy services show increased commitment to the criminal justice process and are more likely to have their abusers found guilty.<sup>77</sup>

Assuming that reluctant witness support increases successful prosecutions in Nunavut, the question must be asked, what is the outcome of these prosecutions? Experiences inside the American legal system suggest that participating in a successful prosecution can be empowering for women who are supported throughout the process.<sup>78</sup> However, given the Inuit's historical relationship with the justice system, there are questions as to whether the same gains in empowerment can be made in Nunavut's courts. According to Alfred, to create a legitimate post-colonial relationship, notions of European superiority must be abandoned and a mutually respectful stance adopted.<sup>79</sup> Successful prosecutions in the settler court system do not affirm the validity of indigenous conceptions of justice or rebuke the notion of European superiority. From an anti-colonial perspective, aiding in prosecution is more likely to further entrench a colonized mindset than to empower, despite any services provided to victims of abuse.

The effects on the abuser are very similar, as prosecution by the colonial court system is an un-empowering experience for men. The Royal Commission on Aboriginal Peoples stated that the humiliation and frustration that comes from the inequality between aboriginal and settler peoples is one factor that causes gendered violence.<sup>80</sup> It stands to reason a man who is incarcerated because his partner sought recourse from the settler justice system is likely to feel even more humiliation and frustration. One of the reasons identified as to why Inuit men abuse is that they lack respect for things they consider to be in the woman's domain, including their pain.<sup>81</sup> Spending time immersed in a legally gendered space like prison is unlikely to change this. Unless highly effective counseling is provided, the goal of ending the violence is unlikely to be furthered by incarceration. Rather, violence is only likely delayed, and eventually turned on the original survivor, a new victim, or the abuser himself upon release.

#### D. The "Special Circumstances" of the Territories

Interestingly, the PPSC Deskbook justifies its agency-reducing policies through the "special circumstances" of Canada's northern territories. The abused spouse has no say in whether prosecution takes place because: "a) the victim may have no access to the same types of support often found in southern Canada, such as emergency shelters or counselling services; b) the victim may face pressure in the community not to report the crime; and c) absolute prohibitions on contact with the alleged abuser may be unrealistic in a small isolated community."<sup>82</sup>

The three justifications cited are for the most part accurate. Nunavut only has three women's shelters, with many women in the west of the territory seeking refuge in

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76 *Ibid* at ch 28, s 28.8.

77 Weisz, *supra* note 72 at 3.

78 *Ibid* at 10.

79 Alfred, *supra* note 10 at 87.

80 Billson & Mancini, *supra* note 30 at 4.

81 Pauktuutit Inuit Women's Association, *supra* note 8 at 6.

82 PPSC, *Deskbook*, *supra* note 7 at ch 28, s 28.2

the shelter located in the Northwest Territories' capital, Yellowknife.<sup>83</sup> Nunavut's communities are certainly very small and people who have worked to encourage women to report domestic violence have experienced hostility from some community members.<sup>84</sup> Domestic violence is very likely underrepresented,<sup>85</sup> though the phenomenon of underreporting is not unique to Nunavut. With these facts in mind, the question is whether these special circumstances nullify Nunavut's other unique characteristics? Anti-colonial theory would suggest this is not the case. All three territories have large aboriginal populations; Nunavut's population is 85.4 per cent Inuit.<sup>86</sup> Having No-Drop prosecution aimed at the territories is a distinctly colonial measure. The policy restricts the choices of people already forced to participate in a foreign justice system. Alfred, who is clear that settler conceptions of justice are distinct from aboriginal conceptions of justice,<sup>87</sup> says that the colonial mentality "blocks recognition of the existence or viability of traditional perspectives."<sup>88</sup> Telling women that the settler legal system is the only way to resolve the power imbalance in their relationship furthers the colonial mentality, implicitly casts doubt on the validity of aboriginal traditions, and is a block to the creation of the supportive community Alfred argues is essential to ending aboriginal men's violence. No-Drop prosecution is a short-term solution that exacerbates a long-term problem.

#### IV. FAMILY ABUSE INTERVENTION ACT

Passed in 2006, the *Family Abuse Intervention Act* ("FAIA") was the Nunavut Legislature's attempt to implement legislation that allowed an alternative to formal legal proceedings to address situations of domestic violence.<sup>89</sup> In addition to passing the bill, the government created the position of Community Justice Outreach Worker (CJOW) in every hamlet to facilitate victims' use of the bill. Despite the government's initial commitment to alternative forms of legal proceedings, critics still consider the bill a failure and charge the government with neglecting the issue.<sup>90</sup> Anti-essentialist and anti-colonial lenses are helpful in understanding why the bill is held in such disrepute.

The *FAIA* creates a number of legal orders that can be sought, though only two have been used with any kind of regularity since its implementation.<sup>91</sup> The first kind, Emergency Protection Orders ("EPOs") are designed for people in urgent situations. They can give the victim possession over the family dwelling and custody of the children, while putting a do-not-contact order on the abuser. Community Intervention Orders ("CIOs") differ in that they require the abuser and survivor to attend traditional Inuit counseling with a specified traditional counselor. Finally, while rarely used,<sup>92</sup> Compensation Orders ("COs") allow survivors of abuse to seek financial compensation for property damage caused by abuse, as well as costs incurred in fleeing violence. COs are notable in that

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83 Jane George, "Nunavut women fleeing violence fill half the beds at Yellowknife shelter", *Nunatsiaq News* (30 September 2011), online: NunatsiaqOnline <<http://www.nunatsiaqonline.ca>> [George, "Nunavut women"].

84 Genesis Group, *Family Abuse Intervention Act: Implementation Evaluation* (2009) at 34. Available through Legislative Library of the Legislative Assembly of Nunavut.

85 Billson, *supra* note 11 at 73.

86 Statistics Canada, *2011 National Household Survey*, *supra* note 2.

87 Alfred, *supra* note 10 at 66.

88 *Ibid* at 94.

89 Genesis Group, *supra* note 84 at 25.

90 "Noble ends, bungled means", Editorial, *Nunatsiaq News* (13 March 2011), online: NunatsiaqOnline <<http://www.nunatsiaqonline.ca>>

91 Genesis Group, *supra* note 84 at 25-26.

92 *Ibid* at 56.

most other jurisdictions do not have as robust a way of getting financial assistance to survivors of abuse.

In addition to the CIOs and COs, which represent novel court orders, the *FAIA* is innovative in other ways. The *Act* is unprecedentedly broad in its definitions of who can avail themselves of its protections, defining family abuse as something that can take place among people in “intimate”, “family”, or “care” relationships.<sup>93</sup> The *FAIA* is clearly cognizant of the fact that due to housing shortages, many Inuit have no choice but to live in close quarters with parents, children or friends.<sup>94</sup> The *Act*’s willingness to cover whomever may be in a household is a clear signal to those enforcing the law that they should be open to atypical abusive relationships, and represents a move away from essentialism in domestic abuse policy.

In addition to a broad array of orders available for a broad array of people, the *FAIA* is designed with a streamlined process for obtaining the orders. To obtain an EPO or CIO a one page form must be filled out and faxed to the offices of the Justices of the Peace (“JP”). The office immediately sets up a time for an *ex parte* hearing, to be held over the phone.<sup>95</sup> If the JP is satisfied, the order is granted immediately. Within five days, the order is reviewed by a judge of the Nunavut Court of Justice. The judge either confirms the JPs decision, or orders a *de novo* hearing of the matter.<sup>96</sup> Respondents to the order have 21 days to request a review of an EPO granted by a Justice of the Peace.<sup>97</sup>

The *FAIA* also appears to recognize that some victims of abuse would likely need help in filling out forms and selecting from the wide array of options available. The legislation specifies that family members, lawyers, RCMP officers and “prescribed persons” can all apply for orders with the consent of the applicants.<sup>98</sup> The regulations clarify that prescribed persons are those occupying the Community Justice Outreach Worker position and those working at shelters.<sup>99</sup>

## A. Evaluation: EPOs

The design of the Emergency Protection Orders offers some respect for women’s agency. For example, the process of getting an EPO appears to allow a woman to avoid involving the RCMP if she wishes. She can fill out the forms herself, avoiding contact with all government officials, save for the hearing with a Justice of the Peace. If she requires assistance, CJOWs exist (in theory)<sup>100</sup> to help her select the restraints she wants against her partner. Ignoring all colonial dimensions that are still in place, the experience might be considered empowering.

Unfortunately, practice does not match up with theory. The problem with EPOs is that research shows they can endanger the safety of the women they are meant to protect. In

93 *Family Abuse Intervention Act*, *supra* note 6, s 2.

94 Cathleen Knotsch & Dianne Kinnon, *If Not Now...When?: Addressing the Ongoing Inuit Housing Crisis in Canada* (Ottawa: National Aboriginal Health Organization, 2011) at 24, 38, online: <[http://www.naho.ca/documents/it/2011\\_Inuit-Housing-Crisis-Canada-FullReport.pdf](http://www.naho.ca/documents/it/2011_Inuit-Housing-Crisis-Canada-FullReport.pdf)>.

95 *Family Abuse Intervention Act*, *supra* note s 7; Genesis Group, *supra* note 134 at 15.

96 *Family Abuse Intervention Act*, *ibid*, ss 15-16.

97 *Ibid* at s 13.

98 *Ibid* at s 26(b).

99 *Family Abuse Intervention Regulations*, Nu Reg 006-2008, s 3.

100 For various reasons that go beyond the scope of this paper, the Community Justice Outreach Workers are reported to be largely a failure. They’ve been found to lack support or supervision (Genesis Group, *supra* note 84 at 32), that they don’t understand their duties (Genesis Group, *ibid* at 36) and that this ignorance of the *Family Abuse Intervention Act* by the CJOWs has hurt community awareness of the *Act* as well (Genesis Group, *ibid* at 6).

American jurisdictions that have civil protection orders, a large proportion of domestic violence occurs after restraining orders have been delivered.<sup>101</sup> Women who have been separated from their abusive partner are also more likely to be victims of homicide than before the separation.<sup>102</sup> The theory behind this violence is that abusers see their victim's obtaining of a civil order as an assertion of independence. The offender reacts by trying to reassert his power over his victim, usually through violence.

There are many factors that suggest that the problem could be just as bad or worse in Nunavut. Firstly, in theory, the EPO is delivered to the abuser by the RCMP. This could bring up the humiliation associated with settler-dominance of the justice system. Secondly, given the small size of many Nunavut communities, the idea of avoiding contact is impractical. Beyond that, enforcement of the orders is an issue. There might be two RCMP officers in a town of 300. How they are supposed to protect a woman against a partner wishing to reassert his power is unclear. Talking about EPOs and probation orders, one Nunavut resident said “[n]one of that paper stuff works...it's just paper and means nothing.”<sup>103</sup> Clearly government orders alone cannot divest abusers of their power.

Making matters worse, Nunavut lacks the administrative capacity to effectively enact the EPOs. Most notably, EPOs were not added to the information available to the RCMP,<sup>104</sup> meaning the RCMP have been charged with enforcing orders they do not know exist. There have also been problems with EPOs that grant the victim exclusive use of the home. There have been at least three cases of women being ejected from houses they were granted exclusive use of, because their names were not on the lease, and public housing authorities claimed no knowledge of the housing provisions in the *FAIA*.<sup>105</sup> There have also been conflicts between social workers and women who have been granted exclusive custody of their children through EPOs.<sup>106</sup> Considering that the legislation is clear that EPOs take precedent<sup>107</sup> over the *Child and Family Services Act*<sup>108</sup>, the *Children's Law Act*<sup>109</sup>, the *Family Law Act*<sup>110</sup> and the *Divorce Act* (Canada),<sup>111</sup> these incidents indicate poor implementation and promotion of *FAIA*.

## B. Evaluation: CIOs

There is much to praise about Community Intervention Orders. They represent an anti-essentialist innovation in dealing with domestic abuse. Firstly, CIOs provide a form of relief for women in abusive relationships which does not require the separation of the parties. EPOs assume that a woman wants to leave the relationship, but are only hindered by concerns about children, housing, money and the abuser himself. CIOs respect that even with options to manage those matters, a woman may have other goals (like maintaining the marriage, not disrupting her social circle, or giving her children a father) that she wishes to pursue even if it means risking her safety. By providing women with a remedy that is not separation-based, women's agency is respected. Evidence in the

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101 Goodmark, *Troubled Marriage*, *supra* note 9 at 83.

102 *Ibid.*

103 Genesis Group, *supra* note 134 at 56.

104 Genesis Group, *supra* note 134 at 50.

105 *Ibid* at 58.

106 *Ibid.*

107 *Family Abuse Intervention Act*, *supra* note 6, s 9.

108 *Child and Family Services Act*, SNWT 1997, c 13, as enacted for Nunavut, pursuant to the *Nunavut Act*, SC 1993, c 28.

109 *Children's Law Act*, SNWT 1997, c 14, as enacted for Nunavut, pursuant to the *Nunavut Act*, SC 1993, c 28.

110 *Family Law Act*, SNWT 1997, c 18, as enacted for Nunavut, pursuant to the *Nunavut Act*, SC 1993, c 28.

111 *Divorce Act*, RSC 1985, c 3.

government commissioned report on the *FAIA* suggests that CIOs are more appropriate in the Nunavut context because women who get an EPO usually get back with their partner within two or three days regardless of the order.<sup>112</sup>

CIOs are also important because they represent something of a legislative recognition that women may stay in abusive relationships. Women who stay in abusive relationships are often treated with skepticism when communicating their situation to judges, the police, or prosecutors—all of whom may work on the assumption that if a woman is not trying to leave a relationship, abuse is not actually happening.<sup>113</sup> While legislative recognition of a fact is unlikely to change assumptions on its own, it represents a positive step.

While there are theoretical positives to CIOs, there are also some large practical problems. Given the often tragic results of restraining orders, CIOs may represent a safer option for women. However, this is far from certain. In the American context, court-ordered counselling only enraged some women's partners, resulting in more abuse.<sup>114</sup> While there have not been any reports of counselling-inspired violence in Nunavut, evidence shows that CIOs have still been largely ineffective.

The first piece of evidence which demonstrates that CIOs are largely ineffective is the low rate of usage of the orders. From 2008 to 2010, there were twenty-two applications for CIOs, but only seven were granted.<sup>115</sup> The low number of requests is explained by the very low level of awareness of the *FAIA* in Nunavut, and the ineffectiveness of the CJOWs. In addition, the fact that only a third of requests were granted raises questions. The government-requested report on *FAIA* describes the low rate of successful CIO applications as being outside the scope of the study, only explaining it as being caused by “sociological issues, personal considerations, and the application of legal theory.”<sup>116</sup> The lack of detail in the report is frustrating. Sociological issues could be a reference to essentialist and agency-denying ideas held by Justices of the Peace and judges, but without more detail, nothing can be said for certain.

The second issue with CIOs is that the “specified traditional Inuit counselor”<sup>117</sup> the *FAIA* makes reference to is undefined, and is not a position that formally exists. The government-commissioned report on the *FAIA* makes it clear that Nunavummiut doubt that Inuit elders have the ability to effectively counsel domestic violence. Some informants even suggested that elders might condone physical discipline of a wife by her husband.<sup>118</sup> At the same time, elders expressed an unwillingness to get involved in “family issues.”<sup>119</sup> It appears that that the government of Nunavut thought it could have its legislation embrace traditional values at the same time as off-loading the cost of employing counselors.

Using Alfred's theory, there is more to be uncovered by analyzing CIOs than simply poor governance. A comment about traditional counselors from one of the *FAIA* report's informants brings the government's mistake to light: “*The elders were beaten or beat up people themselves – who wants counseling from those people?*”<sup>120</sup> Elders inside Inuit communities have been colonized just as much as anyone else. This has two outcomes.

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112 Genesis Group, *supra* note 84 at 56.

113 Goodmark, *Troubled Marriage*, *supra* note 9 at 81.

114 Goodmark, “Reframing”, *supra* note 9 at 14.

115 Genesis Group, *supra* note 84 at 51.

116 *Ibid* at 52.

117 *Family Abuse Intervention Act*, *supra* note 6 at s 17(2)a.

118 Genesis Group, *supra* note 84 at 52.

119 *Ibid* at 5.

120 *Ibid* at 51.

The first is that the healers need healing themselves. The second is that “communities lack the solid, well-defined cultural roles for elders and traditional teachers that [...] aid in the transition of knowledge and meaning.”<sup>121</sup> By redirecting the responsibility for abusive relationships to elders, the government tried to unilaterally conjure up roles that no longer exist.

Alfred urges a more dynamic revitalization process. He suggests that if elders are not in a position to be able to offer support, the task of adapting and transmitting traditional wisdom should fall to scholars, writers and artists.<sup>122</sup> Embracing the traditional wisdom does not mean that it must take the form of support from elders.

### C. Conclusions on the FAIA

Together, EPOs and CIOs represent a commendable attempt at providing women with choices about how to manage domestic violence. Given that EPOs are hard to enforce, and may inspire violence, separation orders should be regarded skeptically and cannot be the sole solution for dealing with domestic violence. Nonetheless, to best respect women’s agency, EPOs should remain an option who may wish to manage their relationship through their use, and should be better supported by Nunavut’s government. CIOs are a positive innovation, in that they recognize separation as being frequently inappropriate in the Nunavut context. To make the orders workable however, large changes are needed. Given the low rates at which CIOs are granted, it appears Nunavut’s judges and JPs are not prioritizing women’s agency when making their rulings. If that is the case, one step in overcoming judicial mistrust of the order would be to build an effective counseling apparatus, with either counselors trained in academic institutions, or a community-based solution that either fills or compliments the role elders once played.

## V. RANKIN INLET SPOUSAL ASSAULT PROGRAM

Started in 2007, the Rankin Inlet Spousal Assault Program (RISAP) is Nunavut’s only spousal abuse counseling program.<sup>123</sup> The initiative is a pre-sentencing program, meaning that the program is available to those in the hamlet who have been charged with a domestic assault and have entered a guilty plea. If they successfully complete the program, the prosecution and defense ask for a conditional discharge as the sentence.<sup>124</sup> The RISAP also provides counseling to those who have been victims of spousal abuse and conducts outreach work to build awareness of family violence issues in the community.<sup>125</sup>

The approach the program takes with offenders is a mixture of traditional knowledge and more conventional counseling. Offenders attend both individual and group counseling sessions. Elders are often invited to the group counseling sessions to talk about family life and resolving disputes without violence, as well to instill pride in traditional ways and boost self-esteem.<sup>126</sup> Elders who participate with the program are also available to provide guidance on issues besides family violence after the program is finished.<sup>127</sup> Interestingly, similar to the findings of the *FAIA* report referenced above, initially some elders did not condemn all forms of spousal violence. Program staff addressed the problem by

121 Alfred, *supra* note 10 at 171.

122 *Ibid.*

123 Department of Justice, *Rankin Inlet Spousal Assault Counselling Pilot Program Final Evaluation* (March 2007) at 1, online: RESOLVE Saskatchewan <<http://www.uregina.ca/resolve/PDFs/Rankin%20Inlet%20Evaluation.pdf>> [Department of Justice, Rankin Inlet]

124 *Ibid.*

125 *Ibid* at 4.

126 *Ibid* at 29.

127 *Ibid.*

clarifying the program's stance on spousal violence. The subsequent positive role played by the elders demonstrates that though they have been influenced by colonialism, it is not a bar to their participation in the program, it is merely a fact that has to be acknowledged and addressed.<sup>128</sup>

## A. Evaluation

The RISAP program is in line with the six values of the battered women's movement and acknowledge the realities of domestic abuse. There is no push for separation of partners and most couples stay together during the program.<sup>129</sup> Counseling for the survivors is available whether she stays with her partner or not.<sup>130</sup> This approach respects women's agency in a way that solutions that demand separation do not. The program may also help build agency: most of the survivors became employed or started a skills-enhancing program while attending the counseling.<sup>131</sup>

The fact the abusers may avoid jail time by completing the program is not necessarily contrary to the goal of holding perpetrators accountable. The program stresses that offenders recognize themselves as being held accountable for their actions.<sup>132</sup> Being made to tell stories of the abuse they perpetrated is a form of accountability<sup>133</sup> and it could be argued to be a superior form of accountability than imprisonment, where the perpetrator does not have to address the reason for his incarceration.

In terms of stopping the violence, the program appears to be a success. Of 28 people who attended some of the program, only two were subsequently charged with assaults, and neither of those individuals had completed the entire program.<sup>134</sup> One assault took place in public against another male, while the other was the homicide of the original complainant.<sup>135</sup> While acknowledging this dreadful fact and recognizing it illustrates the high-stakes nature of these programs, these statistics seem to indicate that RISAP is highly successful. Nonetheless, given the RISAP's small sample size, and the fact that it has only been two to four years since the men have completed the program, the program's successes are tentative. At the same time, the results suggest that because of their colonial experience, counseling addressing Inuit men's specific issues may be particularly effective.

With positive results, it is tempting to avoid finding fault. However, anti-colonial thinking pushes for a more critical evaluation. According to Alfred, the format is an ideal site of decolonization: "the movement towards decolonization [...] will emanate from transformations achieved by direct-guided experience in small, personal, groups and one-on-one mentoring [...]."<sup>136</sup> The problem is the lack of decolonization in the program's curriculum. For Alfred, the first step to ending the internal colonialism that causes domestic abuse is to create awareness of the pain's source. A review of the curriculum of the group sessions for abusers shows the program does not emphasize this point. Most of the sessions deal with either anger-management techniques like time-outs, knowing your warning signs and awareness of stressors, or responsibility-centered

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128 *Ibid* at 29.

129 *Ibid* at 7.

130 *Ibid* at 10.

131 *Ibid* at 33.

132 *Ibid* at 7.

133 Goodmark, *Troubled Marriage*, *supra* note 9 at 182.

134 Department of Justice, *Rankin Inlet*, *supra* note 123 at 4.

135 *Ibid* at 31.

136 Alfred & Cornassel, *supra* note 62 at 613.

activities like debunking excuses for spousal abuse.<sup>137</sup> The closest that the program's group counseling comes to raising awareness of the pain's source are sessions where abusers write their life story with special attention to the losses suffered.<sup>138</sup> While some may draw the connection between their losses and the colonial experience, the program does not broach the subject.

Administered by Pulaarvik Kablu Friendship Centre, Nunavut and Canada's justice departments, as well as Public Security and Emergency Preparedness Canada provided funding for the pilot project. The dependence on colonizing government structures explains the lack of any decolonizing themes to the curriculum. Nonetheless, the program might not be a complete failure of Alfred's vision of ending violence through decolonization. The program encourages the development of a supportive community by bringing abusers together in frank discussions, creating a place for elders to advise those who need it, and facilitating a greater connection between spouses. The infrastructure for a political project is being created, even if political content is absent from the project.

## FURTHER STEPS AND CONCLUSIONS

In Inuit mythology one of the most important figures is Sedna, the goddess of marine mammals. As marine mammals are an important source of food and skins for the Inuit, good relations with Sedna are key to the Inuit's survival. Though there are many versions of the story, there is a basic pattern of a young woman who is "mistreated, and then sacrificed for selfish reasons."<sup>139</sup> One version of the story tells of a woman who rejects her suitors, but is wooed by the spirit of a fulmar<sup>140</sup> who promises to take her to his lavish and well stocked home. Upon arriving the woman finds she was deceived. She is fed only fish and lives a miserable life in a drafty tent. The woman's father eventually hears of her situation and attempts to rescue her. The two attempt to escape by boat, but are caught by a swarm of fulmars. In an attempt to placate the birds, the father throws his daughter out of the boat. When she clings to the side, he uses his knife to cut off her fingers. As they fall in the ocean, the pieces of finger become the sea mammals while the woman is transformed into Sedna.<sup>141</sup>

Anyone who has been following Nunavut's attempts to eliminate domestic violence in the territory may see some parallels between the efforts of the father in the story, and the efforts of the government. An initial effort to save a woman in a bad relationship meets adversity and ultimately ends in betrayal. There are several examples to support this analogy. First, the government commissioned a report to evaluate the *Family Abuse Intervention Act* and received a largely negative report in February of 2010. Rather than act, the government waited until March 2011 to even table the report in the legislature.<sup>142</sup> It is alleged that the government was delaying new legislation until after the 2013 election to avoid generating controversy.<sup>143</sup> A draft family violence strategy released in March 2013 was called "short on specific details"<sup>144</sup> and the Qikiqtani Inuit Association said it did not reflect a serious

137 Pulaarvik Kablu Friendship Center, *Spousal Abuse Counseling Program: Manual For Counselors* (2006) at 55, online: Public Safety and Emergency Preparedness Canada <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/spsl-bs-cnsIng/spsl-bs-cnsIng-eng.pdf>>.

138 *Ibid* at 114.

139 Neil Christopher, *Kappianaqtut: Strange Creatures and Fantastic Beings from Inuit Myths and Legends Volume 1* (Canada: Inhabit Media, 2011) at 21.

140 A fulmar is a northern sea bird.

141 Christopher, , *supra* note 139 at 13, 21-23.

142 George, "Nunavut women", *supra* note 83.

143 Mad Mom, "Nunavut government stalled family violence strategy, Mad Mom says", Letter to the Editor, *Nunatsiaq News* (26 October 2012) online: NunatsiaqOnline <<http://www.nunatsiaqonline.ca>>

144 Samantha Dawson "Nunavut reveals draft family violence strategy" *Nunatsiaq News* (20 March 2013) online: NunatsiaqOnline <<http://www.nunatsiaqonline.ca>>

document on the government's part.<sup>145</sup> In a similar vein, the positive results of the Rankin Inlet Spousal Abuse Program have been known since 2009. Yet neither the Canadian nor Nunavut governments have made any movements towards replicating the program in other communities. Finally, highlighting how prevalent the problem of domestic violence is in Nunavut, the Member of the Legislative Assembly ("MLA") for Pangnirtung was suspended from the legislature in 2011 when it was discovered he was facing spousal assault charges.<sup>146</sup> While he later resigned, it raises the question of the fitness of those who are supposed to develop solutions to the territory's problems.

Taking a feminist lens, the first step is to addressing the high rates of domestic violence is to elect more people willing to prioritize the issue to the Nunavut legislature. As of 2014, there are only three female members of the twenty-one-member body. From there, the government could work at expanding the program offered in Rankin Inlet to bring perpetrators in contact with counseling, and could improve *the Family Abuse Intervention Act* to retain the elements that allow a woman to manage how her case of domestic violence will be dealt with. While poverty and the government's administrative capacity would need to be addressed, these reforms could help stop the violence that currently exists.

Taking an anti-colonial lens, the path forward is more uncertain. Alfred is clear he believes indigenous governments that conform to settler-expectations will by design "undermine, divide and assimilate indigenous people [and that] those who achieve power run the risk of becoming instruments of those objectives."<sup>147</sup> If the MLAs are vulnerable to co-option, their slowness to address the problem is understandable: the state structure they belong to does not prioritize the needs of aboriginal women, and is unlikely to look favorably on solutions that divest the state of power over individuals. If part of the cause of domestic violence is the disempowering authority of the colonial state, then the Nunavut legislature is not the ideal body to rectify the problem.

The Nunavut government is a reality however, and steps will have to be taken even in the face of intransigent government. Alfred's emphasis on decolonization beginning at the individual level recommends that counseling programs not only be expanded across the territory, but that their curriculum promote pride in being indigenous and address the role of colonialism in bringing men in the program to their current situation. As previously mentioned, the Canadian government provides funding for the Rankin Inlet Spousal Abuse Program, and this may limit innovation in the curriculum, and the Nunavut government seems unwilling to really address the issue. Alfred's answer would be to find a way to administer the program without reliance on colonial funds. One potential source of funding (and direction) is Nunavut Tunngavik Incorporated ("NTI"), the Inuit-run organization that exists separate from the Nunavut government, and allocates the settlement money from the Nunavut Land Claims Agreement.<sup>148</sup>

Another step that could be taken is to continue the process of replacing settler justice institutions with a restorative justice system that comes from, and is administered by the communities. A justice system that encourages respect for, and reinvigoration of

145 Nunatsiaq News "QIA dumps on GN's draft violence prevention plan", *Nunatsiaq News* (22 March 2013) online: NunatsiaqOnline <<http://www.nunatsiaonline.ca>>

146 George, "Nunavut women", *supra* note 83.

147 Alfred, *supra* note 10 at 54.

148 NTI's relationship with the government is a complex one. It does not act as a parallel government, but it does exercise considerable influence over the Nunavut government, to the extent that the two bodies have a formal protocol dictating their rights and responsibilities. Whether Nunavut Tunngavik Incorporated perpetuates colonialism or is a decolonizing force goes beyond the scope of this paper, but it is a question well deserving of study. See Graham White, "Governance in Nunavut: Capacity vs. Culture" (Spring 2009) 43:2 *Journal of Canadian Studies* 60).

aboriginal traditions would represent true restorative justice, not only for victims and perpetrators, but through the decolonizing process of building them, for the community as a whole.

The bedrock for the project already exists. Community Justice Committees are at work in some communities, with counsels of elders taking diversions from the RCMP for some youth with misdemeanor charges. The committees involve the accused, the victim, and the community, and find solutions using Inuit principles like inclusiveness and co-operative decision-making.<sup>149</sup> Nunavut's former Chief Justice Beverley Browne has stated that courts are not adept at dealing with domestic violence, and that Community Justice Committees might be better suited.<sup>150</sup> To get to that point, the committees will have to increase their administrative capacity, prepare themselves to interact with more serious matters, and make the case for their legitimacy in the community. In other words, individuals will have to be found who believe in appropriateness of community directed justice and are deeply committed to the decolonization process. These will all be difficult tasks, but they can be attempted even in the face of apathy from the Nunavut government. On top of these challenges, the RCMP will have to be convinced to change its diversion policies to allow a wider range of matters to go before the Community Justice Committees. An end goal for the territory may be relieving the RCMP of its discretion over what matters go to Canadian courts and what matters go to the Community Justice Committees altogether. These are monumental tasks and goals, but the process of rebuilding Inuit justice intuitions and convincing colonial governments to recognize their legitimacy may well be as beneficial to the community as the institutions themselves.

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149 Department of Justice, *Review of Nunavut Community Justice Program: Final Report* (2004) at 12, online: Department of Justice <[http://www.justice.gc.ca/eng/rp-pr/aj-ja/rr05\\_7/rr05\\_7.pdf](http://www.justice.gc.ca/eng/rp-pr/aj-ja/rr05_7/rr05_7.pdf)>.

150 *Ibid* at 34.

ARTICLE

# BILL C-14: A STEP BACKWARDS FOR THE RIGHTS OF MENTALLY DISORDERED OFFENDERS IN THE CANADIAN CRIMINAL JUSTICE SYSTEM

Lisa Grantham\*

CITED: (2014) 19 Appeal 63–81

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## INTRODUCTION

The Canadian criminal justice system has long grappled with those who commit criminal acts while suffering from a mental disorder. As stated by Justice McLachlin (as she then was) in *Winko v British Columbia (Forensic Psychiatric Institute)* (“*Winko*”), “[i]n every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one.”<sup>1</sup> The task has certainly not been an easy one to date with lawmakers struggling to strike the appropriate balance between protecting the public and respecting the liberty of mentally disordered offenders. In 1992, this balance was achieved with the disposition scheme for offenders found not criminally responsible on account of mental disorder (NCRMD). Unfortunately, Bill C-14 will change the existing regime and could negatively impact both the criminal justice and the mental health system.<sup>2</sup> This paper will outline the origins of the mental disorder defence in Canada, examine how the NCRMD scheme currently operates, discuss a recent case involving a NCRMD accused, and finally analyze the proposed amendments. Sensationalistic cases involving mentally disordered offenders combined with a lack of understanding by the public as to how the mental disorder defence operates have caused the current government to push for unnecessary and unconstitutional amendments to the NCRMD regime.

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1 *Winko v British Columbia (Forensic Psychiatric Institute)*, [1998] 2 SCR 625 at 637–638, [1999] SCJ No 31 [*Winko*].

2 Bill C-14, *An Act to Amend the Criminal Code and the National Defence Act (Mental Disorder)*, 2nd Sess, 41st Parl, 2013 (first reading in the Senate November 26, 2013) [Bill C-14]. Previously introduced as Bill C-54 in the 1st Session of the 41st Parliament. The bill was awaiting second reading debate in the Senate when it died on the Order Paper because Parliament was prorogued in Fall 2013. By an Order made by the House of Commons on October 21, 2013, Bill C-14 was deemed approved at all stages completed in the previous session.

## I. HISTORY

The law has long provided an exemption from criminal responsibility for those who were mentally disordered at the time of the offence.<sup>3</sup> In Britain, the *Criminal Lunatics Act* was passed in the early 19th century and established a special verdict where, if the jury found that an accused was insane at the time of the offence, the court would direct that the accused be kept in strict custody “[...] until his Majesty’s pleasure shall be known.”<sup>4</sup> *M’Naghten’s Case* clarified the elements of the defence. In 1843, Daniel M’Naghten murdered the civil servant Edward Drummond and was found not guilty on the grounds of insanity. There was negative public reaction to this decision and the English common law judges were asked to state their opinion regarding the defence. The court held that:

The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.<sup>5</sup>

In Canada, the substantive defence and the post-verdict lieutenant governor’s warrant (LGW) system were both based on the British approach to insanity.<sup>6</sup> Offenders found not guilty by reason of insanity (NGRI) were automatically detained pursuant to the LGW system.<sup>7</sup> This regime was focused on the protection of society at the expense of the mentally ill offender’s liberty interests. The lieutenant governor had the power to indeterminately detain individuals found NGRI or to discharge them if it was in the offender’s best interests and not contrary to the public interest.<sup>8</sup> The offender had no ability to either appeal a decision or force the lieutenant governor to make a ruling within a certain time period.<sup>9</sup> In 1969, an amendment was implemented allowing the lieutenant governor to appoint an advisory board that could make recommendations regarding the dispositions of NGRI accused; however, this decision was entirely discretionary.<sup>10</sup> The LGW system afforded no procedural protections for mentally disordered offenders and although the need for reform was recognized, change would not be realized until the 1990s.

3 For a discussion of the historical origins of the mental disorder defence, see Edwin A Tollefson & Bernard Starkman, *Mental Disorder in Criminal Proceedings* (Toronto: Thomson Carswell, 1993) at 13-16 [Tollefson]. See also, Joan Barrett & Riun Shandler, *Mental Disorder in Canadian Criminal Law*, loose-leaf (consulted on January 6, 2014) (Toronto: Thomson Carswell, 2006) ch 4 at 1-3 [Barrett].

4 Tollefson, *supra* note 3 at 14.

5 *M’Naghten’s Case* (1843), 10 CL & Fin 200 at 209 [*M’Naghten’s Case*], cited in Canada, Royal Commission on the Law of Insanity as a Defence in Criminal Cases, *Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases* (Hull: Queen’s Printer, 1956) at 11 [*Report of the Royal Commission*].

6 Section 19 of *The Criminal Code, 1892*, SC 1892, c 29, the original provision that dealt with the substantive defence, was replaced by section 16 which came into force in the *Criminal Code, SC 1953-54*, c 51. The wording of the provision was heavily borrowed from *M’Naghten’s Case*.

7 Subsection 542(2) of the *Criminal Code*, RSC 1970, c C-34 read “where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant governor of the province is known.” This provision’s number was changed to s. 614(2) by RSC 1985, c C-46.

8 Barrett, *supra* note 3, ch 1 at 3. See also Simon N Verdun-Jones, “The Insanity Defence in Canada: Setting a New Course” (1994) 17:2 *Int’l J L & Psychiatry* 175 at 176 (ScienceDirect) [Verdun-Jones].

9 Barrett, *ibid* ch 1 at 3-4.

10 Tollefson, *supra* note 3 at 1.

Various groups called for changes to the LGW scheme. Firstly, as early as 1956, the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (Royal Commission) recommended that the provinces regularly assess the dispositions of NGRI accused.<sup>11</sup> Secondly, in 1976, the Law Reform Commission of Canada reviewed the *Criminal Code* mental disorder provisions and suggested that a verdict of NGRI should result in a full acquittal and the provincial mental health authorities should then assume responsibility for the offender.<sup>12</sup> The Law Reform Commission further recommended that the post-verdict system be eliminated and stated, “[t]he use of lieutenant governor warrants as a means of disposition of an accused or prisoner suffering from a mental illness is incompatible with our overall sentencing policy.”<sup>13</sup> Finally, the Mental Disorder Project, created by the Department of Justice in 1982 to research the existing mental disorder regime, similarly urged in its 1984 Draft Report (Draft Report) the dismantling of the lieutenant governor’s role. The Draft Report recommended that courts should make the primary disposition decision and mandatory review boards should be established that would deal with the accused on an ongoing basis.<sup>14</sup> There were undoubtedly strong concerns about the fairness of NGRI system but it would take a push from the Supreme Court of Canada (SCC) to provoke substantial reform.

In 1991, the SCC in *R v Swain* (“*Swain*”) struck down the LGW regime and forced the Parliament of Canada to develop a new scheme for dealing with mentally disordered offenders.<sup>15</sup> Chief Justice Lamer held for the majority of the SCC that section 614(2), the provision that placed the NGRI offender in automatic detention at the discretion of the lieutenant governor, violated both sections 7 and 9 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).<sup>16</sup> He found that holding those found NGRI in detention might be necessary to protect the public even though these individuals were not morally blameworthy.<sup>17</sup> However, the liberty interest of NGRI offenders under section 7 of the *Charter* was violated because they were automatically detained without any procedural protections.<sup>18</sup> Likewise, section 9 was offended due to the fact that the detention of those found NGRI was entirely arbitrary with no criteria in place to determine whether detention was warranted in the circumstances.<sup>19</sup> The SCC struck down section 614(2), but allowed a period of temporary validity of six months so that the Parliament of Canada could enact new legislation.<sup>20</sup> In the following year, a comprehensive new regime was introduced.

## II. THE SUBSTANTIVE NCRMD DEFENCE

In 1992, the Parliament of Canada amended the substantive defence cosmetically and the post-verdict regime for dealing with mentally disordered offenders substantially.<sup>21</sup>

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11 *Report of the Royal Commission, supra* note 5 at 42.

12 Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: 1976) at 22.

13 *Ibid* at 38.

14 Department of Justice, *Mental Disorder Project*, Draft Report (Ottawa: May 1984) at 41, 45 [*Mental Disorder Project*].

15 *R v Swain*, [1991] 1 SCR 933, [1991] SCJ No 32 [*Swain*]. For a discussion of this decision, see Verdun-Jones, *supra* note 8 at 175-177.

16 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. In the judgment, the SCC referred to the provision as subsection 542(2) as it then was in the RSC 1970, c C-34 version of the *Criminal Code*.

17 *Swain, supra* note 15 at para 116.

18 *Ibid* at para 122.

19 *Ibid* at para 130.

20 *Ibid* at para 156.

21 Bill C-30, *An Act to Amend the Criminal Code (mental disorder) and to amend the National Defence Act and the Young Offenders Act in consequence thereof*, SC 1991, c 43.

Section 672.34 of the *Criminal Code* changed the verdict from NGRI to NCRMD.<sup>22</sup> As held by the majority of the SCC in *R v Chaulk* (“*Chaulk*”), the defence operates “[...] as an exemption to criminal liability which is based on an incapacity for criminal intent.”<sup>23</sup> Section 16 of the *Criminal Code* provides that:

16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.<sup>24</sup>

There are two procedural and evidentiary issues to note. Firstly, there are limitations on which party may raise the issue of whether an accused was suffering from a mental disorder at the time of the criminal act.<sup>25</sup> An accused may not wish to raise an NCRMD defence during his or her trial for a number of reasons including avoidance of the hefty consequences that can result from the specialized verdict and the negative perception of mental illness.<sup>26</sup> As well, the accused may wish to plead a different defence that could result in a full acquittal regardless of whether they were mentally disordered at the time of the criminal act. If the Crown could raise evidence of mental disorder at any point, this ability could endanger the offender’s liberty interests, especially if the offender ended up being subject to a longer sentence than would be applicable under the traditional sentencing scheme.

Secondly, under subsection 16(2) of the *Criminal Code*, there is a presumption of sanity until either the Crown or the accused proves the contrary on a balance of probabilities.<sup>27</sup> In *Chaulk*, Chief Justice Lamer writing for the majority of the SCC held that this reverse onus was constitutional.<sup>28</sup> He held that subsection 16(2) infringed the presumption of innocence embodied in section 11(d) of the *Charter* because it allowed a conviction even though the trier of fact might have a reasonable doubt as to guilt.<sup>29</sup> However, this violation was justified under section 1 of the *Charter* due to the fact that to hold otherwise would place an onerous burden on the Crown to disprove sanity beyond a reasonable doubt in every case.<sup>30</sup>

Subsection 16(1) of the *Criminal Code* sets out the elements that must be proven to establish the NCRMD defence. The party that seeks to argue it faces a rigorous test. Firstly, it must be ascertained whether the accused was suffering from a ‘mental disorder’

22 *Criminal Code*, RSC 1985, c C-46, s 672.34 [*Criminal Code*].

23 *R v Chaulk*, [1990] 3 SCR 1303 at 1321, [1990] SCJ No 139 [*Chaulk*].

24 *Criminal Code*, *supra* note 22, s 16.

25 In *Swain*, *supra* note 15, the majority of the SCC held that the accused can raise the defence at any stage of the trial; the Crown can only raise the issue after the trier of fact has decided the accused is guilty of the offence charged or unless the accused has put their mental state at issue.

26 Barrett, *supra* note 3, ch 4 at 37. See also Verdun-Jones, *supra* note 8 at 182-184.

27 *Criminal Code*, *supra* note 22, s 16(2).

28 See Verdun-Jones, *supra* note 8 at 187-189.

29 *Chaulk*, *supra* note 23 at 1330.

30 *Ibid* at 1337-1339.

under subsection 16(1).<sup>31</sup> ‘Mental disorder’ is defined as a ‘disease of the mind’ under section 2.<sup>32</sup> The majority of the SCC held in *R v Cooper* (“*Cooper*”) that a disease of the mind encompasses “[...] any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.”<sup>33</sup> Whether the accused was suffering from a ‘mental disorder’ within the meaning of subsection 16(1) is a question of law for the judge to decide. If the judge finds that the condition alleged would be a ‘disease of the mind,’ the trier of fact must determine if the accused in fact had this condition at the time of the criminal act.<sup>34</sup> There is also a medical element. Expert witnesses testify as to whether they believe the illness meets the definition of ‘disease of the mind.’<sup>35</sup> The party raising the defence faces the hurdle of convincing a judge on the balance of probabilities that they were suffering from a condition that legally should be accepted as a ‘disease of the mind.’

The NCRMD accused must satisfy one of two branches under subsection 16(1) of the *Criminal Code* to make out the defence. The first branch is whether the accused at the time of the act was incapable of appreciating the nature and quality of the act or omission.<sup>36</sup> As noted by the Royal Commission, the English legislation uses the word ‘knowing’ as opposed to ‘appreciating.’ In the Royal Commission’s view, the concept of appreciating is broader than that of bare knowledge: “[t]he true test necessarily is, was the accused person at the very time of the offence [...] by reason of a disease of the mind, unable fully to appreciate not only the nature of the act but the natural consequences that would flow from it.”<sup>37</sup> The majority of the SCC in *Cooper* accepted the wider definition of ‘appreciate’; however, in later cases the meaning was narrowed.<sup>38</sup>

The second branch of the NCRMD defence is whether the accused was incapable of knowing that the conduct was wrong.<sup>39</sup> The SCC initially held that ‘wrong’ in subsection 16(1) referred to knowing that one’s conduct was ‘legally wrong.’<sup>40</sup> This holding was overturned in *Chaulk*, where the majority of the SCC held that the term also meant knowing that one’s behaviour was ‘morally wrong.’<sup>41</sup> Critics of this decision point out that there can be many views of what constitutes morally wrong behaviour in Canadian society.<sup>42</sup> The SCC in *R v Oommen* held that the true concern under the second branch of subsection 16(1) is the accused’s rational perception of his or her conduct.<sup>43</sup> If the party seeking to prove the onerous NCRMD defence under subsection 16(1) is successful, they will be subject to Part XX.1 of the *Criminal Code*.

31 *Criminal Code*, *supra* note 22, s 16(1).

32 *Ibid*, s 2.

33 *R v Cooper*, [1980] 1 SCR 1149 at 1159, 51 CCC (2d) 129 [*Cooper*].

34 Barrett, *supra* note 3, ch 4 at 9.

35 *Ibid*, ch 4 at 24.

36 *Criminal Code*, *supra* note 22, s 16(1).

37 *Report of the Royal Commission*, *supra* note 5 at 13.

38 See *R v Kjeldsen*, [1981] 2 SCR 617, 64 CCC (2d) 161 where the SCC held that ‘appreciate’ meant having the capacity to know what one is doing and if the accused had the capacity “to know that he was hitting the woman on the head with the rock...he must have the capacity to... understand the physical consequences which would flow from his act.” See also *R v Abbey*, [1982] 2 SCR 24, 68 CCC (2d) 394 where it was found that the accused’s appreciation of the penal consequences of their behaviour was irrelevant.

39 *Criminal Code*, *supra* note 22, s 16(1).

40 *R v Schwartz*, [1977] 1 SCR 673, 29 CCC (2d) 1 at 701.

41 *Chaulk*, *supra* note 23 at 1352-1358. See also Verdun-Jones, *supra* note 8 at 184-187.

42 Tollefson, *supra* note 3 at 31.

43 *R v Oommen*, [1994] 2 SCR 507, 91 CCC (3d) 8 at 520.

### III. THE CURRENT PROCEDURAL SCHEME UNDER PART XX.1 OF THE CRIMINAL CODE

Part XX.1 of the *Criminal Code* comprehensively deals with those found NCRMD. The accused is no longer subject to automatic and indeterminate detention at the discretion of the lieutenant governor.<sup>44</sup> Courts and specialized Review Boards work to craft the appropriate disposition for the mentally disordered offender while taking into consideration both the safety of the public and the accused's liberty interests.<sup>45</sup> This scheme was "[...] a deliberate move by Parliament to eliminate the former stereotypical assumptions about mentally disordered accused and provide a rational and more humane method of dealing with such persons."<sup>46</sup>

Once a court renders a verdict of NCRMD under section 672.34, the accused comes under the jurisdiction of Part XX.1. Section 672.38 mandates that Review Boards be established in every province.<sup>47</sup> The boards have expertise in both criminal law and mental health issues: a judge must chair them; one member must be a psychiatrist; and, where only one member is a psychiatrist, at least one other member must have training in mental health and be entitled to practice medicine or psychology.<sup>48</sup> The trial judge has the ability to hold a disposition hearing and, if a disposition is made other than an absolute discharge, the Review Board must review the order within 90 days.<sup>49</sup> Otherwise, a Review Board must hold a disposition hearing within 45 days, or at the maximum 90 days if a court orders an extension.<sup>50</sup>

The disposition hearing is conducted in accordance with section 672.5 of the *Criminal Code*. It is conducted in an informal manner with any party being able to adduce evidence, make submissions, or call witnesses.<sup>51</sup> The Crown may appear while the accused has the right to appear and the right to counsel.<sup>52</sup> Victims have the right under subsection 672.5(14) to file a victim impact statement describing the harm that was done to them as a result of the criminal offence.<sup>53</sup> As well, section 672.541 requires the court or Review Board to take into consideration the victim impact statement when determining the appropriate disposition.<sup>54</sup> At the disposition hearing, the accused, the Crown acting in the public interest, and the victim all have equal opportunity to have their interests represented.

Two essential aspects of Part XX.1 are how dispositions are made and how NCRMD accused are dealt with on an ongoing basis. A court or a Review Board must order an absolute discharge if the NCRMD accused is not a significant threat to the safety of the public.<sup>55</sup> If it is determined that the individual is a significant threat to the safety of the public, the court or Review Board must order a conditional discharge or a hospital detention order.<sup>56</sup> The court or Review Board must make the least onerous and restrictive disposition taking into consideration four enumerated factors: the need to protect the

44 Barrett, *supra* note 3, ch 1 at 9.

45 See *Criminal Code*, *supra* note 22, s 672.54.

46 Barrett, *supra* note 3, ch 1 at 9.

47 *Criminal Code*, *supra* note 22, s 672.38.

48 *Ibid*, ss 672.39, 672.4(1), 672.41.

49 *Ibid*, ss 672.45, 672.47(3).

50 *Ibid*, s 672.47.

51 *Ibid*, ss 672.5(2), 672.5(11).

52 *Ibid*, ss 672.5(3), 672.5(7), 672.57(9).

53 *Ibid*, s 672.5(14).

54 *Ibid*, s 672.541.

55 *Ibid*, s 672.54. See also *Winko*, *supra* note 1 at 669.

56 *Ibid*, s 672.54.

public; the mental condition of the accused; the reintegration of the accused into society; and any other needs of the accused.<sup>57</sup> The Review Board has the ability to delegate authority to the person in charge of the hospital to vary restrictions on the liberty of the accused.<sup>58</sup> Section 672.81 deals with the mandatory review of dispositions. Other than for an absolute discharge, Review Boards are obligated to assess an NCRMD accused's disposition every 12 months.<sup>59</sup> Timely review of dispositions ensures that NCRMD accused are not allowed to languish indefinitely in detention.

Bill C-30, the remedial legislation that brought in Part XX.1, provided for capping provisions. However, these sections were not proclaimed.<sup>60</sup> A concern with Part XX.1 was that an accused could be held in detention longer than he or she would have been detained under the traditional sentencing regime if he or she continued to pose a significant threat to the safety of the public.<sup>61</sup> The capping provisions provided that detention under the NCRMD disposition be capped at certain time limits depending upon the maximum penalty available upon conviction and the nature of the index offence.<sup>62</sup> If an accused reached their cap and still posed a threat to society, the provincial civil commitment process would intervene to ensure that the individual would continue to be detained.<sup>63</sup> Critics of the proposed capping measures argued that the provincial mental health systems would not adequately deal with the release of possible dangerous offenders who still threatened the safety of the public.<sup>64</sup> The capping sections highlighted the ongoing debate about how to properly balance the safety of the public and the liberty interests of the NCRMD accused.

The majority of the SCC in *Winko* held that Part XX.1 was a constitutional scheme.<sup>65</sup> The accused submitted that section 672.54 violated both his section 7 and 15 rights under the *Charter* because it placed the burden of disproving a presumption of dangerousness on NCRMD accused and created the possibility of indefinite confinement.<sup>66</sup> The majority found that section 672.54 did not create a presumption of dangerousness; rather, the court or Review Board was mandated to order an absolute discharge unless there was a positive finding that the NCRMD accused posed a significant threat to the safety of the public.<sup>67</sup> In order to meet this definition, “[t]he threat posed must be more than speculative in nature [and it] must also be significant, both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community

57 See *Penetanguishene Mental Health Centre v Ontario*, [2004] 1 SCR 498, 182 CCC (3d) 193 where the SCC held that the ‘least onerous and restrictive requirement’ also applied to crafting conditions after the enumerated factors were taken into account under section 672.54. See also the companion case *Pinet v St. Thomas Psychiatric Hospital*, [2004] 1 SCR 528, 182 CCC (3d) 214 [*Pinet*] where the SCC reiterated that NCRMD offender’s liberty rights were to be considered at every stage of the Part XX.1 regime.

58 *Criminal Code*, *supra* note 22, s 672.56(1).

59 *Ibid*, s 672.81.

60 *Ibid*, s 672.64, as repealed by *An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts*, SC 2005, c 22 [*An Act to amend the Criminal Code*].

61 See *Mental Disorder Project*, *supra* note 14 at 39 where the Department of Justice, prior to the 1992 reforms, recommended that the probable sentence had the person been convicted should be one of the primary considerations in establishing the time limit for a disposition for a verdict of NGRI.

62 Standing Committee on Justice and Human Rights, *Review of the Mental Disorder Provisions of the Criminal Code* (Ottawa: June 2002) at 2 [*Standing Committee*].

63 *Mental Disorder Project*, *supra* note 14 at 39.

64 Barrett, *supra* note 3, ch 1 at 13.

65 See also the companion cases of *Orlowski v Forensic Psychiatric Institute*, [1999] 2 SCR 722, [1999] SCJ No 33; *R v Lepage*, [1999] 2 SCR 744, [1999] SCJ No 34; *Bese v Forensic Psychiatric Institute*, [1999] 2 SCR 722, [1999] SCJ No 32.

66 *Winko*, *supra* note 1 at 644-645.

67 *Ibid* at 660-661.

and in the sense that this potential harm must be serious.<sup>768</sup> This definition of ‘significant threat’ provided useful future guidance to Review Boards.

The majority of the SCC rejected both of the *Charter* arguments. Section 7 of the *Charter* was not infringed because the NCRMD accused’s liberty was restricted no more than necessary to protect the public; in addition, section 15 of the *Charter* was not violated as Part XX.1 worked to combat negative stereotypes of the mentally ill.<sup>69</sup> The regime treated the NCRMD accused on the basis of their unique situation by providing for individual assessments, tailored dispositions, and annual reviews.<sup>70</sup> It was also noted that NCRMD accused could be detained without a fixed sentence because the purpose of a detention order was not to punish, but to protect society and treat the individual.<sup>71</sup> The SCC found that Part XX.1 was a laudable attempt by the Parliament of Canada to create a flexible scheme that dealt with the individual circumstances of mentally disordered offenders while still upholding the protection of Canadian society.<sup>72</sup>

Introduced in 2005, Bill C-10 made a number of changes to Part XX.1 of the *Criminal Code* that strengthened victim’s rights, but also reflected a move away from respecting the NCRMD accused’s liberty.<sup>73</sup> This bill was brought in largely in response to a review of Part XX.1 that was conducted by the Standing Committee on Justice and Human Rights in 2002.<sup>74</sup> Firstly, the capping provisions were repealed.<sup>75</sup> Secondly, sections were added to strengthen the rights of victims. Under subsection 672.5(15.1), the victim can present his or her statement at a disposition hearing if it would not interfere with the administration of justice.<sup>76</sup> The court or Review Board must inquire if the victim was informed of his or her right to prepare a victim impact statement and, if not, the hearing may be adjourned.<sup>77</sup> Additionally, under subsection 672.5(5.1), notice of the disposition hearing will be provided to the victim if requested.<sup>78</sup> Thirdly, the Review Board may extend the time for a review of a disposition up to two years if three criteria are met: the accused was found NCRMD for a serious personal injury offence; the accused is subject to a hospital detention order; and the Review Board is satisfied that his or her condition is not likely to improve and detention remains necessary for the extended period.<sup>79</sup> Currently, Part XX.1 is valid legislation that comprehensively deals with mentally disordered offenders.

After the enactment of Part XX.1, the number of accused who were found NCRMD increased. In 1987, 0.2% of those charged with an offence were found NCRMD compared

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68 *Ibid* at 665.

69 *Ibid* at 670-686.

70 *Ibid* at 681.

71 *Ibid* at 683-684.

72 *Winko*, *supra* note 1 at 686.

73 *An Act to amend the Criminal Code*, *supra* note 60.

74 Standing Committee, *supra* note 62. The Standing Committee recommended that sections be included that gave adequate notice of court or Review Board hearings to victims and that would permit victims to present their victim impact statements at disposition hearings. It was also recommended that the capping provisions be repealed.

75 *Criminal Code*, *supra* note 22, s 672.64, as repealed by *An Act to amend the Criminal Code*, *supra* note 60.

76 *Criminal Code*, *supra* note 22, 672.5(15.1).

77 *Ibid*, ss 672.5(15.2), 672.5(15.3).

78 *Ibid*, s 672.5(5.1).

79 *Ibid*, s 672.81(1.2). S 672.81(1.3) defines a ‘serious personal injury offence’ as an indictable offence involving the use of violence against another person, or conduct endangering the life or safety of another person or inflicting severe psychological damage upon another person, or a number of listed indictable offences.

with 0.54% in 2001.<sup>80</sup> From 1992 to 2004, 6,802 accused were found NCRMD with a 102% increase in the total number of cases admitted to Review Boards during this time period (including those found unfit to stand trial).<sup>81</sup> In British Columbia, James Livingston and his associates found that 276 offenders were found NCRMD during the six years after Bill C-30 was implemented.<sup>82</sup> In contrast, only 188 persons were found NGRI between November 1975 and January 1984.<sup>83</sup> A further study by Isabel Grant found that 38 new NCRMD cases entered the Review Board system in 1993 followed by 60 in 1994.<sup>84</sup> A possible reason for this increase is that the defence has become more attractive to defendants. As Hy Bloom and Brian Butler note, “[p]ost-*Swain*, it is almost always advantageous to pursue the defence, particularly if the client has completely recovered from the mental disorder and he or she no longer represents a significant threat to the safety of the public.”<sup>85</sup> As a result of the implementation of Part XX.1, the NCRMD defence was more frequently utilized.

Several studies have analyzed the characteristics of NCRMD accused and have revealed that a large number of these individuals have had previous contact with the criminal and mental health systems. Anne Crocker and her associates found that the primary diagnosis for NCRMD accused is schizophrenia.<sup>86</sup> In regard to past interaction with either the criminal justice or the mental health system, Jeff Latimer and Austin Lawrence found that 57.6% of NCRMD accused had a previous criminal conviction with 33.6% having at least one prior violent or sexual conviction.<sup>87</sup> In British Columbia, 76.5% of the NCRMD offenders that were examined had been in a psychiatric inpatient facility prior to their current involvement with the criminal justice system.<sup>88</sup> Similarly, in a study that took place in Quebec, 87.5% of NCRMD individuals had previously been hospitalized.<sup>89</sup> These studies suggest that many NCRMD accused may not be getting adequate mental health support and as a result find themselves coming into repeated contact with the criminal justice system.

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80 John E Gray, Margaret E Shone & Peter F Liddle, *Canadian Mental Health Law & Policy*, 2d ed (Markham: LexisNexis, 2008) at 415.

81 Jeff Latimer & Austin Lawrence, *The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Ottawa: Department of Justice, January, 2006) at 11 [Latimer].

82 James D Livingston et al, “A Follow-Up Study of Persons Found Not Criminally Responsible on Account of Mental Disorder in British Columbia” (2003) 48:6 *Can J Psychiatry* 408 at 413 (ProQuest) [Livingston].

83 *Ibid.*

84 Isabel Grant, “Canada’s New Mental Disorder Disposition Provisions: A Case Study of the British Columbia Criminal Code Review Board” (1997) 20:4 *Int’l J L & Psychiatry* 419 at 426 (ScienceDirect) [Grant]. See also Krishna Balachandra, Sam Swaminath & Larry C Litman, “Impact of *Winko* on Absolute Discharges”, online: (2004) 32:2 *J Am Acad Psychiatry Law* 172 < <http://www.jaapl.org>> that found an increase in the use of the NCRMD defence in Ontario after the decision in *Winko*.

85 Hy Bloom & Brian T Butler, *Defending Mentally Disordered Persons* (Toronto: Thomson Carswell, 1995) at 58.

86 Anne G Crocker et al, “Description and processing of individuals found Not Criminally Responsible on Account of Mental Disorder accused of “serious violent offences” (Ottawa: Department of Justice, March 2013) at 15 [Crocker, “Description”]. See also Sarah L Desmarais et al, “A Canadian Example of Insanity Defence Reform: Accused Found Not Criminally Responsible Before and After the *Winko* Decision”, online: (2008) 7:1 *Int’l J Forensic Ment Health* 1 at 5 <<http://www.tandfonline.com>> [Desmarais].

87 Latimer, *supra* note 81 at 16.

88 Livingston, *supra* note 82 at 410.

89 Anne G Crocker et al, “To Detain or To Release? Correlates of Dispositions for Individuals Declared Not Criminally Responsible on Account of Mental Disorder” (2011) 56:5 *Can J Psychiatry* 293 at 295 (ProQuest). See also Crocker, “Description”, *supra* note 86 at 17, where it was found that of accused found NCRMD for a serious violent offence, 38.8% had been previously convicted or found NCRMD.

A number of issues have been raised regarding Part XX.1.<sup>90</sup> Firstly, inadequate resources at the provincial level for mental health limit the effectiveness of the NCRMD regime. The criminal justice and the mental health system intersect and both must run efficiently if mentally disordered offenders are to be treated appropriately.<sup>91</sup> Unfortunately, these insufficient resources have had a negative effect on mentally disordered offenders in Ontario. From 1998 to 2008, *habeas corpus* applications were filed on behalf of several NCRMD accused who were being unlawfully held in detention centres because of insufficient space in psychiatric hospitals.<sup>92</sup> This unlawful detainment was occurring at all stages of the Part XX.1 process including assessments during trial, initial dispositions, and after annual reviews.<sup>93</sup> Inadequate mental health resources impact the constitutional rights of NCRMD offenders and could lead back to the arbitrary detention concerns that resulted in the dismantling of the LGW system.

Secondly, while victims' voices within the criminal justice system should be heard, the disposition hearing for a NCRMD verdict has a distinct purpose as opposed to a traditional sentencing hearing. Using section 672.541 and subsection 672.5(15.1) of the *Criminal Code*, the victim can have their victim impact statement considered by the court or Review Board and may present it at the disposition hearing.<sup>94</sup> At this time, the accused has been found to be not criminally responsible for the criminal act, and the sole issue before the court or Review Board is whether the NCRMD offender poses a significant risk to the public.<sup>95</sup> The admission of these statements could be "[...] counter therapeutic as it shifts the focus of the hearing away from determining the level of risk posed by the offender at the time of hearing back to the gravity of the index offence."<sup>96</sup> The case of Vince Li provides an example of an overbroad victim impact statement. In 2009, Li was found NCRMD with respect to a charge of second-degree murder for the killing of Timothy McLean on a Greyhound bus.<sup>97</sup> At his initial disposition hearing, portions of victim impact statements were struck out because they went beyond the impact that the offence actually had on the victims.<sup>98</sup> Clear guidelines should be developed around the acceptable content of a victim impact statement so that its presentation at a disposition hearing does not overshadow the crafting of an appropriate disposition order.

Thirdly, the extension of reviews under subsection 672.81(1.2) threatens the constitutionality of Part XX.1.<sup>99</sup> The majority of the SCC in *Winko* emphasized how the annual reviews allowed Review Boards to manage a NCRMD accused on a

90 See, for example, Standing Committee, *supra* note 62.

91 *Ibid* at 22-24. The Standing Committee called upon the provincial and federal governments to review and determine what level of resources was needed to deal with NCRMD accused. It was recognized that the increased number of NCRMD pleas had placed substantial strain upon the mental health system and this issue had to be rectified as soon as possible.

92 Janet Leiper, "Cracks in the Façade of Liberty: The Resort to Habeas Corpus to Enforce Part XX.1 of the Criminal Code" (2009) 55 CLQ 134 at 152 (Criminal Spectrum).

93 *Ibid* at 135-136. See also Barrett, *supra* note 3, ch 9 at 8 for a discussion of NCRMD offenders subject to hospital detention orders being held in correctional facilities in the Yukon.

94 *Criminal Code*, *supra* note 22, ss 672.541, 672.5(15.1).

95 See Standing Committee, *supra* note 62 at 14.

96 Barrett, *supra* note 3, ch 1 at 24.

97 *Re, Li* (June 1, 2009), [2009] CarswellMan 439 (Man. Review Board) (WL Can) at paras 3, 9.

98 *Ibid* at para 29.

99 *Criminal Code*, *supra* note 22, s 672.81(1.2). This provision provides that the Review Board may, after making an initial disposition, extend the time for holding a subsequent hearing up to a maximum of two years if the accused has been found NCRMD for a serious personal injury offence, is subject to a hospital detention order, and the Review Board is satisfied that the condition of the accused is not likely to improve and detention remains necessary.

consistent and individualized basis.<sup>100</sup> Arbitrary detention is a concern if an offender who was found NCRMD is detained without their mental condition being assessed regularly. Also, allowing the extension solely for ‘personal injury offences’ focuses on the nature of the index offence not on the risk posed by the NCRMD offender at the time of the disposition hearing.<sup>101</sup> As will be discussed below, the current amendments propose to create the possibility of pushing back disposition review hearings for the new classification of ‘high-risk’ NCRMD accused to a maximum of 36 months.

#### IV. A CASE STUDY: *R V SCHOENBORN*

Recent NCRMD verdicts involving horrific index offences have led to calls for the toughening of Part XX.1.<sup>102</sup> An example of this is the British Columbia case of Allan Schoenborn.<sup>103</sup> In 2009, Schoenborn was found NCRMD with respect to three charges of first-degree murder of his children. Firstly, the accused was successful in establishing on a balance of probabilities that, at the time of the offence, he was suffering from schizophrenia, a ‘disease of the mind.’<sup>104</sup> Secondly, under the second branch of section 16(1) of the *Criminal Code*, he made out that he was incapable at the time of the criminal act, to appreciate that what he was doing was wrong according to the moral standards of reasonable members of Canadian society.<sup>105</sup> After the NCRMD verdict was rendered, it fell to the Review Board to craft the appropriate disposition.

In 2010, pursuant to section 672.47, the Review Board held the initial disposition hearing and noted at the outset that “[t]he circumstances of this case [had] garnered considerable public scrutiny and notoriety, [and] the index offences were horrific and extremely violent.”<sup>106</sup> Firstly, the Review Board found that Schoenborn did pose a significant threat of serious harm to the safety of the public under section 672.54. In coming to this conclusion, the Review Board relied upon a risk assessment provided by the accused’s treating psychiatrist. This report recommended ongoing detention, and outlined how Schoenborn had an unwarranted sense of entitlement and lacked any insight into his illness.<sup>107</sup> Another piece of evidence the Review Board took into account was the victim impact statement filed by Schoenborn’s ex-wife under section 672.541, which outlined her continuing fear of the accused.<sup>108</sup> Secondly, the Review Board determined the ‘least onerous and restrictive’ disposition under section 672.54 was detention with narrow conditions including a no-contact order with his ex-wife.<sup>109</sup> The Review Board had little difficulty crafting a restrictive disposition given Schoenborn’s ongoing mental condition.

Controversy surrounding the Schoenborn case continues to attract media attention. In 2011, the Review Board held Schoenborn’s first mandatory review pursuant to

100 *Winko*, *supra* note 1 at 681. See also *R v Vaughan*, [1997] OJ No. 4252 (QL) (ONCA) where the Ontario Court of Appeal emphasized the mandatory nature of the annual review of the NCRMD offender by the Review Board.

101 See Barrett, *supra* note 3, ch 10 at 7 where it is argued that “drawing distinctions in the NCR population based on the nature of the offence arguably imports an element of personal responsibility for the criminal act that is otherwise lacking from Part XX.1.”

102 See, for example, Ian Bailey, “Prime Minister chokes up over Schoenborn’s young victims”, *The Globe and Mail* (8 February 2013), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

103 *R v Schoenborn*, 2010 BCSC 220, 2010 CarswellBC 362.

104 *Ibid* at para 234.

105 *Ibid* at para 243.

106 *Reasons for Disposition in the Matter of Allan Dwayne Schoenborn* (6 April 2010), online: BC Review Board <<http://www.bcrb.bc.ca>> at para 2 [*Reasons for Disposition*].

107 *Ibid* at paras 21-22.

108 *Ibid* at para 36.

109 *Ibid* at para 37.

subsection 672.81(1) of the *Criminal Code*. The hospital detention order was continued and it was ordered that Schoenborn be eligible for escorted day trips to the community.<sup>110</sup> There was harsh backlash to this disposition by the public and the media. The *Globe & Mail* quoted New Democrat MLA Harry Lali who stated, “[h]ere you have this brutal murderer and [...] he’s being allowed leave into the community and people are right [to be] upset about it.”<sup>111</sup> The right to the escorted day passes was revoked shortly thereafter because Schoenborn withdrew his request for them.<sup>112</sup> The media portrayed Schoenborn as a convicted murderer instead of someone found to be suffering from a serious mental disorder and not criminally responsible for his act.

In February 2013, Schoenborn had his latest review where his detention order was renewed and the Review Board recommended that he be transferred to a mental health facility in Manitoba.<sup>113</sup> His ex-wife opposed the request as she had family that resided in the area; nevertheless, it was found that the move would assist Schoenborn in re-integrating into society and in managing the risk he posed to the public.<sup>114</sup> However, the British Columbia criminal justice branch denied this move in July 2013 because it was found that the transfer would not be in the best interests of public safety.<sup>115</sup> The circumstances of the index offences committed by Schoenborn were atrocious. However, there appears to be a lack of understanding on the part of the media and the public that Schoenborn was found NCRMD for the offences and that dispositions are not meant to be punitive in nature. As well, there is no recognition of the fact that Schoenborn has been held in strict custody since his verdict of NCRMD was rendered, and as long as he continues to pose a significant threat he will not be released into the community. Given the sustained negative media treatment of cases involving NCRMD accused such as Schoenborn, it is not surprising that Bill C-14 was proposed to amend Part XX.1 and prioritize public safety.

## V. BILL C-14

Bill C-14 will make a number of significant changes to Part XX.1, including altering section 672.54, creating a designation of ‘high-risk’ NCRMD accused, and strengthening victims’ rights.<sup>116</sup> The opening paragraph of section 672.54 will be amended to the following:

672.54. When a court or a Review Board makes a disposition under subsection 672.45(2), section 672.47, subsection 672.64(3) or section 672.83 or section 672.82, it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is necessary and appropriate in the circumstances.<sup>117</sup>

110 “Killer with mental disorder granted escorted hospital leave”, *The Globe and Mail* (6 April 2011), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

111 *Ibid.*

112 “BC child killer’s escorted passes revoked”, *National Post* (21 April 2011), online: National Post <<http://www.nationalpost.com>>.

113 “BC board backs moving child killer Schoenborn to Manitoba”, *CBC News* (13 February 2013), online: CBC News <<http://www.cbc.ca>>.

114 *Ibid.*

115 “BC justice branch says no to transferring Allan Schoenborn to Manitoba”, *The Vancouver Sun* (29 July 2013), online: The Vancouver Sun <<http://www.vancouversun.com>>.

116 Bill C-14, *supra* note 2. Bill C-14 also amends the *National Defence Act* with respect to the mental disorder defence regime; however, the following discussion overviews the amendments to the *Criminal Code*.

117 *Ibid.*, cl 672.54.

Bill C-14 codifies aspects of the common law. Clause 672.5401 will codify the definition of significant harm that was put forth in *Winko*.<sup>118</sup> Also, as stated above, the amended section 672.54 will explicitly state that the safety of the public is the paramount consideration to be taken into account by a court or Review Board while making a disposition. The SCC has previously emphasized that the safety of the public is the most important factor under section 672.54.<sup>119</sup> Hopefully, codification of this paramourcy will assist courts and Review Boards in crafting appropriate dispositions under Part XX.1.

Under clause 672.64(1), a prosecutor will be able to apply to have the court designate a NCRMD offender as ‘high-risk’ if the accused was found NCRMD for a serious personal injury offence as defined in subsection 672.81(1.3) and was 18 years of age or more when the index offence was committed.<sup>120</sup> One of two additional criteria must be met: the court must be satisfied that there is a substantial likelihood that the accused will use violence that could endanger the safety of another person or that the acts that constituted the index offence were so brutal as to indicate a risk of grave harm to another person.<sup>121</sup> If the designation is granted, the court must, under clause 672.64(3), make a hospital detention order and the accused is barred from leaving the hospital unless it is necessary for their treatment and a plan to address the risk they pose is created.<sup>122</sup> When the Review Board reviews the court’s disposition order for a ‘high-risk’ NCRMD accused, it has no option other than to make a hospital detention order subject to the restrictions in clause 672.64(3).<sup>123</sup>

Bill C-14 also contains provisions that would extend the time period between disposition review hearings for ‘high-risk’ NCRMD accused and would make a superior court the only body that can lift this classification. Under clause 672.81(1.32), the Review Board may extend the time for holding a disposition review hearing to a maximum of 36 months if it is satisfied that the ‘high-risk’ accused’s condition is not likely to improve and detention remains necessary for the extended period of time.<sup>124</sup> Clause 672.84(1) permits the Review Board to refer the ‘high-risk’ designation to a superior court if it believes that the designation should be overturned.<sup>125</sup> Pursuant to clause 672.84(3), the superior court may only revoke the finding if they are satisfied that the accused will not use violence that could endanger the life or safety of another person.<sup>126</sup>

Victims’ rights are emphasized in Bill C-14. Clause 672.5(5.2) provides that notice of a NCRMD accused’s absolute or conditional discharge will be given to victims upon their request as well as the accused’s intended place of residence.<sup>127</sup> If a NCRMD accused’s ‘high-risk’ designation is reviewed by a superior court, under clause 672.5(13.3), victims

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118 *Ibid*, cl 672.5401.

119 See *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] SCJ No 7 at para 27 where the SCC held that the main objective of Part XX.1 was the protection of the public and the management of an accused’s safety risk. See also *Pinet*, *supra* note 57.

120 Bill C-14, *supra* note 2, cl 672.64(1).

121 *Ibid*, cl 672.64(2) lists the relevant evidence the court is to take into account in deciding whether a ‘high-risk’ designation is appropriate including: (a) the nature and circumstances of the offence; (b) any pattern of repetitive behaviour of which the offence forms a part; (c) the accused’s mental condition; (d) the past and expected course of the accused’s treatment, including the accused’s willingness to follow treatment; and (e) the opinions of experts who have examined the accused.

122 *Ibid*, cl 672.64(3).

123 *Ibid*, cl 672.47(4).

124 *Ibid*, cl 672.81(1.32).

125 *Ibid*, cl 672.84(1).

126 *Ibid*, cl 672.84(3).

127 *Ibid*, cl 672.5(5.2).

will be notified that they are able to file a victim impact statement.<sup>128</sup> Clause 672.541 mandates that the court or Review Board take into account any victim impact statement when making the appropriate disposition and in making or revoking a ‘high-risk’ designation.<sup>129</sup> Finally, clause 672.542 requires the court or Review Board to consider whether a no contact order between the NCRMD accused and the victim, witness to the offence, or justice system participant is an appropriate condition to attach to a disposition.<sup>130</sup>

There are a number of troubling aspects to the amendments contained in Bill C-14. The courts—rather than the specialized Review Boards—will have control over the ‘high-risk’ designation. Despite rhetoric to the contrary, victims’ rights are not significantly improved. The bill likely violates both sections 7 and 9 of the *Charter*. As well, the legislation is likely unconstitutional because it has a punitive purpose. Hospitals will be hindered in their ability to alter the disposition conditions of NCRMD accused designated as ‘high-risk.’ Empirical evidence suggests that a ‘high-risk’ designation is not needed to protect the public from NCRMD offenders. Finally, Bill C-14 will likely negatively impact both the criminal justice and the mental health system.

Firstly, courts should not be the entities responsible for determining whether an NCRMD offender should be designated as a ‘high-risk’ accused. Under the proposed amendments, if a court classified a NCRMD accused as ‘high-risk,’ the Review Board would be mandated to make a hospital detention order. The Review Board would have no discretion to overturn the designation; only a court could reverse it. Review Boards have the expertise necessary to deal with the complex issues of mental health that arise with NCRMD accused. The superior courts will have jurisdiction over the ‘high-risk’ designation, “[...] despite the fact that general criminal courts lack the requisite expertise to make determinations about risks posed by a person with mental illness.”<sup>131</sup> Also, the courts themselves have recognized the skill of Review Boards.<sup>132</sup> As will be discussed in detail below, control over the ‘high-risk’ designation will be placed with the courts despite the fact that Review Boards have been the driving force behind Part XX.1.

Review Boards play an essential role in the workings of Part XX.1. They bear the responsibility for overseeing NCRMD accused while they are under the jurisdiction of the criminal justice system. Courts have the ability by virtue of section 672.45 to hold the initial disposition hearing; however, in practice it is the Review Boards that do so and have the sole power under section 672.81 to conduct ongoing assessments of NCRMD accused.<sup>133</sup> Studies have shown that after a finding of NCRMD was made, courts defer the making of the disposition to Review Boards in the majority of cases.<sup>134</sup> As Joan Barrett and Riun Shandler note, “[c]ourts are at a distinct disadvantage in writing dispositions, as they simply do not have the institutional knowledge, expertise and experience Review Boards have.”<sup>135</sup> As discussed in Part III, the composition of the

128 *Ibid*, cl 672.5(13.3).

129 *Ibid*, cl 672.541.

130 *Ibid*, cl 672.542.

131 *House of Commons Debates*, 41st Parl, 1st Sess, No 217 (1 March 2013) at 14505 (Hon Irwin Cotler) [*House of Commons Debates*].

132 See *DH v British Columbia (Attorney General)*, 24 WCB (2d) 632, [1994] BCJ No. 2011 at para 24 where it was held that it “will be rare that this court [will] interfere with the Review Board’s decisions. Difficult and delicate questions of judgment have been assigned to the Board and it has been constituted with the expertise to discharge its duty in the public interest.” See also Barrett, *supra* note 3, ch 1 at 31.

133 *Criminal Code*, *supra* note 22, ss 672.45, 672.81.

134 See Livingston, *supra* note 82 at 411, where it was found that after a finding of NCRMD was made, courts in British Columbia deferred the making of the disposition to Review Boards in 82.2% of the cases. See also Crocker, “Description”, *supra* note 86 at 20-21.

135 Barrett, *supra* note 3, ch 10 at 3.

Review Boards ensures that the members have sufficient expertise in both the law and in mental health to be able to deal adequately with NCRMD offenders. These specialized bodies should be the ones in control of the ‘high-risk’ classification.

Secondly, it is unclear that Bill C-14 will substantially enhance the rights of victims even though the Conservative government has emphasized this point.<sup>136</sup> The Honourable Rob Nicholson stated that one of the reasons behind the introduction of Bill C-14 is “[ensuring] that the needs of victims receive the appropriate emphasis in the *Criminal Code* mental disorder regime.”<sup>137</sup> Requiring notice to be given at the victim’s request if an NCRMD accused is about to be released under clause 672.5(5.2) would be an improvement. However, requiring that a court or Review Board consider making a no contact order between the NCRMD accused and the victim will likely result in little change to the existing regime because this is already taken into account by Review Boards when making appropriate designations.<sup>138</sup> Latimer and Lawrence found that 20.7% of NCRMD dispositions from 1992 to 2004 had conditions attached that ordered no communication with the victim and others or banned the offender from attending certain locations.<sup>139</sup> There is a danger that the court, when deciding whether to classify a NCRMD accused as ‘high-risk,’ could place undue emphasis on the victim impact statement under clause 672.541 and neglect the fact that the sole concern should be the substantial likelihood that the offender will use violence that could endanger another person. The Conservative government has promoted Bill C-14 with the rhetoric that it will significantly enhance the needs and rights of victims; however, the amendments appear to make little change to this aspect of Part XX.1.

Thirdly, the legislation is likely unconstitutional under both sections 7 and 9 of the *Charter*. The majority of the SCC in *Winko* upheld Part XX.1 because it struck the appropriate balance between the protection of the public and the liberty interests of the NCRMD offender; however, the proposed amendments shift this balance away from protecting the rights of the accused.<sup>140</sup> The Honourable Irwin Cotler argued, “[...] the government is seeking to enact legislation that will invite protracted, expensive, and avoidable constitutional litigation.”<sup>141</sup> While NCRMD accused are brought within the criminal sphere by committing criminal offences, this inclusion does not permit the state to set up a scheme that blatantly violates their constitutional rights.

If Bill C-14 receives Royal Assent, there will likely be claims brought under section 7 of the *Charter*, which provides that “everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>142</sup> The liberty issue will likely be quickly resolved. Part XX.1 permits the state to deprive an NCRMD accused of their liberty; but such deprivation must conform to the principles of fundamental justice.<sup>143</sup> It will likely be successfully argued that because Bill C-14 is overbroad, it does not conform to these principles. Overbreadth is concerned with whether “[...] the means chosen by the state are broader than necessary to achieve the state objective.”<sup>144</sup> As stated above, the purpose

136 See, for example, *Debates of the Senate*, 41st Parl, 2nd Sess, vol 149 No 24 (9 December 2013) at 669 (Hon Paul E McIntyre).

137 *House of Commons Debates*, *supra* note 131 at 14483 (Hon Rob Nicholson).

138 Bill C-14, *supra* note 2, cl 672.542.

139 Latimer, *supra* note 81 at 27.

140 *Winko*, *supra* note 1 at 686.

141 *House of Commons Debates*, *supra* note 131 at 14506 (Hon Irwin Cotler).

142 *Charter*, *supra* note 16, s 7. See *R v Morgentaler*, [1988] 1 SCR 30 and *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 for the test for a section 7 violation.

143 *Winko*, *supra* note 1 at 670.

144 *Ibid* at 673.

behind Part XX.1 is to deal appropriately with both the safety of the public and the liberty needs of the NCRMD accused. The proposed amendments to section 672.54 and the new ‘high-risk’ classification of NCRMD accused are two examples of overbreadth within Bill C-14.

Section 672.54 in its altered form will likely be found to be overbroad. The provision currently is “[...] a clear example of the principle of ‘balance’ between the rights of the accused and the protection of society.”<sup>145</sup> In previously upholding the constitutionality of section 672.54, the SCC emphasized that, where an accused is found to pose a significant threat, only the least onerous and restrictive disposition can be ordered.<sup>146</sup> The new section will replace the requirement that the disposition be ‘the least onerous and least restrictive’ with the requirement that it be ‘necessary and appropriate in the circumstances.’ This amendment is a fundamental change to Part XX.1. Courts and Review Boards will be permitted to craft dispositions that are not the ‘least onerous and least restrictive’ and therefore the NCRMD accused’s liberty may be restricted more than is necessary to protect the public.<sup>147</sup> The ‘least onerous and least restrictive’ requirement is likely integral to the constitutionality of section 672.54.

As well, the ‘high-risk’ classification is overbroad in its application to NCRMD accused. The constitutionality of Part XX.1 was bolstered because it was a “[...] flexible scheme that is capable of taking into account the specific circumstances of the individual NCRMD accused.”<sup>148</sup> The new designation endangers this flexibility. Under clause 672.64(3), if a ‘high-risk’ designation is established, there is no discretion to order anything other than a hospital detention order with restrictive conditions.<sup>149</sup> The Review Board is then bound by this disposition under clause 672.47(4).<sup>150</sup> The ‘high-risk’ classification ignores the individual characteristics of a NCRMD accused by requiring that he or she be subject to a restrictive hospital detention order. It will likely be held that this proposed scheme is overbroad because it uses means that are broader than necessary to protect public safety while disregarding the rights of a NCRMD accused. Both the alterations to section 672.54 and the creation of the ‘high-risk’ NCRMD accused category likely violate section 7 of the *Charter*.

It is also likely that Bill C-14 will attract claims alleging a breach of section 9 of the *Charter*, which provides that “everyone has the right not to be arbitrarily detained or imprisoned.”<sup>151</sup> Francoise Boivin, a member of the opposition government, put forth that as a result of Bill C-14, “[she] can see [the government] keeping someone in prison who will file a writ of [*habeas corpus*].”<sup>152</sup> There will likely be claims of arbitrary detention because of the potential length between reviews of dispositions for ‘high-risk’ accused. Under clause 672.81(1.32), the Review Board has the ability to extend the review of a disposition for a ‘high-risk’ NCRMD accused to a maximum of 36 months with the only criterion being that the accused’s condition is unlikely to improve and detention remains necessary.<sup>153</sup> In *Winko*, the majority of the SCC held that the mandatory annual review of a disposition was an integral part of safeguarding the NCRMD accused’s liberty.<sup>154</sup> A ‘high-risk’ NCRMD accused whose disposition is not reviewed for three

145 Tollefson, *supra* note 3 at 86.

146 *Winko*, *supra* note 1 at 669-670.

147 See Barrett, *supra* note 3, ch 1 at 32. See also *Winko*, *ibid* at 673.

148 *Winko*, *ibid* at 666.

149 Bill C-14, *supra* note 2, cl 672.64(3).

150 *Ibid*, cl 672.47(4).

151 *Charter*, *supra* note 16, s 9.

152 *House of Commons Debates*, *supra* note 131 at 14489 (Francoise Boivin).

153 Bill C-14, *supra* note 2, cl 672.81(1.32).

154 *Winko*, *supra* note 1 at para 72.

years risks being arbitrarily detained because his or her mental condition could improve over the time period and he or she could cease to pose a significant threat to society. If this improvement occurred, the state would cease to have jurisdiction to detain them. It is essential to the integrity of Part XX.1 that a NCRMD offender's disposition be reviewed regularly so that they are detained only if they currently pose a threat to the public.

Bill C-14 is also likely to be unconstitutional because the legislation punishes 'high-risk' NCRMD accused. In *R v Owen*, the majority of the SCC held that "[i]t is of central importance to the constitutional validity of this statutory arrangement that the individual, who by definition did not at the time of the offence appreciate what he or she was doing, or that it was wrong, be confined only for reasons of public protection, not punishment."<sup>155</sup> Clause 672.64(1)(b) will permit the court to designate an accused as 'high-risk' if the characteristics of the index offence indicate a risk of grave harm to another person.<sup>156</sup> This provision focuses on the criminal act to the exclusion of the present mental condition of the accused. Grant, in her study of the British Columbia Review Board between 1992 and 1994, found that "[...] there was no relationship between a finding of significant threat and the underlying index offence."<sup>157</sup> The nature of the index offence should have nothing to do with the determination of whether an accused should be designated as 'high-risk.' The state is attempting to punish offenders who were found NCRMD for heinous acts by imposing restrictive hospital detention orders. If it were found that aspects of Part XX.1 had a punitive purpose, the constitutionality of indeterminate detention would be called into question.

Fourthly, Bill C-14 severely restricts the ability of a Review Board to delegate authority to a psychiatric hospital to manage a 'high-risk' NCRMD accused and provide individualized treatment. Pursuant to clause 672.56(1.1), a hospital's ability to vary restrictions on the liberty of a 'high-risk' NCRMD accused will be subject to the restrictions in clause 672.64(3).<sup>158</sup> A hospital will be unable to permit the offender to be absent from the facility grounds unless it is for treatment reasons or until the 'high-risk' designation is overturned by a superior court. Hospitals should be able to increase or restrict the conditions attached to a NCRMD accused's disposition according to their mental condition. This flexibility "[...] increases the effectiveness of the disposition as it enables the [h]ospital to fine tune the disposition in a manner that best suits the day-to-day needs of the accused's treatment plan."<sup>159</sup> Hospitals are best situated to assess a NCRMD accused's mental state on a regular basis; therefore, their capacity to alter disposition conditions should not be restricted.

Fifthly, a 'high-risk' designation is not needed to protect the public from NCRMD accused. Bill C-14 is fear-based and is not supported by empirical evidence about NCRMD accused. Historically, mentally disordered offenders have been stereotyped as being dangerous and violent.<sup>160</sup> As discussed in Part IV, murder cases involving

155 *R v Owen*, 2003 SCC 33 at para 25, [2003] 1 SCR 779. See also *R v Bouchard-Lebrun*, 2011 SCC 58 at paras 52-53, [2011] 3 SCR 575.

156 Bill C-14, *supra* note 2, cl 672.64(1)(b).

157 Grant, *supra* note 84 at 434. See also Anne G Crocker et al, "Individuals Found Not Criminally Responsible on Account of Mental Disorder: Are We Providing Equal Protection and Equivalent Access to Mental Health Services Across Canada?" (2010) 29:2 Can J Commun Ment Health 47 at 50 (MetaPress) where the authors stated that research consistent with Canadian legislation demonstrates that the seriousness of the index offence should not be a factor used to determine a NCRMD disposition.

158 Bill C-14, *supra* note 2, cl 672.56(1.1).

159 Barrett, *supra* note 3, ch 9 at 61.

160 See Standing Committee, *supra* note 62 at 24. See also Julio Arboleda-Florez, "Considerations on the Stigma of Mental Illness" (2003) 48:10 Can J Psychiatry 645 at 647 (Medline) for a discussion of the longstanding stereotype that those who have a mental illness are violent and dangerous.

mentally disordered offenders like Schoenborn make it easy to perpetuate the belief that the government needs to ‘get tough’ on these dangerous criminals. In reality, they comprise a small percentage of the offending population and Part XX.1 is effective in managing the risk they pose. Crocker’s 2013 study found that only 8.1% of NCRMD accused had committed a serious violent offence.<sup>161</sup> Compared with accused found NGRI between 1975 and 1984, NCRMD offenders between 1992 and 1998 in British Columbia were charged with a lesser number of murder or attempted murder index offences and a greater number of assault and nuisance-type offences.<sup>162</sup> Between 1992 and 1994 in British Columbia, a total of 13 accused who were found NCRMD were charged with murder or attempted murder.<sup>163</sup> From 1992 to 2004 nationwide, assault was the most common serious violent index offence that NCRMD accused were charged with, comprising 40.7% of cases within Review Board systems.<sup>164</sup> The empirical studies that have been conducted illustrate that only a minority of NCRMD accused would be subject to a ‘high-risk’ classification.

Several studies have found that Review Boards are not lenient with NCRMD offenders.<sup>165</sup> Nationwide from 1992 to 2004, Latimer and Lawrence found that 51.7% of NCRMD accused were given a detention order and violent offences were more likely to lead to a detention order than sexual or non-violent offences.<sup>166</sup> All NCRMD accused during this time period were in the Review Board system for at least six months and 60% stayed subject to Review Board jurisdiction for longer than five years.<sup>167</sup> At the initial Review Board hearing in British Columbia, 49.3% of NCRMD accused were given a conditional discharge, 41.7% were given a custody order, and 2.5% were given an absolute discharge.<sup>168</sup> It is important to note that conditional discharge orders often contain the condition that the accused reside in a psychiatric hospital.<sup>169</sup> Crocker’s 2013 study found that, at the end of the study period, 50.8% of offenders found NCRMD for a serious violent offence were still under the jurisdiction of the Review Board.<sup>170</sup> Harsher legislation in regard to NCRMD accused is not needed because Review Boards grant detention orders in the majority of NCRMD cases and offenders are detained for substantial periods of time if they pose a significant threat to the public.

Finally, Bill C-14 will likely have a negative effect on both the criminal justice and the mental health system. In regard to the criminal justice system, it is probable that fewer accused will choose to plead the defence because of the possibility of the ‘high-risk’ designation and the restrictive detention order that comes with it. Currently in British Columbia, over 90% of serious crimes resulting in a NCRMD verdict do so by

161 Crocker, “Description”, *supra* note 86 at 13. This study examined all accused found NCRMD in the timeframe of 2000 to 2005 in British Columbia, Ontario, and Quebec.

162 Livingston, *supra* note 82 at 411. See also Desmarais, *supra* note 86 at 5 where in a study of 592 randomly sampled NCRMD offenders in British Columbia, Ontario and Quebec, it was found that homicide or attempted murder were the least common index offences (15%) committed by NCRMD offenders, while the majority of the index offences were assaults (39%) and ‘all other offences’ (45%).

163 Grant, *supra* note 84 at 427.

164 Latimer, *supra* note 81 at 17.

165 See, for example, Latimer, *ibid*; Livingston, *supra* note 82; Grant, *supra* note 84; Crocker, “Description”, *supra* note 86.

166 Latimer, *ibid* at 24, 26. Homicide, attempted murder, major assault (level II, III), assault (level I), robbery, criminal harassment, threats, and ‘other violent offences’ were classified as violent offences in the study.

167 *Ibid* at 32.

168 Livingston, *supra* note 82 at 411-412. This study examined NCRMD accused in British Columbia from 1992 to 2004.

169 Grant, *supra* note 84 at 429-430.

170 Crocker, “Description”, *supra* note 86 at 21-22.

agreement of counsel.<sup>171</sup> If the proposed changes are enacted, it is likely that there will be an increase in the quantity and length of trials, as accused will be unwilling to consent to being subject to a hospital detention order with restrictive conditions if they could be designated as ‘high-risk.’ This unwillingness may result in more mentally ill individuals languishing in the prison system without access to treatment. A backlog of cases could also arise in the court system as courts will be the only bodies able to hold a ‘high-risk’ designation hearing and to reverse the designation if a Review Board requests. The proposed legislation is likely to be detrimental to the interests of mentally ill individuals who are involved in the criminal justice system.

As well, the mental health system will suffer if Bill C-14 comes into force. The influx of ‘high-risk’ NCRMD accused who will be required to be held in detention until their designation is reversed will put pressure on already strained resources. The Honourable Irwin Cotler raised this concern: “[i]t is by no means clear that our system is at present capable of dealing with greater numbers of NCR accused who are institutionalized for longer periods of time and we risk complicating their recovery by straining the resources of the institutions and the individuals who are treated.”<sup>172</sup> The government must ensure that the mental health system has appropriate resources in place to be able to accommodate the greater number of ‘high-risk’ NCRMD accused that will be detained in psychiatric hospitals as a consequence of Bill C-14.

## CONCLUSION

The implementation of Bill C-14 would be a step backwards for mentally ill offenders in Canada. In promoting the new legislation, the Conservative government has fostered the view that changes are needed because Part XX.1 of the *Criminal Code* has been inadequately managing dangerous NCRMD accused. However, empirical evidence illustrates that Part XX.1 has been effectively dealing with NCRMD accused for decades. Individuals who successfully plead the onerous mental disorder defence have proven that they are not blameworthy in the eyes of the law. Therefore, liberty should only be restricted to the extent that any risk posed to the public by the NCRMD offender needs to be managed. As explained by the majority of the SCC in *Winko*, “[j]ustice requires that the NCR accused be accorded as much liberty as is compatible with public safety. The difficulty lies in devising a rule and a system that permits this to be accomplished in each individual’s case.”<sup>173</sup> Bill C-14 will neglect the individual needs of the NCRMD offender and prioritize the protection of the public. ‘High-risk’ NCRMD accused will face the prospect of a restrictive detention order without consideration of their present mental condition. Bill C-14 is unneeded and will damage the rights of mentally disordered offenders in Canada.

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171 Lyle D Hillaby, “Mental Disorder Prosecutions Overview,” in *Criminal Law and Mental Health Issues* (Vancouver: Continuing Legal Education Society of British Columbia, 2008) 1.1.1 at 1.1.10.

172 *House of Commons Debates*, *supra* note 131 at 14507 (Hon Irwin Cotler).

173 *Winko*, *supra* note 1 at 640.



ARTICLE

# MILESTONE OR MISSED OPPORTUNITY? A CRITICAL ANALYSIS OF THE IMPACT OF *DOMOTOR* ON THE FUTURE OF HUMAN TRAFFICKING CASES IN CANADA

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## INTRODUCTION

In 2011, the largest human trafficking operation to date in Canada was uncovered in Hamilton, Ontario. The *Domotor* case involved over nineteen trafficked persons, transnational elements, and a criminal organization engaged in an elaborate fraud scheme.<sup>1</sup> As the first successfully prosecuted case of international human trafficking, and the largest uncovered trafficking operation to date in Canada, the *Domotor* case has been hailed as a significant milestone in the fight against human trafficking in Canada.<sup>2</sup> Yet, little time has been taken to critically reflect on this case, assessing not only its successes but also its failures, and the implications it may have for future cases of human trafficking in Canada. While the particular criminal justice outcomes of this case have been praised as progress in Canada's response to human trafficking, the

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1 This article uses the term "*Domotor*" to refer generally to the case, which includes two judicial decisions: a bail review hearing, *R v Domotor*, 2011 ONSC 626, [2011] OJ No 6357 (QL) [*Domotor 2011*]; and a sentencing decision, *R v Domotor*, [2012] OJ No 3630 (SC) (QL) [*Domotor 2012*]. This article focuses on the key accused in the case, Ferenc Domotor Sr, who pled guilty to charges of human trafficking, along with other offences. Ultimately, twelve members of the organized crime group pled guilty to various charges in the course of the investigation, eight of which included guilty pleas for the charge of conspiracy to traffic in humans: see "Hamilton human trafficking kingpin sentenced to 9 years" *CBC News* (3 April 2012), online: CBC <<http://www.cbc.ca/news>>.

2 See, i.e., Nicole O'Reilly, "Couple sentenced in largest human trafficking case in Canadian history" *The Hamilton Spectator* (3 April 2012), online: <<http://www.thespec.com>> [O'Reilly, "Couple"]; Samina Esha, "Ferenc Domotor sentenced to nine years in prison in Canada's largest-ever human trafficking ring" *The National Post* (4 April 2012), online: <<http://news.nationalpost.com>>. Prior to *Domotor*, only one case involving a foreign national victim had proceeded to trial under charges of human trafficking in the *Immigration and Refugee Protection Act*, *infra* note 18: see *R v Ng*, 2007 BCPC 204. All other cases known to have resulted in conviction for human trafficking charges under s 279.01–s 279.04 of the *Criminal Code*, RSC 1985, c C-46 involved the domestic sex trafficking of Canadian citizens or residents. See, i.e., Royal Canadian Mounted Police, "Human Trafficking in Canada: A Threat Assessment" (Ottawa: Royal Canadian Mounted Police, 2010) at 1, 23 [RCMP]; Department of Justice, "An Overview of Trafficking in Persons and the Government of Canada's Efforts to respond to this Crime: 2010-2011", online: Department of Justice Canada <[www.justice.gc.ca](http://www.justice.gc.ca)> [DOJ]; "Canada", United Nations Office on Drugs and Crime Human Trafficking Case Law Database, online: <<http://www.unodc.org/cld>>; Benjamin Perrin, *Invisible Chains: Canada's Underground World of Human Trafficking* (Toronto: Penguin Canada, 2010) [Perrin].

unique and exceptional facts that underpin the judicial decisions in *Domotor* may limit its impact on future criminal justice responses to human trafficking cases. Further, the significant focus on the case as a milestone in Canadian criminal legal history has left more important lessons by the wayside. For example, *Domotor* has illustrated numerous unexamined gaps in Canada's current response to human trafficking, particularly from a service and protection perspective.

This article critically examines the *Domotor* case and the role it has, or may have, within the broader landscape of human trafficking cases in Canada. Part I will provide a contextual background regarding human trafficking in Canadian law and policy, and situate *Domotor* within the known landscape of human trafficking cases in Canada to date. This part will also outline the relevant facts and chronology of the *Domotor* case that will be relied upon in the following sections of the article. Part II will outline and analyse the pre-trial detention and sentencing judgments of several accused individuals in this case with attention to the exceptional facts and criminal charges that heavily influenced the judicial reasoning. Here, a critical analysis of the exceptionality of criminal elements in *Domotor* guides our questioning of its relevance as precedent for future human trafficking cases. Part III will discuss the possible impacts—positive and negative—that *Domotor* may have on future responses to human trafficking cases in Canada both within and beyond the criminal justice arena.

## I. UNDERSTANDING DOMOTOR WITHIN THE LEGAL AND POLITICAL LANDSCAPE OF HUMAN TRAFFICKING IN CANADA

Canada has been identified as a destination, transit, and origin country for human trafficking, meaning that trafficked persons come *to*, *through*, and *from* Canada.<sup>3</sup> International human trafficking for both sexual and labour exploitation has been found to exist within Canadian borders in addition to the domestic trafficking of Canadian women and girls for sexual exploitation.<sup>4</sup> Trafficked persons come from a broad and diverse range of backgrounds; in short, there is no single 'trend' regarding human trafficking in Canada. However, a significant amount of attention and action has recently been focused on the domestic sex trafficking issue. Reports from various government actors, including the RCMP<sup>5</sup> and CSIS,<sup>6</sup> have identified this form of trafficking as a particular and heightened concern within Canadian borders. Contrary to the dominant trends existing at this time in Canada, the *Domotor* case, which involved non-sexual forced labour, represented not only Canada's largest uncovered human trafficking ring to date but also the only successfully prosecuted case for both international and labour trafficking.<sup>7</sup>

3 See, i.e., Perrin, *supra* note 2; RCMP, *supra* note 2; DOJ, *supra* note 2.

4 *Ibid.*

5 RCMP, *supra* note 2.

6 Criminal Intelligence Service Canada, "Organized Crime and Domestic Trafficking in Persons in Canada" (August 2008), online: Criminal Intelligence Service Canada <<http://www.cisc.gc.ca>> [CISC].

7 Prior to *Domotor*, only one case involving a foreign national victim had proceeded to trial under charges of human trafficking in the *Immigration and Refugee Protection Act*: see *R v Ng*, 2007 BCPC 204. The accused in that case was acquitted of the human trafficking charge. Since *Domotor*, one case of international labour trafficking has been successfully prosecuted under the *Immigration and Refugee Protection Act*, *infra* note 18, s 118. That case involved the domestic servitude of a Filipino woman in BC: see "Vancouver man convicted of human trafficking in Filipino nanny case" *The Vancouver Sun* (26 June 2013), online: Vancouver Sun <<http://www.vancouversun.com>>; *R v Orr*, 2013 BCSC 1883.

The case of *Domotor* presented several stereotypical features of international human trafficking: deceptive recruitment; debt bondage; forced falsified government applications and documents; and violence.<sup>8</sup> The scheme, carried out by a family-run criminal organization, recruited men from Hungary to work in Canada with the promise of a better quality of life and good wages to support their families back home.<sup>9</sup> Upon arrival to Canada, the men's travel documents were confiscated and they were forced to make false refugee and welfare claims.<sup>10</sup> The men were then taken to open bank accounts, the documentation of which was confiscated by their traffickers.<sup>11</sup> They were housed in cramped and unsanitary conditions in the basement of several houses, were often fed poorly or not at all, and were forced to work in manual labour for up to thirteen or fourteen hours per day for little or no pay.<sup>12</sup> Threats and other intimidation tactics were routinely used against the trafficked men as well as their family members back home, including at least two recorded instances of physical violence.<sup>13</sup> In addition, some of the trafficked men were made to steal from Canada Post mail boxes, to search for cheques in the mail, and to deposit stolen cheques into bank accounts.<sup>14</sup> Province-wide losses totaled an estimated \$1,000,000.<sup>15</sup> The accused's profits flowed from the trafficked men's unpaid labour, from the welfare fraud scheme, and, substantially, through the theft of cheques from the mail.<sup>16</sup>

Following the development of the international *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* ("Protocol"),<sup>17</sup> Canada first created an offence of trafficking in persons under the *Immigration and Refugee Protection Act*<sup>18</sup> in 2001, and subsequently created specific criminal offences under the *Criminal Code* in 2005. The *Criminal Code* offences prohibit trafficking in persons,<sup>19</sup> and the associated acts of obtaining a material benefit<sup>20</sup> and withholding or destroying documents.<sup>21</sup> The primary offence of trafficking in persons is punishable up to a maximum term of 14 years imprisonment,<sup>22</sup> or, where aggravating factors are present, to a maximum term of life imprisonment.<sup>23</sup> *Criminal Code* convictions for trafficking in persons in Canada have generally garnered sentences ranging from 18 months to seven years,<sup>24</sup> though cases without aggravating factors such as extreme physical violence have tended to attract

8 For a summary of facts, see *Domotor 2011*, *supra* note 1 at paras 6-12; *Domotor 2012*, *supra* note 1 at paras 7-16.

9 *Domotor 2011*, *ibid* at para 6; *Domotor 2012*, *ibid* at paras 11-12.

10 *Domotor 2011*, *ibid* at paras 8-9; *Domotor 2012*, *ibid* at paras 12-13.

11 *Domotor 2011*, *ibid* at para 8; *Domotor 2012*, *ibid* at para 12.

12 *Domotor 2011*, *ibid* at paras 7 and 9. See also *Domotor 2012*, *ibid* at paras 12, 22-23; *R v Ferenc Domotor Jr, Ferenc Domotor Sr, Gyongyi Kolompar* (3 April 2012), Hamilton CR-11-3032-0000 (ONSC) (Victim Impact Statement of Tamas Miko) [Victim Impact Statement].

13 *Domotor 2011*, *ibid* at para 11; *Domotor 2012*, *ibid* at paras 17, 20; Victim Impact Statement, *ibid*.

14 *Domotor 2011*, *ibid* at para 12; *Domotor 2012*, *ibid* at para 6.

15 *Domotor 2011*, *ibid*.

16 *Ibid* at para 13.

17 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, GA Res 55/25, UNODC, 2000 [Protocol].

18 *Immigration and Refugee Protection Act*, SC 2001, s 118 [IRPA].

19 *Criminal Code*, RSC 1985, c-C46, s 279.01 and s 279.04 (amended by SC 2005, c 43; SC 2010, c 3; SC 2012, c 15) [*Criminal Code*]; see also s 279.011 for offences involving minors.

20 *Ibid*, s 279.02.

21 *Ibid*, s 279.03.

22 *Ibid*, s 279.01(1)(b).

23 Aggravating factors include kidnapping, aggravated assault, aggravated sexual assault, or causing death of the victim: *Criminal Code*, *ibid*, s 279.01(1)(a).

24 This range is representative of sentences before credit reductions take place. See RCMP, *supra* note 2 at 24; Perrin, *supra* note 2.

sentences of three years or less.<sup>25</sup> For example, the first person convicted in Canada, Imani Nakpangi, received a sentence of three years for the charge of human trafficking in a case involving the sexual exploitation of two Canadian minors.<sup>26</sup> Vytautas Vilutis received a conviction of two years in a case involving charges of human trafficking, receiving a material benefit, and assault.<sup>27</sup> Prior to *Domotor*, the longest sentence was seven years, which was received by Laura Emerson in a case involving significant aggravating factors concerning the use of violence.<sup>28</sup>

In the *Domotor* case, the accused were charged with human trafficking,<sup>29</sup> withholding travel, identity or immigration status documents,<sup>30</sup> receiving a material benefit primarily in the form of unpaid labour,<sup>31</sup> defrauding the City of Hamilton concerning payments under the *Ontario Works Act*,<sup>32</sup> participating in a criminal organization,<sup>33</sup> and criminal conspiracy.<sup>34</sup> Unlike the majority of prosecuted cases before it, *Domotor* not only resulted in the lengthiest sentence—nine years before any credit reductions—handed out to date, but it also has had a potential effect on the pre-trial detention process for future cases of human trafficking.

Situated within the known landscape of human trafficking in Canada, *Domotor* clearly stands out as unique in many ways. While the case has been properly recognized as the first successfully prosecuted case of international and labour trafficking, the following sections illustrate that *Domotor* is significantly different from other human trafficking cases because of its organized criminal activities occurring beyond the ‘traditional’ scope of exploitation associated with Canadian cases of human trafficking.

## II. THE CRIMINAL JUSTICE OUTCOMES AND *DOMOTOR*: IMPORTANT PRECEDENT OR EXCEPTIONAL CIRCUMSTANCES?

The exceptional factual circumstances and criminal activities in *Domotor* gave rise to its significant media attention and highly influenced the outcomes of the criminal prosecution of individuals involved in this case. In what follows, we present a critical analysis of both the pre-trial detention review and the sentencing hearing, highlighting the circumstances that underpin the judicial reasons.

### A. Pre-Trial Detention Review

A pre-trial detention review for four of the accused in *Domotor* arose during the course of the criminal investigation based on applications by three accused against whom pre-trial detention had been ordered, and on application by the prosecutor in relation to

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25 Two accused, Laura Emerson and Juan Pablo Urizar, were involved in cases with extreme physical violence. Emerson received a seven-year prison term: see RCMP, *supra* note 2 at 24; Perrin, *supra* note 2. Urizar received a six-year prison term: *R v Urizar* (13 August 2010), Longueuil 505-01-084654-090 (CQ), online: United Nations Office on Drugs and Crime Human Trafficking Case Law Database <<http://www.unodc.org/cld>>. All other cases ranged from 18 months to three years before any credit reductions: see RCMP, *supra* note 2 at 24-26; Perrin, *supra* note 2.

26 RCMP, *supra* note 2 at 24.

27 *Ibid* at 25.

28 *Ibid* at 24, 26.

29 *Criminal Code*, *supra* note 19, s 279.01.

30 *Ibid*, s 279.03.

31 *Ibid*, s 279.02.

32 *Ibid*, s 380(1)(b); *Ontario Works Act*, SO 1997, c 25.

33 *Ibid*, s 467.11(1). This charge was added at a later date.

34 *Ibid*, s 465(1)(c). This charge was added at a later date.

a fourth accused—Ferenc Domotor—who had been released on conditions.<sup>35</sup> At the time of review, new charges of criminal conspiracy and organization were laid against the accused,<sup>36</sup> which triggered rules for the hearing that had never before been tested in relation to human trafficking charges. Where pre-trial detention is sought, the Crown typically carries the burden of proving, on a balance of probabilities, that pre-trial detention is justified; however, where certain circumstances arise, including a charge of criminal organization, this burden of proof is reversed.<sup>37</sup> Therefore, the reverse onus of proof was applied to this hearing, meaning that the burden of proof to establish *no* just cause for pre-trial detention was placed on the accused. Although this issue took minimal space in the argument and decision concerning detention, it is a critical factor to note since, unlike ‘typical’ pre-trial detention hearings, pre-trial detention was the ‘default result’ in this situation.

The outcome of the review also relied heavily on Justice Cavarzan’s decision to apply tertiary grounds in his assessment of whether a just cause for detention existed. Grounds to establish just cause for detention are listed under subsections 515(10)(a) – (c) of the *Criminal Code*. Relevant to this case were the tertiary grounds listed under subsection 515(10)(c): “if the detention is necessary to maintain confidence in the administration of justice [...]”.<sup>38</sup> To detain under tertiary grounds, the court will consider (i) the apparent strength of the prosecution’s case, (ii) the gravity of the offence, (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and (iv) the fact that the accused is liable for a potentially lengthy term of imprisonment or, in firearm offences, a minimum imprisonment of three years or more.<sup>39</sup> In *Domotor*, the accused argued that use of the tertiary grounds provision was confined to cases involving murder, firearms and drug trafficking, and was therefore not applicable in this case.<sup>40</sup> However, Justice Cavarzan rejected this argument, citing precedent that supported the application of the tertiary grounds provision in many contexts.<sup>41</sup>

In evaluating the application for pre-trial detention, Justice Cavarzan relied on three primary findings: human trafficking is a “very grave offence”;<sup>42</sup> there were numerous victims who suffered violence;<sup>43</sup> and, upon conviction, the accused were liable for potentially lengthy terms of imprisonment.<sup>44</sup> Beyond the ‘basic’ elements of human trafficking in this case, it is clear that the elaborate and organized criminal nature of the offences played a significant role in the decision. Justice Cavarzan commented on the “elaborate and complex scheme of deceit” carried out by the accused, and concluded that the organized criminal activities were a “systematic and cynical attack on Canada’s social safety network.”<sup>45</sup> Commenting further on the organized crime activities, Justice Cavarzan found that “[t]he reasonable and fully-informed member of society would have

35 *Domotor 2011*, *supra* note 1 at paras 2-3.

36 *Domotor 2011*, *supra* note 1 at para 27.

37 *Criminal Code*, *supra* note 19, s 515(6)(a)(ii). The reverse onus provisions under s 515(6) generally has been upheld on *Charter* challenge: see *R v Pearson*, [1992] 3 SCR 665.

38 *Criminal Code*, *ibid*, s 515(10).

39 *Ibid*, s 515(10)(c). This section has presented historical challenges for courts in its breadth and tension with *Charter* rights: see *R v Morales*, [1992] 3 SCR 711; *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309. It remains a somewhat controversial provision to date, and has been criticized as too frequently and broadly applied: see Don Stuart and Joanna Harris, “Is the Public Confidence Ground to Deny Bail Used Sparingly?” (2004) 21 CR (6th) 232.

40 See *Domotor 2011*, *supra* note 1 at paras 36, 64.

41 *Ibid* at para 65, citing *R v BS*, 2007 ONCA 560 at para 10.

42 *Ibid* at para 61.

43 *Ibid* at para 62.

44 *Ibid* at para 63.

45 *Ibid* at para 61.

shaken confidence in the administration of justice<sup>46</sup> if the accused were released from custody. Thus, detention was justified under the tertiary grounds provision.

While *Domotor* may be viewed as setting new precedent by including the offence of human trafficking within the types of conduct and crimes captured by the tertiary grounds provision, it is also easily distinguishable in light of the circumstances of the case. In *Domotor*, the scale of the criminal organization and its operations, the ‘abuse’ of Canada’s social systems, the employment of violence, the number of victims, and the transnational elements together created a compelling argument for pre-trial detention review but also established the uniqueness of this case. Further, the criminal organization and conspiracy charges led to a reverse onus of proof situation. It is difficult to determine whether, in the ordinary course of proceedings, similar evidence tendered by the prosecutor would be sufficient to meet the burden of proof required. Therefore, there is cause to question the applicability of *Domotor* for future assessments of pre-trial detention review in human trafficking cases.

## B. Sentencing Decision

Criminal sentencing in Canada is based on fundamental principles set out in the *Criminal Code*, which include denunciation of unlawful conduct, specific and general deterrence, isolation, rehabilitation, reparations to victims and communities, promotion of responsibility, and accountability in offenders.<sup>47</sup> These principles aim to develop a tradition in criminal sentencing that contributes “to respect for the law and the maintenance of a just, peaceful and safe society.”<sup>48</sup> In line with these general principles and aims, an appropriate sentence accounts for specific considerations, including: relevant aggravating or mitigating circumstances; precedent; proportionality; global length of sentence for multiple offences; the liberty interests of the offender; and available alternatives to imprisonment, particularly as concerns aboriginal offenders.<sup>49</sup>

The *Domotor* decision has been hailed, in part, as a new precedent on sentencing for the crime of human trafficking, having handed down the most stringent sentence in Canadian history to date.<sup>50</sup> The sentencing decision of three high-level actors in the criminal trafficking ring will be considered: Ference Domotor Sr.; Ferenc Domotor Jr.; and Gyongyi Kolompar.<sup>51</sup> Domotor Sr. and Jr. pled guilty to conspiracy to traffic in persons, participation in a criminal organization, and counseling misrepresentation under the *Immigration and Refugee Protection Act*.<sup>52</sup> Kolompar also pled guilty to counseling misrepresentation under the *Immigration and Refugee Protection Act*, and to a charge of fraud in excess of \$5,000.<sup>53</sup> In relation to Domotor Sr., who was regarded as the “kingpin” of the criminal organization in Canada, the court determined a global sentence of nine years imprisonment before credits for pre-trial custody and the guilty plea.<sup>54</sup> Domotor Jr. was given a sentence of five years imprisonment before credits for

46 *Domotor 2011*, *supra* note 1 at para 73.

47 *Criminal Code*, *supra* note 19, s 718.

48 *Ibid.*

49 *Ibid.*, s 718.2; as regards proportionality, see s 718.1.

50 Natalie Stechyson, “Few aware of human trafficking in Canada” (4 April 2012) *Nanaimo Daily News*, A10: “[...] the kingpin of Canada’s largest human trafficking case to date was handed a nine-year sentence Tuesday – the toughest Canadian sentence for human trafficking yet [...]”; see also O’Reilly, “Couple”, *supra* note 2.

51 The analysis in this section will focus on the reasoning and sentences handed down to Domotor Sr and Jr as Kolompar’s case did not include charges of human trafficking and participation in a criminal organization.

52 *Domotor 2012*, *supra* note 1 at paras 1-2.

53 *Ibid* at para 2.

54 *Ibid* at para 53.

pretrial custody and the guilty plea.<sup>55</sup> Kolompar, given the lesser charges in her plea, was sentenced to time served by an agreement between counsel.<sup>56</sup>

The accused in this case were foreign nationals, and their criminal enterprises targeted institutions that are part of Canada's social fabric. Justice Glithero clearly emphasizes the concepts of Canadian values and 'fairness' in setting out the reasons for judgment. In addition to the idea that "[m]odern day slavery is disgusting to us and [...] offends our core values,"<sup>57</sup> the 'abuse' to both social assistance programs and immigration clearly underpinned the reasoning of the court: "[...] when our values are abused, flagrantly, as they were by these three individuals, we are offended [...]."<sup>58</sup> Justice Glithero further emphasizes the gravity of the welfare fraud scheme, finding it a "breach of society's trust" that must be "treated as being a serious matter."<sup>59</sup> Justice Glithero notes that such abuses "have to be dealt with severely"<sup>60</sup> in order to preserve the integrity and fairness of our social assistance and immigration systems.<sup>61</sup> This reasoning sets a clear stage for the remainder of the decision, and provides valuable insight into the perspective of the court in coming to its conclusions on sentencing.

The severe conditions of exploitation and human trafficking, and the criminal organization and fraud activities appeared to be significant factors leading to the particular outcome of the sentencing decision. Discussing the general nature of the case, Justice Glithero notes that the facts go beyond the "essentials" of the offence: "[t]hese offences are by no means impetuous or ill considered, rather they are deliberate and calculated and represent a criminal scheme that was very much premeditated, and was intended to and did last over a long period of time."<sup>62</sup> Here, the court signals that both the criminal organization element and the time period of exploitation are important aggravating factors. Building on the elements of the crime, Justice Glithero finds that "[t]he control exerted over these victims [...] involved more greed, more nastiness, than was required to simply accomplish the legal purpose."<sup>63</sup> It is arguable that the facts of this case mirror commonly used tactics of control in cases of human trafficking such as limited provision of food and basic services, prohibition against contacting family members, and use of gratuitous physical abuse.<sup>64</sup> However, the use of the trafficked men to assist in and commit the extraneous criminal activities associated with the refugee and welfare fraud schemes certainly go beyond the basic elements of labour trafficking. Thus, it may be the connection to the exceptional criminal elements that takes primary importance over the conditions of exploitation the men experienced.

### III. ASSESSING THE IMPACT OF *DOMOTOR* ON FUTURE RESPONSES TO HUMAN TRAFFICKING IN CANADA

While the *Domotor* case has been hailed as a significant step forward in the criminal justice response to human trafficking in Canada, its application and use as a precedent for future human trafficking cases must be approached with caution. For cases more closely representative of the dominant trends seen to date in Canada, *Domotor* would,

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55 *Ibid* at para 58.

56 *Ibid* at paras 44 and 60.

57 *Ibid* at para 50.

58 *Ibid*.

59 *Ibid* at para 40.

60 *Ibid* at para 52.

61 *Ibid* at paras 51-52.

62 *Ibid* at para 37.

63 *Ibid* at para 39.

64 See *ibid* at paras 12-13.

if anything, provide a ceiling—not a benchmark—for sentencing outcomes. Further, while *Domotor* may have illuminated important gaps in Canada’s response to human trafficking cases, this issue has remained relatively under-discussed beyond the criminal justice realm. As such, this final section will examine the potential legacy of *Domotor*, both within and beyond the criminal justice arena, in shaping Canada’s future response to human trafficking within its territory.

### A. *Domotor* as Criminal Law Precedent: A Case about Human Trafficking or Organized Crime?

Although *Domotor* is, in one way, a clear case of human trafficking, the scale and type of criminal schemes uncovered in this case clearly overshadow the more ‘typical’ portrait of human trafficking. Most of the cases seen to date in Canada, unlike *Domotor*, have involved small-scale operations of human trafficking for sexual exploitation;<sup>65</sup> further, these cases have primarily involved Canadian women and girls whereas the trafficked persons in the *Domotor* case were all men. In addition, the criminal organization and conspiracy, elaborate fraud schemes, and abuse of Canada’s immigration and welfare systems were clearly at the forefront of the particular outcomes in this case, as discussed in Part II.

The *Domotor* case, in fact, occupies an extremely unique space being that it is highly stereotypical of human trafficking as represented in social and political landscapes, and yet is a significant departure from identified trends of actual human trafficking cases. While the facts of *Domotor* represent an image of human trafficking commonly propagated, it does not align to the dominant trends established in the body of existing cases in Canada. Further, the outcomes of exploitation in this case went well beyond ‘typical’ targets of trafficking, procuring not only forced labour but also facilitating numerous fraud schemes. While in one way this case may “suggest a greater awareness of the importance of enforcing human trafficking laws among Canadian law enforcement officers and prosecutors, and a great willingness to take aggressive measures to protect victims and punish perpetrators,”<sup>66</sup> from another perspective it can be viewed not as a case with human trafficking at its core but as one primarily concerned with organized crime.

Regarding its use as a precedent for future cases of human trafficking, the *Domotor* case is distinguishable in many ways. First, and perhaps most important, is the weight attributed to the criminal organization elements of this case, as evidenced in the outcomes discussed in Part II. No other case of human trafficking in Canada, to date, has included a conviction on charges of criminal conspiracy or participating in a criminal organization, which immediately sets *Domotor* apart from the apparent trends in Canada. Further, activities associated with the criminal organization in *Domotor*, such as the welfare and refugee fraud schemes, were discussed at length in both decisions, also suggesting that these unique circumstances played an important role in the courts’ analyses. Other notable facts from *Domotor* may have further influenced the unique outcomes in this case, including the international scope of the crime, the number of victims, the type of exploitation, and the length of exploitation. All these facts are substantially different from the dominant trends in Canada to date. Thus, in trafficking cases without sufficient evidence to lay charges of criminal conspiracy and organization, *Domotor*’s influence may be limited.

65 See generally Perrin, *supra* note 2; RCMP, *supra* note 2; CISC, *supra* note 6.

66 Kaitlin Brush et al, “International Legal Updates” (2011) 18:3 Human Rights Brief 42 at 42.

## B. Beyond Criminal Justice: *Domotor* and the Future Impact for Trafficked Persons in Canada

Despite the critical approach taken to the *Domotor* case in this article, there are important lessons to learn from the case which can have a positive impact on the future response to human trafficking in Canada. As a case full of ‘firsts,’ *Domotor* illuminated significant gaps in Canada’s response to trafficked persons in its territory. Though Canada has taken steps to ensure that services and assistance for trafficked persons are improved and realized, the experience of the trafficked men in this case established many areas in which the response can improve. First, as the first case involving trafficked men, *Domotor* revealed the inadequacy of community services directed towards men. Finding appropriate shelter in this case—both being appropriate for men and appropriate for a recently trafficked person—was a significant challenge. Further systemic issues with respect to services such as adequate funding, translation, and interpretation aids were also present for the trafficked men in this case. Given its political and media notoriety, however, it is perhaps surprising that this case did not spur on more immediate, concrete action.

Shortly after the final determination in the *Domotor* case, the federal government released its much-anticipated National Action Plan to Combat Human Trafficking (“Action Plan”).<sup>67</sup> In the forward to the Action Plan, then Minister of Public Safety, Vic Toews, writes:

Human trafficking is one of the most heinous crimes imaginable, often described as modern-day slavery. This crime robs its victims of their most basic human rights and is occurring in Canada and worldwide.

[...]

While many initiatives are underway, both at home and abroad, the time has come to consolidate all of the activities into one comprehensive plan with an unwavering pledge to action. The Government of Canada’s National Action Plan to Combat Human Trafficking *proposes strategies that will better support organizations providing assistance to victims and helps to protect foreign nationals*, including young female immigrants who arrive in Canada alone, from being subjected to illegitimate or unsafe work.<sup>68</sup>

Despite this emphasis on the ‘victims’ of human trafficking, the Action Plan, in substance, focuses nearly entirely on a crime-control approach to addressing the issue, and makes no commitments in respect of service provision and protection for trafficked persons. For example, while the government pledges over \$5,000,000 to various law enforcement projects and agencies in the Action Plan, it promises only “up to” \$500,000—one tenth the funding for law enforcement—to “enhanced victim services.”<sup>69</sup> Further, while the Action Plan specifies particular projects and outcomes for law enforcement, such as the development of an enhanced border team,<sup>70</sup> it does not specify or recommend any particular practices or projects for victim services under the ‘Protection’ section.<sup>71</sup> This silence is a disappointing result for many individuals and agencies engaged with the issue of human trafficking at a service provision level.

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67 *National Action Plan to Combat Human Trafficking* (Ottawa: Government of Canada, 2012), online: Public Safety Canada <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>> [National Plan].

68 *Ibid* at 1 [emphasis added].

69 *Ibid* at 10.

70 *Ibid* at 17-18.

71 *Ibid* at 13-15.

In addition to highlighting the existing gaps in service provision, the outcomes for the trafficked men in *Domotor* have also raised issues with respect to Canada's Temporary Resident Permit (TRP) program for trafficked persons. The TRP program provides temporary regularized immigration status to trafficked persons in Canada with the goal of providing time for reflection and recovery, and immediate assistance with basic needs in the aftermath of exiting a trafficking situation. The TRP program provides an initial permit of one hundred and eighty days to individuals who an immigration officer considers *may* be a victim of human trafficking.<sup>72</sup> A TRP can be further extended up to three years for individuals positively identified as trafficked persons, and where other specific criteria are met:

- Whether it is reasonably safe and possible for the victims to return to and to re-establish a life in the country of origin or last permanent residence;
- Whether the victims are needed, and willing, to assist authorities in an investigation and/or in criminal proceedings of a trafficking offence; and
- Any other reason that the officer may judge relevant.<sup>73</sup>

Despite the guidelines produced to regulate the issuance of TRPs to trafficked persons, numerous problems have been highlighted in practice with respect to accessing the program, and successfully navigating it. For example, confusion surrounding the requisite criteria to issue an initial 180-day TRP has been noted, and may be a factor in reported inconsistency in the discretionary authority of immigration officers, which has resulted in reports of denial of TRPs where advocates felt a TRP should be issued.<sup>74</sup> In addition, advocates report that immigration officers recommend alternative remedies for TRP applicants to regularize their status,<sup>75</sup> despite the fact that these avenues may not be well-suited to the applicant's circumstances as was the case for at least one trafficked man in the *Domotor* case who had his refugee claim denied.<sup>76</sup>

The *Domotor* case presented an excellent opportunity to consider revision and improvement of the TRP program, yet it does not appear that such efforts have been undertaken. For example, one of the trafficked men denied refugee protection stated that he had "never been told about this [TRP] program" and did not know how to apply.<sup>77</sup> His circumstances brought further light to concerns about systemic issues within the immigration system regarding knowledge and access to the TRP program, and inter-departmental communication between agencies like the Immigration and Refugee Board, which processes refugee applications, and other branches that may be more involved in, or responsible for, TRP applications.<sup>78</sup> An opportunity to evaluate and improve the TRP program from the *Domotor* experience seems to have been missed.

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72 Citizenship and Immigration Canada, "IP 1: Temporary Resident Permits" (19 June 2007) at 25-6, online: Citizenship and Immigration Canada <[www.cic.gc.ca](http://www.cic.gc.ca)>.

73 *Ibid* at 27.

74 Canadian Council for Refugees, "Temporary Resident Permits: Limits to protection for trafficked persons" (June 2013) at 2, online: Canadian Council for Refugees <<http://ccrweb.ca>>.

75 *Ibid*.

76 Nicole O'Reilly, "Human-trafficking victim faces deportation to Hungary" (9 February 2013) *The Hamilton Spectator*, online: The Hamilton Spectator <[www.thespec.com](http://www.thespec.com)>.

77 *Ibid*.

78 See *ibid*.

## CONCLUSION

A decade after the development of the international *Protocol* on human trafficking, Canada—like many other countries—continues to struggle in creating and implementing effective responses to human trafficking within its territory. Prior to the *Domotor* case, a significant majority of known human trafficking cases and trends in Canada involved the domestic sexual exploitation of women and girls. *Domotor* thus presented a stark contrast from which to evaluate the domestic response to human trafficking. Though the case has been hailed as a significant victory within the criminal justice system, it appears to have served more as a symbolic success than a concrete step forward with respect to human trafficking. While the criminal justice outcomes in *Domotor* were significant, the actual impact the case will have on future criminal justice responses in Canada is uncertain at best when considering the exceptional and complex criminal elements of this case. *Domotor* has presented the potential for a critical, in-depth inquiry into the effectiveness of Canada's response to human trafficking from a service and protection perspective; however, this potential has yet to be realized by legislators and policy makers, perhaps marking a missed opportunity. Despite the shortcomings and cautionary remarks outlined in this article, *Domotor* has brought a significant increase in awareness of human trafficking in all its forms, and thus has the potential to act as a catalyst for real and meaningful changes that improve the response to human trafficking in Canada.



ARTICLE

# PROBATE ACTIONS AND “SUSPICIOUS CIRCUMSTANCES”: A THIRD STANDARD OF PROOF FOR ALLEGATIONS INVOLVING MORAL GUILT

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## PROMOTION OF A THIRD STANDARD OF PROOF

When a will is challenged as being executed under suspicious circumstances, Canadian courts have historically sought clear, compelling, and cogent evidence to demonstrate the will's validity. The associated standard of proof has been described as one residing *beyond* a balance of probabilities, and is conceptualized as the ‘third standard of proof’ in addition to the civil and criminal standards. This third standard of proof is also particularly appealing when allocating the risk of error in an estates context in which testators are deceased and no longer available to clarify their intentions or perspectives. However, after the 2008 Supreme Court of Canada decision, *FH v McDougall* (“*McDougall*”), it was resolutely pronounced that only two standards of proof operate in Canada, with the third standard of proof dismissed for the practical problems of its application.<sup>1</sup> As conceded below, there are compelling and valid reasons to disregard a third standard of proof for typical will challenges investigating circumstances such as the execution of the will or the testamentary capacity of the testator. However, this paper argues that for challenges that involve allegations of *moral guilt*,<sup>2</sup> and in cases of fraud or undue influence over the testator, then something *more* than a balance of probabilities is desirable, and the more demanding third standard of proof should be utilized.<sup>3</sup>

To demonstrate the advantage of applying a third standard of proof for probate actions involving alleged moral guilt, Part I of this paper will begin with a brief review of the two traditional standards of proof, and Part II will introduce the rationale for a third

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\* Louise M. Mimmagh is a third year student at Osgoode Hall Law School in Toronto, who completed this paper for Professor Benjamin Berger during her second year of study. The author would like to extend her sincere thanks to Professor Berger for all of his assistance while researching and writing the original version of this essay. The author would also like to thank the editors of APPEAL, as well as their external reviewer, for their valuable feedback and suggestions throughout the editing process.

1 *FH v McDougall*, 2008 SCC 53, 3 SCR 41 [*McDougall*] (WL Can).

2 For the purposes of this paper, *moral guilt* specifically refers to the conduct associated with undue influence or fraud in will challenges, behaviour which is quasi-criminal in nature, and carries an element of moral blameworthiness. It is not the intention of this paper to attempt to categorize the moral nature or stigma of any other civil actions.

3 Please note that challenging the validity of a will through allegations of undue influence requires demonstrating an element of coercion over the testator. In contrast, fraud or forgery are separate grounds of contesting a will, yet they are often closely associated with and often are raised during an undue influence challenge.

standard. Part III of the paper will address the structure of will challenges involving “suspicious circumstances” as outlined in *Vout v Hay*,<sup>4</sup> and the *McDougall* decision determining that only two standards of proof operate in Canada. Part IV of the essay will then provide commentary on the strengths and weaknesses of engaging either two or three standards of proof, and suggest that the current structure of will challenges may covertly import a silent third standard. In close, this paper will argue that a third standard of proof is preferable when addressing accusations of moral guilt as it protects those accused of fraud or undue influence from incurring a significant loss of reputation or social stigma upon an otherwise disproportionately low threshold.

## I. STANDARDS OF PROOF

Significant insight into society’s perception of the civil action or offense at bar can be derived by assessing the standard of proof that is assigned. Specifically, as noted in the 1979 landmark United States Supreme Court decision of *Addington v Texas*, the “standard serves to allocate the *risk of error* between the litigants and to indicate the *relative importance* attached to the [trier of fact’s] ultimate decision.”<sup>5</sup>

For example, the risk of error after an individual is charged with an offense, either criminal or regulatory, can be particularly dire for the accused. A conviction may include an individual’s loss of liberty through imprisonment, and a criminal record can carry “connotations of corruption, illegality [...] a significant loss of reputation and the social effects and stigma of such a sanction.”<sup>6</sup> In light of such severe consequences, our legal system has determined that the prosecution must establish guilt beyond a reasonable doubt or to a near certainty.<sup>7</sup> In Canada, this standard of proof is inextricably linked to section 11(d) of the *Canadian Charter of Rights and Freedoms*, which ensures that any person charged with an offense may rely upon the presumption of innocence.<sup>8</sup>

Within a civil proceeding penalties tend to emphasize monetary damages, and judicial errors “are thought to be not nearly as serious” as those for a criminal or regulatory offense.<sup>9</sup> As a result, the risk of error is balanced between the parties, and the standard of proof in this context requires the plaintiff to establish their case on a balance of probabilities so that their position is determined to be “more likely correct than not.”<sup>10</sup>

## II. THE THIRD STANDARD OF PROOF

The rationale for differentiating between actions involving criminal or regulatory offences and civil suits, and their respective standards of proof, often reflects society’s perception of the alleged *moral guilt* of the accused’s conduct. For example, criminal offences such as assault<sup>11</sup> or weapons trafficking<sup>12</sup> are commonly associated with the

4 *Vout v Hay* [1995], 2 SCR 876, 125 DLR (4th) 431 [*Vout v Hay*] (WL Can).

5 *Addington v Texas* (1979), 441 US 418, 99 SCt 1804, online: Justia <<http://supreme.justia.com/cases/federal/us/441/418/case.html>> [*Addington*].

6 David C McPhillips, “The Two Civil Standards of Proof in Employment Cases: An Argument for Formal Recognition” (1997) 5 Canadian Lab & Emp LJ 139 at 141 citing *British Columbia Telephone Co v TWU* (1978), 18 LAC (2d) 225 (British Columbia Arbitration) [*British Columbia Telephone*].

7 *R v Starr*, 2000 SCC 40 at para 230, 2 SCR 144.

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

9 McPhillips, *supra* note 6 at 141.

10 *Ibid.*

11 *Criminal Code*, RSC 1985, c C-46, s 265(1).

12 *Ibid.*, s 99(1).

moral blameworthiness of the accused; by contrast, civil actions involving a breach of contract or a contested property line likely are not.

Yet this well-defined paradigm is disrupted when civil actions intermingle with allegations that engage some level of moral blameworthiness.<sup>13</sup> For example, allegations or a finding of *civil fraud* are similar to criminal offences as there may be a resulting loss of reputation and significant social stigma from any judicial sanction—despite the absence of a criminal record.<sup>14</sup> As a result, a determination must be made about what standard of proof should be adopted in a civil action engaging moral guilt to “properly recognize the seriousness of the accusation.”<sup>15</sup>

In response, some jurisdictions have found that an intermediate standard, which is beyond the balance of probabilities, properly allocates the risk of error between the parties. For example, Chief Justice Burger of the United States Supreme Court described this ‘third standard’ as follows:

The intermediate standard, which usually employs some combination of the words ‘clear’, ‘cogent’, ‘unequivocal’ and ‘convincing’, is less commonly used but nonetheless ‘is no stranger to the civil law’ [...] One typical use of the standard is in civil cases involving allegations of fraud or some other *quasi-criminal wrongdoing* by the defendant. The *interests at stake in those cases are deemed to be more substantial* than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof.<sup>16</sup>

In Canada, the courts have also intermittently and openly engaged with a third standard of proof. For example, in the 1985 decision of *Jory v British Columbia (College of Physicians & Surgeons)* (“*Jory*”), an action regarding professional misconduct, Justice McLachlin (as she then was) stated:

The standard of proof in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt but it is something more than a bare balance of probabilities [...] The evidence must be sufficiently cogent to make it *safe* to uphold the findings *with all the consequences* for the professional person’s career and status in the community.<sup>17</sup>

Therefore, while the presumption of innocence is not fully engaged in these civil actions, the common thread of moral culpability is still evident. As a result, in light of such allegations of moral guilt, judicial intuition has periodically required “a degree of probability which is commensurate with the occasion”—or a third standard of proof.<sup>18</sup>

13 Ennis McBride, “Is the civil ‘higher standard of proof’ a coherent concept?” (2009) 8 Law, Probability and Risk 323 at 325.

14 McPhillips, *supra* note 6 at 141, citing *British Columbia Telephone*, *supra* note 6.

15 McBride, *supra* note 13 at 325.

16 McPhillips, *supra* note 6 at 149, citing *Addington*, *supra* note 5 [emphasis added].

17 *Q v College of Physicians & Surgeons (British Columbia)* 2001 BCCA 241 at para 21, 198 DLR (4th) 250 [*Q v College of Physicians & Surgeons*] (WL Can), citing *Jory v British Columbia (College of Physicians)*, [1985] BCJ No 320 [*Jory*] [emphasis added].

18 *Bater v Bater*, [1950] 2 All ER 458 at 459, 66 TLR (Pt 2) 589 (ON CA) [*Bater*] (WL Can).

### III. ESTATE LITIGATION CONTEXT: PROBATE ACTIONS

Within the estate context, a probate action seeks a court order “pronouncing for or against the validity of an alleged testamentary paper.”<sup>19</sup> When the validity of a will is contested in regards to “suspicious circumstances,” such allegations typically centre on events surrounding the preparation of the will, the capacity of the testator to know and understand the contents of the will, or circumstances that question whether the testamentary freedom or free will of the testator was corrupted by the fraud or undue influence of another party.<sup>20</sup>

#### A. Confusion regarding the Third Standard

However, in the Ontario Superior Court decision of *Scott v Cousins*, Justice Cullity highlighted the unique evidentiary issues encountered during will challenges alleging suspicious circumstances. According to Justice Cullity, “a deceased person’s knowledge and approval, testamentary capacity or capitulation to undue influence is often indeterminate.”<sup>21</sup> In other words, even after a review of the deceased’s testamentary documents, contemporaneous memorandums created by their solicitor, or testimony from family members and others close to the testator, the ‘best’ witness regarding any suspicious circumstances around the will is still ultimately the deceased. Evidence from other sources may never be able to fill in the gaps and confidently confirm or disprove a nexus between the deceased’s testamentary capacity and any suspicious circumstances. Similarly, as outlined by Brian A. Schnurr, a leading author and specialist in estate litigation in Canada, confusion has also existed amongst the estates bar regarding the proper burdens and standards of proof for these probate actions:

Statements in earlier decisions [had] left it unclear as to whether the presence of suspicious circumstances imposed upon those propounding the will an onus higher than the general civil standard of proof on the balance of probabilities.<sup>22</sup>

For example, mixed signals emerged in the 1965 decision of *MacGregor v Ryan*, where the Supreme Court of Canada noted that a more onerous standard for *all* undue influence allegations would be a mistake, but that such a heavy burden may *sometimes* be warranted so “the extent of the proof required is proportionate to the gravity of the suspicion.”<sup>23</sup> Similarly, in the 1974 Ontario Court of Appeal decision of *Re Bailey*, the court addressed the “bleak disaster” of circumstances surrounding the will’s execution, and noted that the standard of proof would be *more demanding* “where suspicious circumstances are shown to exist” than in an ordinary dispute regarding testamentary capacity.<sup>24</sup>

19 M Scott Kerwin, “Estate Litigation Basics – 2010 Update: Probate Actions” in Practice Made Perfect (Vancouver: Continuing Legal Education Society of British Columbia, 2010) at 7.1.4 citing *Supreme Court Rules*, BC Reg 221/90, R 21-4(1)(c).

20 *Vout v Hay*, *supra* note 4 at para 25.

21 *Scott v Cousins*, 37 ETR (2d) 113 at para 37, [2001] OJ No 19 [*Scott v Cousins*] (WL Can).

22 Brian A Schnurr, *Estate Litigation*, loose-leaf (consulted on January 20, 2013) (Toronto: Thomson Canada Limited, 1994) ch 2 at 12.

23 *MacGregor v Ryan*, [1965] SCR 757 at para 24, 53 DLR (2d) 126 [*MacGregor*]; please also see *Maw v Dickey* (1974), 6 OR (2d) 146 at para 68, 52 DLR (3d) 178 (Surrogate Court) for Justice Shapiro’s description of the *MacGregor* decision and “the heavy burden resting on the proponents of the will” due to the fact that the proponents were also found to be “instrumental in the preparation and execution of the will” [emphasis added].

24 *Re Bailey* (1974), 4 OR (2d) 315 at paras 4-9, 47 DLR (3d) 670 [*Re Bailey*] (WL Can).

## B. Clarification under *Vout v Hay*

However, in the 1995 decision of *Vout v Hay*, the Supreme Court of Canada directly addressed this confusion, and clarified both the burdens and standards of proof utilized in an action alleging suspicious circumstances.<sup>25</sup> In this case, an elderly testator had previously left his entire estate to his brother and sister in equal shares.<sup>26</sup> However, in 1985 and at the age of 81, the testator executed a new will in which Vout, a 29-year-old friend, became the major beneficiary.<sup>27</sup> Upon the testator's death, his family contested the validity of the 1985 will due to various suspicious circumstances, including Vout personally giving instructions for the will over the telephone, Vout attending the lawyer's office with the testator for execution, and the visible confusion of the testator when the contents of the will were read aloud to him at the time of signing.<sup>28</sup>

In a unanimous judgment, Justice Sopinka outlined the structure for a will challenge.<sup>29</sup> First, while a will that appears to adhere to all formalities is presumptively valid, this presumption is easily rebutted and extinguished upon introducing evidence of suspicious circumstances.<sup>30</sup> Second, if the will challenge involves suspicious circumstances regarding the execution of the will or the testamentary capacity of the testator, then the legal burden of proof remains with the *propounder* of the will.<sup>31</sup> However, if the suspicious circumstances are raised in regard to allegations of fraud or undue influence over the testator, then the burden of proof is *reserved* and upon the party *challenging* the validity of the will.<sup>32</sup> Third and most importantly, Justice Sopinka also directly clarified that suspicious circumstances do not impose a standard of proof beyond the balance of probabilities, and that the *same civil standard* is adopted for both the propounder and challenger of the will.<sup>33</sup>

However, despite the decision of the Supreme Court in *Vout v Hay*, some uncertainty still remained. For example, in the will challenge of *Brydon v Malamas*, Justice Halfyard noted that in light of the “very strong suspicion” that the testatrix lacked testamentary capacity, “the proponent must prove testamentary capacity to a higher degree of certainty than a mere fifty-one percent probability.”<sup>34</sup>

## C. Reinforcement in *McDougall*

As a result of such lingering comments suggesting a third standard after *Vout v Hay*, the 2008 Supreme Court of Canada decision of *McDougall* again sought to determinedly

25 *Vout v Hay*, *supra* note 4.

26 *Ibid* at para 2.

27 *Ibid* at para 1.

28 *Ibid* at paras 3-4.

29 Please note that in jurisdictions such as British Columbia, the onus of proving undue influence also traditionally rested upon the party challenging the validity of the will and mirrored the procedure in Ontario as described in *Vout v Hay*. However, once the *Wills, Estates and Succession Act*, SBC 2009, c 13 [WESA] comes into force on March 31, 2014 (see BC Reg 148/2013) this onus will be altered in certain instances. Specifically, under section 52 of WESA, after the party challenging the will has shown suspicious circumstances, the onus will now remain with the propounder of the will to prove that undue influence was *not* present—rather than rest upon the party challenging the will to show that undue influence *was* present.

30 *Vout v Hay*, *supra* note 4 at paras 26-27; Kerwin, *supra* note 19 at 7.1.5. As described in *Scott v Cousins*, *supra* note 21 at para 41, the level of evidence required to introduce the possibility of suspicious circumstances needs only to “excite the suspicion of the Court.”

31 *Ibid* at paras 19-20, as per the *Succession Law Reform Act*, RSO 1990, c S.26.

32 *Ibid* at para 21. As noted at para 28, this reversal reflects the “policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established.”

33 *Ibid* at paras 23-24.

34 *Brydon v Malamas*, 2008 BCSC 749 at paras 51, 158, 41 ETR (3d) 104 [*Brydon*] (WL Can).

address this longstanding tension between the “balance of probabilities and cases in which allegations made against a defendant are particularly grave.”<sup>35</sup> The court’s finding on the inapplicability of a third standard was particularly clear:

I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. *However, these considerations do not change the standard of proof.*<sup>36</sup>

Similarly, the court clarified that the distinction between the civil and criminal standards of proof is based only on the latter engaging the presumption of innocence, before outlining the “practical problems” associated with utilizing a third standard.<sup>37</sup>

#### IV. COMMENTARY AND CRITIQUE

The following commentary and critique will investigate questions and concerns about identifying exactly where the third standard of proof resides on a spectrum of probabilities, and when this additional standard of proof should apply in probate actions. In addition, the unique structure of will challenges will be reviewed, as well as a brief discussion about the persistence of the judiciary’s desire and intuition to reference a third standard of proof despite the Supreme Court of Canada’s decision in *McDougall*. Finally, this section will discuss the evidentiary demands upon the party challenging the contested will, before concluding with recommendations on how to accurately convey the location of the third standard of proof to a finder of fact.

##### A. Where the Third Standard Resides

As noted above, there are various practical and procedural problems and concerns with utilizing a third standard of proof. First, it would be necessary to clearly identify *where* the standard resides, and confidently convey this location to the finder of fact.<sup>38</sup> Certainly, operating on a balance of probabilities, or deciding that something is more likely than not, is much easier to conceptualize than trying to describe the precise location of the third standard on a spectrum of certainty.<sup>39</sup> This argument against the third standard is also linked to the law’s preference for utilizing a non-mathematical approach to describe probability, as according to the Baconian school of thought, and explicit judicial concerns that a lay juror cannot readily understand the concept of sixty percent or seventy percent probability.<sup>40</sup>

However, some proponents of the Pascalian, or mathematical, approach have argued that this blanket refusal to utilize percentages undermines both the competence of the finder of fact and the historical faith in the jury in Canada, as it has been adopted in other jurisdictions, and speaking of a sixty percent or seventy percent probability “would not

35 *McDougall*, *supra* note 1 at para 26. The particularly grave allegations in this case involved accusations that McDougall, a school supervisor, had repeatedly sexually assaulted FH when he was a ten year old student at the Sechelt Indian Residential School between 1968-1969.

36 *Ibid* at para 40 [emphasis added].

37 *Ibid* at paras 41, 43.

38 McBride, *supra* note 13 at 327, citing Lord Nicholls in *Re H & Ors (minors)* [1995] UKHL 16, [1996] AC 563 [*Re H & Ors*].

39 *McDougall*, *supra* note 1 at para 43, citing Linda R Rothstein, Robert A Centa & Eric Adams, “Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof” in *Special Lectures 2003: The Law of Evidence* (Irwin Law: Toronto, 2004) at 466.

40 *Ibid* at para 43; McPhillips, *supra* note 6 at 150-151.

give even the most uneducated gambler any difficulty whatsoever.<sup>41</sup> In addition, when conceptualized along a spectrum in reference to proof beyond a reasonable doubt and the civil balance of probabilities, describing the location of the third standard of proof will hardly occur in an inaccessible or vague conceptual vacuum.

Similarly, due the infrequent use of civil juries throughout Canada, the third standard may not even regularly be conveyed to the laymen of the jury. For example, in British Columbia, civil juries are only utilized in approximately three to ten percent of trials.<sup>42</sup> Although the use of civil juries has increased in Ontario to about twenty-two percent, the Ontario Law Reform Commission report on civil juries found that approximately seventy-five percent of these civil jury trials were for tortious actions regarding motor vehicle accidents.<sup>43</sup> Yet even for the rare cases in which a civil jury is utilized during a will challenge involving moral guilt in Canada, taking the time to carefully and cautiously instruct the jury about the location of a third standard of proof is certainly no more daunting or challenging than conveying the criminal standard of proof beyond a reasonable doubt—a standard which judges regularly and successfully convey during their instructions or charge to the jury.

## B. When the Third Standard Applies

Second, applying a third standard would also require a clear determination of *when* this standard applies.<sup>44</sup> Indeed, there are procedural benefits to utilizing a strict dichotomy between civil actions on a balance of probabilities and offences requiring proof beyond a reasonable doubt so that the type of action is directly linked to what standard of proof will be utilized. It has also been argued that as the presumption of innocence is not engaged, a lower standard of proof is acceptable since “society is indifferent” to which party wins a civil suit, thus making it “unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.”<sup>45</sup>

Yet in reality, society is hardly indifferent to the results of all civil suits, or probate actions where the burden of proof rests on the party challenging the will. For example, a judicial finding that an individual engaged in fraudulent behaviour surrounding a will, or placed a coercive and undue influence upon a testator, is certainly linked to a significant loss of reputation and social stigma within one’s family and broader community. Similarly, allegations of being the “officious adult child”, “nefarious caregiver” or “predatory spouse” carry deep connotations suggestive of the unethical nature of the individual under scrutiny.<sup>46</sup> Therefore, despite not being categorized as an offense, such allegations of the defendant’s moral blameworthiness are still present in civil will challenges. As a result, the presence of an intermediate and third standard of proof, when the moral character of an individual is in question, is certainly beneficial in consideration of the overall allocation of judicial error and potential negative impact upon the party facing such allegations.

41 McPhillips, *supra* note 6 at 156.

42 W A Bogart, “Guardian of Civil Rights... Medieval Relic: the Civil Jury in Canada” (1999) 62(2) *Law & Contemp Probs* 305 at 311-312. Please note that the Ontario Law Reform Commission report relies on data collected in 1994-1995, and more recent data was not located.

43 *Ibid* at 312, 317.

44 McBride, *supra* note 13 at 327, citing *Re H & Ors*, *supra* note 38.

45 *McDougall*, *supra* note 1 at para 42, citing John Sopinka, Sidney N Lederman and Alan W Bryant, *The Law of Evidence in Canada*, 2d ed (Butterworths: Toronto, 1999) at 154.

46 David M Smith, “The Challenge of Detecting Undue Influence” 17:1 *The Probator* (March 2012) online: Hull & Hull LLP Barristers and Solicitors <<http://www.hullandhull.com/Media-Centre/March-2012-Probater-Final.pdf>>.

### C. Unique Structure of Will Challenges

Yet the above discussion implies that the propounder of the will is also the party facing allegations of fraud or undue influence: for example, in *Vout v Hay*, the executor and propounder of the will was also the major beneficiary accused of corrupting the testamentary freedom of the deceased. As a result, Vout was present and deeply engaged in the litigation to defend herself against the social stigma of the allegations.

While the executor and propounder of the will is often the party facing such allegations of moral guilt, this is not always the case. Rather, the executor and propounder of the will may simply be seeking a certified or “probated” copy of the will to assume control of the testator’s assets to administer the estate.<sup>47</sup> Therefore, the party facing allegations of fraud or undue influence may not fit into the clear and traditional dynamic of will challenger and propounder, or the traditional division of plaintiff and defendant. Consequently, the alleged fraudster may have a more remote engagement with the proceedings and will challenge as a whole, such as being the spouse of the propounder of the will or the son-in-law of the testator. While more remote parties may be called as witnesses, unlike traditional defendants, they are not guaranteed the same control and engagement with the defense strategy assessing their moral guilt.

Therefore, while the latter dynamic takes on the appearance of assessing the validity of the testamentary *document* on a balance of probabilities, in reality the action is ultimately discerning the moral guilt of an *individual* within this same lower standard of proof. Certainly, discerning the moral guilt of an individual with a more remote engagement on a mere balance of probabilities is particularly concerning. As a result, the protection of this remote individual from judicial error and stigma favours the utilization of a standard of proof beyond the balance of probabilities due to their inability to provide a traditional defendant’s right to fully participate in their own defense.

### D. Legal Reality of a Silent Third Standard

Yet regardless of *McDougall’s* pronouncement that there are only two standards of proof, the intuition of judges and of the court still seems to desire something *more* than the balance of probabilities in the face of allegations of moral guilt. As a result, the language of the court seems to illustrate attempts to preserve a silent third standard into deliberations of fraud or undue influence. For example, commentary that the burden of proof is “proportionate to the gravity of the suspicion” still appeared in recent judicial decisions, including the 2013 decision of *Laszlo v Lawton* regarding undue influence from the testatrix’s husband.<sup>48</sup> Similarly, the 2013 decision of *Wassilyn v Rick Zeron Stables Inc* (“*Wassilyn*”) stated:

Where allegations are framed in fraud, and have criminal or quasi-criminal undertones, the Plaintiff is required to prove such allegations on a standard of proof *higher* than the common civil standard or balance of probabilities. The evidence must be scrutinized in a manner commensurate with the gravity of the allegation.<sup>49</sup>

Other recent actions also approvingly cite references to “a strong balance of probabilities,” and the consideration of something *beyond* a balance of probabilities when questions of

<sup>47</sup> Howard S Black, *Wills and Estates: Cases, Text and Materials* (Toronto: Edmond Montgomery Publications, 2009) at 38.

<sup>48</sup> *Laszlo v Lawton*, 2013 BCSC 305 at para 205, 226 ACWS (3d) 911 (WL Can).

<sup>49</sup> *Wassilyn v Rick Zeron Stables Inc*, 2013 ONSC 127 at para 67, 225 ACWS (3d) 275 [*Wassilyn*] (WL Can) [emphasis added].

moral guilt are at issue.<sup>50</sup> As a result, despite *McDougall* stating that there should only be two standards of proof in Canada, various finders of fact are still clearly communicating their desire for a standard of proof beyond a balance of probabilities when addressing allegations of moral guilt. In addition, judgments such as *Wassilyn* demonstrate the ability and competence of the court to clearly express not only the general location of this third standard of proof, but also highlight the need for such a standard when allegations of moral guilt such as fraud arise.

### E. Implication of Rebutting Presumption of Validity and Reversed Onus

Despite *McDougall*, a silent third standard also continues to exist due to the manner that will challenges precede, and the distance that evidence alleging fraud or undue influence must travel to persuade the trier of fact.

For example, as noted above, a will that complies with the formalities of execution under Ontario's *Succession Law Reform Act* benefits from an initial presumption of validity.<sup>51</sup> To rebut this presumption of validity, the party challenging the will must first submit evidence sufficient to "excite the suspicion of the court" that suspicious circumstances were present.<sup>52</sup> If the court is intrigued, and the suspicious circumstances involve fraud or undue influence, the burden of proof for these allegations rests with the party challenging the will. As a result, in addition to their preliminary evidence, the party challenging the will must then submit *additional* evidence sufficient to satisfy the finder of fact on a balance of probabilities. Therefore, when the initial evidence to overcome the presumption of validity is *combined* with the additional evidence needed to satisfy the civil standard, the evidential distance travelled by the challenging party can be interpreted as going *beyond* the civil standard and into the realm of a third standard of proof.

### F. Recommendations for Describing the Third Standard in Canada

While this paper has argued for both the acknowledgement of what is currently described as a silent third standard, as well as the endorsement of this third standard in cases involving moral guilt, the precise location of this standard must still be solidified. For practical purposes, identification of the location of the third standard would enable it to be confidently and consistently applied by the finder of fact. This author would advocate for a Pascalian or mathematical approach to clearly communicate the precise location of this third standard; surveys of the American judiciary have typically described it as residing in the range of seventy to eighty percent probability.<sup>53</sup>

However, utilizing percentages to communicate legal probabilities would be a radical change within the Canadian legal system. As a result, perhaps the most eloquent manner of communicating the location of this third standard in non-mathematical terms was the above-cited decision of *Jory* by Justice McLachlin (as she then was). Justice McLachlin described the third standard as an intermediate standard, not quite proof beyond a reasonable doubt and yet "something more than a bare balance of probabilities," which rests upon evidence that "must be sufficiently cogent to make it safe to uphold

50 *W (KRM) v Nova Scotia (Minister of Community Services)*, 2010 NSFC 27 at para 11, 297 NSR (2d) 248 (WL Can), citing *H(P) v H*, 72 NSR (2d) 104 at para 28, 173 APR 104.

51 *Succession Law Reform Act*, RSO 1990, c S.26.

52 Kerwin, *supra* note 19 at 7.1.5.

53 David L Schwartz & Christopher B Seaman, "Standards of Proof in Civil Litigation: An Experiment from Patent Law" (2013) 26(2) Harv JL & Tech 429 at 430, 439. Please see references to "clear and convincing evidence," also described as the "intermediate standard" by the authors. The authors' summary of these surveys also noted that the civil balance of probabilities was anything beyond fifty percent probability, while respondents stated that beyond a reasonable doubt required "at least 80% probability."

the findings with all the consequences” for the individual’s reputation.<sup>54</sup> However, such a non-mathematical determination would certainly benefit from a detailed report and review by both the Law Reform Commission of Canada and the Canadian Bar Association’s Legislation and Law Reform Committee. Such a review should also include an assessment of the language and descriptions utilized by jurisdictions that currently employ a third standard of proof. This would allow the description of the third standard of proof to quickly mature to a similar level of clarity that the current civil and criminal standards currently enjoy in Canadian jurisprudence.

## CONCLUSION

As noted above, there are various practical and procedural reasons for utilizing only two standards of proof. For example, it can be difficult to clearly communicate to the finder of fact where the precise location of a third standard of proof resides, and the judicial system benefits from the procedural simplicity of automatically allocating a lower standard of proof to civil actions and a higher standard of proof to offenses and situations clearly engaging moral blameworthiness.

However, despite these concerns, compelling arguments still persist for employing something beyond a balance of probabilities when allegations of moral guilt, such as fraud or undue influence, are present in a probate action. After all, once such allegations of moral guilt arise, the danger of an individual incurring a significant loss of reputation or social stigma through a finding against them also emerges. In such situations, it is no longer appropriate to equally allocate the risk of error between parties on the civil balance of probabilities. As a result, when such allegations of moral guilt are present, the need to protect an individual from both judicial error and social stigma benefits from embracing a third standard of proof that is beyond the civil balance of probabilities and yet less than a finding beyond a reasonable doubt.

Similarly, notwithstanding *McDougall*, a silent third standard still informally continues due to the court’s intuitive desire for clear and compelling evidence when addressing claims of fraud or undue influence. In addition, the cumulative evidential demands of a third standard of proof also linger by requiring the party challenging the will to first overcome the presumption of validity and then to also succeed on a balance of probabilities.

While utilizing this third standard of proof may be more challenging in a judicial system weary of percentages, such additional procedural effort will help offset the risk of unwarranted social stigma being assigned to parties facing allegations of moral guilt, and therefore necessitates our continuing consideration. The third standard of proof acknowledges this need to carefully allocate the risk of error in civil actions involving allegations of moral guilt due to the significant loss of reputation and social stigma that follows such a judicial sanction or finding, and would therefore be a powerful addition to the manner in which we address probate actions alleging suspicious circumstances and moral guilt.

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54 *Q v College of Physicians & Surgeons*, supra note 17 at para 21, citing *Jory*.

## Winner of the 2014 McCarthy Tétrault Law Journal Prize for Exceptional Writing

ARTICLE

# INTERPRETING THE *CHARTER* WITH INTERNATIONAL LAW: PITFALLS & PRINCIPLES

Benjamin Oliphant\*

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## INTRODUCTION

While the use of international human rights law in Canadian courts is not an entirely novel phenomenon,<sup>1</sup> there is little doubt that it has become more prevalent in the Supreme Court of Canada's jurisprudence.<sup>2</sup> Far from being treated "as some exotic branch of the law, to be avoided if at all possible,"<sup>3</sup> the courts have come to embrace international law and human rights norms, notably in the course of defining the guarantees found in the *Canadian Charter of Rights and Freedoms* (the "*Charter*").<sup>4</sup> Indeed, more than simply being considered among various aids to interpretation, it is often said that the *Charter* must be *presumed* to provide at least as much protection as international human rights law and norms, particularly those binding treaties that served as its inspiration.<sup>5</sup> However, as I aim to show below, the Court has so far used international human rights law inconsistently and imprecisely in the process of *Charter* interpretation, exhibiting

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1 See e.g. *R v Shindler*, [1944] AJ No 11, 82 CCC 206; *R v Brosig*, [1944] 2 DLR 232, 83 CCC 199; and *R v Kaehler and Stolski*, [1945] 3 DLR 272, 83 CCC 353. For an overview of the evolving use of international law in the pre-*Charter* period, see William A Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed (Scarborough: Carswell, 1996) at 1-13 [Schabas, *International*].

2 Anne Warner La Forest, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37 UBC Law Rev 157 at 157-159 [La Forest]. This increased use has generated a wealth of scholarship. See generally Schabas, *International*, *ibid*; Stephen J Toope, "Canada and International Law" (1998) 27 Can Council Int'l L Proc 33; AF Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) [Bayefsky, *Human Rights*]; Louise Arbour & Fannie Lafontaine, "Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective" (2007) 45 Osgoode Hall LJ 239 at 250 [Arbour & Lafontaine]; and the materials discussed below.

3 Jutta Brunnee & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Int'l L 3 at 3 [Brunnee & Toope], citing Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (New York: Oxford University Press, 1994) at 206.

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

5 See the survey in Schabas, *International*, *supra* note 1 at 10-13, 26-28.

little in the way of a meaningful presumption of compliance with international human rights obligations. The purpose of this paper is to provide a review of this development in constitutional interpretation, and propose tentative guidelines that may lead to more principled and predictable use of international human rights law in the future.

In Part I, a brief survey of the Court's relevant *Charter* jurisprudence will highlight those circumstances in which international human rights law has been used (or ignored) in *Charter* cases. In the next Part, it will be argued that while international human rights norms may be relevant and persuasive, there should be no automatic 'presumption' that the *Charter* effectively encapsulates all international laws and agreements to which Canada is a signatory. Such a proposition, if adhered to with any rigour, conflicts with the principles of federalism and the separation of powers by giving the federal executive the power to unilaterally affect the meaning of the Constitution. Part III proposes a number of factors that may be helpful in constructing a consistent and principled framework for the use of international human rights norms in *Charter* interpretation. In particular, I will argue that certain factors that are frequently cited—such as whether Canada is strictly bound by the international law or norms—are not particularly salient considerations once we accept that the court should look only to those laws, norms and interpretations in so far as they are considered both relevant and persuasive. Ultimately, while international human rights law may be useful in the context of *Charter* interpretation, greater attention should be paid to its compatibility in the context of Canada's own constitutional order, and to the reasons underlying and offered in support of the international laws and norms.

## I. THE SUPREME COURT'S USE OF INTERNATIONAL LAW

Before surveying the Court's use of international human rights law in *Charter* interpretation, it is important to delineate the scope of inquiry, as the justification of the use of international law in domestic courts depends heavily on the legal context in which it is deployed.<sup>6</sup> The analysis here will be confined to those cases where the Court has used international law or human rights documents to reveal the content of a given *Charter* provision. Cases in which the Court has applied international law in the process of statutory interpretation,<sup>7</sup> defining administrative law duties,<sup>8</sup> developing the common law,<sup>9</sup> interpreting treaty-implementing legislation,<sup>10</sup> deciding the international

6 The Honourable Justice Claire L'Heureux-Dubé, "From Many Different Stones: A House of Justice" (2003) 41 *Alta L Rev* 659 at 668.

7 There is a general presumption of statutory interpretation that requires a statute to be construed in accordance with international law to the extent possible (Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths, 1994) at 330). See e.g. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241; *Schreiber v Canada (AG)*, 2002 SCC 62, [2002] 3 SCR 269; *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1371, 74 DLR (4th) 449 [*National Corn*]; *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 137, 166 DLR (4th) 193. See also Stephane Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004) 25 *Stat L Rev* 19 [Beaulac].

8 See e.g. *Baker v Canada (Ministry of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71, 174 DLR (4th) 193 [Baker].

9 Canadian courts adhere to the doctrine of adoption, such that customary international norms may be adopted into the common law provided that there is no legislation that clearly conflicts with the international rule. See the discussion in *R v Hape*, 2007 SCC 26 at paras 35-39, [2007] 2 SCR 292 [Hape], and the cases cited therein.

10 See e.g. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at 1019-1020, 160 DLR (4th) 193.

application of the *Charter*,<sup>11</sup> or the section 1 context<sup>12</sup> will not make up part of this analysis, important as they are. Each one of these contexts presents its own challenges and potential for greater theoretical and doctrinal development.<sup>13</sup> However, I expect that confining the analysis to the use of international human rights law in the interpretation of discrete provisions of the *Charter* will focus the impact of the analysis.

## A. The Court's Use of International Human Rights Law in *Charter* Cases

With the bounds of the inquiry established, we can turn to how the Supreme Court has used international human rights laws in the course of interpreting the breadth and content of *Charter* rights and freedoms. The practice appears to have its genesis in Chief Justice Dickson's dissenting opinion in *Reference re Public Service Employee Relations Act (Alta)* ("*Alberta Reference*"),<sup>14</sup> one of a trilogy of cases<sup>15</sup> dealing with the extent to which labour rights are protected under the section 2(d) guarantee of freedom of association. In his reasons, the Chief Justice asserted that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."<sup>16</sup> The legal basis of this presumption was not articulated in detail,<sup>17</sup> although the Chief Justice appeared to ground it in the conceptual and historical nexus between international human rights documents and the *Charter*,<sup>18</sup> thus making the former an 'important indicia' of the latter.<sup>19</sup>

The plausibility of such a presumption will be addressed in the next part. For now, it is important to note a somewhat different and potentially more attractive formulation, in which Chief Justice Dickson suggests that international laws and norms may constitute

11 See e.g. *Hape*, *supra* note 9 at para 56.

12 Examples include *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight Communications*]; *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 75 DLR (4th) 577; *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 133 DLR (4th) 1; *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326, 64 DLR (4th) 577, La Forest J; *R v Lucas*, [1998] 1 SCR 439 at para 50, 157 DLR (4th) 423; *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202; *R v Sharpe*, 2001 SCC 2 at paras 171, 175-79, [2001] 1 SCR 45; *R v Keegstra*, [1990] 3 SCR 697 at 749-755, [1990] SCJ No 131, Dickson CJ [*Keegstra*]; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 67, [2013] 1 SCR 467.

13 For instance, some have observed that the use of international and comparative sources would appear to be required under section 1, which has been called a "broad invitation to examine the law in effect in other 'free and democratic societies.'" Schabas, *International*, *supra* note 1 at 131. See also John Claydon, "The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms" (1986) 2 Conn J Int'l L 349 at 351; Bayefsky, *Human Rights*, *supra* note 2 at 111; The Honourable Mr Justice Michel Bastarache, "The Honourable G.V. La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts" in Rebecca Johnson et al, eds, *Gérard V. La Forest at The Supreme Court of Canada 1985-1997* (Winnipeg: Canadian Legal History Project, University of Manitoba, 2000) at 436 [Bastarache, "Use of Foreign Materials"].

14 *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161, Dickson CJC, dissenting [*Alberta Reference*].

15 *Ibid*; *PSAC v Canada*, [1987] 1 SCR 424, [1987] SCJ No 9; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, [1987] SCJ No 8 (collectively the "*Labour Trilogy*").

16 *Alberta Reference*, *ibid* at 349. This approach has been referred to as a 'universalist' method of *Charter* interpretation, insofar as it considers the existence of human rights norms to be, in a sense, universally ascertainable. See Steven Barrett & Benjamin Oliphant, "The Trilogy Strikes Back: Reconsidering Constitutional Protection for the Freedom to Strike" (2014) Ottawa L Rev (forthcoming).

17 Bayefsky, *Human Rights*, *supra* note 2 at 21, 76.

18 See Schabas, *International*, *supra* note 1 at 44 (the "common heritage" of the *Charter* and post-war international human rights documents is a "powerful argument for the relevance of the international instruments in interpreting the Canadian *Charter*").

19 *Alberta Reference*, *supra* note 14 at 349.

‘relevant and persuasive sources’ for the interpretation of the *Charter*, not unlike comparative law sources generally.<sup>20</sup> In his words:

The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*’s provisions.<sup>21</sup>

Chief Justice Dickson’s ‘presumption’ seems confined to those treaties and laws by which Canada is bound. His overall focus, however, is broader and would appear to extend to both ‘soft’ international law and non-binding law, as well as the judicial and quasi-judicial decisions of international tribunals or oversight bodies. As such, Chief Justice Dickson went on to rely on the *International Covenant on Economic Social Cultural Rights (ICESCR)*<sup>22</sup> as well as a non-binding interpretation<sup>23</sup> of International Labour Organization (ILO) *Convention No. 87*<sup>24</sup> in finding that freedom of association included an implicit right to strike.<sup>25</sup>

Following Chief Justice Dickson’s influential dissent, the use of international law in the context of *Charter* interpretation has blossomed.<sup>26</sup> Space does not permit a complete survey but a few representative examples will demonstrate the way in which the Court has used international laws, norms and interpretations in the course of defining the scope of *Charter* rights and freedoms.

A natural starting point, given the origins of the presumption, is with respect to freedom of association, where the Court has been keen to take inspiration from international norms in developing that section’s jurisprudence.<sup>27</sup> In *Health Services and Support – Facilities*

20 *Ibid* at 348.

21 *Ibid*.

22 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976) [ICESCR]. Dickson CJC noted that the ICESCR, along with the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [ICCPR], were adopted in an effort to make more specific the broad principles articulated in the *Universal Declaration of Human Rights*, GA Res. 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71 [UNDHR].

23 *Alberta Reference*, *supra* note 14 at 355, citing *ILO Official Bulletin*, vol LXVIII, Series B, No 3, 1985, at 34-35.

24 *Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organize*, 9 July 1948, 68 UNTS 17, ILO No 87 (entry into force 4 July 1950) [Convention No 87].

25 The difference between an automatic presumption of incorporation and deeming international sources ‘relevant and persuasive’ will be taken up more fully in Parts II & III below.

26 See e.g. *Slight Communications*, *supra* note 12 at 1056-1057, and the decisions cited in this section. See generally Patrick Macklem, “The International Constitution” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) [Macklem, “International Constitution”] 261.

27 See *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 16, [2001] 3 SCR 1016 [Dunmore]; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 69-79, [2007] 2 SCR 391 [B.C. Health]; *Ontario (AG) v Fraser*, 2011 SCC 20 at paras 91-95, [2011] 2 SCR 3 [Fraser]. Members of the court have also occasionally turned to human rights documents in delineating the scope of other fundamental freedoms. For instance, in *Harper v Canada (AG)*, a case involving the constitutional permissibility of campaign spending limits, McLachlin CJC and Major J (dissenting), appeared to rely on international human rights covenants in finding that the scope of 2(b) should be influenced by the fact that the “right to receive information is enshrined in both” the *UNDHR* and the *ICCPR*. See *Harper v Canada (AG)*, 2004 SCC 33 at para 18, [2004] 1 SCR 827.

*Subsector Bargaining Association v British Columbia* (“*B.C. Health*”)<sup>28</sup> for instance, the Court addressed a challenge to government legislation nullifying portions of collective agreements in the B.C. health care sector and effectively precluding collective bargaining on a number of terms in the future. While generally the legislature is constitutionally competent to limit the scope of or derogate from negotiated contracts,<sup>29</sup> the Court found that by doing so in the case of collective bargaining agreements, the government had impermissibly violated the union members’ freedom of association. In coming to this conclusion, the Court overruled the *Labour Trilogy*’s finding that section 2(d) did not afford protection to collective bargaining, partially on the basis that “collective bargaining is an integral component of freedom of association in international law.”<sup>30</sup> Although endorsing Chief Justice Dickson’s presumption, the inquiry in *B.C. Health* was not limited to “the international human rights documents that Canada has ratified.”<sup>31</sup> The Court went on to rely on ILO *Convention No. 98*,<sup>32</sup> which Canada has not ratified,<sup>33</sup> as well as non-binding interpretations of that law.<sup>34</sup>

Occasionally, the Court will look to more detailed articulations of a right or freedom in international human rights documents in the course of interpreting the ‘open textured’ *Charter* provisions, a use explicitly recommended by the Chief Justice in the *Trilogy*.<sup>35</sup> Such was the case in *R v Brydges* (“*Brydges*”),<sup>36</sup> a case involving section 10(b) of the *Charter*, which provides the right to “retain and instruct counsel without delay and to be informed of that right.” Justice Lamer (as he then was) discussed Article 14 of the *International Covenant on Civil and Political Rights (ICCPR)*, which goes some ways further than the *Charter*’s text in providing for a right to duty counsel.<sup>37</sup> Justice Lamer found that this provision in the *ICCPR* reinforced his view that “the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately,” and includes the right to have access to available legal aid and duty counsel, and the right to be informed of that opportunity.<sup>38</sup> As with the Chief

28 *B.C. Health*, *ibid*.

29 Peter Hogg, *Constitutional Law of Canada*, 5d ed loose-leaf (consulted on 15 January 2014), (Toronto: Carswell), ch 44 at 6-13 [Hogg]; Robert Charney, “The Contract Clause Comes to Canada: The British Columbia Health Services Case and the Sanctity of Collective Agreements” (2008) 23 *NJCL* 65 at 71.

30 *B.C. Health*, *supra* note 27 at paras 20, 69-79.

31 *Ibid* at para 70.

32 *Convention (No 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951). See Brian Langille, “Can We Rely on the ILO?” (2006-2007) 13 *CLEJ* 273 at 279-281 [Langille, “Can We Rely?”].

33 See generally Brian Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009) 54 *McGill LJ* 177 at 194-198 [Langille, “Freedom of Association Mess”]. On the problematic interpretation and use of ILO law in *B.C. Health*, see Brian Langille and Benjamin Oliphant, “From the Frying Pan into the Fire: *Fraser* and the Shift from International Law to International ‘Thought’ in *Charter* Cases” (2011) 16 *CLEJ* 181 [Langille & Oliphant]. See also the discussion in Part III, below.

34 *B.C. Health*, *supra* note 27 at para 74, citing United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant — Concluding Observations of the Human Rights Committee — Canada*, UNOHCHR, 1999, UN Doc CCPR/C/79/Add 105.

35 See *Alberta Reference*, *supra* note 14 at 349, citing John Claydon, “International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms” (1982) 4 *Sup Ct L Rev* 287 at 293.

36 *R v Brydges*, [1990] 1 SCR 190, 74 CR (3d) 129 [Brydges].

37 It provides the right of an accused to be “tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” *ICCPR*, *supra* note 22, art 14(3)(d).

38 *Brydges*, *supra* note 36 at 215.

Justice's decision in the *Alberta Reference*, Justice Lamer did not attempt to clearly justify his reliance on international law, or ground it in theory or principle.<sup>39</sup>

The Court has also turned to international human rights norms in interpreting the section 7 rights to life, liberty and security of the person.<sup>40</sup> In *United States v Burns* (“*Burns*”),<sup>41</sup> for instance, the Court clarified its previous decisions in *Kindler v Canada (Minister of Justice)* (“*Kindler*”) and *Reference Re Ng Extradition (Can)* (“*Ng*”),<sup>42</sup> and found that extraditing an individual who may potentially be sentenced to death upon conviction violates section 7. While the Court admitted that “evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty,”<sup>43</sup> the emerging international consensus that imposition of the death penalty as such violates human rights norms was found compelling by the Court.<sup>44</sup> In particular, the Court found that the arguments against extradition without assurances that the accused would not face the death penalty have “grown stronger” since *Kindler* and *Ng*.<sup>45</sup> In supporting this conclusion, it cited “important initiatives within the international community denouncing the death penalty, with the government of Canada often in the forefront,”<sup>46</sup> including a range of international protocols, reports, resolutions, and treaties, of varying degrees of legal weight and authoritativeness.<sup>47</sup>

It should also be noted that the use of international human rights law does not always lead the Court to a more expansive definition of a *Charter* right or freedom in question. Beyond those cases in which the Court may use international legal norms in support of reasonable limits on a right or freedom under section 1<sup>48</sup>—which are beyond the scope of this survey—the Court may also find that international law undercuts the more expansive definition of a right or freedom urged by a claimant. For instance, in *USA v Cotroni* (“*Cotroni*”), the Court considered the interpretation of section 6(1) of the *Charter* in the context of extradition proceedings.<sup>49</sup> Justice La Forest, for the majority, found that section 6(1) was indeed infringed by deportation. He cited a number of international

39 Bayefsky, *Human Rights*, *supra* note 2 at 78.

40 In a number of cases, members of the court have mentioned international law in passing, without it forming any meaningful aspect of the judgment. See e.g. *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 503, 24 DLR (4th) 536 [*Motor Vehicle Reference*]; *R v Oakes*, [1986] 1 SCR 103 at paras 54-55, 26 DLR (4th) 200; *Mills v The Queen*, [1986] 1 SCR 863, 29 DLR (4th) 161, Lamer J, dissenting; *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 at paras 57-58, 1997 CanLII 295; *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 56 CCC (3d) 65, Lamer CJC, concurring [*Reference re ss 193*]; *Beauregard v Canada*, [1986] 2 SCR 56 at paras 33-34, 30 DLR (4th) 481; *R v Milne*, [1987] 2 SCR 512 at para 24, 46 DLR (4th) 487 [*Milne*]; *R v L(DO)*, [1993] 4 SCR 419, 85 CCC (3d) 289, L'Heureux-Dubé, concurring; *R v O'Connor*, [1995] 4 SCR 411 at para 114, 130 DLR (4th) 235; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 69, 152 DLR (4th) 577, La Forest J, concurring.

41 *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].

42 *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438 [*Kindler*]; and *Reference Re Ng Extradition (Can)*, [1991] 2 SCR 858, 84 DLR (4th) 498 [*Ng*].

43 *Burns*, *supra* note 41 at para 89.

44 *Ibid* at paras 83-92.

45 *Ibid* at para 131.

46 *Ibid* at paras 85-88.

47 *Ibid* at paras 79-92. See also the similar reasoning process in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].

48 See the cases cited *supra* note 12.

49 *USA v Cotroni*, [1989] 1 SCR 1469, 48 CCC (3d) 193 [*Cotroni*].

instruments that limited protection to situations of exile or banishment,<sup>50</sup> and found that if the objective was to so limit section 6, “one would have thought these more specific words would have been used rather than according a general right to remain in Canada.”<sup>51</sup> However, these international materials also led Justice La Forest to conclude that “the infringement to s. 6(1) that results from extradition lies at the outer edges of the core values sought to be protected by that provision.”<sup>52</sup>

Similar reasoning was adopted in the recent case of *Divito v Canada* (“*Divito*”),<sup>53</sup> again in the context of mobility rights. *Divito* involved provisions of the *International Transfer of Offenders Act* (“*ITOA*”)<sup>54</sup> that permitted the Minister to refuse the transfer of a Canadian citizen incarcerated abroad seeking to serve his sentence in Canada. The claimant asserted that these provisions, taken together, violated the section 6(1) right to ‘enter’ Canada. Justice Abella for the majority endorsed Chief Justice Dickson’s presumption of compliance,<sup>55</sup> and relied on both binding and non-binding international norms in interpreting the scope of section 6(1).<sup>56</sup> However, Justice Abella also noted that, as a matter of international law, “requiring the return of an offender to his or her home state infringes the doctrine of state sovereignty,” and therefore Canada has no free standing authority to *require* the return of a citizen lawfully imprisoned abroad.<sup>57</sup> The ability to serve one’s sentence in Canada depended entirely on a bilateral Canada-US treaty,<sup>58</sup> which had been implemented through the *ITOA*. That this ability was merely a “creation of legislation” supported the conclusion that the law itself did not offend the *Charter* by permitting the government to refuse such a transfer.<sup>59</sup>

## B. Relevant International Law Not Considered

In the cases discussed above, the Court has taken seriously Chief Justice Dickson’s presumption, and found that international human rights law and norms can be a critical factor in identifying the meaning and scope of *Charter* provisions. Despite the significance of this trend,<sup>60</sup> however, there have also been a number of high profile *Charter* cases in which clearly relevant international human rights norms and documents did not find their way into the Court’s reasoning. A useful starting point is, again, in the labour relations context. In *R v Advance Cutting & Coring Ltd* (“*Advance Cutting*”),<sup>61</sup> the various judgements making up the majority found that a statutory ‘union shop’ provision

50 *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46, art 3(1), (entered into force 2 May 1968); *The Explanatory Reports on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (1971); *ICCPR*, *supra* note 22, art 12.

51 *Cotroni*, *supra* note 49 at 1481.

52 *Ibid.*

53 *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, 364 DLR (4th) 391 [*Divito*].

54 *International Transfer of Offenders Act*, SC 2004, c 21, ss 8, 10(1), 10(2).

55 *Divito*, *supra* note 53 at para 22.

56 *Ibid* at paras 21-28. For instance, at para 27, the majority relied on a General Comment to the relevant article of the *ICCPR* for the proposition that there will be “‘few, if any’ limitations on the right to enter that would be considered reasonable” (Report of the Human Rights Committee, CCPR, 55th session, Supp No 40, UN Doc A/55/40 at 128-133).

57 *Divito*, *ibid* at para 40.

58 *Treaty Between Canada and the United States of America on the Execution of Penal Sentences*, 2 March 1977, Can TS 1978 No 12, arts II, III, IV (entered into force 19 July 1978).

59 *Divito*, *supra* note 53 at para 45.

60 These cases and others have led Patrick Macklem to conclude that the Supreme Court has effected a “fundamental shift in Canada’s constitutional relationship to the international legal order.” Macklem, “International Constitution”, *supra* note 26 at 265.

61 *R v Advance Cutting & Coring Ltd*, 2001 SCC 70, [2001] 3 SCR 209 [*Advance Cutting*].

requiring all employees to be members of a union as a condition of employment was not unconstitutional. This conclusion appears to run contrary to ILO interpretations of the relevant international law,<sup>62</sup> which provide that people should be free to *not* join a union, and to join a union of their choosing.<sup>63</sup> Indeed, Justice Bastarache, in dissent, cited a variety of sources in finding that the freedom to not associate was well entrenched in international human rights law.<sup>64</sup> Nevertheless, the other members of the Court did not meaningfully address the international law angle at all.<sup>65</sup> For instance, Justice LeBel (Arbour and Gonthier JJ., concurring) simply noted that the interpretation of the freedom of association provision of the *European Convention* by the European Court of Human Rights (ECHR),<sup>66</sup> “interesting as it may be,” should not be followed because labour laws of a country represent a political compromise that should not easily be displaced by the courts.<sup>67</sup>

Even where the Court does directly address the relevant international law or norms, it has not always been eager to rely on the *interpretations* of those laws or norms offered by oversight bodies. The case of *Canadian Foundation for Children, Youth and the Law v Canada (AG)* (“*Canadian Foundation*”)<sup>68</sup> provides a helpful counter-example. In *Canadian Foundation*, the Court was tasked with determining the constitutional permissibility of including a defence to assault under the *Criminal Code* relating to the corporal punishment of children.<sup>69</sup> The majority noted that the relevant international treaties<sup>70</sup> do not *explicitly* prohibit corporal punishment under all circumstances in support of its finding that the law did not offend section 7.<sup>71</sup> However, as noted by Justice Arbour in dissent, the Committee on the Rights of the Child—the body tasked with reviewing State progress under the *Convention on the Rights of the Child*—concluded in its report on Canada that “physical punishment of children in families [should] be prohibited.”<sup>72</sup> Unlike in *Burns* and *B.C. Health*, the opinion of an international monitoring body in *Canadian Foundation* was evidently not considered compelling by the majority.

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- 62 Committee on Freedom of Association, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed, (Geneva: International Labour Organization, 2006) at para 975 [Digest]. Roy Adams has noted that union shop clauses “clearly [offend] the basic principles of freedom of association.” Roy J Adams, “From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining” (2008) 12 *Just Labour* 48 at 61 [Adams, “Human Right”]. See also Bob Hepple, “The Right to Strike in an International Context” (2009) 15 *CLEJ* 131 at 144 [Hepple, “Right to Strike”].
- 63 This interpretation has been followed by the European Court of Human Rights (ECHR). See *Young, James and Webster v UK* (1982), 4 EHRR 38 (individual cannot be fired for refusing to join a trade union); *Sigurdur A Sigurjonsson v Iceland* (1993), 16 EHRR 462 (issuance of a cab drivers’ license contingent on joining a union violates article 11); *Sørensen and Rasmussen v Denmark*, No 52562/99, (11 January 2006) (closed shop provisions violate article 11).
- 64 *Advance Cutting*, *supra* note 61 at paras 11-15.
- 65 See also *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 319, 81 DLR (4th) 545, where the reasons of La Forest J, dissenting on this point, relied on the ‘bilateral’ nature of freedom of association as indicated in the *UNDHR*. The other opinions of the Court did not address this point.
- 66 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, art 11(1), (entry into force 3 September 1953) [*European Convention*].
- 67 *Advance Cutting*, *supra* note 61 at para 193.
- 68 *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76 [*Canadian Foundation*].
- 69 *Criminal Code*, RSC 1985, c C-46, s 43.
- 70 *ICCPR*, *supra* note 22, arts 7, 24; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, arts 3(1), 5, 19(1), 37(a), 43(1), (entered into force 2 September 1990) [CRC].
- 71 *Canadian Foundation*, *supra* note 68 at para 33.
- 72 *Ibid* at paras 187-188, citing Committee on the Rights of the Child, *Report adopted by the Committee at its 233rd meeting on 9 June 1995*, Ninth Session, CRC/C/43, at para 93.

Similarly, in *Gosselin v Quebec (AG)*,<sup>73</sup> the majority found, *inter alia*, that providing social assistance benefits that fell substantially below a level necessary to meet basic needs did not violate section 7. The majority acknowledged that a number of sources of international law provide basic social provisions as a human right to be exercised against the government,<sup>74</sup> but nevertheless declined, in its interpretation of “security of person” within section 7, to recognize such a positive right to social assistance. Indeed, the majority of the Court did not even consider international law as a relevant factor in the interpretation of section 7.<sup>75</sup> Had any sort of presumption of compliance applied, one would have expected the Court to either apply or rebut the presumption in this instance, particularly as Justice Arbour in dissent recommended an interpretation of section 7 which would include a positive right to social assistance.<sup>76</sup>

Finally, the Court has occasionally overlooked international human rights documents even where previously found useful. For instance, while the *ICCPR* expressly guarantees the right to legal assistance to be provided without payment to an accused “if he does not have sufficient means to pay for it,”<sup>77</sup> the Court in *R v Prosper* (“*Prosper*”) found that section 10(b) of the *Charter* includes no such obligation.<sup>78</sup> It came to this conclusion on the basis that such a right is not found expressly in the *Charter* and was indeed

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73 *Gosselin v Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*].

74 See *ICESCR*, *supra* note 22, art 11(1) (“the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”); *UNDHR*, *supra* note 22, arts 22, 25.

75 The *ICESCR* and *UNDHR* were only considered by the majority in the context of interpreting Quebec’s statutory human rights legislation (the *Charter of human rights and freedoms*, CQLR c C-12), and not in its *Charter* analysis. *Gosselin*, *supra* note 73 at para 93.

76 *Gosselin*, *ibid* at para 385. As another example, the Court has rejected an interpretation of section 7 that would include some protection for property rights. See e.g. *Irwin Toy v Quebec*, [1989] 1 SCR 927 at 1003, 58 DLR (4th) 577 [*Irwin Toy*]; *Reference re ss 193*, *supra* note 40. It came to this conclusion despite the fact that property rights are protected in the *UNDHR* (*supra* note 22, art 17) and the absence of property rights in the *Charter* represents a “shocking and deliberate departure from the constitutional texts that provided the models for s. 7,” see Hogg, *supra* note 29 at ch 47, 17-19; see also Gregory Alexander, *The Global Debate over Constitutional Property* (Chicago: University of Chicago Press, 2006) at 41. While this may be a sound interpretation of the constitution, it certainly does not reflect a presumption of compliance with international human rights norms. For proponents of an interpretation of s 7 that would include protection for property, see John Whyte, “Fundamental Justice: The Scope and Application of Section 7 of the Charter” (1983) 13 *Manitoba Law Review* 455; Phillip W Augustine, “Protection of the Right to Property in the Canadian Charter of Rights and Freedoms” (1986) 18 *Ottawa L Rev* 55. Other scholars are less sympathetic: see Janet McBean, “Implications of Entrenching Property Rights in Section 7 of the Charter of Rights” (1988) 26 *Alta L Rev* 548; Richard Bauman, “Property Rights in the Canadian Constitutional Context” (1992) 8 *SAJHR* 344; Jennifer Nedelsky, “Reconceiving Rights as Relationships” (1993-1994) 1 *Rev Const Stud* 1. On the deliberate exclusion of property rights from the *Charter*, see Alexander Alvaro, “Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms” (1991) 24 *Canadian Journal of Political Science* 309.

77 *ICCPR*, *supra* note 22, art 14(3)(d).

78 *R v Prosper*, [1994] 3 SCR 236, 118 DLR (4th) 154 [*Prosper*]. The majority decided, at 278, that section 10(b) does not impose a substantive constitutional obligation on governments “to ensure that duty counsel is available, or likewise, provide detainees with a guaranteed right to free and immediate preliminary legal advice upon request.”

considered and rejected by the framers.<sup>79</sup> Somewhat surprisingly, given the logic and holding of *Brydges*, the majority did not address the relevant international law on this point at all.<sup>80</sup> While Professor Peter Hogg has suggested that more detailed international human rights treaties may be useful in the context of *Charter* interpretation, and cites the right to duty counsel as a specific example,<sup>81</sup> the Court has thus far resisted this implication in the context of 10(d).<sup>82</sup>

### C. Conclusion

The above survey suggests that the Court's track record in addressing international law in the context of *Charter* interpretation is somewhat mixed. In the labour relations context, great attention has occasionally been paid to the use of international human rights norms and the interpretations of various ILO bodies in defining the scope of section 2(d), at least in those cases following the *Labour Trilogy*. Indeed, in response to challenges to the Court's interpretation of international law in *B.C. Health*,<sup>83</sup> the majority of the Court unequivocally affirmed its position in *Fraser v Ontario (AG)*,<sup>84</sup> There, the majority not only emphasized that the *Charter* "must be interpreted in light of Canadian values and Canada's international and human rights commitments,"<sup>85</sup> but asserted that it must also be interpreted in light of "the current state of *international thought* on human rights."<sup>86</sup> Against this backdrop, cases like *Advance Cutting*, in which the majority judges were apparently unconcerned with the relevant international human rights norms, illustrate the inconsistency of the Court's use of international law.<sup>87</sup>

Similarly, while the Court has often been anxious to rely on non-binding interpretations of international human rights laws in cases like *Burns* and *B.C. Health*, it has also been content to downplay them in cases like *Canadian Foundation*. It was not made clear why the Court found the opinions of oversight bodies useful in the former context and not the latter. Finally, as alluded to above, the interpretation of section 10(b) in *Prosper* seems to run directly contrary to the Court's logic in *Brydges*, rendered a few years prior. If the

79 *Ibid* at 265-268. Similar reasoning can be found in *Milne*, *supra* note 40, although in that case with specific reference to the relevant international law. In *Milne*, the Court refused to give an interpretation to ss 9 and 12 that would provide a right to lesser punishment where the punishment for the offence had been changed after conviction and sentencing. Such an interpretation was, as counsel in *Milne* pointed out, in line with the *ICCPR*, article 15 of which provides that where the law has been changed to impose a lighter penalty after the commission of the offence, "the offender shall benefit thereby." The majority of the Court rejected such an interpretation of the *Charter*, noting at 527 that "(i)t is difficult to see how such an approach could be taken in light of the fact that specific attention was given to this matter in s. 11(i) of the *Charter*, which limits the rights of an accused in this regard to the benefit of a reduction in sentence made between the time of the commission of the offence and the time of sentencing."

80 The only reference to the *ICCPR* was in Justice L'Heureux-Dubé's dissenting reasons. She quoted from *R v Robinson* (1989), 73 CR (3d) 81 at 113, which had observed that the framers had considered the relevant provisions of the *ICCPR* and other human rights documents before rejecting a right to duty counsel. However, Justice L'Heureux-Dubé also rejected an interpretation that would impose a positive obligation on the government to provide duty counsel, for reasons similar to the majority. See *Prosper*, *ibid* at 286-288.

81 Hogg, *supra* note 29, ch 36, 39-43.

82 It should be noted, however, that while the courts have not found an affirmative right to counsel under s 10(b), they have found that court appointed counsel may be required in certain situations where section 7 interests are implicated. See *R v Rowbotham* (1988), 41 CCC (3d) 1, 1988 CanLII 147 (Ont CA); *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124.

83 Most notably by Rothstein J, dissenting, in *Fraser*, *supra* note 27 at paras 247-250.

84 *Ibid*.

85 *Ibid* at para 92 (emphasis in original).

86 *Ibid* (emphasis added).

87 Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System" (2004) 37 UBC L Rev 113 at 142-143 [Weiser, "Undressing"].

reasoning the Court employed in *Prosper* was extended to *Brydges*, it would have led to the contrary conclusion: the framers were aware of the more generous articulation of the right to counsel in the *ICCPR*, and their decision to not extend the more expansive articulation should be dispositive. Evidently, the fact that a given international human rights document contains a more precise articulation of a given right or freedom found in the *Charter* can cut both ways, and it is not clear in advance which way it will cut.

## II. PRESUMPTIONS OF COMPLIANCE AND CREEPING MONISM

A number of critics have suggested that the Court's use of international human rights law is often confined to those provisions and interpretations that appear to support a conclusion at which the Court has already arrived.<sup>88</sup> The Court's framework for the use of international law has been called "imperfect at best, and improvised at worst,"<sup>89</sup> "inconsistent and even unintelligible,"<sup>90</sup> "troublesome and confused," and "unpredictable."<sup>91</sup> In fairness, it should be noted that the Court's reasoning might have reflected the various emphases on the importance of international human rights law and norms by counsel, the different approaches of different judges, or principled distinctions lurking in the background that have not been systematically revealed in the written reasons. Whatever its source, the apparent inconsistency identified in the case law cannot help but sow confusion; it is not clear from the outset whether the Court will consider such laws and norms to be irrelevant, conclusive, or somewhere in between. It seems clear that this inconsistency is sustained by the confusion surrounding the theoretical basis for the use of international law in the context of *Charter* interpretation.<sup>92</sup> The remainder of this paper will attempt to identify the potential fault lines in the debate over the use of international law in the context of *Charter* interpretation, and propose some principles and guidelines that may lead to the more consistent use of such materials in the future.

### A. Abandoning Presumptions of Compliance

From the outset, it should be emphasized that there is a potentially large conceptual gap between suggesting that the courts *must* apply a 'presumption' that relevant international human rights norms are effectively incorporated into the *Charter*, and considering international laws and interpretations relevant and persuasive as the context warrants. In the former case, it would be incumbent on courts to identify any germane international human rights documents, apply that meaning to the relevant *Charter* provision, and then either accept that definition or seek to rebut it by meeting an unknown standard. By contrast, where international human rights norms are considered 'relevant and persuasive,' they may simply be among the matrix of factors that the court might consider helpful in the course of resolving issues involving the content of specific *Charter* rights and freedoms. The survey above suggests that the Court has tended towards the latter in practice, but has at least rhetorically adopted the former.

Stephen Toope has argued that this tendency is unfortunate, and suggests that the distinction between the two standards—a presumption on the one hand and persuasive sources on the other—was quite deliberately made. According to Professor Toope:

88 Bayefsky argues in the context of her discussion of the labour relations cases that "the Court considers international law where it is supportive of a predetermined conclusion but ignores it when it is not." Bayefsky, *Human Rights*, *supra* note 2 at 89.

89 Arbour & Lafontaine, *supra* note 2 at 252.

90 Gib van Ert, *Using International Law in Canadian Courts*, 2d ed. (Toronto: Irwin Law, 2008) at 326 [van Ert, *Using*] (summarizing critics of the Court's approach).

91 Bayefsky, *Human Rights*, *supra* note 2 at 93.

92 See van Ert, *Using*, *supra* note 90 at 325-326.

In the 1987 Labour trilogy, Dickson attempted to introduce a distinction between general international human rights law which served as the context for the *Charter's* adoption and was therefore “relevant and persuasive” in *Charter* interpretation, and human rights treaties to which Canada is a party, which would serve as the benchmark for all *Charter* rights. The *Charter* should be presumed to guarantee protection “at least as great” as that afforded under Canada’s treaty obligations. The Court subsequently ignored this distinction. This is a loss, not only in *Charter* cases, but also in all cases where international law is invoked. That part of international law that is “inside” Canada is not only persuasive, it is obligatory. When we fail to uphold our obligations, we tell a story that undermines respect for law internationally.<sup>93</sup>

In line with this observation, various commenters have endorsed some sort of presumption of compliance in the context of *Charter* interpretation. For instance, Professors A.F. Bayefsky and M. Cohen have suggested that some of Canada’s international commitments should be seen as effectively implemented through the *Charter*, while other laws or norms should be seen as presumptively incorporated.<sup>94</sup> Chief Justice Lamer has stated extra-judicially that “[t]he *Charter* can be understood to give effect to Canada’s international legal obligations, and should therefore be interpreted in a way that conforms to those obligations.”<sup>95</sup> Consistent with these positions, Patrick Macklem has recently identified what is effectively a form of ‘creeping monism,’<sup>96</sup> whereby various international obligations have been imported into the domestic legal order through judicial interpretation of the *Charter*.<sup>97</sup>

While the notion that international human rights norms have been implemented or otherwise incorporated into Canadian law through the *Charter* was “enthusiastically advanced” by scholars in the early years of the *Charter*,<sup>98</sup> such an approach has been largely resisted by the courts.<sup>99</sup> At first blush, any doctrine of incorporation or compliance would appear to run headlong into the reality that the *Charter* could only with great difficulty be read to include every international human rights document assented to by the Canadian government. It would indeed be a remarkable single page document that

93 Stephen J Toope, “Inside and Out: The Stories of International Law and Domestic Law” (2001) UNBLJ 11 at 17. See also Schabas, *International*, *supra* note 1 at 231-232.

94 M Cohen & AF Bayefsky, “The Canadian Charter of Rights and Freedoms and Public International Law” (1983) 61 Can Bar Rev 265 at 301-308. See also Daniela Bassan, “The Canadian *Charter* and Public International Law: Redefining the State’s Power to Deport Aliens” (1996) 34 Osgoode Hall LJ 583 at 590-593 [Bassan].

95 Karen Knop, “Here and There: International Law in Domestic Court” (1999-2000) 32 NYUJ Int’l L & Pol 501 at 518 [Knop], citing Antonio Lamer, “*The Treaty System in the 21st Century*”, (International Conference on Enforcing International Human Rights Law, delivered at York University, 22 June 1997) [unpublished].

96 For a comparative survey of this phenomenon, see Melissa A Waters, “Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties” (2007) 107 Colum L Rev 628. On the monist-dualist distinction, see generally John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 220-224 [Currie, *PII*].

97 See Macklem, “International Constitution”, *supra* note 26. See also Langille & Oliphant, *supra* note 33 at 220-232.

98 For the sake of brevity, I do not here distinguish between the various methods for asserting that international commitments are, in some sense, effectively incorporated into the domestic legal order through the *Charter*. I think the criticisms offered here apply whether based on a meaningful presumption of compliance, the notion that the *Charter* is ‘implementing legislation’ for international human rights documents, or other related rationales. See the various approaches discussed in MA Hayward, “International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications” (1984) 23 UWO L Rev 9 [Hayward].

99 Schabas, *International*, *supra* note 1 at 15.

would, by necessary implication, incorporate the commitments found in the nearly forty international human rights treaties and declarations to which Canada is a party,<sup>100</sup> much less the full spectrum of international law, norms, protocols, and decisions available. However, even if we were to accept that a presumption of compliance is plausible,<sup>101</sup> there are good reasons to not adopt it. In particular, the meaningful application of such a presumption would undermine two important pillars of the Canadian constitutional order: federalism and the separation of powers.<sup>102</sup>

From the outset, it should be noted that such a presumption runs contrary to the rules that treaties are not self-enforcing in Canada,<sup>103</sup> and that customary international law can be displaced by legislation.<sup>104</sup> It also undermines the clear direction from the Court that Canada's international law obligations are not incorporated into the *Charter*.<sup>105</sup> Although some countries have adopted a monist system,<sup>106</sup> or have explicitly incorporated international law into the domestic law through a constitution<sup>107</sup> or quasi-constitutional legislation,<sup>108</sup> Canada has not done so. It therefore remains for all intents and purposes a dualist jurisdiction<sup>109</sup> in which those international treaties requiring domestic implementation must be adopted by the relevant legislature before becoming binding in Canada.<sup>110</sup>

100 La Forest, *supra* note 2 at 194. See also the up-to-date list on the Canadian Heritage website. Department of Canadian Heritage, "Multilateral human rights treaties to which Canada is a party", online: Government of Canada <<http://www.pch.gc.ca>>.

101 Dickson CJC, at least, appeared to only be referring to those international human rights laws similar to those found in the *Charter*. See *Alberta Reference*, *supra* note 14.

102 Professor Weinrib has called these the 'two constitutional complications': Lorraine Weinrib, "A Primer on International Law and the Canadian Charter" (2006) 21 NJCL 313 at 318-322 [Weinrib, "Primer"]. This issue has been addressed in detail elsewhere, so only a brief summary will be attempted here. See generally Langille & Oliphant, *supra* note 33 at 220-232.

103 *Francis v The Queen*, [1956] SCR 618 at 621; *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 172-73 [*Capital Cities*]; *Baker*, *supra* note 8 at para 69. See also Weiser, "Undressing", *supra* note 87 at 125; La Forest, *supra* note 2 at 186; Gibran van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can YB Int'l L 3 at 16-17 [van Ert, "Treaties"]. The exception to this rule are those treaties and agreements that can be implemented through powers already possessed by the executive branch of government, and therefore need no further legislative authority for their implementation. See Hogg, *supra* note 29, ch 11, 6-10.

104 La Forest, *supra* note 2 at 164-165.

105 *Suresh*, *supra* note 47 at para 60.

106 See generally the discussions in Thomas Buergenthal, "Modern Constitutions and Human Rights Treaties" (1997) 36 Colum J Transnat'l L 211; Jorg Polakiewicz, "The Application of the European Convention on Human Rights in Domestic Law" (1996) 17 HRLJ 405.

107 Some national constitutions give international law a status superior to the constitution itself. See generally Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, "Commitment and Diffusion: How and Why National Constitutions Incorporate International Law" (2008) 2008 U Ill L Rev 201.

108 See *Human Rights Act 1998* (UK), c 42 (implementing the *European Convention* and its interpretations by the ECHR. *European Convention*, *supra* note 66, s 2(1)(a)).

109 I note that monism and dualism can often be best seen as points on a "continuum," as opposed to strictly categorical (see Currie, *PL*, *supra* note 96 at 220-224). Indeed, some have described Canada as a 'hybrid' system: monist with respect to customary international law and dualist with respect to conventional law. See e.g. van Ert, "Treaties", *supra* note 103 at 4; Gibran van Ert, "Dubious Dualism: The Reception of International Law in Canada" (2010) 44 Val U L Rev 927 [van Ert, "Dubious Dualism"]. However, as any reception of customary law or application of a statutory presumption with respect to conventional law can be displaced by clear legislation, I consider the dualist nature of the constitutional order to be predominant. See also the discussion in The Honourable Justice Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional litigation: Fugue or Fiction? Recent Developments and Challenges in Internalizing International Law" (2002) 16 Sup Ct L Rev (2d) 24 at 33-36 [LeBel & Chao].

110 At least as a formal matter, this requirement appears to be accepted by many scholars who envision a greater role for international law in the context of *Charter* interpretation. See e.g. Bayefsky, *Human Rights*, *supra* note 2 at 30 and William A Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Can Bar Rev 174 at 177. But see the argument of Macklem, "International Constitution", *supra* note 26 at 272, who argues that "dualism is alive in Canada in name only."

This dualist approach to international treaties is required by the logic of the Canadian constitutional structure with regards to both the division of powers and separation of powers. In brief, the Governor General, acting on the advice of the Prime Minister and Cabinet, possesses the constitutional authority to enter treaties binding Canada internationally.<sup>111</sup> However, in order for such treaties to have the force of law in Canada, they must be adopted by the relevant legislature.<sup>112</sup> As it is the federal executive that is endowed with treaty making power, a monist structure would allow the executive to unilaterally make domestic law without parliamentary oversight, and to give effect to treaties encroaching upon provincial jurisdiction without provincial consent or participation.<sup>113</sup> This logic applies *a fortiori* to the argument that international obligations assented to by the federal executive are incorporated into *constitutional law*, which limits the content of legislation passed by either level of government. Allowing past, present or future federal executives to effectively modify the meaning of the *Charter* is untenable given the onerous steps required to change the language of the constitution explicitly.<sup>114</sup> That the Crown has affixed Canada's name to a given treaty affects the recourse that may be had at the international level; it does not for that reason have the force of law within Canadian courts.<sup>115</sup> To put the matter bluntly: "[i]f treaties are made by the executive, and the executive cannot make law, treaties must not be law."<sup>116</sup>

This observation brings us back to the important distinction between applying international law as a statutory presumption or as a matter of common law development on the one hand, and presumptively applying it in construing the *Charter* on the other. The relevance of this distinction is left unaddressed by many commenters,<sup>117</sup> and some

111 This power is derived from the royal prerogative. See generally Hogg, *supra* note 29, ch 11, 1-11; van Ert, "Treaties", *supra* note 103 at 10-13.

112 See generally Schabas, *International*, *supra* note 1 at 21-22; Currie, *PIL*, *supra* note 96 at 235, 245.

113 See *AG Canada v AG Ontario et al*, [1937] 1 DLR 673, [1937] AC 326, (UK PC) at 682-683 [*Labour Conventions*]; Langille & Oliphant, *supra* note 33. While there is some dispute over the ongoing vitality of the *Labour Conventions* case on this point (see Hogg, *supra* note 29, ch 11, 11-18; Bayefsky, *Human Rights*, *supra* note 2 at 27-30), it is difficult to fathom a power in the Canadian constitutional framework that would provide the federal executive with the unilateral ability to so entirely undermine the division of powers. See van Ert, "Treaties", *supra* note 103 at 67-76; Hogg, *supra* note 29, ch 11, 14-18. Such a transcending doctrine would seem to be particularly problematic in light of the Supreme Court's recent emphasis on the principle of 'cooperative federalism.' See e.g. *Reference re Securities Act*, 2011 SCC 66 at 58-62, [2011] 3 SCR 837.

114 See *Procedure For Amending Constitution of Canada*, Part V of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982 (UK)*, 1982, c 11, s 38. It might also be argued that such a position upends the separation of powers in another way, by impinging on the *judiciary's* role over the interpretation of the constitution, a power often jealously guarded. See *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 745, 19 DLR (4th) 1; *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 111, [2007] 1 SCR 429 [*Hislop*]; Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: University of British Columbia Press, 2013) at 168-172. But see Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal-Kingston: McGill-Queen's University Press, 2010).

115 See e.g. *Henry v Canada*, [1987] 3 FC 429, 10 FTR 176 at para 10, Strayer J; Currie, *PIL*, *supra* note 96 at 235, 245.

116 van Ert, "Dubious Dualism", *supra* note 109 at 928. Gib van Ert notes the simplicity of the formulation, but considers the syllogism "largely accurate" with respect to the legal status of treaties in Canada. See also Weinrib, "Primer", *supra* note 102 at 319.

117 See e.g. Stephen J Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) *Can Bar Rev* 534 at 538; Beaulac, *supra* note 7; Errol P Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights" (1982) 20 *Alta L Rev* 383 at 390; Martha Jackman and Bruce Porter, "Justiciability of Social and Economic Rights in Canada" in Malcolm Langford, ed, *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge: Cambridge University Press, 2008); Hayward, *supra* note 98 at 10; van Ert, *Using*, *supra* note 90 at 323-360.

courts,<sup>118</sup> who seem to operate under the belief that the presumption should naturally apply in the context of constitutional interpretation, just as it applies in the course of statutory interpretation. In my view, this approach does not adequately reflect the substantial difference in interpreting legislative acts in light of textual ambiguity and permanently rendering those acts of no force and effect.<sup>119</sup> In the former event, where the court ‘gets it wrong’ in imputing to the democratic branches an intention that is not present, or by developing the common law in a way contrary to the will of elected bodies, the legislatures can correct such an interpretation through the passage of legislation. No such recourse is available where the Court is interpreting the meaning of a constitutional document.

This leads to difficulties for the ‘presumption of compliance’ school of thought with respect to *Charter* interpretation. For instance, Professor Bayefsky relies on the “time-worn presumption and resulting admonition to bring Canadian law into conformity with international legal obligations where possible.”<sup>120</sup> However, she also notes that when the courts apply this time worn presumption in the normal course, there is “no doubt” that unambiguous<sup>121</sup> domestic legislation will prevail where it conflicts with international law.<sup>122</sup> Put differently, the corollary of the presumption of compliance is that “courts will apply the law laid down by statute or common law, *even if it is inconsistent with a treaty which is binding upon Canada.*”<sup>123</sup> I would suggest that the reason that the presumption is relatively uncontroversial<sup>124</sup> with respect to statutory interpretation and common law development is because it can be ousted by clear legislative action that derogates from the international law or agreement. In stark contrast, the *Charter* is applied to *abridge* legislative authority, however clearly it is expressed. In the context of the *Charter*, the logic of the presumption is turned on its head: it does not operate in this context to ensure the relevant legislative body remains vested with its constitutional authority, but rather to divest it of authority.

Other difficulties arise if the presumption is applied to constitutional interpretation. For instance, it might be noted that the Supreme Court has consistently stated that *all* decisions of the executive—including those stemming from the royal prerogative—are subject to *Charter* scrutiny.<sup>125</sup> Thus, the effects of treaties must be consistent with the *Charter*, and executive efforts to generate legal results through treaties “are as much

118 See e.g. *Re Warren*, [1983] OJ No 113 at para 7, 35 CR (3d) 173 (Ont HC) (“Since the meaning of s. 11(a) is not completely clear on its face, resort should be had to the [CCPR] as a tool of statutory interpretation”); *R v Videoflicks*, [1984] OJ No 3379, 14 DLR (4th) 10 (CA); Bayefsky, *Human Rights*, *supra* note 2 at 100-105.

119 Irit Weiser, “Effect in Domestic Law of International Human Rights Treaties Ratified Without Implementing Legislation” (1998) *Can Council Int’l L Proc* 132 at 133; Weiser, “Undressing”, *supra* note 87 at 148. Even strong proponents of using international law as an interpretive aid in constitutional interpretation note this “serious objection”. See e.g. The Honorable Justice Michael Kirby, “International Law – The Impact on National Constitutions” (7th Annual Grotius Lecture delivered at the Annual Meeting of the American Society of International Law, Washington DC, 29 March 2005), [unpublished].

120 Bayefsky, *Human Rights*, *supra* note 2 at 95.

121 See *Capital Cities*, *supra* note 103 at 173 (“I do not find any ambiguity that would require resort” to the relevant international Convention); *Schavernoeh v Foreign Claims Commission*, [1982] 1 SCR 1092 at 1098, 1982 CanLII 191; *National Corn*, *supra* note 7, at 1371-1372.

122 Bayefsky, *Human Rights*, *supra* note 2 at 67-68; *Daniels v R*, [1968] SCR 517 at 541, [1968] RCS 517.

123 Hogg, *supra* note 29, ch 11, 6-9 (emphasis added).

124 But see the opinion of Justice Iacobucci in *Baker*, *supra* note 8 at paras 79-81 (“one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch”).

125 See e.g. *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455, 18 DLR (4th) 481 and *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 36, [2010] 1 SCR 44.

subject to the required conformity with the *Charter* as are legislative efforts.<sup>126</sup> If this is true, how can it also be that the proper *interpretation* of the *Charter* can be discerned with reference to an exercise of that same executive power? The analytical approach is entirely circular: the executive must act in accordance with the *Charter*, which must in turn be interpreted in accordance with a product of that executive action, that is, international treaties.

None of which is intended to suggest that it is illegitimate for the courts to abridge legislative authority, which is the very purpose of the *Charter*. Rather, it is simply to note the inaptness of applying statutory presumptions to constitutional interpretation without considering the important distinctions between the two exercises. As Chief Justice Dickson once observed, “[t]he task of expounding a constitution is crucially different from that of construing a statute.”<sup>127</sup> I think that distinction requires careful attention in this context.<sup>128</sup>

As a result, I prefer the position adopted by Chief Justice McLachlin, dissenting in *R v Keegstra*.<sup>129</sup> The Chief Justice argued that while international human rights law may be helpful when interpreting the *Charter*, it would be wrong “to consider these obligations as determinative of or limiting the scope of those guarantees”; the *Charter* is a uniquely Canadian legal instrument, whose protections may depart from international covenants.<sup>130</sup> The Court’s role here is, in a sense, to ‘translate’ relevant international norms “in a way that forwards a unique Canadian vision of law.”<sup>131</sup> In my view, a meaningful presumption resulting in a form of ‘creeping monism’ is only slightly less troubling than a *de jure* monist system in the Canadian context, and for the same reasons: it would effectively permit the federal executive, in executing its power to adhere Canada to international legal obligations, to unilaterally modify, expand or contract the meaning of *Charter* guarantees. Along with the other difficulties raised above, I think any notion of a presumption of compliance should be avoided. Fortunately, there is an alternative approach that would avert these problems without losing the benefit of international human rights norms entirely.

## B. The Relevant and Persuasive Approach

On the analysis above, the more rigorously any constitutional presumption of compliance or doctrine of incorporation is applied, the more constitutionally objectionable it becomes. However, there seems to be no compelling justification for excluding international sources from the matrix of factors that elucidate the purpose, meaning and scope of *Charter* rights and freedoms. In my opinion, the justification for the use of international legal sources in the context of *Charter* interpretation is rather straightforward, and indeed is well accepted in our legal culture. It is simply that “the search for wisdom is not to be circumscribed by national boundaries.”<sup>132</sup> To the extent that international human rights laws and norms are helpful in construing the meaning of *Charter* provisions, it should only be to the extent

126 Bayefsky, *Human Rights*, *supra* note 2 at 27.

127 *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155, 11 DLR (4th) 641.

128 See also Weinrib, “Primer”, *supra* note 102 at 329: “It must be a fundamental error to claim that international law has the same role to play in *Charter* interpretation as it does in the interpretation of an ordinary domestic statute.”

129 *Keegstra*, *supra* note 12. In *Keegstra*, the majority of the Court cited the obligations to prohibit hate speech expressed in the *ICCPR* and other conventions in support of its finding that prohibition of hate speech was justifiable under section 1.

130 *Ibid* at 837-838.

131 La Forest, *supra* note 2 at 184, discussing the approach of members of the Court in *Keegstra*, *supra* note 12.

132 Hogg, *supra* note 29, ch 36, 39-43. See also Langille & Oliphant, *supra* note 33 at 229.

that they are considered relevant and persuasive on a given point of interpretation.<sup>133</sup> As others have observed, this ‘relevant and persuasive’ approach was indeed the principal thrust of the Chief Justice’s reasons in the *Alberta Reference*, his invocation of a ‘presumption’ notwithstanding.<sup>134</sup> The approach envisioned here would, generally speaking, resemble the Court’s use of comparative law sources: for elucidation where considered persuasive, as opposed to commanding statements of constitutional meaning.<sup>135</sup>

Amongst others, Gib van Ert has criticized the relevant and persuasive approach as evincing an “ultimately weak approach to international law,” and one that departs from the common law system of reception, discussed above.<sup>136</sup> He suggests that the relevant and persuasive approach upsets the balance between self-governance and respect for international law “by empowering Canadian courts to ignore or depart from international conceptions of human rights with relative ease.”<sup>137</sup> However, as noted above, courts are already permitted, and indeed required, to do so, if by “with relative ease” we mean upon clear direction from the relevant legislature. Respectfully, the argument that this approach is “too much self-government and too little respect for international law” appears to be based on the idea that the *Charter* operates like any other domestic legal document. To the contrary, unlike a common law or statutory presumption “reserving to our laws the power to depart from international norms by explicit action,”<sup>138</sup> such an approach may serve to prohibit explicit legislative action, and invalidate laws that are not in conformity with international obligations.

I do not mean to suggest that advocates of a presumption of compliance are without strong reasons for their position. Undoubtedly, ensuring adherence to international commitments is an objective to be lauded, and our elected representatives should take such obligations seriously. The more a considered opinion of the Court dovetails with Canada’s international obligations, the better. In my view, however, the difficulties with the presumption raised above weigh heavier in the balance, and the fact that the relevant and persuasive approach is “unobjectionable”<sup>139</sup> seems to recommend it. The courts’ responsibility in this context is to interpret the constitution, not to bend it to ensure compliance with international agreements entered into by the Crown. The hard task will be in constructing a framework for a principled approach to the use of relevant and persuasive international legal materials, a point to which I now turn.

### III. RELEVANCE AND PERSUASIVENESS OF INTERNATIONAL LAWS & NORMS

If the above argument is accepted, we might be content to know that courts have not consistently applied anything approaching a meaningful presumption of compliance

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133 Of course, one could conceivably put in place a ‘weak’ presumption, which would permit the presumption to be rebutted by, for instance, the factors identified here, or any other reason seen to be controlling. Such an approach might not differ markedly from the approach endorsed here. However, it is not clear to me in that case what is gained by terming it a ‘presumption,’ if that presumption is as likely to come to pass as not, given all of the many factors that might displace it.

134 van Ert, *Using*, *supra* note 90 at 339.

135 I think the approach defended here at least roughly parallels what Professor Weinrib calls the “comparative approach.” See Weinrib, “Primer”, *supra* note 102 at 326-328. See also La Forest, *supra* note 2 at 183, 187-189.

136 van Ert, *Using*, *supra* note 90 at 341.

137 *Ibid* at 342.

138 *Ibid*.

139 *Ibid*.

with international human rights obligations.<sup>140</sup> In effect, the Supreme Court has largely limited itself to discretionary use of international human rights law, which use has been “entirely permissive.”<sup>141</sup> In so doing, however, the Court has opened itself up to the charge of inconsistency and ‘cherry picking’—that is, only considering the relevant international law, norms or interpretations to the extent it supports a pre-determined conclusion.<sup>142</sup> While a staunch proponent of the use of international law in *Charter* interpretation, Professor Bayefsky suggests that the justification for its use has not been clearly articulated,<sup>143</sup> and the use is often selective, evidencing a “results oriented” approach.<sup>144</sup> Needless to say, if the use of international human rights laws and norms are considered relevant and potentially persuasive in the context of *Charter* interpretation, their use and consideration should not be limited to those circumstances where those law and norms support a conclusion at which the interpreter has already arrived. The following proposals are relatively unstructured, but raise for consideration issues that may lead to a more principled and consistent application of a relevant and persuasive approach.<sup>145</sup>

## A. Relevance

First, the Court should take care to identify exactly what is to be considered ‘relevant’ in the context of *Charter* interpretation. Some judges<sup>146</sup> and scholars<sup>147</sup> have suggested that binding international law should be given more weight in *Charter* interpretation than international law to which Canada is not a party.<sup>148</sup> Indeed, if the rationale for the use of international law in *Charter* interpretation is a presumption of compliance with Canada’s international obligations, it might be said that only those laws binding on Canada should be considered relevant to the exercise.

As the survey above reveals, however, the Court has not strictly adhered to any such distinction,<sup>149</sup> notwithstanding the belief that Chief Justice Dickson “clearly placed such

140 See Bassan, *supra* note 94 at 593; Weiser, “Undressing”, *supra* note 87 at 133; Schabas, *International*, *supra* note 1 at 232-233. See also Stephane Beaulac & JH Currie, “Canada” in Dinah Shelton, ed, *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford: Oxford University Press, 2011) at 125; Currie, *PL*, *supra* note 96 at 259-261; van Ert, *Using*, *supra* note 90 at 323-351.

141 Weiser, “Undressing”, *supra* note 87 at 133.

142 See Justice Scalia’s comments in Norman Dorsen, “A conversation between U.S. Supreme Court justices” (2005) 3 *Int J Con Law* 519 at 522 [Dorsen] (“Well if you don’t want (foreign sources) to be authoritative, then what is the criterion for citing it? That it agrees with you? I don’t know any other criterion to bring forward.”)

143 Bayefsky, *Human Rights*, *supra* note 2 at 93.

144 *Ibid* at 3, 93. Bayefsky makes a similar point with respect to the Court’s use of international law that is not binding on Canada at 126-127.

145 From a slightly different perspective, see also the helpful discussion in Weiser, “Undressing”, *supra* note 87 at 143-155.

146 *Alberta Reference*, *supra* note 14 at 349 (presumption applies to “international human rights documents which Canada has ratified”); *B.C. Health*, *supra* note 27 (presumption applies to “international conventions to which Canada is a party”). See also Rothstein J’s dissent in *Fraser*, *supra* note 27 at para 248, where he notes that because Canada is not bound by *Convention No 98*, it is “therefore inappropriate to interpret the scope of Canada’s obligations on the basis of that Convention.” See also *Burns*, *supra* note 41 at para 93 and *Suresh*, *supra* note 47 at para 76.

147 Bassan, *supra* note 94 at 590; Brunnee & Toope, *supra* note 3 at 18-20.

148 In one description, Justice Bastarache has said that the Court will consider non-binding instruments as “a guide to interpretation, while (binding international laws) are a ‘relevant and persuasive factor’ in *Charter* interpretation.” Bastarache, “Use of Foreign Materials”, *supra* note 13 at 434. It is not immediately clear to me what the difference is between a ‘guide’ and a ‘factor’ in interpretation, but the distinction does not appear to be helpful on the approach suggested here.

149 Macklem, “International Constitution”, *supra* note 26 at 272.

binding norms in a paramount category.<sup>150</sup> Indeed, if it is accepted that international human rights norms can be useful to the courts only where relevant and persuasive to an issue before it, the binding status of the law *on Canada* specifically does not seem to be a salient consideration.<sup>151</sup> This conclusion flows from the same logic employed above: the federal executive—present, past or future—should not be able to unilaterally modify the meaning of the *Charter* by refusing to assent to a treaty or convention any more than by executing or adhering to one. If international laws, norms and interpretations thereof can help the courts better ascertain the meaning of the *Charter*, this would seem to be so independent of decisions made by the federal executive at any given moment.<sup>152</sup>

Nor does it seem particularly relevant when those international laws, norms, or interpretations came to be recognized. William Schabas applauds Chief Justice Dickson's approach on this point, arguing that "it is significant that he does not at all insist upon the role the international instruments played in the drafting of the *Charter*," as such an approach "may tend to focus the attention of judges on the state of international human rights law" on the date of the *Charter's* adoption.<sup>153</sup> While the contemplation of the framers has been relied on as a justification for the use of international law,<sup>154</sup> undue emphasis on this justification would presumably imperil the only untouchable precept of Canadian constitutional interpretation: the document is not frozen in any period of time but is a 'living tree'.<sup>155</sup>

Nevertheless, such 'intentionalist' justifications can and have appeared on both sides of the equation, as noted above. In *B.C. Health*, the majority considered it important that the international agreements to which it made reference "were adopted by the ILO prior to the advent of the *Charter* and were within the contemplation of the framers of the *Charter*."<sup>156</sup> Conversely, the framers' decision to deliberately leave out specific rights contained in international documents appeared to support the opposite conclusion in cases like *Prosper*. Leaving aside the analytical inconsistency between these approaches, both positions are difficult to maintain in light of the Court's apparent rejection of the framer's intent in clarifying the scope of *Charter* rights and freedoms.<sup>157</sup> Until the Court's disinterest in the framer's intent wavers, it would seem anomalous to rely on what was

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150 Schabas, *International*, *supra* note 1 at 38.

151 On this point, see La Forest, *supra* note 2 at 185.

152 It should be noted that whether or not the law in question is binding on Canada certainly would be of central importance in other contexts. See *supra*, notes 7-11 and surrounding text.

153 Schabas, *International*, *supra* note 1 at 46.

154 See Bayefsky, *Human Rights*, *supra* note 2 at 33-66, 100-105.

155 See e.g. Hislop, *supra* note 114 at para 94.

156 *B.C. Health*, *supra* note 27 at para 78. The implication that the contemplation of the framers should be considered a relevant factor in *Charter* interpretation proved temporary, and was duly qualified in the very next sentence: "For another, the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians."

157 See e.g. *Motor Vehicle Reference*, *supra* note 40 at 504-507; *Reference re Employment Insurance Act (Can)*, ss 22 and 23, 2005 SCC 56 at para 9, [2005] 2 SCR 669; Hogg, *supra* note 29, ch 60, 7-8 ("Indeed, as has been narrated, while Americans have debated whether the 'original understanding' should be binding, Canadians have debated whether evidence of the 'original understanding' should even be disclosed to the Court!"); Justice Ian Binnie, "Constitutional Interpretation and Original Intent" in Grant Huscroft and Ian Brodie, eds, *Constitutionalism in the Charter Era* (Markham, Ontario: LexisNexis, 2004) 345 at 370 (the doctrine of 'original intent' "has never really taken hold in Canada and is... unlikely to do so"); Adam Dodek, "The Dutiful Conscript: An Originalist View of Justice Wilson's Conception of Charter Rights and Their Limits" (2008) 41 Sup Ct L Rev 331 at 333-334 ("Originalism is a dirty word in Canadian constitutional law... [it] is either ignored or denigrated in Canada."). But see Bradley W Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22 Can JL & Jur 331.

presumed to be in their assumed ‘contemplation’ in this context while not typically giving any effect to their intent in drafting the specific *Charter* provisions themselves.

It should also be noted that while the Court has usefully cautioned against using international human rights norms as a means of limiting the protections afforded by the *Charter*,<sup>158</sup> the same cautionary logic would appear to extend to impermissibly expanding protections well beyond the language of the *Charter*, which may unduly limit the operation of the democratic branches of government. If international human rights law can be a lodestar, there seems to be no principle by which it should not be meaningfully addressed (although not necessarily followed) whether it leads to an expansive or narrow interpretation of the *Charter*. As Professor Hogg has pointed out, a purposive interpretation of the *Charter* is not necessarily generous or expansive: it is purposive.<sup>159</sup> Legislatures and courts will often face intractable trade-offs where the expansion of one important interest leads to at least some contraction of the other. There would appear to be no sound basis for an automatic presumption in favour of either outcome. The ‘presumption’ should simply be that the courts will uniformly address relevant international law and interpretations thereof, and will at least make some effort to explain why it is deemed relevant or persuasive (or not) beyond simply noting that it happens to support a given conclusion.<sup>160</sup>

By contrast, one factor that may be important in assessing the relevance of a given international norm seems obvious: a court should seek to identify a specific provision in the *Charter* that can support the interpretation offered. Where the text, history or purpose of the *Charter* provision can only with great difficulty shoulder the international law or norm sought to be applied, courts may legitimately question whether the latter is particularly relevant to the proper interpretation of the former.<sup>161</sup> This consideration may explain the Court’s reluctance to read property protections or positive social and economic rights into the *Charter* given the conspicuous absence of such provisions in the text.<sup>162</sup>

158 See *R v Cook*, [1998] 2 SCR 597 at para 148, 164 DLR (4th) 1. See also Weiser, “Undressing”, *supra* note 87 at 140.

159 Hogg, *supra* note 29, ch 36, 30-31.

160 Moreover, it is not immediately obvious why dictates of human rights treaties signed in the 1960s, for instance, are or should be dispositive of obligations under the *Charter* half a century later. See on this point La Forest, *supra* note 2 at 216, who discusses the “danger of crystallization” where international human rights law is not “tested and translated” into the contemporary Canadian context.

161 See the discussion of *Gosselin* and *Irwin Toy* in Part I, above. See also Schabas, *International*, *supra* note 1 at 27 (“If the role and influence of the *Covenant* in the drafting of the *Charter* is inescapable, there are also significant and substantial differences that militate against the implication approach. Several rights found in the *Covenant* do not appear at all in the *Charter*, among them the right to property as well as the full range of economic, social and cultural rights. In some cases, the wording of texts is inspired by common law provisions rather than the international model.”) By contrast, international human rights norms may be more clearly relevant in cases involving discrete interactions with the justice system, or where an individual’s life or security of person are undoubtedly in jeopardy, as was the case in *Burns*. There is little doubt that *Charter* protected interests are potentially implicated in such cases, and the international norms developed in this area would be directly relevant to a specific *Charter* provision. Similarly, there is little doubt that the Conventions relating to freedom of association may be relevant to cases involving section 2(d) in the workplace. In such cases, what remains to be demonstrated is the *persuasiveness* of a given law, norm or interpretation in the context of the specific case.

162 I do not mean to suggest such interpretations would be necessarily illegitimate, but only that the absence of clear textual authority in the *Charter* may be one factor that the Court might consider in assessing the relevance of a given international treaty, law or norm to a given case. On the *Charter* as a vehicle for property rights, see the sources cited in *supra* note 76. With respect to social and economic rights, see e.g. Bruce Porter, “Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights” (2000) 15 J L & Soc Pol’y 117; and Arbour & Lafontaine, *supra* note 2 at 266-273.

This discussion of relevance might alert us to another difficulty with basing the use of international legal sources on the importance of Canada adhering to its international obligations; there is no obvious reason why this rationale would be limited to foundational human rights treaties. The case of *Canada (Attorney General) v PHS Community Services Society* (the “*Insite* case”)<sup>163</sup> may illustrate the problem, as it has been suggested that the tolerance of safe injection sites might place Canada in violation of its international obligations with respect to narcotics control.<sup>164</sup> I make no comment on the cogency of the argument as it would have applied in that case, and the issue was not addressed by the Court. However, if the presumption is based on the importance of adherence to Canada’s international commitments, *as such*, there seems to be no obvious reason why this type of commitment should not come into play in the Court’s reasoning, even if the international law or agreement in question is not in the nature of a human rights treaty. By contrast, whatever Canada’s international law enforcement commitments, such an international obligation would plainly not be *relevant* to developing the content of the right to life, liberty or security of person on the theory presented here.

As such, it is proposed that relevance of a given international law, norm or interpretation would be established not by the date of its enactment, the contemplation of the framers, or the ‘bindingness’ of the law or norm on Canada specifically. Nor would it be particularly relevant that Canada had entered into a treaty or agreement unrelated to the right or freedom in question, but obliquely pulling toward a restrictive (or expansive) interpretation thereof. Rather, the question of relevance as envisioned here would be a relatively low bar, focusing largely on whether or not the international law or norm is genuinely related to a provision found in the Canadian *Charter*, and in a meaningful sense enlightening on the points at issue in a given case. Unencumbered by any presumption of compliance, the Court can focus on identifying those documents and interpretations that are most clearly pertinent to the *Charter* provision and dispute in question. It can then proceed to decide if the existence of an international norm, or the arguments put forward in its support, is particularly persuasive in the context of a given case. This decision will often require close attention to the *reasons* provided—by drafters, courts, administrators, quasi-judicial bodies, committees, and others—for placing such interests above the democratic fray, which is the subject of the next section.

## B. Persuasiveness

### i. Looking at the ‘Reasons’

One way to assess the persuasiveness of a given law or norm would be to identify the reasoning and deliberations that went into the drafting of the document, and to determine whether those reasons would be considered persuasive at this point in time and in our constitutional order. However, given the reluctance of the Court to ascribe much weight to the intentions of the *Charter*’s own framers, it is not clear that it would find the intention of the drafters of international agreements to be of greater utility, even if they were readily available. Instead, the Court may wish to turn to authoritative interpretations of those laws or norms for guidance as to their scope and the purposes behind those guarantees, and to ascertain the degree to which they shed light on the purposes behind the *Charter* provisions in question. Professor Hogg has noted that decisions of the UN Human Rights Committee, for instance, might be considered particularly persuasive “because they are considered interpretations by distinguished jurists of language and ideas that are similar to the language and ideas of the Charter.”<sup>165</sup>

163 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*Insite*].

164 See International Narcotics Control Board, *Report of the International Narcotics Control Board for 2011*, INCB, 2011, UN Doc E/2011/1, at paras 281-290.

165 Hogg, *supra* note 29, ch 36, 39-43.

The converse of this observation is, I think, that the interpretations of international law by international bodies should not be given greater force in elucidating the nature and scope of the *Canadian* constitution than their authoritativeness and arguments merit.

Thus, in determining the authoritativeness of the source, it will be important for the courts to thoughtfully address the mandate and function of the interpretive agent, and the context in which those decisions were taken. The Court's treatment of ILO law in *B.C. Health* provides a useful cautionary tale with respect to both understanding the relevant international law, and recognizing the authoritativeness or mandate of the interpretive bodies. In that case, the Court relied on decisions of the Committee of Freedom of Association (CFA)<sup>166</sup> in determining that "international law" supports a human right to collective bargaining that includes a duty to bargain in good faith. This conclusion was problematic for two reasons. Firstly, the entire structure of the ILO is based on the principle of *voluntary* collective bargaining,<sup>167</sup> which places no legal obligation on employers to bargain.<sup>168</sup> In other words, the premises did not support the Court's ultimate conclusion. In light of this point, the Court in *Fraser* noted that the ILO does not *prohibit* compulsory bargaining,<sup>169</sup> however this is a far less compelling justification for modifying the meaning of a *Charter* freedom than the original claim that the right to compulsory bargaining "is an integral component of freedom of association in international law."<sup>170</sup> Secondly, the CFA is a representative,<sup>171</sup> non-judicial body,<sup>172</sup> staffed by non-lawyers,<sup>173</sup> indeed, according to the ILO constitution, the CFA is incapable of 'making law.'<sup>174</sup> The body is tasked with finding *ad hoc* and politically acceptable compromises between labour, employers, and government's interests.<sup>175</sup> Although some may be perfectly comfortable with the Canadian courts directly delegating the interpretation of the *Charter's* fundamental freedoms to political actors in Geneva,<sup>176</sup> this delegation is probably an outcome to be avoided, in the absence of the courts identifying and assessing the relevance and cogency of the reasons behind a particular conclusion.

For this reason, a court might justifiably place greater stock in the decisions of rigorous judicial bodies interpreting similar constitutional documents than it would to various quasi-judicial international bodies more beholden to the need for political and practical compromise. The fact that the latter may be operating under the auspices of international law does not, in itself, make its reasoning more persuasive. For example, although of course Canada is not a party to the *European Convention*, the ECHR is a scrupulous judicial body interpreting often-similar human rights protections, and the courts may be inclined to treat the relevant jurisprudence of these bodies as more authoritative and compelling than more administrative and political bodies, such as the CFA. However, again, the arguments provided—and their fit with the Canadian constitutional order and purposes behind the *Charter* provisions in question—should be paramount.

166 *B.C. Health*, *supra* note 27 at paras 76-78.

167 Langille, "Freedom of Association Mess", *supra* note 33 at 197.

168 *Digest*, *supra* note 62 at para 926; Langille, "Can We Rely", *supra* note 32 at 291-293.

169 *Fraser*, *supra* note 27 at para 95.

170 *B.C. Health*, *supra* note 27 at para 20.

171 Hepple, "Right to Strike", *supra* note 62 at 137.

172 See Langille & Oliphant, *supra* note 33 at 201-205.

173 Langille, "Can We Rely", *supra* note 32.

174 *Ibid* at 287-288.

175 *Ibid* at 286-287.

176 According to Roy Adams, "[f]reedom of association is a general concept, the detailed meaning of which in the context of work has been delegated by the world community to the ILO to work out" (Adams, "Human Right", *supra* note 62 at 56). See also James Gray Pope, "The Right to Strike Under the United States Constitution" (2009) 15 CLELJ 209 at 223.

To put the matter bluntly, once we have shed the notion that the *Charter* presumptively reflects international human rights law or norms, it is typically the reasons underlying a law or norm that should be considered compelling. As such, the Court might quite reasonably find the opinion of a Canadian expert on the area of law in question, or the reasons of another domestic court interpreting similar provisions in its own constitution, to be more persuasive than an interpretation of international human rights documents by judicial or quasi-judicial bodies, international law experts, administrators, or monitoring bodies. As Chief Justice Dickson himself noted, international human rights norms and interpretations can be useful “in much the same way” as comparative law sources generally.<sup>177</sup> What matters most are the reasons offered, the context in which they are provided, and their persuasiveness in the context of the Canadian constitutional order, not the bare conclusions at which these bodies have arrived.

## ii. The Existence of a Law or Norm as ‘Persuasive’

It is often assumed that the mere existence of a particular norm or law would carry weight in the interpretation of a related *Charter* guarantee, perhaps in the nature of a ‘six billion people can’t be wrong’ type argument. Such an approach is generally more compatible with a presumption of compliance with international obligations, as it is otherwise difficult to characterize the mere *existence* of a law, norm or interpretation as ‘persuasive’. As noted above, the existence of a long-standing norm or law, and the deliberate decision *not* to include it expressly in the *Charter*, may just as easily lead the Court to avoid such an interpretation.

To the extent that the Court intends to rely on the very existence of a particular norm or law as a useful indicium of the meaning of the *Charter*, some effort should be made to determine its authoritativeness in the global legal order. The mere existence of a given norm might be a particularly compelling justification in the case of peremptory norms of customary international law, which are specifically derived from widespread international acceptance.<sup>178</sup> Admittedly, discerning such norms can be difficult; as the Court has noted, “it is often impossible to pinpoint when a norm is generally accepted and to identify who makes up the international community.”<sup>179</sup> Moreover, where a certain norm has such widespread acceptance to have become a peremptory norm, it is difficult to imagine that it is not already protected by the *Charter*. Nevertheless, the existence of a meaningful international consensus on a given point may typically be considered more revelatory than an isolated normative argument stemming from but not required by an international treaty, even if advanced by an international oversight body.

By contrast, a norm that is not authoritative in international law and subject to significant controversy and disagreement would likely be less persuasive in any *Charter* interpretation.<sup>180</sup> Otherwise the Court would be merely citing one side of a debate.<sup>181</sup> Thus, courts may wish to be alert to whether they are relying on tangible and established

177 *Alberta Reference*, *supra* note 14 at 348-349.

178 Peremptory norms are such that any violation of the norm would “shock the conscious of mankind” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 15 at 23). The generally accepted list prohibits, for instance, genocide, slavery, apartheid and torture. See *Steen v Islamic Republic of Iran*, 2013 ONCA 30, 114 OR (3d) 206 at para 30, citing JH Currie, C Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (Toronto: Irwin Law, 2007) at 159.

179 *Suresh*, *supra* note 47 at para 61.

180 John Claydon, “The Application of International Human Rights Law by Canadian Courts” (1981) 30 *Buff L Rev* 727 at 742.

181 On the ultimately contentious nature of rights claims at the international level, see Michael Ignatieff, “Human Rights as Politics”, in Amy Gutmann, ed, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2003) 3 [Ignatieff].

international human rights laws and norms,<sup>182</sup> or non-authoritative interpretations of laws, treaties, conventions, and declarations. While the latter may be found persuasive, the courts would have to more clearly engage with the reasoning employed to determine its pertinence to the dispute in question.

For similar reasons, and while international human rights law cannot be easily categorized into permanent, watertight compartments of ‘hard’ and ‘soft’ law,<sup>183</sup> courts may consider it wise to generally attach lesser weight the ‘softer’ the law. This is simply because the softer and more ‘symbolic’ the law, the easier it is to attract universal assent,<sup>184</sup> and the further actual practice may be removed from commitment without a mechanism for effective international implementation or enforcement.<sup>185</sup> As Justice LeBel and Gloria Chao have written:

many of these documents include aspirational declarations, programmes of action, guidelines and protocols, also known as ‘soft law’. Although such general statements or declarations are useful as they allow obligations to be formed ‘in a precise and restrictive form that would not be acceptable in a binding treaty,’ by its very nature, ‘soft law’ does not set out how these principles may be applied in domestic legal orders.<sup>186</sup>

Thus, if the Court is relying on the very existence of a given law or norm as persuasive in the context of *Charter* interpretation, it might want to attend to the actual significance, permanence, and authoritativeness of that norm in the international arena. This is not to suggest that only binding or ‘hard’ international law could ever be considered useful. It is to suggest that where a court is relying solely on the collective wisdom of the international community in identifying the meaning of the *Charter*, it should take care to ensure a meaningful consensus or some demonstrable wisdom is in play.

Indeed, it could be argued that the ‘six billion people can’t be wrong’ justification invites something of a paradox, in that the justification tends to dissipate the more useful the norm becomes. As alluded to above, fundamental human rights described at a high enough level of abstraction to achieve universal (or near universal) assent<sup>187</sup> are likely to be little help in interpreting the *Charter*.<sup>188</sup> Conversely, the further one particularizes a norm—for instance, by looking to specific decisions of an international tribunal, interpretations of oversight bodies, or non-binding instruments further specifying the content of a given right or freedom—the less likely the universal assent or obedience to the norm in question. In such situations, the mere presence of the norm becomes less compelling on the basis of collective assent, and the more important it becomes

182 The difficulty in identifying these norms was noted in *Suresh*, *supra* note 47.

183 Ryan Goodman & Derek Jinks, “How to Influence States: Socialization and International Human Rights Law” (2004) 54 *Duke LJ* 621 at 687-698.

184 *Ibid* at 676-678; Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (Toronto: Oxford University Press, 2005) at 120.

185 Jack Donnelly, “The Social Construction of International Human Rights”, in Tim Dunne & Nicholas J Wheeler, eds, *Human Rights in Global Politics* (Cambridge, UK: Cambridge University Press, 1999) 71 at 75.

186 LeBel & Chao, *supra* note 109 at 28.

187 van Ert, *Using*, *supra* note 90 at 331-332 (“The more general the language, and the more attainable the goals, the more likely the draft instrument is to become law and gain broad adherence.”)

188 For instance, one suspects that torture, slavery and genocide—while clearly prohibited at international law—are incompatible with any plausible reading of the *Charter*. Similarly, there is little doubt that section 2(d) of the *Charter* contains at least the freedom to join and belong to a trade union without state molestation, in general terms, as is included in the *ICCPR* and *Convention No. 87*. However, as none of these general propositions are much in dispute, they may not be very helpful in understanding the meaning of our own constitution.

to look at the reasoning of the body offering its interpretation of the (more abstract) document that *actually* received widespread endorsement. There is much in between abstract universal commands that undoubtedly have the stamp of international law, and singular non-binding decisions of an international body pertaining to very different parties in very different circumstances from our own; but that is the point. On the relevant and persuasive approach, it will be rarely useful to a court to simply point in the general direction of a norm at international law, because if it were that easy to establish a proposition in a *Charter* case, it probably does not need establishing.

## CONCLUSION

The above observations and suggestions are tentative only, and have been developed in light of the specific cases that have come before the Court to date. This paper barely scratches the surface of the issue, and there is no doubt that other factors may prove to be useful to a court in addressing the relevance and persuasiveness of international law in a given case.<sup>189</sup> Indeed, the subject matter in question—constitutional interpretation and human rights norms in international law—is indelibly political and nebulous on a number of intersecting planes, and does not lend itself to anything approaching hard and fast rules. As such, the recommendations here are relatively modest. Respectfully, I would submit that courts should resist the temptation to purportedly rely on a presumption of compliance, especially where that presumption is applied selectively. They should instead continue to rely on international legal norms to the extent that they are found relevant and persuasive in the context at hand, and in light of the specific *Charter* provision in question. Abandoning the pretence of a presumption of compliance would, in my view, lead to greater consistency and transparency in the courts' reasoning. If it is agreed that the mere existence of a law, norm, document, or interpretation will not often be considered an argument in itself, the courts may spend greater time addressing the relevance and persuasiveness of the material to the case at hand. If the courts purport to rely on the very existence of a given law or norm in coming to a conclusion about the meaning of the *Charter*, it should be clear that they are appealing to the presumed collective wisdom of the international community directly, and as much as possible identify the reasons why it is considered helpful in resolving the dispute in question.

At the same time, there is no good reason for the Court to entirely ignore international human rights norms, laws, or interpretations thereof in the process of interpreting the constitution, a position that has some purchase in the United States.<sup>190</sup> Just as with comparative law and academic authorities, the Court should draw on the strongest legal and normative arguments available in coming to its conclusions about the *Charter's* meaning. That judges may do so inconsistently is not a point in favour of the Court artificially blinding itself to international legal materials entirely, so much as revealing an opportunity for greater doctrinal development. Greater consistency in this context can be best accomplished with a clear view towards why those international laws and norms are important, and how they further a purposive interpretation of the *Charter* in context of our unique constitutional order.

189 See especially Weiser, "Undressing", *supra* note 87.

190 See Justice Scalia's comments in Dorsen, *supra* note 142; Roger P Alford, "Misusing International Sources to Interpret the Constitution" (2004) 98 Am J Int'l L 57.



ARTICLE

## CAN WATER BE A HUMAN RIGHT?

Kirsten Snell\*

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### INTRODUCTION

In 2002, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) published General Comment No. 15 (Comment 15).<sup>1</sup> Comment 15 gave non-legally binding recognition to the right to water, and outlined obligations and guidelines for implementing this right.<sup>2</sup> Comment 15 was followed in 2010 by a United Nations (UN) General Assembly Declaration recognizing “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”<sup>3</sup> One hundred twenty-four nations voted in favour of the declaration, forty-one abstained, and none were inclined to political suicide by voting against it.<sup>4</sup> United States deputy representative to the Economic and Social Council, John Sammis, explained that his country abstained from voting because “the legal implications of a declared right to water have not yet been considered.”<sup>5</sup> More than three years later, Sammis’ statement holds true.

There have been two main approaches taken by nations in crafting a human right to water which will be discussed in Parts I and II of this paper. First, the derivative approach recognizes a secondary human right to water as necessary to fulfilling primary economic, social, or political rights. An example is found in Botswana where courts have recognized an implied right to access water deriving from the primary right of any owner or occupier of land to sink or deepen a borehole or well and to extract water for domestic purposes.<sup>6</sup> The second approach recognizes an independent positive human right to water.<sup>7</sup> This approach has been taken in South Africa where the right to have access to sufficient water was granted constitutional protection.<sup>8</sup>

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1 *General Comment No.15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UNCESCR, 29th Sess, UN Doc E/C.12/2002/11, (2003) [Comment 15].

2 Ling-Yee Huang, “Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water” (2008) 20:3 Fla J Int’l L 353.

3 *The Human Right to Water and Sanitation*, GA Res 64/292, UNGAOR, 64th Sess, UN Doc. A/64/L.63/Rev, (2010) at 2.

4 Jacob Mchangama, “Counterpoint: Water is the Wrong Right”, *The Globe and Mail* (5 August 2010), online: *The Globe and Mail* <<http://www.theglobeandmail.com/commentary/counterpoint-water-is-the-wrong-right/article1375870/>>.

5 Mchangama, *supra* note 4.

6 *The Water Act*, Botswana, c-34:01, s 6.

7 Erik Bluemel, “The Implications of Formulating a Human Right to Water” (2004) 31 Ecology LQ 957.

8 *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, ss 27(1)(b) and (2).

On the surface, adding water to the roster of internationally recognized human rights, as urged by the UN High Commissioner for Human Rights (UNHCHR), seems unobjectionable: with statistics from the World Health Organization (WHO) that over one billion people lack access to safe drinking water and 2.5 billion lack the adequate sanitation necessary to reduce exposure to water related diseases, a human rights approach to water entitlements has an immediate appeal as a means of alleviating human suffering.<sup>9</sup> However, case law from Botswana and South Africa has demonstrated that recognizing the existence of a human right to water does not account for the means of implementing or remedying violations of the right. There is little indication that establishing this right has led to substantive changes in government obligations or access to water in those countries in a manner otherwise unachievable under a more flexible property rights approach that frames water as an independently existing entity, the access and usage of which may be granted, transferred, or removed as appropriate.<sup>10</sup>

In contrast to religion, fair trials, or equality, water has not been successfully shaped into a human right because it is not a human creation. It is an invaluable natural entity necessary to sustain all living creatures and systems on the planet. Humans may better organize our own use of water through licensing or permitting systems based in property rights regimes and limit that use by acknowledging ecosystem needs. Prioritization of competing uses and regular interference with water rights will be essential because water is a scarce natural resource; as such, it is inappropriate to deem water a human right, which by definition would place it among “rights inherent to all human beings...[which are] interrelated, indivisible...and inalienable.”<sup>11</sup>

While there is an impetus from international organizations to create a human right to water, this paper will not focus on the international legal recognition of such a right. Instead, this paper explores the ways in which individual states are shaping this right in domestic law. It will demonstrate that a human rights framework is not an appropriate vehicle for managing natural resources or expanding water supply to those in need by examining both the derivative and independent human right approaches. The discussion of each approach will contain an analysis of the legal foundation of that human right, a definition of the substance of the right, and a case study where the right has been recognized in that manner. To provide a broad overview of the topic, this paper will refer to statistics on global water usage and the cost of providing water as well as aspects of water rights regimes in countries including Botswana, South Africa, India, Bolivia, Canada, and the United States.

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9 Office of the High Commissioner for Human Rights, *Report on the scope and content of relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, UNHCHR, 6th Sess, UN Doc A/HRC/6/3, (2007); WHO, “Health through safe drinking water and basic sanitation” (2014), online: <[http://www.who.int/water\\_sanitation\\_health/mdg1/en/](http://www.who.int/water_sanitation_health/mdg1/en/)>.

10 Common property rights approaches that utilize permitting systems include: i) Prior Allocation (transferable licences to certain allocations of water from a given source governed by priority of registrations); ii) Public Authority Management (“use it or lose it” permits governed by water boards); iii) Riparian Rights (owner of land bordering water source is entitled to access water flow in its natural quantity and quality for limited uses); and iv) Civil Codes (non-transferable use permits granted by various government ministries): see Randy Christensen and Anastasia Litner, “Trading Our Common Heritage?: The Debate over Water Rights Transfers in Canada” in Karen Bakker, ed, *Eau Canada: The Future of Canada’s Water* (Vancouver: University of British Columbia Press, 2007) 222 at 223.

11 Office of the High Commissioner for Human Rights, *What are Human Rights?* (2012) online: United Nations Human Rights <<http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>> [What are Human Rights].

## I. THE DERIVATIVE RIGHT APPROACH

The derivative approach creates a subordinate human right to water implied within a primary right, which may be another human, legal, political, economic, or socio-cultural right. The idea that a human right to water can be derived through other rights arises from the basic understanding that humans require water for nearly all of our activities, from cleaning and cooking to drilling for oil and manufacturing cars.<sup>12</sup> Following this logic, the human right to life as entrenched in section 7 of the Canadian *Charter of Rights and Freedoms* (“*Charter*”)<sup>13</sup> cannot be exercised unless one has access to life-sustaining water.

A human right to water could be derived from a wide range of recognized primary rights. Comment 15 states that “[t]he human right to water [...] is a prerequisite for the realization of other human rights.”<sup>14</sup> This includes the right to life, liberty and security of the person under the *Universal Declaration of Human Rights*.<sup>15</sup> The *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) includes the rights to make a living by work and to take part in cultural activities, the right to develop, and the right to adequate food, all of which may imply a subordinate right to water.<sup>16</sup> Comment 15 would require states to provide water to meet the core obligations of each of the ICESCR rights, including a sufficient amount of clean water, safely accessible to all, at a low cost with proper monitoring and a plan of action.<sup>17</sup> It would obligate States to take positive measures to assist individuals and communities to enjoy the right to water.<sup>18</sup> The CESCR noted that the right to health under the *International Bill of Human Rights* would require improvement of environmental hygiene, which implicates safe drinking water, protection of bodies of water from contamination, and water to clean up waste.<sup>19</sup> Although statements from the CESCR are not legally binding, countries including South Africa and Botswana have utilized the language contained in Comment 15 to recognize a human right to water.<sup>20</sup>

The UN Economic and Social Council (ECOSOC) estimated the minimum amount of water required for subsistence is 7.5 litres per day (L/day), which would cover only food incorporation and hydration, or 50 L/day to also account for sanitation and hygiene.<sup>21</sup> The amount of water required for ensuring good health, if that is to include hygiene, is far more than that needed to satisfy the right to food. These are both far less than the amount of water needed to satisfy the ICESCR right to “develop” if that implies industrial development,<sup>22</sup> which is unclear from the wording of ICESCR.<sup>23</sup> Given the different quantities of water required for the broad range of activities contemplated by

12 Dan Shrubsole & Dianne Draper, “On Guard for Thee? Water (Ab)uses and Management in Canada” in Bakker, ed, *supra* note 10 at 40.

13 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c-11, s 7 [*Charter*].

14 *Comment 15*, *supra* note 1 at para 1.

15 *Ibid.*

16 *International Covenant on Economic, Social and Cultural Right*, 16 December 1966, GA Res 2200A (XXI) (entered into force 3 January 1976), arts 6(1), 15(1)(a), 11(1), 1(1) [ICESCR].

17 *Comment 15*, *supra* note 1 at para 37.

18 *Ibid* at para 25.

19 *General Comment No.14: The Right to the Highest Attainable Standard of Health*, UNCESCR, 22nd Sess, UN Doc. E/C.12/2000/4 (2000) at 3-5, 11-13, 15.

20 See Part I-A and Part II-E below for more on this topic.

21 Huang, *supra* note 2 at 357.

22 ICESCR, *supra* note 16.

23 “Development” in this paper signifies the presence of sophisticated industry and infrastructure within a nation. This includes the presence of manufacturing or resource extraction practices that tend to require large amounts of water, and transportation infrastructure capable of reliably delivering water to various users. See Shrubsole & Draper, *supra* note 12.

the ICESCR, and the limited nature of water as a resource, the derivative right approach would require a hierarchy for determining which political, economic or socio-cultural rights should be provided for first. Yet an underlying human right to water would be incompatible with hierarchy because a human right is intended to be indivisible and non-discriminatory.<sup>24</sup>

Even if the derivative human right to water could be limited to a few primary ICESCR rights like adequate food or health, allotments would have to be tailored to different regions in a country for the same right. For example, the water needed to produce adequate food varies with growing conditions, climate, and landscape, while the amount of water needed for health depends on climate and population, among numerous other factors. To avoid human rights violations and to provide an adequate amount of water for each activity would require historical knowledge and predictions of water availability each year, information that even a wealthy and developed country like Canada lacks.<sup>25</sup> Any prediction is subject to environmental conditions beyond human control or knowledge, and in any given year the available water may be so little as to render meaningless a specific entitlement to a finite resource that belongs to the entire population of a country.

When the UN General Assembly issued its 2010 declaration that the right to safe and clean drinking water is a right that is essential for the full enjoyment of life and all human rights,<sup>26</sup> Canada, the United States, Australia, and Britain were among the countries that abstained from adopting the non-binding resolution.<sup>27</sup> In effect, these countries refused to acknowledge the recommendation as a valid approach to realizing legal rights to water. The United States' representative to ECOSOC, John Sammis, explained that

[t]his resolution describes a right to water and sanitation in a way that is not reflective of existing international law; as there is no "right to water and sanitation" in an international legal sense as described by this resolution.<sup>28</sup>

Sammis' response to the declaration typifies the weakness in the derivative approach to recognizing a human right to water. The derivative approach is burdened by the questionable existence of positive obligations on governments to satisfy primary rights. It also demands that governments prioritize primary human rights by determining which rights require water for their fulfilment. These issues are illustrated in the Botswana case of *Matsipane Moselethanyane and Gokenyatsiwe Matsipane v. Attorney General* ("*Matsipane*"),<sup>29</sup> where a human right to water was recognized in order to overcome discriminatory practices by a government against occupiers of wildlife reserve land.

## A. The Derivative Approach in Botswana

In 2011, the Botswana Court of Appeal quashed a prior ruling that denied the Basarwa (also known as Kalahari Bushmen) access to water on their ancestral lands located in

24 *What are Human Rights*, *supra* note 11.

25 Shrubsole & Draper, *supra* note 12 at 47.

26 *The Human Right to Water and Sanitation*, *supra* note 3.

27 Mchangama, *supra* note 4.

28 John F Sammis, "Explanation of Vote by John F Sammis, US Deputy Representative to the Economic and Social Council, on Resolution A/64/L 63/Rev 1, the Human Right to Water", Explanation, (PRN 2010/155), 28 July 2010, online: United States Mission to the United Nations <<http://usun.state.gov/briefing/statements/2010/145279.htm>>.

29 *Matsipane Moselethanyane and Gokenyatsiwe Matsipane v Attorney General* (2011), Civil Appeal No CACLB-074-10 (Bots), online: Global Health and Human Rights Database <<http://www.globalhealthrights.org/africa/matsipane-moselethanyane-ors-v-the-attorney-general/>> [*Matsipane*].

the Central Kalahari Game Reserve (CKGR).<sup>30</sup> In 1961, the CKGR was established to conserve wildlife and provide residence for the Basarwa, who formed permanent hunter-gatherer settlements there.<sup>31</sup> In 1986, the De Beers diamond company agreed to allow Basarwa residents to use a borehole that the company had sunk at Mothomelo for gathering water.<sup>32</sup> The government maintained the engine of the borehole pump from 1986 – 2002.<sup>33</sup>

In 2002, the government evicted the Basarwa from the CKGR after issuing a policy statement that the reserve existed solely for the purpose of wildlife conservation.<sup>34</sup> The new policy deemed that human settlements were incompatible with that purpose, and bringing water infrastructure into the area would seriously compromise fauna conservation efforts.<sup>35</sup> During relocation of the Basarwa, the pump engine and water tank built into the borehole were dismantled, and the borehole was sealed.<sup>36</sup> The court speculated that these changes were likely done to induce the Basarwa to move, although many eventually returned to their settlements.<sup>37</sup> The court called the ordeal, which persisted for several years, a “harrowing story of human suffering and despair from the shortage of water in a harsh climate.”<sup>38</sup> The government’s action to decommission the borehole resulted in Basarwa residents becoming “weak and vulnerable to sickness,” and forced them to spend their days searching the bush for melons containing traces of water.<sup>39</sup>

The Basarwa took the government to court, arguing that they had a right under section 6(1)(a) of Botswana’s *Water Act* to re-commission or sink new boreholes at their own expense to take and use water for domestic purposes by virtue of their occupation or ownership of the land.<sup>40</sup> In accordance with section 6, the Basarwa were not seeking a right to abstract at will unlimited quantities of water from an unspecified number of boreholes, but rather to use an existing or new hole.<sup>41</sup> As such, they reasoned that section 9 of the *Water Act*, which forbids taking water without an authorized water right, would not apply.<sup>42</sup> Importantly, the Basarwa argued that being denied access to water for domestic purposes would make their occupation of the land meaningless.<sup>43</sup> The Basarwa also claimed that the government violated section 7(1) of the *Constitution of Botswana* (1966)<sup>44</sup> by subjecting them to “inhuman or degrading punishment or treatment.”<sup>45</sup>

In response, the government argued that the well was not a borehole as defined under the *Water Act* but that it was a “prospecting hole” drilled for mineral prospecting and it was never meant to provide water to anyone.<sup>46</sup> The government argued that, with section 6 being subject to section 9, the owner or occupier of land intending to sink or deepen wells or boreholes to take water for domestic purposes could only do so with a water right

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30 *Ibid.*

31 *Ibid* at para 4.

32 *Ibid* at paras 4-5.

33 *Ibid* at para 5.

34 *Ibid* at para 6.

35 *Ibid.*

36 *Ibid* at para 7.

37 *Ibid* at paras 6-7.

38 *Ibid* at para 4.

39 *Ibid* at para 8.

40 *Ibid* at para 13.

41 *Ibid* at para 14.

42 *The Water Act, supra* note 6, ss 6 and 9.

43 *Matsipane, supra* note 29 at paras 14-16.

44 *Constitution of Botswana* (1966), BWA-010, 1966, s 7(1).

45 *Matsipane, supra* note 29 at para 19.

46 *Ibid* at para 9.

granted under the *Act*.<sup>47</sup> The Basarwa had therefore violated section 9 by failing to obtain a water right to use the borehole.<sup>48</sup>

The court cited the decision in *Sesana and Others v. A Attorney General* (2006),<sup>49</sup> a related case brought by one of the same applicants in *Matsipane*, to support their finding that the Basarwa were wrongly deprived of possession of their settlements. The court further held that the government had acted unlawfully and unconstitutionally by denying the Basarwa permits to enter the land.<sup>50</sup> The borehole had ceased being a prospecting hole after being converted for domestic purposes for the benefit of the community, and there was no legal basis for denying access or sealing it.<sup>51</sup> The court also agreed with the appellants' statement that occupation rights without water rights would be meaningless:

[i]n a country in which an occupier of land may have to drill beneath it to find water he and his family will need if they are to live there, it is unsurprising that Parliament should have decided that he should have an 'inherent' right to do just that.<sup>52</sup>

Their "inherent" right to access water was deemed absolute and unqualified, and the court held that the Basarwa did not need authorization to take water.<sup>53</sup> This language suggests that the court granted a human right of access to water underlying the right to occupy land rather than a property right to use or own water.<sup>54</sup> The language in the decision that permits access to water for domestic purposes is consistent with a human rights approach to water as it was granted to allow families to live and survive in the area that they occupy.<sup>55</sup> The court acknowledged that Comment 15 guided their judgment, and quoted the General Assembly recognition of the right to safe and clean drinking water as a fundamental human right essential for the full enjoyment of life and all human rights.<sup>56</sup>

This ruling shed light on how courts may address the issue of access to water when applicants live in areas where water is naturally scarce. In reference to the section 7(1) claim, the court agreed that the Basarwa were subjected to inhuman or degrading treatment in being denied permission to use or sink a borehole, at their own expense, for domestic purposes.<sup>57</sup> This finding overruled the trial judge's holding that the Basarwa had brought whatever hardships they suffered upon themselves by "freely choosing to go and live where there was no water."<sup>58</sup>

One problem with this judgment is the incongruity between the acknowledgment of a human right underlying the primary right to occupy land and the apparent lack of a positive governmental obligation to provide essential services. Although it was held by the court that the Basarwa had the right to use the borehole, the Basarwa asserted that use would be at their own expense, and in fact conceded to the respondent's argument that

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47 *Ibid* at para 13.

48 *Ibid*.

49 *Sesana and Others v Attorney General* (2006) (2) BLR 633 (HC); (2006) AHRLR 183 (BwHC 2006).

50 *Matsipane*, *supra* note 29 at para 12.

51 *Ibid* at paras 17-18.

52 *Ibid* at para 16.

53 *Ibid* at para 19.

54 Bonolo Ramadi Dinokopila, "The Right to Water in Botswana: a review of the *Matsipane Mostlhanyane* case" (2011) 11:1 Afr Hum Rts L J 282.

55 *Matsipane*, *supra* note 29 at para 16.

56 *Ibid* at para 19.

57 Dinokopila, *supra* note 54 at 291.

58 *Matsipane*, *supra* note 29 at para 10.

the government was under no obligation to restore the provision of basic and essential services to residents of the CKGR, following *Sesana*.<sup>59</sup> Therefore, the government would be barred from inflicting suffering by depriving citizens of self-financed access to water, but it need not take initiative to prevent suffering from lack of water. It appears the court has recognized a *negative* human right to water where one might expect a *positive* obligation on the government to provide water to protect citizens from inhumane conditions.

Legal scholar Bonolo Dinokopila suggests that the life threatening effects of the state's decision to seal the borehole without authority gives a moral basis for recognizing a human right to water.<sup>60</sup> However, the ruling in *Matsipane* was founded on the concept that an *occupier of land* needs to access water for the survival of his family. This reveals a reliance on the language of property rights even where moral considerations figure prominently. While this avoids a revolutionary expansion of human rights, it offers a pragmatic solution to a physical problem within the bounds of existing law: courts may recognize that a property right to land contains a property right to water.

Human rights exist as a category of rights intended to be inalienable, necessary, and of such basic importance that they are unchanging,<sup>61</sup> yet a court's binding judgments are subject to appeal. As the court in *Matsipane* implied by declining to reopen the *Sesana* ruling against a government obligation to provide essential services, there is a democratic deficit in allowing judges to read-in an underlying right and then dictate that the government must implement it. This criticism is especially true when the provision of services requires going beyond court expertise to policy making centred on how to obtain, manage, and pay for a scarce natural resource like water. However, the ambiguity that accompanies a judge-made derivative human right to water could be avoided by the creation of a human right to water that stands on its own authority.

## II. THE INDEPENDENT RIGHT APPROACH

An independent human right to water could be initiated in the legislative branch of government and applied broadly to a range of water-based activities. Benefits of explicitly acknowledging a human right to water, according to Peter Gleick of the Pacific Institute, include encouraging and pressuring governments to meet basic water needs of their populations, and identifying minimum water requirements and allocations for parties within a particular watershed.<sup>62</sup> This approach, which would marry the natural environment directly to human need with no possibility of divorce, faces inherent conceptual and remedial challenges. A description of various types of rights and their attendant remedies by law and economics scholar Guido Calabresi provides a useful framework for evaluating these challenges.<sup>63</sup>

Calabresi notes that rights are protected either by property, liability, or inalienability rules.<sup>64</sup> Interference with a right would be appropriate in the realm of property rights, which "involve a collective decision as to who is to be given an initial entitlement" and then permit removal of the entitlement through a voluntary transaction.<sup>65</sup> An inalienable

59 *Ibid* at para 18.

60 Dinokopila, *supra* note 54 at 290-292.

61 *What Are Human Rights*, *supra* note 11.

62 Peter H Gleick, "The Human Right to Water" (2007) 41 *Economía Exterior* 1, online: Pacific Institute <[http://www2.pacinst.org/reports/human\\_right\\_may\\_07.pdf](http://www2.pacinst.org/reports/human_right_may_07.pdf)>.

63 Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 *Harv L Rev* 1089.

64 *Ibid*.

65 *Ibid* at 1092.

right such as a human right “is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.”<sup>66</sup>

Permitting interference with a right to water seems misplaced in a human rights context as human rights are absolute and indivisible. Comment 15, however, can be interpreted as permitting interference with an individual’s right to water as it notes that states or third parties must consult with and give notice of actions to affected individuals prior to the interference with their rights.<sup>67</sup> CESCR may have included this statement in Comment 15 because the state must be able to regularly interfere with rights to resources that exist independently as natural, tangible entities both to deliver and manage them. This is particularly true where resources are scarce due to environmental factors beyond human control. However, this indicates that water rights do not fit comfortably within a human rights regime.

If rights are dependent on the rules and remedies that accompany them, as Calabresi suggests, then a right without remedy is no right at all.<sup>68</sup> The remedies identified in Comment 15 to address violations of the human right to water include “adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition” by the national or international judiciary.<sup>69</sup> It follows that a human right to water must be adequately defined and provide for immediate remedial action in order to have any meaning. A human right to a substance necessary for life requires actual means of quickly resolving deficiencies in water availability and criteria for determining what is meant by deficiency.

As Gleick notes, a human right to water cannot imply the right to an unlimited amount of water, nor does it require that water be provided for free.<sup>70</sup> It will be limited by resource scarcity, the need to maintain natural ecosystems, and economic and political factors. As such, it may only be applied to satisfy basic needs for drinking, cooking, and “fundamental domestic uses.”<sup>71</sup>

Despite the challenges noted above, Comment 15 provides a framework for countries seeking to implement an independent positive human right to water through its recognition of four key factors. These are defined by the statement that everyone is entitled to (1) sufficient, (2) safe and acceptable, (3) physically accessible, and (4) affordable water for personal and domestic uses.<sup>72</sup> This section explores the substance of the four factors to shed light on issues with the definition and implementation of this right.

## A. Sufficient Supply

Water supply for each person must be sufficient and continuous for personal and domestic uses, according to Comment 15.<sup>73</sup> These uses include drinking water, human waste disposal, clothes washing, food preparation, and personal and household cleanliness. Comment 15 acknowledges “some individuals and groups may also require additional water due to health, climate, and work conditions.”<sup>74</sup>

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66 *Ibid.*

67 *Comment 15, supra* note 1 at para 56.

68 Calabresi & Melamed, *supra* note 63.

69 *Ibid* at para 55.

70 Gleick, *supra* note 62 at 4.

71 *Ibid* at 4.

72 *Comment 15, supra* note 1 at para 2.

73 *Ibid* at para 12(a).

74 *Ibid.*

The estimated minimum amount of water required for subsistence according to ECOSOC is 7.5 L/day, which covers only food preparation and hydration, or 50 L/day, which accounts for sanitation and hygiene.<sup>75</sup> The WHO gives a higher estimate of at least 50 – 100 L/day for each person.<sup>76</sup> According to Shrubsole and Draper, in 2006 each Canadian used an incredible 4400 L/day “to support our lifestyle,” with about 343 L/day allotted specifically to personal domestic use.<sup>77</sup> In France and Sweden, individuals use only 150 L/day and 200 L/day respectively.<sup>78</sup> This extreme variation in the quantities that individuals in different countries would consider necessary for fulfilling basic needs explains the lack of specificity in this category within Comment 15.

If water is recognized as an independent human right in water-poor countries like Botswana, which has only about 2.4 cubic kilometers (km<sup>3</sup>) of internal renewable water resources per year for a population of about 1.8 million,<sup>79</sup> governments would have to find alternative means of supplying the guaranteed quantities of water to their citizens. They may turn to bulk exports from countries like Canada where there is a perceived abundance of water, and an average internal annual renewable water resource of 2850 km<sup>3</sup> for a population of 34 million.<sup>80</sup>

Whether a country is considering bulk exports or determining the minimum amount of water necessary to satisfy basic human needs, a metering or usage monitoring system would likely have to be implemented to determine sufficient supply. According to a 2009 report by the Organisation for Economic Cooperation and Development (OECD), governmental expenditures on water infrastructure in OECD countries averaged \$11.9 billion during 2006.<sup>81</sup> While it would be a valuable long-term investment that could be used as a conservation tool, the cost of building and maintaining such a system could be a large burden in countries that lack infrastructure for extracting and purifying water, let alone measuring individual use.

The Klamath Basin dispute in northern California<sup>82</sup> demonstrates scarcity issues more commonly faced in developed nations, and illustrates the efficacy of property rights regimes for protecting access to water. Although the parties in the dispute were not arguing over water supply for basic domestic uses as in *Matsipane*, poor water quality in the basin had an impact on water available for both basic and other needs.<sup>83</sup>

Over-allocation of water, changing hydrology, and several hydro-electric dams negatively affected both the quality and quantity of water in the Klamath River.<sup>84</sup> These changes

75 Huang, *supra* note 2 at 357.

76 David R Boyd, “The Right to Water: A Briefing Note” (2011) *InterAction Council: The Global Water Crisis*, citing J Bartram and G Howard, *Domestic Water Quantity, Service, Level and Health*, Geneva: World Health Organization (2003) at 2.

77 Shrubsole & Draper, *supra* note 12 at 39.

78 *Ibid.*

79 Karen Frenken, ed, “Irrigation in African in Figures: Aquastat Survey 2005” (2005) 29 FAO Water Reports at 50-51, online: AQUASTAT – FAO’s Information System on Water and Agriculture <<http://www.fao.org/nr/water/aquastat/catalogues/index2.stm>>.

80 AquaStat, “Country Fact Sheet: Canada” (2014), online: AQUASTAT – FAO’s Information System on Water and Agriculture. <[http://www.fao.org/nr/water/aquastat/data/cf/readPdf.html?f=CF\\_CAN\\_en.pdf](http://www.fao.org/nr/water/aquastat/data/cf/readPdf.html?f=CF_CAN_en.pdf)>.

81 OECD, *Managing Water for All: An OECD Perspective on Pricing and Financing*, OECD Studies on Water, (2009) at 42, online: OECD Publishing Free Preview <[http://www.keepeek.com/Digital-Asset-Management/oecd/environment/managing-water-for-all\\_9789264059498-en](http://www.keepeek.com/Digital-Asset-Management/oecd/environment/managing-water-for-all_9789264059498-en)>.

82 Deborah Curran & Oliver M Brandes, “When the Water Dries Up: Lessons from the Failure of Water Entitlements in Canada, The US and Australia” (11 June 2012), online: POLIS Water Sustainability Project <<http://poliswaterproject.org/publication/478>>.

83 *Ibid.*

84 *Ibid* at 7.

significantly impacted the ability of Indigenous communities to exercise their senior tribal right to fish given a major decline in salmon population.<sup>85</sup> Junior agricultural licence holders were unable to obtain sufficient water for irrigation due to the decreased supply of water.<sup>86</sup> After years of shortage and litigation, Indigenous and agricultural rights holders negotiated the Klamath Basin Restoration Agreement in 2010.<sup>87</sup> The agreement maintained the property rights-based system of prior allocation, but re-allocated water for salmon habitat restoration and granted agricultural users fifty percent of the forecasted supply for April to September, though they were legally entitled to greater supply.<sup>88</sup> Finally, the agreement provided a dispute resolution mechanism to resolve any future conflicts.<sup>89</sup>

The Klamath Basin dispute showed that “at the appropriate scale, people prefer to cooperate to solve conflicts over entitlements to and the use of resources rather than resort to legal rules and litigation.”<sup>90</sup> While priority rules attached to property rights-based licencing regimes may fail to resolve disputes between competing interests through litigation, they provide a basis for negotiation. Successful negotiation relies upon flexibility and well-defined interests, and can be a valuable means of addressing scarcity, particularly in cases where governments cannot adequately dictate what supply will be available for a large group of stakeholders.

## B. Safe Water

According to Comment 15, safe water for domestic or personal use must be “free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health.”<sup>91</sup> It should be of an “acceptable” color, odour, and taste, as determined by WHO drinking water guidelines.<sup>92</sup> While water quality may be conceived as a problem facing underdeveloped countries like Botswana, it is a live issue on Canadian soil as well.

Safe water guidelines in Canada are set both federally and provincially, through provincial legislation such as the *Drinking Water Protection Act* in BC,<sup>93</sup> and federally through non-binding guidelines set by Health Canada.<sup>94</sup> Provincial standards for potable water recognize fecal coliform, *e. coli*, and total coliform,<sup>95</sup> but do not address other potential health risks which may be present due to environmental factors in different locations affected by local industry or climate. Furthermore, insufficient funding, vast distances between sources, and poor central monitoring have resulted in fragmented management of thousands of water supply systems in BC.<sup>96</sup> The consequences of a lack of federally binding guidelines are felt most distinctly by First Nations communities in Canada; a Health Canada report found that in 1999 water borne diseases like shigellosis, hepatitis A, and giardiasis, were respectively 20 times, 12 times, and 2 times worse on reserve than

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85 *Ibid* at 8.

86 *Ibid* at 7.

87 *Ibid* at 8.

88 *Ibid*.

89 *Ibid*.

90 *Ibid*.

91 *Comment 15, supra* note 1 at para 12(b).

92 *Ibid*.

93 *Drinking Water Protection Act*, SBC 2001, c-9.

94 Health Canada “Guidelines for Canadian Drinking Water Quality – Summary Table” (2012), online: Health Canada <[http://www.hc-sc.gc.ca/ewh-semtpubs/water-eau/2012-sum\\_guide-res\\_recom/index-eng.php](http://www.hc-sc.gc.ca/ewh-semtpubs/water-eau/2012-sum_guide-res_recom/index-eng.php)>.

95 *Drinking Water Protection Regulation*, BC Reg 87/2011, ss 2.

96 Curran & Brandes, *supra* note 82.

in the general Canadian population.<sup>97</sup> This major discrepancy is in large part caused by the fact that reserves, falling within federal jurisdiction by virtue of section 91(24) of the *Constitution Act, 1867*,<sup>98</sup> are not covered by any binding guidelines.<sup>99</sup> Without the threat of legal penalties for poor water quality to incentivize federal spending, populations on reserve have been left to deal with insufficient infrastructure and personnel training, and inadequate drinking water treatment and delivery.<sup>100</sup>

In recognition of this problem, the federal government proposed in 2009 that provincial legislation for operational standards be referentially incorporated into regulations developed through consultation with First Nations.<sup>101</sup> This proposal has culminated in the new *Safe Drinking Water for First Nations Act*.<sup>102</sup> Critics like Constance MacIntosh hold that a federal regime will face challenges regarding off-reserve source water protection, as sources off-reserve would fall into provincial jurisdiction with its attendant land-use planning and activity control legislation.<sup>103</sup>

An independent human rights approach could conceivably be effective in bridging the gap between provincial and federal jurisdiction over safe drinking water standards by giving a federally recognized human right to water paramountcy over provincial land-use legislation. This recognition could permit First Nations communities in particular, along with other Canadians, to hold both levels of state actors accountable for providing safe drinking water. However, section 35 of the *Constitution Act, 1982*<sup>104</sup> already imposes a fiduciary obligation on the federal government to act in the best interest of First Nations.<sup>105</sup> It is not clear whether an extra layer of human rights protection would help to resolve the discrepancy in water quality on reserve or would further obscure the legal process surrounding Aboriginal Rights and Title claims. On the other hand, the traditional property rights approach allows individual actors to reorganize and redistribute their rights among themselves using negotiation as was done in the Klamath Basin.<sup>106</sup>

Following Calabresi's definition of inalienable rights as mentioned above,<sup>107</sup> human rights cannot be negotiated or altered, and exist on a large scale as entitlements held by individuals which are only legally enforceable against the state.<sup>108</sup> A human right to water recognized in domestic law would impose an obligation, rather than an option, upon the federal government to find a solution to the problem of water quality;<sup>109</sup> yet it would not be effective in disputes between individuals as in the Klamath Basin dispute noted above. Where a dispute with the government arises, a human rights approach could create distance between citizens and the deemed solution by taking their particular interests out of the equation and rendering the decision non-negotiable.

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97 Constance MacIntosh "Public Health Protection and Drinking Water Quality on First Nation Reserves" (2009) 18:1 Health L Rev 5 at 7.

98 *Constitution Act 1867* (UK), 30 & 31 Vict, c-3, s 91(24).

99 MacIntosh, *supra* note 97 at 7.

100 *Ibid* at 5-6.

101 *Ibid* at 6.

102 *Safe Drinking Water for First Nations Act*, SC 2013, c 21.

103 MacIntosh, *supra* note 97 at 8.

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

105 See *R v Van der Peet*, [1996] 2 SCR 507 at paras 24-25, 137 DLR (4th) 289; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321.

106 Curran & Brandes, *supra* note 82.

107 See Part II, above and Calabresi & Melamed, *supra* note 63 at 1092.

108 *What are Human Rights*, *supra* note 11.

109 *Ibid*.

### C. Physically Accessible

Under the requirement that water be accessible, Comment 15 specifies that water must be physically accessible to everyone without discrimination or threats of physical harm.<sup>110</sup> The issue of physical accessibility was raised in *Matsipane*, where it was found at trial that the Basarwa subjected themselves to physical hardship by choosing to live on land where there was no readily available water.<sup>111</sup> On appeal, the court rejected this argument because the Basarwa had established a water source with the borehole in the area where they lived, and the government had actively sealed it without any legal authority.<sup>112</sup> The government's argument is undoubtedly callous in the face of human suffering caused, not by the Basarwa acting foolishly, but by the government's allegedly intentional infliction of suffering to force the Basarwa to relocate. However, in a different context, this type of argument could carry some weight.

At what point is it environmentally irresponsible for humans to live in a location which has limited or no natural water source simply because we desire to live there? The fact that California requires \$400 million in taxes per year to subsidize a system of aqueducts for agricultural and domestic needs should tell us that the ecosystem is not capable of supporting such a large population.<sup>113</sup> The state has recognized this issue, and although water rights transfers have increased to 1.2 million acre feet per year, the state has intervened to ensure that over one third of those transfers have been done to meet environmental, rather than human, needs.<sup>114</sup> Needless to say, the cost of infrastructure and transfer facilitation at this volume is well beyond what most water-poor states could reasonably be expected to provide.

Environmental rights scholar David Boyd argues that benefits of a human rights regime for water would include protecting water from pollution and other adverse impacts.<sup>115</sup> He is echoed by others who hold that human rights to water resonate more soundly than pure environmental claims, which are subject to regulatory whims, and human rights and environmental protection overlap in efforts to preserve the environment for the benefit of present and future generations.<sup>116</sup> However, regulatory regimes are effective in promoting flexibility in conflicts over entitlements, which is not possible under a non-negotiable human rights regime, and often require precise definition of health risks and pollution-causing activities.

As Linda Nowlan points out, “water flow, or environmental flow, plays a critical role in ecosystem health; human uses for water compete with other species’ needs, often at the expense of freshwater biodiversity.”<sup>117</sup> The amount of water needed for basic personal and domestic uses is relatively low compared to agricultural or industrial uses. However, 200 L/day for every person in a country of over a billion people—like India, which recognizes a human right to water through the constitutional right to life<sup>118</sup>—adds up to an enormous amount of water being diverted from environmental flows to fulfil human needs in existing communities.<sup>119</sup>

110 *Comment 15, supra* note 1 at para 12(c)(i) and (iii).

111 *Matsipane, supra* note 29 at para 10.

112 *Ibid.*

113 Christensen & Litner, *supra* note 10 at 232.

114 *Ibid* at 231.

115 Boyd, *supra* note 76 at 2.

116 Huang, *supra* note 2 at 359.

117 Linda Nowlan, “CPR for Canadian Rivers: Law to Conserve, Protect and Restore Environmental Flows in Canada” (2012) 23:3 *J Envtl L & Practice* 237 at 239.

118 *Constitution of India* 1950, art 21; Vrinda Narain, “Water as a Fundamental Right: A Perspective from India” (2010) 34:4 *Vt L Rev* 917.

119 The enforcement of India's right to water has been weak: see Narain, *ibid.*

If communities cannot afford to bring water to themselves, the government may force groups to relocate, as was attempted illegally in *Matsipane*.<sup>120</sup> That case highlights the problem of competing human and environmental needs. While the government lacked the authority for shutting off access to the borehole, its plan to move humans out of the CKGR was apparently motivated by wildlife conservation purposes.<sup>121</sup> Relocations in other states could violate enumerated rights such as that of housing in the *Constitution of the Republic of South Africa*,<sup>122</sup> or the freedom of movement under the *Charter*.<sup>123</sup> This problem is exacerbated in areas experiencing urban migration, where water systems struggle to keep up with demand, and in favela-like squatter settlements whose long-term existence governments do not wish to encourage.<sup>124</sup>

Although a human right to water under Comment 15 would require water to be accessible without discrimination, water sources are not typically distributed evenly by population density in nature. Communities that cannot access enough clean water to fulfil their basic needs either must have water sources brought to them, or must be relocated closer to water. Bulk water removals to communities that can afford to bring the water to them would be protected not simply by international trade law but by the more inflexible and absolute guarantee of a human right. Yet major alterations of water flows pose a threat to environmental health,<sup>125</sup> and, consequently, human habitation.

#### D. Affordable

The requirement that states provide access to a sufficient supply of clean water is inextricably connected with the issue of affordability. Comment 15 requires that water, the necessary facilities and services, and all direct or indirect charges are affordable for all.<sup>126</sup> Whether privately or publicly provided, these services must be charged based on the principle of equity, which demands that poorer households not be disproportionately burdened with water expenses.<sup>127</sup>

To ensure affordability it is suggested that states adopt any necessary measures, which may include a range of appropriate low-cost techniques and technologies, appropriate pricing policies like free or low-cost water, and income supplements.<sup>128</sup>

It has been argued that a human right to water could prevent the privatization of water resources. This is a matter of concern particularly in countries that are straining to meet the heavy costs of implementing or improving water systems, as occurred in Cochabamba, Bolivia.<sup>129</sup> In 2000, less than sixty percent of the population of Cochabamba had access to a water supply system, in part due to the large number of squatter settlements in the city; consequently, private water vendors began acting as the primary suppliers.<sup>130</sup> To resolve this problem, the Bolivian government deemed water a state-owned commodity that could be licenced to private companies for distribution.<sup>131</sup> Accordingly, the government prohibited any independent water collection, including the

120 *Matsipane*, *supra* note 29 at para 6.

121 *Ibid*.

122 *Constitution of the Republic of South Africa, 1996*, *supra* note 8 at s 26.

123 *Charter*, *supra* note 13 at s 6.

124 Bluemel, *supra* note 7 at 988.

125 Nowlan, *supra* note 117 at 244.

126 *Comment 15*, *supra* note 1 at para 12(c)(ii).

127 *Ibid* at para 27.

128 *Ibid*.

129 Bluemel, *supra* note 7 at 966-7.

130 *Ibid* at 965.

131 *Ibid* at 966.

use of rainwater barrels.<sup>132</sup> Licenced companies pursued a program of full cost recovery, which allowed water suppliers to recover the full cost of supplying water to all users; this measure immediately increased water costs to account for over twenty percent of household income.<sup>133</sup> Four months after the scheme began, Bolivians erupted into violent protests, which ultimately forced the government to end privatized water delivery, and return water to government control.<sup>134</sup> While there may be controversy around the notion that water, as a human right, “should be available to all regardless of ability to pay,”<sup>135</sup> the Bolivian experience points to the existence of an informal ceiling on the price of water at least in that community.

The OECD published a report on global tariff policies for water supply and sanitation in 2009, which gave a rare look into actual costs and methods of paying for water systems in both OECD and non-OECD countries.<sup>136</sup> It found that tariffs, or charges to household users, are an important means of providing ongoing funding for water supply systems, achieving a sustainable level of cost recovery, and reducing waste or undervaluation of water as a resource.<sup>137</sup> However, full cost recovery from tariffs alone, as occurred in Cochabamba, “is far from the norm.”<sup>138</sup>

To avoid imposing crippling tariffs, countries are shifting towards local commercial finance, which is reimbursed by user charges.<sup>139</sup> Federal grants and loans are common, and financing through pollution charges and municipal bonds has increased, with the latter occurring in India and South Africa.<sup>140</sup> Finally, the OECD found that countries initially relied on dedicated water financing agencies to support infrastructure development, and have lessened this reliance over time.<sup>141</sup> Donors and international financial institutions usually aimed for three to five percent of household income covering water tariffs when planning for water infrastructure investment projects.<sup>142</sup>

According to the 2012 GWI/OECD Global Water Tariff Survey, the average combined water and wastewater tariff among 310 cities was US\$1.98 per cubic meter (m<sup>3</sup>).<sup>143</sup> Surprisingly, the lowest average residential tariffs were found in water-poor countries with Saudi Arabia charging US\$0.03/m<sup>3</sup>, and Cuba charging US\$0.04/m<sup>3</sup>.<sup>144</sup> The highest costs were found in Australia at US\$6.47/m<sup>3</sup> and Denmark, where residents pay up to US\$9.21/m<sup>3</sup>.<sup>145</sup> In 2007, Toronto residents paid US\$1.64/m<sup>3</sup>, and users in Gaborone, Botswana paid US\$0.53/m<sup>3</sup>.<sup>146</sup> The OECD report found that water charges in developing countries, such as Egypt, usually account for a maximum of two percent of household income, while OECD countries only spend one percent of household income on water.<sup>147</sup> However, even in OECD countries such as Denmark, New Zealand, and

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132 *Ibid.*

133 *Ibid.*

134 *Ibid* at 966.

135 *Ibid* at 967.

136 OECD, *supra* note 81.

137 *Ibid.*

138 *Ibid* at 80.

139 *Ibid* at 55.

140 *Ibid.*

141 *Ibid.*

142 *Ibid* at 57.

143 Global Water Intelligence, “Water Tariff Survey”, (2012) 13:9 Global Water Intelligence 37, online: <<http://www.globalwaterintel.com>>.

144 *Ibid.*

145 *Ibid* at 37-41.

146 *Ibid.*

147 OECD, *supra* note 81 at 57.

Turkey, the lowest decile of the population was found to spend as much as 3.0 – 10.3 percent of household income on water and wastewater bills.<sup>148</sup>

Affordability does not simply demand that states offer the lowest possible rates for water use, but it requires a consideration of fair pricing to account for long term economic and water needs. Environment Canada reported that the National Round Table on Environment and Economy found “unmet water and wastewater infrastructure needs [...] were \$38-49 billion (CAD) in 1996, and capital costs for the following 20 years will be in the order of \$70-90 billion.”<sup>149</sup> The clear way to deal with the problem, it states, is to pay realistic rates for municipal water service that are sufficient to cover the true cost, based on actual quantity used. The Municipal Pricing Report found that the average domestic water user paid CAD\$1.26 for 1000 L in 2004, a rate which Environment Canada deemed to be too low;<sup>150</sup> although it is unclear whether any governmental policy exists which suggests what a fair rate would be.

Undervaluing water in Canada is caused by a perceived super abundance based on statistics stating Canada contains twenty percent of the water in all the world’s lakes, despite the fact that Canada only has 6.5 percent of the world’s total renewable water supply.<sup>151</sup> In countries like Canada where water is undervalued, a human right to water could possibly inhibit or cause delay in adjusting water prices to reflect true value by giving individuals a basis to complain that they should be entitled to free or low-cost (i.e. undervalued) water.

The OECD reported that Canada’s current expenditure on water infrastructure was US\$7.88 billion with an average annual investment projected to be US\$2.75 billion by 2015, and US\$4.38 billion by 2025.<sup>152</sup> According to the WHO, the costs of implementing suitable water and sanitation systems in countries currently lacking them would range from \$135 – 327 billion.<sup>153</sup> This cost will be a major hurdle for water-poor countries in which a human right to safe and sufficient water would be a means of holding irresponsible or unreactive governments accountable for failing to provide access to sufficient and safe water.<sup>154</sup>

As indicated by the affordability factor in Comment 15, part of the purpose of recognizing a human right to water is to ensure that states provide access to water even to those who cannot afford it under the principle of full cost recovery.<sup>155</sup> It is clear from the underpricing of water in Canada that presently the government is not pursuing a full cost recovery on water use or infrastructure, even absent a human right to water.

Following the lesson from Cochabamba, total privatization of water supplies in water-poor countries, or those lacking infrastructure, seems unlikely. Private companies would have no motivation for investing billions into a system where users and governments will not or cannot afford to pay even relatively low charges. A human rights approach may be more valuable in developing countries where there is an actual possibility of recovery of the hundreds of billions required to build adequate water supply systems. Even so,

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148 *Ibid* at 88, figure 3.3.

149 Environment Canada, “Withdrawal Uses: What is a Fair Price” (2006), online: Environment Canada <<http://www.ec.gc.ca/>>.

150 *Ibid*.

151 John B Sprague, “Great Wet North? Canada’s Myth of Water Abundance” in Bakker, *supra* note 10, 23 at 25.

152 OECD, *supra* note 81 at 42.

153 *Ibid* at 52.

154 *Ibid* at 52.

155 Bluemel, *supra* note 7 at 963.

the OECD report shows that a variety of approaches to financing are being taken in most developing countries.<sup>156</sup> This approach decreases the likelihood of a single private or state entity taking control over water supply systems, and exploiting or refusing to provide water to local populations, which removes an incentive for the strict human rights approach.

As demonstrated in *Lindiwe Mazibuko and Others v. City of Johannesburg and Others* (“*Lindiwe*”),<sup>157</sup> protection from privatization does not necessarily ensure complete affordability or access to water resources. Local governments who control water resources also have the power to turn off the tap, even when an independent human right to water is constitutionally recognized. While a human right to water could guide a country’s approach to financing and determining affordable tariffs to fund its water systems, conscientious policymakers could pursue an affordable pricing regime absent a human right to water.

### E. The Independent Right Approach in South Africa’s Constitution

In the 2009 *Lindiwe* case, the South African Constitutional Court was faced with its first opportunity to interpret section 27(1)(b) of the *Constitution of the Republic of South Africa* (“*Constitution*”), which provides that everyone has the right to have access to sufficient water.<sup>158</sup> The court concluded that the achievement of equality, a founding principle in the constitution, cannot be accomplished “while water is abundantly available to the wealthy, but not to the poor.”<sup>159</sup>

Johannesburg Water, the company that provides water services to city residents, estimated that one-quarter to one-third of all water it purchased was distributed to the impoverished Soweto district with only one percent of revenue coming back due to the failure of many residents to pay consumption charges.<sup>160</sup> Further, the company could not account for about seventy-five percent of water pumped to Soweto.<sup>161</sup> In response to these problems, the city and Johannesburg Water developed a three-tiered water services policy under the *Water Services Act* (1994).<sup>162</sup> Every household would receive 6000 L of water per month (or 25 L per person per day) available for free following section 11 of the *Water Services Act*; consumers would pay for any water used in excess of that amount.<sup>163</sup> The tariff followed a rising block structure so that heavier water users paid a higher per kilolitre tariff.<sup>164</sup> Low-income households could register as indigent, which required them to obtain pre-paid meters but made them eligible for a yearly allocation of 4000 L for emergency use, and wrote off all arrears owed to the city.<sup>165</sup> Only pre-paid meters were available in the Soweto neighbourhood of Phiri while credit-meters were permitted in other communities.<sup>166</sup>

During the implementation of the new policy, one of the Applicants refused to have a pre-paid meter installed, which resulted in her connection being cut off until she applied

156 OECD, *supra* note 81.

157 *Lindiwe Mazibuko and Others v City of Johannesburg and Others*, Case CCT 39/09, [2009] ZACC 28, online: Southern African Legal Information Institute <<http://www.saflii.org/za/cases/ZACC/2009/28.html>> [*Lindiwe*].

158 *Constitution of the Republic of South Africa, 1996*, *supra* note 8, s 27(1)(b).

159 *Lindiwe*, *supra* note 157 at para 2.

160 *Ibid* at para 12.

161 *Ibid*.

162 *Ibid* at para 14.

163 *Ibid* at para 80-81.

164 *Ibid* at para 80.

165 *Ibid* at para 81.

166 *Ibid* at para 14.

for a meter seven months later.<sup>167</sup> The Applicants argued that section 11 of the *Water Services Act* conflicted with section 27(1)(b) of the *Constitution* as the 25 L amount was insufficient and should have been set at 50 L.<sup>168</sup> They criticised the scheme for being inflexible and applying unfairly based on economic status.<sup>169</sup>

As noted by the court, this case dealt with the problem of requiring courts to determine the extent of state's positive obligations relating to the attainment of constitutional rights. Following precedent,<sup>170</sup> the court read section 27(1) together with section 27(2), which requires the government to take reasonable measures within available resources "to achieve the progressive realization of the right."<sup>171</sup>

In response to the argument that the minimum amount of water per person should be changed, the court made reference to ECOSOC's 1990 General Comment 3, which contained similar language to Comment 15.<sup>172</sup> Both Comments declare that states have a "minimum core obligation" to ensure the satisfaction of minimum essential levels of each individual right.<sup>173</sup> The court maintained "courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community," and interpreted "minimum core" as something relevant to reasonableness, not a self-standing right conferred on everyone.<sup>174</sup> As a result, the minimum amount under the city policy was not found to be insufficient. The court upheld prior rulings rejecting the argument that social and economic rights in South Africa's constitution "contain a minimum core which the state is obliged to furnish."<sup>175</sup>

The difficulty and variety of means of supplying water in part determines what constitutes "sufficient water," yet the court lacks the expertise for making these assessments "for both institutional and democratic reasons."<sup>176</sup> However, the court held that positive obligations imposed on the government by the *Constitution* could be enforced if courts required the government to take progressive steps where they had previously failed, or required review or removal of government measures if they did not meet the constitutional standard of reasonableness.<sup>177</sup> This standard would not be met if the policy made no provision for those most desperately in need.<sup>178</sup> The court found that progressive steps were exemplified in the city's revision of its indigent policy to provide more water for poor households.<sup>179</sup>

The 6000 L allowance for all households was found reasonable because the block tariff structure ensured that wealthier customers who use more water would be charged more, and because of the difficulty of distinguishing which households would be deserving of free water.<sup>180</sup> Further, the court held that the free allowance would provide average households of 3.2 people with 60 L per person per day, which was far more than the

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167 *Ibid* at paras 15-16.

168 *Ibid* at para 44.

169 *Ibid* at para 44.

170 On "defining the scope of positive rights...and the corresponding obligations on the State", *ibid* at para 49, quoting *Treatment Action Campaign No.2* [2002] ZACC 15 at para 39.

171 *Lindiwe, supra* note 157 at para 50.

172 *Ibid* at para 40.

173 *Ibid* at para 52.

174 *Ibid* at paras 54-5.

175 *Ibid* at para 53 citing *Government of South Africa and Others v. Grootboom and Others* [2000] ZACC 19 at para 34, and *Treatment Action Campaign* at para 34 *supra* note 170.

176 *Lindiwe, supra* note 157 at para 62.

177 *Ibid* at para 67.

178 *Ibid* at para 67.

179 *Ibid* at para 95.

180 *Ibid* at 84.

prescribed minimum of 25 L.<sup>181</sup> Increasing minimum amounts to benefit poor areas with a larger number of users would be unreasonably burdensome to the city, and overly generous to households with fewer users given that the court had already decided against allotting on a per person basis.<sup>182</sup>

The city's requirement that pre-paid or credit meters be mandatorily installed based on geographic area was justified as a power "reasonably incidental to providing services to citizens in a sustainable manner that permits cost recovery."<sup>183</sup> This policy reflected the reality that residents in Soweto had a history of failing to pay their water bills.<sup>184</sup> The court held that temporarily suspending service to customers with prepaid meters that have not purchased additional credit after their monthly basic supply or prior credit has been used up did not amount to unconstitutional, permanent discontinuation of water supply.<sup>185</sup>

This judgment provides a significant amount of guidance as to the limitations and powers of an independent human right to water within South Africa, as well as broader guidance to any positive rights to government-provided services.

First, a state recognizing a human right to water may not be required to immediately provide every person with sufficient water; rather, it must take reasonable steps to progressively implement the right. This approach diminishes the added protection of having an absolute human right to water as this right must be realized like any other right: with flexibility and balancing of surrounding factors.

Second, minimum standards are to be determined by the state though they are reviewable by the courts. Counter to the notion of human rights being absolute and indivisible, the court in *Lindiwe* held that "fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context."<sup>186</sup> Again, the court was guided by the concept of reasonableness, which applies in the more flexible property and liability rights regimes as defined by Calabresi.<sup>187</sup>

Third, the court's emphasis on progressive realization and statement that it would be overly burdensome to determine the monthly amount of free water on a per person basis<sup>188</sup> indicates that this human right can be significantly limited by administrative realities. The court seems willing to limit the force of human rights protection due to its self-professed discomfort in imposing costly positive obligations on the government.

Finally, the court found that temporary cut-off due to failure or inability to pay after using the allotted minimum free allowance of water did not amount to a suspension of human rights.<sup>189</sup> This finding is controversial on its face as a human right is intended to be absolute and protected against any alteration; yet it is clear that water shut-off changes one's living conditions and prevents one's daily water needs from being fulfilled. However, the court was understandably reluctant to hold the government to any positive obligation to immediately provide water as cost recovery through tariffs is necessary in order to provide water at all. The ability to suspend water rights, and the reasonable

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181 *Ibid* at para 88.

182 *Ibid* at paras 88-89.

183 *Ibid* at para 111.

184 *Ibid* at para 139.

185 *Ibid* at para 124.

186 *Ibid* at para 60.

187 Calabresi & Melamed, *supra* note 63.

188 *Lindiwe*, *supra* note 157 at paras 88-89.

189 *Ibid* at para 124.

motivation to do so, suggests that a human rights framework is not appropriate where water rights are concerned.

## CONCLUSION

The human right to water was recognized in the 2002 CESCR General Comment 15 as well as in a 2010 UN General Assembly Declaration.<sup>190</sup> While a human right to water may appear attractive as a means of preventing water-borne disease and ensuring adequate supply of water for basic domestic needs, many questions are raised when one considers how a declaration of the right translates into an actual legal entitlement.

Courts in Botswana have attempted to derive a human right to sink or deepen a borehole and abstract water for domestic purposes from the primary right of an individual to own or occupy land.<sup>191</sup> In South Africa, the government has entrenched an independent human right to sufficient supply of water within its *Constitution*.<sup>192</sup> However, the *Lindiwe* case from South Africa shows that available resources limit the human right to water. Further, a human right to water does not permit citizens to immediately demand provision of water services, and does not guard against water shut-off for non-payment of a water tariff.<sup>193</sup> The *Matsipane* case from Botswana demonstrates the difficulty in defining a human right to water as a means of achieving other rights. The human right to water in that case suffered from the questionable justiciability of positive rights. The case also hinted at the tension between conservation needs and human needs as well as the environmental costs of delivery of water to individuals who live in areas lacking sufficient water supplies.

The human rights framework does little to add protection to water rights beyond what could be offered by a responsibly crafted property rights-based regulatory framework that manages access and usage of water through permitting systems. The ability to grant or remove property rights as needed is balanced, particularly in the common law, by a legal tradition that acknowledges the validity of those rights and offers them a high degree of protection. As the negotiated resolution of the Klamath Basin dispute demonstrates,<sup>194</sup> flexibility and responsiveness to environmental conditions are necessary elements for successfully addressing scarcity, and are inherent to property rights-based regimes.

Yet flexibility and responsiveness are precisely what indivisible, inalienable and non-discriminatory human rights regimes are created to avoid. Inalienable rights, as noted by Calabresi,<sup>195</sup> cannot be negotiated, altered, or interfered with. Water, however, is a naturally occurring entity that exists with or without humans, and that we cannot exist without: it is already alienated from us. Ironically perhaps, treating water as property acknowledges it as a substance outside of human control, as something to which we must be granted a right and which should not be confined to being considered first and foremost in terms of human consumption.

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190 *Comment 15*, *supra* note 1; *The Human Right to Water and Sanitation*, *supra* note 3.

191 *Matsipane*, *supra* note 29.

192 *Constitution of the Republic of South Africa, 1996*, *supra* note 8.

193 *Lindiwe*, *supra* note 157.

194 Curran & Brandes, *supra* note 82.

195 Calabresi & Melamed, *supra* note 63.



## CASE COMMENTARY

# THE PRUDE IN THE LAW: WHY THE POLYGAMY REFERENCE IS ALL ABOUT SEX

Dana Phillips\*

CITED: (2014) 19 Appeal 151–158

## INTRODUCTION

On October 22, 2009, as renewed public controversy over Canada's longstanding criminal prohibition of polygamy culminated in a constitutional reference to the Supreme Court of British Columbia (BCSC), Mormons and self-identified sluts<sup>1</sup> found themselves in bed together. Although united in their desire for a common result—the striking down of the prohibition codified in section 293 of the *Criminal Code*<sup>2</sup>—they differed radically in their underlying perspectives and interests. Mormons affiliated with the Fundamental Church of Jesus Christ of Latter Day Saints (FLDS) sought to defend patriarchal polygynous practices as part of their right to freedom of religion under section 2(a) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).<sup>3</sup> Allegations of sexual abuse and exploitation within the polygynous FLDS community of Bountiful, British Columbia had triggered the reference and stood directly in the judicial spotlight.<sup>4</sup> The sluts, many of whom identified with a movement known as ‘polyamory,’ also sought to defend a non-normative approach to conjugal relationships; one that rested not on the religious entrenchment of patriarchal values but rather on principles of personal autonomy, equality, and sex-positivity. Their practices of ethical non-monogamy<sup>5</sup> were rooted, not in religious conviction but in a principled rejection of socially imposed monogamy and its associated culture of dishonesty, secrecy, and sexual shame. Far from the spotlight of the constitutional reference, this group found themselves in danger of becoming its collateral damage.<sup>6</sup>

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1 While not all ethical non-monogamists would call themselves sluts, I use the term here in reference to Dossie Easton & Janet W Hardy's *The Ethical Slut: A Practical Guide to Polyamory, Open Relationships & Other Adventures* 2d ed (Berkeley: Celestial Arts, 2009) [*Ethical Slut*].

2 *Criminal Code*, RSC 1985, c C-46, s 293 [*Criminal Code*].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(a) [*Charter*].

4 For a detailed account of the events leading up to the reference, see Sheila M Tucker, *Process and the Polygamy Reference: The Trip to Bountiful* (2011) 69:4 *Advocate* 515.

5 In *Ethical Slut*, *supra* note 1 at 274, Easton & Hardy note that they prefer the term ‘polyamory’ to ‘non-monogamy,’ since the latter implicitly centers monogamy as the social norm. However, I have chosen to use this term in order to include individuals who may identify as ‘non-monogamous’ but not ‘polyamorous.’

6 Both the FLDS and the Canadian Polyamory Advocacy Association participated in the reference as interested persons.

On November 23, 2011, Chief Justice Bauman sealed the fate of these strange bedfellows with his decision in *Reference Re: Section 293 of the Criminal Code of Canada* (“*Polygamy Reference*”).<sup>7</sup> The lengthy judgment reduces to a simple analysis. Yes, the prohibition of polygamy violates section 2(a) of the *Charter*, but that violation is justified under section 1 because the prohibition is all about protecting society from harms: “harms to women, to children, to society, and, importantly, to the institution of monogamous marriage.”<sup>8</sup>

It is the harm to the institution of monogamous marriage that casts the ethical non-monogamists in with the polygynous Mormons. In this paper, I draw from the practice of ethical non-monogamy to explore Chief Justice Bauman’s reasons for articulating this harm, and to consider its consequences. In Part I, I critique Chief Justice Bauman’s reliance on the harms widely associated with polygynous communities as justification for the absolute prohibition of polygamy. To show that the harms and benefits arising from relationships are not inextricably tied to their outward form, in Part II I discuss ethical non-monogamy as an equality-oriented alternative to more traditional polygamous practices.<sup>9</sup> In Part III, I consider why Chief Justice Bauman identifies “harm to the institution of monogamous marriage” as a consequence of polygamy rather than simply affirming the benefits of monogamous marriage. I argue that this articulation legitimizes the objective of preserving the institution of monogamous marriage, which, as I explain in Part IV, ultimately serves to reign in sexual difference.

Most ethical non-monogamists would not be directly caught within the scope of section 293 as delineated by Chief Justice Bauman.<sup>10</sup> However, I contend that his decision amounts to a reprimand of their sexual preferences with the full force of the law behind it. To justify upholding the prohibition of polygamy, Chief Justice Bauman focuses on the outward form of conjugal relationships rather than the harms and benefits that arise in particular circumstances. In doing so, he enables the government to continue indirectly controlling sexual behavior that cannot be directly regulated in the modern political context. Underlying his concern with preserving monogamous marriage as a social institution is a deep-seated view of sexuality as sinful, shameful, and dangerous to the public order.

## I. THE HARMS OF POLYGAMY: INHERENT OR CONTINGENT?

‘Polygamy’ is an umbrella term used to denote multi-spouse relationships. It includes, among its various forms, two distinct conjugal arrangements: polygyny, where a male has multiple female spouses, and polyandry, where a female has multiple male spouses. Chief Justice Bauman’s justification for upholding section 293 is grounded in two conclusions which he draws from the extensive evidence brought before him: first, the most prevalent form of polygamy is and has always been polygyny;<sup>11</sup> and second, polygyny is inherently harmful.<sup>12</sup> The harms of polygyny drawn from the evidence at trial include poverty,

7 *Reference Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, [2011] BCJ No 2211 (QL) [*Polygamy Reference*].

8 *Ibid* at para 881.

9 My discussion of the outward form of relationships refers to structural features such as the number of people involved and the identities, roles, and commitments of those individuals within the relationship—in other words, the characteristics by which relationships are socially and legally categorized.

10 Chief Justice Bauman interprets section 293 as applying strictly to multiple marriages, excluding more informal non-monogamous conjugal relationships (*Polygamy Reference, supra* note 7 at para 987).

11 *Ibid* at para 136.

12 *Ibid* at para 1045.

crime, increased mortality, physical and mental health problems (especially for women and children), domestic violence, sexual abuse and exploitation, sex trafficking, gender inequality, and the oppression of women.<sup>13</sup>

A preliminary problem with Chief Justice Bauman's analysis is his uncritical acceptance of evidence that looks to speculative theories of evolutionary psychology to draw conclusions about the dangers of polygyny and the contrasting benefits of monogamy.<sup>14</sup> While a full discussion of the issue lies beyond the scope of my paper, it is important to flag the empirical weakness of this evidence, which relies on dubious assumptions about human mating behaviour to hypothesize the causes and effects of polygyny.<sup>15</sup> To the extent that Chief Justice Bauman relies upon such theoretical projections without the expertise to properly weigh them, his factual findings with respect to the harms of polygyny and the benefits of monogamy rest on shaky ground.

Evidentiary issues aside, there are two major flaws in Chief Justice Bauman's reasoning. First, while polygyny may well be the most prevalent form of polygamy, it is certainly not the only form. Interestingly, after asserting the inherent harms of polygyny, Chief Justice Bauman adds that "many of these harms could arise in polyandrous or same sex polygamous relationships."<sup>16</sup> He avoids claiming that such relationships are inherently harmful, but he suggests that they may cause harm to children, to the psychological health of spouses, and to the institution of monogamous marriage.<sup>17</sup>

The second flaw is that the harms at issue are not inherent to the structure of the relationship itself. As argued by legal scholar Elizabeth Emens, polygyny's oppression of women is contingent: "the validity of the charge depends on the individual relationship, just as in monogamous marriage."<sup>18</sup> Emens' point indicates a third problem, also noted by legal scholar Carissima Mathen: many of the harms associated with polygyny are already directly prohibited through other provisions of the *Criminal Code*.<sup>19</sup> For example, the *Criminal Code* sets out indictable offences for all of the following acts: sexual interference with a person under 16 (sections 150.1 – 155); sexual exploitation (section 153); assault, including sexual assault (section 265 – 268); unlawfully causing bodily harm (section 269); human trafficking (section 279.01); and trafficking of persons under 18 (section 279.011).<sup>20</sup> While the harms associated with polygyny are separately criminalized, the prohibition of polygamy itself does not require proof of any harm whatsoever; it applies to all multi-spouse relationships, regardless of the actual dynamics of the relationship.<sup>21</sup> The result, as Mathen argues, is a criminal provision that arbitrarily targets a specific category of relationship.<sup>22</sup>

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13 See *ibid* at paras 779-793 for a more detailed description.

14 See, for example, Chief Justice Bauman's discussion of Dr Heinrich's evidence at paras 493-506 (*ibid*).

15 For a comprehensive critique of human mating theories derived from evolutionary psychology, see Christopher Ryan & Cacilda Jethá, *Sex at Dawn: The Prehistoric Origins of Modern Sexuality* (New York: HarperCollins, 2010).

16 *Polygamy Reference*, *supra* note 7 at para 1045.

17 *Ibid*.

18 Elizabeth Emens, "Just Monogamy?" in Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004) 75 at 77 [Emens, "Just Monogamy"].

19 *Ibid* at 76; Carissima Mathen, "Big Love and Small Reasons: Considering Polygamy" (lecture delivered at the University of Alberta, 28 January 2011), online: YouTube <<http://www.youtube.com/watch?v=FqPbY5yggcc>>.

20 *Criminal Code*, *supra* note 2.

21 *Ibid*.

22 *Ibid*.

## II. ETHICAL NON-MONOGRAMY

The practices of ethical non-monogamists illustrate the contingent connection between relationship forms and values, both by refuting the inherent harmfulness of polygamy and by offering a form-independent relationship philosophy. Far from supporting patriarchy or enabling sexual exploitation, ethical non-monogamists offer an approach to intimate relationships that promotes honesty, consent, equality, and autonomy in a far more radical way than a social institution such as marriage ever could.<sup>23</sup> Practitioners often refer to this philosophy as ‘polyamory’ — a sort of reclaiming of polygamy within a context of real equality. The Canadian Polyamory Advocacy Association defines polyamory as “the practice, desire, or acceptance of having more than one intimate relationship at a time with the knowledge and consent of everyone involved.”<sup>24</sup> The precise form of polyamorous relationships may vary greatly: from plural marriage to more informal intimate networks to couples in open relationships.<sup>25</sup> What matters is not so much the outward form of the relationship but adherence to certain key principles, which Emens describes as self knowledge, radical honesty, consent, self-possession, and the privileging of love and sex as key life priorities.<sup>26</sup> The Canadian Polyamory Advocacy Association’s opening statement in the *Polygamy Reference* emphasizes that polyamorists believe in the equality of all genders and sexual orientations.<sup>27</sup>

Despite its flexibility, the term ‘polyamory’ often connotes a fringe lifestyle that attracts significant social stigma. Individuals who espouse the principles of polyamory within more conventional relationship forms (e.g., married couples in open relationships) may thus be wary of identifying themselves in this way. In 2011, popular Seattle sex columnist Dan Savage coined a new term for such people: “monogamish.”<sup>28</sup> Savage believes that many couples who are perceived as strictly monogamous have successfully experimented with consensual non-monogamy in private but choose not to share these stories with their friends and loved ones for fear of social stigma.<sup>29</sup> These couples have arranged their lives to coincide with monogamous social norms; however, they share with their polyamorous counterparts the understanding that non-monogamous needs and desires (whether emotional, sexual, or both) may be pursued with joy, respect and honesty—and that this pursuit may actually strengthen the viability of their most prized intimate relationships. The experiences of polyamorists provide an answer to feminist legal scholar Mary Lyndon Shanley when she asks “whether polygamy can be reformed on egalitarian lines.”<sup>30</sup> The stories of the monogamish demonstrate the potential pervasiveness of this alternative philosophy within mainstream culture.

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23 The Canadian Polyamory Advocacy Association website states: “We don’t just choose freely; we define the choices. If we have an ‘institution’, it’s an anti-institution.” (“The Poly Majority”, online: Canadian Polyamory Advocacy Association <<http://polyadvocacy.ca/>>).

24 “About Polyamory”, online: Canadian Polyamory Advocacy Association <[polyadvocacy.ca](http://polyadvocacy.ca/)>.

25 Elizabeth Emens, “Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence” (2004-2005) 29 NYU Rev L & Soc Change 277 at 303 [Emens, “Monogamy’s Law”].

26 *Ibid.*, at 320-330. See also “Our Beliefs” in *Ethical Slut*, supra note 1 at 20-26.

27 *Reference Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, [2011] BCJ No 2211 (Opening Statement on Breach, Canadian Polyamory Advocacy Association at para 13).

28 Dan Savage, “Monogamish”, Savage Love, *The Stranger* (20 July 2011), online: *The Stranger* <<http://www.thestranger.com/>>.

29 Indeed, his “Meet the Monogamish” column attests to this (Dan Savage, “Meet the Monogamish”, Savage Love, *The Stranger* (4 January 2012) online: *The Stranger* <<http://www.thestranger.com/>>).

30 Mary Lyndon Shanley, “Just Marriage” in Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004) 1 at 18.

### III. HARM TO THE INSTITUTION OF MONOGAMOUS MARRIAGE (SAY WHAT?)

The story of ethical non-monogamy suggests that the values promoted by intimate relationships are not tied to outward form or institution. From this perspective, the criminal law should focus not on polygamy but on the particular harms that sometimes arise in polygamous relationships.<sup>31</sup> Chief Justice Bauman, however, rejects this approach. To uphold the law's focus on form, he advances a further, peculiar line of argument built on two premises. First, he asserts that plural marriage poses a direct threat to the institution of monogamous marriage. Second, he argues that this institution has historically established benefits to society.<sup>32</sup> Chief Justice Bauman points to "the prevailing view through the millennia in the West"<sup>33</sup> as the authority for these benefits, which he summarizes as paternal certainty and joint parental investment in children, gender equality, and a strong, mutually supportive family unit.<sup>34</sup> His reasoning is arguably also informed by earlier articulations of the benefits of monogamous marriage, which he describes at length. The historical evidence presented on this point includes the association of monogamous marriage with democratic freedom, justice, and egalitarianism in society at large. It also includes the notion, persistent throughout Western history, that monogamous marriage protects against sexual temptation (often described in terms of sin) while promoting chastity and fidelity.<sup>35</sup>

Chief Justice Bauman takes great pains to explain and emphasize this argument, perhaps belying his understanding that it is a strange one. Harms and benefits are already naturally opposed, and can be directly weighed against each other. It is redundant to say that a loss of benefits is a harm. However, in the context of the *Reference*, this twist of logic may serve a useful purpose. Without disrupting the harm-based justification for the prohibition of polygamy, Chief Justice Bauman avoids the problem of arbitrarily targeting a particular category of relationship by inserting the preservation of a long-standing social institution as an additional objective. Polygamy may not be inherently harmful, but it is inherently non-monogamous. On the other side of the equation, preserving the status quo of marriage gains new credibility as a legislative objective when couched in the language of harm. Neither the contingent harms of polygamy nor the preservation of monogamous marriage alone provide a compelling objective to justify the violation of constitutional rights. However, when taken together, they cancel out each other's deficiencies, allowing the law to focus on categories of relationships rather than on the specific harms and benefits that arise out of those relationships in different situations.

### IV. THE PRUDE IN THE LAW

Why does Chief Justice Bauman place so much emphasis throughout his judgment on the importance of preserving the institution of monogamous marriage rather than simply promoting its benefits? After all, ethical non-monogamy offers the very benefits that Chief Justice Bauman associates with monogamous marriage, often in a more meaningful way. Shanley rightly observes that notions of spousal unity in monogamous marriage have often worked against women's autonomy and equality in the past. This is

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31 This perspective also questions whether relationships should be institutionalized at all. However, this topic is outside the scope of my paper. For discussion of the institutionalization of relationships, see Joshua Cohen & Deborah Chasman, eds, *Just Marriage* (New York: Oxford University Press, 2004).

32 *Polygamy Reference* *supra* note 7 at para 883.

33 *Ibid* at para 884.

34 *Ibid*.

35 *Ibid* at paras 170-227.

most clearly exemplified by the doctrine of coverture, present in the English common law until the late 19th century, wherein a married woman's legal status was subsumed under that of her husband.<sup>36</sup> While women have since gained considerable rights, the persistence of economic power imbalances in heterosexual marriage and the ongoing problem of domestic violence refute any notion that the present day institution has solved the problems of gender equality.

By contrast, ethical non-monogamy is premised upon the autonomy and equal treatment of all partners, regardless of gender or sexual orientation.<sup>37</sup> By encouraging open and honest discussions between partners in intimate relationships, and creating space within those relationships for the conscious fulfillment of non-monogamous desires, the practice arguably strengthens family bonds. Relying on the evolutionary psychology viewpoint, Chief Justice Bauman concludes that plural relationships of all types decrease parental investment in children.<sup>38</sup> However, as noted by Easton and Hardy, wider intimate networks can actually provide more resources for kids, who “take to these relationships quite readily, perhaps more so than to the traditional nuclear family: children have grown up in villages and tribes for most of human history.”<sup>39</sup> Emens offers the example of Elizabeth Joseph, a polygynous female attorney who credits the domestic support provided by her co-wives for her ability to pursue a career and raise a family without stretching herself too thin.<sup>40</sup>

There is only one historically lauded characteristic of monogamous marriage that ethical non-monogamy cannot offer: the sexual restraint of monogamy itself. As legal scholar Gillian Calder argues, “the current condemnation of polygamy may be tied to many sources [...] but at the heart of all of these issues is the issue of monogamy.”<sup>41</sup> Throughout Western history, monogamous marriage has been seen as a protection against both paternal uncertainty and sexual immorality.<sup>42</sup> But ethical non-monogamists eschew the notion that sex and pleasure are immoral in themselves.<sup>43</sup> In their view, sex is only wrong when it is deceitful or non-consensual.<sup>44</sup> Here, I argue, lies the reason why Chief Justice Bauman feels compelled to uphold the institution of monogamous marriage itself rather than its associated benefits. The *Criminal Code* independently addresses many of the harms associated with polygamy, but it does not criminalize promiscuity.<sup>45</sup> Such a provision is unlikely to garner the support of a majority of Canadians, who stood with Pierre Trudeau over 50 years ago when he famously declared that “the State has no business in the bedrooms of the Nation.”<sup>46</sup>

Chief Justice Bauman clearly recognizes that it would be out of step with current social mores to criminalize non-monogamous sexual practices. In delineating the scope of section 293, he is careful to exclude adultery, cohabitation, and other non-monogamous

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36 Shanley, *supra* note 30 at 26.

37 *Supra* note 27.

38 *Polygamy Reference*, *supra* note 7 at 1045.

39 *Ethical Slut*, *supra* note 1 at 100.

40 Emens, “Just Monogamy”, *supra* note 18 at 77.

41 Gillian Calder, “Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage in Canadian Family Law” (2009) 21 CJWL 55 at 80.

42 *Polygamy Reference*, *supra* note 7 at paras 884; 170-227.

43 See *Ethical Slut*, *supra* note 1 at 11-13.

44 Emens, “Monogamy’s Law” at 320-330, *supra* note 25; *Ethical Slut*, *supra* note 1 at 20-26.

45 Some US states still have provisions that make adultery a criminal offence, but they are rarely enforced (Emens, “Monogamy’s Law”, *supra* note 25 at 364).

46 *Omnibus Bill: “There’s no place for the state in the bedrooms of the nation,”* Toronto, CBC Digital Archives (1967-12-21, archived from the original on 2012-08-12), online: <<http://www.webcitation.org/69rtGGDLm>>.

relationships short of marriage, and even suggests that sexual behaviour is not the target of the law.<sup>47</sup> To emphasize the point, he quotes from B. Carmon Hardy's *Mormon Polygamy in Mexico and Canada*<sup>48</sup>: "it was not the sexual derelictions of individuals with which the law was concerned so much as with preserving the form of the monogamous home."<sup>49</sup> Still, the question remains: what purpose does that form serve? It serves to encourage sexual monogamy, without directly mandating it. I suggest that this is the only meaningful answer. As I have already illustrated, all the other supposed benefits of monogamy are not form-dependent. By framing the purpose of section 293 in terms of the preservation of monogamous marriage, Chief Justice Bauman indirectly influences what he cannot directly regulate.

According to Mathen, the purpose of section 293 has always been "a religiously compelled moral ideal"<sup>50</sup> rather than a harm-based provision. As she argues, it makes little sense for a criminal provision to have an objective (i.e., preventing harm) that is not relevant in every case where the provision applies, is not reflected in the elements of the offence, and is itself addressed through independent criminal offences.<sup>51</sup> Drawing from the work of American philosopher Martha Nussbaum, Mathen suggests that the true purpose of the prohibition lies in the same "primal emotions of disgust and shame" raised by other sexually deviant acts such as necrophilia, incest, and, until recently, sodomy.<sup>52</sup>

The sexual squeamishness underlying Chief Justice Bauman's reasoning reflects deep-seated cultural values. Nowhere is this more apparent than in the current cultural discourses surrounding adultery and same-sex marriage. In her survey of popular culture, law and sexuality scholar Brenda Cossman notes a persistent effort to prevent and treat what has become known as an "epidemic of adultery", often through a quasi-religious process of sexual shaming.<sup>53</sup> In one example, she describes an Oprah episode entitled "Cheating Husbands Confess,"<sup>54</sup> wherein the cheaters tell their stories to the audience's shock and dismay—a "public shaming, where the cheaters stand in public, marked as bad citizens."<sup>55</sup> Cossman connects this ritual to the religious confession, long used as a method of redemption for sexual sin.<sup>56</sup> She also observes the pervasive cultural message that married people must take responsibility for their desires, such that "the sexually monogamous marriage becomes the new front line in the war on this epidemic."<sup>57</sup> Even in the twenty-first century, sexual desire remains a scourge to be kept at bay by the virtues of monogamy.

The political battle for gay rights provides another example of societal revulsion towards promiscuity. Cossman discusses the case of *M v H*,<sup>58</sup> in which the Supreme Court of Canada found that the exclusion of same-sex couples from the statutory definition of common-law spouse in Ontario violated the right to equality under section 15(1) of

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47 *Polygamy Reference*, *supra* note 7 at para 1037.

48 B. Carmon Hardy, "Mormon Polygamy in Mexico and Canada: A Legal and Historiographical Review" in Brigham Y Card et al, eds, *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990).

49 *Ibid* at 196, cited in *Reference*, *supra* note 7 at para 889.

50 Mathen, *supra* note 19.

51 *Ibid*.

52 *Ibid*.

53 Brenda Cossman, "The New Politics of Adultery" (2006) 15 Colum J Gender & L 274 at 286-288 [Cossman, "New Politics"].

54 Oprah, "Cheating Husbands Confess" (ABC television broadcast, 1 November 2004).

55 Cossman, "New Politics", *supra* note 53 at 288.

56 *Ibid* at 288-289.

57 *Ibid* at 286.

58 *M v H*, [1999] 2 SCR 3, [1999] SCJ No 23.

the *Charter*.<sup>59</sup> She warns that while the decision validated gays and lesbians as legal subjects, it did so only in the context of the monogamous, nuclear family: “[t]he new legal subject was not a sexual subject, but a desexualized subject. It was not, absolutely not, the erotically charged subject of the gay bars and bathhouses, who remain sexual outlaws.”<sup>60</sup> This warning was illustrated by the many police raids on men’s and women’s bathhouses that occurred in the months following the judgment.<sup>61</sup> The point is also manifest in the *Reference*:

And let me recognize here that we have come, in this century and in this country, to accept same-sex marriage as part of that institution. That is so, in part, because committed same-sex relationships celebrate all of the values we seek to preserve and advance in monogamous marriage.<sup>62</sup>

In other words, the legal recognition of same-sex relationships is conditional upon their conformity with monogamous heterosexual norms.

## CONCLUSION

The lines of the law in the *Reference* are carefully drawn. On the one hand, Chief Justice Bauman avoids the direct regulation of sexual behaviour, and scopes section 293 narrowly enough to avoid criminalizing most forms of non-monogamy. On the other hand, by focusing on upholding monogamous marriage as a central institution, and by framing this goal in terms of harm-prevention, he allows the prohibition of polygamy to retain public legitimacy, and re-affirms the social normativity of sexual monogamy. The result is a law that criminalizes patriarchal polygyny, but also marginalizes ethical non-monogamy. The effect belies the intention. A law that punishes both patriarchal polygyny and ethical non-monogamy with the same crack of the whip is not a law against crime, exploitation, or the oppression of women. It is a law against sexual difference. Still, legal scholars Ratna Kapur and Tayyab Mahmud assert that alongside “the law’s hegemonic role in the creation of meaning”<sup>63</sup> lies its capacity “to produce resistant practices that move beyond the focus of disciplinary surveillance.”<sup>64</sup> Such is the achievement of the monogamish. By practising ethical non-monogamy within the guise of the monogamous form, they give lip service to the prude in the law, but free themselves from its handcuffs.

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59 Brenda Cossman, “Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories” (2000) 48 *Clev St L Rev* 49.

60 *Ibid* at 54.

61 *Ibid* at 54-55. See also Calder, *supra* note 41 at 75-76.

62 *Polygamy Reference*, *supra* note 7 at para 1041.

63 Calder, *supra* note 41 at 60.

64 Ratna Kapur & Tayyab Mahmud, “Forward: Re-orienting Law and Sexuality” (2000) 48 *Clev St L Rev* 1 at 5.







