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TABLE OF CONTENTS

PREFACE

ARTICLES

SPECIAL THANKS

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The 2016/17 *Appeal* Editorial Board would like to thank the University of Victoria Faculty of Law for its ongoing financial and institutional support. We would also like to give special thanks to Ted McDorman and Dr. Kathryn Chan for their guidance in the production of this volume of *Appeal*.

PREFACE

by Ian Gauthier and Alexa Ferguson

On behalf of the entire editorial board, the Editors-in-Chief would like to thank you for picking up this volume of *Appeal: Review of Current Law and Law Reform*! This year we received submissions from law students across the country and abroad. It was an exceptionally difficult task to decide the final papers that would make up the journal.

That being said, we are proud to present six outstanding submissions focusing on a wide array of issues facing the legal community. This volume of *Appeal* features a comment on the upcoming *Cambie Surgery Centre* challenge to the constitutionality of the British Columbia *Medicare Protection Act.* Also featured are articles on contemporary issues facing Indigenous communities in Canada. *Appeal* this year explores the lessons the *Nisga'a Final Agreement* can offer to the different models of Aboriginal self-government, as well as reconciling Indigenous legal orders with Crown legal orders through the appointment of Aboriginal justices to the Supreme Court of Canada.

Volume 22 also presents a paper tackling the issue of racial discrimination in law enforcement, arguing that *Charter* provisions allowing damages for rights infringement can be used to address these violations. We also present papers discussing issues in the working world: one addressing modern trends in the interpretation of the *Charter* in labour law cases, and another discussing the impact of technology on the legal services industry.

Appeal would not be possible without our strong network of faculty and volunteers. We would like to extend our gratitude to our external reviewers who graciously donated their time and expertise despite their busy schedules. In particular, we would like to extend our thanks to Professor Ted McDorman and Dr. Kathy Chan for their support and guidance throughout the process.

A sincere thank you is also in order for our volunteer student reviewers, who have once again been instrumental in ensuring the ensuring the quality of our publication and the rigorousness of our blinding process. And of course, the Editors-in-Chief would like to thank the members of the *Appeal* Editorial Board for their tireless efforts and contributions to ensuring the journal continues its tradition of excellence.

Appeal would also not be possible without the continued support of our patrons and sponsors. Their financial contributions ensure that *Appeal* continues to promote exceptional student work.

Finally, we must thank our authors. The writing and editing process is gruelling, time-consuming, and often frustrating work, and we are thrilled with the quality of this year's content.

It has been an enormous privilege to serve as the 2016-17 Editors-in-Chief. With great pride, we present Volume 22 of *Appeal*: *Review of Current Law and Law Reform.*

ARTICLE

DECONTEXTUALIZED RIGHTS: CONCERNS REGARDING THE *BEDFORD* SECTION 7 FRAMEWORK IN THE HEALTH CARE CONTEXT OF THE CAMBIE SURGERY CENTER TRIAL

Kathryn Costain*

CITED: (2017) 22 Appeal 3

* Kathryn Costain is a second-year JD candidate at the University of Victoria Faculty of Law. She originally wrote this paper for an Advanced Constitutional Law seminar course and sincerely thanks Professor Donna Greschner for her guidance and support.

INTRODUCTION

Cambie Surgery Centre, the Specialist Referral Clinic, and four individual patients [hereafter "Cambie et al."] are challenging the constitutionality of sections 14, 17, 18, and 45 of British Columbia's *Medicare Protection Act*.[1] This case went to trial in the BC Supreme Court on September 6, 2016, and the trial is ongoing at the time of publication.[2] Section 14 forces doctors to opt in or out of the public billing system, rather than allowing them to concurrently offer services both privately and in the public system. Sections 17 and 18 place limits on billing extra for services classified as a benefit under the BC Medical Services Plan, this limits the amount that enrolled doctors and clinics can charge for services. Section 45 voids private insurance contracts for services that are classified as benefits under the provincial medical services plan, making the cost of private health care an effective deterrent for most patients. Taken together, these provisions limit the ability of doctors to provide private health care for services that are considered medically necessary and included in the public health system, while limiting patients' ability to access those services. A concurrent private health care system is not prohibited, but it is made less viable by these provisions.

The plaintiffs' primary claim is made under section 7 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Section 7 protects 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.[3] The plaintiffs claim that the aforementioned provisions of the *Medicare Protection Act* infringe the section 7 *Charter* rights of patients by effectively forcing them to remain on long waiting lists for services in the public health care system and that the subsequent delay in receiving treatment causes them to endure physical and psychological suffering, at times increasing their risk of death.[4] This claim is grounded in the belief that if the provisions were not in place, these patients might have been able to obtain private health insurance and receive treatment much sooner at a private clinic such as the Cambie Surgery Centre. The present claim brought by Cambie et al. follows the 2005 *Chaoulli* decision, which also challenged provincial legislation that restricted the development of a concurrent privately-funded health sector.[5] The Supreme Court of Canada held that the legislation challenged in *Chaoulli* violated patients' rights. However, this decision was made under the *Quebec Charter* and thus, the decision was not binding outside of Quebec.[6] Cambie et al. now hopes to have this pronouncement extended to the rest of Canada through a decision made under the Canadian *Charter*.[7] If the plaintiffs in the present case are successful, the effects of the decision will have a more significant impact than *Chaouilli*, because it will be applicable across Canada.

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1 *Medicare Protection Act*, RSBC 1996, c. 286.

2 I will refer to the present case brought by Cambie et al. as *Cambie* for simplicity. An official case name was not released at the time of publication.

3 *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.

4 *Cambie Surgeries Corporation, et al. v The Medical Services Commission, et al.* Fourth Amended Notice of Civil Claim. No. S090663, Vancouver Registry, March 14, 2016, at para 92 [Notice of Claim], online: <https://d3n8a8pro7vhmx.cloudfront.net/bchealthcoalition/pages/234/attachments/original/1472934222/2016_03_14_Fourth_Amended_Notice_of_Civil_Claim.pdf?1472934222> archived at < https://perma.cc/G3FK-UKKT>.

5 *Chaoulli v Quebec (AG),* 2005 SCC 35, at para 18, 23 [*Chaoulli*].

6 *Ibid,* at para 101; *Charter of Human Rights and Freedoms,* CQLR c C-12, s.1.

7 *Cambie Surgeries Corporation, et al. v The Medical Services Commission, et al.* Opening Statement of the Plaintiffs. No. S090663, Vancouver Registry, September 6, 2016, online: <https://d3n8a8pro7vhmx.cloudfront.net/bchealthcoalition/pages/234/attachments/original/1473905437/2016_09_06-Opening-Statement-of-the-Plaintiffs.pdf?1473905437> archived at <https://perma.cc/7NN5-RTYY>.

Cambie et al.'s claim challenges the governing principles of Canada's health care system, questioning whether the principles that have guided the provision of Canadian health care for many years are even desirable. To describe this as an assault on Canadian Medicare is hardly an overstatement. *Charter* critic, Andrew Petter, warned that the *Chaoulli* decision "dealt a serious blow to the legitimacy of the single-payer model of health insurance, and the values of collective responsibility and social equality that it seeks to uphold."[8]

The defendants in *Cambie* are British Columbia's Medical Services Commission, Minister of Health, and Attorney General [hereafter "the provincial defendants"]. The provincial defendants' response to Cambie et al.'s claim displays a firm entrenched commitment to preserving the *Canada Health Act*: "the province is entitled … to protect the principle that care is allocated on the basis of need and not the ability to pay, and to further the *Canada Health Act* principles."[9] This position is supported by many intervenors including Doctors for Medicare, the BC Health Coalition, an independent patient group, and most recently the Attorney General of Canada.[10] As *Chaoulli* did before it, *Cambie* raises serious questions about the effectiveness of the current health care system and the extent to which individual rights may be infringed in order to protect it. The Court must determine the degree to which governments can constrain access to private health care in order to protect the public health care system, when that action forces people to remain suffering on waiting lists.

Cambie highlights the apparent tension between the values underlying the *Canada Health Act*, such as the protection of health care as a social benefit, and the interests of the individual entrenched in the *Charter*, which take precedence by reason of constitutional supremacy. Following *Chaoulli,* members of the academic community raised concerns that the Court did not properly consider the impact that decision would have on disadvantaged members of society.[11] This stems in part from the fact that the individual interests protected by the majority in *Chaoulli* were isolated and decontextualized. As relational theorist Jennifer Llewellyn states, "the Court's attention in *Chaoulli* was squarely on the extent to which individual freedom understood atomistically was limited by collective choices."[12] The Supreme Court of Canada's approach to individual rights in *Chaoulli* takes the individual out of his or her context, leading to the appearance that those individual interests are by necessity in conflict with the interests of the rest of

8 Andrew Petter, Wealthcare: the Politics of the Charter Revisited" in Colleen Flood, Kent Roach, and Lorne Sossin, eds, *Access to Care, Access to Justice: the Legal Debate Over Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) at 131 [Petter].

9 Cambie Surgeries Corporation, et al. v The Medical Services Commission, et al. Response to Fourth Amended Civil Claim. No. S090663, Vancouver Registry, 14 March 2016 [Provincial Response] Part 1 at para 13, online: <https://d3n8a8pro7vhmx.cloudfront.net/bchealthcoalition/pages/234/attachments/ original/1473048283/2016_03_14_MSC_Response_to_Fourth_Amended_Civil_Claim. pdf?1473048283> archived at <https://perma.cc/8AXA-5QWF>; Canada Health Act, R.S.C., 1985, c. C-6. The Canada Health Act principles include public administration, comprehensiveness, universality, portability, accessibility, and sustainability.

10 Cambie Surgeries Corporation, et al. v The Medical Services Commission, et al. Opening Statement of the Coalition Intervenors. No S090663, Vancouver Registry, 14 September 2016 [Statement of the Intervenors] at para 10, online: <https://d3n8a8pro7vhmx.cloudfront.net/bchealthcoalition/pages/20/attachments/original/1473869168/2016_09_14_Coalition_Intervenors'_Opening_Statement.pdf?1473869168> archived at <https://perma.cc/B4RE-8JJU>.

11 Petter, *supra* note 8, at 131.

12 Jennifer Llewellyn, "A Healthy Conception of Rights? Thinking Relationally About Rights in a Health Care Context" in Jocelyn Downie and Elaine Gibson, eds, *Health Law at the Supreme Court of Canada* (Toronto: Irwin Law Inc, 2007) at 79 [Llewellyn, "A Healthy Conception of Rights"].

society.[13] Further individualization of the section 7 analysis seen in *Bedford* and affirmed in *Carter* will only serve to exacerbate these concerns.[14]

The tension between individual and collective rights in *Chaoulli* and *Cambie* is troubling because it is in many ways an artificial construct created by section 7 jurisprudence. Relational rights theory, as articulated by Jennifer Llewellyn, asserts that individual rights cannot truly be understood apart from the context of their relation to other rights holders. Relational rights theory focuses on the way in which individuals relate to one another and aims to discover the relationships that are most healthy for both the individual and those who they relate to.[15] In this context, the term "relationships" refers to connections with and interdependency on others in society; not to personal or intimate relationships.[16] This theory can be a useful tool because it makes the interests of the vulnerable more visible. It is also important to note at this stage that relational theory does not aim to undermine the rights of the individual. Rather, it reveals the context within which those rights are exercised, with the aim of promoting rights in a way that strengthens the relationships necessary for individuals to flourish in society.[17]

Understanding rights relationally by necessity involves a balancing between the interests of an individual and the interests of the other individuals who make up Canadian society. This balance avoids the excessive focus on the individual, which Llewellyn terms the "rights as trumps approach,"[18] thereby providing a more nuanced perspective. The "rights as trumps" approach is derived from a more traditional liberal view that sees rights as a barrier or protection from others rather than a means of thriving in relationships with others.[19] The insight provided by relational rights theory is significant because failure to take the relational and contextual nature of all rights into account limits the Court's ability to come to a just resolution of the problem before it.[20] If *Cambie* advances to the Supreme Court of Canada, the Court may want to reconsider the guidelines set out in *Bedford* in order to determine whether the section 7 framework analysis needs to be adapted to better reflect the underlying purpose of that section. Otherwise, the Court risks decontextualizing Cambie et al.'s section 7 rights and turning the *Charter* into a tool that undermines the interests of vulnerable members of society while purporting to support the "basic values underpinning our constitutional order."[21]

This paper begins with a discussion of the Canadian Medicare system and Cambie et al.'s challenge to the *Medicare Protection Act*. I will then turn to a section 7 analysis and examine the claim's likelihood of success. This analysis will include a discussion of recent developments in section 7 jurisprudence through *Bedford* and will address why the regulatory context of health care legislation may complicate those developments. I

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13 *Ibid,* at 60.

14 *Bedford v Canada (AG)*, 2013 SCC 72 [*Bedford*]; *Carter v Canada (AG)*, 2015 SCC 5 [*Carter*]. *Bedford* involved a challenge to Criminal Code provisions relating to prostitution, while *Carter* challenged provisions criminalizing assisting or counselling death by suicide where it restricted physician-assisted death. Both of these cases held that the Court looks at whether even one individual has had their right to life, liberty, or security of the person infringed in a way that is not in accordance with the principles of fundamental justice when determining whether a section 7 right is infringed, and that societal interests are taken into account when considering justification under section 1.

15 Llewellyn, "A Healthy Conception of Rights," *supra* note 12, at 62.

16 Jennifer Llewellyn, "Restorative Justice: Thinking Relationally About Justice" in Jocelyn Downie and Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) at 103.

17 Llewellyn, "A Healthy Conception of Rights," *supra* note 12, at 62-63.

18 *Ibid*, at 63.

19 *Ibid,* at 60.

20 *Ibid*, at 57.

21 *Bedford, supra* note 14, at para 96.

will finish with a discussion of why cases such as *Cambie* and *Chaoulli* complicate the *Charter's* role in Canadian society. Such cases raise questions of what section 7 should protect, and highlight the consequences of an exclusively individualistic view of section 7 rights. Throughout the analysis, relational rights theory will be used as a tool to highlight the shortcomings in the current section 7 jurisprudential framework. In particular, this theoretical tool will highlight limitations that arise from the fact that this framework focuses on protecting the negative rights of an isolated individual to such an extent that the rights become decontextualized and lose their efficacious value.

I. CONTEXT

A. The Canadian Health Care Context

The *Canada Health Act* and the corresponding Canadian Medicare system have become defining features of Canadian identity such that "Canada's commitment to a universal public health care system is widely regarded by citizens as a core social value and a defining national achievement."[22] The idea of health care on the basis of need rather than wealth is rooted in the belief that the ability of society's vulnerable members to access health care should be protected. This organizing principle ensures a greater degree of equality in the delivery of health care services, as everyone in need of medically necessary services will receive roughly the same level of service regardless of their wealth. The *Canada Health Act* provides what is essentially a positive right to access health care, which necessarily involves state intervention in the provision of services. This can be contrasted with the *Charter*, which has been interpreted as protecting the autonomy and dignity of individuals through negative rights that prevent state interference.

The *Canada Health Act* is an aspirational document that defines the goals for the legislative scheme that regulates Canadian health care, but it cannot actualize those goals itself. As Justice Deschamps points out in *Chaoulli,* "the *Canada Health Act* does not … provide benchmarks for the length of waiting times that might be regarded as consistent with the principles it lays down, and in particular with the principle of real accessibility."[23] Though the *Canada Health Act* is the source of the principles that animate the Canadian health care system, it is limited in its practical ability to enforce the implementation of these principles as it is necessarily restricted to setting out certain factors that provinces must meet in order to receive federal funding rather than creating a fully-functioning system. When discussing the issues raised by Cambie et al., it is easy to be scornful of the seemingly elitist patients and doctors at private clinics who want to buy health care and who may undermine a cherished social benefits scheme, however the plaintiffs raise the legitimate concern that the goals of the *Canada Health Act* may not be realized within the current system.

Provincial legislatures work to incorporate requirements from the *Canada Health Act* into their own provincial systems through practical legislative frameworks such as British Columbia's *Medicare Protection Act*. It is this legislation that Cambie et al. are challenging. Flood and Choudhry suggested in 2004 that "governance in health care is in a state of paralysis, as both provincial and federal governments find it more politically expedient to blame each other for Canadians' concerns about Medicare than do something about it."[24] Since that time, benchmarks for certain categories of treatment

22 Petter, *supra* note 8, at 117.

23 *Chaoulli, supra* note 5, at para 16.

24 Colleen Flood and Sujit Choudhry, "Strengthening the Foundations: Modernizing the Canada Health Act" in Tom McIntosh, Pierre-Gerlier Forest, and Gregory P Marchildon, eds, *The Governance of Health Care in Canada* (Toronto: University of Toronto Press, 2004) at 368 [Flood and Chowdry].

were set by the joint effort of federal and provincial governments.[25] There are mixed reports of whether these guarantees are actually helping and whether they actually reflect a reasonable degree of access. For example, ten years later, British Columbia received a failing grade in the Wait Time Alliance's annual report card in the category of knee replacements.[26] The Wait Time Alliance was formed by a group of doctors in 2004 to monitor government progress and provide benchmarks on medically acceptable wait times.[27] Though the values embraced in the Canadian legislative framework are laudable, reports such as those issued by the Wait Time Alliance indicate that there are less than trivial concerns arising from the lived experience of patients in the system. The severity of the current problems in the public health care system and the effect of changes to the *Medicare Protection Act,* such as decreasing limitations on concurrent private health care, are evidentiary issues that will need to be determined at trial. That being said it is important to recognize the current limitations of Canada's health system, which may be in need of reform to remain worthy of protection. As Flood and Choudhry note, "the [Canada Health Act] is a means, not an end in itself."[28]

B. The Litigation Context

Chaoulli challenged the prohibitions on concurrent private health insurance for items that are covered under public health insurance. That case marked a turning point in health care litigation by disrupting "the seamless co-existence of two national symbols cherished by Canadians: publicly funded health care and the *Charter*."[29] Though it was ultimately decided under the *Quebec Charter*, *Chaoulli* determined that Medicare was not off-limits for *Charter* litigation:

> "[W]here the government puts in place a scheme to provide health care, that scheme must comply with the *Charter* … By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the *Charter*."[30]

Chaoulli revealed a Court divided on what its role in this matter should be and on whether it had the ability to properly address the concerns raised by the plaintiff given the complexity inherent in the provision of public health care. A slim majority in *Chaoulli* concluded that "the courts have all the necessary tools to evaluate the government's measure".[31] Though the "necessary tools" includes the Court's ability to properly assess the evidence, equally important is the Court's ability to provide a remedy that properly accommodates the competing concerns and interests in this case. If the plaintiffs are successful in demonstrating that the current state of the Canadian health care system violates patients' section 7 rights, it does not necessarily follow that allowing

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25 Bacchus Barua, *Waiting Your Turn: Wait Times for Health Care in Canada* (Vancouver, Fraser Institute, 2015), [Fraser Report], online: <https://www.fraserinstitute.org/sites/default/files/waiting-your-turn-2015.pdf> archived at <https://perma.cc/7NAC-VQ5U> at 15.

26 *Eliminating Code Gridlock in Canada's Health Care System: 2015 Wait Time Alliance Report Card* (Ottawa: Wait Time Alliance), online <http://www.waittimealliance.ca/wp-content/uploads/2015/12/EN-FINAL-2015-WTA-Report-Card_REV.pdf> archived at <https://perma.cc/H5KN-LGSU>. The 2015 report cited in this paper was the last report issued by the Alliance.

27 Wait Time Alliance, "About Us", (2014), online: <http://www.waittimealliance.ca/about-us/> archived at <https://perma.cc/D3JT-Y63D>.

28 Flood and Choudhry, *supra* note 24, at 382.

29 Christopher P. Manfredi and Antonia Maioni "Judicializing Health Policy: Unexpected Lessons and an Inconvenient Truth" in James Kelly and Christopher P. Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) at 138 [Manfredi and Maioni].

30 *Chaoulli, supra* note 5, at paras 104-105.

31 *Ibid*, at para 96.

concurrent private health care is an equitable solution to this problem. As Manfredi and Maioni suggest, the adversarial context of *Charter* litigation has disadvantages, as "the articulation of policy demands in the form of constitutional rights can exclude alternative choices from consideration."[32] *Charter* challenges brought under section 7 have a tendency to place the individual in opposition to society, creating a context in which one side wins and the other loses. As long as this opposition remains central to such litigation, the courtroom may not be the best context in which to assess the issues raised in *Cambie*. More specifically, the Court may be unable to find a solution to current limitations on access to health care that does not exacerbate existing relationships of inequality within Canadian society.

C. The Present Case

Four years after they intervened in *Chaoulli*, Cambie et al. launched the present case claiming that the restrictions on concurrent private health care violate patients' section 7 rights, which they say "include the right to access necessary and appropriate health care within a reasonable time."[33] The problem identified in both *Cambie* and *Chaoulli* is that in order to preserve a health care system based on equality of access, legislators are willing to allow the possibility that some patients will suffer more than they otherwise would. As the provincial respondents argue, "a functional health care system must prioritize differently for elective conditions than for urgent, emergency, or high priority conditions. The prioritization process takes into account the fact that no risk of death arises with respect to elective surgery."[34] Section 7 of the *Charter* does not, however, only protect against threats to patients' life—it is also engaged by threats to patients' security of the person. The Court makes this clear in *Chaoulli,* stating that "clearly not everyone on a waiting list is in danger of dying before being treated … [yet] many patients on non-urgent waiting lists for orthopaedic surgery are in pain and cannot walk or enjoy any real quality of life."[35] Cambie et al.'s claim raises the important question of the degree to which an individual's autonomy and choice can be interfered with in order to preserve social benefit legislation. As a constitutional principle, human dignity "shapes the interpretation of all rights guarantees … the state must treat each person as an end in herself, rather than a means to the well-being or advantage of others—regardless of wealth or power."[36] Though the principles of human dignity and autonomy shape this case, and section 7 rights more broadly, these principles are not absolute.[37] *Cambie* seeks to determine the limits of those principles in the context of health care legislation.

As in *Chaoulli,* the plaintiffs in *Cambie* argue that though private provision of medically necessary health care services is not prohibited, it is out of the reach for most Canadians due to the restrictions in the *Medicare Protection Act*. They argue that patients are effectively denied health care, as most patients cannot afford to pay the cost of the treatment without insurance and physicians cannot afford to provide the service for the amount stipulated in the medical services plan. Unlike *Chaoulli,* which focused primarily on the restrictions on private health insurance, *Cambie* is challenging the provisions that prohibit extra billing and that force physicians to opt in or out of the public system.[38] They argue that even if private insurance was available, it is not a commercially viable option for doctors to offer private health services as long as the other restrictions are in

32 Manfredi and Maioni, *supra* note 29, at 142.

33 Notice of Claim, *supra* note 4, at para 105.

34 Provincial Response, *supra* note 9, Part 1 at para 48.

35 *Chaoulli, supra* note 5, at para 42.

36 Lorraine Weinrib, "Charter Perspectives on *Chaoulli:* The Body and the Body Politic" in Colleen Flood, Kent Roach, and Lorne Sossin, eds, *Access to Care, Access to Justice: the Legal Debate Over Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) at 58 [Weinrib].

37 *Rodriguez v BC (AG)* [1993] 3 S.C.R. 519, at para 30 [*Rodriguez*].

38 Notice of Claim, *supra* note 4, at para 115.

place due to facility costs.[39] The plaintiffs' argument assumes that patients will receive better access if the restrictions are lifted, yet there is a secondary issue of how many patients will qualify for private health insurance.

This case is complicated by the fact that success for Cambie et al. would at most assist only those patients who can access private health care. It is to be hoped that if the Court finds a *Charter* violation, the remedy will involve some balancing that reduces harm to the vulnerable. Regardless, a favourable ruling will provide no benefit to those who cannot afford or qualify for private health insurance. This problem has prompted Martha Jackman to suggest that finding provisions such as those challenged in the present case to be unconstitutional would "represent a serious perversion of a right to health."[40] The dilemma of negative vs. positive rights lies beneath everything argued in this case. As Emmett MacFarlane notes, "when cases develop a right of access … that is rooted in the logic of negative rights, the result ultimately fails to produce consistent rights protection and coherence from a policy perspective."[41] The decision in *Chaoulli* to protect patients' security of the person by allowing them access to private health care does not fully take context into account and so does not address the inequality it would create within the Canadian health care system. Chief Justice McLachlin and Justice Major write that "the *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."[42] Within the context of the *Chaoulli* decision, this means that access to concurrent private health insurance should be allowed as the appellants in that case requested. Some argue, however, that what should actually be provided is *Charter*-compliant health care within the public scheme itself.[43] When cases such as *Chaoulli* and *Cambie* are viewed in their relational context, it is more apparent which members of society would actually be able to exercise the choice to utilize a concurrent private health care system if the restrictions in the *Medicare Protection Act* were lifted.

Cambie et al. are challenging the provisions restricting private health care, not the management of the public health care system. It has been suggested that *Chaoulli* could be the precursor to positive rights claims, yet the claims that have followed, including the present case, are negative rights claims that seek to expand upon the remedy granted in *Chaoulli*.[44] A weakness of the adversarial process in handling complex social problems, however, is that the cases that are brought determine which problems the Court rules on. Though the focus is on the suffering sustained by individual patients, both *Cambie* and *Chaoulli* were brought by doctors who have a financial interest in access to care outside of the public health care system.[45] The development of negative rights claims without a corresponding development of positive rights has a serious impact on contexts that relate to social benefits such as health care because applying the *Charter* in such a manner exacerbates existing relationships of inequality in Canadian society.[46]

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39 *Ibid*, at paras 112, 114.

40 Martha Jackman, "Misdiagnosis or Cure? Charter Review of the Health Care System" in Colleen Flood ed, *Just Medicare: What's In, What's Out, How We Decide,* (Toronto: University of Toronto Press, 2006) at 72.

41 Emmett MacFarlane, "The Dilemma of Positive Rights: Access to Health Care and the Charter" (2014) 48:3 Journal of Canadian Studies 49, at 51.

42 *Chaoulli, supra* note 5, at para 104.

43 Weinrib, *supra* note 36, at 68.

44 Flood, Colleen and Michelle Zimmerman, "Judicious Choices: Health Care Resource Decisions and the Supreme Court" in Jocelyn Downie and Elaine Gibson, eds, *Health Law at the Supreme Court of Canada* (Toronto: Irwin Law Inc, 2007) at 43.

45 *Chaoulli, supra* note 5, at para 181.

46 See Lorne Sossin "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Colleen Flood, Kent Roach, and Lorne Sossin, eds, *Access to Care, Access to Justice: the Legal Debate Over Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) at 162.

II. CHARTER ANALYSIS

A. Section 7 and the *Bedford* Framework

At the first stage of a section 7 analysis, Cambie et al. must show that a patient's life, liberty, or security of the person interests are engaged by the impugned provisions. At the second stage, the plaintiffs must establish that any infringement under the first stage is not in accordance with the principles of fundamental justice.[47] If a section 7 violation is established, the provincial respondents must then show that the violation is justified under section 1.[48] In the timespan between the *Chaoulli* decision in 2005, and the time when *Cambie* began to be heard in the BC Supreme Court in September 2016, the Supreme Court of Canada ruled on *Bedford* and *Carter.* In those decisions, the Court clarified the principles of arbitrariness, overbreadth, and gross disproportionality and held that "in determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s. 7, courts are not concerned with competing social interests or public benefits conferred by the impugned law."[49]

This statement in *Bedford* made a significant impact on section 7 jurisprudence by shifting the point at which courts consider the public good in a section 7 challenge. As the Court put it in *Bedford*, "the question of justification on the basis of an overarching public goal is at the heart of section 1 but plays no part in the section 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights."[50] This raises two potential causes of concern. First, the principles of fundamental justice may lose their ability to protect section 7 rights as violations may be more easily justified under section 1.[51] Second, concerns for the public good may be pushed out of the Court's conception of what justice means in Canadian society. This risk is seen in *Bedford* and *Carter,* where the impugned provisions, which are arguably an attempt by the legislature to protect broader social interests, are deemed by the Court to be "inherently bad" and "fundamentally flawed" before the Court has even considered the social interests that might be engaged by the legislation.[52] By dividing social interests from the determination of fundamental justice, the Court places individual and societal interests in an increasingly antagonistic relationship to one another. Such division may not be sustainable. As Mark Carter suggests, "societal interests are inextricable from the objects or purposes of the laws."[53] Cambie et al.'s claim challenges a legislative scheme that is directly concerned with the societal interest in accessing health care, so the BC courts will need to determine what the Supreme Court of Canada meant by its statements on the place of the public good or social interest in the analysis of a section 7 claim. Because the *Bedford* decision had such a serious impact on the structure of courts' analyses of claims made under section 7, I will refer to the current framework of section 7 analysis as the *Bedford* framework. Despite the flaws inherent in the *Bedford* framework's division between individual and social interests, this paper will analyze Cambie et al.'s claims in the context of this framework because it is the current state of the law.

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47 *Bedford, supra* note 14, at para 58.

48 *Ibid,* at para 161.

49 *Carter*, *supra* note 14, at para 79; See also Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill LJ at 593-594 [Stewart].

50 *Bedford, supra* note 14, at para 125.

51 Stewart, *supra* note 49, at 594.

52 *Bedford, supra* note 14, at para 96; *Carter, supra* note 14, at para 82.

53 Mark Carter, "*Carter v Canada:* "Societal Interests Under Sections 7 and 1" (2015) 78 Sask L Rev 209, at 210.

B. Engaging Life and Security of the Person Interests

Though the impact on patients' life and security of the person from sitting on a waitlist is generally negative, evidence of this infringement and a causal connection to the provisions in question must still be proven.[54] This should not be too difficult because as the recent Fraser Report indicates, "wait times are not benign inconveniences. Wait times can, and do, have serious consequences such as increased pain, suffering, and mental anguish. In certain instances they can result in poorer medical outcomes."[55] What complicates Cambie et al.'s task is the need to link the protected interest to the impugned sections of the *Medicare Protection Act*. Cambie et al. and the Fraser Institute clearly think this connection exists, but that point must still be determined by the BC Supreme Court. *Allen,* a similar case challenging legislation prohibiting concurrent private health insurance in Alberta, was unsuccessful because the plaintiff attempted to advance *Chaoulli* as a factual determination that prohibitions of private health insurance infringe patient's security of the person without advancing any additional evidence at this initial stage of the section 7 analysis.[56] Though people suffer while waiting for surgery, it is the underlying injury that causes the pain. Therefore, if the patient would not have experienced less suffering without the restrictions imposed by the *Medicare Protection Act*, there is no case for challenging the restrictions under section 7. In order to engage life and security of the person interests, public wait times must cause the patient to suffer more than they would with the injury alone and more than if they received treatment in the private health care system.

The above analysis has looked at the combined effect of the provisions. On the evidence presented, the Court may find that not all of these provisions engage section 7 rights. *Cambie* is complicated by the complex nature of the legislation involved. All of the impugned provisions acting together deter private health care and protect the public health system. When taken together they effectively prevent all but the wealthiest patients from exiting the system to obtain their treatment quicker. However, as seen in the divided court in *Chaoulli* and the commentary that followed, it is difficult to measure the effects of just one piece in a legislative scheme. It remains to be seen which, if any, of the provisions will be found to engage section 7 interests in the way claimed by Cambie et al.

Though Cambie et al.'s claim focuses primarily on the infringement of the right to security of the person, rather than their right to liberty, the plaintiffs argue that security of the person includes a patient's right to exercise control over their own health by choosing to step outside of a public health care system that does not adequately meet their needs. This link between choice and security of the person is not new. In *Chaoulli*, the Court relied on *Morgentaler* and *Rodriguez* in finding that security of the person encompasses:

> "[A] notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress … [T]he prohibition against private insurance in this case results in psychological and emotional stress and a loss of control by an individual over her own health."[57]

In *Carter,* liberty and security of the person interests were considered together because "underlying both of these rights is a concern for the protection of individual autonomy

54 *Allen v Alberta,* 2014 ABQB 184, at paras 39-41 [*Allen*].

55 *Fraser Report*, *supra* note 25, at iii.

56 *Allen, supra* note 54, at paras 39-41.

57 *Chaoulli, supra* note 5, at para 122; *R v Morgentaler* [1988] 1 S.C.R. 30; *Rodriguez*, *supra* note 37, at para 21.

and dignity."[58] It is noteworthy that the plaintiffs are not asking for wait times to be decreased within the public system, which would likely involve a positive right to a certain quality of health care. Rather, they seek the right to choose from a wider range of health care options when they believe the public health care system is not meeting their needs.

The provincial defendant's response attempts to separate any suffering that patients might experience from the restrictions in the *Medicare Protection Act*, arguing that, "to the extent that the Patient Plaintiffs, or any of them, experienced unnecessary or unreasonable pain or suffering … that pain or suffering was not caused by the Impugned Provisions, but by decisions made by, and actions taken by, their treating physicians."[59] The provincial defendants argue that this is not a constitutional matter because the legislation or government action does not itself cause the delays responsible for the patients' increased suffering. It is unlikely that the Court will accept the defendants' argument, given the Court's discussion of causation in *Bedford*: "the causal question is whether the impugned laws make this lawful activity more dangerous."[60] It is clear in the present case that the patients' suffering is caused primarily by injury and illness, secondarily from being forced to wait for treatment, and finally from being denied the ability to receive treatment sooner. However, "a sufficient causal connection standard does not require that the impugned government action nor law be the only or the dominant cause."[61] The *Medicare Protection Act*'s effect of forcing patients to remain in the public health care system puts at least some patients at an increased risk of suffering and lasting damage. It is highly likely that the Court will find that this first step of the section 7 analysis is met.

C. The Principles of Fundamental Justice

Even if Cambie et al. successfully show an adverse impact on patients' life and security of the person interests, they still must prove that the infringement is not in accordance with the principles of fundamental justice. The plaintiff's notice of claim primarily focuses on principles against arbitrariness, overbreadth, and gross disproportionality.[62] In order to evaluate whether the provisions infringe section 7 rights in a manner that is arbitrary, overly broad, or grossly disproportionate, it is first necessary to determine what the purpose or object of the law is. The purpose stated in the *Medicare Protection Act* is "to preserve a publicly managed and fiscally sustainable health care system for British Columbia in which access to necessary medical care is based on need and not the individual's ability to pay."[63] Though relevant, the Act's purpose statement is not determinative. The Court will consider other factors including the words of the challenged provision and the broader legislative context.[64]

In *Chaoulli,* Chief Justice McLachlin and Justice Major found that the objective of the *Canada Health Act* is "to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers."[65] Justice Deschamps went further to suggest that quality of care and equality of access are inseparable even where "the quality objective is not

58 *Carter, supra* note 14, at para 64.
59 Provincial Response, *supra* note 9, at part 1, para 32.
60 *Bedford, supra* note 14, at paras 87, 89.
61 *Ibid*, at para 76.
62 Notice of Claim, *supra* note 4, at paras 118-139.
63 *Medicare Protection Act, supra* note 1, s. 2; Provincial Response, *supra* note 9, at para 11.
64 *R v Appulonappa*, 2015 SCC 59, at para 34.
65 *Chaoulli, supra* note 5, at para 105 [emphasis omitted]; see *Canada Health Act, supra* note 9, s. 3.

formally stated."[66] The purpose of the legislation challenged in *Chaoulli* is similar to that challenged in *Cambie*. Though it is difficult to speculate on how the purpose of the law will be framed by the courts, it is likely that they will consider the purposes stated in both the *Medicare Protection Act* and the *Canada Health Act* as part of the larger legislative context. The purpose of each act will likely be determined to include at a minimum both the preservation of the public system and reasonable access to health care without financial or other barriers.[67]

i. Principle Against Arbitrariness

A provision is considered arbitrary where there is no connection between the provision and its purpose, or where the provision contradicts the purpose of the legislation.[68] In *Chaoulli*, the Court was split on whether provisions prohibiting private health insurance were rationally connected to the purpose of preserving the public health care system. Chief Justice McLachlin and Justice Major looked at whether a limit on life and security of the person is necessary to further the state objective, broadening the scope of the principle against arbitrariness. The Court returned to a narrower understanding of arbitrariness in later cases as an adverse effect on section 7 interests with no rational connection to the provision's purpose (rather than an adverse effect that is merely *not necessary* for the fulfillment of the provisions' purpose).[69] Ultimately, "the applicability of *Chaoulli* must be assessed in light of subsequent judicial decisions … [and] any connection to the stated policy objectives negates arbitrariness."[70]

Given *Bedford*'s statement that arbitrariness, overbreadth, and gross disproportionality are all applied by assessing the effects on a single individual, the distinction between the arbitrariness and overbreadth analysis is unclear. *Carter* holds that "an arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law."[71] On the other hand, an overly broad law is rational in some cases, just not in connection to the individual claimant. As Hamish Stewart notes, "it is unclear how a court is supposed to decide that a law has no rational connection to its objective without considering how well it achieves that objective."[72]

Cambie et al. argue that the Court should determine arbitrariness for the same reasons endorsed by Chief Justice McLachlin and Justice Major in *Chaoulli*: "[b]ased on comparison with other health systems in Canada and internationally, permitting and facilitating access to a private health care system does not jeopardize the existence of a strong public health care system."[73] The *Chaoulli* decision has received much criticism on this point. Colleen Flood writes that the majority looked only to the fact that public and private insurance exist alongside one another in some jurisdictions without analyzing the complexity of those systems and other differences that might exist between each jurisdiction.[74] As Lorraine Weinrib suggests, "the expert and comparative evidence before the Court, as well as expert predictions of what would follow from invalidating the insurance ban, demonstrate complexity that the majority either ignored or dismissed too

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66 Ibid, at para 50.

67 See *Medicare Protection Act, supra* note 1, s. 2; *Canada Health Act, supra* note 9, s. 3

68 *Bedford, supra* note 14, at paras 98-99.

69 *Ibid*, at para 111; *Carter, supra* note 14, at para 83.

70 *Allen, supra* note 54, at para 45.

71 *Bedford, supra* note 14, at para 117; *Carter*, *supra* note 14, at para 83.

72 Stewart, *supra* note 49, at 587.

73 Notice of Claim, *supra* note 4, at para 120; *Chaoulli, supra* note 6 at paras, 140-149.

74 Colleen Flood, "Chaoulli's Legacy for the Future of Canadian Health Care Policy" (2006) 44 Osgoode Hall LJ 273, at 276-277.

easily."[75] The concern articulated by both Flood and Weinrib led the BC Health Coalition and Doctors for Medicare to intervene in *Cambie* in order to ensure that evidence of a connection between the purpose and effects of the provisions is presented.[76] The fact that the plaintiffs are challenging all provisions that restrict the growth of a concurrent private health system rather than merely the restrictions on private health insurance may contribute to a different ruling than in *Chaoulli*. Whether or not these provisions are the only way or the best way to protect the public health care system, they are certainly a way to protect it. The courts will likely not find the provisions to be arbitrary for the same reason stated in *Carter*: "a total ban … clearly helps achieve this object."[77]

ii. Principle Against Overbreadth

There have been significant developments to the principle of overbreadth since the *Chaoulli* decision. Unlike arbitrariness, which asks whether there is any connection between the effects and the purpose, "the overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law goes too far by denying the rights of some individuals in a way that bears no relation to the object."[78] It is likely that the plaintiffs will be able to meet this test. If the purpose of the provisions is to grant reasonable access to health care without financial or other barriers, provisions which prevent access do not further that object and in fact contradict it. The plaintiffs stress that "preferred beneficiaries" are already permitted to receive treatment outside of the regular public system by physicians who have not been forced to opt out of the public system.[79] Though the provincial respondents stress differences in funding in such cases, they do not address the fact that such patients are not placed in the same waitlists as those within the public health system.[80] Such exceptions complicate the simple binary that the provincial respondents seek to maintain between need and wealth as organizing principles in the delivery of health care.

The provincial respondents argue that if the plaintiffs' treating physicians had acted properly, the plaintiffs "could have been treated appropriately in the public system."[81] It is clear, however, that at least some patients are not receiving appropriate access to health services within the public system, as "access to a waiting list is not access to health care."[82] It is likely that even if the provisions are not arbitrary because they are for the most part rationally connected to their object, they may still be caught by overbreadth. As *Bedford* states, "where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the specific individual." The Court does not take "enforcement practicality" into account until the justification stage of section 1.[83] This complicates the overbreadth analysis for certain types of laws that by their nature target more people than necessary. As the Ontario Court of Appeal notes in

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75 Weinrib, *supra* note 36, at 67.

76 Statement of the Intervenors, *supra* note 10, at paras 34-35.

77 *Carter, supra* note 14, at para 84.

78 *Ibid*, at para 85.

79 Notice of Claim, *supra* note 4, at para 126a. The preferred beneficiaries include WCB claimants (whose coverage is funded through an entirely different system that predated the *Medicare Protection Act*) as well as the RCMP, people serving in the military, and prison inmates who according to the defendants cannot constitutionally be restricted as they fall under federal jurisdiction.

80 Provincial Response, *supra* note 9, at Part 3, paras 24-30.

81 *Ibid*, at paras 33, 57.

82 *Chaoulli, supra* note 5, at para 123.

83 *Bedford, supra* note 14, at para 113. In *Bedford*, the Attorney General argued that the broader provision was necessary to capture exploitative relationships. The Court held that it was better addressed under s.1 (para 143).

Michaud, "the singular focus of s. 7 means that it is not possible to dismiss this prospect as a *de minimis* consequence of a beneficial safety regulation."[84] This complication is clear in the context of safety regulations, but I would assert that it is applicable to the statutory scheme regulating health care as well.

Michaud provides a useful analysis of how clarifications to the principles of fundamental justice in the *Bedford* framework play out in the context of a complex regulatory scheme, specifically with regard to the principle against overbreadth. Michaud was a case involving mandatory speed limiters for truck drivers. A speed limiter prevents a vehicle from accelerating past a set speed. Michaud argued that his section 7 right to security of the person was violated because he could not accelerate to avoid danger.[85] The Court identified various features that differentiate safety regulations from other types of legislation typically encountered in section 7 litigation such as the *Criminal Code* provisions challenged in *Bedford* and *Carter*.[86] First the uncertainty inherent in safety regulations complicates a legislature's decision of how best to control the risk they seek to prevent. Second, regulatory schemes are often orientated in a prospective or precautionary way that aims to prevent the harm in the first place rather than, or in addition to, penalizing harmful behaviour after the fact.[87] Third, there is a tendency for safety regulations to consist of "bright line" rules that are certain and knowable but over inclusive to some degree.[88] Finally, safety regulations are often a delicate balancing act as competing purposes and policies are reconciled.[89]

These features laid out in *Michaud* are also seen in the legislative scheme challenged by *Cambie et al*.. First, as seen through the Court's division in *Chaoulli*, it is not certain how increased access to private health care would impact the public health care system. Secondly, the restrictions in the *Medicare Protection Act* attempt to pre-emptively restrict harmful effects to the system by discouraging the creation of concurrent private health care in addition to penalizing prohibited behaviour after the fact. Third, as in safety regulations, the legislature has drawn a line delineating which health care services will be allowed to take place outside of the public system. Lastly and perhaps most importantly, finding a balance between conflicting interests and policies is essential in the context of health care legislation. As suggested previously, the purpose of the *Medicare Protection Act* includes reasonable access to health care and the preservation of the public health care system. These two purposes are for the most part compatible but become complicated when the means of preserving the system undermines peoples' access, or when access undermines the preservation of the system. This balancing is recognized by the dissent in *Chaoulli*: "the issue here, as it is so often in social policy debates, is where to draw the line. One can rarely say in such matters that one side of a line is "right" and the other side of a line is "wrong."[90] As *Michaud* recognizes, the principle against overbreadth has a tendency to be engaged by such laws because it is their nature to be over or under inclusive.[91] It is highly likely that the impugned provisions in the present case will be captured by overbreadth, but by doing so the principle of overbreadth may itself be overbroad, catching that which does not actually implicate "the basic values underpinning our constitutional order."[92]

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84 *R v Michaud,* 2015 ONCA 585, at para 74 [Michaud].
85 *Ibid,* at paras 1-2
86 *Ibid*, at paras 86-113.
87 *Ibid*, at paras 100-102.
88 *Ibid*, at paras 88-89.
89 *Ibid*, at para 91.
90 *Chaoulli, supra* note 5, at para 170.
91 *Michaud, supra* note 84, at para 89.
92 *Bedford, supra* note 14, at para 96.

iii. Principle Against Disproportionality

Gross disproportionality occurs "in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure … the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society."[93] This is a high threshold that will arguably be difficult for the plaintiffs to meet. As mentioned earlier, the individual plaintiffs' suffering is caused by their illness or injury and then worsened by not being able to receive a specific health care service. The plaintiffs must prove that not being able to access medical care outside of the public system increased their suffering or the threat to their life to such a degree that it is "totally out of sync" with the purpose of the provisions.[94]

As with arbitrariness and overbreadth, a law is in breach of section 7 if it impacts even one person in a manner grossly disproportionate to its purpose. Though it is easy to generalize all patients on waitlists as suffering to some degree, some wait times may be more unreasonable than others as, for example, more serious injuries or illnesses may result in greater suffering. The plaintiffs in *Cambie* include a number of patients who believe their section 7 rights were infringed due to wait times for surgery or diagnostics. It may be that waiting for diagnostic services for a serious condition such as cancer causes a grossly disproportionate degree of psychological suffering and risk to life.[95] A disproportionate amount of suffering may also arguably occur where delays significantly increase the risk of an adverse outcome.[96] Waiting for an elective orthopaedic surgery, on the other hand, would involve some physical and psychological suffering but may be more proportionate in its effects as the condition is not life threatening.[97]

The Court emphasizes in *Bedford* that "gross disproportionality under s. 7 does not consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law."[98] It is hard to imagine how the Court might accomplish this task in this case: the societal benefit that flows from the law is intimately connected to the value of the purpose of protecting the public health care system. As Hamish Stewart writes, "a non-trivial impact on, for example, even one person's security of the person is always disproportionate to the complete achievement of a relatively unimportant objective, even if that objective is completely achieved."[99] It is unclear how the Court is supposed to measure the importance of an objective without considering the social benefits that flow from that objective.

It is at this stage of the analysis that a consideration of the relational context can truly underline the impact of the Court's focus on negative rights in past jurisprudence. If the Court finds that the suffering and risk that a patient can sustain on a public waiting list

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93 *Ibid*, at para 120.

94 *Ibid*.

95 Notice of Claim, *supra* note 4, at paras 29-38: Individual plaintiff Ms. Martens had suspected colon cancer but required a biopsy to confirm this diagnosis. According to the Notice of Claim, survival rates for early detection is approximately five times higher than late-stage cancer detection. Cambie et al. do not specify whether waiting six months for the colonoscopy as scheduled in the public system would have crossed the line between early and late detection.

96 *Ibid*, at paras 50-64. Due to complications in surgery, individual plaintiff Mr. Khalfallah was left a paraplegic, paralysed below the navel. Cambie et al. claim that there would have been far less likelihood of this adverse consequence if he had received treatment for his kyphosis sooner.

97 *Ibid,* at para 39-48. Individual plaintiff Ms. Corrado suffered pain and was unable to play soccer while waiting for knee surgery, but her condition was not life-threatening and there were no lasting effects.

98 *Bedford, supra* note 14, at para 121 [emphasis in original].

99 Stewart, *supra* note 4, at 586.

while being denied access to private health care is so grossly disproportionate as to be out of sync with our societal norms, then the Court must also acknowledge that there are others suffering the same fate who could not afford to access private health care even if they were allowed to. By looking at the context within which the present case is situated, one can see that if gross disproportionality is found, there are serious questions regarding whether the remedy requested by Cambie et al. properly addresses the problems revealed through the section 7 analysis.

iv. Vagueness

The plaintiffs also argue that the provisions are unconstitutionally vague.[100] It is highly unlikely that the vagueness claim would be successful given the test laid out by the Supreme Court of Canada in *Canadian Foundation for Children*.[101] Though the definition of "medically necessary" may be open to interpretation, the overall provisions challenged by the plaintiffs are clearly intelligible and it is reasonable to assume that the corporate plaintiffs are well aware of what actions are contravene the law.

D. Section 1: Justifying an Infringement

If the Court does find that some or all of the impugned provisions of the *Medicare Protection Act* infringe section 7, any infringement may be justified under section 1. At this point in the analysis, the burden shifts to the provincial respondents who must show that:

> "[T]he law has a pressing and substantial objective and that the means are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law."[102]

Though the Supreme Court of Canada has not yet found a section 7 violation justified under section 1, "the highly individualistic focus of the section 7 analysis is complemented by an apparent willingness to consider societal interests at the section 1 stage, thus opening up the possibility of justifying a violation of a principle of fundamental justice."[103] As stated in *Carter,* though it will be difficult, "in some situations the state may be able to show that the public good—a matter not considered under s. 7, which looks only at the impact on the rights claimants—justifies depriving an individual of life, liberty, or security of the person."[104] The *Medicare Protection Act* is concerned at the very least with preserving the public health care system because of the societal good that results from having a health care system in which access to care is on the basis of need. This is a pressing and substantial objective. Thus, what the Court must determine whether its adopted means are also proportionate.

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100 Notice of Claim, *supra* note 4, at para 140.

101 *Canadian Foundation for Children, Youth and the Law v Canada (AG)* 2004 SCC 4, [2004] 1 S.C.R. 76, at para 15. This case holds that "a law is unconstitutionally vague if it does not provide an adequate basis for legal debate and analysis, does not sufficiently delineate any area of risk, or is not intelligible."

102 *Carter, supra* note 14, at para 94; *R v Oakes* [1986] 1 S.C.R. 103.

103 Stewart, *supra* note 49, at 589.

104 *Carter, supra* note 14, at para 95.

i. Rational Connection

It is highly unlikely that an arbitrary provision will be justified under section 1. In fact, the Court in *Chaoulli* questioned whether that would ever be possible.[105] On the other hand, a law that is not arbitrary will almost certainly be rational. Under the *Bedford* framework, courts considering the principle of arbitrariness under section 7 must focus on the individual, but when they consider rationality under section 1 they may expand their analysis to include broader societal effects. It is unclear whether the results of these analyses would ever differ, however, since both focus on a complete lack of rational connection between the effects and the objectives of the provisions. Because the Court will likely not find the impugned provisions of the *Medicare Protection Act* to be arbitrary under section 7, it is equally likely that the Court will find the provisions are rationally connected to their object in the section 1 analysis.

ii. Minimal Impairment

At the minimal impairment stage, "the burden is on the government to show the absence of less drastic means of achieving the objective in a real and substantial manner."[106] This stage will likely see more novel analysis than the rational connection stage as a result of the changes in *Bedford*, which found that enforcement practicality—meaning where a law is drawn broadly in order to make enforcement more practicable—is to be considered during the minimal impairment analysis rather than at the overbreadth stage in section 7.[107] Though the Supreme Court of Canada has not yet justified a section 7 infringement, the Ontario Court of Appeal in *Michaud* has shown how an overly broad law, specifically a regulatory statute, could be considered minimally impairing.[108] The Supreme Court of Canada has also affirmed that it is willing to give deference to the legislature under section 1 where a law violating section 7 involves a "complex regulatory response" to a social problem."[109] The Court in *Michaud* acknowledged that although *Carter* held that an absolute prohibition could not be described as a "complex regulatory response," this does not necessarily mean that Courts should never show deference when a prohibition is challenged.[110] The Ontario Court of Appeal further developed this point, noting that sometimes the concept of "prohibition" may not always be useful because "picking out one feature from a very complex regulatory response is too granular an approach," and a seemingly cut-and-dry prohibition may actually be an indivisible component of a complex regulatory response.[111] *Cambie* involves prohibitions on extra billing and concurrent private health insurance, but these prohibitions may be an inseparable part of a complex network of health care legislation.

In addition, *Irwin Toy* suggests that courts should use increased deference when the government is balancing the interests of competing groups, especially when vulnerable groups are involved, in contrast to cases where the government is a "singular agonist."[112] Though there are strong arguments in the present case for justification under section 1 if the Court finds the law to be overly broad, it is uncertain how much weight the Court will give these elements. In *Carter* and *Bedford*, which also included a concern for the protection of vulnerable people from exploitation, the Court did not find that the impugned provisions were justified. *Carter* states that "a theoretical or speculative fear

105 *Chaoulli, supra* note 5, at para 155.
106 *Carter, supra* note 14, at para 102.
107 *Bedford, supra* note 14, at para 113.
108 *Michaud, supra* note 84, at paras 130-131.
109 *R v Safarzadeh-Markhali,* 2016 SCC 14, at para 57.
110 *Carter, supra* note 14, at para 98; *Michaud, supra* note 85, at paras 129-130.
111 *Ibid*.
112 *Irwin Toy Ltd v Quebec (AG)* [1989] 1 S.S.R. 927, [1989] S.C.J. No 36, at paras 80-81.

cannot justify an absolute prohibition, nor can the government meet its burden simply by asserting an adverse impact on the public."[113] Though enforcement practicality and protection of the vulnerable may be important factors, the Court may choose to take a strict view of whether there is a less impairing option when considering whether to justify an overbroad law at this stage of the analysis.

iii. Proportionality

The provincial respondents may be able to justify overbreadth at the final stage of section 1, which focuses on proportionality and balancing the positive and negative effects of the challenged provisions. Hamish Stewart cautions that though "it should not be assumed that the law would automatically fail … it is hard to imagine that a court would accept that a law could be justified by its social benefits if its impact, even on only one particular individual, was so draconian as to fall entirely outside the norms of Canadian legal and political culture."[114] That being said, it may be at this proportionality stage that the Court is able to give the most thought to the effects that repealing the law would have on Canada's current social inequalities, since only those who can afford and qualify for private insurance would be able to take advantage of concurrent private health care if it were to be established. The Court will likely be extremely cautious in justifying a grossly disproportionate provision, however, because such a decision would seriously impact the significance of finding a law grossly disproportionate in the first place. If a law is held to be grossly disproportionate and then is easily justified under section 1, it raises the question of whether the law was actually "entirely outside the norms" of Canadian society in the first place.[115]

The provisions in *Michaud* were justified under the proportionality stage because their overly broad effect only infringed the security of the person interests of two percent of individuals captured by the law.[116] Thus, even though the law in that case infringed the plaintiff's section 7 rights in a manner that was overbroad, the infringement was held to be justifiable when balanced against the safety interests of the other ninety-eight percent of drivers. If more than two percent of patients in need of treatment have their interests negatively impacted by the impugned provisions in *Cambie* in a manner that is overly broad, it may be more difficult to justify that overbreadth at the proportionality stage.

Conclusion of Charter Analysis

The Court is in a difficult position in this case. If it declares the provisions invalid, it will be accused of rolling back legislation that is in place for the benefit of those who would be severely disadvantaged by a private system. Yet a decision that upholds the provisions leaves the system in its current state with little incentive for provincial governments to undertake costly improvements. The *Canada Health Act* and the legislative schemes that surround it are a powerfully symbolic testament to the need to protect the social good of health care that all can access on the basis of need rather than ability to pay. Yet long waitlists persist and people suffer physically and psychologically as they wait for treatment. In some cases, longer wait times before treatment result in greater risk of adverse outcomes.

If the Court finds a section 7 violation that is not justified under section 1, it will need to decide what relief to grant. The Court's conclusion in *Cambie* would likely be similar to *Chaoulli*, in which "the prohibition on private health insurance [was] not constitutional where the public system fail[ed] to deliver reasonable services."[117] Such a

113 *Carter, supra* note 14, at para 119.
114 Stewart, *supra* note 49, at 592-593.
115 *Ibid.*
116 *Michaud, supra* note 84, at para 139
117 *Chaoulli, supra* note 5, at para 158.

ruling is complicated by the lack of consensus between governments and physicians as to what constitutes a reasonable length of time.[118] Cambie et al. argue for access to private health care generally, but it is likely that only restrictions in certain areas of health care could actually be found to infringe patients' section 7 rights. All the examples raised by Cambie et al. involved elective surgery or diagnostics. Though allowing access to private health care in these areas would still have an impact on the public health care system, that impact may be less severe than a general right to access private health care. The Court cannot set out comprehensive guidelines as to what the legislature must do in such situations, however it may be able to provide guidance on how the *Medicare Protection Act* could be maintained in a way that does not unjustifiably infringe on section 7 rights.

III. ISOLATING THE INDIVIDUAL: FURTHER REFLECTIONS ON THE *BEDFORD* FRAMEWORK

The Canadian government's decision to entrench the rights contained in the *Charter* created a powerful tool for checking government power and abuse of authority. In order to give effect to this protection, it is important that statutes such as the *Canada Health Act* are not insulated from *Charter* protection merely because of the important place such statutes have in society. As Loraine Weinrib states, "legislatures cannot be the final arbiter of their own fidelity to [principles of human dignity]. Independent review is necessary."[119] That being said, such a powerful tool must be treated with care so that it does not undermine the values upon which it is based. As the Supreme Court of Canada suggested in 1986, "the courts must be cautious to ensure that [the *Charter*] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."[120] Relational theorist Jennifer Llewellyn argues that rights cannot properly be understood outside of the context of human relationships. She suggests that "a relational conception of rights is particularly helpful in understanding and responding to rights claims in a health care context because it can properly conceive of the complex nature of the relationships and claims at issue in this context."[121] Acknowledging the potential impact on vulnerable members of society does not need to result in excessive deference that insulates government actions from review, but such considerations may help the Court to ensure that the *Charter's* mission is accomplished in a way that brings some measure of balance rather than increasing the current inequalities in society.

In *Chaoulli*, this balance is arguably lacking. Justice Deschamps seems disdainful of the emotional reaction of those who "characterize the debate as pitting rich against poor when the case is really about determining whether a specific measure is justified under either the *Quebec Charter* or the *Canadian Charter.*"[122] Such a mechanistic view of the Court's role is particularly troublesome given how much the Court's own decisions have contributed to the development of the *Charter* rights that they apply. The dissent written by Justices Binnie and Lebel in that case is equally flawed due to a singular focus on the social benefits provided by the *Canada Health Act*. As Weinrib writes, "the dissent's delineation of the appropriate tests and its examination of the argumentation and supporting evidence focused less on the Court's special obligation to protect constitutional rights than on the legitimacy and desirability of a public health care system, whatever its operative performance."[123] In both *Chaoulii* and *Cambie*, we see concerns for the public good placed

118 Notice of Claim, *supra* note 4, at paras 91, 95.
119 Weinrib, *supra* note 36, at 59.
120 *R v Edward Books,* (aka *R v Videoflicks*) [1986] 2 SCR 713, at para 141 [*Edwards Books*].
121 Llewellyn, "A Healthy Conception of Rights," *supra* note 12, at 63.
122 *Chaoulli, supra* note 5, at para 16.
123 Weinrib, *supra* note 36, at 58.

in opposition to individual interests and autonomy. Insufficient consideration of the impact of finding the impugned provisions void could lead to unanticipated societal side effects. Excessive deference, however, can lead to stasis and can fail to provide protection if the legislature steps too far. Using the *Bedford* framework with its almost exclusive focus on the individual may make it difficult to avoid slipping into either of these two pitfalls.

The *Bedford* framework attempts to isolate the individual from their societal context, as the Court determines whether the law impacts a single person in a way that is arbitrary, overbroad, or grossly disproportionate. The law is then declared "inherently flawed" even if societal interests and effects are important enough to justify the infringement on the individual's interests.[124] Such an analysis sees the social and the individual as two distinct considerations that are in opposition to one another. However as Llewellyn suggests, "the rights as trumps approach that emerges simply cannot produce the sort of complex responses to rights claims required in the health care context."[125] In addition to being inadequate for producing a complex response, the "rights as trumps approach" is not needed to accomplish the goal of protecting the rights of the individual.

In *Mills*, the SCC considered section 7 in the criminal trial context.[126] Though that case involved a very different context than *Bedford* or *Cambie*, it may provide a useful contrast to the extremes noted above in the *Chaoulli* judgments. Though not explicitly addressed, *Mills* showed how courts can take relational contexts into account in a way that works within the existing constitutional structure provided by section 7. *Mills* affirmed the Court's statement in *Seaboyer,* that "the principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns."[127] In *Mills,* the Court was evidently aware of the need to balance these competing interests and "[interpret] rights in a contextual manner—not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances."[128] The individual's right to make a full answer and defence was of great importance in that case, but could not be defined in isolation. *Mills* was decided in the context of sexual violence. Throughout the case, the Court considered both the interests of the accused, whose rights were clearly at stake in the trial, but also the interests of the complainant, who was part of a vulnerable and historically underprotected group, and the interests of society at large.

Unlike *Bedford,* which held that the interests of the individual must be isolated from the interests of society in order to be protected, *Mills* found that the interests of the individual, and the principles of fundamental justice, can only be defined within their context.[129] As mentioned previously in the overbreadth analysis, the principles defined in *Bedford* may lead to incongruous results, such as a finding that nearly all safety regulations are inherently flawed. The Court's attempt to clarify the principles of fundamental justice in *Bedford* risks isolating the principles from their context and thereby giving them less meaning. As stated in *Seaboyer* and affirmed in *Mills*, "the ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice."[130] I am not convinced that the Court can properly answer this question using the *Bedford* framework.

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124 *Carter, supra* note 14, at para 95.

125 Llewellyn, "A Healthy Conception of Rights," *supra* note 12, at 63.

126 *R v Mills* [1999] 3 S.C.R. 668, 1999 CarswellAlta 1055 [*Mills*]. In the context of a charge of sexual assault, the accused challenged the restrictions on access to the complainant's private records contained in Bill C-46 arguing that it infringed his right to bring full answer and defence.

127 *R v Seaboyer* [1991] 2 S.C.R. 577, [1991] S.C.J. No. 14, at para 24 [*Seabouyer*].

128 *Mills, supra* note 126, at para 61.

129 *Ibid*, at para 63.

130 *Seaboyer, supra* note 127, at para 24; see also *Mills, supra* note 126, at para 72.

Cambie et al.'s claim could potentially undermine the life and security of the person interests of those who must remain in the public health system. It must be noted that in *Mills*, the Court was concerned with balancing two sets of *Charter* rights. Because those who stand to be most negatively impacted by a concurrent private health care system have no positive right to health care, their interests are not constitutionally protected. These interests are still part of the context of this case, however, and must be considered for the Court to fully understand what is at stake. If the Court decides it simply cannot consider these interests within the section 7 analysis, then it should hold off judgment on whether a provision is "inherently flawed" until the impugned provision has been assessed in its entire context. As Llewellyn suggests, section 1 "seeks to protect *Charter* rights while creating space to balance these rights where they might conflict with democratically determined values and objectives."[131]

CONCLUSION

Cambie raises serious concerns regarding how the Court should balance the interests of the individual *Charter* litigant with the interests of the rest of society. Though this case will likely not follow *Chaoulli* in finding that the provisions are arbitrary, it is very possible that the provisions will be captured by the principles against overbreadth and gross disproportionality. If that occurs, the Court will have to determine whether such violations of section 7 are justified under section 1 of the *Charter*. In doing so, the Court must determine the degree of deference it is willing to give the legislature's choices in the complex regulatory context of health care legislation. *Cambie* highlights the possibility that courts will "roll back legislation which has as its object the improvement of the condition of less advantaged persons."[132] As section 7 interests and the principles of fundamental justice continue to develop, the Court must remain aware of the degree to which such developments actually bring justice to Canadian society. The further individualization of the principles of fundamental justice seen in the *Bedford* decision may be seen as a positive step because it may provide protection in situations where the public goals are seen as oppressive to minority interests. It is also worth noting that a decision made using the *Bedford* framework will not always undermine a relational theory of justice. It is arguable that the *Bedford* decision drew attention to the way in which the challenged prostitution laws were creating oppressive or unhealthy relationships in society. The weakness of the *Bedford* framework, however, is that it is susceptible to misuse. Those in power may use this framework to further their own interests in a way that subsequently undermines the interests of the vulnerable. Further, there are situations in which the *Bedford* framework is inappropriate, particularly in complex regulatory contexts that involve a balancing of interests.

As demonstrated in this paper, the focus of relational rights theory on an individual's context may help the Court to avoid some of the pitfalls that arise from a decontextualized analysis of the individual claimant's interests. Taking an individual's relational context into account will not solve the tensions that underlie this health law context; the tension between the individual and society will always exist because neither interest can be absolute. Taking the full context into account, however, allows the Court to embrace this complexity and balance these interests in order to seek justice. As seen in *Mills*, this does not negate or diminish the rights protected within the *Charter*. Rather, a contextual analysis provides the means by which those rights can be understood and realized as fully as is possible within the judicial context.

131 Llewellyn, "A Healthy Conception of Rights," *supra* note 12, at 64.

132 *Edward Books, supra* note 120, at para 141.

ARTICLE

A NEW HOPE, OR A *CHARTER* MENACE? THE NEW LABOUR TRILOGY'S IMPLICATIONS FOR LABOUR LAW IN CANADA

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INTRODUCTION

Over the past three decades, the Supreme Court of Canada [SCC] has gradually and haltingly expanded the *Canadian Charter of Rights and Freedoms*' ("the *Charter*") protection of labour rights.[1] Recently, more dramatic changes in the *Charter*'s application to labour law have caused controversy. In this paper, I will demonstrate the benefits of the Court's most recent application of the *Charter* section 2(d) freedom of association to labour movements.[2] I argue that despite the uncertainty they have caused, these decisions are a necessary clarification of decades of incremental progress and articulate a helpful and progressive understanding of systemic inequalities in labour law.

The first section of this paper provides a historical overview of the interaction between labour law and the *Charter*, starting with the original 1987 "Labour Trilogy," tracking developments in labour law over the past 30 years, and culminating in 2015's "New Labour Trilogy." In the paper's second section, I address some potential criticism and uncertainties that remain to be resolved in the wake of these decisions. Specifically, I investigate whether the right to strike recognized in *Saskatchewan Federation of Labour v Saskatchewan* ("*SFL*") will extend to other strike-restricting scenarios,[3] what the acknowledgment of collective rights under section 2(d) might mean for other *Charter* rights, and whether these decisions ought to be seen as victories from a workers-rights perspective. Ultimately, I conclude that New Labour Trilogy is a positive shift. Any uncertainty it causes is a necessary component of a living constitution that must adapt to increasingly nuanced understandings of rights and equity.

I. HISTORICAL OVERVIEW

The freedom of association under section 2(d) of the *Charter* is broadly understood as the freedom "to combine together for the pursuit of common purposes or the advancement of common causes."[4] Historically, section 2(d) case law has primarily revolved around the protection of labour rights. This protection has had an uneven history. During the drafting of the *Charter*, NDP MP Svend Robinson proposed that section 2(d) be amended to explicitly state "freedom of association including the freedom to organize and bargain collectively."[5] This amendment was defeated in a Special Joint Committee vote of twenty to two.[6] Somewhat ironically given the jurisprudence that followed, the explanation for denying the amendment was that "freedom to organize and bargain collectively [is] covered by the freedom of association already in […] the *Charter*."[7] The members of the Special Joint Committee working group seemed to have assumed that freedom of association would obviously entail the protection of collective bargaining rights.[8]

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1 Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 The title of my paper is inspired by the similarly-titled paper by Steven Barrett & Benjamin Oliphant, "The Trilogy Strikes Back: Reconsidering Constitutional Protection for the Freedom to Strike" (2014) 45:2 Ottawa L Rev 201 [Barrett].

3 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 [*SFL*].

4 *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 334, 38 DLR (4th) 161 [*Alberta Reference*].

5 Canada, *Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,* No. 33 (9 January 1981) at 69 [Canada].

6 Dianne Pothier, "Twenty Years of Labour Law and the Charter" (2002) 40:3-4 Osgoode Hall LJ 369 at 371.

7 Canada, *supra* note 5.

8 There is much to be said about the distinction between freedoms and rights. For the purpose of this paper, I will roughly assume that enumerated freedoms have corresponding rights that attach, though this may be an oversimplification. For further discussion of freedoms, rights, and corresponding duties, see Brian Langille, "The Trilogy is a Foreign Country, They Do Things Differently There" (2014) 45:2 Ottawa L Rev 285.

Unfortunately for labour activists, this protection turned out to be far from obvious. Instead, leaving collective bargaining out of the *Charter* set the stage for a series of early cases that denied section 2(d) protection for the right to strike, the right to collective bargaining, and the existence of collective rights more generally. This section traces the evolution of section 2(d) *Charter* jurisprudence, from 1987's Labour Trilogy to the pivotal 2015 New Labour Trilogy, which effectively reversed the Court's original holdings.

A. Original Labour Trilogy – 1987

Soon after the implementation of the *Charter*, courts were called upon to address the role of section 2(d) in labour law disputes. In 1987, the SCC released three key cases concerning the protection of freedom of association: *Public Service Alliance of Canada v Canada* ("*PSAC*"),[9] *RWDSU v Saskatchewan* ("*Dairy Workers*"),[10] and most significantly the *Alberta Reference*. These cases, regularly referred to as the Labour Trilogy, denied the existence of collective rights in general, and specifically found that the right to strike and the right to collective bargaining did not exist under section 2(d). This was in keeping with a historical tendency for courts to allow control of labour law to be dictated by government policy and legislation.[11]

In the *Alberta Reference*, the Lieutenant Governor in Council referred several questions to the Alberta Court of Appeal regarding the validity of Alberta's *Public Service Employee Relations Act*,[12] *Labour Relations Act*,[13] and the *Police Officers Collective Bargaining Act*.[14] The Court of Appeal found that it was *Charter*-compliant to legislatively prohibit strikes and instead unilaterally impose compulsory arbitration as a mechanism for resolution of disputes. The appellants, headed by the Alberta Union of Provincial Employees, appealed to the SCC.

Justice Le Dain, writing for the majority, upheld the finding from the Court of Appeal. In his brief decision he gave little in the way of reasons, writing simply that he rejected the perspective that freedom of association gave groups "the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence."[15] In addition, he argued that the right to strike and the right to bargain collectively are relatively recent creations of statute, the regulation of which require complex balancing of policy concerns beyond the expertise of the Court.[16]

Justice McIntyre, in a concurring judgment, expanded significantly on *why* freedom of association did not cover the right to collective bargaining or the right to strike. These reasons have been influential, and have been frequently quoted as precedent.[17] In his reasons, Justice McIntyre held that freedom of association can advance group interests but ultimately belongs only to the individual.[18] Because freedom of association protects only *individual* rights to associate, and collective bargaining is inherently a *group* activity,

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9 *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249 [*PSAC*].

10 *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277.

11 CED 4th (online), *Constitutional Law*, "Constitutional Law: Constitution Act, 1982: Fundamental Freedoms: Freedom of Association" (X.1.(b).(v)) at § 516.

12 RSA 1980, c P-33.

13 RSA 1980, c L-1.1.

14 SA 1983, c P-12.05.

15 *Alberta Reference*, *supra* note 4 at 391.

16 *Ibid.*

17 Judy Fudge & Heather Jensen, "The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice" (2016) 27:1 King's LJ 89 at 96 [Fudge, "Arc of Workplace Justice"].

18 *Ibid*, at 397.

it follows that collective bargaining cannot be a constitutionally protected right. He concluded that the right to collective bargaining does not exist under the *Charter* and neither does the connected right to strike.[19]

These findings were reiterated in *Dairy Workers* and *PSAC*. In the former, the Court found that legislation prohibiting work stoppages for dairy workers was constitutional, because the right to strike was not *Charter*-protected. In the latter, the majority reiterated that the right to collective bargaining was not captured under freedom of association, and consequently it was constitutional for the government to introduce legislation that significantly limited collective bargaining by extending the terms of collective agreements and fixing wage increases.[20]

Despite the majority findings, the SCC was not unanimous in its denial of these rights. Chief Justice Dickson wrote a strong dissent in the *Alberta Reference*, which held that the right to bargain collectively and the right to strike are both protected under section 2(d). This dissent would become crucial in later SCC decisions. In his reasons, he held that the purpose of section 2(d) is to ensure that individuals have "a voice in shaping the circumstances integral to their needs, rights and freedoms,"[21] and to "protect the individual from state-enforced isolation in the pursuit of his or her ends."[22] Under his analysis, work is not merely an economic interest, but rather one of the most important components of a person's life.

Chief Justice Dickson argued that the freedom to associate is a "cornerstone of modern labour relations", and necessary to overcome "the inherent inequalities" between employers and employees.[23] A meaningful understanding of this freedom must not be limited to the right to merely combine together, but also to perform those activities for which the association was formed. If freedom of association did not protect those activities, it would be "legalistic, ungenerous, [and] indeed vapid."[24] Thus, the freedom to associate within a unionized workplace must encompass the right to perform activities integral to that union, such as collective bargaining.[25] In turn, an effective system of collective bargaining requires the right to strike.[26] A regime that substantially limits the ability to strike will engage section 2(d) *Charter* protections, and this infringement will not be justified under section 1 of the *Charter* if an adequate alternative method of dispute is not provided.

Union-side labour lawyers were intensely critical of the majority's findings in the Labour Trilogy, claiming that the decisions meant "governments were entitled to run roughshod over workers' rights."[27] The next section analyzes the aftermath of the original Labour Trilogy in Canadian case law.

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19 *Ibid*, at 409-410.

20 *PSAC*, *supra* note 9 at 452-453.

21 *Alberta Reference*, *supra* note 4 at 334.

22 *Ibid*, at 365.

23 *Ibid*, at 334.

24 *Ibid*, at 363.

25 *Ibid*, at 368-369.

26 *Ibid*, at 371.

27 Judy Fudge, "'Labour is Not a Commodity': The Supreme Court of Canada and Freedom of Association" (2004) 67:2 Sask L Rev 425 at 427 [Fudge, "Labour"].

B. The Intervening Years

i. Following the Labour Trilogy: A Divided Court – 1987-2000

With the Labour Trilogy, the Court had decisively failed to protect workers against government and employer power: collective bargaining was not protected by section 2(d), judicial deference was the preferred approach to labour law issues, and the *Charter* did not protect collective rights. From the beginning, though, it was clear that the SCC itself was deeply divided on the precedent that had been created.

The first major freedom of association case following the Labour Trilogy contained five separate written judgements; a clear demonstration of the conflicted and confused state of the law. In *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* ("*PIPS*"), the Court considered whether refusing to formally recognize a labour association (thereby denying them collective bargaining power) constituted a violation of the association's collective bargaining rights.[28] The majority, though fractured into four different concurring judgements, ultimately held that section 2(d) covered only the bare right to form a group and did not extend to associational activities like collective bargaining. Even Chief Justice Dickson deferred to the majority precedent in the *Alberta Reference*, agreeing that section 2(d) could only protect individual rights.[29] Because incorporation could only be a group right, not an individual right, section 2(d) could not extend to the right to formal recognition of an association.

The SCC was similarly divided in *Delisle v Canada (Deputy Attorney General)* ("*Delisle*"), which considered legislation banning the unionization of the RCMP.[30] The majority's reasons closely followed the majority decision in *PIPS*; while section 2(d) granted the freedom to join an association, it did not include any right to have that association formally recognized by statute. The Court found that legislation prohibiting RCMP members from unionizing did not infringe RCMP members' freedom of association, because this freedom does not include the right to a particular formally-recognized union. The majority's reasons reiterated the importance of judicial deference in the "complex and political field of socio-economic rights".[31] In contrast, the minority once again attempted to employ a broader, more purposive conception of collective associational rights, and favourably cited the dissent in the *Alberta Reference*.[32]

Overall, while these cases upheld the Labour Trilogy, it was abundantly clear that the SCC had not reached any kind of consensus about the appropriate application of the *Charter* to labour law. Labour activists continued to push for reform and unions continued to fight to carry cases to the SCC, hoping to finally find the protections they sought. Confusion reigned.

ii. Shift Toward Chief Justice Dickson's Model – 2000-2007

The jurisprudence began to shift slightly at the turn of the millennium, moving gradually from the previous restrained approach toward an increasingly vigorous defence of unions.[33] In 2001's *Dunmore v Canada (AG)* ("*Dunmore*"), the SCC tilted for the

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

29 *Ibid*, at 374.

30 *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 176 DLR. (4th) 513.

31 *Ibid*, at para 23.

32 *Ibid*, at para 63.

33 Section 2(b) freedom of expression cases first heralded a change in the SCC's constitutional approach to labour law. See e.g. *UFCW Local 151 v KMart Canada Ltd*, [1999] 2 SCR 1083, 176 DLR (4th) 607.

first time toward a more robust application of section 2(d).[34] In that case, a surprisingly unified court found that the exclusion of agricultural workers from Ontario's labour relations legislation infringed section 2(d).

Agricultural workers in Ontario had been granted union and collective bargaining rights under the *Agricultural Labour Relations Act, 1994* ("*ALRA*").[35] This Act was repealed in 1995, leaving only the *Labour Relations Act, 1995* ("*LRA*"), which explicitly excluded agricultural workers.[36] Certain agricultural workers challenged the repeal of the *ALRA* and their exclusion from the *LRA*. Their challenge was successful, with a majority of eight judges finding that the appellants' freedom of association had been violated. The Court held that the agricultural workers had a constitutional freedom to organize a trade association that was substantially impeded by their exclusion from the *LRA*.[37]

This case has been described as "a confusing decision that is not easily reconciled with prior jurisprudence."[38] Despite its obvious divergence from the Labour Trilogy, the Court made no explicit mention of reversing precedent. Justice Bastarache, writing for the majority, simply stated that in some situations associational freedoms will be violated even when the activities "cannot [...] be understood as the lawful activities of individuals."[39] He quoted Chief Justice Dickson's dissent from the *Alberta Reference* approvingly, saying that the passage on collective rights "was not explicitly rejected by the majority in the *Alberta Reference.*"[40]

While the majority continued to deny a constitutional right to collective bargaining, this decision marked a substantial shift toward a broader, more purposive understanding of section 2(d).[41] Whatever clarity had remained from the Labour Trilogy seemed to be in doubt. Labour litigation, already marked by the jurisprudential divisiveness of the SCC, was less predictable than ever.

Not surprisingly, while some academics and labour activists heralded the *Dunmore* decision as "revolutionary,"[42] many were not impressed. Lawyers criticized its "ambiguities and uncertainties,"[43] and labour rights supporters called it "[not] entirely satisfactory".[44] The parameters of section 2(d) became less clear. The case law thus far had been erratic and unpredictable, and previous precedent had not been officially overturned so much as conspicuously ignored. There was a lack of clarity over whether courts would return to the strict interpretation of the Labour Trilogy, or whether this case marked a permanent shift toward Chief Justice Dickson's *Alberta Reference* dissent. Over the next 10 years the SCC took the latter approach, continuing to move toward more expansive *Charter* protection of labour movements.

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

35 SO 1994, c 6.

36 SO 1995, c1 Sched A.

37 *Ibid*, at para 43.

38 John Craig & Henry Dinsdale, "A 'New Trilogy' or the Same Old Story?" (2003) 10 CLELJ 59 at 60 [Craig, "Same Old Story"].

39 *Dunmore*, *supra* 34 at para 16.

40 *Ibid*. This handily ignores that Chief Justice Dickson himself acknowledged in *PIPS* that the Court had denied the collective rights approach to freedom of association.

41 *Ibid*, at para 17.

42 Roy J Adams, "The Revolutionary Potential of Dunmore" (2003) 10 CLELJ 117.

43 Craig, "Same Old Story", *supra* note 38 at 82.

44 Patricia Hughes, "*Dunmore v Ontario (Attorney General)*: Waiting for the Other Shoe" (2003) 10 CLELJ 27 at 56.

iii. A Turning Point – 2007-2014

Explicit reversal of the Labour Trilogy's precedent finally occurred in 2007. In *Health Services and Support-Facilities Subsector Bargaining Assn. v BC* ("*BC Health Services*"), the SCC found that "the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the *Charter's* protection of freedom of association do not withstand principled scrutiny and should be rejected."[45] For the first time, the majority of the SCC recognized collective bargaining rights, albeit in a "narrowly circumscribed" way.[46] The Court held that collective bargaining was protected under section 2(d) for four main reasons.

First, the history of collective bargaining indicates that it has a long history as a fundamental right of the sort that ought to be protected by the *Charter*.[47] Second, international labour law supports recognizing the right to collective bargaining.[48] Third, protecting collective bargaining is "consistent with the *Charter*'s underlying values."[49] The *Charter* is animated by values like "human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy," all of which are promoted by the protection of collective bargaining.[50] Fourth and finally, the Court systematically refuted the reasons previously given for denying *Charter* protection of the right to collective bargaining: collective bargaining is not a recent legislative creation, judicial deference for policy issues should not create an entire "no go zone" for *Charter* jurisprudence, *Dunmore* had already determined that freedom of association is no longer restricted to individual rights, and the procedure of collective bargaining can be protected without constitutionally guaranteeing a particular outcome.[51]

Having addressed the reasons for denying *Charter* protection and explored a number of reasons supporting the inclusion of collective bargaining under freedom of association, the Court concluded that "section 2(d) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining."[52]

While this decision was praised as a "symbolic and moral victory" for the Canadian labour movement, celebrations amongst labour supporters were nonetheless qualified.[53] The scope of the protection was limited. The Court was clear that freedom of association will only be engaged when legislation "substantially interferes" with the process of collective bargaining. Further, they avoided considering the right to strike.

Labour advocates' fears were realized in *Fraser v Ontario (AG)* ("*Fraser*").[54] In that case the SCC declined to interpret *BC Health Services*' precedent in a purposive way. Farm workers in Ontario were excluded from Ontario's *Labour Relations Act*, and were instead governed by the *Agricultural Employees Protection Act, 2002* ("*AEPA*"), which provided

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45 *Health Services and Support- Facilities Subsector Bargaining Assn. v BC*, 2007 SCC 27 at para 22, [2007] 2 SCR 391.

46 Susanna Quail, "Labour Rights and Labour Politics under the *Charter*" (2014) 45:2 Ottawa L Rev 343 at 353 [Quail].

47 *Ibid*, at para 40.

48 *Ibid*, at para 70.

49 *Ibid*, at para 80.

50 *Ibid*, at para 81.

51 *Ibid*, at paras 25-30.

52 *Ibid*, at para 87.

53 Judy Fudge, "Eating Crow: The Emergence of a *Charter* Right for Workers and Unions to Engage in Collective Activities" (20 June 2007), *The Court* (blog), online: <http://www.thecourt.ca/2007/06/page/2/> archived at <https://perma.cc/VE87-C4Z2> [Fudge, "Eating Crow"].

54 *Fraser v Ontario*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

much fewer collective bargaining rights.[55] *AEPA* protected the right of agricultural workers to make collective representations to their employers and to have those representations heard in good faith, but did not protect any other aspects of meaningful collective bargaining. Despite the fact that agricultural workers were denied majority representation, grievance-based dispute resolution, and other common components of collective bargaining, the Court found that the legislation did not violate section 2(d) because it did not make good faith resolution of workplace issues between employees and their employers "effectively impossible."[56]

This extremely narrow interpretation of *BC Health Services* reinforced confusions. Even if the existence of a *Charter*-protected right to collective bargaining had technically been acknowledged, did the Court really have any appetite to protect the labour movement from anti-union governments? Had the gradual but distinct expansion of *Charter*-protected labour law been halted, or was it merely in hiatus?[57]

In short, the first three decades of jurisprudence on freedom of association and labour law were meandering and contradictory. Meanwhile, federal and provincial governments intensified their enactment of legislation that contributed to the erosion of labour rights.[58] Between 2007 and 2012 alone, the Canadian federal government tabled 6 different pieces of back-to-work legislation.[59] At the same time, multiple provincial governments introduced restrictive laws characterized by Jon Peirce as a "frontal assault on the labour movement."[60] Facing these political challenges, unions had no certainty about the level of protection they could expect from the courts. While the SCC had increasingly departed from the Labour Trilogy's original holdings, the actual scope of *Charter* protection remained unclear. In 2015, the SCC finally clarified its position.

C. New Labour Trilogy – 2015

In January 2015, the SCC released three important labour law decisions. This trilogy clarified the Court's approach to freedom of association and provided much stronger protection for workers. Taken together, these decisions demonstrated three main points: first, the Court decisively confirmed that freedom of association encompasses collective rights; second, the Court applied a broad and purposive understanding of freedom of association that includes the right to collective bargaining; and finally, this right was expanded to specifically include the right to join a union of one's choosing and the right to strike.

i. *Mounted Police Association of Ontario v Canada (AG)*

The first decision released was *Mounted Police Association of Ontario v Canada (AG)* ("*MPAO*"), wherein the SCC found that RCMP members had the right to join a union of their own choosing.[61] In *MPAO*, the Court found in favour of RCMP workers who once

55 SO 2002, c 16.

56 *Fraser, supra* note 54 at para 9.

57 Fudge, "Arc of Workplace Justice", *supra* note 17 at 98.

58 Bernie Froese-Germain, "Labour Rights, Inequality and Democracy" (2013) Canadian Teachers' Foundation Research & Information, online: <http://www.ctf-fce.ca/en/Pages/Issues/Labour-Rights-Briefing-Document.aspx> archived at <https://perma.cc/SVT7-W6QS> at 2.

59 Priya Sarin, "An Erosion of Labour Rights in Canada? It's starting to look that way", *Rabble* (May 31, 2012), online: <http://rabble.ca/columnists/2012/05/erosion-labour-rights-canada-its-starting-look-way> archived at <https://perma.cc/MK4D-Y82X>.

60 Jon Peirce, "Provinces Erode Public Sector Workers' Rights" (2008) 34 Communications Magazine.

61 *Mounted Police Association of Ontario v Canada*, 2015 SCC 1, [2015] 1 SCR 3 [*MPAO*].

again challenged their exclusion from the *Public Sector Labour Relations Act* ("*PSLRA*"),[62] and the imposition of a non-unionized labour regime.[63] Denied the union protections of the *PSLRA*, RCMP members were instead compelled to advance their workplace concerns through the Staff Relations Representative Program (SRRP).[64] This program was not "formed or chosen by members of the RCMP," and was not independent from management's influence.[65] This case was essentially a re-visitation of the same legislative scheme that the Court had considered in *Delisle*, but in this case it reached a very different conclusion. The Court justified overturning precedent in this case by referring to the incremental shifts toward a different interpretation of freedom of association enumerated in the case law above. [66]

In its reasons, the Court endorsed a "purposive and contextual approach" to section 2(d) analyses. It stated that a "generous approach" to interpreting freedom of association in the field of labour relations was necessary to "[encourage] the individual's self-fulfillment and the collective realization of human goals."[67] It also clarified that "substantial interference" remains the legal test for finding an infringement of freedom of association (not "effective impossibility," as implied in *Fraser*).[68]

Taking this approach, the SCC found that the legislative scheme in question violated section 2(d). Meaningful understanding of the right to collective bargaining must encompass workers' rights to identify and advance their workplace concerns free from management's influence. Both choice and independence are essential features of a meaningful process of collective bargaining under section 2(d): "*Charter* compliance is evaluated based on the degrees of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme."[69] Considered in this context, the SRRP offered neither adequate choice nor independence.

ii. *Royal Canadian Mounted Police v Canada (AG)*

In *Royal Canadian Mounted Police v Canada (AG)* ("*Meredith*"), the second case from the New Labour Trilogy, the Court assessed a specific aspect of the RCMP labour regime from *MPAO*.[70] Non-unionized RCMP members challenged the *Expenditure Restraint Act*, which rolled-back scheduled wage increases for RCMP members. The Court held that this rollback did not violate RCMP members' freedom of association rights because it did not substantially interfere with their right to collectively pursue workplace goals through collective bargaining.

Although *Meredith*'s "uniquely distinguishable facts" may make it difficult to draw direct analogies in the future, the decision is still notable for two key reasons.[71] First, it holds that associational activity can still attract section 2(d) rights even in the absence of

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62 SC 2003, c 22, as enacted by *Public Service Modernization Act*, SC 2003, c22, s 2, s 2(a) "employee" (d).

63 *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281, s 56.

64 *MPAO, supra* note 61 at para 2.

65 *Ibid*, at para 26.

66 *Ibid*, at para 127.

67 *Ibid*, at para 46.

68 *Ibid*, at paras 75-77.

69 *Ibid*, at para 90.

70 *Royal Canadian Mounted Police v Canada*, 2015 SCC 2, [2015] 1 SCR 125 [*Meredith*].

71 Fay Faraday, "*Meredith v Canada*: Constitutional Protection for the Right to Bargain Collectively Under the Supreme Court of Canada's New Labour Trilogy" (Paper delivered at the Canadian Foundation for Labour Rights Forum, Toronto, April 9 2015) online: <http://labourrights.ca/sites/labourrights.ca/files/documents/cflr_new_labour_trilogy_forum.pdf> archived at <https://perma.cc/322U-2RMT> at 26.

a constitutionally adequate process of collective bargaining.[72] Second, it upholds the test from *BC Health Services* and reiterates that the correct legal test for a section 2(d) violation is substantial interference with employees' collective pursuit of workplace goals.[73]

iii. *Saskatchewan Federation of Labour v Saskatchewan*

The third, and arguably most significant, of the New Labour Trilogy cases is *Saskatchewan Federation of Labour v Saskatchewan* ("*SFL*").[74] In this case, the SCC decisively reversed the original Labour Trilogy and held that the *Charter* section 2(d) protects the right to strike.

In 2007 the Government of Saskatchewan introduced two pieces of legislation, the *Trade Union Amendment Act* ("*TUAA*")[75] and the *Public Service Essential Services Act* ("*PSESA*")[76]. The *TUAA* made it easier for employees of a bargaining unit to have a union decertified as a bargaining representative. The *PSESA* allowed public sector employers to unilaterally designate employees as "essential" without any process for an independent party to review whether the employee's work was in fact necessary to prevent danger to life, health, and safety. These employees were prohibited from any work stoppage, but were not provided with any meaningful alternative dispute resolution mechanism in the event of a collective bargaining impasse. The Saskatchewan Federation of Labour challenged the validity of these Acts, arguing that both infringed the right to freedom of association.

The SCC upheld the *TUAA* as constitutional because it did not substantially interfere with the freedom to freely create or join associations, even though the trial judge had acknowledged that the *TUAA* reduced the success rate of union applications for certification.[77] The Court's approach to the *PSESA*, however, was much more dramatic.

Writing for the majority, Justice Abella held that the *PSESA* was unconstitutional. Overruling decades of precedent, the Court found that section 2(d) freedom of association encompassed a right to strike, which the *PSESA* violated by prohibiting striking for public service workers who were deemed "essential." Employing the purposive and generous approach to freedom of association laid out in *MPAO*, Justice Abella embarked on an in-depth analysis of the national and international context, history and power dynamics of unionized workplaces and work stoppages. In doing so, she turned to the "magnetic guide" of Chief Justice Dickson's *Alberta Reference* dissent.[78]

Using that dissent as a grounding point, Justice Abella's analysis was heavily animated by underlying concerns about justice, equity, and power imbalances within employment structures. She referenced the "deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in that context."[79] Within this framework, striking is a necessary tool for employees to have their concerns and needs taken seriously, and an "indispensable component" of collective bargaining.[80]

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72 *Meredith*, *supra* note 70 at paras 4, 25.
73 *Ibid*, at para 24.
74 *SFL*, *supra* note 3.
75 SS 2008, c 26.
76 SS 2008, c P-42.2.
77 *SFL*, *supra* note 3 at para 100.
78 *Ibid*, at para 63.
79 *Ibid*, at para 55.
80 *Ibid*, at para 75.

The appropriate test for whether the *Charter*'s protection of freedom of association has been infringed is "whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining."[81] Under this test, legislation that prevents employees from engaging in any work stoppage as part of the bargaining process would be a violation of section 2(d) and must be justified under section 1. Because of the lack of an independent review mechanism or meaningful alternative dispute resolution mechanisms, the *PSESA* was not minimally impairing under section 1 and therefore not *Charter* compliant. The SCC declared the legislation invalid, with a one-year suspension of invalidity to allow the Government of Saskatchewan to enact new legislation.

iv. Response to the New Labour Trilogy

Unions and labour advocates were thrilled with the rulings, triumphantly claiming the decisions as a "huge victory" for labour rights.[82] Many heralding the rulings as a definitive sign that the SCC has abandoned its history of inadequate protection of workers.[83] In particular, the clear defense of the importance of collective bargaining and the reiteration that collective rights are an important part of equity movements in Canada were greeted as "progressive" and "optimistic."[84]

This support, however, was far from unanimous. Critics derided the Court's lack of respect for precedent. Lawyer Asher Honickman called *SFL* "arguably [the SCC's] most troubling decision of the 21st century."[85] A common thread in critiques of this case was fear about the resulting uncertainty. Many debated whether the gradual shift in approach appropriately met the threshold of "significant change in the law" established in *Bedford v Canada* ("*Bedford*") as the requirement for overturning precedent.[86] The Court's arguably casual dismissal of precedent was unsettling, indicating the potential for disruptive uncertainty both in the realm of labour law and for *Charter* jurisprudence more broadly.[87]

II. REFLECTION AND UNANSWERED QUESTIONS

The New Labour Trilogy does leave uncertainty for labour law, but not to an extent that should be cause for alarm.[88] For two main reasons, I argue that such concerns about the New Labour Trilogy overstate the extent of the uncertainty. First, freedom of association jurisprudence has never really been certain. Therefore, the concern that employers will

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81 *Ibid*, at para 78.

82 Mary Thibodeau, "Solidarity Forever! A Right to Strike is Recognized in *Saskatchewan Federation of Labour v Saskatchewan*", *The Court* (February 4, 2015), online: <https://www.thecourt.ca/solidarity-forever-a-right-to-strike-is-recognized-in-saskatchewan-federation-of-labour-v-saskatchewan/> archived at <https://perma.cc/6NXR-KU3G>.

83 Fudge, "Arc of Workplace Justice", *supra* note 17 at 108.

84 Jim Clancy, "Foreword" (2015) Canadian Foundation for Labour Rights Forum Report online: <http://labourrights.ca/sites/labourrights.ca/files/documents/cflr_new_labour_trilogy_forum.pdf> archived at <https://perma.cc/322U-2RMT> at 3.

85 Asher Honickman, "A Troubling Decision on the Right to Strike", *The National Post* (February 11 2015), online: <http://news.nationalpost.com/full-comment/asher-honickman-a-troubling-decision-on-the-right-to-strike> archived at <https://perma.cc/Y5N4-4JQ8>.

86 *Bedford v Canada*, 2013 SCC 72, [2013] 3 SCR 1101.

87 Janelle Souter, "'Clearly the Arc Bends': *Stare Decisis* and *Saskatchewan Federation of Labour v Saskatchewan*" (2015) 78 Sask L Rev 397.

88 For the purposes of this paper, I will not address the broader questions of *Bedford* and *stare decisis* thresholds. Instead, I will focus on the New Labour Trilogy's substantive precedents.

now face a "wave of costly and time-consuming litigation" is exaggerated.[89] As discussed above, the divisiveness of the Court has always encouraged labour activists and unions toward litigation in attempts to disrupt the status quo. Second, while the New Labour trilogy does overturn precedent, this reversal is not an abrupt about-face but rather the reasonable culmination of decades of incremental shifting toward increased worker protection. As Justice Abella herself wrote in *SFL*, "clearly the arc bends increasingly toward workplace justice."[90]

With that said, there are still some marked areas of uncertainty that will need to be addressed. Although there are many issues at play, the second section of this paper will focus on three key questions. First, I will examine the extent to which the *Charter*-protected right to strike will be applicable to various different types of strike legislation. Second, I will explore the impact that this trilogy may have on collective rights in Canada more broadly. Third, I will speak to whether these decisions are truly indicative of decisive victories for the labour movement.

A. How Will *SFL* Impact Other Strike-Restricting Scenarios?

SFL's applicability to different types of strikes and legislation remains to be seen, but this uncertainty should not in itself be a cause for concern. While some have called these future cases "impossible to predict," the reasoning in *SFL* is adequately robust and extensive for future courts to apply a similar analysis to different scenarios.[91] While there is still some uncertainty regarding the particulars of how strike jurisprudence will evolve, the Court has provided a meaningful framework that can be generalized to different types of strike legislation.

SFL dealt with what was essentially a blanket prohibition on striking for the purposes of collective bargaining. The *PSESA* put a tremendous amount of unilateral power in the hands of public sector employers without offering any outside checks or meaningful alternatives for dispute resolution. It remains to be seen how the test for section 2(d) will apply to legislation that does not prohibit all work stoppages, especially in the case of back-to-work laws and non-collective bargaining strikes.

Lawyer Paul Cavalluzzo identified multiples types of strikes that could be impacted by this holding, notably: a) essential service limitations on public sector strikes (often called "controlled strikes" because the legislation controls which non-essential employees retain the right to strike); b) non-collective bargaining strikes, including strikes for political purposes; and c) back-to-work laws. [92] [93] It seems clear in some of these areas that a *Charter*-protected right to strike will be found to exist and the bulk of future discussion will take part in the section 1 analysis. In others, it is unlikely that a *Charter*-protected right to strike will be found at all.

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89 John Craig & Christopher Pigott, "The New Labour Trilogy: Supreme Court Reshapes Labour Law (Again)" (March 11 2015), *Faskin Martineau DuMoulin LLP* online: <http://www.fasken.com/the-new-labour-trilogy-the-supreme-court-of-canada-reshapes-labour-law-again/> archived at <https://perma.cc/7JUV-AR2G> [Craig, "Trilogy"].

90 *SFL*, *supra* note 3 at para 1.

91 Craig, "Trilogy", *supra* note 89.

92 Paul Cavalluzzo, "The Impact of *Saskatchewan Federation of Labour* on Future Constitutional Challenges" (Paper delivered at the Canadian Foundation for Labour Rights Forum, Toronto, April 9 2015) online: <http://labourrights.ca/sites/labourrights.ca/files/documents/cflr_new_labour_trilogy_forum.pdf> archived at <https://perma.cc/322U-2RMT> at 9 [Cavalluzzo].

93 *Ibid*, at 9-10.

i. Essential Services Legislation and Controlled Strikes

The Court will likely find that a right to strike exists in scenarios analogous to *SFL*, when other essential services legislation controls or limits the right to strike for particular categories of public sector workers. The Court in *SFL* established that deprivation of the right to strike will meet the section 2(d) threshold of substantial interference with collective bargaining rights. Future cases are therefore likely to hinge on the section 1 analysis, as the burden shifts to the government to prove that the legislation is demonstrably justified in a free and democratic society. To do so, the government must first demonstrate that the objective of the legislation is pressing and substantial, and then show that the means used are proportional, rationally connected to the objective, and minimally impairing of rights.[94] Because of the uncontroversial importance of maintaining citizens' health and safety, it seems likely that essential services legislation will generally be considered a pressing and substantial objective. Therefore, future court challenges will likely revolve around "whether the legislative means adopted to attain these objectives are reasonable and proportional in the circumstances."[95]

While the exact parameters binding strike-infringing legislation have not been thoroughly established, the Court in *SFL* provided some clear signposts. As discussed above, the SCC has indicated two critical components of a minimally-impairing legislative response: access to a meaningful dispute mechanism process to resolve collective bargaining impasses, and an independent body to review which employees are designated as "essential." What exactly a meaningful dispute resolution looks like has not yet been authoritatively established, and future cases will almost certainly call for "careful consideration."[96] At the very least, the New Labour Trilogy provides an outline for future analysis.

ii. Non-Collective Bargaining Strikes, Including Political Strikes

The Court in *SFL* ties the entirety of its section 2(d) analysis to the importance of collective bargaining, and distinguishes collective bargaining strikes from other strikes.[97] There is little established framework on which to base an argument for the protection of non-collective bargaining strikes. As a result, the *Charter* is least likely to protect work stoppages occurring outside of scheduled collective bargaining.

With that said, the Court has clearly been on a path of broadening the scope of freedom of expression, with a focus on inequality and the importance of collective labour movements in addressing workplace power discrepancies. It is conceivable that this trend could continue into the realm of non-collective bargaining strikes, especially political strikes that are used to protest the working conditions and environment of workers. For example, in *General Motors of Canada Ltd v CAW-Canada*, GM workers staged a strike contrary to the *Labour Relations Act* and GM's collective agreement.[98] This strike was deliberately intended to protest the proposed labour policies of the recently elected provincial government. The union argued that the employer had the resources and power to participate in government lobbying, and would benefit from proposed legislative changes to the detriment of the union. The union's work stoppage attempted to address this inequality in political power by "adopting a means tailored to the social situation of workers […] who lack the resources available to employers."[99] Ultimately, the Ontario

94 *R v Oakes*, [1986] 1SCR 103, 26 DLR (4th) 200.
95 *Ibid*, at 10.
96 Barrett, *supra* note 2 at 240.
97 *SFL*, *supra* note 3 at paras 43-45.
98 *Bedford v Canada*, [1996] OLRB Rep 409, 1996 CarswellOnt 4196 at para 2.
99 *Ibid*, *at* para 35.

Labour Relations Board found that the strike constituted expressive activity for the purposes of section 2(b),[100] but that legislation prohibiting striking during a collective agreement was demonstrably justifiable under section 1.[101]

With the SCC having since indicated a willingness to expand 2(d) for equity-driven reasons, this tribunal decision may hold relevant analogies. If a government is passing legislation that erodes the rights of workers and unions while in the middle of a collective agreement, and individual employees combined do not have lobbying power that is equal to corporations, union-endorsed strikes could be an effective tool to promote equality. It is possible that the nature of power dynamics in a workplace and the recognized effective nature of work stoppages could lead the Court to recognize the right to political strikes.

However, there are strong practical and ideological reasons to limit striking to collective bargaining. This restriction came into being as a "trade-off": employers received the guarantee of stability that came from limiting striking to certain contexts and workers received "a bundle" of significant, enforceable rights in exchange, including the right to keep their job after a strike.[102] Allowing work stoppages to occur erratically outside of collective bargaining undermines the stability and fairness of this trade-off. Even if the right to political strikes is recognized under the *Charter*, section 1 analyses will likely justify the constitutionality of legislation restricting strikes to collective bargaining periods.

iii. Back to Work Laws

Finally, the Court will have to determine how the precedent from *SFL* will apply to back-to-work legislation. In these scenarios, union workers are not pre-emptively denied the right to strike but are forced back to work by the passage of legislation after a collective bargaining strike has already begun. In 2015, Cavalluzzo argued that these laws "should be found unconstitutional […] in that they substantially interfere with collective bargaining for no justifiable reason."[103]

The Ontario Superior Court recently endorsed this perspective in *CUPW/STTP v Canada (AG)* (*CUPW*), where Justice Firestone held that the *Restoring Mail Delivery for Canadians Act*[104] was unconstitutional.[105] This legislation, passed in response to a labour dispute between Canada Post and the Canadian Union of Postal Workers that had escalated to rotating strikes and a nation-wide lockout, forced "the immediate resumption of postal services."[106] In doing so, the Act imposed an arbitration process wherein the arbitrator, unilaterally selected by the government, would select one party's final offer in its entirety rather than drawing on both.[107]

Justice Firestone held that this legislation engaged section 2(d) right to strike protections, and was not justified under section 1. Even though this legislation did not prohibit the *possibility* of engaging in work stoppages, it still substantially interfered with collective bargaining because it disrupted the balance between employer and employees.[108] The work stoppages had been actively "contributing to a meaningful process of collective

100 *Ibid*, at para 137.
101 *Ibid*, at para 173.
102 Judy Fudge & Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History" (2010) 15:2 CLELJ 333 at 350.
103 Cavalluzzo, *supra* note 92 at 12.
104 SC 2011, c 17.
105 *CUPW/STTP v Canada (AG) (CUPW)*, 2016 ONSC 418, 130 OR (3d) 175 [*CUPW*].
106 *Ibid*, at para 1.
107 *Ibid*, at para 18.
108 *Ibid*, at para 183.

bargaining" when they were taken away.[109] In his section 1 analysis Justice Firestone accepted that the back-to-work legislation was pressing and substantial.[110] However, he held that it was not minimally impairing because the arbitration regime imposed was "ineffective…inadequate," and was not impartial.[111]

Throughout the case, Justice Firestone relied heavily on *SFL*, applying the same test and analysis. His judgment is a clear example of how the precedent can be meaningfully applied to different scenarios.

Overall, while *SFL* may have been restricted to a particular fact scenario, the clear reasoning and thoroughly-explored motivations should provide helpful signposts for future courts and litigants. A measure of uncertainty will likely persist until the courts have decisively analysed the right to strike in a variety of different contexts. The uncertainty raised in this area overall, however, is surmountable.

B. What Will This Mean for Collective Rights in Canada?

The New Labour Trilogy also raises questions about whether future *Charter* analyses will similarly adopt a more nuanced, less individualistic view of rights. Collective rights are embedded in the *Charter* in three key areas: the protection of minority language rights in section 23, Aboriginal and treaty rights in section 25, and the multicultural interpretive provision in section 27.[112] The rest of the *Charter*, and the vast majority of *Charter* case law, has been heavily focused on the discrete rights of the individual.

The original Labour Trilogy typified this individualistic approach. Despite the inherently collective connotations of association, Justice McIntyre refused the possibility of collective section 2(d) rights, stating that "people, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess."[113]

This standpoint, already thrown into question in *Dunmore*, was decisively set-aside in *MPAO*. "Recognizing group or collective rights complements rather than undercuts individual rights," the Court held. "Both are essential for full *Charter* protection."[114] This holding is consistent with academic scholarship that has critiqued individualistic human rights approaches as a neoliberal regime incapable of adequately addressing equity concerns.[115] Not only is it difficult for an individual alone to effectively overcome entrenched systemic inequalities, a purely individualistic rights-based approach can actually "reinforce rather than challenge" existing social inequities.[116] "[B]y framing struggle and resistance in terms of legal and individual remedies which, if successful, lead to small individual improvements and a marginal re-arrangement of the social edifice," individual human rights analyses obscure the systemic roots of inequality and resistance.[117]

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109 *Ibid*, at para 186.

110 *Ibid*, at para 201. Thereby declining to accept a section 1 analysis of 2(d) wherein *only* essential services legislation could be considered pressing and substantial.

111 *CUPW*, *supra* note 105 at paras 214, 217.

112 Errol P Mendes, "The *Charter* and its Constitutional Lineage: An Evolving Template of Distributive Justice for Reconciling Diversity, Collective Rights of National Minorities and Individual Rights?" (2007) 22:1 NJCL 61 at 80 [Mendes].

113 *Alberta Reference*, *supra* note 4, at para 156.

114 *MPAO*, *supra* note 61 at para 65.

115 See e.g. Maureen Ramsay, *What's Wrong with Liberalism? A Radical Critique of Liberal Philosophy* (New York: Continuum, 2004).

116 Costas Douzinas, "The Paradoxes of Human Rights" (2013) 20:1 Constellations: an International Journal of Critical and Democratic Theory 51 at Thesis 5.

117 *Ibid*, at Thesis 5.

MPAO addresses the limitations of individual rights within the specific context of labour law. At its heart, "section 2(d) of the *Charter* is aimed at reducing social imbalances."[118] These imbalances are deeply entrenched in the workplace, where employers hold substantially more systemic and structural power than employees do individually. The SCC acknowledges that a collective approach is needed to address these inequalities, and that a purposive reading of section 2(d) protects "the right to join with others to meet on more equal terms the power and strength of other groups and entities."[119]

The analysis in *MPAO* indicates a deeper and more nuanced understanding of the structures of inequality than the original Labour Trilogy. However, I suggest that this decision likely does not indicate that the SCC will immediately introduce further uncertainty by recognizing collective rights in other areas of the *Charter*. The analysis provided within *MPAO* is confined specifically to labour movements, and provides little in the way of examples of how this could play out outside of section 2(d) of the *Charter*. In addition, "association" seems inherently and almost explicitly collective, as are the other sections where collective rights have been recognized. Other *Charter* rights are much more explicitly framed as individual rights. It seems unlikely that the Court will drastically overhaul its analysis of those *Charter* rights in the near future.

Even if *MPAO* does not signify a dramatic shift in substantive approach, it does show an inclination toward a more sensitive analysis. If nothing else, this decision indicates that the SCC is thinking about rights in a more nuanced, less individualistic way. This is good news, as legal scholar Errol Mendes suggests that collective rights are "the very marrow of minority rights."[120] The Court's willingness to endorse some of the animating principles behind collective rights, such as recognition of the realities of structural and systemic inequality, is hopeful for future analyses of other *Charter* rights.

This shift in mindset is a welcome one. A purely individualistic approach to rights has, at best, been ineffective in addressing inequalities.[121] There are strong arguments that achieving meaningful equality requires recognizing group rights in conjunction with universal human rights.[122] Collective rights, if employed by a disadvantaged group to "limit the economic or political power exercised by the larger society over the group," can effectively move diverse societies toward equality without undermining individual rights.[123] The fact that the SCC has gradually moved toward adopting this framework of analysis is a hopeful shift away from neoliberal analyses toward a more robust understanding of complex inequalities.

Overall, the explicit recognition of collective rights in the New Labour Trilogy is unlikely to substantially disrupt future *Charter* jurisprudence. Rather, it provides an illuminating example of a multi-layered critical analysis that is sensitive to the realities of power.

C. To What Extent Will These Cases Benefit Labour Law in Canada?

Even from a pro-labour perspective, there are reasons to be concerned that the New Labour Trilogy may not live up to expectations. The final section of this paper will canvas three critiques of the New Labour Trilogy that have been advanced from a labour-rights perspective: one, that *SFL* still contains an unsettling precedent that could allow

118 *MPAO*, *supra* note 61 at para 59.

119 *Ibid*, at para 66.

120 Mendes, *supra* note 112 at 75.

121 Samuel Moyn, "A Powerless Companion: Human Rights in the Age of Neoliberalism" (2014) 77:4 Law & Contemp Probs 147 at 151.

122 See e.g. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

123 *Ibid*, at 7.

governments to erode union power; two, that the relevance of unions has shrunk in recent years, and victories for labour movements are inadequate to protect the majority of workers and workplace inequalities; and three, that the shift of union mobilizing from the political realm to the courts erodes the power of grassroots workers and perpetuates unequal distributions of power.

I argue that these concerns are legitimate and that the New Labour Trilogy on its own cannot address the increasing power of political and corporate interests against workers' rights. With that said, *Charter* litigation still has an important and effective role to play in achieving workplace equality when used in conjunction with grassroots workers' movements. Although the New Labour Trilogy is not a panacea, it has the potential to be an effective tool for unions and pro-labour lawyers.

i. Does *SFL* Allow Governments to Continue Undermining Union Power?

Despite being widely praised by labour advocates, *SFL* still raises cause for concern. While issuing a suspended declaration of invalidity for strike-prohibiting sections of the *PSESA*, the SCC nonetheless upheld the constitutionality of the *TUAA*. As discussed above, this legislation introduced stricter requirements for a union to be certified and loosened the requirements for decertification.[124] The Court held that this did not constitute substantial interference with the collective bargaining process. In doing so, the Court left room for governments hostile to labour movements to erode union power. The right to strike applies only to unionized workplaces. By allowing governments to create bureaucratic roadblocks to certified unionization, the Court left the door open to government intervention with labour movements.

The extent to which this precedent will allow governments to undercut unionization remains to be seen. In *MPAO* the Court was clear that workers have the right to join a union. In *Meredith*, the Court found that section 2(d) could apply to collective action even outside of a formally-recognized union structure. The finding in *SFL* has not removed these protections, but merely found that the government's interference did not meet the threshold for substantial interference in that particular scenario. Given the hostility of recent governments to labour movements, however, allowing room for governments to stifle effective union certification is still concerning.[125] This concern is particularly acute given the decline in union power discussed in the following section.

ii. Are Labour Movements Irrelevant for Workers' Rights?

A common critique of the New Labour Trilogy is that the labour movement is on the decline and that victories for unions are increasingly less relevant for the majority of workers. Between 1981 and 2012, unionization rates declined in every Canadian province, from a federal average of 38% of Canadian workers to 30%.[126] At the same time, wages for unionized workers have "stagnated."[127] Unions are increasingly seen as unwilling or unable to play the radically political, workers-rights-driven role that they historically held.[128]

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124 *SFL*, *supra* note 3 at paras 14-15.

125 Canadian Foundation for Labour Rights, "Restrictive Labour Laws in Canada", updated January 2016, online: <http://labourrights.ca/print/61> archived at <https://perma.cc/P9FU-VRAV>.

126 Diane Galarneau & Thao Sohn, "Long-term Trends in Unionization" (2013) *Insights on Canadian Society*, Statistics Canada Catalogue no 75-006-X [Galarneau].

127 Quail, *supra* note 46 at 357.

128 See e.g. Brad Walchuk, "Union Democracy and Labour Rights: A Cautionary Tale". (2011) 2:2 Global Labour J 106.

Within this context, it remains to be seen whether constitutional protection can revitalize collective bargaining and unions, or whether they will continue to slide toward obscurity. Judy Fudge, an eminent labour movement lawyer and scholar, suggests that "while it is heartening for people who are concerned with the dignity of workers that the SCC has elevated collective bargaining to a constitutional right, it is unlikely that defensive battles fought in courts can turn the economic and political tide that has undermined the basis for transforming these rights into job security and improved wages for working people."[129] On the other hand, Susanna Quail suggests that the SCC's approach to constitutionalizing collective movements has been sufficiently flexible that it should be relevant to future labour movements, even if current union structures fall to disuse.[130]

I would add two brief comments to this discussion: first, the statistics tell a slightly more complicated story about the decline of unionization. Decline in Canadian unionization was precipitous between 1981 and 1999, but rates between 1999 and 2012 held relatively steady and even rose in some provinces.[131] In particular, it is interesting to note that unionization rates have *not* declined for women workers.[132] From an equity-driven perspective this may be significant given the historic and ongoing vulnerability of female workers,[133] who are more likely to be precariously employed,[134] and who continue to experience a "wage gap" relative to men for paid labour.[135]

Second, the Court's recent shift toward addressing workplace inequalities has not been limited to labour law. The SCC found in 2016 that federally-regulated employers could not fire non-unionized employees without cause.[136] While the bulk of the Court's reasons were concerned with the appropriate standard for judicial review, it is still interesting to see the expansion of non-unionized employee protections so soon after a series of cases expanded protections for unionized workers.

iii. Does *Charter* Litigation Erode the Political Effectiveness of Labour Movements?

Finally, labour activists have criticized the overall trend of shifting the labour movement into the legal sphere. Unions have historically often played a radical and deeply political role: they have been at the forefront of agitating for crucial rights such as shorter workweeks, workplace safety standards, and parental benefits.[137] But as the struggle moves "from workplaces and public spaces to courtrooms, control shifts from the hands of workers to the hands of union bureaucrats and lawyers."[138] This shift risks perpetuating the very inequalities of power that unions are intended to combat.

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129 Fudge, "Eating Crow", *supra* note 53.

130 Quail, *supra* note 46 at 358-359.

131 Galarneau, *supra* note 126 at 3.

132 *Ibid*, at 2.

133 On the feminization of poverty in Canada generally, see e.g. Monica Townson, "A Report Card on Women and Poverty", (2000) Canadian Centre for Policy Alternatives, online: <http://policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/women_poverty.pdf> archived at <https://perma.cc/BE67-3WGH>.

134 "Women and Precarious Work: a Framework for Policy Recommendations", (2005) Oxfam Canada at ii.

135 *The Global Gender Gap Report 2016*, World Economic Forum, online: <http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Gap_Report_2016.pdf> archived at <https://perma.cc/H5US-7DQK>.

136 *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, 2016 CarswellNat 2998.

137 Canadian Labour Congress, "History of Labour in Canada", (2015) online: <http://canadianlabour.ca/why-unions/history-labour-canada> archived at <https://perma.cc/5RG5-64Q3>.

138 Quail, *supra* note 46 at 356.

This issue is a very real concern, and labour advocates and organizers should be cautious. However, it does not completely invalidate the victories in the New Labour Trilogy. First, a large part of the labour critique of litigation is that the *Charter*'s "fundamentally liberal, individualized conception of rights" is inherently incompatible with labour values, and "to pursue these claims in court is to accept and buttress a paradigm fundamentally opposed to the organizing principles and political underpinnings of unionism."[139] As discussed above, though, the New Labour Trilogy is *not* based on individualistic rights-doctrines, but rather on a complex understanding of collective movements and power.

Second, it is not clear that *Charter* litigation and grassroots movements are necessarily mutually exclusive. Litigation has been one strategy used when governments hostile to labour movements have reduced the effectiveness of other mobilization tactics.[140] It is possible that the legal affirmation of labour rights, coupled with the recent change in federal government, may shift the political environment sufficiently that grassroots political organizing can once again become a powerful and effective tool. In this sense, the New Labour Trilogy both increases the legal strength of unions and workers, and reaffirms the importance and power of collective action. It does not confirm that litigation is the only effective strategy, but does show that litigation can be used in conjunction with other grassroots mobilization as an important tactical tool.

CONCLUSION

After 30 years of convoluted case law that simultaneously failed to produce clarity and failed to provide any meaningful protection to workers, the New Labour Trilogy is a welcome development. These cases raise serious questions as to how freedom of association will develop within the field of labour law, and deeper questions about the fundamental nature of *Charter* rights. This uncertainty is not negligible; courts, lawyers, and workers will have to work to produce answers. But Canada has long recognized that "growth and expansion" are critical aspects of our constitution,[141] and accepting the status quo can mean accepting ongoing marginalization and oppression. As the Court increasingly comes to apply a more nuanced and equity-driven critical lens to *Charter* questions, it will have to upset historical decisions and overturn precedent. These changes can be startling and produce great uncertainty. However, they are nonetheless a necessary component of a living constitution that must adapt to an evolving understanding of rights, freedoms, and equality.

139 *Ibid*, at 359-360.

140 *Ibid*, at 364.

141 *Reference re a Reference as to Meaning of Word "Persons" in Section 24 of British North American Act, 1867*, [1929] UKPC 86, 1929 CarswellNat2 at para 54.

ARTICLE

LEGAL TECHNOLOGY: ARTIFICIAL INTELLIGENCE AND THE FUTURE OF LAW PRACTICE

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Lawyers are increasingly told that advanced technology is coming soon to their doorsteps and will radically change the nature of their work. Such premonitions are often vague and not particularly threatening to a profession that has happily operated in much the same way for over a century. This paper examines the notion that technology will radically disrupt the legal profession by first describing the drivers of modern technological progress and the recent rise of artificial intelligence (AI). It then considers what current technology trends might mean for the legal profession, concluding that technology is likely, in a relatively short period of time, to transform how legal services are delivered.

I. THE SECOND MACHINE AGE

In their book *The Second Machine Age*,[1] Eric Brynjolfsson and Andrew McAfee argue that humanity is on the brink of massive technological breakthrough. Drawing on anthropologist Ian Morris' work,[2] Brynjolfsson and McAfee point out that human social development[3] was relatively gradual until technological developments in the late eighteenth century bent the curve exponentially.[4] In particular, the steam engine enabled previously unimaginable physical feats, leading to mass production, mass transportation, and railways.[5] As Morris writes, "Even though [the steam] revolution took several decades to unfold… it was nonetheless the biggest and fastest transformation in the entire history of the world."[6] This transformation ushered in what the authors call the 'first machine age.'

A. The Foundations, Impact, and Pace of Change

Brynjolfsson and McAfee argue that a 'second machine age' is imminent and that it will be as transformative as the first one. The authors offer three reasons why the second machine age is imminent. The first reason, exponential technological progress, refers to the fact that computing power per dollar has doubled roughly every eighteen months since the 1960s, a phenomenal known as "Moore's Law".[7] To illustrate the pace of exponential growth, the authors note that the fastest supercomputer in the world in 1997, which cost $55 million and was nearly the size of a tennis court, was matched nine years later by a $500 video game system, the Sony PlayStation 3.[8] If this pace of technological progress continues—and at present there is little reason to think otherwise[9]—the average desktop computer will have the same processing power as the human brain by 2020 and have more processing power than all of humanity by 2050.[10]

The second reason why the authors believe the second machine age is imminent is the nature of digital information. Digital information has two unique economic properties

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1 Eric Brynjolfsson and Andrew McAfee, *The Second Machine Age* (USA: W. W. Norton & Company Inc., 2014) [Brynjolfsson and McAfee].

2 See Ian Morris, *Why the West Rules – For Now: Patterns of History, and What They Reveal About the Future* (New York: Farrar, Straus and Giroux, 2010) [Morris].

3 *Ibid*. Morris defines human social development as consisting of four attributes: energy capture, organization, war-making capability, and information technology.

4 McAfee & Brynjolfsson, *supra* note 1, at 6.

5 *Ibid*.

6 Morris, *supra* note 2, at 497.

7 McAfee & Brynjolfsson, *supra* note 1, at 41.

8 *Ibid*, at 49.

9 Michael Kanellos, "Moore's Law to Roll on for Another Decade," *CNET* (11 Feb 2013), online: <http://www.cnet.com/news/moores-law-to-roll-on-for-another-decade/> archived at <https://perma.cc/HRY7-GSEZ>.

10 Ray Kurzweil, *The Age of Spiritual Machines: When Computers Exceed Human Intelligence* (London: Penguin, 2000).

that give it advantages over other forms of information. First, it is non-rival, meaning that "digital information is not 'used up' when it is used."[11] Second, it costs almost nothing to reproduce quickly.[12] These properties combine to make digital information incredibly useful as a free (or nearly free), precise, and instant resource.[13]

Finally, the authors believe that the second machine age is imminent because it is easier now than ever to combine ideas to innovate. Innovation occurs, the authors contend, not by inventing something new from scratch, but instead by combining existing ideas in a new way.[14] They contend that the best way to encourage innovation is to increase the human capacity to test new ideas.[15] One way to do this is by involving more people in the testing process to increase the probability that a valuable recombinant idea will emerge and, as the McAfee and Brynjolfsson note, "digital technologies are making it possible for ever more people to participate."[16] This phenomenon is known as crowdsourcing and can have impressive results. Organizations ranging from Allstate Insurance to NASA have crowdsourced solutions to problems that they could not solve internally, with solutions often coming from persons whose expertise is well outside the domain of the problem.[17]

Due to exponential growth, digital information and combinatorial innovation, the authors contend that the second machine age will be as transformative of the first one.[18] New computer technologies, they argue, are breaking down barriers in much the same way that mechanical innovations did to create the first machine age: "[c]omputers and digital advances are doing for mental power—the ability to use our brains to understand and shape our environments—what the steam engine and its descendants did for muscle power."[19] As our mental power increases with new technologies, opportunity for progress expands almost inconceivably quickly.

B. AI in the Second Machine Age

The next frontier along the path of blistering technological advance, according to McAfee and Brynjolfsson, is the maturing of the artificial intelligence era. After AI became a formal field in 1956 and AI research programs became established around the world, expectations were high. One prominent AI theorist (and eventual Nobel Laureate) predicted that "machines will be capable, within twenty years, of doing any work a man can do," and another leader in the field declared that "within a generation… the problem of creating 'artificial intelligence' will be solved."[20] However, progress was slow and government funding and interest in AI research plummeted in the mid-1970s, leading to a period known as the "AI winter" that lasted until 1980.[21] After a brief rally in AI interest around expert systems in the early 1980s, a second AI winter set in and funding for research was scarce until the mid-1990s.[22]

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11 McAfee & Brynjolfsson, *supra* note 1, at 62.

12 *Ibid*.

13 *Ibid*.

14 *Ibid*, at 83.

15 *Ibid*.

16 *Ibid*.

17 *Ibid*, at 84-85.

18 *Ibid*, at 7-8.

19 *Ibid*.

20 Daniel Crevier, *AI: The Tumultuous History of the Search for Artificial Intelligence* (New York: Basic Books, 1994) at 109; quoting Herbert Simon and Marvin Minsky, respectively.

21 Tanya Lewis, "A Brief History of Artificial Intelligence", Livescience (4 December 2014), online: <http://www.livescience.com/49007-history-of-artificial-intelligence.html>, archived at <https://perma.cc/8WE5-YQM2>.

22 Pamela McCorduck, *Machines Who Think* 2nd ed (San Francisco: CRC Press, 2004) at 430-435.

Despite its poor record of progress and good reasons for doubt, AI would achieve its greatest successes in the later 1990s and early 21st century. In 1997, an AI program became the first computer world chess champion and in 2011 another AI program called "Watson" won *Jeopardy!*.[23] More recently, AI programs have been behind some of the most cutting-edge developments of the era, including 3D printing and self-driving cars.[24] Given the recent unprecedented period of success in AI, there is reason to believe that the field is less at risk of falling into another AI winter.

McAfee and Brynjolfsson argue that these developments are merely "warm-up acts" to the imminent rise of AI. The authors contend that the exponential, digital and recombinant forces of the second machine age have enabled "two of the most important one-time events in [human] history: the emergence of real, useful artificial intelligence (AI) and the connection of most of the people on the planet via a common digital network."[25] If some of the more recent AI developments seem more amusing than useful (for example, Watson's *Jeopardy!* win), the authors note developing AI technologies that may give key aspects of sight to the visually impaired, restore hearing to the deaf and allow quadriplegics to control wheelchairs with their thoughts.[26]

In addition to useful AI, the authors emphasize the impact of the ongoing shift to connecting billions of people with the world's collective knowledge via mobile phones and networks. As the theory goes, with more human brains accessing information through communication technologies, humanity will generate and exchange more ideas and recombinant innovation will flourish.[27] These two events combined are, to the authors, more important than anything since the industrial revolution and "will make a mockery out of all that came before."[28] If McAfee and Brynjolsson are even half right, then AI technologies will have a major impact on society in the coming decade. The next section of this paper considers what this change will mean for the future of law practice.

II. THE SECOND MACHINE AGE AND LAW PRACTICE

A. Drivers of Change in the Legal Market

Richard Susskind has been thinking and writing about the future of legal practice for decades. In his 2013 book *Tomorrow's Lawyers: An Introduction to Your Future*,[29] Susskind sums up his most recent vision for the future of legal services. In short, he predicts radical change in the next ten years brought about, in part, by emerging technologies.

Susskind identifies three primary drivers of change in the legal market: the "more-for-less" challenge, liberalization in business structures, and information technology.[30] Susskind suggests that information technology is perhaps the most misunderstood and under-appreciated catalyst of change in legal service delivery.[31] He notes that many lawyers believe information technology is overhyped and point to the "dot-com bubble" as an

23 John Markoff, "Computer Wins on 'Jeopardy!': Trivial, It's Not" *The New York Times* (16 February 2011).

24 McAfee & Brynjolfsson, *supra* note 1, at 90.

25 *Ibid*.

26 *Ibid*, at 92.

27 *Ibid*, at 93-96.

28 *Ibid*, at 90.

29 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (United Kingdom: Oxford University Press, 2013) [Susskind].

30 *Ibid*, at 10. The more-for-less challenge describes the increasing pressure on law firms to deliver more legal services for less money. Liberalization refers to the relaxation of laws and regulations that govern who can offer legal services and what types of businesses can offer legal services.

31 *Ibid*.

example.[32] Susskind argues that this perspective misses the larger trend, exemplified by the persistence of Moore's Law, the astounding growth of accessible digital information,[33] and accelerating advances in AI.[34]

B. The New Division of Labour and Moravec's Paradox

One reason technological enthusiasts believe law practice will change soon is because of the compatibility between the abilities of computers and the nature of legal work. Legal work requires intelligence and analytical skills but not necessarily physical capabilities. As it turns out, computers can be programmed to do high-level reasoning relatively easily but struggle mightily with low-level sensorimotor tasks—a principle known as Moravec's paradox.[35] As cognitive scientist Steven Pinker explains:

> The main lesson of thirty-five years of AI research is that the hard problems are easy and the easy problems are hard… As the new generation of intelligent devices appears it will be the stock analysts and petrochemical engineers and parole board members who are in danger of being replaced by machines. The gardeners, receptionists, and cooks are secure in their jobs for decades to come.[36]

Therefore, legal professionals who predominantly use high-level reasoning in their work, rather than nuanced sensorimotor skills, are vulnerable to change brought about by developments in AI.

Second, computers are good at following rules but are bad at pattern recognition. In their 2005 book *The New Division of Labour*,[37] Frank Levy and Richard Murnane explain this now well-publicized insight. The decision-making process regarding whether to provide an applicant with a mortgage, for example, can be expressed in a rule (an algorithm) that includes the mortgage amount and the applicant's financial details. As a result, computers are good at mortgage evaluations. Conversely, the work of scientists or novelists, for example, involves more complex and creative pattern recognition that is difficult to translate into digestible rules for computers.

Arguably, there are many rule-based tasks in legal practice that computers can perform better and more efficiently than humans. One example in practice today is "e-discovery" software, which uses specifically programmed algorithms to determine the relevance of a given set of documents. Perhaps predictably, the legal profession was initially reluctant to give a computer control of a task that could have grave consequences if performed poorly and insisted on having humans do the work of discovery. However, Maura Grossman and Gordon Cormack, in their seminal 2011 article, debunk the myth that manual human review of discovery documents is the most accurate form of review.[38] Instead,

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32 *Ibid*. The "dot-com bubble" was a speculative stock market bubble fueled by growth in the internet sector in the late 1990s. The dot-com bubble collapsed from 1999-2001, resulting in the devaluation or even collapse of many highly-touted and valuable companies.

33 Susskind notes that "…every two days, according to Google's Eric Schmidt, 'we create as much information as we did from the dawn of civilization up until 2003." *Ibid*.

34 *Ibid*, at 13.

35 Hans Moravec, *Mind Children: The Future of Robot and Human Intelligence* (Cambridge, MA: Harvard University Press, 1988) at 15.

36 Steven Pinker, *The Language Instinct* (New York: Harper Perennial Modern Classics, 2007) at 190-91.

37 Frank Levy and Richard Murnane, *The New Division of Labour* (New York: Princeton University Press, 2005) [Levy and Murnane].

38 Maura R. Grossman & Gordon Cormack, "Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review" (2011) 17:3 Rich.J.L. & Tech 11 [Grossman and Cormack].

they find that "technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort."[39] Other articles further emphasize the cost benefits of e-discovery, which can amount to savings of 70% or more.[40]

Further, as McAfee and Brynjolfsson point out, the acceleration of AI is so rapid that computers are becoming much better at pattern recognition as well. When Levy and Murnane contrasted computers' abilities to follow rules and recognize patterns in 2005, they offered driving a vehicle as an example of complex pattern recognition that is ill-suited for computerization.[41] Their view seemed to be confirmed later that year when a high profile driverless car competition ended with the winning car completing only 5% of the course before crashing.[42] However, just four years later, in October of 2010, Google announced that its autonomous cars had for some time been successfully driving across the United States.[43] What seemed reasonably safe from automation by Levy and Murnane's estimation was achieved only five years after they made their prediction.

The implication then for legal practice is not that all legal work will be automated, but that rule-based, repetitive tasks and even some tasks involving complex pattern recognition are likely to be automated. One example might be an AI system that gives a legal opinion to a client with a personal injury claim. To many practicing lawyers this might seem preposterous given the complex set of variables that go into assessing whether the client has a promising claim and what the value of the claim might be. However, given that AI engineers found a way to manage all the complex variables associated with driving a car safely in traffic, it seems probable that some legal questions such as personal injury claims assessments may also soon be manageable for AI technologies.

C. New Roles for Legal Professionals

The emergence of new legal technologies does not mean that lawyers will become irrelevant. Instead, the roles of legal professionals will shift, rather than disappear, and become more interactive with technological applications in their given field. As McAfee and Bryjolfsson point out, "[e]ven in those areas where digital machines have far outstripped humans, people still have vital roles to play."[44] The game of chess, for example, is a field where computers now dominate in direct competition with humans.[45] However, in "freestyle" chess tournaments, which allow teams to include any combination of human and computer players, the teams of humans and computers (even where the computer partner is relatively basic technology) dominate the most powerful computers.[46] As former World Chess Champion Gary Kasparov described a 2005 freestyle tournament,

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39 *Ibid*.

40 Anne Kershaw & Joe Howie, "Crash or Soar: Will The Legal Community Accept 'Predictive Coding?'" *Law Technology News* (October 2010), online: <https://perma.cc/84KN-4BQD>. See also, Chris Dale, "Having The Acuity to Determine Relevance with Predictive Coding" *e-Disclosure Information Project* (15 October 2010), online: <https://perma.cc/727C-CWVT>.

41 Levy & Murnane, *supra* note 37, at 67.

42 Joseph Hooper, "From Darpa Grand Challenge 2004: DARPA's Debacle in the Desert" *Popular Science* (June 2004), online:<http://www.popsci.com/scitech/article/2004-06/darpa-grand-challenge-2004darpas-debacle-desert> archived at <https://perma.cc/CUW6-9H3V>.

43 Sebastian Thrun, "What We're Driving At" *Google Official Blog* (9 October 2010), online: <https://googleblog.blogspot.ca/2010/10/what-were-driving-at.html> archived at <https://perma.cc/32QM-2USU>.

44 McAfee & Brynjolfsson, *supra* note 1, at 188.

45 D. T. Max, "The Prince's Gambit," *The New Yorker* (21 March 2011), online: <http://www.newyorker.com/reporting/2011/03/21/110321fa_fact_max> archived at <https://perma.cc/VC2T-E3Q5>.

46 McAfee & Brynjolfsson, *supra* note 1, at 188.

"[h]uman strategic guidance combined with the technical acuity of a computer" can produce highly successful outcomes.[47]

The complementary relationship between human and machine is seen in legal practice as well. In e-discovery, for example, though lawyers may not sift through the documents themselves, they remain indispensable to the e-discovery process. As one commentator notes:

> [H]umans will continue to apply their insights and intelligence strategically to guide [e-discovery]. Automated document review technology is a tool like any other with potential that cannot be realized fully without the worldly knowledge and creativity that only humans can bring to bear in solving complex problems.[48]

In such contexts, lawyers' roles shift to become more rooted in collaboration rather than independent problem solving. Arguably this collaboration requires that lawyers have a more advanced and nuanced skillet. As Susskind puts it, "[i]t is more taxing to create a system that can solve many problems than to find an answer to a specific issue."[49] The rewards of the partnership between skilled lawyers and AI are exemplified by the productive capabilities of e-discovery and the legal expert still has much to contribute in an era of increasingly intelligent machines.[50]

III. CAUTIONARY VIEWS ON TECHNOLOGICAL OPTIMISM AND THE IMPACT OF LEGAL TECHNOLOGY

A. Internet-Centrism and Solutionism

Not all commentators on technology share the optimism of McAfee, Brynjolfsson and Susskind. Evgeny Morosov, in his book *To Save Everything, Click Here: Technology, Utopianism, and the Urge to Fix Problems That Don't Exist*, identifies two worrisome trends he calls "internet-centrism" and "solutionism."[51] Internet-centrism is the misguided view that the internet is not just another tool created by humans, but rather the culmination of human invention.[52] This view is problematic because it holds the internet and its associated values of transparency and efficiency as unimpeachable realities, rather than historical peculiarities that are subject to critique.[53]

Solutionism is the habit of exacerbating complex problems by advocating shallow solutions that focus almost exclusively on transparency and efficiency.[54] As one reviewer of Morosov's book summarizes:

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47 Garry Kasparov, "The Chess Master and the Computer," *New York Review of Books* (11 February 2010), online: <http://www.nybooks.com/articles/achives/2010/feb/11/the-chess-master-and-the-computer/> archived at <https://perma.cc/FSS6-CUJB>.

48 Ben Kerschberg, "What Technology-Assisted Electronic Discovery Teaches Us About The Role Of Humans In Technology" *Forbes* (9 January 2012), online: <http://www.forbes.com/sites/benkerschberg/2012/01/09/what-technology-assisted-electronic-discovery-teaches-us-about-the-role-of-humans-in-technology/> archived at <https://perma.cc/B8ET-FMTM> [Kerschberg].

49 Susskind, *supra* note 29, at 111.

50 See also, David Donaldson "Big data useless without human element" *The Mandarin* (9 October 2015), online: <http://www.themandarin.com.au/50786-big-data-useless-without-people/> archived at <https://perma.cc/FX4B-FPGZ>, which emphasizes the importance of human curiosity in making large datasets useful.

51 Evgeny Morosov, "To Save Everything, Click Here: Technology, Utopianism, and the Urge to Fix Problems That Don't Exist (New York: Penguin, 2013).

52 Ellen Ullman, "Big Data is Watching You", *New York Times Sunday Book Review* (17 May 2013).

53 *Ibid*.

54 *Ibid*.

> Solutionism is a kind of technological determinism… the technological solutions available for minor problems… lead us to shallow thinking, and our goals divert from understanding large, complex social problems into writing yet more apps. Worse, we start seeing only problems that can be solved by apps as problems worth solving.[55]

For example, a solutionist might emphasize fitness-related technology as a response to the epidemic of obesity in Western countries, while minimizing or, worse still, delegitimizing socioeconomic and cultural facets to the problem.

If Susskind is right that legal technology will explode in the next decade, then Morosov's principles may be a timely counterpoint to unbridled technological optimism. An internet-centric perspective applied to legal practice could subvert core legal principles like privacy and equality in favour of transparency and efficiency. Although some compromise in traditional legal values may be justified, it should not take place without careful consideration. Solutionism, too, may creep into new legal technology applications with a commercial focus that obscures justice as the ultimate goal of the legal system.

Still, internet-centrism and solutionism are not reasons to turn away entirely from the potential of new technologies. Morosov's perspective is an important reminder to acknowledge the values and potential impacts behind new technology applications. As in all domains that integrate new technology in the second machine age, legal practice should consider the trade-offs. However, the benefits of technological progress are immense and it would be foolish not to explore them further.

B. Constraints on the Adoption of Legal Technology

Beyond Morosov's general critiques of technological progress, other critics take aim at legal technology in particular. Simon Chester is one such critic who spoke at the Pacific Legal Technology Conference in Vancouver, British Columbia in October of 2015.[56] Chester acknowledges that technology is advancing at a blistering pace and that the legal profession will be affected. However, he argues that champions of legal technology, like Susskind, often overlook significant barriers to integrating technology into the legal marketplace.[57] Chester's critiques can be grouped into three categories: technical, economic, and cultural.

i. Technical Constraints

Chester argues that a few technical barriers still limit the implementation of legal technology, in particular AI technologies. Law is messy and, according to Chester, it is difficult to construct algorithms that capture the law in a useful way.[58] Unlike in the medical field, Chester notes, answers to legal questions can vary greatly depending on the relevant jurisdiction.[59] Few legal problems have clear yes or no answers.

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55 *Ibid*.

56 Mr. Chester is a lawyer at Gowlings in Toronto. His career spans law teaching, a decade in government and thirty years in private practice on Bay Street. He has been a pioneer in applying advanced technology in legal practice and has chaired the American Bar Association TechShow. See Slaw.ca "About Simon Chester" (19 November 2015), online: <http://www.slaw.ca/author/simon-c/> archived at <https://perma.cc/X3RE-6JM3>.

57 Simon Chester, "How Tech is Changing the Practice of Law: Watson, AI, Expert Systems, and More" (Debate presented at the Pacific Legal Technology Conference, Vancouver, 2 October 2015). [Chester].

58 *Ibid*.

59 For this reason, Chester believe that emerging AI technologies will have much greater impact in fields that better transcend local peculiarities, like medicine and finance.

Others have noted the complexity of legal reasoning as a potential barrier to implementing effective legal technologies. One argument is that legal reasoning is an inherently "parallel process" in which "the answer to one question may change which questions are subsequently asked."[60] This difficulty, some contend, significantly disrupts the ability to have computers deliver useful answers to legal questions.

Another technical constraint, Chester argues, is that AI machines will struggle to access relevant legal information because major legal publishers are unlikely to give away expensive materials to which they have propriety, and law firm data is restricted by confidentiality obligations. As Chester analogizes with reference to IBM's supercomputer Watson: "Watson needs fuel to run, but the [gas stations] are closed."[61] If he is right, then integrating legal technology into the marketplace will likely take longer than many predictions contend.

Chester's technical critiques of implementing legal technology are unconvincing. Though few legal problems have straightforward answers, this does not mean that AI technologies cannot be used effectively in law. Where problems are complex, with few simple yes or no answers, AI programmers can still find ways to better input the data needed for the AI system to be effective.[62] For example, reviewing documents for discovery is not a process with simple yes or no answers, and the unique context of the case often determines the degree of relevance for each document. Still, e-discovery technicians use various methodologies to program e-discovery systems to be sensitive to the subtleties of a specific case[63] and, in doing so, achieve better results than human-only discovery processes.[64]

AI can also manage the difficulties posed by the nature of legal reasoning as a parallel process. While legal reasoning often requires modifying the original question based on answers received, this reasoning can be represented in computers in a decision-tree model.[65] Many expert systems employ this capability, modifying subsequent questions posed according to previous answers. For example, AI processes called "neural networks" have been used in this way for at least two decades[66] and are at the forefront of current AI applications such as self-driving cars.[67]

Chester overstates the inaccessibility of legal information for AI machines. Far from protecting their data from AI technologies, major legal publishers are more likely to use new technologies for their own benefit. For example, Thomson Reuters, a leading provider research information for lawyers and other professionals, announced its partnership with

60 Michael Aikenhead, "The Uses and Abuses of Neural Networks in Law" (1996) 12 Stanta Clara Computer & High Tech. L.J. 31 at 56.

61 *Ibid*.

62 Kerschberg, *supra* note 48.

63 *Ibid*.

64 Grossman & Cormack, *supra* note 38.

65 John Zeleznikow & Daniel Hunter, *Building Intelligent Legal Information Systems – Representation and Reasoning in Law*, ch. 6 (1995) Computer Law Series No. 13, 1986 at 118-25; See generally Alan Tyree, *Expert Systems in Law* (Sydney, Australia: Prentice Hall, 1989) for a discussion of the use of logic and tree diagrams in representing laws.

66 Trevor Bench-Capon, *Neural Networks and Open Texture*, 4th International Conference on Artificial Intelligence & Law 292 (1993).

67 Ben Firner, "End-to-End Deep Learning for Self-Driving Cars" (17 August 2016), online: <https://devblogs.nvidia.com/parallelforall/deep-learning-self-driving-cars/> archived at <https://perma.cc/43PY-CF8N>.

IBM in October of 2015 to explore Watson's analytic potential in key industries.[68] Of the partnership, IBM Watson senior vice president noted the "incredible opportunity to combine Watson's cognitive capabilities with… [Thompson Reuter's] vast trove of data."[69] Given the demonstrated willingness of "big players" to engage technology with their collection of legal data, there is currently little reason to think that data accessibility will be a significant barrier to effective legal technology.

ii. Economic Constraints

Chester's second barrier to the rise of technology in law practice is economic. He points out that the market for legal technology, by which he means legal service providers who might invest in legal technology, is relatively small[70] and will struggle to attract technologically innovative developers when larger markets (such as healthcare and financial services) have more potential for profit. Further, the legal services market is fragmented, with 65 jurisdictions in North America alone, and under-capitalized, with few "big players" willing to develop and implement new legal technologies.[71] These economic forces, Chester argues, will significantly delay the impact of technology on legal practice.

Though the economic barriers identified by Chester are not entirely unfounded, they are only likely to impact the development of legal technology in the short term. It is difficult to know the size of the Canadian legal market as recent reports have highlighted the presence of latent demand for legal services.[72] If new legal technologies are able to access the latent demand by lowering the cost of legal services, then the legal market may indeed be larger and more profitable for technology developers than current economic indicators suggest. Further, it is not clear that market fragmentation or under-capitalization will be barriers to legal technology development beyond the short term. Contrary to Chester's suggestion, there are "big players" taking a lead in legal technology. Aside from the recent Thompson Reuters and IBM partnership, the world's largest law firm, Dentons, is utilizing an advanced AI legal software developed out of the University of Toronto,[73] while global mega-firm Norton Rose Fulbright is experimenting with software called Noeta Logic and other new technology applications.[74] Given the willingness to experiment, especially in a legal industry overdue for innovation, it is difficult to see how Chester's economic barriers will have significant impact beyond the next few years.

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68 Thomson Reuters Press Release, "Thomson Reuters and IBM Collaborate to Deliver Watson Cognitive Computing Technology" (8 October 2015), online: <http://thomsonreuters.com/en/press-releases/2015/october/thomson-reuters-ibm-collaborate-to-deliver-watson-cognitive-computing-technology.html> archived at <https://perma.cc/Y9R4-K7RW>.

69 *Ibid*.

70 Chester, *supra* note 57. Chester notes that the market for legal service providers is slightly smaller than the market for online travel services and that Microsoft recently hired its first full-time legal market representative.

71 *Ibid*.

72 Canadian Bar Association, "The Future of Legal Services in Canada: Trends and Issues" *CBA Legal Futures Initiative*, online: <http://www.proselex.net/Documents/The%20Future%20of%20Legal%20Services.pdf> archived at <https://perma.cc/YZA3-YCMQ> at 22 [Canadian Bar Association].

73 Jeff Gray, "U of T students' artificially intelligent robot signs with Dentons law firm" *The Globe and Mail* (9 August 2015), online: <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/u-of-t-students-artificially-intelligent-robot-signs-with-dentons-law-firm/article25898779/> archived at <https://perma.cc/XF3H-VMD9>.

74 Charles Christian, "NRF to roll out Neota Logic as innovation takes hold" *Legal IT Insider* (October 2015), online: <http://www.legaltechnology.com/wp-content/uploads/2015/11/Insider287.pdf> archived at <https://perma.cc/K2BC-82TG>.

iii. Cultural Constraints

Chester's strongest argument is that the culture of legal practice will slow the pace of integration well beyond the predictions of legal technology optimists. Chester predicts that change in the legal profession takes ten times as long and be ten times as expensive as industry experts predict, but once it occurs, the change will be twice as effective as predicted.[75] While Chester's argument draws only on his experience engaging with legal technology in over forty years in the Canadian legal services industry,[76] others have independently corroborated the lack of openness to change in the Canadian legal culture. For example, in an address titled "The Legal Profession in the 21st Century," Chief Justice Beverley McLachlin noted that the conservative Canadian legal culture is a key impediment to progress in the profession.[77] If Chester is right, then the dramatic change in the coming decade predicted by legal futurists like Susskind may be further off than forecasted.[78]

There are reasons to believe that the culture in the legal profession will significantly delay the integration of legal technology. Arguably, most of the legal profession is largely ignoring legal technology or engaging it in a merely symbolic sense in order to reassure clients.[79] Even those who earnestly engage legal technology seem to only want to digitize current workflows, or in other words, to "pave the cow path." Stephanie Kimbro, a fellow at Stanford Law School and a pioneer in Virtual Law Practice, writes that expert systems are tools primarily used to "assist in the decision-making process for lawyers."[80] Only secondarily does she recognize potential for experts systems to be client-facing, and even then, only "as a preventative or educational resource.[81] Kimbro's focus on lawyer-centric applications misses the more promising possibility that new technology applications could better increase access to justice by enabling clients to solve their own problems, without consulting expensive legal experts. Arguably, her perspective reflects the inward-focused culture of law practice, which severely restricts the transformative potential of technology in the legal services industry.[82]

Clayton Christiansen's book *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail*[83] helps explain why the legal services industry continues to view new technology applications only as efficiency tools, rather than as a means to work differently altogether. Christiansen explains that companies tend to innovate at the highest tiers of their market because profits are traditionally best achieved "by charging the highest prices

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75 Chester, *supra* note 57.

76 For Chester's biography, see Pacific Legal Technology Conference, Speakers, online: <http://www.pacificlegaltech.com/speakers.html> archived at <https://perma.cc/QPA3-5DN7>.

77 Chief Justice Beverley McLachlin, "The Legal Profession in the 21st Century" (Paper delivered at Canadian Bar Association Plenary, Calgary, 14 August 2015) at 3.

78 Susskind, *supra* note 29, at 82. Susskind predicts that by about 2020 all substantial and successful legal businesses will be "converting their business processes from human handcrafting to ever more sophisticated and intelligent IT-based production."

79 *Ibid*, at 79, refers to this as the "denial" stage, where most major legal services providers are hoping that the legal market will reset to 2006 when many law firms had more non-price-sensitive work than they could handle.

80 Stephanie Kimbro, "Using Technology to Unbundle in the Legal Services Community" (February 2013), Harvard Journal of Law and Technology, online: <https://ssrn.com/abstract=2233921> archived at <https://perma.cc/9WS6-M6YZ> at 19.

81 *Ibid*.

82 For example, by orienting new technology to help lawyers do their work, it precludes the possibility the new technologies might allow some legal work to be done without lawyers. This keeps lawyers involved and keeps costs high, thereby limiting the impact of new technologies and access to justice.

83 (Boston, MA: Harvard Business School Press 1997).

to the most demanding and sophisticated customers at the top of market."[84] However, this strategy, called "sustaining innovation," is vulnerable to "disruptive innovation," which gives "a whole new population of consumers at the bottom of a market access to a product or service that was historically only accessible to consumers with a lot of money or a lot of skill."[85] Typically, disruptive innovation strategies are not attractive to successful businesses because, at least initially, these strategies often have lower gross margins, smaller target markets, and simpler products that score lower on traditional performance metrics than sustaining innovation strategies.[86]

When applied to the legal services industry today, Christiansen's ideas are illuminating. By Christansen's theory, well-established, traditional law firms are more likely to pursue profits at the high end of the legal market by incrementally improving services for sophisticated, non-price-sensitive customers. This sustaining innovation strategy has worked for big firms for many years now and, over time, the legal industry has developed a cultural bias against change. Until a big firm breaks rank and demonstrates the transformative potential of legal technology there will be little to challenge the cultural stubbornness. As Susskind puts it, "it will be hard to convince a group of billionaires that their business model is broken."[87]

Although, the culture of sustaining innovation in the legal services industry opens the door for other innovators to use technology to provide legal services to the bottom end of the market, this endeavour is likely unappealing to traditional firms given that the market is undeveloped and risky. As Christiansen states, "discovering markets for emerging technologies inherently involves failure, and most individual decision makers find it very difficult to risk backing a project that might fail because the market is not there.[88] Christiansen's framework helps explain the resistance to change in the legal profession[89] and supports Chester's argument that the legal culture will delay the integration of new technologies, at least from within the traditional legal market.

Chester's argument, however, underemphasizes the pressure that non-traditional legal service providers will put on mainstream legal culture. As Nate Thompson, another speaker at the Pacific Legal Technology Conference, responded to Chester's cultural argument, "[t]he change is likely to come from outside the profession and it will surround us from the outside."[90] Once surrounded, the traditional legal service providers would have little choice but to embrace technological change more fully. As a recent Canadian Bar Association (CBA) "Futures Report" posits:

> Choosing to adopt the newest forms of technology may not be an option for most lawyers and firms in the future. An entire generation has expectations that service providers will conduct business in a way to which they have become accustomed—quickly, directly, and online.[91]

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84 Clayton Christensen, Key Concepts: Disruptive Innovation, online: <http://www.clayton christensen.com/key-concepts/> archived at <https://perma.cc/6A6T-YU6A> [Christensen].

85 *Ibid*

86 *Ibid*.

87 Susskind, *supra* note 29, at 56.

88 Christensen, *supra* note 86, at 158.

89 Commentators on change resistance in the legal profession often note that where a medical office today would be unrecognizable to a doctor from 200 years ago, a lawyer from the 1800s would be relatively comfortable in a modern courtroom. See George J Annas, "Doctors, Patients, and Lawyers – Two Centuries of Health Law" (2012) 367 *New England Journal of Medicine* 445-50 at 445.

90 Nate Thompson, "How Tech is Changing the Practice of Law: Watson, AI, Expert Systems, and More" (Debate presented at the Pacific Legal Technology Conference, Vancouver, 2 October 2015).

91 Canadian Bar Association, *supra* note 72, at 29.

Put in Christiansen's terms, while traditional law firms may insist on pursuing sustaining innovation strategies, outsides with less to lose will adopt a disruptive approach and force traditional firms to reconsider their strategy.

There has been a boom of legal technology start-ups in recent years coming from outside the traditional legal industry and 'disruption innovation' is already underway.[92] LegalZoom and Rocket Lawyer are two examples of legal services providers who started by servicing the low-margin end of the market and have gradually inched their way up.[93] They were allowed to do so because, at first, they were not competing with lawyers but instead serving an abandoned portion of the market, namely low-income customers who cannot afford traditional legal services.[94] Now LegalZoom and Rocket Lawyer are competing with traditional lawyers and the legal community has taken notice, most aggressively by trying to have the LegalZoom deemed an unauthorized practice of law.[95] Importantly, LegalZoom and Rocket Lawyer were not products of the conservative mainstream legal culture, but rather disruptive innovators from the fringes who crept into prominence in spite of the conservative mainstream legal culture.

There are some signs that the mainstream legal culture is ready to shift. As noted, major players in the legal services marketplace, including Dentons, Norton Rose Fulbright, and Thompson Reuters are investing in product innovation in unprecedented ways. Demographic trends caused by aging lawyers are likely to rapidly alter the makeup and culture of traditional firms.[96] The incoming cohort of lawyers set to take leadership positions are more tech savvy and more comfortable outside of the structure of the traditional firm.[97] This may further increase the willingness of big firms to embrace change and new ways of practicing.

CONCLUSION

Most commentators on legal technology only argue about when and how technology will transform legal practice, not whether it will be transformed. Lawyers, especially young lawyers, should be alert to the possibilities legal technology enable. If Susskind is right, then in the future most legal professionals will be working much closer with computers than we do with clients (if that is not true already). As futurist Kevin Kelly puts it, "[y]ou'll be paid in the future based on how well you work with robots."[98]

While skepticism about long-term predictions is warranted, critiques of legal technology are often overstated and reactionary. Susskind calls these critiques "irrational rejectionism," which he defines as "the dogmatic and visceral dismissal of a technology with which the skeptic has no direct personal experience."[99] In a world with so many

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92 Basha Rubin, "Legal Tech Startups Have a Short History and a Bright Future" *TechCrunch* (6 December 2014), online: <http://techcrunch.com/2014/12/06/legal-tech-startups-have-a-short-history-and-a-bright-future/> archived at <https://perma.cc/Y5D5-ASVE>.

93 Ben Barton "Lessons From the Rise of LegalZoom" *Bloomberg BNA* (18 June 2015) online: <https://bol.bna.com/lessons-from-the-rise-of-legalzoom/> archived at <https://perma.cc/DH3X-CVNQ>.

94 *Ibid*.

95 Terry Carter "LegaZoom hits a legal hurdle in North Carolina" *ABA Journal* (19 May 2014), online: <http://www.abajournal.com/news/article/legalzoom_hits_a_hurdle_in_north_carolina> archived at <https://perma.cc/2KJT-HFKS>.

96 Canadian Bar Association, *supra* note 72, at 31.

97 *Ibid*, at 25-26.

98 Kevin Kelly, "Better than Human: Why Robots Will—and Must—Take Our Jobs", *Wired*, (24 December 2012), <https://www.wired.com/2012/12/ff-robots-will-take-our-jobs/>, archived at <https://perma.cc/CAC6-HRZF>.

99 *Ibid*, at 12.

new technologies that rise and fall so quickly (for example, Twitter going from obscurity to 300 million users in three years),[100] it is understandable that people are skeptical of technologies, especially those perceived as threats to their livelihoods. Still, much evidence points towards imminent change.

Given the trends in technology, it is difficult to foresee anything other than a significant shift in how legal services are delivered. As Susskind submits, "[i]t is simply inconceivable that information technology will radically alter all corners of our economy and society and yet somehow legal work will be exempt from any change."[101] Though Morosov and Chester give good reasons to reign in careless technological optimism, it appears that legal technology will have a major impact sooner rather than later. Culture may yet have some impact in slowing the integration of legal technology, but at some point the mainstream culture will be overwhelmed by those at the margins who are willing to react to market pressures and remodel the delivery of legal services.

100 *Ibid*.

101 *Ibid*, at 6.

ARTICLE

A PRAGMATIC APPROACH TO FEDERALISM IN THE ABORIGINAL CONTEXT: LESSONS FROM THE *NISGA'A FINAL AGREEMENT*

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Recent developments such as the Idle No More movement and the Truth and Reconciliation Commission's Final Report have emphasized the need to reconsider Canada's relationship with First Nations. Implicit in this exercise are questions surrounding Aboriginal governance. This essay builds on calls for federalism to provide a means of self-government. It draws on the 1998 *Nisga'a Final Agreement* (the "*Final Agreement*" or the "1998 *Agreement*")—a self-governance treaty with engrained federalist traits—and argues that in the Aboriginal context, traditional state-based conceptions of federalism should yield to what the author terms a 'pragmatic model of federalism.'

A pragmatic approach to federalism must promote historically marginalized voices, avoid prescriptiveness, and cater to multiple and complex identities. In promoting marginalized voices, the framers of Aboriginal federal arrangements must prioritize the community's traditional governance structure and its expectations. Moreover, the voices of important non-elected actors should be fostered through institutional channels. The pragmatic approach must also avoid prescriptiveness. Normative measures of assessment are to be used cautiously and existing conceptions of federalism should not overshadow alternative governance structures. Finally, discussions about future Aboriginal federal arrangements must reflect and accommodate the various identities that are present in First Nations communities and in Canada more broadly.

INTRODUCTION

Known for its open areas and scenic beauty, northwest British Columbia is also home to an unconventional federalist model. Tucked away in the remote Nass Valley lies a self-governing Aboriginal nation, complete with a central government and constitutive units. Both in law and in fact, the Nisga'a Nation straddles the line between an autonomous federation and a member of the Canadian state. Its organization offers a rich layering of governance structures and intergovernmental relations.

At a time when federalism is being promoted as a viable model of Aboriginal governance,[1] the Nisga'a Nation stands as a largely untapped source of lessons. This article draws on Nisga'a legal structure in contending that traditional state-based conceptions of federalism should, in the Aboriginal context, be set aside in favour of a more pragmatic model. This model—be it applied to imagining new federal arrangements or assessing existing ones—must recognize historically marginalized voices, avoid prescriptiveness, and take into account the variety of Aboriginal identities.

Part I offers an overview of Nisga'a governance structure and holds it out to be both a valuable and under-studied example of federal-style self-government. Indeed, the Nisga'a Nation illustrates two complementary concepts: the prospect of reallocating powers from Ottawa and the provinces in a federal manner, as well as various means of recognizing federal arrangements within Indigenous communities themselves. The text then turns to the three areas that should be borne in mind when framing future debates on the adequacy of federalism in the Aboriginal context: recognizing voice (Part II), avoiding prescriptiveness (Part III), and accounting for multiple and complex identities (Part IV). Considering voice involves drawing on traditional models of governance and the distinct expectations of those whom the new arrangements will affect. It should also extend to providing institutional channels for important non-elected actors such as elders. Avoiding a prescriptive approach to federalism is similarly multifaceted. The normative lenses through which the merits of a federation are assessed should be used cautiously so as to take into account the realities of the Aboriginal context, and existing

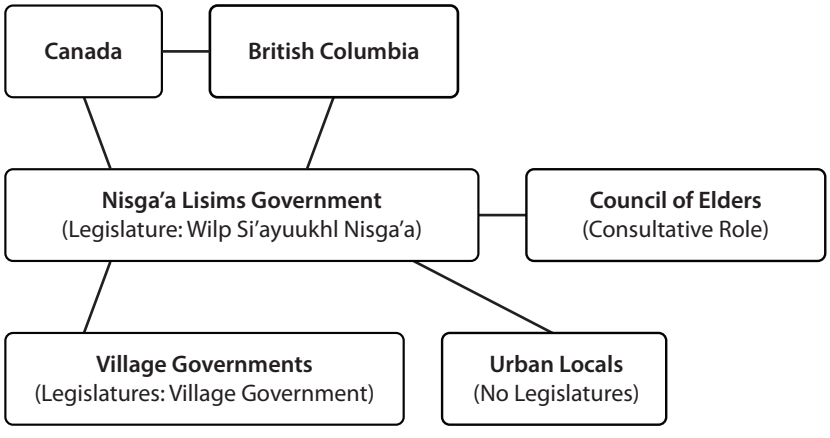
1 Pathways to Aboriginal Self-Governance in Canada" (2006) 36:4 American Rev Can Studies 568; Ian Peach, ed, *Constructing Tomorrow's Federalism: New Perspectives on Canadian Governance* (Winnipeg: University of Manitoba Press, 2007).

models of federalism should not overshadow distinct ways of structuring the federation. Accounting for diversity allows the discussion about future federal arrangements to reflect the complexities of shared identities, which may be more pronounced among Aboriginal peoples in Canada.

PART I: OVERVIEW OF THE NISGA'A FEDERATION

The Nisga'a Nation's federal dimensions were crystallized as a result of negotiation between Aboriginal leaders of the Nass Valley and the governments of Canada and British Columbia, which culminated in the *Nisga'a Final Agreement Act*.[2] It took over 20 years for the parties to achieve consensus on a new form of self-government. The ensuing governance structure bears several federalist traits, both internally and in relation to the Canadian and British Columbian governments.

Table 1 – Governance Structure of the Nisga'a Nation



Legislative powers in the Nisga'a Nation are divided between two orders of government: the Nisga'a Lisims Government and the four village assemblies. While the central government may make laws with respect to citizenship and culture, for instance, the village governments are responsible for local matters such as traffic and transportation in their respective jurisdictions. Moreover, the *Final Agreement* assigns a number of shared competences to the central and village governments.[3] The councillors from each village government sit in the central legislature, but officers of the Nisga'a Lisims Government do not sit in the villages' assemblies.

The Nisga'a government includes two further organs in addition to the central and regional legislatures. Urban Locals are groupings of Nisga'a citizens, residing off Nisga'a land in select British Columbian municipalities (Vancouver, Prince Rupert/Port Edward and Terrace), who elect representatives to the central government but cannot legislate alone. Similarly, the non-elected Council of Elders provides guidance on legislation and constitutional amendments without legislating unilaterally. As signatories to the *Nisga'a Final Agreement*, British Columbia and Canada continue to influence Nisga'a governance by enacting and enforcing applicable laws (e.g. criminal law) and negotiating transfer payments.

2 Nisga'a Final Agreement Act, SC 2000 C-7 [Nisga'a Final Agreement].

3 *Ibid at* c 11.

The division of power between a central government and regional legislatures invites us to view the Nisga'a Nation as a federation. While the Nation does not describe itself as such, or make any explicit mention of the federal nature of its governance structure in official documents, it does allude to the similarities between its governance model and that of the Canadian federation on its website. "Much like the Canadian federal and provincial government systems," it explains, "the Nisga'a Nation has both a national and local governments."[4]

It is common academic practice to analyze so-called federations in disguise on the same footing as self-proclaimed federations.[5] Doing so allows for a richer understanding of intergovernmental relations where power is shared between several decision-making bodies. Applying this practice to the Nisga'a Nation creates a multi-level federal model: the Nisga'a Lisims Government and the Village Governments form a distinct federation within the broader Canadian Federation. In this sense, the following analysis discusses both the prospect of federal design within Aboriginal communities and of reallocating powers currently held by Ottawa or the provinces in a federal fashion.

There are several reasons why the Nisga'a Nation serves as a model for future debates on federalism in the Aboriginal context and as the anchor for this article. First, it is an established federal-style self-governance agreement. With the *Nisga'a Final Agreement* approaching the 20-year mark, the Nation's governance structure has evolved beyond the transitional phase and offers a look at the long-term effects of the *Final Agreement*'s provisions. Second, while the subject of some criticism,[6] the Nisga'a Federation offers measurable markers with which to assess its success. The latest implementation report published jointly by the Nisga'a Lisims Government, the Province of British Columbia, and the Government of Canada suggests that indicators such as enrolment and completion rates of post-secondary education are steadily rising and that the Nisga'a are satisfied with the services they receive in areas such as healthcare.[7] However, the Nisga'a Federation has been the subject of limited scholarly attention and remains under-studied. This paper therefore aims to publicize lessons that have come to light since the *Final Agreement*'s signing in 1998.

PART II: RECOGNIZING VOICE

Adopting a pragmatic model of federalism for future self-governance discussions should involve recognizing voices both past and present. That is to say, the opinions of historically marginalized actors should be heard and acknowledged in decision-making. At the planning stage, when deciding whether to pursue federalism, parties should be conscious of the particular Aboriginal group's expectations and whether it has a history of divided power. If federalism is deemed to be appropriate and such a governance structure is enacted, a place must continue to be made for traditional voices at all levels.

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4 Nisga'a Lisims Government, "About", online: <www.nisgaanation.ca/about-3> archived at <https://perma.cc/8JHS-YPHH>.

5 See e.g. Jean-Michel Josselin & Alain Marciano, "How the Court Made a Federation of the EU" (2007) 2:1 Rev Intl Organizations 69 depicting the European Union as a federation; Derek Powell, "Constructing a Developmental State in South Africa: The corporatization of intergovernmental relations" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Toronto: Oxford University Press, 2015) portraying South Africa as a federation; Thomas O Hueglin & Alan Fenna, *Comparative Federalism: A Systematic Enquiry*, 2nd ed (Toronto: University of Toronto Press, 2015) at 129–131 applying a federalist lens to the Kingdom of Spain.

6 See e.g. Joseph Quesnel & Conrad Winn, "The Nisga'a Treaty: Self Government and Good Governance: The Jury is Still Out" (2011) 108 FCPP Policy Series 1 at 12.

7 See Nisga'a Lisims Government, *Nisga'a Final Agreement Implementation Report 2011–2012,* (New Aiyansh, BC, 2014).

As the tired adage 'history is written by the victor' suggests, there are many ways of retelling the past and some voices resonate louder than others. Aboriginal peoples have been the victims of voice appropriation since the arrival of European settlers, and voice appropriation is closely tied to delegitimization.[8] The histories of Aboriginal peoples have been independently recounted by non-Aboriginal academics, journalists, and politicians for years.[9] Legal precedent can be equally misleading. Many landmark cases portray Aboriginal peoples as passive bystanders holding rights at the mercy of the Crown.[10]

Indeed, approaching Nisga'a history from the Canadian or British Columbian government's view may conjure up a big bang or revolutionary moment beginning in 1973. That year, the Supreme Court of Canada rendered a landmark decision in *Calder et al. v Attorney General of British Columbia*.[11] Six judges agreed that the Nisga'a held Aboriginal title over their land, although three judges found that title had been extinguished. Spurred by the recognition of potential Aboriginal rights to resources and land, the Canadian government reviewed its Aboriginal land claims policy and began negotiating with the Nisga'a Tribal Council in 1976.[12] British Columbia formally joined negotiations in 1990.[13] From this perspective, the land claims that set in motion the current federation spawned rather abruptly in 1973.

Yet, relying on the official narratives produced by courts and governments eclipses the Nisga'a tradition of shared power and the fact that their land claims stretch back to the Nation's first contact with European settlers.[14] Attempts to reclaim control over the land through negotiation can be traced as far back as 1887, when Nisga'a Chiefs travelled to Victoria for an audience with the Premier to request self-government.[15] In 1913, the Nisga'a petitioned the Privy Council for "the right to decide for ourselves the terms upon which we would deal with our territory."[16] Hence, a historical account that includes Aboriginal voice reveals a deep-seated desire among the Nisga'a to regain control over their land and to govern it according to their traditional federal structure.

Federal structures have always existed among the Nisga'a and formed a pivotal part of the Nation's governance; the history of the Nisga'a people is that of four distinct clans to which membership follows maternal bloodlines.[17] Hence, no entity has ever held a monopoly on land ownership or decision-making. The division of power among the clans leads one observer, Tracie Lea Scott, to conclude that "[i]n Nisga'a Society […] there

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8 See Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 16–19.

9 *Ibid* at 23.

10 See e.g. *St Catherines Milling and Lumber Co v R*, [1887] 13 SCR 577, 1887 CanLII 3. For a more in-depth discussion of this point, see Tracie Lea Scott, *Postcolonial Sovereignty?: The Nisga'a Final Agreement* (Saskatoon: Purich, 2012) at 25 [Scott].

11 *Calder et al. v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.

12 See Indigenous and Northern Affairs Canada, "Chronology of Events Leading to the Final Agreement with the Nisga'a Tribal Council," online: <www.aadnc-aandc.gc.ca/eng/1100100031295/1100100031296> archived at <https://perma.cc/T46M-4K95> [Indigenous and Northern Affairs Canada].

13 *Ibid*.

14 See Daniel Raunet, *Without Surrender Without Consent: A History of the Nishga Land Claims* (Vancouver: Douglas & McIntyre, 1984).

15 See Indigenous and Northern Affairs Canada, *supra* note 12.

16 Quoted in Jim Aldridge, "The 1998 Nisga'a Treaty" in Terry Fenge & Jim Aldridge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montreal: McGill-Queen's University Press, 2015) at 138.

17 See Raunet, *supra* note 14 at 29. For an historical understanding of the wider geographical divisions in the area, see Neil J Sterritt et al, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998).

was never a single central authority."[18] In addition to shared jurisdiction among clans, political power was further divided between houses (*wilps*) and their leaders.[19] Despite the recentness of the 1998 *Agreement* and the *Nisga'a Constitution* (the "*Constitution*"), Nisga'a narratives evidence that these documents are founded on a long-standing division of power among the nation's leadership.

It should be self-evident that the architects of new federations must take into account the voices of those who will be directly affected by the proposed governance structure. In light of the negotiation process with Canadian and British Columbian governments, the Nisga'a did not have an uncontested say in shaping their internal federal arrangements, nor in carving their place within the broader Canadian federation. Nonetheless, the lead-up to the *Nisga'a Final Agreement* exemplifies the importance of listening to often marginalized voices in order to assure the federal arrangement's success. During the heat of negotiations in the 1990s, government authorities held over 250 public consultation meetings[20] and regrouped 31 organizations to create the Treaty Negotiation Advisory Committee.[21] This commitment to canvassing the opinions and expectations of stakeholders allows the *Final Agreement* to be seen not as Aboriginal peoples bowing to outside political pressures, but rather as the Nisga'a independently choosing to enter the Canadian political arena.[22]

The importance of involving the voices of those most directly affected by new federal arrangements is reflected in the ratification process that enabled the Nisga'a Federation's implementation. After negotiations were concluded, 72% of Nisga'a voters cast their ballots in favour of the *Final Agreement* and its federal arrangements.[23] For what it is worth, the Chief Federal Negotiator's assessment of the *Nisga'a Final Agreement* lends further credence to the idea that the federation is a product of the Nisga'a people's choosing. W. Thomas Mallow asserts that the *Final Agreement* corresponds to the Nisga'a's wish of being full partners in the Canadian Federation.[24] Consulting with stakeholders whose voices have historically been marginalized suggests that the Nisga'a Federation will correspond to Nisga'a expectations and that it will benefit from their support once implemented.

The long-term success of a federal arrangement in the Aboriginal context may depend on the continued centrality of voice. As such, a pragmatic approach to federalism should include formal consultative mechanisms at all levels of government. Federations, especially newer ones, are dynamic. The voices that are so important in shaping the original agreements on which they rest should be prominent in the governance arrangement's evolution.

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18 Scott, *supra* note 10 at 103.

19 *Ibid*.

20 See Indigenous and Northern Affairs Canada, *supra* note 12.

21 See W Thomas Molloy, "A Testament to Good Faith: The Process and Structure of the Nisga'a Negotiations: A Federal Negotiator's Perspective" (2004) 11 Intl J on Minority & Group Rights 251 at 255 [Molloy].

22 See Scott, *supra* note 10 at 102.

23 See Brian A Crane, Robert Mainville & Martin W Mason, *First Nations Governance Law*, 2nd ed (Markham, LexisNexis, 2008) at 299. For a greater understanding of the ratification process, including the reaction in British Columbia more broadly, see Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas & McIntyre, 2006) at 124–36.

24 See Molloy, *supra* note 21 at 258. See also Tom Molloy with Donald Ward, *The World Is Our Witness: The Historic Journey of the Nisga'a into Canada* (Calgary: Fifth House, 2000).

In many Aboriginal communities, elders play a greater role in the transmission of knowledge than in the wider Canadian population. The *Nisga'a Constitution* recognizes this fact through the Council of Elders.[25] Those who sit on the Council provide opinions and guidance to the Nisga'a Lisims Government, and must be consulted prior to passing constitutional amendments. By creating a dedicated and permanent body of elders, the *Constitution* ensures that the voices of a group that would likely not be recognized in traditional state-based conceptions of federalism may resonate through official channels.

Aboriginal federal arrangements also differ significantly from many state-based models in that their clout is substantially weaker than that of the provincial and national governments with which they interact. The display of competitive federalism often observed between Ottawa and the provinces is ill-suited to self-governing Aboriginal nations. As communities with comparatively small populations, limited resources, and no competences attributed in the 1867 *Constitution Act*,[26] Aboriginal groups can seldom impose their orientations or policies on Canadian governments. Forms of cooperative federalism with formal consultative requirements offer a means of offsetting this power imbalance between federal actors.

The negotiators of the *Nisga'a Final Agreement* were acutely aware of Aboriginal federal arrangements' fragility. Without formal consultative mechanisms, the Nisga'a Federation could be severely impacted by unilateral decisions made in Ottawa or Victoria. The *Final Agreement* consequently prescribes co-operation with members of the wider Canadian Federation. One major example is British Columbia's obligation to consult the Nisga'a before amending provincial laws that may affect them.[27] Such consultative arrangements help to ensure that the voices in new Aboriginal federal arrangements continue to be heard as the Federation and provincial and Canadian governments evolve.

PART III: AVOIDING PRESCRIPTIVENESS

There exist as many models of federalism as there are federations. Each federalist country has adapted the way in which powers are divided between its orders of government so as to reflect its unique history and needs. This practice must imperatively be followed in the Aboriginal context. Canada's First Peoples have unique needs and expectations. It would be misguided for those designing new forms of self-government to model them too closely on established governance structures. A pragmatic approach to federalism in the Aboriginal context must strive to adopt a wider normative lens that is conscious of corrective justice objectives—a framework stressing the return of that which was acquired wrongfully, such as land and institutional power. The pragmatic approach must also ensure that existing models of federalism do not overshadow distinct ways of structuring novel federations.

Those debating the shape of new and potential federations in the Aboriginal context may be tempted to adopt a narrow liberal view of acceptable governance structures. Such a normative perspective would align with the idea that any differential treatment of individuals runs counter to the basic tenets of equality and fairness. Yet, the narrow liberal view fails to capture the historical disadvantages of Aboriginal peoples and the potential usefulness of corrective justice. The foundational works of two Canadian scholars, Alan C. Cairns and Will Kymlicka, may help reconcile the importance we attribute to equality concerns and the needs of many Aboriginal communities.

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25 See *The Constitution of the Nisga'a Nation*, 1998, s 27 [*Nisga'a Constitution*].

26 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (Part VI of the Act, *Distribution of Legislative Powers*, only attributes competences to Parliament and to the provincial legislatures).

27 See *Nisga'a Final Agreement*, *supra* note 2, c 11, s 30.

Cairns and Kymlicka promote a wider understanding of fairness, bearing in mind the unique history of Aboriginal nations as Canada's First Peoples. In his seminal book, Cairns describes Aboriginal peoples as "citizens plus."[28] His model "recognizes the Aboriginal difference fashioned by history and the continuing desire to resist submergence."[29] Similarly, Kymlicka has addressed group-differentiated rights, history, and the fact that national minorities were forced into the state through colonization.[30] Cairns and Kymlicka invite us to assess new and potential Aboriginal federations in Canada with a view towards corrective justice.

The concept of fairness within the *Nisga'a Consitution* also respects historical context. The *Nisga'a Constitution* contains provisions that distinguish Nisga'a citizens and non-citizens, yet it "cherishes the unique spirit, respects the dignity, and supports the independence of each individual."[31] For example, non-citizens residing on Nisga'a land and Nisga'a citizens alike must obey local laws of general application (e.g. traffic regulations).[32] Only Nisga'a citizens, however, are eligible to elect the representatives that make these laws; non-citizens are limited to a right of consultation for decisions that directly and significantly affect them.[33] Kymlicka might answer this charge of legislated inequality by analogizing group-differentiated rights to states. Even in liberal democracies, citizenship allows for distinctions in rights, including political entitlements.[34] Non-citizens may wish to acquire a country's citizenship, but this willingness is dismissed by virtue of not being "born into the right group."[35]

The Nisga'a Nation maintains a tight and culturally-based control over who may become a citizen. Entitlement to citizenship rests on being a Nisga'a participant, which in turn requires Nisga'a ancestry.[36] Exceptions are limited to matters of adoption and marriage between a Nisga'a citizen and another Aboriginal individual.[37] This tight centralized control over who may become a Nisga'a citizen limits opportunities for outsiders to enter the Federation and maintains a socio-demographically homogenous citizenry. In the same stroke, however, this restrictive control over citizenship is necessary to maintain the very raison d'être of an Aboriginal federation. Unlike ordinary federal states, federalist arrangements in the Aboriginal context are created to allow culturally distinct groups to self-govern. If outsiders are permitted to claim citizenship in Aboriginal federations, they could quickly outnumber the Aboriginal population. Fairness in this context appears to be served by tight controls over who may reap the benefits of citizenship.

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28 See Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000). For the original author who coined the term, see HB Hawthorne, ed, *A Survey of the Contemporary Indians of Canada* (Ottawa: Queen's Printer, 1966) [Cairns]. For further analysis of the term, and a discussion of the evolution to "Citizens Plural", see also Paul LAH Chartrand, "Citizenship Rights and Aboriginal Rights in Canada: From 'Citizens Plus' to 'Citizens Plural,'" in John Erik Fossum, Paul Magnette & Johanne Poirier, eds (Brussels: PEI Peter Lang, 2009). The Nisga'a Tribal Council has itself appropriated the term "citizens plus" (see Nisga'a Tribal Council, *Citizens Plus* (New Aiyansh, BC: Nisga'a Tribal Council, 1976)).

29 *Ibid* at 9.

30 See Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) at 11, 118 [Kymlicka].

31 *Nisga'a Constitution*, *supra* note 25, s 9.

32 See Indigenous and Northern Affairs Canada, "Nisga'a Final Agreement – Issues and Responses – Governance," online: <www.aadnc-aandc.gc.ca/eng/1100100031319/1100100031321> archived <https://perma.cc/XH9S-VRU6>.

33 See *Nisga'a Constitution*, *supra* note 25, s 12(1); *Nisga'a Final Agreement*, *supra* note 2, c 11, s 19.

34 See Kymlicka, *supra* note 30 at 124.

35 *Ibid*.

36 See *Nisga'a Constitution*, *supra* note 25, s 8; *Nisga'a Final Agreement*, *supra* note 2, c 20, s 1.

37 See *Nisga'a Final Agreement*, *Ibid*.

Some might argue that the *Nisga'a Constitution*'s penchant for elders' participation in decision-making creates a hierarchy among the citizenry itself. The Council of Elders plays a prominent role in the Nisga'a federation's governance and its membership is restricted to Nisga'a chiefs, matriarchs and respected elders.[38] While many Nisga'a citizens may never serve on the Council of Elders, the body's role corresponds with the citizens plus model. A chief concern outlined by Cairns is having a group tasked with providing advice over traditional Nisga'a values (for instance, as they apply to the *Constitution*, language and citizenship).[39] Although the *Nisga'a Constitution* provides for differential treatment of citizens and non-citizens and between citizens themselves, these initiatives fall within the bounds of liberal society.

Avoiding a prescriptive approach to federations in the Aboriginal context also means that labels should be used cautiously. While all state-based federations' governing structures vary in some respects, they can usually be categorized according to established criteria (e.g. monarchical or republican executive power, civilian or common law tradition, etc.). These labels may be a poor fit for Aboriginal communities that wish to include traditional or other means of governance in their federalist arrangements.

In designing the exercise of executive power within the federation, the framers of the *Nisga'a Constitution* adopted an unconventional, somewhat hybrid design occupying a middle-ground between presidential and parliamentary models. On the one hand, the *Constitution* prescribes a degree of separation between the legislative and executive branches that is more akin to a presidential model of governance. It does not provide any indication that, as would be the case in a parliamentary system, the executive's loss of the legislature's support would entail the government's collapse. Moreover, the leader of the Nisga'a Lisims Government holds the title of president. On the other hand, the *Constitution* does not prevent the executive branch from playing a direct role in the legislative process, as is the case in presidential systems.[40] Instead, the Nisga'a Nation's legislative house encompasses all officers of the Nisga'a Lisims Government, including the members of the executive branch.[41] The president and other members of the executive therefore directly fashion the legislative process. The separation of legislative and executive branches is also absent in the Nisga'a Village Governments as the *Nisga'a Constitution* does not provide for an executive body.[42]

Only by sidestepping the conventional labels of presidential or parliamentary systems were the Nisga'a able to craft a model that fits their needs and expectations. The governance structure bears neither the instability of the British-descended parliamentary system, nor the restrictive separation of power emblematic of presidential arrangements. In considering the needs of other, often small, Aboriginal communities, federal design appears to be best served by a non-prescriptive approach.

Another aspect of avoiding prescriptiveness in relation to Aboriginal federal designs involves allowing room for growth. In negotiating new federal agreements, stakeholders should support the gradual development of powers previously delegated to the province or the Canadian government. Doing so would ensure that new Aboriginal federations are neither restricted to a small set of powers nor saddled with an inordinate number of responsibilities at the transitional stage.

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38 See *Nisga'a Constitution*, *supra* note 25, s 27(1).

39 *Ibid*, s 32(2).

40 See Hueglin & Fenna, *supra* note 5 at 50.

41 See *Nisga'a Constitution*, *supra* note 25, ss 31(2), 36.

42 *Ibid*, s 42.

The *Nisga'a Final Agreement* anticipated that the Federation would grow organically and might wish to exercise additional powers as it developed. For instance, the *Final Agreement* allows the Nisga'a Nation to establish its own courts, police service, and other institutions.[43] By 2010, the Nisga'a Lisims Government had enacted more than 28 pieces of legislation.[44] As the Nisga'a Nation continues to become more independent and to legislate in the areas over which it is responsible, it may wish to exercise greater control over its affairs by creating its own court. When contemplating future federal arrangements in the Aboriginal context, it is worth bearing in mind that communities such as the Nisga'a Nation may develop quickly under self-governance agreements and require flexibility in the federal division of powers to grow organically.

PART IV: ACCOUNTING FOR MULTIPLE AND COMPLEX IDENTITIES

Federalist arrangements in the current Canadian Aboriginal context must operate within a pluralist society. Not only are the federations anchored in a wider governance structure regrouping scores of different peoples, but Aboriginal Nations themselves exhibit significant diversity. Cairns has outlined this latter point through his treatment of reduced otherness and multiple identities. The opposite of assimilation, he explains, is often viewed as parallelism: a paradigm based on the two-row wampum model, which stresses the endurance of differences and nation-to-nation respect.[45] Such a binary view of 'us and them' does not reflect contemporary Aboriginal realities. As Cairns explains, "Aboriginal societies, like all other societies […] are penetrated societies. They should not, therefore, be viewed as if they were whole societies with only minimal relations with the Canadian society."[46] A pragmatic approach to federalism in the Aboriginal context must distance itself from the two-row wampum model and adopt a pluralist view with regard to matters of identity.

On paper, the *Nisga'a Final Agreement* describes the Nisga'a as "the collectivity of those aboriginal people who share the language, culture, and laws of the Nisga'a Indians of the Nass Area, and their descendants."[47] Being united in culture is at the heart of what it means to be Nisga'a. The restrictive rules attributing citizenship through matrilineal ancestry further compound this idea. Yet, shared culture should not be conflated with shared identity. Some citizens of the Nisga'a Nation have, in past years, demonstrated a strong attachment to the wider Canadian Federation. In *Chief Mountain v British Columbia (Attorney General)*,[48] members of the Gingolx village contested the constitutional validity of the *Nisga'a Final Agreement*, claiming that it violated their rights as Canadian citizens under the Canadian constitution.[49] This recent Supreme Court of British Columbia case demonstrates the multiple identities that members of an Aboriginal community hold. On the one hand, residents of the Gingolx village relied on their

43 See *Nisga'a Final Agreement*, *supra* note 2, c 12.

44 See Ross Hoffman & Andrew Robinson, "Nisga'a Self-Government: A New Journey Has Begun" (2010) 30:2 Can J Native Studies 387 at 398 [Hoffman and Robinson].

45 See Cairns, *supra* note 28 at 91–92. The two-row wampum model is said to reflect agreements in early Indigenous-settler relations according to which harmonious relationships would be achieved by Aboriginal and European groups coexisting without interfering in each other's laws or customs.

46 *Ibid* at 101.

47 *Nisga'a Final Agreement*, *supra* note 2, c 1, s 12.

48 *Chief Mountain v British Columbia (Attorney General),* 2011 BCSC 1394, 2011 BSCS 1394 (CanLII) [*Chief Mountain*].

49 See Hoffman & Robinson, *supra* note 44 at 399.

attachment to the Canadian state to ground their legal challenge.[50] On the other hand, even Canada and the Nisga'a Nation—the parties defending the federal arrangements—stressed that the *Final Agreement* is an expression of the Nisga'a people's desire to participate in Canadian society.[51] Many within the Nation hold multiple identities as both Nisga'a and Canadian citizens.

Acknowledging the diverse identities that make up any Aboriginal community means that a pragmatic approach to federalism must avoid isolationism. The governance structures should not be designed to segregate members of the community from the wider Canadian federation. Future federal arrangements in the Aboriginal context must simultaneously grant communities greater agency to manage their affairs while enabling its members to identify with various groups.

Concretely, accommodating these multiple identities can be facilitated by combining the more traditional model of territorial federalism with that of ethno-federalism. While the former divides powers and grants rights according to geographical divisions, ethno-federalism does not depend on physical demarcation. Members of select groups are granted rights by virtue of their ethnic identity. The *Nisga'a Final Agreement* created three Urban Locals, where Nisga'a citizens living away from the Nass Valley may participate in the political life of their nation while simultaneously identifying, for instance, as a Vancouverite. Although Nisga'a Urban Locals are limited to three British Columbian municipalities, one could imagine an arrangement where a member of the Aboriginal community residing anywhere in Canada may maintain their political ties. In this sense, a member of the community who leaves the land traditionally held by her nation would not be forced to forsake one identity in order to integrate a new one.

Accounting for multiple identities behoves the architects of future federations in the Aboriginal context to be mindful of diverse groups that occupy every part of Canada. New and complex federal arrangements can easily be mischaracterized or misunderstood, and it is incumbent upon those who promote them to explain and promulgate distributions of power carefully.

While the *Nisga'a Final Agreement* and its federalist dimension have had a pacifying effect, in that they quelled over 100 years of grievances from the Nation's leadership, it has also sparked confrontation with non-Aboriginal and Nisga'a actors alike. Lawsuits challenging the validity of the *Nisga'a Final Agreement* have brought tensions to light as recently as six years ago.[52] To this day, the Government of Canada's website attempts to assuage fears among non-Aboriginals that the Nisga'a have been granted race-based rights.[53] From an Aboriginal perspective, federal arrangements may constitute a renewed and subtler confrontation between Canada and First Peoples. At least one Indigenous scholar contends that self-government agreements are but a renewed manifestation of colonization contributing to assimilation and imposing non-Aboriginal governance structures.[54] Future

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50 It should be acknowledged that reading the case does not confirm whether villagers launched the lawsuit because of a deep attachment to Canada or merely as an instrumental means of countering an agreement they perceived to be unfavourable. It is also not clear whether the village association behind the legal action speaks for the majority of Gingolx residents.

51 See *Chief Mountain*, *supra* note 48.

52 See *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123, 189 DLR (4th) 333; *Chief Mountain supra* note 48.

53 See Indigenous and Northern Affairs Canada, *supra* note 32.

54 See Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2009). For a critique of federal arrangements' assimilative tendencies in the United States, see Jeff Corntassel & Richard C Witmer, *Forced Federalism: Contemporary Challenges to Indigenous Nationhood*, American Indian Law and Policy Series, vol 3 (Norman, OK: University of Oklahoma Press, 2008).

federalist arrangements in the Aboriginal context must not only be fair to those who will be directly affected, but they must also be seen to be fair by members of the wider Canadian federation who do not identify with the Aboriginal group.

CONCLUSION

At a time when First Nations leaders and governments are considering means of expanding Aboriginal peoples' agency, federalist arrangements stand out as a way of implementing self-government. This article has argued that imagining new federal models and assessing existing ones requires setting aside traditional state-based conceptions of shared rule in favour of a pragmatic federalist approach. The Nisga'a Nation—a successful, yet understudied incarnation of Canadian Aboriginal federalism—offers a number of lessons.

A pragmatic approach to federalism must promote voice. Each Aboriginal community's traditional governance structure and its expectations must be taken into account. In addition, institutional channels may permit important non-elected actors' voices to resonate fully in government. New federations in the Aboriginal context must avoid prescriptiveness. Insiders and outsiders alike should be cautious in applying normative measures of assessment and may consider using a corrective justice lens. In the same vein, the architects of future federations must avoid resorting to existing federal models in a way that would overshadow alternative governance structures. Finally, successful federal arrangements will need to reflect and accommodate the multiple identities that are present within Aboriginal communities and in the wider Canadian population.

ARTICLE

USING SECTION 24(1) *CHARTER* DAMAGES TO REMEDY RACIAL DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

Gabriella Jamieson*

CITED: (2017) 22 Appeal 71

INTRODUCTION

Systemic racism is present in our criminal justice system and it has wide-reaching harmful impacts.[1] The consequences of racial discrimination are severe and can include physical and psychological harm, isolation, alienation, mistrust, behavioural adaptations, damage to family and social networks, and the over-incarceration of racial minorities.[2]

Many approaches are required to address and correct the issue of systemic racial discrimination.[3] Potential approaches to meaningful change include: cultural competency training relating to unconscious bias, implementing monitoring systems, providing more resourcing to *Gladue* workers, increasing funding for specialized courts, and appointing more racially- and culturally-diverse judges. Without detracting from the importance of these initiatives and others, this paper explores the use of damage awards pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*[4] as an avenue of relief for individuals harmed by racial discrimination who cannot access other remedies available in the criminal trial process or tort law.

The paper addresses this topic in five parts. Part I introduces the systemic and historical nature of racial discrimination. Part II discusses the nature of section 24(1) *Charter* damages and why they may provide an appropriate remedy for *Charter* violations caused by racial discrimination in the criminal justice system. While not a perfect or complete remedy, *Charter* damages can provide relief to individuals who face discrimination and can "clarify the law so as to prevent similar future breaches."[5] Part III canvasses the seminal decision on section 24(1) damages: *Vancouver (City) v Ward*.[6] Part IV covers the recent decision in *Henry v British Columbia (AG)*[7] and remarks on how it impacted the test for *Charter* damages, with comments on *Ernst v Alberta Energy Regulator*.[8] Part V considers how to approach a claim for *Charter* damages resulting from racial discrimination.

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1 David M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40:2 Sup Ct Rev 656 at 661 [Tanovich, "Charter of Whiteness"].

2 *Ibid.*

3 Ranjan Agarwal & Joseph Marcus, "Where There is no Remedy, There is No Right: Using *Charter* Damages to Compensate Victims of Racial Profiling" (2015) 34:1 NJCL 75 at 79 [Agarwal & Marcus].

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11, section 24(1) [*Charter*].

5 *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 30, Cromwell J [*Ernst*].

6 *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*].

7 *Henry v British Columbia (Attorney General)*, 2015 SCC 24 [*Henry*].

8 *Ernst, supra* note 5.

I. RACIAL DISCRIMINATION: A REAL ISSUE THAT NEEDS TO BE REMEDIED

A. The Nature of Racial Discrimination

There is a significant body of evidence illustrating the existence of racial discrimination and racial profiling in Canada.[9] The Ontario Court of Appeal (ONCA) in *R v Brown* accepted the definition of racial profiling as involving "the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group…[where] race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group."[10] In *Brown*, Justice Morden for a unanimous Court of Appeal found that social science evidence clearly established racial profiling exists and went on to explain that "[t]he attitude underlying racial profiling is one that may be consciously or unconsciously held." For example, a police officer "need not be an overt racist" for his or her conduct to be "based on subconscious racial stereotyping."[11]

Justice Doherty of the ONCA stated in *Peart v Peel (Regional Municipality) Police Services Board* that racial discrimination is "offensive to fundamental concepts of equality and the human dignity of those who are subject to negative stereotyping."[12] The Court noted that both courts and the community at large have come to recognize that racial profiling is a daily reality for many minorities and that racism continues to operate in our criminal justice system.[13]

The Supreme Court of Canada (SCC) explicitly acknowledges the existence of systemic discrimination against Aboriginal peoples in Canada.[14] In *R v Gladue*, the SCC accepted findings in the Report of the Royal Commission on Aboriginal Peoples and the Aboriginal Justice Inquiry of Manitoba regarding widespread discrimination.[15] In *R v Williams*, the Court found there is "widespread bias against Aboriginal people" and "there is evidence that this widespread racism has translated into systemic discrimination in the criminal system."[16]

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9 Agarwal & Marcus, *supra* note 3 at 78; *R v Brown*, 2003 CanLII 52142 (ONCA) [*Brown*]. In his article on the Marshall Inquiry, Bruce Marshall discusses the definition of racism and distinguishes between individual, institutional, and structural racism. He also suggests that racism should be effect-oriented rather than entailing a certain intention or belief – I agree with this explanation. See generally Bruce H Wildsmith, "Getting at Racism: The Marshall Inquiry" (1991) 55 Sask L Rev 97 at 104-105 [Wildsmith].

10 *Brown, supra* note 9 at para 7; *Brown* was recently referenced in *R v Ohenhen*, 2016 ONSC 5782, a case that could be a strong basis for a *Charter* damages claim.

11 *Brown, supra* note 9 paras 7-8.

12 *Peart v Peel (Regional Municipality) Police Services Board,* 2006 CanLII 37566 (ONCA) at para 93 [*Peart*]; David M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 146 at 147 [Tanovich, "Using the Charter"].

13 *Peart, supra* note 12 at para 94.

14 *R v Gladue* 1999 CanLII 679 (SCC) [*Gladue*]; *R v Ipeelee* 2012 SCC 13 [*Ipellee*]; *R v Kokopenace*, 2015 SCC 28 [*Kokopenace*].

15 *Kokopenace*, *supra* note 14 at para 283, McLachlin CJ, dissenting; Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996) [RCAP Report]; Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People,* vol 1, *The Deaths of Helen Betty Osborne and John Joseph Harper* vol 2, (The Aboriginal Justice Implementation Commission, 1991) online: <http://www.ajic.mb.ca/volume.html> archived at <https://perma.cc/2RBM-NF2R> [Justice Inquiry of Manitoba].

16 *Kokopenace*, *supra* note 14 at para 283, McLachlin CJC, dissenting; *R v Williams*, 1998 CanLII 782 (SCC).

B. The Extent of the Problem

Historical reports, Royal Commissions, and inquiries reflect on the nature of systemic racial discrimination and its impact on criminal investigations.[17] Although some of these documented cases occurred over thirty years ago, the principles and conclusions drawn from them remain relevant today. Recent statistical findings and case law further corroborate the conclusions of these reports. The case of Donald Marshall is an example of racial discrimination as a real and complex issue that demands remedial action in Canada.

i. The Royal Commission on the Donald Marshall Jr. Prosecution

R v Marshall presented explicit facts that raised issues of racism and discrimination: Mr. Marshall, an Aboriginal youth, was charged with murdering a black youth. He was investigated, tried and wrongly convicted by white criminal justice participants.[18] While the Commission stated the outcome was not the result of "any evil intention to discriminate by those in the criminal justice system,"[19] the unintended nature of discrimination does not make its impact any less insidious or devastating.[20]

The police, Crown prosecutors, defence counsel, courts and the Department of the Attorney General all contributed to the wrongful conviction of Donald Marshall in 1971.[21] The Royal Commission concluded "[t]he criminal justice system failed Donald Marshall, Jr. at virtually every turn."[22] The Commission also found that "[o]ne reason Donald Marshall, Jr. was convicted of and spent 11 years in jail for a murder he did not commit is because Marshall is an Indian."[23]

This Commission Report suggests racial discrimination causes increased public perceptions of unfairness and erosion of confidence in our justice system. Notions of unfairness can cause distrust to spread through the community "with debilitating and corrosive effects within…the system."[24] Loss of confidence can present on a spectrum, from simply questioning the system to complete loss of confidence in the system's integrity.[25] Restoring this confidence "can only be accomplished through the unwavering and visible application of the principles of absolute fairness and independence."[26]

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17 RCAP Report, *supra* note 15; Justice Inquiry of Manitoba *supra* note 15; Nova Scotia, *Findings and Recommendations of the Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: The Royal Commission, 1989) [Donald Marshall Commission]; Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto, 1995); Saskatchewan, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Regina: 2004), Independent Review by the Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries* (2013).

18 Donald Marshall Commission, *supra* note 17, vol 1 at 149; see also Wildsmith, *supra* note 9 at 16, where Bruce Wildsmith notes that more could have been done to "get at racism and access its role," including looking for structural racism in the justice system.

19 Donald Marshall Commission, *supra* note 17, vol 1 at 151.

20 *Ibid*.

21 Donald Marshall Commission *supra* note 17, vol 1 at 193.

22 *Ibid* at 15. See also Wildsmith, *supra* note 9 at 112-113 for a critique on the analysis presented in the report, and how it could have found more direct evidence of racism.

23 Donald Marshall Commission, *supra* note 17, vol 1 at 148.

24 *Ibid* at 228.

25 See generally *ibid* at 228-229.

26 *Ibid* at 194.

ii. Recent Manifestations and *Charter* Violations

The Office of the Correctional Investigator has compiled statistics and reports relating to the over-incarceration of Aboriginal people in Canada, indicating the issue of racial discrimination is getting worse over time.[27] In *R v Ipeelee,* the SCC found, "statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened." Indeed, "overrepresentation of Aboriginal people in the criminal justice system is worse than ever."[28] In January 2016, the office reported that 25% of federal inmates are Indigenous, and 35% of incarcerated women are Indigenous.[29]

> To put these numbers in perspective, between 2005 and 2015 the federal inmate population grew by 10%. Over this same period, the Aboriginal inmate population increased by more than 50% while the number of Aboriginal women inmates almost doubled. Given that 4.3% of Canada's population is comprised of Indigenous Peoples, the Office estimates that, as a group, they are incarcerated at a rate that is several times higher than their national representation.[30]

The racial profiling of Indigenous peoples and other racial minorities is an ever-growing problem in Canada. One survey found:

> Indigenous students will be stopped more frequently, the study indicates; whether or not they were engaged in or close to an illegal activity when stopped by police had little influence in explaining the results. This suggests staying out of trouble does not shield Indigenous student [sic] from unwanted police attention.[31]

There are many stories and documented incidents evidencing the high level of racial discrimination against racialized individuals in Ontario.[32] In October 2016, the Ottawa Police Service released a report summarizing data collected between 2013 and 2015 on the race of drivers stopped at traffic stops. The report indicates racial groups observed as "Middle Easterner" or "Black" are stopped in a disproportionately high number.[33] Further, racialized minority drivers experienced disproportionately high incidences of no action outcomes at the traffic stops.[34]

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27 Laura Stone, "Prison Watchdog encouraged by Ottawa's aboriginal pledge", *The Globe and Mail* (28 March 2016) online: <http://www.theglobeandmail.com/news/politics/prison-watchdog-encouraged-by-ottawas-aboriginal-pledge/article29412979/> archived at <https://perma.cc/46X3-6KAF>; Office of the Correctional Investigator, online: <http://www.oci-bec.gc.ca/index-eng.aspx>archived at <https://perma.cc/S6X8-L3HQ>.

28 *Ipeelee, supra* note 14 at para 62.

29 The Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015-2016*, ch 4 (Ottawa: Correctional Investigator Howard Sapers, 2016) at 43.

30 *Ibid.*

31 Nancy MacDonald, "Canada's prisons are the 'new residential schools'" *Maclean's* (18 February 2016), online: <http://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/> archived at <https://perma.cc/R6LQ-GS7K>. McClean's surveyed more than 850 post-secondary students in Regina, Saskatoon and Winnipeg.

32 Leo Russomanno, "Carding, not just a Toronto Problem" (8 June 2015), online: <http://www.agpllp.ca/carding-not-just-a-toronto-problem> archived at <https://perma.cc/7EC4-RLTL>; Desmond Cole, "The Skin I'm In: I've been interrogated by police more than 50 times—all because I'm black" *Toronto Life* (21 April 2015), online: <http://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/> archived at <https://perma.cc/H4P6-FTBL>.

33 Ottawa Police Services Board & Ottawa Police Service, *Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts*, executive summary (Ottawa, October 2016) at 3, online: <https://www.ottawapolice.ca/en/about-us/resources/.TSRDCP_York_Research_Report.pdf> archived at <https://perma.cc/F5WL-JXWC>.

34 *Ibid* at 5.

These examples of racial discrimination, among others, can and do offend the *Charter*. Police may make assumptions about the relationship between race and crime, creating suspicion about a person in their mind.[35] These assumptions may be motivated by conscious or unconscious bias, and can quickly escalate into an arrest and detention. Racial profiling often occurs under the guise of the police power to detain citizens for investigative purposes.[36] For example, evasive action may look suspicious, but in reality such action could stem from the suspect's numerous interactions with law enforcement and a desire to avoid all further contact with police.[37] Some officers may target individuals of a certain race because they believe it is a reliable investigative tool, even though racial profiling is neither an effective nor reliable way to investigate crime.[38]

If racial profiling motivates a detention or search, the detention is arbitrary and the search is unreasonable. These incidents violate sections 8 and 9 of the *Charter*.[39] In addition, if an individual becomes a suspect because of unconscious discrimination and tunnel vision, sections 7 and 11(d) violations could result. If left unremedied, these violations can lead to systemic distrust of the justice system,[40] and those who experience *Charter* violations may assume their rights are worth less than the rights of others.

II. "A RIGHT, NO MATTER HOW EXPANSIVE IN THEORY, IS ONLY AS MEANINGFUL AS THE REMEDY PROVIDED FOR ITS BREACH."[41]

A. *Charter* Damages: What Are They and Can They Remedy Harms?

Arguments on the exclusion of evidence under section 24(2) of the *Charter* are available during criminal trials where *Charter* violations resulted in the discovery of evidence. Additionally, a court may order a stay pursuant to section 24(1) when an individual is prosecuted solely on the basis of racial discrimination.[42] However, remedies are rarely granted where an individual is stopped on the street, searched, harassed, arrested, or tried on the basis of racial discrimination.[43] Factually innocent victims of racial discrimination rarely find relief through tort law and "alternative judicial and administrative remedies remain largely inadequate."[44] Often, those who experience *Charter* violations flowing from racial discrimination and who are factually innocent have "both the greatest grievance and the smallest chance of having that grievance remedied."[45]

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35 Tanovich, "Using the Charter", *supra* note 12 at 149-150.

36 For a further and more detailed discussion of investigative detention and its impacts on racial minorities, see Tanovich, "Using the Charter", *supra* note 12; Tanovich, "Charter of Whiteness", *supra* note 1; Agarwal & Marcus, *supra* note 3 at 89-90.

37 Tanovich, "Using the Charter", *supra* note 12 at 150.

38 *Ibid* at 158, 164.

39 Agarwal & Marcus, *supra* note 3 at 80, 88-89.

40 *Ward, supra* note 6 at para 28.

41 *R v 974649 Ontario Inc*, 2001 SCC 575 at para 20.

42 Kent Roach, "Remedies for Discriminatory Profiling" in Robert J Sharpe & Kent Roach eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) at 403 [Roach, "Remedies for Discriminatory Profiling"]; *R v Regan*, [2002] 1 SCR 297; however, stays are an extreme remedy and are usually reserved for only the clearest of cases.

43 Roach, "Remedies for Discriminatory Profiling", *supra* note 42 at 403.

44 It will often be difficult to claim malicious prosecution or negligent investigation in cases of racial discrimination, and there is no distinct tort for racial profiling or discrimination in Canada. Further, human rights tribunals are generally subject to caps, legislative or otherwise, or result in inconsistent awards: Agarwal & Marcus, *supra* note 3 at 77, 81-84.

45 Agarwal & Marcus, *supra* note 3 at 80.

Chief Justice McLachlin and Justice Cromwell, dissenting in *R v Kokopenace*, indicated the state has a responsibility to make reasonable efforts to address systemic problems.[46] They noted that the phrase "systemic problems" was a euphemism for "among other things, racial discrimination and Aboriginal alienation from the justice system."[47] The dissent also found that while there are many "deeply seated causes" contributing to the under-representation of Aboriginal people on juries and the overrepresentation of Aboriginal people in the correctional system, "the *Charter* provides a basis for action, not an excuse for turning a blind eye."[48]

The *Charter* does provide a basis for action, in part through the award of damages pursuant to section 24(1). Rather than turning a blind eye, counsel and the judiciary can purposively use section 24(1) to remedy proven constitutional wrongs caused by deeply-entrenched racial discrimination in the criminal justice system.[49] The SCC has insisted "the large and purposive construction attaching to the conceptual definition of *Charter* rights must be mirrored by a large and generous approach to *Charter* remedies."[50] Courts have broad and largely unfettered discretion under section 24(1) to award damages for *Charter* breaches where "appropriate and just" to "provide a meaningful response to rights violations."[51] In *Ward*, the SCC confirmed the approach to awarding *Charter* damages should not be "cut down" by appellate courts so that all relevant considerations in any given case can be factored into the remedial analysis.[52]

Charter damages can provide financial relief to victims of racial discrimination, where the discrimination results in *Charter* violations. Litigation in this area can also provide an opportunity for the state to understand its responsibility to address the individualized consequences of systemic problems. Fully considering the breach at issue and its consequences also furthers the development of remedial and constitutional law.[53]

Although racial discrimination is an intersectional and complicated issue,[54] *Charter* damages are an appropriate remedy. They strike a balance between constitutional rights and effective government: "two important pillars of our democracy."[55] *Charter* damages can provide tangible monetary compensation to those who are thrust into the criminal

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46 *Kokopenace*, *supra* note 14 at para 281. Note that this was in the context of jury representation, but I think it is applicable to the context of racial discrimination as well.

47 *Ibid* at para 282, Cromwell J and McLachlin CJC, dissenting.

48 *Ibid* at para 285, Cromwell J and McLachlin CJC, dissenting.

49 See Generally Agarwal & Marcus, *supra* note 3. *Charter* litigation to date has not been very successful in remedying racial injustice in Canada, particularly in the criminal justice process. Professor Tanovich suggests that, "[n]arrow approaches to judicial review and a lack of judicial imagination have played a role in limiting the impact of Charter litigation" on this issue. Race is not often successfully raised in *Charter* cases, perhaps because some counsel do not see the issue, are uncomfortable engaging with it, or are unsure how to argue racial profiling in a *Charter* case. However, creative and evidence-based arguments by counsel, paired with the judiciary's willingness to hand down imaginative remedial judgments can expand the availability of section 24(1) damages to remedy victims of discrimination: Tanovich, "Charter of Whiteness" *supra* note 1 at 662, 674, 676.

50 Beverly McLachlin, "Rights and Remedies – Remarks" in Robert J Sharpe & Kent Roach eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010).

51 *Ward*, *supra* note 6 at para 16; *Henry, supra* note 7 at para 35; *R v Mills*, [1986] 1 SCR 28 at p 965 [*Mills*].

52 *Ward, supra* note 6 at para 18; *Henry, supra* note 7 at para 106, McLachlin CJC, dissenting.

53 For a further discussion on parliamentary sovereignty and damage awards, I can direct the reader to Raj Anand, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" (2010) 27 NJCL 159 at 167 [Anand] and Marilyn L Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Can Bar Rev 517 at 540 [Pilkington].

54 Peter Schuck, *Suing Government* (New Haven: Yale University Press, 1983) at 3 [*Schuck*]: conduct that violates the constitutional rights of individuals is not *one* problem but rather a web of issues.

55 *Ernst, supra* note 5 at para 25; *Mackin v New Brunswick,* 2002 SCC 13, para 79 [*Mackin*].

justice system on the basis of their race. These cases can also clarify the law relating to *Charter* breaches—assisting to prevent future *Charter* rights infringements.[56] *Charter* damages in this context have the potential to address the larger systemic issues of racial discrimination.

B. *Charter* Damages are not a Panacea

While *Charter* damages should be used to address *Charter* violations resulting from racial discrimination, it is important to be mindful of existing theoretical, procedural, and jurisdictional bars to claiming them.[57] Constitutional rights violations do not create "automatic or unlimited" remedies, particularly remedies such as *Charter* damages awards.[58] A claimant must "often traverse broad domains of official and governmental immunity"[59] before attaining damages grounded in compensation, vindication, or deterrence—the settled purposes for awarding *Charter* damages. Whether *Charter* damages can adequately address a systemic problem remains to be seen. Marilyn Pilkington (in the early days of the *Charter*) wrote, "if inadequate funding is at the root of the problem, diverting funds to pay damage awards may only exacerbate [the root of the problem]."[60] However, limiting the availability of *Charter* damage awards requires a principled and well-reasoned approach that appreciates the experience of the victim. The fact that a particular damage award does not fix the systemic issue, or does not provide deterrence on its own, is not a reason to deny a remedy to someone whose rights were infringed.[61]

Procedurally, section 24(1) invites individuals to apply to "a court of competent jurisdiction" to obtain a remedy. In *Ward*, the SCC confirmed that a court of competent jurisdiction must have the power to consider *Charter* questions and have inherent or statutory jurisdiction to award damages.[62] But while individuals must commence their *Charter* damages claims in a provincial superior court,[63] even superior courts have been reluctant to award damages in the midst of a criminal trial because of the fundamental differences between criminal and civil trials.[64]

An individual prosecuted in a superior court has recourse to damages within one proceeding, whereas an individual prosecuted in a provincial court does not. This is a serious limitation because most criminal cases are dealt with in provincial court. While it is possible for a provincial superior court to rely on its inherent jurisdiction to award

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56 *Ernst*, *supra* note 5 at paras 30, 36, Cromwell J.

57 Agarwal & Marcus, *supra* note 3 at 77.

58 *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 292.

59 *Ibid*.

60 Pilkington, *supra* note 53 at 562.

61 *Ibid*.

62 Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (consulted last on 9 March 2016), (Aurora: Canada Law Book), ch 11 at 7 [Roach loose-leaf]; *Ward SCC*, *supra* note 6 at para 58; *R v Conway*, 2010 SCC 22.

63 *Tucker v* Canada, 201 FCT 157 (CanLII) at para 10; Whaling *v Canada (Attorney General)*, 2017 FC 121 [*Whaling*] is a recent example of a claim in the Federal Court; Roach loose-leaf, *supra* note 62, ch 11 at 7. However, there has been movement on the issue of provincial court jurisdiction. In 2011, the Saskatchewan Provincial Court found its enabling statute allowed it to award damages under section 24(1): *R v Wetzell* 2011 SKPC 9. On appeal, the Court of Appeal found the SKPC did not have jurisdiction to award *Charter* damages because this was a criminal proceeding, and because neither party had raised the damages issue: 2013 SKCA 143. It remains to be decided whether in the civil context, the SKPC has jurisdiction to award *Charter* damages.

64 *Mills*, *supra* note 51; *R v Pang*, (1994) 95 CCC (3d) 60; Roach loose-leaf, *supra* note 62, ch 11 at 8.

damages under 24(1), where appropriate,[65] the only recourse for those prosecuted in provincial court is a separate proceeding in superior court. This can be costly, time-consuming, and likely requires the expensive assistance of counsel. Legislative amendments could allow superior courts *or* provincial courts to award *Charter* damages during criminal proceedings when a stay is too extreme a remedy, and the exclusion of evidence is inapplicable.[66]

III. *WARD* AND THE TEST FOR *CHARTER* DAMAGES

A. Introduction: *Ward* through the Courts

Mr. Ward brought a claim against the City of Vancouver, the Province of British Columbia, and individual officers in tort and *Charter* damages for unlawful arrest, search, and detention.[67] All levels of court agreed the Defendants violated Mr. Ward's sections 7, 8, and 9 *Charter* rights through the wrongful imprisonment, strip-search, and seizure of his vehicle.[68] The British Columbia Supreme Court (BCSC) awarded $5000 in damages against British Columbia for the section 8 violation, $5000 against the City for the detention, and $100 against the City for the unreasonable car seizure.[69] All parties appealed to the British Columbia Court of Appeal (BCCA) and the City appealed to the SCC regarding the $5100.[70]

The SCC upheld the BCCA's decision in part. The Court upheld the contested $5000 against British Columbia for the strip search, but set aside the $100 award for the car seizure against Vancouver.[71] Ultimately, Mr. Ward received $10,000 in *Charter* damages and the decision clarified the legal test for damages pursuant to section 24(1) of the *Charter*. This case provided much needed structure to the confused jurisprudential history of *Charter* damages.

B. The *Ward* Test

In *Ward,* the SCC confirmed that competent courts are empowered to grant *Charter* damages pursuant to section 24(1) as a public law remedy against the state, through a functional approach. Broadly, the functional approach determines whether damages are "appropriate and just" in the circumstances.[72] More specifically, the claimant must first establish a *Charter* breach. Second, the claimant must establish that damages are appropriate, just, and fulfill with the purposes of *Charter* damages: compensation,

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65 Roach loose-leaf, *supra* note 62, ch 11 at 9-10. For example, in *R v McGillivary,* 1990 CanLII 2344 (NB CA), the New Brunswick Court of Appeal recognized the possibility of inherent jurisdiction to award damages but preferred that it be addressed in a separate proceeding.

66 Roach loose-leaf, *supra* note 62, ch 11 at 12.

67 On August 1, 2002, members of the Vancouver Police Department (VPD) mistakenly thought Mr. Cameron Ward intended to throw a pie at Jean Chrétien. VPD officers arrested and detained Mr. Ward, and impounded his car. At the police lock-up, corrections officers strip-searched him. The officers did not find any pies and determined they had no grounds to charge Mr. Ward with anything. Mr. Ward spent time in a cell before being released 4.5 hours later.

68 *Ward v City of Vancouver,* 2007 BCSC 3 at para 130 [*Ward BCSC*], however, Justice Tysoe found the Vancouver Police Department officers were justified in arresting Mr. Ward for breach of the peace, but *Charter* violations occurred when he was not released in a reasonable amount of time: para 123.

69 *Ibid,* at paras 128-129.

70 *Ward v British Columbia*, 2009 BCCA 23 [*Ward BCCA*].

71 *Ward, supra* note 6 at para 79. This is important to note because *Charter* damages remedy personal violations, and likely will never apply to property seizure, even where wrongful.

72 *Ward, supra* note 6 at para 24.

vindication, or deterrence. Third, the state can establish other considerations that render *Charter* damages "inappropriate or unjust."[73] The quantum of damages is determined at step four.

The lower courts in *Ward* addressed whether bad faith was required to award *Charter* damages for a *Charter* violation. The trial judge found the officers did not act maliciously or wrongfully enough to meet any tort standard,[74] but the lack of bad faith did not restrict the court from awarding *Charter* damages.[75] Throughout the trial and appeal process, British Columbia asserted that no damages could lie against government for a *Charter* breach "absent a concurrent tort, abuse of power, negligence or wilful blindness."[76] The government argued that *Mackin v New Brunswick* applied to immunize the government from *Charter* damages, absent negligence or bad faith.[77] The trial judge, and later the Court of Appeal, found the absence of bad faith, abuse of power, or tortious conduct is not a bar to awarding *Charter* damages in the context of discretionary decision-making or carrying out duties such as arrest and detention.[78] In the opinion of the BCCA, "[t]o require that the breach be accompanied by a tort or by bad faith to justify an award of damages in many cases will give to the victim of the breach only a pyrrhic victory, not a true remedy."[79] This finding was important to establishing *Charter* damages as a remedy available regardless of when other remedial avenues are closed.[80]

The Court in *Ward* carefully distinguished private law damages from constitutional damages. It clarified that section 24(1) damages lie against governments, rather than individuals, who exercise governmental functions or exceed legal authority.[81] Where constitutional damages are awarded, the state or society at large will compensate the claimant for breaches of that individual's constitutional rights.[82] However, policy considerations relevant to private law damages may play a role in awarding public law damages.[83]

The *Ward* test can afford those who experience racial discrimination an opportunity to get redress and participate in institutional change. The application of this *Charter* damages test, as modified in *Henry* and discussed in *Ernst,* to cases of racial discrimination is discussed in detail in the following section.[84]

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73 *Ward, supra* note 6 at para 33.

74 *Ward BCSC, supra* note 68 at paras 95, 103.

75 *Ward BCSC, supra* note 68 at para 111.

76 *Ward BCCA, supra* note 69 at para 34.

77 *Ibid* at para 57; *Mackin, supra* note 55.

78 *Ward BCCA, supra* note 69 at para 47; *Ward, supra* note 6 at para 12.

79 *Ward BCCA, supra* note 69 at para 63.

80 Note that Justice Saunders, in dissent at the BCCA expressed concern that awarding section 24(1) damages for non-pecuniary loss would become a "fall-back" where negligence or another tort cannot be established: para 89. However, an understanding of *Charter* remedies flows from this logic would leave large gaps in the availability of remedies, thus undermining the inherent importance of *Charter* rights.

81 Roach loose-leaf, *supra* note 62, ch 11 at 24.

82 *Ward, supra* note 6 at para 22.

83 *Ibid*.

84 *Henry, supra* note 7; *Ernst*, *supra* note 5.

C. Post- *Ward: Henry*

In 2010, the BCCA quashed Ivan Henry's convictions and released him from prison after almost 27 years behind bars. The BCCA found there were serious errors in the conduct of Mr. Henry's trial and that the sexual assault verdicts were unreasonable.[85] Mr. Henry filed a civil claim against the City of Vancouver, the Attorney General of British Columbia, and the Attorney General of Canada for *Charter* damages resulting from his wrongful conviction. The Crown submitted a motion to strike the claim for *Charter* damages absent malice.[86] As a result, the issue of the fault requirement in the Crown's failure to disclose went up to the SCC in order to ground an award of section 24(1) damages.[87] British Columbia argued, as it had argued in *Ward*, that fault was required. Specifically, British Columbia and the other Attorneys General argued that proof of malice is required in order for a claimant to receive *Charter* damages in the context of the Crown's failure to disclose.

At the SCC, Justice Moldaver for the majority held that where the Crown's failure to disclose violates the claimant's *Charter* rights, the claimant need not prove Crown counsel acted with malice. Rather, the claimant must prove that,

> Where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.[88]

The majority held a claimant must prove the wrongful non-disclosure caused the claimant harm—a "but for" causation requirement,[89]—a move away from the broad remedial approach to *Charter* damages established in *Ward*. Although the SCC in *Ward* cautioned against cutting down the test,[90] *Henry* narrowed the test for *Charter* damages in the context of the failure to disclose.

Chief Justice McLachlin and Justice Karakatsanis dissented, finding the majority's fault-based standard was inconsistent with the purpose of section 24(1) and the principled framework developed in *Ward*.[91] Where *Ward* requires the claimant to establish a *Charter* breach, the majority's modified *Ward* test requires the claimant to prove the *Charter* breach, that the actor had intent to withhold, and that the withholding caused harm. While the *Henry* modifications are specific to the context of the failure to disclose, future cases will have to resolve whether the *Henry* modifications apply to *Charter* damages claims in other contexts, particularly those involving Crown prosecutors.[92]

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85 *Henry, supra* note 7. The court could not determine whether Mr. Henry was factually innocent of the crimes, as the forensic evidence collected at the time of the trial was destroyed before the BCCA reheard his case and quashed the convictions.

86 *Ibid*, at para 21.

87 *Ibid* at para 2. This case continued to trial in the Fall of 2015. Chief Justice Hinkson released his decision in June, 2016: 2016 BCSC 1038 [*Henry* trial decision]; See Emma Cunliffe, "*Henry v British Columbia*: Still Seeking a Just Approach to Damages for Wrongful Conviction" (2016) 76 SCLR 144 at 154, for more in depth coverage of this case, its facts and its implications for wrongful convictions.

88 *Henry*, *supra* note 7 at para 31.

89 *Ibid* at para 95.

90 *Ward*, *supra* note 6 at para 18.

91 *Ibid* at para 104.

92 WH Charles, *Understanding Charter Damages* (Toronto: Irwin Law, 2016) at 118 [*Understanding Charter Damages*].

In *Ernst,* the SCC had another opportunity to apply the *Ward* test, although in a context with a less tangible connection to racial discrimination. In *Ernst*, the SCC grappled with the availability of *Charter* damages in the face of an administrative tribunal protected by an immunity clause.[93] That case, like *Henry*, resulted from a motion to strike the claim for *Charter* damages. The SCC's split decision on whether it was "plain and obvious" that *Charter* damages were available indicates the question of whether *Charter* damages are available in specific contexts is not, in fact, obvious. These issues are explored in more detail in Part V. As a result, *Henry* (and arguably aspects of *Ernst*) "will likely dampen Charter damage claims against the state for non-disclosure even though a failure to disclose is one of the main causes of wrongful convictions."[94]

IV. THE CURRENT *WARD* TEST, APPLIED TO RACIAL DISCRIMINATION

The *Ward* framework is well-formulated to remedy *Charter* violations involving racial discrimination because it recognizes the inherent harm in *Charter* breaches. It can respond with both individualized compensation and the potential for systemic change. The absence of a clear intent or causation requirement in the test addresses the nature of racial discrimination as commonly unconscious and capable of covertly imbuing a series of transactions within the criminal justice system with bad faith. However, the *Henry* decision raises a substantive obstacle to claiming damages arising out of Crown conduct, particularly regarding the failure to disclose as constitutionally required since *R v Stinchcombe*.[95] Part IV of this paper details the test for awarding damages under section 24(1) in light of *Ward*, *Henry,* and the SCC's recent commentary in *Ernst*. It also applies the test in the context of racial discrimination, providing arguments and commentary on its potential future success.

A. Step One: Establishing a Charter Breach

The first stage of the *Ward* test requires the claimant to establish the *Charter* violation.[96] In the context of racial discrimination, a claimant must prove on the basis of circumstantial and expert evidence that discrimination or racial profiling led to a *Charter* violation.

i. Which Rights Ground *Charter* Damages?

As noted in Part I(B)(ii) of this paper, racial discrimination can easily lead to violations of *Charter* sections 7, 8, 9, and 11(d). But racial discrimination can also be addressed as a section 15 equality violation.[97] That said, I suggest the section 15 jurisprudence to date is not sufficiently clear to predictably underpin a section 24(1) *Charter* damages claim in the criminal law context. The test under section 15 is rather unwieldy,[98] and generally used in the context of discriminatory *laws* as opposed to discriminatory *acts*. Further, the definition of equality shifts over time, and may better be described as "a process of constant and flexible examination, of vigilant introspection, and of aggressive

93 *Ernst*, *supra* note 5. This case also had issues relating to constitutional notice and an incomplete record on the constitutionality or justification of the immunity clause.

94 Roach loose-leaf, *supra* note 62, ch 11 at 32.

95 *R v Stinchcombe*, 1991 CanLII 45 (SCC) [*Stinchcombe*].

96 *Henry*, *supra* note 7 at para 37.

97 Agarwal & Marcus, *supra* note 3 at 89.

98 Although it was condensed somewhat by Justice Abella, this time with a unanimous court, in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.

open-mindedness."[99] Framing the issue as a section 15 violation may allow courts to sidestep granting a remedy, because judges may be unfamiliar with the section 15 argument in the context of racial discrimination by government actors, and the breach is harder to prove.

As *Charter* violations flowing from racial discrimination rarely lead to a meaningful remedy, it is wise to argue the most predictable path first. Discrimination often results in many discrete violations such as unlawful searches, arbitrary detentions, unwarranted charges, and the failure to disclose relevant documents.[100] A discriminatory investigation or prosecution will usually involve sections 8 and 9 *Charter* breaches, or a section 7 violation if the individual is denied a fair trial or is wrongfully convicted. Kent Roach notes:

> One tension for lawyers is between asking for what you think you can get versus asking for a more ambitious remedy that the decision maker may be unwilling to give. There is a constant tension between the understandable desire to win and the desire to attempt to tackle the full extent of systemic and deeply entrenched problems.[101]

While the ultimate endgame and perhaps "secondary goal"[102] is for an individual to be investigated in a manner that is free from racial discrimination and prosecuted only where evidence warrants it, basing a constitutional damages claim only on section 15 is to argue for redress where the right is unclear and not strongly linked to a remedy.

While this paper does not focus on section 24(1) damages flowing from a section 15 *Charter* breach, this area nonetheless deserves close attention in the future. In a case currently before the Ontario Superior Court (ONSC), the plaintiff, Ms. Anoquot, claims section 24(1) damages for sections 7, 8 and 15 *Charter* violations flowing from police interactions.[103] The statement of claim survived an application to strike two statements that alleged discrimination on a personal and a systemic level.[104] The ONSC found "[w]ith respect, the Defendants seem oblivious to the nature of the claim that Ms. Anoquot is making, which is that the Defendants employ a stereotypical approach and systemically strip search Aboriginals rather than engaging in a case-by-case analysis."[105] The ONSC acknowledged that a discrimination claim would be complicated, because discrimination claims are "inherently complicated."[106] The complexity of a claim, however, is not a bar to pleading it. Pleading it successfully in the future will simply require extensive documentation and discovery processes.[107]

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99 Rosalie S. Abella, "Limitations on the Right to Equality before the Law" in Armand de Mestral et al eds, *The Limitation of Human Rights in Comparative Constitutional Law* (Montreal: Editions Yvon Blais, 1986) at 226.

100 Agarwal & Marcus, *supra* note 3 at 88-89. These authors carefully distinguish between discrete *Charter* violations and why our courts should not recognize a broad right to an adequate investigation.

101 Roach, "Remedies for Discriminatory Profiling", *supra* note 42 at 396.

102 See generally: Stephen Coughlan & Laura Peach, "Keeping Primary Goals Primary: Why There is No Right to an Adequate Investigation" (2012) 16 Can. Crim L Rev 248 at 254.

103 *Anoquot v Toronto Police Services Board*, 2015 ONSC 553 [*Anoquot*].

104 *Ibid* at para 18.

105 *Ibid* at para 28.

106 *Ibid* at para 34.

107 *Ibid*.

ii. What Proof is Required?

Courts and tribunals have become more willing to take racial discrimination seriously in the context of *Charter* violations.[108] When provided with adequate evidence, courts acknowledge that racial discrimination is not just the acts of a few bad apples, but rather a systemic problem.[109] In addition to the systemic root causes of discrimination, state misconduct can be racially motivated even when the individual does not consciously appreciate the discriminatory nature of his or her action.[110] Professor Tanovich notes, "[s]ince most profiling is unconscious, is there really any point in putting the suggestion to the officer? What can he or she reasonably be expected to say in response to the question?"[111] It is therefore important that a claim of racial profiling or discrimination leading to a *Charter* violation can be successfully grounded in circumstantial evidence.[112]

In *Brown,* the ONCA found that a "racial profiling claim could rarely be proven by direct evidence…if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence."[113] To find an officer engaged in racial profiling in the context of a traffic stop for example, it must be more probable than not that the real reason for the stop was the person of interest's race.[114] The ONCJ discussed *Brown* in *North Bay (City) v Singh*, noting it "would be extremely rare to have such [overt] evidence [of racial discrimination] as the social science evidence supports the fact that there is much subconscious racial stereotyping and profiling and most people would seek to hide overt racist views if they had them."[115]

Circumstantial evidence of discrimination can be adduced through indicia of racial profiling, such as factors that courts have recognized through the assistance of studies,[116] academic writing, and expert evidence.[117] These indicia can aid a court in drawing inferences of racial discrimination where warranted.[118] In *Peart,* the ONCA referred to these indicia as "social facts" flowing from the trier of fact's assessment of the evidence in any given case.[119] The indicia of racial profiling in a traffic stop case include: continuing surveillance even after police determine a car is not stolen, officers assuming targeted individuals have drugs or guns, engaging in an unwarranted high risk take down (because this indicates the officers assumed the individuals were dangerous) and

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108 See R v Bharath, 2016 ONCJ 382 [*Bharath*], for an application of *Brown* and Professor Tanovich's academic commentary on this issue; Human Rights Tribunals are also considering social science evidence in this context. See *Nassiah v Peel (Regional Municipality) Police Services Board*, 2007 HRTO 14 at para 115 [*Nassiah*] and *Aiken v Ottawa Police Services Board*, 2013 HRTO 901, where the Ontario Human Rights Tribunal used expert testimony by Professor Scot Wortley to understand the factors that indicate racial profiling. Professor Wortley has generated empirical research on racial profiling, particularly in Ontario.

109 Agarwal & Marcus *supra* note 3 at 89; *Nassiah, supra* note 108 at para 212.

110 *Peart, supra* note 12 at para 42.

111 Tanovich, "Charter of Whiteness", *supra* note 1 at 678.

112 *Brown*, *supra* note 9.

113 *Brown, supra* note 9 at para 45. This appeal dealt with the issue of whether or not the trial judge had a reasonable apprehension of bias when he refused to properly consider the issue of racial profiling. The ONCA found there was a reasonable apprehension of bias, and in the decision made authoritative comments on the standard of proof required to prove racial profiling.

114 *Brown, supra* note 9 at para 11; *R v Thompson*, 2014 ONSC 4749 at para 41.

115 *North Bay (City) v Singh,* 2015 ONCJ 500 at para 9 [*Singh*].

116 In *Aiken v Ottawa Police Services Board*, 2013 HRTO 901, the settlement agreement included the Ottawa Police Service agreeing to collect race-based data on traffic stops for future study, see *supra* note 33 for the report. This is an example of a study that could be used as evidence of racial profiling.

117 *Peart, supra* note 12 at paras 95, 98.

118 Agarwal & Marcus, *supra* note 3 at 80.

119 *Peart, supra* note 12 at para 96.

evidence of police violence even where there is no evidence of illegal activity.[120] Other issues of evidence, such as the credibility of witnesses and corroborating evidence may also build an argument that racial discrimination occurred.[121]

Expert evidence will play a key role in proving that racial discrimination or profiling occurred and lead to a *Charter* breach. While Doherty JA noted in *Peart* that,"[t]he reality of racial profiling cannot be denied," he was not prepared to accept that racial profiling was "the rule rather than the exception."[122] He was not ready to take the leap without being sure: "I do not mean to suggest that I am satisfied that it is indeed the exception, but only that I do not know."[123] It is unlikely that courts will make ground-breaking decisions in this area of the law without strong evidence before them.[124] Expert evidence can ground particular circumstantial evidence in the greater systemic picture or help courts understand the indicia of racial discrimination.[125] Counsel should endeavour to use *Brown,* along with expert evidence, to prove *Charter* violations and claim damages pursuant to section 24(1) of the *Charter* where racial discrimination is at issue.

iii. A Shifting Burden in the Future?

The African Canadian Legal Clinic (ACLC) intervened at the ONCA in both *Brown* and *Peart*. They argued that an allegation of racial profiling should justify shifting the burden of proof.[126] The argument flowed from the proposition that because racial profiling is so common, when it is alleged, placing the burden on police rather than the claimant is more likely to achieve an accurate result.[127] Specifically, the ACLC argued that where racial profiling is alleged against police, the onus should shift to the police to demonstrate that improper racial considerations were *not* a factor contributing to the state action.[128] The ACLC suggested fairness considerations favour placing the burden on police, because they have access to more information than the claimant.[129] Although that argument was unsuccessful in *Brown* and *Peart*, it may be more fruitful after more cases have proven *Charter* violations on the basis of discrimination.

In dismissing the ACLC's argument, the Court of Appeal found that while the burden of proof shifts to the Crown in some contexts, as in a claim alleging unreasonable search and seizure, "[s]tate interference with individual liberty whether by way of detention or arrest has never been seen as requiring prior judicial authorization,"[130] and therefore the

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120 *Peart v Peel (Regional Municipality) Police Services Board*, 2003 CanLII 42339 (ONSC) at para 20.

121 *Brown, supra* note 9 at para 45; *Peart, supra* note 11 at para 114; *Bharath, supra* note 108 at para 419; See also *Brown v Durham Regional Police Force*, 1998 CanLII 7198 (ONCA) where Doherty JA stated that if only people of colour were stopped at a checkpoint, then this allows the inference that the stop was discriminatory.

122 *Peart*, *supra* note 12 at para 146.

123 *Ibid*.

124 Consider *St. Anicet (Parish of) v Gordon*, 2014 QCCM 290 at paras 55-58, where the Court found on a balance of probabilities that one of the reasons the police stopped the accused was racial profiling. The judge found that the stop breached the accused's sections 9 and 15 *Charter* rights, and the court ordered a stay of proceedings pursuant to section 24(1) of the *Charter.* Also consider *R v Huang*, 2010 BCPC 336 at para 5, where the British Columbia Provincial Court held the facts before the Court indicated on a balance of probabilities that the officer involved stopped the accused on the basis of his race and thus violated the accused's section 9 *Charter* rights. The Court found the officer was not truthful because there were "simply too many circumstances" that made his explanation improbable.

125 *Brown, supra* note 9 at paras 44-46; *Peart*, *supra* note 12 at paras 95-96.

126 *Brown, supra* note 9; *Peart, supra* note 12.

127 *Peart, supra* note 12 at para 145.

128 *Ibid* at paras 136, 144.

129 *Ibid* at para 148.

130 *Ibid* at paras 140-143.

shift is not justified. Further, demonstrating that the other party is in a better position to disprove an issue does not justify a reverse onus.[131] Only where the party expected to bear the onus "has no reasonable prospect of being able to discharge that burden, and the opposing party is in a position to prove or disprove the relevant facts" does fairness mandate a reverse onus.[132]

The ONCA held that a "properly informed consideration of the relevant circumstantial evidence—indicators of racial profiling—combined with maintaining the traditional burden of proof on the party alleging racial profiling" and "a sensitive appreciation of the relevant social context" strikes the proper balance of the parties' interests.[133] As the Court noted, the traditional rule has resulted in successful claims in the past.[134] Importantly, the Court emphasized that there may frequently be a tactical burden on the police to introduce evidence that negates a racial profiling inference in any case.[135] As the above reasons indicate, it would be a large step in reasoning even for a non-Ontario court to come to opposite conclusions on this point.

iv. Other Challenges in Proving a *Charter* Breach Through Discrimination

One aspect of the *Peart* judgement is troubling. The ONCA found that when the initial contact with police is tainted by racial discrimination, it does not mean all further actions or contact are equally tainted.[136] I argue that it will be a very rare case where the initial discrimination and consequent violation does not flow through most, if not all, subsequent police and Crown conduct if left unchecked. Without the initial discrimination that brought the individual into contact with the criminal justice system, the individual may not have encountered the system at all. At a minimum, courts should presume that discrimination flows to subsequent actions (from investigative detention to arrest and incarceration, for example) unless proven otherwise. This argument can be bolstered through appropriate expert evidence on the nature of discrimination and precise argument on this point.[137]

B. Step Two: The Functional Justification of Damages

Once a *Charter* breach is established, damages must be functionally justified as appropriate and just. To be appropriate and just, they must satisfy one or more of the confirmed purposes of *Charter* damages: compensation, vindication, or deterrence.[138] While there was some confusion pre-*Ward* as to whether bad faith was also required to justify *Charter* damages, it is clear post-*Ward* that only one of the above purposes is required to functionally justify a damage award.[139] Any countervailing factors are addressed at a later stage.

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131 *Ibid* at para 149.

132 *Ibid*.

133 *Ibid* at para 147.

134 *Ibid* at para 150.

135 *Ibid* at para 151.

136 *Ibid* at para 92.

137 Another challenge these claims may encounter is an application to strike claims that reference racial profiling and discrimination. The claim may be struck for lack of particularity where pleadings do not properly tie together "both the historical and the ongoing improper police conduct to the racial discrimination claim." Counsel should be prepared to address this argument if it arises: *Sidhu v Canada (The Attorney General)*, 2015 YKSC 53 at para 17; *Anoquot, supra* note 103 (the statements in this case survived an application to strike paragraphs from the notice of claim).

138 *Ward, supra* note 6 at paras 24, 25, 31.

139 For a brief discussion of the pre-*Ward* case law on this issue of bad faith, see Agarwal & Marcus, *supra* note 3 at 90-91.

i. Compensation

Compensation demands that a claimant is compensated for personal loss. The SCC in *Ward* stated that compensation will often be the "most prominent function" of damages.[140] The purpose of compensation is analogous to damages in the private law context, where it is the primary (if not the only) justification for a damage award. In *Ward,* the SCC defined compensation broadly. *Charter* damages can compensate physical, psychological, or pecuniary harm, but also harm to intangible interests through distress, humiliation, embarrassment, or anxiety.[141] The Court's description of compensation in the *Charter* context is consistent with a purposive analysis of *Charter* rights, because the *Charter* protects non-pecuniary values "including fairness, privacy, security of the person, liberty and equality."[142]

In the context of discrimination, compensation can take various forms. A flexible approach is required to remedy harms that may be more "subtle" than in other contexts.[143] The amount of compensation required will likely depend on which *Charter* right is violated and what harm, if any, flowed from the violation. Further, even if an individual did not suffer compensable "personal loss," damages are still available where the other purposes of vindication and deterrence "clearly call for an award."[144] These other purposes ensure the remedy adequately addresses the inherent societal harm of *Charter* violations.

ii. Vindication

Vindication recognizes that constitutional violations not only harm the claimant involved, but also society as a whole. *Charter* damages serve to compensate the individual who experienced a *Charter* breach, but they also affirm constitutional values and the rule of law on the basis of vindication. While compensation focuses on the individual, vindication "focuses on the harm the Charter breach causes to the state and to society."[145] Even if a violation does not result in compensable harm to the individual, public confidence in the court's ability to give meaning to *Charter* rights can be impaired by violations. This impairment can justify a damage award.[146]

Charter damages functionally justified by vindication are crucial to affirming the importance of *Charter* rights. The purpose of vindication is particularly important for a *Charter* damages claim involving racial discrimination. Systemic discrimination breeds distrust of the justice system. If courts fail to remedy these violations, they may appear to specifically condone violations flowing from discrimination. This can have a disproportionate effect of breeding distrust in racialized groups.[147] Awarding damages on the basis of vindication can demonstrate commitment to remedying the issue and perhaps help rebuild public confidence in the rule of law. Where discrimination leads to the 'worst case scenario' of a wrongful conviction, an award on this basis "would recognize the state's responsibility for the miscarriage of justice that occurred."[148]

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140 *Ward, supra* note 6 at para 25.

141 *Ibid* at paras 27, 50.

142 Roach loose-leaf, *supra* note 62, ch 11 at 26.

143 Agarwal & Marcus, *supra* note 3 at 91.

144 *Ward, supra* note 6 at para 30; *Ernst*, *supra* note 5 at para 160, Abella J, concurring.

145 *Ward, supra* note 6 at para 28.

146 Roach loose-leaf, *supra* note 62, ch 11 at 27.

147 Tanovich, "Charter of Whiteness", *supra* note 1 at 679. The disproportionate impact can also be considered in the deterrence category, or under the seriousness of the breach, which affects the quantum of damages.

148 *Henry*, *supra* note 7 at para 115.

As Peter Schuck argues in the American context, "[n]o social or moral order can sustain itself, much less flourish, unless it can affirm, reinforce, and reify the fundamental values that define it."[149] A remedial system that fails to compensate victims of a certain kind of official wrongdoing is neither effective nor just.[150]

iii. Deterrence

Charter damages can also serve the purpose of deterrence. This purpose is forward-looking.[151] Awarding damages on the basis of deterrence can regulate government behaviour to achieve *Charter* compliance in the future.[152] The Court in *Ward* emphasized that deterrence in this context is general deterrence aimed at influencing government as a whole rather than "deterring the specific wrong-doer."[153]

Prior to the *Ward* decision, deterrence was rarely recognized "as a legitimate goal for constitutional remedies."[154] Kent Roach states that recognizing deterrence as a valid purpose for awarding damages has the potential to reshape remedies jurisprudence.[155] While it is unlikely that deterrence alone would justify a *Charter* damage award,[156] *Ward* makes it clear that deterrence can at least complement a compensatory purpose, strengthening a damage award's impact on systemic change.

Fostering a legal regime that allows for legal challenges can also act as deterrence.[157] Raising obstacles in the form of unprincipled fault or intent requirements can blunt the value of deterrence because it shifts the risk of litigation to the claimant and permits unremedied *Charter* violations.[158] If the reasoning of the majority in *Henry* extends to other contexts, it could stifle the potential of deterrence-based awards. It raises an obstacle for future *Charter* damages claimants.

In the context of discrimination, deterrence is extremely important. Because of the unconscious nature of racial discrimination, general deterrence can encourage governments to implement better training or policies to counteract the effects of discriminatory acts throughout the criminal justice system. As Chief Justice McLachlin noted in dissent in *Henry*, awarding damages for the purpose of deterrence, even where government actors carry out duties in good faith, is important for pushing the state to "remain vigilant in meeting its constitutional obligations."[159]

C. Step Three: Countervailing Factors

At this stage of the test the burden shifts to the Crown. The Court in *Ward* recognized that damages may not be warranted if the state substantiates compelling countervailing factors, even if damages would serve the purposes of compensation, vindication, or deterrence.[160] These countervailing factors include the availability of alternative remedies

149 *Ibid.*
150 Schuck, *supra* note 54 at 23.
151 *Ward, supra* note 7 at para 29, *Henry*, *supra* note 7 at para 112, McLachlin CJC dissenting.
152 *Ward, supra* note 7 at para 29.
153 *Ibid.*
154 Kent Roach "A Promising Late Spring for Charter Damages: *Ward v Vancouver*" (2011), 29 NJCL 135 at 156.
155 *Ibid.*
156 Roach loose-leaf, *supra* note 62, ch 11 at 28.
157 Schuck, *supra* note 54 at 17.
158 *Ibid.*
159 *Henry*, *supra* note 7 at para 116.
160 *Ward, supra* note 6 at para 33.

and effective governance concerns.[161] Effectively, these factors have the same result as the imposition of a bad faith requirement, qualified immunity, or good faith immunity because they restrict the availability of damages.[162]

The Court in *Ward* suggests countervailing factors should be contextualized in each case.[163] While the case-by-case approach risks unpredictability for both parties, it "also requires the government to bear the burden of justifying restrictions on Charter remedies" in all cases.[164] The *Ward* contextual approach is consistent with other *Charter* jurisprudence; it provides rights and remedies to individuals, but allows government to justify reasonable restrictions when required.[165] An approach that blocks access to remedies without a contextual analysis or sufficient evidence, such as the one put forward in *Henry*, is inconsistent with *Charter* jurisprudence.[166]

i. Alternative Remedies

If an alternative remedy fulfills the purposes of *Charter* damages, then no further award is required.[167] For example, someone who receives tort damages or a Human Rights Tribunal award would likely receive a nominal award or simply a declaration under section 24(1) to address the other purposes of vindication and deterrence.[168]

Under this countervailing factor, the claimant need not exhaust all other remedies first and can run concurrent claims in tort and *Charter* damages as long as the result is not double compensation.[169] As mentioned above in Part II(A), individuals who experience racial discrimination rarely find recourse in tort law, so alternative remedies may rarely be engaged. However, it may be engaged more in the future as Human Rights Tribunal awards increase.[170]

In *Henry*, the SCC did not engage with available alternative remedies.[171] However in *Ernst*, Cromwell J's judgment considered judicial review of the Alberta Energy Regulator's decision to be an alternate remedy, because it could "substantially" address the alleged *Charter* breach.[172] The Chief Justice's judgment instead considered that judicial review might not vindicate *Charter* rights or deter future breaches and that it was premature to find this an alternate remedy.[173] While this paper focuses on racial discrimination in the criminal justice context, expanding the analysis to decisions of quasi-judicial bodies would require consideration of this potential bar to *Charter* damages.

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161 *Ibid*.
162 Roach loose-leaf, *supra* note 62, ch 11 at 29.
163 *Ibid; Henry*, *supra* note 7 at paras 106-107, McLachlin CJC, dissenting.
164 *Ibid*.
165 *Ibid*.
166 *Ibid*.
167 *Ward, supra* note 6 at para 34.
168 Roach loose-leaf, *supra* note 62, ch 11 at 29.
169 *Ward, supra* note 6 at paras 35-36.
170 Agarwal & Marcus, *supra* note 3 at 93.
171 *Henry*, *supra* note 7 at para 38: the Court referenced alternative remedies as a countervailing factor but did not engage in an analysis of any alternative remedies available.
172 *Ernst*, *supra* note 5 at paras 30, 32-33, Cromwell J.
173 *Ibid*, at para 167, McLachlin CJ, dissenting.

ii. Good Governance Concerns in *Ward*

In *Ward*, the state failed to establish a good governance concern that could negate a damage award.[174] The state argued *Charter* damages will always chill government conduct and that a no-fault regime in the context of individual government actions would result in a flood of damage claims.[175] The Court rejected this argument because the logical conclusion of it means *Charter* damages would *never* be appropriate.[176] Kent Roach notes:

> If concerns about chilling law enforcement discretion and draining the public purse in *Ward* are not sufficient to negate the award of damages, it is difficult to see that any violations of the Charter rights of a single Charter applicant should be defeated on effective governance grounds.[177]

The floodgates concern in *Ward* regarding the no-fault requirement was not supported by evidence, and the same argument can be made in a *Charter* damages claim today. There are 'naturally occurring' and significant barriers limiting *Charter* damages claims that will likely continue to prevent floods of claims in the future. As noted in Mr. Ward's factum, "[i]f the spectre of widespread and large monetary liability for breaches of the *Charter* was realistic, one could reasonably have expected it to have already arisen in the nearly 28 years since the *Charter* was enacted."[178] Perhaps many courts' conservative approach to awarding damages during this time was due to unclear precedent on the issue. Or, perhaps there are naturally occurring checks against a flood of *Charter* damage claims. There are many examples of natural restraints in this area of the law: our court system already weeds out unmeritorious or vexatious claims, launching a *Charter* damages claim can be prohibitively expensive, and the threat of the loser-pays-costs rule in civil litigation looms large.[179] Most importantly, damage awards since *Ward* have generally been minimal and launching a claim for *Charter* damages is often not "economically rational."[180]

iii. Good Governance Concerns since *Ward*: Chilling Effects and Tort Comparisons

The *Ward* test allows for argument on the limitation of *Charter* damages if they would adversely impact effective government. However, this limiting potential can shift the cost of a *Charter* violation to the individual.[181] In *Henry*, the majority increased the gap within which an individual must bear the costs of a *Charter* violation; good governance

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174 *Ward, supra* note 6 at para 68.

175 But see: *Ward, supra* note 6 at para 39; Roach loose-leaf, *supra* note 62, ch 11 at 30; *Mackin, supra* note 55 at paras 81-82.

176 *Ward, supra* note 6 at para 38.

177 Roach loose-leaf, *supra* note 62, ch 11 at 31.

178 *Vancouver (City) v Ward*, 2010 SCC 27 (Factum of the Respondent at para 140).

179 Roach loose-leaf, *supra* note 62, ch 11 at 6. Roach notes there are some methods to get around this, for example the government can enter into an agreement that they will not seek costs no matter the outcome, litigants can seek a protective costs order or a court may simply not award costs to the government if they win.

180 *Ibid,* ch 11 at 2; *Understanding Charter Damages supra* note 92 at 102-103; See also note 226 below for a discussion of class action suits, where the damages award can be higher. Notably, the award of over 8 million dollars in the recent *Henry Charter* damages decision was astronomical compared to other cases.

181 Roach loose-leaf, *supra* note 62, ch 11 at 27: This is contrary to Justice Wilson's true compensatory approach in her dissenting judgments in *McKinney v University of Guelph*, [1990] 3 SCR 229 and *Air Canada v British Columbia* [1989] 1 SCR 1161. In these cases, Wilson J advocated that if the choice is between the individual and those who violated the right, the violator should bear the costs in order to restore the victim to the position he or she occupied before the breach.

concerns now circumscribe the award of damages for the Crown's failure to disclose.[182] It seems the involvement of Crown counsel in the *Charter* violation attracts a more protectionist approach, raising issues regarding the immunization of prosecutorial discretion. Consequently, it is likely that no *Charter* damages will flow where the Crown's failure to disclose was unintentional or caused by unconscious racial discrimination.

In *Ernst*, one judgment of the split Court held that immunity clauses provide a justified good governance concern in the case of quasi-judicial decision makers,[183] imposing a "sweeping" immunity for *Charter* damages.[184] While this may be the case, some of the reasoning in Justice Cromwell's judgment also has the potential to restrict future *Charter* damages claims where they might otherwise be justified.[185] Although the Court's "division in thinking" on the availability of *Charter* damages "in the face of common law and statutory immunities protecting state actors appears to be quite profound,"[186] good governance concerns since *Ward* appear to be evolving in a manner that circumscribes the test for *Charter* damages.

The majority in *Henry* held that not limiting the availability of *Charter* damages in the disclosure context would cause a flood of claims. They found it would expose prosecutors to an unprecedented scope of liability that would negatively impact the exercise of their vital public function."[187] It seems the risk of a no-fault (or more precisely, a no-intent) standard in *Henry* loomed large as a good governance concern, even in the context of a constitutional obligation such as the duty to disclose. While courts are loathe to wade into a review of core prosecutorial discretion, such as the discretion to lay charges, the duty to disclose all relevant information to the defence does not involve any significant degree of prosecutorial discretion.[188] As the Chief Justice found in dissent, "[i]t is not an action for abuse of discretion, but an action for breach of a legal duty imposed by the *Charter*. Where this *Charter* duty is breached, it is the state and not the individual prosecutor who faces liability."[189]

Nevertheless, the majority drew from the line of malicious prosecution tort cases dealing with prosecutorial discretion where the actions of the individual are at play.[190] The majority's concern regarding the chilling effect on Crown counsel resulted in the imposition of an intent standard.[191] The fear of liability in a no-fault regime, leading to "defensive lawyering" and the addition of an extraneous consideration to "the Crown's role as a quasi-judicial officer," justified the increased standard for the Crown in their

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182 *Henry, supra* note 7 at paras 39-42.

183 *Ernst*, *supra* note 5 at paras 51-55, Cromwell J. The decision was split 4-1-4, with a 5-4 majority striking the claim for *Charter* damages. There is a large distinction between quasi-judicial decision-makers in a tribunal and police officers or prosecutors, as noted by Justice Abella in concurrence at paragraph 121. However, the Court's statements on the state of the *Ward* test contribute to the analysis in this paper.

184 *Ernst*, *supra* note 5 at para 177, McLachlin CJC, dissenting.

185 Although many issues mentioned here relating to *Ernst* are not the outcome of a majority decision, the Court's differing comments on *Charter* damages indicate future arguments and concerns on the issue.

186 *Whaling supra* note 63 at para 23.

187 *Henry, supra* note 7 at paras 73, 77.

188 *Ibid* at paras 49, 128. The prosecutor need only disclose "relevant" evidence. However, the assessment of relevance includes discretion to some extent.

189 *Ibid* at para 129.

190 *Ibid* at paras 55-59. While he distinguished these cases, the standard he ended up with is very close to the malice requirement in the malicious prosecution cases.

191 *Ibid* at paras 40, 45. The malice standard was established in *Nelles v Ontario* [1989] 2 SCR 170, *Proulx v Quebec (Attorney General)* 2001 SCC 66, and *Miazga v Kvello Estate*, 2009 SCC 51.

duties of disclosure.[192] While this may occur in limited circumstances, knowing that disclosure decisions could violate the *Charter* would most often promote better decision-making. As the Chief Justice noted in *Ward*, "[g]ood governance is strengthened, not undermined, by holding the state to account where it fails to meet its *Charter* obligations."[193] The *Constitution* by nature is a restraint on state action. To broaden immunity on the basis of a chilling effect would counter the idea that the *Charter* should stand to encourage constitutional compliance. The Chief Justice for the dissent in *Henry* echoed these concerns again by stating that holding the state to account feeds back into the general deterrence value of *Charter* damages.[194]

Justice Cromwell's judgment in *Ernst* also referenced the protection of quasi-judicial decision-makers. He cited *Ward*, stating that we must afford immunity to certain state functions to avoid a chilling effect in decision-making.[195] However, the citation from *Ward* must be read in context. It applies to the "[l]egislative and policy-making functions" of the state and to those who carry out constitutionally invalid duties under legislation.[196] As noted in the Chief Justice's judgment, it was unclear whether the decision-maker in this case was even acting in an adjudicative capacity.[197] Justice Cromwell also relies on policy defences in the private law context, noting that the majority in *Henry* also heavily relied on tort law.[198] Although there is no clear majority judgment in *Ernst*, one can see the extension of the chilling effect concerns in *Henry*, a shift on the principles in *Ward*, and the Court's continued reliance on tort law concepts.

While the policy considerations engaged in tort actions may be relevant to limiting *Charter* damages under good governance, these damages are against the state, not against individual 'bad' actors. Therefore, the chilling effect often argued in regards to common law civil actions would be "considerably less and different" than if individuals were personally liable.

Although there is a stated distinction between tort and *Charter* remedies, the intent standard in this modified *Ward* test falls very close to malice in the tort context. It will require the same type of proof to successfully claim *Charter* damages where the violation flows from the failure to disclose. An individual must establish a *Charter* breach and establish that the prosecutor intended to withhold disclosure knowing, or reasonably being expected to know, that the failure to disclose was material and impinged the accused's right to full answer and defence. While the majority found intent could be inferred, "a claimant need only prove that prosecutors were actually in possession of the information and failed to disclose it"[199] or that "prosecutors were put on notice of the existence of the information and failed to obtain possession of it."[200] This inference is available to the trier of fact but is not mandatory.[201] The standard could leave a harmed party without a remedy for the lack of disclosure where it was unintentional, merely careless, or even negligent.

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192 *Henry, supra* note 7 at para 73.

193 *Ibid* at para 129, McLachlin CJC, dissenting.

194 *Ibid* at para 129, McLachlin CJC, dissenting.

195 *Ernst, supra* note 5 at para 42, citing *Ward*, *supra* note 6 at para 40.

196 *Ward, supra* note 6 at para 41.

197 *Ernst, supra* note 5 at para 172, McLachlin CJC dissenting.

198 *Ernst, supra* note 5 at para 43, Cromwell J. Chief Justice McLachlin's judgment is also critical on this issue. She argues "immunity in negligence law does not necessarily translate into immunity under the *Charter*" at para 173.

199 *Henry, supra* note 7 at para 86.

200 *Ibid* at para 86; *R v McNeil*, 2009 SCC 3 at para 49.

201 *Henry, supra* note 7 at para 86. Notably, this description of inferred intent is comparable to how carelessness or "wilful blindness" can substitute for an intentional *mens rea* requirement in the *Criminal Code*.

To avoid defensive lawyering and chilling effects, the majority essentially imposed a qualified immunity rule for the failure to disclose. This works to reduce the remedial value of *Charter* damages by negating compensation, deterrence, and vindication where *Charter* violations flow from the unintentional failure to disclose. It also shifts the cost of the violations to the victim and complicates the trial process by requiring evidence of individual intent. This seems contrary to the spirit of the *Ward* test that lays damages against the state, not individuals. In *Ernst*, Justice Cromwell's decision also imposed immunity (not even qualified)[202] without proof of chilling effects. He also expressed concerns about the Board's potential liability to damage claims,[203] without comment on the state's responsibility for *Charter* compliance. This judgment may indicate a trend towards immunity and away from remedial recognition of *Charter* violations.

Deliberately laying *Charter* damages against the state as a whole, rather than implicating the intentions of individual government actors, will also reduce chilling effects. This too will take the spotlight off the Crown's actions or intentions. It allows courts to focus on the accused's resulting harm in the criminal process. Removing the intent standard means there is less risk that the modified *Ward* test will be used in other types of *Charter* damages cases. While future cases may argue *Charter* damages could extend to violations resulting from core prosecutorial discretion in some contexts, surely reducing the scope of available remedies short of prosecutorial discretion is unwarranted.

The majority in *Henry* asserts the purpose of the intent and knowledge requirement is to set a threshold high enough to address good governance and let only serious instances of non-disclosure form the basis of a section 24(1) remedy.[204] However, as addressed below, this standard may not be nuanced enough to provide a remedy in cases of racial discrimination. Serious instances of non-disclosure and *Charter* violations can result from the unintentional failure to disclose or the failure to provide a check on investigatory tunnel vision. Many of these instances will occur where racial discrimination makes its way into a criminal investigation. The *Henry* decision may therefore have a disproportionate impact on these kinds of claims.

iv. The Impact on Racial Discrimination Claims

The imposition of an intent standard may be problematic for *Charter* damages claims flowing from racial discrimination that extend into the trial process and beyond. This standard was imposed without much more than speculative evidence.[205] Many historical inquiries into wrongful convictions have noted that the interacting nature of unconscious systemic discrimination and the failure to disclose are often to blame for miscarriages of justice. It would be unfortunate if *Charter* damages become categorically unavailable to victims of racial discrimination where the Crown does not intend to discriminate.

Racial discrimination, where it exists, will rarely dissipate when a file comes into contact with Crown counsel. It seeps through the criminal justice process in many cases, and the intent requirement in *Henry* will be a substantial obstacle for future *Charter* damages claims where the individual's *Charter* violations extend into the Crown's office. Invoking the intent requirement is as useful as asking a police officer if they racially profiled someone at a traffic stop. To go further, asking individual Crown counsel to defend their decision to not disclose information when allegations of racism are on the table invites

202 *Ernst*, *supra* note 5 at para 55, Cromwell J.
203 *Ibid* at para 47, Cromwell J.
204 *Henry, supra* note 7 at para 89.
205 *Henry, supra* note 7 at para 133.

a difficult exchange. When the damages lie against the state as a whole, the deterrence value remains at a general level and nudges the state towards implementing policies that will better avoid discrimination in the future.

The Manitoba Justice Inquiry and the Donald Marshall Report both speak to the unconscious nature of racial discrimination. In his article on the leading causes of wrongful convictions, Bruce MacFarlane explores the nature of tunnel vision in criminal investigations.[206] Tunnel vision involves an overly narrow focus that can colour the evaluation of information received and the unconscious response to that information in a criminal investigation or prosecution.[207] In other words, the case against an individual will be built from this filtered information, and other information that points away from guilt is invisible or ignored.[208] The notion of tunnel vision is consistent with the unconsciousness of racial discrimination. Many government actors are susceptible to unconscious bias, particularly confirmation bias. As with racial profiling where a police officer may infer criminality on the basis of race,[209] Crown counsel may unconsciously make decisions on what is relevant or material to the case based on confirmation bias, linked to racial discrimination.[210]

This is not to say that all Crown counsel are fostering racial discrimination, only that the *Henry* intent standard could deny a damage award under section 24(1) without a principled consideration of the impact of narrowing the availability of damages where the failure to disclose arises from unconscious racial bias. If the line of reasoning in *Henry* and *Ernst* is followed into future cases, the test could be narrowed in other circumstances without much justification. When government is immunized from liability for violations without principled justification, leaving victims without a remedy, the integrity and universality of the state's underlying fundamental values are questioned.[211]

D. Step Four: Quantum of Damages

The "presence and force of" the purposes underlying a *Charter* damage award will determine the quantum of those damages.[212] Compensation will usually be the most significant purpose, followed by vindication and deterrence.[213] Compensation engages the goal of restoring the claimant to her pre-breach condition where loss is proven, as it does in tort law.[214] But the Court in *Ward* noted that "cases may arise where vindication or deterrence play a major and even exclusive role"[215] in determining quantum. Tort law is less applicable in these cases as the damage award assumes a more punitive aspect.[216] Courts should determine what is rational and proportionate in the circumstances, guided

206 Bruce A MacFarlane, *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System: The Goudge Commission of Inquiry into Pediatric Forensic Pathology in Ontario* (2008) [MacFarlane]; David Gill, "Full Disclosure: *Charter* Damages after *Henry v British Columbia*" (2015) [unpublished].

207 MacFarlane, *supra* note 206 at 34.

208 *Ibid*.

209 *Brown*, *supra* note 9 at para 7.

210 MacFarlane, *supra* note 206 at 36.

211 Schuck, *supra* note 54 at 23.

212 *Ward, supra* note 6 at para 47.

213 *Ibid*.

214 *Ibid* at paras 48, 50.

215 *Ibid* at para 47.

216 *Ibid* at paras 51,56.

by precedent.[217] What is rational and proportionate will depend on the seriousness of the breach (the impact on the claimant and the seriousness of the state misconduct).[218] The more serious the breach, the higher the quantum will be.[219]

Ultimately, the damage award must be fair to both the claimant and the state.[220] The Court warned that the diversion of public funds to pay large awards "may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective."[221] Despite this, the award must be meaningful and compensate *Charter* breaches as independent wrongs "worthy of compensation in … [their] own right."[222] In the *Henry* trial decision, Chief Justice Hinkson of the BCSC noted he had no evidence before him to "assess the amount beyond which an award in this case could begin to threaten public funding"[223] and so awarded a large damage award against British Columbia.

Racial discrimination is a large, systemic issue, and when *Charter* violations stem from discrimination, the seriousness of collective misconduct is high.[224] Because *Charter* damages lie against the state as a whole rather than against individual actors, courts should focus on the breaches as independent wrongs in their own right. They should also consider the systemic impacts of the independent wrongs. Where there is evidence of individual misconduct, the quantum of damages should increase.[225] Where *Charter* damages are justified on the basis of compensation, vindication, or deterrence in the context of racial discrimination, the quantum could be large enough to make a claim financially viable.[226]

CONCLUSION

Charter damages are an important remedy that should be more widely available to victims of racial discrimination in the criminal justice system. Their availability relies on counsel advancing creative arguments and courts accepting the issue of racial discrimination as a serious one that requires adequate remedies. There are legal and financial obstacles to obtaining *Charter* damages. These obstacles could be addressed through legislative amendments, policy directions, and legal aid funding. As mentioned in Part II, a claimant generally cannot pursue *Charter* damages in provincial courts and *Charter* damages cannot be awarded within the confines of a criminal trial. Parts III and IV indicate that *Charter* damage claims can be prohibitively expensive and individuals in high profile

217 *Ibid* at para 51.

218 *Ibid* at para 52.

219 *Ibid*. Notably, when considering *Charter* damages in *Henry*, 2016 BCSC 1038, the BCSC awarded 7.5 million dollars to Mr. Henry for vindication and deterrence. This sets the bar high for future cases where rights are violated in a serious manner.

220 *Ward, supra* note 6 at para 53.

221 *Ibid*.

222 *Ibid* at para 54.

223 *Henry* trial decision, *supra* note 87 at para 463.

224 *R v Harris*, 2007 ONCA 574; Tanovich, "Charter of Whiteness", *supra* note 1 at 679. The disproportionate impact of discriminatory policing is a consideration when assessing the seriousness of a *Charter* violation.

225 Although, if there is specific misconduct that can be addressed through existing torts, a claimant might run into the issue of adequate alternative remedies.

226 For a more detailed discussion on this issue, see generally: Agarwal & Marcus, *supra* note 3 at 96. Class action *Charter* damages claims are also an option to pursue, and several were filed in 2013 against Ontario police services boards. The success of these claims is mixed; see *Thorburn v British Columbia*, 2013 BCCA 480 where the BCCA found that whether the strip searches were reasonable had to be decided through individual trials. On the other hand, in *Good v Toronto (Police Services Board)*, 2016 ONCA 250, the ONCA upheld a class action certification relating to detentions during the G20 in Toronto.

cases will likely find themselves in a legal struggle that must endure the appeal process. The test for *Charter* damages is also in flux. The *Ward* test is likely, but not certainly, on a narrowing trajectory. A final obstacle lies in the reality that many cases for damages against the state may settle. Settlements are subject to non-disclosure clauses. These clauses mean that state behaviour is not publically highlighted or deterred, as it would be in a *Charter* damages claim. However, *Charter* damages are still a powerful tool driven by "compelling societal interest in vindicating individual *Charter* rights," compensating victims, and deterring violations in a sea of inadequate alternative remedies.[227]

Ultimately, the value we place on decreasing the prevalence of racial discrimination should "find expression not only in safeguards…but also in the form of meaningful redress when those safeguards fail"[228] as they are bound to do in a system run by human beings. But meaningful redress is not always available to those who experience identifiable *Charter* violations, particularly in the context of racial discrimination. The individual and systemic costs of discrimination therefore require more attention and may be partially redressed through the principled application of remedial provisions like section 24(1) of the *Charter*.

While *Charter* damages do not provide a perfect or complete response to systemic racism, they provide relief to victims while clarifying the state's obligations to protect *Charter* rights, potentially leading to systemic responses. Section 24(1) of the *Charter* provides a broad basis for action. Rather than widening gaps to refuse remedies without a principled basis, section 24(1) should be broadly interpreted to provide remedial relief to victims of racial discrimination. In 1986, the SCC stated that section 24(1) damages ensure "the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians."[229] Let us hope section 24(1) will be used as an instrument for ensuring the *Charter* rights of all Canadians.

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227 Agarwal & Marcus, *supra* note 3 at 77.

228 *Henry v British Columbia (Attorney General),* 2015 SCC 24 (Factum of the Intervener, Association in Defence of the Wrongly Convicted at para 7), although this quote specifically referenced the immense value we place on preventing the state from punishing the innocent, rather than avoiding racial discrimination, it applies to both contexts.

229 *Mills*, *supra* note 51 at 881.

ARTICLE

RECONCILING CROWN AND INDIGENOUS LEGAL ORDERS: THE RECIPROCAL BENEFITS OF RESERVING AN INDIGENOUS SEAT ON THE SUPREME COURT OF CANADA

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I. PROLOGUE STORY[1]

Atanarjuat rose to his feet quickly when Chief Justice McLachlin walked in. Though this building was fancier than the others, Atanarjuat was no stranger to court. He was named Atanarjuat, meaning "fast runner," after his great uncle and he learned quickly.[2] Atanarjuat appreciated that a criminal conviction was no laughing matter, but he never got used to the judge's funny dresses and white bibs. He fought his smile as they walked in—first Chief Justice McLachlin, then Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon, and Rowe. It was ironic how the powerful judges looked so small within the confines of the grand courtroom's 12-meter-high, black walnut walls. Everyone took their seats. "Merci, thank you," said Chief Justice McLachlin.

As he sunk into his seat, Atanarjuat felt the weight of his past, the current proceedings, and the consequences deep in his chest. He longed to be home in Iqaluit where he could speak Inuktitut with his Inuit family. The Judges would be talking about how his traumatic experiences in residential school should affect the amount of time he'd do for breaching his parole. "Atanarjuat Angilin and Her Majesty the Queen," announced McLachlin. He thought: "at least I'm not Adam G4-125 anymore!" Humour was the only thing that made him feel better.

When the judges determined his sentence, they would consider available Inuit justice measures and how his experiences in residential school led to his appearance in court today. This was meant to be a way for the courts to deal with the disproportionate number of Indigenous people in Canadian prisons and was to be a step towards reconciliation, as he understood it. In a room full of non-Indigenous judges speaking the dominant culture's languages to impose the rules of those cultures upon him, though, he couldn't help but be reminded of residential school. He saw this environment as a step backwards rather than a step towards reconciliation.

INTRODUCTION

In the residential schools that existed in Canada between the 1820s and 1990s, Indigenous[3] children experienced extreme emotional, physical, and sexual abuse. Among the greatest impact of residential schools were Indigenous peoples' loss of self-respect and pride, and non-Indigenous peoples' disrespect for their Indigenous neighbours.[4] The Truth and Reconciliation Commission of Canada (TRC) was created by the Indian Residential School Agreement to address the legacy of residential schools.[5] One of the

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1 Prologue Story adapted from/inspired by *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

2 The film *Atanarjuat (The Fast Runner)* (IsumaTV (14 January 2017), online: <http://www.isuma.tv/atanarjuat-the-fast-runner> (Igloolik: Igloolik Isuma Productions Inc., 2011)) inspired the name for the character in this story.

3 I use the term "Indigenous" to avoid the use of terms implying agreement with Canada's legal approach to colonization. The term "Indigenous Peoples" is used to acknowledge the diversity of "Nations" and communities within Nations in what is now known as Canada. "Nation" is a term that I use to describe a group of Indigenous peoples with a distinct governance system and/or set of legal orders. The word "community" is used in this paper to refer to groups of people within Nations. The term "Aboriginal" is a colonial legal construct used to refer to the Indian, Inuit, or Métis people of Canada as per section 35(2) of the *Constitution Act,* 1982. I use that term when referring narrowly to laws, statistics, or quotations regarding the three legally recognized Indigenous groups in Canada.

4 The Truth and Reconciliation Commission of Canada (TRC), "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada," online: <http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [TRC, "Honouring the Truth"] at vi.

5 *Ibid* at 24.

Commission's 94 Calls to Action is to develop a Royal Proclamation of Reconciliation.[6] The Proclamation is to include the following commitment as per Call to Action 45(iv):

> Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.[7]

The Supreme Court of Canada (SCC) is a potential forum through which Indigenous and Crown constitutional and legal orders may be reconciled. Its essential features constitute a crucial aspect of Canada's Constitution, as affirmed by the *Constitution Act*,[8] and it functions as Canada's "exclusive ultimate appellate court."[9] Between 2000 and 2004, the percentage of cases heard at the SCC involving conflicts between Aboriginal peoples and the colonial state ranged between four and almost sixteen per cent.[10] These conflicts related to alleged breaches of treaty rights, assertions of Aboriginal rights under section 35 of the *Constitution Act,* compensation requests for the harm suffered by Indigenous people in residential schools, restorative justice principles for Aboriginal offenders;[11] principles set out in *R v Gladue,*[12] the *Indian Act,*[13] and family law matters concerning Aboriginal children with non-Aboriginal foster parents.[14] The amount of cases involving Aboriginal-state conflicts was notably disproportionate, considering that Aboriginal peoples made up only 3.3 per cent of Canada's population during this period. Chartrand et al. argue that given the disproportionate hearing rate of Aboriginal-state conflict cases, it makes practical sense to reserve a seat on the SCC for an Indigenous judge.[15]

With Prime Minister Trudeau's recent appointment of Aboriginal Minister of Justice and Attorney General Jody Wilson-Raybould and Chief Justice McLachlin's upcoming mandatory retirement in 2018, the momentum for ensuring Aboriginal representation on the SCC is building. Upon accepting the Truth and Reconciliation Commission's Final Report on December 15, 2015, Prime Minister Trudeau stated:

> This is a time of real and positive change. We know what is needed is a total renewal of the relationship between Canada and Indigenous peoples. We have a plan to move towards a nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership, and we are already making it happen… we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission.

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6 *Ibid* at 199.

7 *Ibid* at 199.

8 *Constitution Act,* 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11 [*Constitution Act*].

9 *Reference re Secession of Quebec,* [1998] SCR 217 at para 77 and 9, 161 DLR (4th) 385 [*Secession Reference*].

10 Larry Chartrand et al, "Reconciliation and Transformation in Practice: Aboriginal Judicial Appointments to the Supreme Court" (2008) 51:1 Can Pub Admin 143 at 148 – 149 [Chartrand et al, "Reconciliation"].

11 *Criminal Code*, RSC 1985, c C-46, s. 718.2(e).

12 *R v Gladue,* [1999] 1 SCR 688, 171 DLR (4th) 385.

13 *Indian Act,* RSC 1985, c. I 688 [*Indian Act*].

14 Chartrand et al, "Reconciliation," *supra* note 10 at 148.

15 Chartrand et al, "Reconciliation," *supra* note 10 at 148 – 149.

In this paper, I argue that reserving one seat on the SCC for an Indigenous Justice, either by convention or statute, would be an important step towards implementing Call to Action 45(iv).[16] The Justice would self-identify as Indigenous or possess status according to the *Indian Act*.[17] They would have some knowledge of Indigenous legal orders (including their own Nation's and possibly those of other Nations in what is now known as Canada) and would qualify as judges under the common law. In this paper, I refer to Indigenous legal orders as laws embedded in Indigenous peoples' "social, political, economic, and spiritual institutions."[18] Professor Val Napoleon states that "Indigenous law is part of and derives from an Indigenous legal order."[19]

In order to achieve reconciliation, both Indigenous and Crown legal orders must be addressed in a comprehensive, coherent, and legitimate manner. They must also be understood, accessed, and applied.[20] I argue that reserving a seat on the SCC for an Indigenous Justice would further the goal of reconciling Indigenous and Crown legal orders by enhancing the efficacy and legitimacy of both. Firstly, it would allow Crown legal orders to benefit from the influence of Indigenous legal orders. Second, it would enhance the SCC's legitimacy as a multi-juridicial institution. Third, it would allow for better application of Crown laws related to Aboriginal peoples. Fourth, it would help maintain Indigenous peoples' confidence in the Court as the final arbiter of their rights. And finally, it would enhance the efficacy of Indigenous legal orders by allowing for their direct application.

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16 John Borrows also argues that all levels of the court system should include more Indigenous judges; see John Borrows, Canada's Indigenous Constitution (Toronto: University of Toronto Press, 2010) at 215-218. He notes at 215 that the idea of appointing an Indigenous Justice to the SCC was recommended in the RCAP Final Report and received resolutions of support by the Canadian Bar Association, the Indigenous Bar Association (IBA), the Canadian Association of Law Teachers, and the National Secretariat Against Hate and Racism in Canada. Further, John Borrows notes at 215 that Albert Peeling and Professor James Hopkins, in a position paper they prepared for the IBA, argue that "the appointment of Aboriginal persons to the Supreme Court is philosophically consistent with legal pluralism." See Albert Peeling and James Hopkins, "Aboriginal Judicial Appointments to the Supreme Court of Canada," Unpublished, April 6, 2004, paper prepared for the IBA, at 21. In Chartrand et al, "Reconciliation", supra note 10, it is argued that accommodating Indigenous legal traditions within Canada's juridical framework by appointing Indigenous judges to the SCC is justified from both a philosophical and legal perspective.

17 I argue that a spot reserved for a person who self-identifies as Indigenous should be available to certain non-status Indian and Métis people. The determination of who holds Indian status under the *Indian Act* is highly problematic for people who descend from someone who missed initial enrollment, people who descend from a woman who lost her status when she married a non-status man, and people (or their descendants) who lost their status when they completed a University degree or joined the army. I would argue that the determination of whether someone who self-identified as Indigenous could hold the seat would need to be made on a case-by-case basis, considering the unique circumstances of the individual's identity (and possibly oral or written evidence regarding their identity) and their connection to the Nation that they claim to be from.

18 Val Napoleon, *Thinking About Indigenous Legal Orders*, (National Centre for First Nations Governance, 2007) [Napoleon, *Indigenous Legal Orders*] at 2.

19 *Ibid* at 2.

20 Val Napoleon, "What is Indigenous Law? A Small Discussion," Unpublished, 8 December 2015, on file with the Indigenous Law Research Unit, University of Victoria, [Napoleon, "What is Indigenous Law?"] at 1.

II. RECONCILIING INDIGENOUS AND CROWN LEGAL ORDERS AT THE SUPREME COURT OF CANADA

Bringing Indigenous legal orders to the SCC through the appointment process would enhance the general efficacy of Crown legal orders (Aboriginal and non-Aboriginal) by allowing them to benefit from the influence of Indigenous legal orders. Aboriginal Crown legal orders include Crown laws relating particularly to Aboriginal peoples. While Crown legal orders operate from the top-down, through the judiciary, law enforcement, and government actors, Indigenous legal orders operate from the bottom-up through public institutions of Indigenous citizens organized in various ways.[21] Similar to Crown law, Indigenous law is organized as legal precedent existing in memory. Indigenous law is usually oral rather than written.

The commonalities and differences between Indigenous and Crown legal orders could intermingle in conversations between Justices on the SCC to enhance the law's efficacy. Indigenous legal orders are helpful sources for *all people* seeking guidance on how to exist peacefully in the present and going into the future.[22] Law is "an active collaborative and public process" and the issues it addresses (including community safety, fairness, and accountability) are universal.[23] Unique Indigenous legal orders can offer Crown legal orders new insights on how to effectively deal with these problems. Furthermore, the SCC would provide an important environment for putting the two legal orders in conversation with one another. Indeed, neglecting to turn to Indigenous legal orders for insights at the SCC is troubling considering the power that the Supreme Court has over Indigenous groups within its jurisdiction. As Professor John Borrows has noted, "when you build a structure on an unstable base, you risk harming all who depend on it for security and protection."[24]

In their article advocating for reconciliation through Aboriginal judicial appointments, Larry Chartrand, Lisa Chartrand, Bruce Feldthusen, and Sarah Han argue that reserving an Indigenous seat on the SCC would be an important step towards ensuring the SCC's legitimacy as a multi-juridicial institution.[25] As the court stated in the *Reference Re Supreme Court Act,* ss. 5 and 6 (*"SCA Reference"*),[26] reserving a third of seats on the SCC for Québécois judges was essential to ensuring the SCC's legitimacy as a bijuridical institution upon its creation. It is problematic to describe Canada's legal system as bijuridical, however.[27] A wide variety of sources—written, unwritten, statutory, and customary—lie at the heart of Canadian law and authority.[28] These include long-standing Indigenous legal orders[29] that were not extinguished by discovery, occupation,

21 Napoleon, "What is Indigenous Law?", *supra* note 19 at 1-2.

22 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10 [Borrows, *Canada's Indigenous Constitution*].

23 Napoleon, "What is Indigenous Law?", *supra* note 19 at 1.

24 Borrows, *Canada's Indigenous Constitution, supra* note 22 at 15.

25 Chartrand et al, "Reconciliation," *supra* note 10 at 150.

26 *Reference Re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 55, 1 SCR 433 [*SCA Reference* cited to SCC].

27 Borrows, *Canada's Indigenous Constitution, supra* note 22 at 15.

28 Canada Royal Commission on Aboriginal Peoples, *Report,* vol. 2, *Restructuring the Relationship* (Ottawa: Queen's Printer, 1996) at 179 [Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*].

29 Borrows, *Canada's Indigenous Constitution, supra* note 22 at 15.

prescription, or conquest.[30] Thus, Canada is best understood as a multi-juridicial state.[31] Morphing the SCC into a multi-juridical institution by reserving Indigenous seats would be a meaningful way of recognizing it as such.

Indigenous legal order representation on the SCC would also better enhance the efficacy of applying Crown legal orders related to Indigenous peoples. The Court in *R. v Van der Peet* considered the issue of defining the Aboriginal rights recognized and affirmed in section 35(1) of the *Constitution Act*.[32] It stressed that Aboriginal rights must be interpreted differently from *Charter* rights because they are rights uniquely held by Aboriginal people.[33] Section 35(1) must be interpreted in a generous, liberal, and purposive manner.[34] Its purposes are to affirm Aboriginal rights and reconcile them with the existence of Crown sovereignty.[35] In order to achieve this purpose, courts must account for the perspective of the Aboriginal rights claimant in a way that is cognizable to the common law.[36] The courts in *Delgamuukw v British Columbia,*[37] and *Tsilhqot'in Nation v British Columbia,*[38] confirmed that judicial assessments of Aboriginal title as a specific subset of Aboriginal rights must account for both perspectives.

As argued by Chartrand et al., interpretations of section 35(1) which purposively, generously, and liberally take into account the perspective of Indigenous peoples, while also accounting for the common law perspective, would best be achieved by Indigenous justices trained in both Indigenous and common law.[39] The best way to interpret from an Indigenous perspective is to have an Indigenous person do the interpreting. Indigenous legal orders are inextricably intertwined with section 35(1) rights.[40] As per the court in *Delgamuukw*, "the [A]boriginal perspective on occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of [A]boriginal peoples."[41]

The ability of non-Indigenous judges to properly interpret Indigenous legal orders has not withstood scrutiny, as those judges are "susceptible to the danger of only recognizing law within Indigenous societies if they find analogies to concepts within English law."[42] Certainly Indigenous judges would be among the most qualified to analyze and apply Indigenous laws in order to glean an Indigenous perspective. Increasingly, Canadian law schools are offering programs that allow students to engage with Indigenous legal orders.[43] Among the most "innovative and ambitious" of these programs is the University of Victoria's proposed joint common law and Indigenous law degree.[44] Such a program could train legal professionals to support the proper recognition of Indigenous legal orders in Canadian courts.

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30 *Ibid* at 21.

31 *Ibid* at 107.

32 *R v Van der Peet,* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet* cited to SCR].

33 *Ibid* at para 19.

34 *R v Sparrow,* [1990] 1 SCR 1075 at para 56, 70 DLR (4th) 385.

35 *Van der Peet, supra* note 32 at para 43.

36 *Ibid* at para 49.

37 *Delgamuukw v British Columbia,* 79 DLR (4th) 185 at para 84, [1991] 3 WWR 97 (BCSC) [*Delgamuukw* cited to DLR].

38 *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at para 34, [2014] 2 SCR 257.

39 Chartrand et al, "Reconciliation," *supra* note 10 at 149 – 151.

40 Borrows, *Canada's Indigenous Constitution, supra* note 22 at 11.

41 *Delgamuukw, supra* note 37 at 148.

42 Borrows, *Canada's Indigenous Constitution, supra* note 22 at 16.

43 Val Napoleon and Hadley Freidland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories" (2016) 51:1 *McGill Law Journal* 143 at 148 – 149.

44 *Ibid.*

There are many unique and distinct Indigenous Nations within Canada. An Indigenous judge from one Nation would need to reason across legal orders to apply the laws of another Nation—for example, a Nisga'a judge may need to reason through and apply an Anishinabek law. Or, as was the case at the Tsuu T'ina Nation Provincial Court between 1999 and 2007, an Anishnabek judge may need to reason through and apply Tsuu T'ina law. The Tsuu T'ina court is located on the Tsuu T'ina Nation reserve just west of Calgary. It works within the Western adversarial system and has the same jurisdiction as any Provincial Court; however, it is largely based on Tsuu T'ina laws and follows Tsuu T'ina protocols. The court must be presided over by an Aboriginal judge who "has an innate understanding of the cultural sensibilities of First Nations people through direct personal involvement with the culture, [has] resided on reserve and [has] worked with Aboriginal people."[45] The judge is to be "from outside the Treaty 7 area to avoid community pressure and to set the tone of 'non-interference.'"[46] Between 1999 and 2000, Judge Leonard Tony Mandamin sat on the Tsuu T'ina Nation Provincial Court, alongside two Tsuu T'ina peacemakers and in collaboration with Tsuu T'ina elders to implement Tsuu T'ina justice on the Tsuu T'ina reserve. While the Tsuu T'ina court has not operated without criticism,[47] it offers a concrete example of how an Indigenous judge may work to analyze and apply a different Nation's laws. Though Judge Mandamin is not Tsuu T'ina, his experiences and identity as an Indigenous person have placed him in a unique position that provides him with valuable tools for reasoning through Tsuu T'ina Nation's legal orders.

Although the legal orders of different Indigenous Nations are distinct and unique, an Indigenous judge is better equipped to understand the unique legal orders of another Indigenous Nation because of their experience engaging with Indigenous protocols and familiarity with concepts that are common to many Indigenous legal orders. For example, John Borrows discusses how Indigenous legal theories (though diverse and often overlapping with Western legal theories) may be less likely than Western legal theories to reflect a belief that humans must restrain nature in order to live within it.[48] As stated by Borrows, "[f]or many Indigenous people, the casebook for learning natural law requires an intimate knowledge of how to read the world; understanding natural law from this point of view does not require an intimate knowledge of how to read legal philosophy."[49] Or, as is the case with Judge Mandamin, Indigenous judges familiar with the legal orders of their Nation may be better equipped than a non-Indigenous judge to navigate through concepts of restorative justice. According to Cree Judge Mary Ellen Turpel (as she then was), Crown legal orders are "grounded in a retributive theory of punishment" while Indigenous legal orders are often more concerned with healing and restoring social

45 Catherine Bell, "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in Catherine Bell and David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 252.

46 *Ibid*.

47 See Dale Dewhurst, "Parallel Justice Systems, Or a Tale of Two Spiders" in Catherine Bell and David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 217 for a critique.

48 Borrows, *Canada's Indigenous Constitution, supra* note 22 at 28.

49 *Ibid,* at 29.

balance.[50] While particular laws relating to restorative justice are different across Nations, an Indigenous judge familiar with the concept may be among the most qualified to reason through and apply a particular Nation's restorative justice law.

Allowing that judge to do so would also enhance Crown law's legitimacy by bolstering Indigenous peoples' confidence in the Court as the final arbiter of their rights. The Court in *SCA Reference* determined that reserving Québécois seats on the SCC was not only to provide civil law expertise for legal purity and accuracy purposes;[51] the seats were also reserved to ensure that Quebec's legal traditions and social values were represented on the Court, thereby enhancing the confidence of Quebec citizens. In "Indigenous Legal Traditions: Roots to Renaissance," Val Napoleon and Hadley Friedland describe how the effect of disintegrating so many aspects of Indigenous legal orders as a result of colonialism would be "difficult to overestimate."[52] Indigenous legal orders have not only been discarded in the past, but even criminalized.[53] In the face of colonialism, Indigenous peoples and their legal orders have been remarkably resilient. Still, it has resulted in "disorientation, chaos, and fear" in Indigenous communities.[54] Currently, Indigenous peoples in Canada are significantly less confident than non-Indigenous peoples in the Crown's justice system and courts.[55]

Appointing Indigenous judges to the SCC would offer one means for strengthening Indigenous peoples' confidence in the judicial system. Merely recognizing Indigenous legal orders will not, on its own, cause them to spring to life.[56] They must be accessed, analyzed, synthesized, and applied in the real world.[57] Direct application of Indigenous legal orders would enhance their efficacy. John Borrows advocates for the direct application of Indigenous legal orders through different modern forums.[58] The vitality of Indigenous legal orders rests on their ability to exist as current, living systems that adapt to changing circumstances.[59] As stated in the *Secession Reference*, working out our constitutional problems requires "a continuous process of discussion… compromise, negotiation, and deliberation."[60] Appointing Indigenous judges to the SCC is one way to bring Indigenous legal orders into the discussion, thereby allowing for Indigenous people

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50 Mary Ellen Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In" in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Issues* (Ottawa: Supply and Services Canada, 1993) at 174.

While restorative justice may generally be considered more important or preferable within many Indigenous Nations, it should be recognized that Indigenous legal orders can and do include more coercive and forceful responses as well. Because the Canadian state continues to be unaccepting of more forceful and coercive Indigenous legal orders, problematic assumptions have developed that conflate concepts of "restorative justice" with concepts of "Aboriginal justice" and ignore other aspects of Indigenous legal orders. See Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Marcus D. Dubber & Tatjana Hornole, eds, *The Oxford Handbook of Criminal Law* (New York: Oxford University Press, 2014), [Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance"] at 237 – 238.

51 *SCA Reference, supra* note 26 at para 19.

52 Napoleon and Friedland, "Indigenous Legal Traditions: Roots to Renaissance," *supra* note 50 at 231.

53 *Ibid,* at 231.

54 *Ibid.*

55 See Statistics Canada, "Public Confidence in Canadian Institutions," by Adam Cotter, in *Spotlight on Canadians: Results from the General Social Survey,* Catalogue No 89-652-X (Ottawa: Statistics Canada, 2015). The survey finds that while non-Aboriginal people are 58% confident in the "justice system and courts," Aboriginal people are only 43% confident.

56 Napoleon, "What is Indigenous Law?", *supra* note 19 at page 3.

57 *Ibid,* at 3 - 4.

58 Borrows, *Canada's Indigenous Constitution, supra* note 22 at 8 - 11.

59 *Ibid,* at 8.

60 *Secession Reference*, *supra* note 9 at para 68.

to participate in their continual construction. Indigenous justices on the SCC would give life to Indigenous legal orders by applying restorative justice in line with section 718.2(e) of the *Criminal Code* or when considering the best interests of an Indigenous child in a family law context.

It may be argued that bringing Indigenous legal orders to the SCC could also be damaging to the Indigenous Nations whose legal orders are being reasoned through. One pressing and legitimate concern is that when Indigenous legal orders are taken out of their proper context (the Nation where they were created and where there are Elder members who are the experts at interpreting the Nation's laws), there is opportunity for them to be misinterpreted. This misinterpretation may serve Crown interests, but is incongruous with or harmful to the Nation's interests and worldviews. Measures to address this concern could include ensuring that an Indigenous judge trained in Crown and Indigenous law hears cases relating to Indigenous people as frequently as is possible at the trial court level, hears Elders and other Nation members as expert witnesses at trial, and travels to the Nation to hear Elders engage with their Nation's legal orders in the appropriate place at the appropriate time.[61]

CONCLUSION

The goal of reconciling Indigenous and Crown legal orders would be furthered through a judicial appointment process which reserved three seats on the SCC for people who identify as Indigenous. This process would enhance the legitimacy and efficacy of Crown legal orders by allowing them to benefit from the influence of Indigenous legal orders, enhancing the SCC's legitimacy as a multi-juridicial institution, allowing for better application of Crown laws related to Aboriginal peoples, and maintaining Aboriginal peoples' confidence in the Court. It would also enhance the legitimacy and efficacy of Indigenous legal orders by allowing for their direct application.

III. EPILOGUE STORY – THIS IS MY VISION

Atanarjuat rose to his feet quickly when Chief Justice Worme walked in. After him came Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon, and Rowe. Atanarjuat knew that the judges would be talking about how his traumatic experiences in residential school should affect his sentence for breaching his parole. He was not looking forward to being sentenced, but he was comforted by the fact that Chief Justice Donald Worme would take part in determining what his sentence would be. While he was in Kingston, he learned that Chief Justice Worme was the man that acted for the families of the young Cree men who police officers left to die in Saskatoon's freezing cold. Atanarjuat took his seat. "Merci, thank you, Qujannamiik, ay-ay," said Chief Justice Worme. Hearing Inuktitut made Atanarjuat feel more at home.

61 This was the case in *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700.

APPEAL ▪ VOLUME 22 ▪ 2017