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A valued part of the volume 24 editorial board and
a treasured member of our law student community.

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PREFACE

I must go back here to the particular incidents which occur to my thoughts of the time of the visitation, and particularly to the time of their shutting up houses in the first part of their sickness; for before the sickness was come to its height people had more room to make their observations than they had afterward; but when it was in the extremity there was no such thing as communication with one another, as before.

Daniel Defoe, *A Journal of the Plague Year, 1722*

Welcome to our journal of a pandemic year. 2020 has changed all our lives. Some of us have lost loved ones. We have all struggled to keep connected, and to maintain the relationships that sustain us in times of happiness and difficulty.

Yet, this is not Daniel Defoe's plague. True, in 2020, "there was no such thing as communication with one another, as before". But we have other tools to stay virtually connected.

This is the first time—and, we hope, the last time—that *Appeal* is produced entirely virtually. In most cases, our editors have never met in person. All our meetings were held online, and all our conversations and deliberations mediated through technology. We learned to "unmute" ourselves, to put our comments in the "chat", to "reply in thread".

Despite these peculiarities, it has been an incredible year for *Appeal*. We had a record number of submissions. A significant number of volunteers turned out for our submissions review sessions. As always, our expert reviewers were incredibly generous with their time and expertise. We are grateful to those who submitted articles and to everyone who freely gave their time and effort to put this project together under trying circumstances.

Volume 26 features works by six authors, including two from the University of Victoria Faculty of Law. The first part of the volume addresses Indigenous issues within the scope of Aboriginal title and rights, child protection, and representation on juries. The latter half examines critical areas requiring legal reform in environmental remediation, the duty of care owed by universities, and the gendered aspects of family relocation.

In 2001, *Mitchell v Minister of National Revenue* set out guidelines on interpreting modern Aboriginal rights. Alexandra Potamianos considers how courts since have used the decision to restrict the admission of oral history evidence and finds that, in effect, *Mitchell's* restrictive approach has limited the ability of Indigenous groups seeking to claim Aboriginal title and rights.

Romi Laskin addresses the damaging impact of the child welfare system on Indigenous children in British Columbia. She proposes implementing *Gladue*-like reports within the child protection process. Laskin argues that this strategy will better facilitate Indigenous traditions and cultural continuity, provide support to caregivers, comply with international obligations, and respect the best interests of both children and families.

Stemming from the Colton Boushie case, Keith Hogg tackles Indigenous representation on juries by delving into recent cases and reform initiatives. While the issue has received significant attention from both the legal community and the public, Hogg outlines why they have failed to create meaningful change. He identifies key problems in the jury selection process and offers some practical solutions to encourage equitable jury representation.

Holly Stewart tackles the important environmental issue that arises when an oil well becomes non-productive and the company is unwilling or unable to remediate. Stewart identifies potential regulatory reforms in the British Columbia context in light of the Supreme Court of Canada's decision in *Orphan Well Association v Grant Thornton Ltd,* 2019 SCC 5.

Can a university be held liable in tort for student suicides on or off-campus? Shailaja Nadarajah examines the potential consequences of expanding the duty of care in tort law between universities and their students, and suggests that jurisprudence from the United States can provide important lessons for Canada in addressing this troubling issue.

Moving to the area of family law, Meredith Shaw explores how courts have engaged with the gendered aspects of post-separation relocation quality of life analysis. By charting and analyzing British Columbia court decisions made under the *Family Law Act's* relocation provisions, Shaw finds that courts' handling of the connected gendered issues of family violence and affordable housing has been uneven and proposes reforms to address gaps in the law.

These six pieces would not have been possible without the help we received from students and the legal community. We are grateful for the support of our external reviewers and sponsors. We also thank the Faculty of Law including the dean, Susan Breau, and our faculty advisor, Theodore McDorman, the staff at the Diana M. Priestly Law Library, the University of Victoria Law Students' Society, and, our graphic designer, Michael Doborski.

Above all we express our gratitude to our exemplary editorial board who brought it all together: Alexander Alstad, Serena Cheong, Rachel De Graaf, Joannie Fu, Catherine Lafferty, and Frances Miltimore.

We wish you the best of health.

Samrah Mian and Aaron Francis

ARTICLE

THE CHALLENGES OF INDIGENOUS ORAL HISTORY SINCE *MITCHELL V MINISTER OF NATIONAL REVENUE*

Alexandra Potamianos *

CITED: (2021) 26 *Appeal* 3

ABSTRACT

This article answers two questions: How has the Supreme Court of Canada's *Mitchell v Minister of National Revenue* decision been operationalized by trial-level courts? Based on these findings, does this decision make room for Aboriginal title and rights claimants to contest dominant understandings of Indigenous presence in the Canadian settler state? Examining the reasoning of six trial-level court decisions, this article finds that *Mitchell* was operationalized in four of the cases to exclude Indigenous oral history evidence. In its application by trial courts, this article argues that *Mitchell* does not create opportunities for Indigenous challenges to colonial spatial relationships.

* Alexandra Potamianos is currently in her third year of the JD program at Osgoode Hall Law School. Many thanks to Professor Benjamin L Berger for his encouragement and comments on earlier drafts of this paper.

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INTRODUCTION

As lawyers we don't have to take any responsibility to construct a world. We only have to destroy another's construction. We say no. We are the civilized, comfortable, well-heeled carriers of no. We thrive on it. Other races die.[1]

Leslie Hall Pinder, Counsel in *Delgamuukw v British Columbia*

In the 1997 Supreme Court of Canada decision, *Delgamuukw v British Columbia*,[2] Chief Justice Lamer held that the laws of evidence are to be "adapted" to ensure that oral history is "accommodated and placed on an equal footing" with written forms of evidence in the context of Indigenous land and rights claims.[3] In 2001, the Supreme Court provided further instruction on the use of oral history evidence in its *Mitchell v Minister of National Revenue*[4] decision. Following the guidance provided by Canada's highest court in these two cases, recent scholarship suggests that lower courts continue to struggle with the admissibility and weighing of oral history evidence in the context of Indigenous land and rights litigation.[5]

The purpose of this article is to answer two research questions: How has the Supreme Court's *Mitchell* decision been operationalized by trial-level courts across Canada? And, based on these findings, does this decision make room for Aboriginal title and rights claimants to contest dominant understandings of Indigenous presence in the settler Canadian state? Drawing on critical legal geography scholarship, this article will ultimately argue that by offering Indigenous oral history evidence, claimants have the opportunity to challenge and resist colonial spatializations.

In answering the first question, this article tracks the reasoning of six trial-level court decisions: *Benoit v Canada*;[6] *Attorney General of Canada v Anishnabe of Wauzhushk Onigum Band et al*;[7] *Queen v Drew et al*;[8] *White Bear First Nations v Saskatchewan (Environment)*;[9] *Couchiching FN et al v AG Canada et al*;[10] and *R v Dickson*.[11] It finds that the direction provided by the

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1 Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991) at 12.

2 [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

3 *Ibid* at para 87.

4 2001 SCC 33 [*Mitchell*].

5 See generally David Milward, "Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence" (2010) 14 Intl J Evidence & Proof 287 [Milward]; Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Wiyasiwewin Mikiwahp Native Law Centre, University of Saskatchewan, 2019) [Drake]; David Laidlaw, "The Challenges in Using Aboriginal Traditional Knowledge in the Courts" in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary: University of Calgary Press, 2019) 606; Drew Mildon, "A Bad Connection: First Nations Oral Histories in the Canadian Courts" in Renate Eigenbrod & Renée Hulan, eds, *Aboriginal Oral Traditions: Theory, Practice, Ethics* (Blackpoint, NS: Fernwood, 2008).

6 2002 FCT 243 [*Benoit*], rev'd *Canada v Benoit*, 2003 FCA 236 [*Benoit FCA*].

7 2002 CarswellOnt 3212 (WL Can) (Ont Sup Ct), rev'd on other grounds, 2003 CarswellOnt 4835 (WL Can) (ONCA) [*Anishnabe of Wauzhushk*].

8 2003 NLSCTD 105 [*Drew*], aff'd 2006 NLCA 53, leave to appeal to SCC refused, 31750 (3 May 2007).

9 2009 SKQB 151 [*White Bear First Nations*].

10 2014 ONSC 1076 [*Couchiching FN*].

11 2017 ABPC 315 [*Dickson*].

Supreme Court of Canada in *Mitchell* was operationalized in four out of the six cases to exclude, rather than include, Indigenous oral history evidence. This research provides insight into how the principles articulated in *Mitchell* have been applied in practice by trial-level courts. If deemed admissible and given equal and due weight, oral history has the ability to be "*expressions*"[12] of Indigenous presence and relationship to the land.

In answering the second question, this article engages in an exercise in what legal geography scholar, Antonia Layard, would call "reading law spatially."[13] "Reading law spatially" involves shifting the focus of analysis away from the "law first" and toward "a grounded perspective beginning in the site or event." It helps us to "understand how spatial and legal practices co-produce (for example) wildlife reserves, protests or homelessness,"[14] or, as in the case of this article, toward a focus on how the application of the law has *actual* spatial effects—whether by reinforcing existing spatial relationships or creating new ones.

Scholarship connecting law with geography posits that the "[l]aw is seen not as distinct, but as *enmeshed with space*."[15] Alternatively, "the law is a socially constructed institution, that is produced within space and helps to produce space."[16] Critical legal geography helps reveal the inner workings of power that are often rendered invisible by focusing on the location of the law's impact and the targets of its uneven effects.[17] Put simply, a legal geographical perspective illuminates how the law materially changes and often determines the meaning of the spaces that we inhabit. In the context of the kinds of Aboriginal rights and land claims to be explored in this article, judicial pronouncements may alter uses and ownership over particular lands having negative spatial implications for Indigenous peoples.

This article will begin with a general overview of the evidentiary challenges that arise when Indigenous communities present oral history evidence to courts. Next, it will discuss how Supreme Court of Canada case law addressing oral history evidence has evolved up until *Mitchell*. It will then analyze six trial-level court decisions involving Indigenous claimants seeking to adduce oral history evidence and the courts relying on *Mitchell* in their reasons to either include or exclude this evidence altogether. In a concluding section, this article will argue that by taking a more restrictive evidentiary approach in *Mitchell*, the Supreme Court

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12 Julie Cruickshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v B.C.*" (1992) 95 BC Studies 25 at 35 [emphasis in original].

13 Antonia Layard, "Reading Law Spatially" in Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie, eds, *Routledge Handbook of Socio-Legal Theory and Methods* (New York: Routledge, 2020) 232.

14 *Ibid.*

15 Deborah G Martin, Alexander W Scherr & Christopher City, "Making Law, Making Place: Lawyers and the Production of Space" (2010) 34:2 Progress in Human Geography 175 at 177 [emphasis in original].

16 *Ibid* at 179.

17 See generally David Delaney, "Legal Geography II: Discerning Injustice" (2016) 40:2 Progress in Human Geography 267; Robyn Bartel et al, "Legal Geography: An Australian Perspective" (2013) 51:4 Geographical Research 339; Nicholas Blomley, "Making Space for Law" (1993) 14:1 Urban Geography 3; Irus Braverman, "Hidden in Plain View: Legal Geography from a Visual Perspective" (2011) 7:2 Law, Culture and the Humanities 173; Nicholas Blomley & Joel Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30:3 Osgoode Hall LJ 661.

has made it more difficult for Indigenous claimants to offer this kind of evidence. Drawing from various legal geography scholars, this article finds that, based on its application by trial court judges, the *Mitchell* decision does not create increased opportunities for Indigenous claimants to offer alternative understandings of Indigenous presence. Rather, trial court judges use portions of the judgment to reinforce existing colonial spatial relationships.

I. METHODOLOGY

A selective case study approach was adopted in this article to explore how trial-level courts have analyzed and applied the *Mitchell* decision. *Mitchell* has been cited in the case law over 200 times. To narrow the scope of this paper, cases were selected from trial-level courts that reference the *Mitchell* decision from 2002—2019 and particularly cite paragraph 39 of this judgment, which is set out in full below.

Each of these cases was then selected based on whether or not the issue in the case was about Indigenous land and/or treaty rights and whether there was a substantive discussion about oral history. The significant 2007 decision of the British Columbia Supreme Court, *Tsilhqot'in Nation v British Columbia*,[18] where the oral history of Tsilhqot'in First Nation was deemed admissible, is not included in the application section of this article. While this case does provide insight into how trial-level courts apply the *Delgamuukw* and *Mitchell* decisions, Justice Vickers did not specifically cite paragraph 39 of Chief Justice McLachlin's judgment in *Mitchell*. However, leading up to his 2007 *Tsilhqot'in* decision, Justice Vickers set out a framework for determining the admissibility of oral history evidence offered by the Tsilhqot'in Nation in *William et al v British Columbia et al*, which will be briefly discussed in Part V.

Given that this article focuses on trial-level court decisions only, this research is limited by the small sample of cases selected. Future research might explore how appellate level courts have considered and operationalized the *Mitchell* decision since its release in 2001.

II. DIFFICULTIES WITH INDIGENOUS ORAL HISTORY EVIDENCE

The oral character of Indigenous histories has proved to be an evidentiary challenge for Indigenous claimants trying to assert claims for land title and treaty rights in Canadian courts. These claimants are at a "disadvantage if a major source of their knowledge, transmitted orally, across time, and in a distinctive style, cannot meaningfully be entered as evidence."[19] Indigenous claimants asserting title and/or treaty rights must meet distinct legal tests in which they bear the burden of proof on a balance of probabilities. Proving these rights is a particularly onerous task because courts have been reluctant to admit and give equal weight to oral histories, which are the basis of Indigenous historical traditions.[20]

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18 2007 BCSC 1700 [*Tsilhqot'in*].

19 Bruce Granville Miller, "Introduction" in *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011) 1 at 2—3.

20 See Kent McNeil & Lori Ann Roness, "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts" (2000) 39:3 J West 66 at 67.

Scholarship in this area has identified a variety of evidentiary difficulties for Indigenous claimants trying to adduce oral history, such as the "best evidence" rule and the parole evidence rule.[21] The primary reason why oral history evidence is different from other types of presumptively admissible evidence is because it violates the rule against hearsay. It is therefore presumptively *inadmissible*, subject to a number of exceptions.[22]

Put simply, hearsay is "'an out-of-court statement offered for the truth of its contents,"' where there is no opportunity to "*contemporaneously*" cross-examine the person who made the statement.[23] Indigenous oral histories, which are passed down over generations, are considered to be hearsay because they are offered to prove the truth of their contents and the person who originally made the statement is deceased and cannot testify in court.[24] Jan Vansina, an anthropologist and accepted expert in the *Tsilhqot'in* case, made the distinction between *oral histories*, which relate to accounts about events and situations which are contemporary and occurred within the witness' lifetime, and *oral traditions*, which are not contemporary to the witness' lifetime and are instead '"verbal messages from the past beyond the present generation."'[25] Despite these definitional differences, oral history and oral traditions have been used interchangeably by the Supreme Court of Canada and are subject to hearsay rules.[26] In this article, the term "oral history" is used because it aligns with much of the scholarship in this area.

Strict applications of the rule against hearsay have the effect of excluding oral history evidence, which impacts the ability of Indigenous communities to meet required legal tests and successfully assert their claims for treaty rights and land title. Despite these challenges, oral history evidence can be admitted by courts as an exception to the hearsay rule. Indigenous oral histories, unlike historical documents, are not a category of a recognized exception on their own under the law of evidence. Instead, these histories may be admitted if they fall into one of the existing exceptions (i.e. public and general rights) or if they meet the requirements of necessity and reliability.[27]

Even where oral history evidence is deemed admissible as an exception to the hearsay rule, it may not be given equal or any weight. The familiarity with and rationale underlying the rule against hearsay renders oral history "suspect" to trial judges when weighing this evidence.[28] Although the Supreme Court of Canada provided some guidance related to

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21 See Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30:4 Alta L Rev 1276 at 1281—83.

22 See Drake, *supra* note 5 at 285.

23 Hamish Stewart et al, *Evidence: A Canadian Casebook*, 4th ed (Toronto: Emond Montgomery, 2016) at 130; Drake, *supra* note 5 at 283 [emphasis in original].

24 See Drake, *supra* note 5 at 284.

25 Kristen Hausler, "Indigenous Perspectives in the Courtroom" (2012) 16:1 Intl JHR 51 at 60—61.

26 *Ibid* at 61. See also Lorraine Weir, "'Oral Tradition' as Legal Fiction: The Challenge of Dechen Ts'edilhtan in *Tsilhqot'in Nation v. British Columbia*" (2016) 29 Intl J Sem L 159 (a discussion problematizing the distinction between oral history and oral tradition).

27 See Drake, *supra* note 5 at 286.

28 See Michael Asch & Catherine Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 19:2 Queen's LJ 503 at 533—34.

weight in *Delgamuukw* and *Mitchell*, trial judges may still find that the oral history evidence presented cannot be given more weight "than it can reasonably support" or find written forms of evidence to be more "reliable."[29]

Carving out a new exception for oral history evidence, similar to the existing one for historical documents, might enable access to justice for Indigenous claimants from an evidentiary perspective. More specifically, as Karen Drake argues, a recognized exception would result in oral history evidence being presumptively admissible, and therefore, less likely to be marked as suspicious.[30] However, while creating a recognized exception will ensure that oral history evidence is automatically admissible, it may not be viewed as unsuspicious by judges. Indeed, "no matter how thoughtfully oral tradition is performed, an appreciation of its messages anticipates–and requires–a receptive audience."[31]

Moreover, the rule against hearsay, like all other rules of evidence, was developed "in the shadow of the adversary system."[32] In this system, an impartial decision-maker decides on an issue after hearing the position of both parties. The underlying idea of the adversarial system is that individuals are self-interested and, by having each party present their side and then attack the other, the truth will emerge.[33] However, in a context where written forms of evidence are viewed as "objective" and "scientific," and therefore more trustworthy than oral forms of evidence, what counts as "the truth" favors one side over the other.[34]

In 1996, the historical traditions of Aboriginal peoples were described by the Royal Commission on Aboriginal Peoples as "neither linear nor steeped in the same notions of social progress and evolution" compared to "non-aboriginal" historical traditions.[35] The Commission further noted that Aboriginal oral histories are "subjective" because they include '"facts enmeshed in the stories of a lifetime."'[36] This description was cited by Chief Justice Lamer in *Delgamuukw*[37] and continues to pervade judicial understanding of oral history evidence offered by Indigenous claimants. It seems then that it is not simply the "oralness" of oral history evidence that leads judges to approach this type of evidence with skepticism. Rather, it is the oral character of the evidence, combined with Indigenous ways of storytelling, viewed as factually imprecise, that leads judges to reject this evidence at face value.

Even though there is a "tendency to dichotomize oral and documentary history," the differences between these types of evidence should not be overgeneralized.[38] Indeed, oral and written history evidence share many similarities; for example, they are both influenced

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29 Milward, *supra* note 5 at 288.

30 See Drake, *supra* note 5.

31 Cruickshank, *supra* note 12 at 34.

32 McLeod, *supra* note 21 at 1280—81.

33 *Ibid*.

34 See John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall LJ 1 at 15.

35 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 38.

36 *Ibid.*

37 *Delgamuukw, supra* note 2 at para 85.

38 Borrows, *supra* note 34 at 15.

by the life experiences and backgrounds of their creators.[39] Indigenous legal scholar John Borrows suggests using methods triangulation to scrutinize either of these types of historical evidence. This might involve testing oral history evidence, for example, against academic work, family histories, journals, Indian agency correspondence and notes, maps and government materials, among other sources to produce a detailed, cohesive account of the past.[40] However, judges continue to draw sharp distinctions between written and oral histories, favoring the former. Until the suggestions of scholars, such as Borrows and others,[41] on how judges should interact with oral histories are seriously taken up, judicial preference for documentary forms of evidence continues to be one barrier, among many,[42] for claimants of Aboriginal rights and/or title.

III. EVOLUTION OF CASE LAW ON INDIGENOUS ORAL HISTORY EVIDENCE

In the earlier jurisprudence of the Supreme Court of Canada, the Court recognized the evidentiary difficulties that Indigenous communities face. For example, in the 1985 decision *Simon v the Queen*, Chief Justice Dickson stated that since the Micmacs kept oral rather than written historical records, "impos[ing] an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty."[43] Since then, the Supreme Court has more explicitly stated that the rules of evidence must be adapted to accommodate Indigenous oral history evidence.

In *R v Van der Peet*, Chief Justice Lamer held that courts should approach evidentiary rules and "interpret" evidence:

> with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.[44]

In *Delgamuukw*, a claim was first brought by Gitxsan and Wet'suwet'en hereditary chiefs in 1984 for historical ownership and use over 58,000 square kilometers of land in British Columbia.[45] At trial, Chief Justice McEachern of the British Columbia Supreme Court

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39 *Ibid* at 17.

40 *Ibid* at 19.

41 See e.g. Milward, *supra* note 5.

42 See Kirsten Anker, "Aboriginal Title and Alternative Cartographies" (2018) 11:1 Erasmus L Rev 14 (Meaningful participation by Indigenous peoples in legal proceedings is often frustrated by "multiple and entrenched factors," including trauma from "compounded injustices," and high levels of poverty and disease, as a result of historical and ongoing colonization at 18).

43 [1985] 2 SCR 387 at para 44, 24 DLR (4th) 390 [*Simon*].

44 [1996] 2 SCR 507 at para 68, 137 DLR (4th) 289 [*Van der Peet*].

45 *Delgamuukw*, *supra* note 2 at para 7.

admitted the Gitxsan *adaawk* and the Wet'suwet'en *kungax*—both forms of oral history—as evidence under the existing exception for public and general rights and "out of necessity," but ultimately rejected their claim for ownership and jurisdiction.[46] On appeal, the claim shifted from ownership and jurisdiction to Aboriginal title and self-government.[47]

At the Supreme Court of Canada, Chief Justice Lamer, writing for the majority, recognized the importance of "adapt[ing] the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts ... [since] those histories play a crucial role in the litigation of aboriginal rights."[48] Acknowledging the challenges with oral history evidence as proof of Aboriginal rights and title, the Chief Justice then went on to state that "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents," on a case-by-case basis.[49] Applying this approach to the trial judge's decision, Chief Justice Lamer concluded that the trial judge erred in giving no independent weight to the oral histories and ordered a new trial, but did not make a determination regarding Aboriginal title.

In the 2001 Supreme Court of Canada *Mitchell* decision, the question before the Court was "whether the Mohawk Canadians of Akwesasne have the right to bring goods into Canada from the United States for collective use and trade with other First Nations without paying customs duties."[50] Both the majority and the dissent found that the right was not established. Chief Justice McLachlin, writing for the majority, provided guidance about both the admissibility and weighing of oral history evidence. On admissibility, Chief Justice McLachlin stated that '[t]he flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum."'[51] She then went on to state that oral histories are admissible "when they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge."[52]

On the issue of weight, Chief Justice McLachlin began by quoting from the *Delgamuukw* decision that 'it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts."'[53] However, she then went on to provide the following caution, at paragraph 39 of her reasons, regarding the utility of oral histories:

> There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague

46 Drake, *supra* note 5 at 286. See also *Delgamuukw*, *supra* note 2 at para 95.
47 See *Delgamuukw*, *supra* note 2 at para 73.
48 *Ibid* at para 84.
49 *Ibid* at para 87.
50 *Mitchell, supra* note 4 at para 1.
51 *Ibid* at para 30.
52 *Ibid* at para 31.
53 *Ibid* at para 37.

> sense of after-the-fact largesse." In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case", neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.[54]

This paragraph signalled a more restrictive approach to oral history evidence than that laid out by the Supreme Court in *Delgamuuk*w. Part IV of this article will track how paragraph 39 has been operationalized by trial-level courts.

IV. THE APPLICATION OF *MITCHELL* IN CANADIAN TRIAL COURTS

The six trial-level court decisions, presented in chronological order below, employ paragraph 39 of the *Mitchell* decision in determining the admissibility of oral history evidence offered by Indigenous claimants. The main finding from these cases is that *Mitchell* is more often used to exclude, rather than include, offers of Indigenous oral history evidence. Even in the cases where oral history evidence is included, it is often given little to no weight.

A. *Benoit v Canada*

In 1899, to open the Peace-Athabasca country for settlement, the Government of Canada secured an agreement with the Cree and Dene people for what is now Treaty 8.[55] At the time the treaty was negotiated, the Treaty Commissioners acting for Canada relayed to the government that "an assurance was made by them to Aboriginal People that the Treaty did not 'open the way to the imposition of any tax.'"[56] The Aboriginal party to the agreement believed that the assurance meant that they would not, at any time, have tax imposed on them. Given this, the Aboriginal plaintiffs in *Benoit v Canada*, a 2002 decision of the Federal Court of Canada, challenged the "constitutional applicability of Federal taxation provisions to beneficiaries of the Treaty."[57] A preliminary issue to be decided in this dispute was to find a "reasonable meaning" of the assurance made, at the time of negotiation, in the minds of both the Treaty Commissioners and the Aboriginal people. Justice Campbell not only admitted the oral history evidence offered by the Aboriginal plaintiffs, but heavily relied on it to make his determination as to the meaning of the assurance.

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54 *Ibid* at para 39 [citations omitted].

55 *Benoit*, *supra* note 6 at para 3.

56 *Ibid* at para 4.

57 *Ibid.*

In examining the oral evidence, including the testimony of three elders and transcript evidence taken from elders 30 years ago, Justice Campbell held that the assurance was understood as a tax exemption by the Aboriginal plaintiffs, and therefore was an enforceable treaty right.[58] As an example, one Elder, Joe Willier, provided the following oral history evidence when called at trial:

> My father and his generation of leaders told me they were being paid for the land. The Commissioner promised that we would never have to pay tax. He said: "You will always be free from tax because you have already paid through selling your land." My uncles, Chief Keenooshayoo, and Headman Moostoos, paid for those rights for us for the future when they sold the land. They paid for our taxes forever when they sold the land. It is my belief that is what is wrong with the GST (Goods and Services Tax).[59]

Though Justice Campbell commented that paragraph 39 of *Mitchell* should be read as a caution when dealing with oral history evidence,[60] he accepted the evidence provided by the Aboriginal plaintiffs, further stating that "if an Aboriginal person is considered qualified to give evidence of oral tradition, that person is entitled to have weight accorded to his or her evidence unless some certain reason exists for not doing so."[61]

However, this decision was reversed in 2003 by the Federal Court of Appeal, which held that the evidence adduced at trial could not support Justice Campbell's decision.[62] Specifically citing paragraph 39 of the *Mitchell* decision, the Court stated that "the Trial Judge crossed the boundary which McLachlin C.J. warned against in *Mitchell v. Minister of National Revenue.*"[63] Looking in particular at how Mr. Willier's evidence was treated by the trial judge, Justice Stone, writing for the Court, again relying on paragraph 39 of *Mitchell*, stated that:

> With respect, I fail to see how Mr. Willier's answer that he had not been told that he had to pay tax can be transformed into an answer that his people had received a treaty promise exempting them from taxation. In my view, this is exactly what McLachlin C.J. had in mind when she stated in *Mitchell*, *supra*, that oral history evidence should not be artificially strained to carry more weight that it can reasonably support. Whatever Mr. Willier had in mind in giving his answer, he certainly did not say, nor can he be taken to have said, that he had been told that his people understood that they had been exempted from taxation.[64]

Overall, the Federal Court of Appeal's 2003 decision, which relies on paragraph 39 of *Mitchell* to reverse the trial judge's 2002 decision, is an early example of how Chief Justice McLachlin's comments in *Mitchell* were used to approach oral history evidence in a cautious manner.

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58 *Ibid* at para 8.
59 *Ibid* at para 227.
60 *Ibid* at para 212.
61 *Ibid* at para 285.
62 See *Benoit FCA*, *supra* note 6.
63 *Ibid* at para 23.
64 *Ibid* at para 91.

B. *Attorney General of Canada v Anishnabe of Wauzhushk Onigum Band et al*

This 2002 Ontario Superior Court decision showcases the Court's favoritism towards documentary evidence. Here, the main question before the Court was, "[f]or which of the Respondent Indian Bands was the Agency One Reserve … set apart?"[65] Since 1908, the federal government treated the Rainy Lake Bands as the only bands having any interest in the reserve, but various land transactions had been carried out by third parties since that time. This led the Department of Indian Affairs and Northern Development to be concerned that these transactions may lead to disputes, prompting the Attorney General of Canada to submit this question to the Superior Court.[66]

In this case, oral history evidence was offered by way of an affidavit from the Rainy River and Rainy Lake Bands, though Justice Smith did not describe in any detail the contents of this evidence. After setting out the three-part test for admitting oral history evidence and referring to Chief Justice McLachlin's comments at paragraph 39 in *Mitchell*, Justice Smith stated: "[i]t is important to receive the Aboriginal perspective in deciding cases such as this. Oral history is of great assistance, however, it must not be blindly accepted nor should it be preferred over documentary evidence if the accuracy of the documentary evidence is established."[67] He went on to say, "[i]n the instant case the "oral evidence" while of some help, was vague and frequently not directly related to the issues before the court."[68] Ultimately, Justice Smith relied on documentary evidence from 1908 to 1976 of three land surrenders, which were "all uniform, consistent and signed by the same parties." Using only this evidence, Justice Smith came to the conclusion that the land was set aside for the Rainy Lake Bands, rather than an Order in Council and the accompanying oral history evidence offered.[69]

In this case, paragraph 39 of the *Mitchell* decision was operationalized to exclude the Indigenous oral history evidence offered by the claimants in this case. Justice Smith's comments provide further evidence of Borrows' point that, when confronted with oral history, judges have a tendency to "disregard" or "downplay" its use in favor of written evidence.[70]

C. *Queen v Drew et al*

Next, in this 2003 decision of the Newfoundland and Labrador Supreme Court, two central issues were to be decided. First, whether the Mi'kmaq of Conne River had Aboriginal hunting rights based on their presence on the Island of Newfoundland either before European contact or before the assertion of British sovereignty. Second, whether they could claim treaty rights based on treaties between the British and Mi'kmaq of Nova Scotia from the 18th century.[71]

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65 *Anishnabe of Wauzhushk, supra* note 7 at para 2.
66 *Ibid* at paras 28, 30.
67 *Ibid* at para 57.
68 *Ibid* at para 58.
69 *Ibid* at para 80.
70 Borrows, *supra* note 34 at 14.
71 See *Drew, supra* note 8 at para 1.

This action was commenced by the Province under Newfoundland's *Lands Act* for an order that the defendants be found wrongfully in possession of Crown lands and that their hunting cabins be removed from the Bay du Nord Wilderness Area.[72]

The defendants countered that the cabin removal notices should be "vacated" because they are Aboriginal people within the definition of "Indian" under the *Indian Act* and are on an "Indian reserve." Additionally, the Wilderness Area is made up of some territory that the Mi'kmaq have traditionally relied on for "subsistence" and to exercise their rights to fish, hunt and trap, which are constitutionally protected.[73] Ultimately, Justice Barry rejected these arguments, held that the defendant's did not adequately make out their claims for Aboriginal or treaty rights, and ordered that their cabins be removed from the Wilderness Area.

Much of the evidence offered by the defendants in this case was archaeological or documentary, rather than oral historical. One Elder though, John Nicholas Jeddore, testified that going on the country for food and furs '"was important, because that was our life. That's the way we lived. To us, there was no other way. To me and my father, there was no other way."'[74] However, his evidence only dated back to 1930 and was mainly biographical.[75] In refusing to give any weight to the limited oral history evidence offered by the defendants, which included the live testimony of Mi'kmaq elders, Justice Barry stated that "[t]he information provided by the Elders at Conne River, while reflecting the rich life of Mi'kmaq in the Province, did not refer back far enough to establish the time when Mi'kmaq presence in Newfoundland commenced."[76]

Justice Barry went on to say that, "[t]he *Mitchell* decision suggests that evidence that is tenuous and scanty," such as that provided by the defendant's in this case, "will be insufficient for the purposes of proving an aboriginal rights claim."[77] He followed this statement by quoting Chief Justice McLachlin's comments in paragraph 39 of *Mitchell* in full, demonstrating again that this particular passage is being used to put limits on the uses of oral history evidence in Aboriginal rights and land claims.

D. *White Bear First Nations v Saskatchewan (Environment)*

In this case, heard and decided in 2009 by the Saskatchewan Queen's Bench, the Minister of the Environment issued two permits to Harvest Operations Corporation allowing for oil and gas exploration in Moose Mountain Provincial Park.[78] The White Bear First Nation filed an application for judicial review to seek an order quashing the permits and requiring the Minister to consult with White Bear.[79] In support of their application, White Bear filed an affidavit from Chief Brian Standingready containing oral history evidence.[80] The Minister

72 *Ibid* at para 2.
73 *Ibid* at para 3.
74 *Ibid* at para 59.
75 *Ibid* at para 206.
76 *Ibid* at para 540.
77 *Ibid* at para 549.
78 See *White Bear First Nations, supra* note 9 at para 2.
79 *Ibid* at para 3.
80 *Ibid*.

objected to portions of this affidavit and applied to strike them out for being irrelevant and/or inadmissible as hearsay. Here, Justice Ball took a flexible approach to the rule against hearsay stating that:

> [e]xcluding demonstrably trustworthy evidence from affidavits based on an archaic, overly rigid application of "the rule against hearsay" would hinder the search for truth in many situations. In this case, it would operate to exclude virtually all properly grounded oral history evidence from the affidavit of Chief Standingready.[81]

Justice Ball then went on to state that the Supreme Court of Canada's jurisprudence, including the *Delgamuukw* and *Mitchell* decisions, requires oral history evidence to be given by "qualified" persons.[82] For the Supreme Court, an Aboriginal witness is qualified to give oral history evidence if they "represent a reasonably reliable source of the particular people's history."[83] In assessing whether a witness is "a reasonably reliable source" of oral history, courts in the past have inquired into the background of the witness (i.e. their Aboriginal ancestry, birth place, band membership, inability to speak English, etc.) and of their oral history sources (i.e. identity of the source, age of the witness at the "time of conveyance," and their reputation in the community, etc.).[84] Here, the claimants argued that Chief Standingready was properly qualified as he had been Chief of the White Bear First Nations intermittently for the last 32 years and it had been confirmed that his affidavit represented the perspective of the Nation.[85] However, Justice Ball did not provide much relevant description of the contents of the affidavit. Justice Ball ultimately concluded that the Chief's "qualifications" fell below the standard set out by the Supreme Court of Canada and much of the affidavit evidence was struck.[86]

In this case, Justice Ball used Supreme Court jurisprudence, including the *Mitchell* decision, to exclude the Indigenous oral history evidence offered, but did not rely on paragraph 39 of this judgment to do so. However, Justice Ball did go on to quote paragraph 39 of the *Mitchell* decision after stating that the Supreme Court in *Delgamuukw* held that the rules of evidence must be "adapted."[87] In doing so, Justice Ball demonstrates an awareness that a line must not be crossed in admitting oral history evidence and stretching the rules of evidence too far or abandoning them altogether.

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81 *Ibid* at para 26.

82 *Ibid* at paras 27—28.

83 *Ibid* at para 28, citing *Mitchell, supra* note 4 at para 33.

84 David M Robbins, "Aboriginal Witness Evidence and the Crown in Chief Roger William v. British Columbia and Canada" (2004) at 2.2.3—2.2.4, online (pdf): *Woodward & Company* < www.woodwardandcompany.com/wp-content/uploads/pdfs/witnessevidence_robbins.pdf> [perma.cc/45M3-KNAH].

85 See *White Bear First Nations, supra* note 9 at para 10.

86 *Ibid* at para 32.

87 *Ibid* at para 29.

E. *Couchiching FN et al v AG Canada et al*

In a 2014 decision of the Ontario Superior Court, the Couchiching First Nation called three elders to give oral history evidence regarding "Ojibway use and occupation of the Agency One Reserve site" prior to its formation in the 1870s.[88] The oral history evidence presented here was deemed admissible.

When reviewing the general principles regarding the assessment of oral history evidence in Aboriginal land and treaty claims from *Delgamuukw* and *Mitchell*, Justice Fregeau stated that Chief Justice McLachlin "cautioned that there is a boundary between a sensitive application and a complete abandonment of the rules of evidence that must not be crossed."[89] This is similar to the judicial interpretation and understanding of paragraph 39 of the *Mitchell* decision in the *Anishnabe of Wauzhushk* and *White Bear First Nations* decisions, among others mentioned above.

In this case, Justice Fregeau found the oral history evidence of one Elder, Fred Major, to be admissible.[90] Mr. Major provided insight into the use and occupation of the Reserve site prior to the signing of Treaty 3, which led to the creation of the Reserve, stating that '"our people" were "living there" before the "Europeans" arrived.'[91] Based on information relayed to him by his grandfather, Mr. Major also described where and how the Ojibway fished in the area, as well as explained that they used a nearby beach to build birch bark canoes.[92] Despite finding Mr. Major's evidence to be persuasive, and therefore entitled to equal and due treatment,[93] Justice Fregeau concluded that all of the evidence, including Mr. Major's, failed "to establish, on a balance of probabilities, that the site of the Agency One Reserve held any special significance to the Ojibway of the region in the historical period prior to the signing of Treaty #3."[94] This resulted in the dismissal of the plaintiffs' claim for a declaration that the strip of land adjacent to the Reserve forms part of that reserve, as was their claim for a declaration that any part of the strip included in the 1908 surrender was within the reserve prior to this surrender.[95]

Although Justice Fregeau found the oral history evidence to be given by one of the three elders to be admissible, the caution in his judgment demonstrates that he understands paragraph 39 of the *Mitchell* decision as providing a "warning" or caveat to the more "generous" approach to oral history evidence articulated in *Delgamuukw.*[96]

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88 *Couchiching FN, supra* note 10 at para 54.
89 *Ibid* at para 71.
90 *Ibid* at para 75.
91 *Ibid* at para 76.
92 *Ibid* at paras 77—78.
93 *Ibid* at para 81.
94 *Ibid* at para 464.
95 *Ibid* at paras 551—52.
96 Fraser Harland, "Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in *Tsilhqot'in Nation v British Columbia*" (2018) 16/17:1 Indigenous LJ 21 at 31.

F. *R v Dickson*

Most recently, Justice Andreassen at the Provincial Court of Alberta in 2017 held that the oral history evidence of Elder and former Chief of the Mohawk of Kahnawake, Andrew Delisle, was admissible, but was given little weight as a result of its "limited reliability."[97] The applicant, Robbie Dickson, was earlier convicted under Alberta's *Tobacco Tax Act.* On the facts of this case, the applicant argued that his convictions were "inconsistent with an aboriginal right to trade in tobacco protected by section 35 of the *Constitution Act,* 1982."[98] The main questions to be decided by the Court then were whether the applicant, as a Mohawk of Kahnawake, actually had an Aboriginal right to trade in tobacco and if so, whether or not this right was unjustifiably infringed by provincial legislation. Ultimately, Justice Andreassen held that the applicant did not have the Aboriginal right to trade in tobacco on a commercial scale, and so was not protected under section 35 of the *Constitution*.[99] Further, even if the applicant established this right, he could not prove that it was infringed.

At the outset of the decision, Justice Andreassen acknowledged that "[n]o member of Mohawk society is personally familiar with practices before 1609 … or is alive to describe their culture. They did not keep written histories."[100] As a result, "[i]t would be difficult if not impossible to prove any aboriginal right if the strict rules of evidence were applied."[101] However, citing paragraphs 38, 39, and 51 of the *Mitchell* decision, Justice Andreassen concluded that this flexible and "more open" approach to the admissibility of evidence must not "be taken too far."[102] Specifically quoting paragraph 39 of *Mitchell*, Justice Andreassen stated that '"evidence should not "be artificially strained to carry more weight than it can reasonably support."'[103]

Mr. Delisle provided oral history evidence on a range of issues, including on how one becomes a chief,[104] the significance and uses of tobacco,[105] and information concerning the land where his ancestors lived in what is now known as eastern Canada.[106] He not only described how "like everything else, tobacco is a gift of the Creator," but also explained that the land his ancestors lived on was plentiful with flint, which was used to create knives, arrowheads and other tools, and was later traded.[107] While Justice Andreassen found that Mr. Delisle's evidence was important in that "it provided a needed perspective on the aboriginal right to trade in tobacco held by the Mohawk people of Kahnawake," and gave insight into important ancestral practices, it was unreliable as his testimony was evasive and often contradicted expert evidence.[108] For example, his assertion that the Mohawks originated in eastern Canada, rather than upstate New York, was proven to be false by both the archaeological and historical record

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97 *Dickson, supra* note 11 at para 61.
98 *Ibid* at para 1.
99 *Ibid* at para 417.
100 *Ibid* at para 25.
101 *Ibid.*
102 *Ibid* at para 28.
103 *Ibid.*
104 *Ibid* at para 40.
105 *Ibid* at paras 48—50.
106 *Ibid* at para 47.
107 *Ibid* at paras 47, 49.
108 *Ibid* at paras 56, 58.

and by expert evidence.[109] In addition, the applicant's own expert would not go so far as Mr. Delisle to say that the exchange of flint by the Mohawks was in fact trade.[110] Overall, though Mr. Delisle's evidence was deemed admissible, it was given little weight compared to the expert and other documentary and archaeological forms of evidence offered by both parties.

V. IMPLICATIONS OF *MITCHELL* FOR ABORIGINAL TITLE AND RIGHTS CLAIMS

The second question that this article seeks to answer is whether the *Mitchell* decision makes room for Aboriginal title and/or rights claimants to contest dominant understandings of Indigenous presence in the settler state of Canada based on its application by trial-level court judges. When deemed admissible and given equal and due weight, oral history evidence has the potential to challenge what are deemed to be fixed territorial boundaries. The case law analysis presented above shows that paragraph 39 of the *Mitchell* decision was used in four out of the six cases to exclude, rather than include, Indigenous oral history evidence. Chief Justice McLachlin's comments make it more difficult for Indigenous claimants to adduce oral history evidence. The remainder of this article will discuss the consequences that this finding has for Indigenous uses of and control over space in the settler state of Canada. However, before considering the impact of the *Mitchell* decision specifically, this article will address a few more general points about the relationship between law and space.

According to sociologist Pierre Bourdieu, the law '"brings into existence that which it utters,"'[111] often with spatial implications. In the context of disputes about Aboriginal title and rights, this means that judicial pronouncements and the application of legal rules may have the effect of displacing and/or dispossessing Indigenous peoples of their land, preventing them from defending and freely using it, including to exercise their constitutionally-protected rights. For example, in December 2019, Justice Church of the British Columbia Supreme Court extended an injunction against the Wet'suwet'en Nation after members of the Nation set up blockades to prevent the construction of a natural gas pipeline crossing Wet'suwet'en territory.[112] The Wet'suwet'en argue that this project is not only in violation of their law, but also of the Supreme Court of Canada's ruling in *Delgamuukw*, where the Court urged that Aboriginal title be found to exist over a portion of the land where the pipeline is to be built.[113] However, the claim for title is still outstanding.[114]

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109 *Ibid* at para 58.

110 *Ibid* at para 47.

111 Sarah Blandy & David Sibley, "Law, Boundaries and the Production of Space" (2010) 19:3 Soc & Leg Studies 275 at 278, citing Pierre Bourdieu, *Language and Symbolic Power* (Cambridge: Polity Press/ Oxford: Basil Blackwell, 1991) at 42.

112 See *Coastal GasLink Pipeline Ltd v Huson,* 2019 BCSC 2264.

113 *Ibid* at paras 51, 149. See also Jon Hernandez, "'We Still Have Title': How a Landmark B.C. Court Case Set the Stage for Wet'suwet'en Protests", *CBC News* (13 February 2020), online: <www.cbc.ca/news/canada/british-columbia/delgamuukw-court-ruling-significance-1.5461763> [perma.cc/5AM- H85L].

114 *Ibid* at para 149.

The law, by way of Justice Church's decision, operates to reinforce existing colonial spatial relationships in two ways. First, it unquestioningly accepts that the provincial Crown is still the owner of the land as the claim for Aboriginal title over the land is unresolved. As a result, the province can exercise its right to regulate access to that land and right to any benefits flowing from its resources. Effectively, the government of British Columbia can provide the necessary permits to the project proponent to construct the pipeline. Second, the law reinforces a colonial and exploitative relationship *toward* the land by prioritizing resource extraction and the eventual commodification over any other uses.

In this timely example, the law does not work alone in dispossessing Indigenous peoples. In February 2020, the Royal Canadian Mounted Police enforced the British Columbia Supreme Court's injunction and arrested many people from the Wet'suwet'en camp.[115] The law, in addition to geographical tools and technologies, such as maps and Geographic Information Systems, was used by police to facilitate the interrelated processes of colonization and dispossession. Indeed, in tracing back to the process of land dispossession in British Columbia during the 19th century, geographer Cole Harris concludes that:

> British Columbia could not have been reorganized into colonial space without something like the map. Maps enabled newcomers to locate themselves in this space and find their way around. More than this, maps conceptualized unfamiliar space in Eurocentric terms, situating it within a culture of vision, measurement, and management. Employing a detached vertical perspective, this cartography rendered space as a plan—as a surface.[116]

Further, according to Harris, "outsiders" or colonizers did not necessarily envision the land to be a *tabula rasa* in making these maps—they knew Indigenous peoples lived in these spaces—but instead they created a "geographical imaginary that ignored [I]ndigenous ways of knowing and recording space."[117] Maps, along with other bureaucratic tools such as data and statistics, were used to manage people and to parcel and divide up land. Simultaneously, the law worked to legitimize this reorganization of space and the physical removal of land from Indigenous control.[118]

Geographic tools were and continue to be relied on in legal disputes about Aboriginal rights and title by both the Canadian state, including the Crown, and Indigenous claimants. In her work on alternative Indigenous mapping, Kirsten Anker poses the question: "[c]an maps, as one of the master's tools, ever dismantle the house of colonialism?"[119] Her answer is both yes

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115 Brent Jang, "RCMP Enforce Court Injunction Against Opponents of Pipeline Construction on Wet'suwet'en Territory," *Globe and Mail* (6 February 2020), online: <www.theglobeandmail.com/canada/british-columbia/article-rcmp-enforce-court-injunction-against-opponents-of-pipeline/> [perma.cc/97K6-JWQ8].

116 Cole Harris, "How Did Colonialism Dispossess? Comments from an Edge of Empire" (2004) 94:1 Annals of the Association of American Geographers 165 at 175.

117 *Ibid* at 175—76.

118 *Ibid* at 177. According to Harris, even though Indigenous peoples were subject to the violence of colonization and dispossession, they still exercised agency and engaged in acts of resistance, including moving fences, disrupting surveys, organizing petitions, and later launching and defending against legal challenges (at 179—80). All of these actions seek to confront oppressive spatial relationships.

119 Anker, *supra* note 42 at 14—15.

and no. On the one hand, alternative cartographies have been offered by Indigenous peoples to courts to counter dominant assumptions about ownership. On the other hand, there is a continuing risk that "Indigenous understandings of land [will be] reductively captured or misrepresented by this technology."[120] Though these understandings may appear to be neutral articulations of space, they are still deeply "implicated in the colonial project."[121]

Likewise, oral histories have the power to be alternative "*expressions*" of Indigenous presence and relationship to the land, and to bring to the forefront Indigenous peoples' "mistreatment at the hands of the British and Canadian legal systems," including their loss of land, rights and jurisdiction without their consent.[122] Oral history evidence may also be used to contest what are understood to be fixed territorial boundaries. For example, in *Delgamuukw*, the oral histories offered by the Gitxsan and Wet'suwet'en presented an alternative understanding of the land and its boundaries as fluid and changing, rather than as rigid and unchanging over space and time.[123] By offering oral history evidence to the courts, Indigenous peoples have the ability to challenge, supplement, and potentially subvert written forms of evidence and maps offered by the Canadian state that are often relied upon as authorities by judicial officials.

Some Indigenous and non-Indigenous scholars, similar to Anker, are skeptical of offering oral histories as evidence in Indigenous land and rights claims.[124] They argue that doing so takes these stories out of the control of the Indigenous peoples who created them and concedes them to the control of white, Canadian judges who distort their meaning and often diminish their value in interpreting them.[125] To these critics, co-opting oral histories and "translating" them into forms that are more readily recognizable to the Canadian colonial legal system allows judges to use them superficially as a way to incorporate an "aboriginal perspective." However, such uses often do not have the effect of leading to *substantive* outcomes for Indigenous peoples—that is, exercising full control and jurisdiction over their land.

At the same time, for land title and rights claims to be successful for Indigenous peoples, their lawyers must frame oral history evidence in a way that is cognizable to Canadian judges for it to be heard, despite the "evidentiary constraints" posed by the rule against hearsay.[126] Legal geography scholar Nicholas Blomley uses the term "bracketing" to define the work that goes into framing a legal claim.[127] For Blomley, bracketing "entails the attempt to stabilize and fix a boundary within which interactions take place more or less independently of their

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120 *Ibid* at 14.

121 *Ibid*.

122 Borrows, *supra* note 34 at 25.

123 See Sophie McCall, "'What the Map Cuts Up, the Story Cuts Across': Translating Oral Traditions and Aboriginal Land Title" in *First Person Plural: Aboriginal Storytelling and the Ethics of Collaborative Authorship* (Vancouver: UBC Press, 2011), 137.

124 See D'Arcy Vermette, "Colonialism and the Suppression of Aboriginal Voice" (2009) 40:2 Ottawa L Rev 225 at 239—45; Matthew Sparke, "A Map that Roared and an Original Atlas: Canada, Cartography, and the Narration of Nation" (1998) 88:3 Annals of the Association of American Geographers 463 at 470—71.

125 See Milward, *supra* note 5 at 302.

126 See Weir, *supra* note 26 at 161.

127 See Nicholas Blomley, "Disentangling Law: The Practice of Bracketing" (2014) 10 Annual Rev L & Soc Science 133.

surrounding context."[128] Moreover, "[f]or a legal transaction to occur, a space must be marked out within which a subject, object, and set of relations specified as legally consequential are bracketed, and detached from entanglements (ethical, practical, ecological, ontological) that are now placed outside the frame."[129] A clear example of bracketing can be seen in the British Columbia Supreme Court's 2004 decision, *William et al v British Columbia et al*,[130] where Justice Vickers set out a framework to determine the admissibility of oral history evidence adduced by the Tsilhqot'in Nation in their ultimate claim for Aboriginal title over land in the Cariboo-Chilcotin region of British Columbia.[131] In this case, the lawyers for the Indigenous claimants had to ensure that the evidence fit within this frame in order to be considered by the court.[132]

By engaging in bracketing, lawyers for Indigenous claimants and judicial officials create circumstances in which oral histories may be misconstrued. Bracketing is problematic in the context of oral history specifically, because it forces lawyers to fit these evidentiary sources into judicially-created frameworks or categories to be seen as reliable, and therefore worthy of due consideration.[133] Sources that do not fit within these categories are discounted by judges as "legend" or as rooted in subjective belief, and therefore, are not admissible as evidence.[134]

Still, without offerings of oral history evidence, claims about Indigenous presence and land use as presented by the Canadian state go unchallenged in courts. By offering oral history evidence, Indigenous claimants can challenge existing colonial spatial relationships and allow for alternative "visualisations" of space and its uses to emerge. As argued by late Gitxsan leader, Medig'm Gyamk, even where a court case does not lead to a "win" for the Indigenous party, there are still benefits to bringing these kinds of claims:[135] the history of the claimants is now on the record, and they have directly challenged the legitimacy of the Canadian legal system, as well as the concentration of power in the settler state.[136]

Though all the trial-level decisions presented in Part IV can be read as acts of resistance by Indigenous peoples, the decision in *Couchiching FN* is a clear example of Indigenous contestation of dominant understandings of presence on the land using oral history evidence. In that case, Elder Fred Major's oral history evidence was used to challenge claims made to the land by the settler state through their expert. In *Couchiching FN*, Justice Fregeau broadly framed the issue as follows: "among the myriad issues and impediments confronting the Dominion government in accomplishing its goals of European settlement, development and

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128 *Ibid* at 135.

129 *Ibid* at 136.

130 2004 BCSC 148 [*William*].

131 See *Tsilhqot'in*, *supra* note 18.

132 Other courts have relied on Justice Vicker's framework to determine the admissibility of oral history evidence: see e.g. *White Bear First Nations, supra* note 9.

133 See Blomley, *supra* note 127 at 140—141 for a discussion of how legal categorization forms an important part of "bracketing-work."

134 See Weir, *supra* note 26 at 162 for a critique of Justice Vicker's decision in *Tsilhqot'in*.

135 Medig'm Gyamk (Neil Sterritt), "It Doesn't Matter What the Judge Said" in Frank Cassidy, ed, *Aboriginal Title in British Columbia: Delgamuukw v The Queen* (Lantzville, BC: Oolichan Books, 1992) 303 at 306.

136 *Ibid.*

a national transportation system, one was fundamental – what was now Canada encompassed the traditional homelands of Canada's Aboriginal peoples."[137] A way that this "impediment" was dealt with was through signing treaties between the Crown and Aboriginal peoples to allow for the Canadian government to secure land across the country and further enable colonial expansion. One of these treaties, Treaty 3, was at the center of the dispute between the First Nation and the Canadian government in *Couchiching FN*.

As mentioned previously, the issue in this case was whether a strip of land formed part of the Agency One Reserve as a reserve created pursuant to Treaty 3, and therefore belonging to the Couchiching First Nation rather than the Crown. Relying primarily on expert evidence from Canada, Justice Fregeau found that it was not. However, Elder Fred Major's oral history evidence was used, in part, to refute a government expert's assertion that none of the reports he reviewed showed that the strip of land, which included a shoreline, was used by the Ojibway. Accordingly, Justice Fregeau stated:

> The record establishes that this reserve site had been used historically by the Ojibway, on an occasional basis, as a camping ground utilized by them during their "seasonal rounds". In the course of doing so, it is obvious the Ojibway would have required the use of the shoreline at this site, just as they would have required the use of the shoreline at countless other locations where they camped within the region.
>
> The Ojibway travelled exclusively by water for at least six months of the year. Fishing was critical to their existence. I fail to see how they could effectively travel by water from one location to another, camp and fish without access to and use of the shoreline. This finding is consistent with the oral history evidence of Fred Major, found at paragraphs 76 to 79.[138]

Though not a consequential part of the decision, Mr. Major's oral history evidence works to refute claims to the land made by the settler state through their expert. It actively challenges dominant understandings of Ojibway presence on the land and presents a counter-visualization of the space to the one offered by the settler state. As Sarah Keenan argues, Indigenous claims to land reveal "cracks in [the] law" by unsettling and potentially subverting notions of whose land it is in the first place.[139] Despite this momentary recognition of Indigenous presence in *Couchiching FN*, Justice Fregeau's decision ultimately reinforces existing spatial relationships in finding that the strip of land was not part of the Agency One Reserve. Here, the law has clear material impacts on space, as Justice Fregeau's judicial pronouncement restricts Indigenous control over and use of the land, while re-asserting the control and jurisdiction of the Crown.

As seen in the preceding paragraphs, Indigenous claimants continue to resist colonial spatializations by offering oral history evidence regardless of whether it is deemed admissible and/or given any weight. However, bringing these kinds of claims is only one of many forms of resistance used by Indigenous peoples to challenge the Canadian state. Following the Supreme Court's decision in *Delgamuukw*, Medig'm Gyamk declared: "[w]e never ever saw

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137 *Couchiching FN, supra* note 10 at para 7.

138 *Ibid* at paras 531—32.

139 Sarah Keenan, "Subversive Property: Reshaping Malleable Spaces of Belonging" (2010) 19:4 Soc & Leg Studies 423 at 437.

it as the only thing we were ever going to do. Never. It was only one of the ways we sought to achieve justice in our territories. And it was important, if not more important, to pursue other avenues to resolve our issues."[140] Indigenous peoples were—and continue to be—engaging in a variety of acts of resistance without judicial invitation from the Supreme Court of Canada.

CONCLUSION

This article sought to answer two main questions. First, it aimed to understand how the Supreme Court of Canada's *Mitchell* decision has been operationalized by trial-level courts in the context of Aboriginal rights and title disputes where the claimants have sought to adduce oral history evidence. Second, it asked whether, based on its use by trial-level courts, this decision opened up space for Aboriginal title and rights claimants to contest dominant understandings of Indigenous presence. More specifically, it looked at how trial-level court decisions used paragraph 39 of *Mitchell* to determine the admissibility and/or weight of Indigenous oral history. The most significant finding of this article is that the *Mitchell* decision has been used to tighten the admission and uses of oral history evidence. In a concluding section, this article suggested that by taking a more restrictive approach in *Mitchell*, the Supreme Court has made it more difficult for Indigenous claimants to use oral history to counter dominant understandings of Indigenous presence and relationships to land.

140 Medig'm Gyamk, *supra* note 135 at 305.

ARTICLE

EXPANDING THE REACH OF *GLADUE*: EXPLORING THE USE OF *GLADUE* REPORTS IN CHILD PROTECTION

Romi Laskin *

CITED: (2021) 26 *Appeal* 25

ABSTRACT

This paper explores the potential of the legislature or courts using *Gladue*-like reports in British Columbia's child protection laws and policies. It first lays out the current provincial legal frameworks and illustrates its shortcomings by comparing them with Indigenous legal orders; to argue that the Indigenous communities should control their child protection systems. Drawing parallels between sentencing and child protection cases, this paper explores a proposed restructuring of the child protection system focusing on the potential of implementing *Gladue*-like reports. The paper finds that this restructuring would have lasting and positive impacts on Indigenous children, their families, and communities. It identifies avenues for legal reform that would mandate *Gladue*-like reports in child protection.

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"*MCFD* [Ministry of Children & Family Development] *is meant to be there for the best interests of the child. Was what happened to me for the best interests of the child? Now I have all this trauma and all this undealt with stuff just because I was a ward of the government. And then I pass it on to my kids because I was parented by the government, so I had no one to care for me, so then how do I pass that on to my kids?*"[1]

These comments, made by an Indigenous woman during a storytelling circle organized by West Coast LEAF highlight British Columbia's (BC) current child protection system's weaknesses. Indigenous children have been and continue to be disproportionately affected and harmed by the system. To effectively care for Indigenous children, the current regime must be profoundly reformed to account for the legacy of colonialism, meaningfully involve Indigenous communities and their traditions and laws, support struggling caregivers, and ultimately keep Indigenous children in their families or communities.

Frances Rosner, a Métis child protection lawyer working in Vancouver, has proposed using *Gladue*-like reports in child protection to help achieve that needed reform.[2] This paper explores the potential of using *Gladue*-like reports in the child protection context, and suggests that such reports could significantly reform the child protection system, and benefit Indigenous children and their communities.

Part I of this paper will review the main issues in the provincial child protection system, and its disproportionately harmful impact on Indigenous children. Part II will lay out the current provincial legal framework for child protection, and illustrate its shortcomings by comparing it to two Indigenous legal orders. Part III will assess the *Gladue* decision, and draw parallels between the case's criminal context and the child protection context. Part IV will propose a structure for child protection *Gladue* reports, and will highlight lessons that can be learned from *Gladue* reports. Part V will explore the impact that *Gladue*-like reports could have on Indigenous children, their families and communities. Part VI will identify changes to the current legal framework that would mandate *Gladue*-like reports. Part VII will briefly consider how *Gladue*-like reports would help governments comply with international law. Finally, part VIII will anticipate potential criticisms of the reports in child protection, and offer counterarguments.

This paper was written by a white settler from the unceded territories of the xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh (Squamish), and Sel̓íl̓witulh (Tsleil-Waututh) Nations. While she has worked as a support worker for people who had their children apprehended by MCFD and those who were themselves apprehended as children, she has no personal experience with the child welfare system. The author wrote this paper for Professor David Milward's class, Current Topics in Indigenous Law: Criminal Justice and Family Law. Before starting the paper, the author contacted Frances Rosner to ask if Ms. Rosner had any work that would benefit from student research. Ms. Rosner provided the idea behind this paper, and later gave permission for it to be published, and the author is grateful to her for her time and generosity.

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1 "Pathways in a Forest: Indigenous guidance on prevention-based child welfare" (2019) at 43, online (pdf): *West Coast LEAF* <http://www.westcoastleaf.org/wp-content/uploads/2019/09/Pathways-in-a-Forest.pdf> [https://perma.cc/84US-8G5L] [*Pathways*].

2 Interview of Frances Rosner (22 October 2019) [Rosner].

I. REVIEW OF ISSUES IN CHILD PROTECTION

It is painfully evident that British Columbia's child protection system is failing Indigenous children, their families and communities. Indigenous children are overrepresented in the system, the system is harming children, and completely ignores the impact of colonialism on Indigenous communities.

Statistics demonstrate the severity of Indigenous children's overrepresentation in British Columbia's child protection system. They are 15 times more likely to enter governmental care than non-Indigenous children.[3] Indigenous children comprise less than 10% of British Columbia's population, but in 2018, 63% of children in foster care in British Columbia were Indigenous.[4] One in five Indigenous youth in British Columbia will come into contact with the child welfare system during their childhood.[5]

Alarmingly, the so-called child protection system is often not protecting children or improving their futures; in fact it is shown to frequently cause additional harm. *Reclaiming Power And Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* noted that children in care are more likely to end up in the criminal justice system than they are to graduate high school.[6] Additionally, the system places Indigenous children at greater risk of violence than if they were not in the system, both while they are involved with the system and in the future.[7] The system also causes immense disruption to Indigenous children's cultures, identities and families.[8]

The child protection system ignores the impact of colonialism and intergenerational trauma on Indigenous communities. In *Red Women Rising*, a report documenting the experiences of Indigenous women, a mother raised in care who had her children apprehended explains, "our intergenerational trauma like addictions and residential school history is used against

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3 Grand Chief Ed John, "Indigenous Resilience, Connectedness And Reunification–From Root Causes To Root Solutions: A Report on Indigenous Child Welfare in British Columbia" (2016) at 15, online (pdf): *First Nations Summit* <https://fns.bc.ca/our-resources/indigenous-resilience-connectedness-and-reunification-from-root-causes-to-root-solutions> [https://perma.cc/CP82-35P5] [*Indigenous Resilience*].

4 British Columbia, Ministry of Children and Family Development, *Children and Youth in Care (CYIC)* (Victoria: Ministry of Children and Family Development, 2018) <https://mcfd.gov.bc.ca/reporting/services/child-protection/permanency-for-children-and-youth/performance-indicators/children-in-care> [https://perma.cc/9PEZ-33WK] [MCFD].

5 "Aboriginal Children in Care: Report to Canada's Premiers" (2015) at 7, online (pdf): *Aboriginal Children in Care Working Group* <https://fncaringsociety.com/sites/default/files/Aboriginal%20Children%20in%20Care%20Report%20%28July%202015%29.pdf> [https://perma.cc/BR6B-XV6A].

6 *Reclaiming Power And Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol 1a* (2019) at 340, online (pdf): <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> [https://perma.cc/F4QP-A36H] [*MMIWG*].

7 *Ibid at 339.*

8 *Ibid at 340.*

us to take our children."[9] This is especially problematic because Canada used Indigenous children as a tool to assimilate Indigenous peoples through the residential school system.[10] In *Calling Forth Our Future*, a Union of British Columbia Indian Chiefs (UBCIC) report, the child protection system is situated in the context of colonialism:

> "Colonization is the forced deconstruction of cultures and the imposition of alien ones. Colonization is theft. Theft of land, theft of resources, and theft of cultures, language and social organization. In Canada, the theft of Indigenous Peoples Nationhood occurred, and continues to occur, with the theft of our children."[11]

It is worth briefly reviewing the goals and methods of residential schools, as they were the colonial precursor to the child protection system. The purpose of residential schools was to "civilize" Indigenous children.[12] These schools forbade children from speaking their Indigenous languages, wearing their traditional clothes, and socializing with their siblings. Severe and repeated physical, sexual, and emotional abuse was commonplace.[13] The last residential school in British Columbia closed in 1984.[14] The provincial child welfare system continues to remove Indigenous children from their families and communities, supposedly in the "best interests" of the children.[15] Today, many Indigenous caregivers who have had their children apprehended feel the child protection system has replaced residential schools. As one mother explained: "The residential school agent is now the MCFD social worker."[16]

Contrary to pervasive stereotypes, the vast majority of Indigenous children in care have been apprehended due to concerns of neglect, not physical harm, emotional harm, or sexual abuse.[17] Many advocates believe neglect is essentially the conditions created by poverty. They contend that the disproportionate rate of Indigenous children in care does not stem from

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9 Carol Muree Martin & Harsha Walia, "Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside" (2019) at 111, online (pdf): *Downtown Eastside Women's Centre* <http://dewc.ca/wp-content/uploads/2019/03/MMIW-Report-Final-March-10-WEB.pdf> [https://perma.cc/PW8A-QS9R] [*Red Women Rising*].

10 Ardith Walkem, "Calling Forth Our Future: Options for the Exercise of Indigenous Peoples' Authority in Child Welfare" (2002) at 12, online (pdf): *Union of B.C. Indian Chiefs* <http://caravan.ubcic.bc.ca/sites/caravan.ubcic.bc.ca/files/UBCIC_OurFuture.pdf> [https://perma.cc/M687-AAGS] [*Calling Forth*].

11 *Ibid at 9*.

12 *Ibid*.

13 "Violations of Indigenous Human Rights" (2002) at 17, online (pdf): *Native Women's Association of Canada* <https://www.nwac.ca/wp-content/uploads/2015/05/2002-NWAC-Violations-of-Indigenous-Human-Rights-Submission.pdf> [https://perma.cc/C969-3SKP].

14 "Project of Heart Illuminating the hidden history of Indian Residential Schools in BC" (2015) at 14, online (pdf): *The BC Teachers' Federation: Educating for truth and reconciliation* <https://bctf.ca/HiddenHistory/eBook.pdf> [https://perma.cc/JVD6-62H2].

15 *Calling Forth*, *supra* note 10 at 11-12.

16 *Red Women Rising*, *supra* note 9 at 24.

17 British Columbia, Ministry of Children and Family Development, *Ministry Of Children And Family Development Performance Management Report vol 9* (Victoria: Ministry of Children and Family Development, 2017) at 37 <https://www2.gov.bc.ca/assets/gov/family-and-social-supports/services-supports-for-parents-with-young-children/reporting-monitoring/00-public-ministry-reports/volume_9_mar_2017.pdf> [https://perma.cc/9Q3C-2TH8].

high numbers of Indigenous parents abusing their children but rather from high numbers of impoverished Indigenous families.[18] *Honouring the Truth, Reconciling for the Future, a Summary of the Final Report of the Truth and Reconciliation Commission of Canada (TRC)* explains that a tendency to see Aboriginal poverty as a symptom of neglect, rather than as a consequence of failed government policies, has resulted in grossly disproportionate rates of child apprehension.[19]

Over forty percent of First Nations children in BC live in poverty.[20] As a result of the enduring effects of colonization, Indiegnous people live in high rates of poverty.[21] A wide range of factors contribute to this poverty, including Indigenous people being stripped of their land, livelihoods, and cultures, through policies such as residential schools.[22] For example, the lack of an education offered by residential schools has led to chronic unemployment or underemployment for many survivors of residential schools.[23] This legacy still persists. Today, communities with the highest percentages of descendants of residential school survivors have the lowest levels of educational success.[24] The TRC also notes a significant income-gap between Aboriginal and non-Aboriginal Canadians, with Aboriginal people living in deeper poverty that is likely to last for longer periods.[25]

Today's child protection system is harming children, repeating the mistakes of the past, and is highly ineffective. It is common for the same parents or caregivers to come into contact with the system multiple times.[26] Parents who were apprehended as children have their own children apprehended by the same agency that was responsible for raising them.[27] Radically improving the child-protection system is not only critical for children but for communities as a whole to enable communities and families to keep their children and build better futures.[28]

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18 Katie Hyslop, "How Poverty and Underfunding Land Indigenous Kids in Care", *The Tyee* (14 May 2018), online: <https://thetyee.ca/News/2018/05/14/Indigenous-Kids-Poverty-Care/> [https://perma.cc/9HHP-ZH74].

19 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 138, online (pdf): <http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [https://perma.cc/X8X8-UN6L] [*TRC Summary*].

20 "Towards Justice: Tackling Indigenous Child Poverty in Canada" (2019) at 14, online (pdf): *Upstream* <https://www.afn.ca/wp-content/uploads/2019/07/Upstream_report_final_English_June-24-2019.pdf> [https://perma.cc/M9JN-9PQ5].

21 *TRC Summary*, *supra* note 19 at 133.

22 "First Nations Poverty in Canada", online: *Ryerson University Chair in Indigenous Governance* <https://www.ryerson.ca/chair-indigenous-governance/research-projects/ongoing/first-nations-poverty-in-canada/#:~:text=The%20poverty%20of%20First%20Nations,Neu%20%26%20Therrien%2C%220200)> [https://perma.cc/8SUG-4KET].

23 *TRC Summary*, *supra* note 19 at 145.

24 *Ibid at 146.*

25 *Ibid at 147.*

26 MCFD, *supra* note 4.

27 *Pathways, supra* note 1 at 27.

28 Ardith Walkem, "Wrapping Our Ways Around Them The CFCSA, Aboriginal Communities And Parents" (2015) at 3, online (pdf): *ShchEma-mee.tkt Project* <https://cwrp.ca/sites/default/files/publications/en/wowat_bc_cfcsa_1.pdf> [https://perma.cc/44LM-DEWR] [*Wrapping*].

II. CURRENT LEGAL FRAMEWORK IN BRITISH COLUMBIA

It is perhaps not surprising that the legislation that created the child protection system is highly problematic for Indigenous children. Although the federal government funds programs and services for Indigenous children, the *Child, Family and Community Service Act* (*CFCSA*) governs child protection in British Columbia.[29] The *CFCSA* focuses on protecting the "best interests of the child," and the act's emphasis and characterization of this concept has serious consequences for Indigenous children. As set out below, and as illustrated through comparison with First Nation child protection laws, there are shortcomings in both the implementation and the text of the *CFCSA* as it relates to Indigenous children.

A. Issues with Implementation

First, while the *CFCSA* does include special provisions regarding the guiding principles, service delivery principles and the "best interests" of Indigenous children, those provisions remain inadequate. For example, section 4, on the Best Interests of Child, provides that:

> (2) If the child is an Indigenous child[…] the following factors must be considered in determining the child's best interests:
>
> (a) the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language;
>
> (b) the importance of the child belonging to the child's Indigenous community.[30]

While these provisions may look powerful on paper, the unfortunate reality is that rulings on *CFCSA* matters involve balancing many factors. Courts often give these culturally-specific provisions less weight than other factors that ignore cultural backgrounds, such as a judge's perceptions of the child's physical and emotional needs, as well as their development level.[31]

B. Structural and Conceptual Limitations

Second, and more fundamentally, the "best interests" concept – the *CFCSA*'s paramount consideration – is flawed in its conceptualization of individual children as separate entities from their communities.[32] The *CFCSA*'s narrow focus on the best interests of the child fails to recognize the essential role that extended families and communities play in caregiving. Many scholars and activists, including Grand Chief Ed John, have pointed out that the child welfare system's focus on the best interest of the child is not harmonious with Indigenous communities' holistic approach toward family and community.[33] For example, communities

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29 *Child, Family And Community Service Act*, RSBC 1996, c 46 [CFCSA].

30 *Ibid, s 4.*

31 See e.g. *Wrapping*, *supra* note 28 at 39 citing *In the matter of the children NP and BP: NP and SM v the Director of Child, Family and Community Service* (BCSC Prince George Registry 03998, 1999), where the court gave more weight to the non-Aboriginal couple's understanding of the child's special educational needs than to the First Nations aunt and uncle's understanding of the child's cultural needs.

32 *Wrapping*, *supra* note 28 at 29.

33 *Indigenous Resilience*, *supra* note 3 at 91.

worry that if courts or social workers misunderstand shared caregiving, they may believe the child has been abandoned or neglected.[34] Further, the UBCIC notes that the "best interests" concept overlooks political, social, and economic aspects of the best interests of Indigenous children:

> "…when the best interests of the child test is applied within the provincial child welfare context, the interests of Indigenous children are harmed because the province is not suited to know or assess any of the factors which come into play in terms of membership within an Indigenous Nation, or the ways in which this citizenship is fostered and benefits Indigenous children. Membership within an Indigenous Nation is not merely "cultural" it involves Sovereign rights and incorporates political, social and economic rights that cannot be addressed under the provincial legislation; the fullness of the relationship of a child with, and within, their Indigenous Nation is not accounted for."[35]

According to scholar Marlee Kline, the colonial concept of the best interests of the child understands children as decontextualized people who have interests completely independent from their families, communities, and cultures.[36] This is a serious shortcoming of the *CFCSA*. *Wrapping Our Ways Around Them*, a report prepared for the Legal Services Society of British Columbia (LSS), emphasizes that true protection of the best interests of children will be achieved through the "full and active involvement" of their Indigenous community.[37]

The shortcomings of the *CFCSA's* "best interests" conception are especially stark if one compares it with First Nations' child protection laws. For example, Part 2, section 7.2 of the Carcross/Tagish First Nation's comprehensive family statutes emphasizes the importance of keeping children within the community:

> "All of our stories, all of our teaching emphasize the importance of family. Families are the foundation of a good kwáan (community). We know that we must do all we can as a kwáan (community) to support families. Our kwáan (community) is a family, each member caring for others. We as a kwáan (community) will not leave anyone behind. When families cannot provide and protect children, we must. Only as a united kwáan (community) can we keep our children with us, keep them out of state care, out of jails, and free of substance abuse…"[38]

The Splatsin or Spallumcheen Band child protection bylaw places a similar emphasis on ensuring that children remain integrated within their communities. The Band created the child welfare bylaw, the only one that has been allowed under section 81 of the *Indian Act,*[39]

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34 *Wrapping*, *supra* note 28 at 32.

35 *Calling Forth*, *supra* note 10 at 51.

36 Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375 at 395.

37 *Wrapping*, *supra* note 28 at 30.

38 *Statutes of Government of Carcross/Tagish First Nation*, Book Two: Government of Carcross/Tagish Traditional Family Beliefs and Practices, part 2, s 7.2 <https://www.ctfn.ca/media/documents/Publications/Legislation/2._Family_Act_2010.pdf> [https://perma.cc/G954-HMXL].

39 *Indian Act*, RSC 1985, c I-5, s 81.

in 1980, in response to high levels of its kids in care.[40] In section 10(iii), the bylaw provides that in deciding where to place the Indian child, Indian customs should guide the Chief and Council along with the preferences the bylaw lists.[41] It states:

> If a child cannot be placed with their family, placement is to be made according to the following order of preference:
>
> 1. a parent
> 2. a member of the extended family living on the reserve
> 3. a member of the extended family living on another Indian reserve
> 4. a member of the extended family living off the reserve
> 5. an Indian living on a reserve
> 6. an Indian living off a reserve
> 7. only as a last resort shall the child be placed in the home of a non-Indian living off the reserve[42]

Reviewing some of the laws of these two communities highlights the emphasis placed on communities caring for children. Both sets of laws acknowledge that a "family" encompasses much more than the nuclear family or blood relatives. The Carcross/Tagish First Nation explicitly says that "Our kwáan (community) is a family."[43] The Spallumcheen Band provides that if a child cannot be placed with their family, the first preference is for a child to be placed with their parents, demonstrating that family means much more than parents. Additionally, they stress the collective responsibility of caring for and protecting children: it is not only the children's parents but the whole community that is responsible for its children.

It is worth noting that many British Columbia First Nations play a role in their community's child protection system through "delegation agreements" as codified by the *CFCSA* or treaties.[44] However, the authority of those nations and delegated agencies are still subject to the *CFCSA* on child protection matters.[45] The Spallumcheen (Splatsin) Band is the only exception, since its bylaws were made through the *Indian Act*.[46]

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40 *Wrapping, supra* note 28 at 19.

41 *A By-Law For the Care of our Indian Children Spallumcheen Indian Band By-Law #3-1980*, s 10(iii) <https://www.mmiwg-ffada.ca/wp-content/uploads/2018/10/P02-03P03P0401_Winnipeg_Exhibit_49_Turpel-Lafond.pdf> [https://perma.cc/XR8M-SBU7].

42 *Ibid*.

43 *Statutes of Government of Carcross/Tagish First Nation, supra* note 38.

44 Amber Prince, "Your Rights On Reserve: A Legal Tool-Kit For Aboriginal Women In BC" (2014) at 60, online (pdf): *Atira Women's Resource Society* <https://www.atira.bc.ca/sites/default/files/Legal%20Tool-kit-April-14.pdf> [https://perma.cc/4WRN-DB6F].

45 *Wrapping, supra* note 28 at 18.

46 *Ibid at 19.*

III. *GLADUE* DECISION AND PARALLELS WITH CHILD PROTECTION

Before exploring the use of *Gladue*-like reports in child protection, it is instructive to review key elements of the *Gladue* and *Ipeelee* decisions, and the reports that have emanated from them. Identifying the principles underlying *Gladue*, *Ipeelee*, and *Gladue* reports illustrates the applicability of the reports in child protection contexts.

In *Gladue,* the Supreme Court outlined the tailored considerations to be applied when sentencing Indigenous offenders, and the rationale behind those considerations – a rationale that, as discussed below, has similar resonance in child protection contexts. The case involved the application of section 718.2(e) of the *Criminal Code*, which mandates restraint in the use of incarceration as a sentence for any offender, and called for specific attention to be given to an Aboriginal offender's circumstances.[47] *Gladue* increased the attention that courts should give, noting that Aboriginal offenders and their communities are often not "well served" by incarceration.[48] Similarly, the child protection system does not serve Indigenous communities well; in fact, it exacerbates the harm felt by children and their communities. The Court further noted that Aboriginal people's "different conceptions of appropriate sentencing procedures and sanctions" have contributed to the "excessive" incarceration of Aboriginal people.[49] The same is true in child protection; Indigenous communities' systems for protecting children stand in stark contrast to the provincial child protection system.

These parallels are deepened in *Ipeelee,* in which the Supreme Court further expounded upon section 718.2(e) and *Gladue.* The Court clarified that when sentencing Aboriginal offenders, judges must consider "the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts." Furthermore, the Court ruled that "the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection."[50] Child protection cases also gravely need this analysis. It is essential that judges give serious consideration to the systemic and background factors that impacted the child's caregivers, such as residential schools, intergenerational trauma, or forced relocation.

The Court in *Ipeelee* then proceeded to instruct judges to take judicial notice of matters including:

> "the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."

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47 Benjamin Ralston, "*Gladue*: Oft-cited but still woefully misunderstood? Paper prepared for Continuing Legal Education Society of British Columbia, *Gladue* Submissions Course" November 15-16 2018 at 3 [CLE].

48 *R v Gladue*, [1999] 1 SCR 688 at 74, 1999 CanLII 679 (SCC) [*Gladue*].

49 *Ibid* at para 70.

50 *R v Ipeelee*, 2012 SCC 13 at para 59 [*Ipeelee*].

It clarified that such matters "…do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel."[51] Again, this framework could easily fit child protection contexts. Judges must learn about colonialism's impact on Indigenous children, families and communities, and take judicial notice of it. Like Aboriginal offenders, Indigenous children and caregivers, should to be evaluated within the context of colonization and the harm the State continues to cause rather than have their actions judged in a vacuum. Context will not excuse maltreatment of children, but it may give judges greater insight into the situation and how to address it.

IV. *GLADUE*-LIKE REPORTS IN CHILD WELFARE

While the need for *Gladue*-like reports in child protection is arguably apparent, there is a challenge in identifying what these reports should contain, and how they will work. For these reports to be successful, Indigenous communities who are most familiar with the challenges they face and their community's strengths that can help address the childcare challenges should determine the content and implementation of the reports. Ideally, representatives from various Indigenous communities across British Columbia would form a committee (the committee) to create and implement the *Gladue*-like child protection reports. The provincial and federal governments would need to properly fund this group and compensate representatives for their work.

This paper will outline a proposal for the content of the reports and practical aspects of writing the reports, but it is merely a starting point and should be changed based on the committee's directions. This part of the paper will also review lessons learned from *Gladue* reports in the criminal context.

A. Content of the Reports

The reports should explain how colonialism impacts the child's community and caregivers, the caregiving role of extended family or community members, and the services the family already accessed. It should then recommend programs and strategies to help caregivers address their traumas and issues, so that they can keep their child at home. These ideas stem from *Gladue* reports, and shortcomings of the colonial child protection system. The *Gladue*-like report could contain three main sections: Contextual History, Record of Service Provision, and Healing Plan.

i. Contextual History

The contextual history would contain information about the child, their caregivers and their community, focusing on the continuing impacts of colonialism. Borrowing language from Maurutto and Hannah-Moffat, the goal of this section would be to "situate" caregivers within a "colonial heritage" that placed them "at risk."[52] This section would address the particular

51 *Ibid* at para 60.

52 Kelly Hannah-Moffat & Paula Maurutto, "Re-contextualizing pre-sentence reports Risk and Race" (2010) 12:3 Punishm & Soc 262 at 278.

colonial harms imposed on the child's community, identify the impact of the harms on the community as a whole, and specifically on the child and caregivers. It would identify how colonialism contributed to the caregiver's actions that appeared to have placed the child in danger.

Additionally, this section would explain the role the child's community plays in caring for the child. For example, perhaps a boy moves around every week to aunts or uncles who lovingly care for him, or he lives with his grandparents for months when his mom is unwell. Perhaps the mother has not spoken to her extended family in months and struggles because she cannot rely on them for support. The contextual history would also highlight the role that poverty may play in the parenting concern, to clarify that it is not the same as intentional neglect.

ii. Record of Service Provision

Next, the Record of Service Provision would outline all the services provided to the family, and why they were not adequate to protect the child. This section would examine whether there were substantive or logistical reasons that prevented the caregiver from benefitting from resources. For example, did a mother not attend recommended parenting classes because they were not culturally responsive? Was the instructor relying on racist stereotypes to teach the mother to parent? Did the mother actually wish to attend the classes but was unable to do so because she was working or unable to secure transport to the classes?

The section would also report on any positive steps the caregivers had already taken. For example, perhaps the father was previously drinking alcohol every night but now has reduced his reliance on substances and is only drinking once or twice a week. This section would also look at the services parents accessed independently, to help ensure their efforts are recognized. Perhaps the family reached out to a non-profit or Band Council to inquire about child-care or trauma counselling. The section would offer insight into the shortcomings of the services the caregiver has been given and illustrate efforts caregivers had made to rectify the situation.

iii. Healing Plan

Lastly, the Healing Plan would suggest how to address the harms and unresolved trauma caused by colonialism, as well as any other pertinent parenting issues. Its goal is to keep the child with their caregiver, or if that is not possible, with another family or community member. Subject to the caregiver's consent, the Healing Plan would be grounded in their particular community's laws and heavily involve their community. Healing Plans should be tailored to the child and community in question. It is essential for the Healing Plan to avoid a pan-Indigenous approach. Instead, the report writer should speak with Elders, Knowledge Keepers, or service providers in the particular community to explore their traditions, laws, and suggestions for how the community can support the child and caregiver.[53]

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53 See e.g. *R v Macintyre-Syrette*, 2018 ONCA 259 at 21-23 where the Court noted the *Gladue* report was insufficient because it did not address the submission that "removing an offender from the community is not the traditional way of First Nations." The report did not recommend specific opportunities for the offender to participate in his community's ceremonies, or suggest how such ceremonies could benefit the offender and help him reconcile with his community.

The Healing Plan would contain similar elements to the Aboriginal Cultural Preservation Plan suggested by *Wrapping Our Ways Around Them.*[54] The Healing Plan would consider the community's laws to address the issue, including solutions to the issue.[55] For example, it could suggest a traditional dispute resolution process for that community. For instance, the ShchEma-mee.tkt Project organized by the Lytton, Skuppah and Oregon Jack Creek communities within the Nlaka'pamux Nation organized an ongoing Circle of Care and Accountability process for child protection issues.[56] They facilitated one circle at the community level with emergency response teams, and community supports for substance issues, special needs, and spiritual knowledge. Another circle brought together parents (potentially with their lawyers), extended family, the child welfare agency (potentially with their lawyers), Elders, and community members. The Circles of Care continue until the concerns are resolved.

The Healing Plan would also aim to ensure that caregivers have the opportunity to benefit from culturally appropriate programs and that children can participate in cultural activities. It would identify supports for the child and caregiver, including Elders or cultural supports from the community. If the concerns are grounded in poverty, the Healing Plan will suggest resources to address the specific issue, such as vocational training or food security programs. When caregivers have behaved dangerously, the Healing Plan will not overlook or excuse the behaviour. Instead, it will give families a chance to tackle their issues. *Wrapping Our Ways Around Them* noted that Indigenous families also hold biases, such as not wanting to create tension or a rift within community, so people may be hesitant to challenge parenting practices that are known to be unsafe.[57] The Healing Plan would strive to provide ample opportunities for the caregiver to effectively address issues without shame or blame.

Some caregivers or community members may also be hesitant to raise child-care issues because the community may not be a safe or trusting environment, or because the community does not have the capacity to address the issues. The Healing Plan would take these nuances into account. If the caregiver did not want to involve the community, the Plan could incorporate other available resources and supports. If the community does not have the needed resources, the Plan would suggest the best possible resources. This situation will not be uncommon, as many communities do not have the funding to offer adequate programming for their members. For example, the Canadian Human Rights Tribunal found that Canada's funding for First Nations children living on reserve and in the Yukon is inequitable and discriminatory.[58] The Healing Plan will not hold the lack of available programming against the caregiver.

The Healing Plan should also address follow-up. The Plan should suggest whether, when, and how to check-in with the child and caregiver as they participate in the Healing Plan. Furthermore it would suggest whether, when, and how to follow-up with the child and

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54 *Wrapping*, *supra* note 28 at 89.

55 *Ibid*.

56 *Ibid* at 118.

57 *Ibid* at 46.

58 *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

caregiver after the initial concerns have been addressed. Report writers, community members, or social workers could do the follow-up, depending on the needs of the family, and the direction of the committee.

As a whole, the reports would reflect the recommendation made in *Wrapping Our Ways Around Them*. This would allow "the Court, child welfare agencies, parents and Aboriginal communities to work together to ensure that the interests of children are protected and placed at the centre of decision-making, by recognizing an active voice for Aboriginal communities and creating space for Aboriginal ways of making decisions."[59]

B. PRACTICAL ASPECTS OF THE REPORTS

Practically, the courts or the government would need to create a framework that laid out who would be entitled to *Gladue*-like reports in child protection settings and who would write the reports. This framework would also have to consider how to foster the trust and involvement of Indigenous communities and specific children and caregivers.

i. Entitlement to Reports

This paper proposes that all Indigenous children would have access to a *Gladue*-like report, according to the *CFCSA*'s definition of an Indigenous child. This includes First Nations, Nisga'a, and Treaty First Nation children. It also includes children under 12 who have a biological parent of Indigenous ancestry, including Métis and Inuit, who consider themselves to be Indigenous, and children over 12 of Indigenous ancestry, including Métis and Inuit, who consider themselves to be Indigenous.[60] A child separated from their Indigenous culture, would still be entitled to a *Gladue*-like report.

If the child is old enough to give consent, they would have the option of opting out of the report. If the child is too young to consent, the caregiver would have the ability to opt-out of the report. If the child is old enough to consent but disagreed with the caregiver about whether they wish to have a report, the report writer would first try to understand why the person is opposed to the report and see if there is a way to address their concerns. However, at times it may not be possible to agree. The committee would create rules on if and how to write reports when the child and caregiver disagree about whether to obtain or opt-out of the report.

ii. Report Writers

The success of the reports largely hinges on report writers. Report writers have to be able to write clear, insightful reports with helpful and practical recommendations. The report writers would have to be certified through specialized training programs. The training programs should be offered in-person across the province and online, so people living throughout British Columbia can take the training, regardless of whether they have reliable internet access. Training would cover the legacy of colonialism, the structure of the provincial child protection system, children's developmental and safety needs, examples of some Indigenous

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59 *Wrapping*, *supra* note 28 at 4.

60 *CFCSA, supra* note 29, s 1.

communities' conceptualizations of family and child protection, and trauma-informed interviewing. It would also teach writers about the required content of the reports, and how to effectively write them. Ideally, the writers would be Indigenous, but if that is not feasible, then non-Indigenous people could also author reports, provided they have demonstrated cultural sensitivity and proficiency. Funding will be central in determining the success of the reports. Ideally, the Legal Services Society of British Columbia would fund the reports, with additional funding from the provincial and federal governments. Social workers play a critical role in child protection, so it would be important to ensure they believe in the *Gladue*-like reports' importance. They might support the reports as it will ease their workload because outside authors will write the reports. Social workers will be able to learn a great deal by reading the reports.

iii. Fostering Trust of Communities and Families

The program will have to gain the trust of children, caregivers, and communities for them to wish to participate in the report process and fully engage with it. Many communities and individuals are distrustful of both MCFD and the court system, because of the history of institutional abuse at residential schools and within the child welfare and criminal justice systems.[61] The committee will have to consider how to overcome this distrust. It will likely involve the program being visibly directed by the committee, and implemented by people whom individuals and communities do not already distrust.

For example, the committee will have to decide whether the MCFD social workers should be involved with any aspects of the reports or whether the processes should remain distinct. MCFD or delegated agency social workers conduct assessments once an issue puts a child's safety into question. They decide whether the child is in danger and whether they need to further investigate. In the investigation, social workers gather information from different places, including the caregiver, the child, and other relatives or caregivers.[62] For Indigenous children who receive *Gladue*-like reports, there will likely be an overlap between the report writer's and social worker's conversations. It may seem efficient to have the report writer accompany the social worker, but this may cause people to distrust the report writer.

iv. Admissibility of the Reports

For the reports to be effective, they will have to be deemed admissible by judges. The reports would contain hearsay evidence, which is generally not admissible. A distinction between child protection and sentencing proceedings is that section 723(5) of the *Criminal Code* states that "[h]earsay evidence is admissible at sentencing proceedings", while no such clear rule exists in child protection. Ideally, the legislature would amend the *CFCSA* to state that such evidence is admissible, as it has in sentencing proceedings. Even in the absence of such an amendment, however, there is a range of other potential solutions. Section 68(2) of the *CFCSA* permits the court to admit any hearsay evidence it considers reliable or any reports it considers relevant, and counsel may be able to have such reports admitted under either of those provisions.

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61 *Wrapping*, *supra* note 28 at 45.

62 "Child protection process", online: *Legal Aid BC Family Law* <https://familylaw.lss.bc.ca/children/child-protection/child-protection-process> [https://perma.cc/4THT-TJYC].

C. Lessons Learned from *Gladue* Reports

To enhance the efficacy of *Gladue*-like reports in child protection, we can use the lessons learned from some of the challenges with traditional *Gladue* reports. Five lessons are discussed in this paper:

1. The reports need to identify solutions;
2. The reports need to be culturally specific;
3. The reports need to be accessible to all Indigenous children within a reasonable time frame;
4. The reports do not need to demonstrate a link between systemic and background factors and the parenting concern;
5. The reports need to have and meet provincial standards.

First, the Healing Plans need to be robust enough to address the issues outlined in the contextual history, to address the concern of highlighting problems without generating solutions. In his research on *Gladue* reports, Benjamin Ralston noted that at least as much attention should be paid to the proposed sentencing and sanctions as to the systemic and background factors.[63] Reports should support families moving forward, not hold them back.

Second, the reports should be grounded in the specific community's or nation's laws, customs, practices, and traditions.[64] A pan-Indigenous approach is insufficient. Healing Plans that do not incorporate relevant legal traditions will be insufficient. Few sentencing decisions have specifically noted Indigenous legal traditions, which may stem from *Gladue* reports not adequately explaining the laws.[65] However, there have been some promising exceptions, which *Gladue*-like reports in child protection can build on. For example, in *R v. Itturiligaq*, when applying *Gladue* principles, the court explored Inuit Qaujimajatuqangit (societal values), which, when factored in, helped create a just and fit sentence.[66]

Third, the legislature or court should not replicate the limited availability of and long wait times for *Gladue* reports. Full reports must be accessible to all who want them across the province. It is common for a "*Gladue* factors" section to be inserted into pre-sentence reports (PSR) in the criminal context.[67] Just as that is inappropriate in the criminal context, it will also be inadequate for social workers to add a few sentences about the impact of colonialism or culturally responsive programming options into their care plans or recommendations. Report writers should be situated to write reports that better describe the Indigenous social

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63 Benjamin Ralston, "Paper prepared for the Legal Services Society of British Columbia's *Gladue* Writers Conference" 22-23 November 2018 at 8 [Writer's Conference].

64 *Ibid at 9*.

65 *CLE, supra* note 46 at 17.

66 *R v Itturiligaq*, 2018 NUCJ 31 at para 62.

67 David Milward & Debra Parkes, "*Gladue*: Beyond Myth and towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 88.

circumstances and culturally appropriate resources than what social workers currently write. The committee, in cooperation with the courts and MCFD, will need to determine whether the reports should be substituted for social workers' reports or care plans, as *Gladue* reports are sometimes used in place of PSRs.[68] Regardless, the reports must be accessible to children and caregivers who live on reserve, off-reserve, in rural areas, and in urban centres.

The report writers must prepare child protection *Gladue* reports quicker than *Gladue* reports currently are currently prepared, particularly if children have already been removed from their home. It is common for offenders to be in custody for longer than would otherwise be necessary while waiting for their *Gladue* reports.[69] At times, offenders waive their right to a *Gladue* report to be released from pre-custody detention sooner.[70]

In the child protection context, it is essential that waiting for reports does not result in kids remaining in care, away from home, for longer. Each day away from their caregiver results in lost family and cultural bonding time, and trauma for the child and their caregiver. Further, temporary custody orders can be extended, and may form the status quo, eventually becoming permanent through adoption.[71] Section 43 of the *CFCSA* lays out time limits for temporary custody orders ranging from 3 to 12 months, depending on the child's age.[72] The reports would ideally be written within the time limit, hopefully preventing the extension of the orders. Ultimately, this will come down to governments providing sufficient funding to create a robust network of funded report writers.

Fourth, the reports do not need to show a "causal connection" between systemic and background factors and the caregiver's seemingly dangerous behaviour. Many lower courts required *Gladue* reports to make such a link,[73] but the Court in *Ipeelee* clarified that direct causation was unnecessary.[74] Further decisions have explained that no link or causal connections are needed for *Gladue* principles to apply.[75] Courts considering *Gladue*-like reports in child protection can borrow from the *Gladue* jurisprudence, and consider systemic and background factors, whether or not they are directly linked to child protection concerns.

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68 Patricia Barkaskas et al, "Production and Delivery of Gladue Pre-sentence Reports: A Review of Selected Canadian Programs" (2019), online: *International Centre for Criminal Law Reform & Criminal Justice Policy* <https://icclr.org/2020/02/26/production-and-delivery-of-gladue-pre-sentence-reports-a-review-of-selected-canadian-programs/> [https://perma.cc/9H77-3G2N].

69 "Report of Proceedings" (2018) at 25, online (pdf): *British Columbia Eleventh Justice Summit: Indigenous Justice II* <https://www.justicebc.ca/app/uploads/sites/11/2019/02/eleventh-summit-report.pdf> [https://perma.cc/HAL6-7ACU].

70 *Ibid*.

71 *Wrapping*, *supra* note 28 at 77.

72 *CFCSA, supra* note 29, s 43.

73 See e.g. *Writer's Conference*, *supra* note 62 at 5.

74 *Ipeelee*, *supra* note 49 at paras 81-83.

75 *R v Joe,* 2017 YKCA 13 at para 77.

Fifth, provincial standards for the application and content of the reports must be created and met. There are no national standards for applying *Gladue* in the criminal context, which has led to the reports not being used when they should be, and a lack of follow-up being offered, both to the offender, and to the report writers who witness and discuss serious trauma on a regular basis.[76] The committee should create standards including who can request a report, maximum wait-times for the reports, the content of the reports, and follow-up for children, caregivers, and writers. It is imperative that the provincial and federal governments adequately fund the program to ensure these standards can be satisfied.

Incorporating these lessons will hopefully amplify the anticipated positive impacts of *Gladue*-like reports on Indigenous children and families, which are explored in the next section.

V. THE POWER OF *GLADUE*-LIKE REPORTS IN CHILD PROTECTION

Gladue-like reports in child protection could have a massively positive influence on Indigenous children, their families, and their communities. Five primary potential benefits are likely to flow from the reports. The author recommends a pilot project to better evaluate the impact of the reports.

A. Education of Social Workers and Judges

First, the reports could educate social workers and judges without relying on a pan-Indigenous approach.[77] Each report would be unique to that child's community, teaching social workers and judges about colonialism's impact on that particular child and community. This would situate caregivers in the appropriate context, and help ensure that colonialism's legacy is not forgotten when social workers and judges make their decisions. This hopefully will lead to decisions and recommendations with better outcomes for children. For example, a judge might hesitate to impose a custody order separating a child from their family after reading about a community's history of its children being forcibly removed from their parents.

The reports would also help fulfill the Truth and Reconciliation Commission of Canada's (TRC) Calls to Action 1(iii) and 1(iv) by contributing to social workers' training on the history and impact of residential schools, and on the potential for Aboriginal communities to provide appropriate solutions for healing.[78] The reports would also make strides toward TRC Call to Action 4(ii) by providing child-welfare agencies and courts with the information they need to take the legacy of residential schools into account in their decision-making.[79]

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76 Catherine Lafferty, "Standards still lacking for Gladue reports, meant to support Indigenous people in the justice system, say legal experts", *The Star* (13 Dec 2020), online: <https://www.thestar.com/news/canada/2020/12/13/standards-still-lacking-for-gladue-reports-meant-to-support-indigenous-people-in-the-justice-system-say-legal-experts.html> [https://perma.cc/UE7D-R7KD].

77 Rosner, *supra* note 2.

78 *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), online (pdf): <http://nctr.ca/assets/reports/Callsto Action English2.pdf> [https://perma.cc/EM7E-8GXW] [*TRC*].

79 *Ibid, at 1*.

B. Shifting the Focus to the Best Interests of the Family

Second, the reports would shift the focus to best interests of the family, from the current Eurocentric interest of the best interests of the child.[80] The reports would recognize that a child's family can be much larger than their nuclear family, or even their blood relatives. The contextual history could describe the collective nature of caregiving for the child. Then, the Healing Plan would outline ways to support all the caregivers, such as connecting them with alcohol and drug counselling, which will significantly benefit the children. Focusing on the best interests of the family would not ignore the child's best interests; it instead recognizes that the child and their family's best interests are inextricably linked, however the community conceives of their family (i.e. if a family is thriving, it is likely their child will thrive too; if a family is struggling, their child will probably also struggle).

C. Addressing Root Causes of Caregivers' Dangerous Actions

Third, the reports would provide caregivers with the opportunity to protect their children by addressing the root causes of their actions that are endangering their children. This has the potential to have long-term positive impacts on an entire community. This is different from the current system, which often removes children without fully considering why a caregiver acted in a particular way.[81]

Consider the hypothetical example of MCFD apprehending the son of an Indigenous mother who MCFD believes drinks excessively and neglects her son. In this situation, a report could show that the mother is a Sixties Scoop survivor, whose parenting style often replicates the way she was parented. This may lead to her sometimes overlooking her child. The mother's drinking is a form of self-medication in response to abuse she faced in her Sixties Scoop placement. The Healing Plan would recommend the son stay with his mother if she attends parenting classes designed for Sixties Scoop survivors, trauma counselling and alcohol counselling, and is supported by specified community members. Through these resources, the mother could learn new parenting strategies and ways to process her own trauma without endangering her son. This would allow her son to remain with his family and maintain cultural connections, rather than enter the harmful child protection system and become caught up in the same cycle of abuse and substance issues as his mother. *Gladue*-like reports could reduce the devastating cycles of involvement with the child protection system, and the negative outcomes associated with it.[82]

The Healing Plan would not only be more comprehensive and culturally specific than plans typically created by MCFD social workers, but it would ideally be grounded in trust amongst the caregiver, child, and community. The parties' current trust issues are a serious obstacle to creating the best environment for the child. For example, some parents report that they do not feel they can be honest with social workers because they fear the repercussions.[83] Reports written by authors whom the children, caregivers, and communities generally trust could produce more fulsome and beneficial recommendations.

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80 Rosner, *supra* note 2.

81 Ibid.

82 *Wrapping*, *supra* note 28 at 97.

83 *Pathways, supra* note 1 at 27.

D. Preventing Cultural Misunderstandings

Fourth, the reports would limit cultural misunderstandings, increasing the likelihood of children staying in their homes or family reunification if children have already been removed. The reports would recognize the validity of different caregiving practices in communities, such as multiple family members caring for a child. The reports would help prevent social workers from misunderstanding these practices as harmful to a child. For example, the contextual history could describe how a child benefits from moving between households in his community, such as learning cultural practices that his parent is not familiar with, or having more adults to confide in if something is wrong. The context provided by reports could help increase the number of children raised by their family, rather than by outsiders.

E. Increasing Investment in Preventative and Culturally Responsive Programming

Fifth, the reports may lead to increased investment in preventative and culturally-responsive programming. If reports continually highlight that a particular community lacks an important resource, the judges and social workers reading those reports might advocate for MCFD or another governmental agency to provide that community funding to develop the resource. Alternatively, communities may wish to assess the reports produced about children from their community, which may also shed light on specific resources that are needed.

For this benefit to be realized, the provincial and federal governments must adequately fund the programs that address the specific needs of Indigenous communities. This would facilitate the attainment of TRC Call to Action 5, for the federal, provincial, territorial and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families.[84] Overall, *Gladue*-like reports would help ensure more Indigenous children stay with their families and connect them with resources that will enhance caregivers' abilities to protect their children.

F. Pilot Project

These benefits are anticipated based on an understanding of the current child protection system and the identified benefits of *Gladue* reports in the criminal context. However, this is uncharted territory. The reports may have other positive consequences, or perhaps unexpected negative repercussions. It seems worthwhile to run a pilot project that enabled a random sample of Indigenous children to receive such reports, recognizing that there may be fairness implications in the short-term for families not in the project. The project could collect data on the outcomes of those children. Additionally, the project could speak with the children (depending on their ages), caregivers, communities, child protection agencies, and judges to learn about how the reports were effective, and how they could be improved. Best practices for the reports would then evolve based on the project to facilitate the reports' greatest possible impact.

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84 *TRC, supra* note 77 at 1.

VI. LEGAL FRAMEWORK TO MANDATE *GLADUE*-LIKE REPORTS

The benefits of *Gladue*-like reports appear significant, so the pressing question is how to change the current legal framework to make such reports mandatory in Indigenous child protection matters. There are two potential pathways to reforming the law: amending the *CFCSA* and expanding the use of *Gladue* reports through parents' counsel introducing the reports.

A. Amending the *CFCSA*

First, amendments to the *CFCSA* could lead to *Gladue*-like reports becoming mandatory, paralleling how *Gladue* reports became necessary in light of s. 718(2)(e) of the *Criminal Code*. Métis family lawyer Frances Rosner has advocated for shifts in the *CFCSA* from permissive to binding language, using *must* rather than *should*, in sections regarding Indigenous children.[85] This may be the most efficient strategy given that the *CFCSA* already has sections that encourage (but do not require) the consideration of many factors that the reports would explore.

Today these provisions are often not given much weight, but they would likely be more effective with mandatory language. For example, *should* in section 2(c) of the *CFCSA* (the provision setting out the guiding principles of the act) could be amended to *must*. The provision would read, "if, with available support services, a family can provide a safe and nurturing environment for a child, support services *must* be provided."[86] The Healing Plan would help fulfill this provision by outlining appropriate support services, and the law would ensure that the government provided the family said services. Similarly, changing *should* to *must* in section 3(b) (the provision setting out principles of service delivery) would make it read "Indigenous people *must* be involved in the planning and delivery of services to Indigenous families and their children."[87] The Healing Plan would fulfill the requirement of involving Indigenous people in the planning of services because writing a Healing Plan requires direction from Knowledge Keepers, Elders, family members and service providers in each child's Indigenous community.

Mandatory language would also require that judges adjudicating child protection issues consider the issues that the reports would address. For example, with mandatory language section 3(c.1) (the provision setting out principles of service delivery) could read, "the impact of residential schools on Indigenous children, families and communities *must* be considered in the planning and delivery of services to Indigenous children and families."[88] If such information was not evident in the report, a judge would be required to ask the child welfare agency how the impact of residential schools was considered in their plan. However, thorough reports should address this and other questions, so the judge would know they were complying with the law.

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85 Rosner, *supra* note 2.

86 *CFCSA, supra* note 29, s 2(c).

87 *Ibid,* s 3(b).

88 *Ibid,* s 3(c1).

A limitation of the language shift is that the *CFCSA* would still not consider the collective nature of caregiving in many Indigenous communities. Ideally, the legislature would add a provision to section 4, which sets out factors of a child's best interest, recognizing that an Indigenous child's best interests are inextricable from those of its family and community. This would enable the best interest concept to be more culturally sensitive. Healing Plans would aim to protect the child's best interests, recognizing that their interests are deeply connected to the interests of their family.

Amending the language of the *CFCSA* is likely the best option. Then, a ruling from a court that comprehensive *Gladue*-like reports are helpful or even necessary to comply with the *CFCSA* could provide the impetus for LSS or a government body to provide funding. However, it may be possible to introduce *Gladue*-type reports through the adversarial process, even without legislative amendments.

B. Expansion of *Gladue* Reports

The second way to mandate *Gladue*-like reports in child protection is for counsel to introduce them in their cases, without *CFCSA* amendments. This expanded use of *Gladue* reports would come in the midst of growing acceptance of *Gladue* factors in non-criminal contexts.

To date, the child protection process does not use *Gladue* reports. To prepare for this paper, the author conducted extensive research on the use of *Gladue* reports in civil cases. The research found no child protection case where a party created a *Gladue* report, which is likely a function of the expenses and resources required to write such a report, and the novelty of the proposed use of *Gladue* reports in this context.

However, the jurisprudence is quite promising as it discloses an expanding scope of influence for *Gladue,* which a court could expand to include the child protection context. For example, in *Alberta (Child, Youth and Family Enhancement Act, Director) v. JSA*, a child protection case regarding an Indigenous child, the mother's counsel encouraged the court to consider *Gladue* factors.[89] The court differentiated the child protection matters from criminal matters. Still, it noted that courts should consider *Gladue* factors in the context of the child protection agency's obligation to provide services to assist the family.

There are also other civil cases, unrelated to child protection, where courts have considered *Gladue* factors. The paper will briefly review three of them. In *O'Shea v. Vancouver (City),* an Indigenous plaintiff sued the Vancouver Police Department but failed to provide the City with the required notice.[90] Justice L.N. Bakan considered the *Gladue* principles as they applied to the plaintiff, and ruled that the plaintiff had a reasonable excuse for not providing the notice in the right time frame.[91] In *Law Society of Upper Canada v. Batstone,* a professional misconduct case against an Indigenous lawyer, Chair Wright considered *Gladue* principals, which contributed to a less severe penalty.[92] In *United States v. Leonard,* an extradition case

89 *Alberta (Child, Youth and Family Enhancement Act, Director) v JSA*, 2019 ABPC 32 at para 15.

90 *O'Shea v Vancouver (City)*, 2015 BCPC 398 at para 100.

91 *Ibid*.

92 *Law Society of Upper Canada v Batstone*, 2015 ONLSTH 214 at para 12, [2015] LSDD No. 263.

regarding two Indigenous accused, the court that held *Gladue* principals were relevant in considering *Charter of Rights and Freedoms* arguments, which led to the court setting aside the surrender order.[93]

Generally, support for increased use of *Gladue* principles is rising. As the Alberta Court of Queen's Bench recently stated:

> … it is time that we recognized that *Gladue* and *Ipeelee* should be taken for more than tokenism, and we should recognize what we have done to Aboriginal peoples, and we should attempt, through any means that we can, to re-establish and assist in re-establishing the culture, which worked quite well before we got here.[94]

If counsel provided complete *Gladue* reports in child protection cases, this would be a strong option. However, the reports are costly, and it would be difficult to secure funding to do so in the short term. A practical option is for counsel to start by raising *Gladue* principles and aspects of healing plans more frequently, to show the utility of such information. Over time, judges, social workers, and policymakers will arguably recognize the value of this type of reporting structure, and they may create a scheme for the creation of reports for every Indigenous child.

VII. COMPLIANCE WITH INTERNATIONAL LAW

While a robust analysis of international child protection law is beyond the scope of this paper, it is instructive to briefly consider the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) and the *United Nations Convention of the Rights of the Child* (UNCRC). *Gladue*-like reports would assist both Canada and British Columbia in complying with these international instruments.

A. United Nations Declaration of the Rights of Indigenous Peoples

UNDRIP establishes standards to achieve the human rights of Indigenous peoples, and to preserve their cultures, traditions, and law.[95] Canada is a full supporter of UNDRIP, and in December 2020 the federal government introduced legislation to implement UNDRIP, though at the time of writing this paper it has not yet been passed.[96] Provincially, UNDRIP is close to becoming binding law. Recently, British Columbia passed Bill 41, which legislates that "the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."[97] Courts must now interpret British Columbia's laws to be in line with UNDRIP.

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93 *United States v Leonard*, 2012 ONCA 622 at para 1.

94 *R v Holmes*, 2018 ABQB 916 at para 8.

95 *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/295 (2007) [*UNDRIP*].

96 Russ Diabo, "Federal UNDRIP Bill C-15 is an attack on Indigenous sovereignty and self-determination: Opinion", *APTN News* (21 Dec 2020), online: <https://www.aptnnews.ca/national-news/undrip-bill-c-15-federal-government-soverignty-russ-diabo/> [https://perma.cc/JWT4-46ZZ].

97 Bill 41, *Declaration on the Rights of Indigenous Peoples Act,* 4th Sess, 41st Parl, British Columbia, 2019, s 3.

The provincial and federal governments have a range of obligations regarding child protection under UNDRIP. Article 7(2), deals with rights to live freely and securely as distinct peoples, and article 8, deals with cultural destruction.

Article (7)2 states that:

> Indigenous Peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.[98]

Article 8 states that:

> Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.[99]

The strong wording of these provisions arguably makes any provincial law that allows child protection agencies to remove Indigenous children from their own group (or community) inconsistent with UNDRIP and British Columbia's new legislation. *Gladue*-like reports could enable the British Columbia government to meet its obligations, by exploring all options that would allow a child to stay in their community, including suggesting resources for the caregiver, or identifying other community members who can care for the child. Further, the articles provide that it is incumbent upon the government to build systems that prevent Indigenous children from forced assimilation and depriving children of their culture.[100] *Gladue*-like reports and assessments of the reports could identify gaps in culturally-responsive programming that the government should provide the funding to fill, to prevent children from being taken from their homes and being assimilated into a foreign community in violation of articles 7(2) and 8 of UNDRIP.

B. United Nations Convention of the Rights of the Child

The UNCRC also contains provisions that protect Indigenous children. Canada has ratified the UNCRC, indicating its support for the Convention.[101] While it is not binding law, courts should interpret the *CFCSA* in a way that is consistent with the UNCRC.

UNCRC provisions impose many obligations on Canada and its child protection systems, including article 5, which addresses the rights of families to help protect their children's rights, and article 30, which addresses children's rights to their own culture, language and religion.

Article 5 states that:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible

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98 *UNDRIP*, *supra* note 94, art 7(2).

99 *Ibid, art 8.*

100 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada),* 2018 CHRT 4 at para 76.

101 *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 [*UNCRC*].

> for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the right recognized in the present Convention.[102]

Article 30 states that:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.[103]

These articles recognize the right of extended families and communities to care for their children. Further, they provide that states have a duty to respect the rights and responsibilities of the child's parents, extended family and community. The contextual history section of the report would illustrate the role that families and communities play in caring for their children, making it easier for courts to uphold their right to do so, rather than removing children and interfering with communities' rights.

Additionally, the articles clarify that a state should not deny children their right to enjoy their culture or use their own language. Implementing reports with Healing Plans that provide children with an opportunity to maintain their connection with their culture would help fully realize children's rights to their culture and language.

It is also possible that *Gladue*-like reports would help the federal and provincial governments comply with domestic legal obligations, such as those under section 35 of *The Constitution Act, 1982*. Additionally, the reports may help governments meet the recommendations of The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.[104] This is also beyond the scope of this paper, but deserves further research.

VIII: POTENTIAL CRITICISMS OF USING *GLADUE*-LIKE REPORTS IN CHILD PROTECTION

There are two main potential criticisms of using *Gladue*-like reports in child protection. First, some may argue that law reform that does not result in nations being completely in control of their own child protection system is unacceptable. For instance, the UBCIC's report on child protection asserted that child welfare systems need to flow from recognition of a nation's self-governance, jurisdiction and authority.[105] It also stressed that Indigenous nations have their own laws, traditions and customs to protect their kids, which delegated agencies likely interfere with.[106]

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102 *Ibid, art 5.*

103 *Ibid, art 30.*

104 *Master List of Report Recommendations* (2019), online: *The National Inquiry into Missing and Murdered Indigenous Women and Girls* <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/National-Inquiry-Master-List-of-Report-Recommendations-Organized-By-Theme-and-Jurisdiction-2018-EN-FINAL.pdf> [https://perma.cc/8VFY-K23N].

105 *Calling Forth*, *supra* note 10 at 13.

106 *Ibid*.

However, one of the main nuances this criticism fails to consider is that it will realistically take a long time before all Indigenous nations completely control their own child protection systems. *Gladue*-like reports are not a replacement for self-governance; they are an interim solution striving to incorporate as much involvement and direction from Indigenous nations as possible. The reports would recognize the importance of Indigenous legal orders and traditions, and encourage child protection systems and courts to do the same. Healing Plans crafted appropriately will resemble how the community itself would respond to the child protection concern. *Gladue*-like reports would aim to support Indigenous children and their families until nations have full jurisdiction over child protection.

On the other hand, the second foreseeable criticism is that it is unfair for Indigenous people to receive "special treatment" by the courts. People may believe in the importance of formal equality, that the law ought to treat everyone identically.

One can find counter-arguments to this criticism in the case law on *Gladue* reports, which were subject to the same critique. For example, in *Gladue*, the Court stated that the "fundamental purpose of section 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference."[107] The difference of the numbers of Indigenous children in the child protection system, that they are 15 times more likely to enter governmental care than non-Indigenous children, cannot be overlooked, and must be specifically addressed.[108]

CONCLUSION

The child protection system is crying out for reform. Another generation of Indigenous children is again suffering at the hands of the colonial government. *Gladue*-like reports have the potential to transform the system by recognizing the impact of colonialism on Indigenous communities, as well as the power of Indigenous nations and communities' laws, customs and traditions to care for children. The mother whose comments opened this paper was robbed not only of her childhood, but also of motherhood. With the current child protection system, the same will likely be true for her children. While they will certainly not solve every or even most problems facing Indigenous children, *Gladue*-like reports have the potential to enable more Indigenous children to remain safely in their communities. These reports might also significantly curtail the negative outcomes currently associated with the child protection system, and increase positive outcomes for children and their communities. They also have the potential to improve compliance with domestic and international legal obligations, and to take strides to protect Indigenous children's rights to their culture and homes.

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107 *Gladue, supra* note 47 at para 87.

108 *Indigenous Resilience*, *supra* note 3 at 15.

ARTICLE

SEEING JUSTICE DONE: INCREASING INDIGENOUS REPRESENTATION ON CANADIAN JURIES

Keith Hogg *

CITED: (2021) 26 *Appeal* 51

ABSTRACT

The underrepresentation of Indigenous people on Canadian juries threatens public confidence in the criminal justice system, particularly in cases involving Indigenous accused or defendants. Despite being the subject of many high-profile legal cases, inquiries, and reports, the problem endures today, and meaningful reform has been elusive. This paper considers the ways in which Indigenous people are excluded at each of the three stages of the juror selection process. It critiques the Supreme Court of Canada's ruling on the issue in the 2015 case of *R v Kokopenace* and concludes with several recommendations including that citizens be allowed to volunteer for jury duty in order to remedy the race-based disparity in representation on juries.

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INTRODUCTION

On February 9th, 2018, a jury acquitted Saskatchewan farmer Gerald Stanley of murder and manslaughter in the death of Colten Boushie, a 22-year-old Cree man from the Red Pheasant First Nation. Stanley claimed to have accidentally shot Boushie while he was trespassing on Stanley's farm, whereas Boushie's friends claimed they drove onto the property in search of help with a flat tire. The shooting inflamed racial tensions in the province, and Stanley's acquittal by what appeared to be an all-white jury prompted an outpouring of anger and grief across Canada. Thousands attended protests in cities across the country, and the Prime Minister and multiple Cabinet ministers took the unusual step of commenting publicly on the trial's outcome, all to the effect that, as a country, "we have to do better."[1]

Much of the criticism of the verdict in the Stanley trial focused on the lack of visibly Indigenous people on the jury, a troubling and enduring issue in the Canadian criminal justice system. Part I of this paper highlights the jury's important role in the criminal justice system and outlines the history of Indigenous underrepresentation on Canadian juries. The following three parts discuss issues affecting Indigenous representation at each of the three stages of the jury selection process and address possibilities for reform at each stage. Finally, Part V considers allowing Indigenous people to volunteer for jury duty as one possible reform to remedy Indigenous underrepresentation and increase the Indigenous community's trust and confidence in the Canadian criminal justice system.

I. THE SCOPE OF THE PROBLEM

In *R v Sherratt*, the Supreme Court of Canada (the "Supreme Court") summarized the importance and role of the jury as follows:

> The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.[2]

The longstanding exclusion and underrepresentation of Indigenous people from serving on juries has denied them the many benefits outlined above. It contributes to the pervasive belief that the Canadian justice system is a tool of colonial oppression, securing justice for the colonizers at the expense of the colonized. The issue was extensively canvassed in the 1999 *Report of the Aboriginal Justice Inquiry of Manitoba*,[3] as well as a 2013 report by

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1 "Ministers say Canada must 'do better' after Boushie verdict", *CBC News* (10 February 2018), online: <https://www.cbc.ca/news/politics/trudeau-ministers-boushie-verdict-reaction-1.4530093> [https://perma.cc/KV7S-7H2P] [CBC].

2 [1991] 1 SCR 509, 1991 CarswellMan 7 at para 30 [*Sherratt*].

3 The Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol I (Manitoba: AJIC, November 1999), at Chapter Nine: Juries, online: <http://www.ajic.mb.ca/volumel/chapter9. html> [https://perma.cc/Q66L-ZKZR] [Aboriginal Justice Inquiry].

former Supreme Court Justice Frank Iacobucci, *First Nations Representation on Ontario Juries*.[4] The issue was also considered by the Supreme Court in the 2015 case of *R v Kokopenace*.[5] This paper draws extensively on the calls for reform made in both the above reports, and the *Kokopenace* decision is summarized and critiqued in Part II.

In the introduction to his report, Justice Iacobucci notes that First Nations[6] people are "overrepresented in the prison population … [but] significantly underrepresented, not just on juries, but among all those who work in the administration of justice in this province, whether as prosecutors, court officials, defence counsel, or judges."[7] Despite constituting only 4.3 percent of the Canadian population, 25 percent of the country's federal prison inmates are Indigenous.[8] Indigenous people, especially women, are also significantly overrepresented as victims of crime. Indigenous women are three times more likely to be victims of violent crime compared to their non-Indigenous counterparts.[9] Indigenous people are dramatically overrepresented as both homicide victims (25%) and those accused of committing homicide (33%).[10] The fact that Indigenous people are both victims of crime and face criminal charges at disproportionately higher rates than the general Canadian population makes the need for their equal participation in the country's jury system all the more vital.

The Canadian justice system has a long history of all-white juries hearing cases involving Indigenous people, from the conviction of Manitoba Métis leader Louis Riel by an all-white jury and his subsequent hanging in 1885,[11] to the wrongful murder conviction of Donald Marshall Jr. by an all-white jury in 1971,[12] to Gerald Stanley's controversial acquittal by an all-white jury in 2018.[13] Manitoba's Aboriginal Justice Inquiry was prompted in part by the brutal murder of an Indigenous woman, Helen Betty Osborne, in 1971.[14] Sixteen years after her death, when two of her suspected murderers were finally put on trial, the case was heard by an all-white jury in an area where almost a third of the population was Indigenous.[15]

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4 Independent Review Conducted by The Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries* (Ontario: Ministry of Attorney General, February 2013), online <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html> [https://perma.cc/KP4ACFXE] [Iacobucci Report].

5 2015 SCC 28 [*Kokopenace*].

6 Today, "Indigenous" is considered the correct and most inclusive term to refer to First Nations, Métis, and Inuit peoples living in Canada. The terms "Aboriginal" and "First Nations" have also been used in the past to refer to Indigenous peoples as a whole and are used in the reports discussed in this paper.

7 Iacobucci Report, *supra* note 4 at para 14.

8 Department of Justice, *Indigenous overrepresentation in the criminal justice system* (January 2017), online: <http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jan02.html> [https://perma. cc/88BU-EQW8].

9 *Ibid.*

10 *Ibid.*

11 *R v Riel*, [1885] UKPC 3.

12 Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98 Can Bar Rev at 325.

13 CBC, *supra* note 1.

14 Aboriginal Justice Inquiry, *supra* note 3 at Volume II: The Death of Helen Betty Osborne.

15 *Ibid.*

As the *Report of the Aboriginal Justice Inquiry of Manitoba* stated, "whether it is the accused or the victim who is Aboriginal, the perception of a fair trial will be enhanced if Aboriginal people are properly represented on juries. They are, after all, very much affected by the outcome of trials in their communities."[16]

Whether or not increased representation on juries will necessarily lead to more just verdicts for Indigenous victims or those accused of crime, the law has long recognized that justice must not only *be* done, but must be *seen* to be done.[17] Where Indigenous participation on juries is concerned, justice is not being seen to be done. Increasing Indigenous participation in the jury system is a crucial step towards increasing the confidence and trust placed in the justice system by Indigenous people and Canadians in general.

II. THE JURY ROLL

The first stage in the jury selection process is the creation of the jury roll—the list of names from which potential jurors are drawn. Separate legislation in each province and territory governs the process followed in creating the list. Generally, the sheriff or another court services official in each judicial district compiles the list by drawing names from various provincial records. The type of record used to compile the jury roll can be crucial in ensuring a representative jury.

A. The *Kokopenace* Decision

Clifford Kokopenace, an Indigenous man from a reserve in northern Ontario, was convicted by a jury of manslaughter in 2008.[18] When significant problems with the 2008 jury roll came to light, Kokopenace appealed his conviction. While Indigenous people living on reserves made up more than 30 percent of the population in the judicial district of Kenora, where the trial took place, they constituted only 4.1 percent of the potential jurors on the 2008 roll.[19] Of the 175 people summoned for jury selection prior to Kokopenace's trial, only eight were residents of reserves.[20] Four of the eight were excused by the sheriff, and two did not respond to the summons.[21] The case reached the Supreme Court of Canada in 2015. In a strong dissent, with Chief Justice McLachlin concurring, Justice Cromwell stated that the issue at stake in the appeal was whether the guarantee of a representative jury "is real or illusory for Aboriginal people."[22]

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16 *Ibid* at Volume II: The Death of Helen Betty Osborne and Chapter Eight: The Jury.

17 *R v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256 at para 259.

18 *Kokopenace*, *supra* note 5 at para 4.

19 *Ibid* at para 197.

20 *Ibid* at para 305.

21 *Ibid* at para 305. As a person's race is not listed on the jury roll, residence on a reserve is the most accurate way to estimate Indigenous representation on the roll, as almost all those living on reserves are Indigenous. It is unclear whether either of the two on-reserve residents who attended the jury selection ultimately served on the trial jury.

22 *Ibid* at para 190.

The right to a representative jury is enshrined in sections 11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms*.[23] Section 11(d) provides that any person charged with an offence has the right to a fair and public hearing before an independent and impartial tribunal, and section 11(f) confers the benefit of a trial by jury to any person charged with an offence punishable by at least five years of imprisonment.[24] The courts have held that a representative jury helps guarantee that jury's impartiality, though a lack of representativeness will not necessarily mean that the jury is not impartial.[25] The Supreme Court has also held that representativeness is an essential component of the right of the accused to a trial by jury.[26] If the jury is to fulfill its role as the "conscience of the community", it must be representative of that community.

Having recognized the importance of representativeness, the question becomes: What does it mean for a jury to be 'representative' of the community? How far does the requirement extend? As Justice McLachlin (as she then was) put the question in *R v Biddle*:

> The community can be divided into a hundred different groups on the basis of variants such as gender, race, class and education. Must every group be represented on every jury? If not, which groups are to be chosen and on what grounds? If so, how much representation is enough? Do we demand parity based on regional population figures? Or will something less suffice?[27]

In subsequent judgements, the courts have affirmed that requiring a trial jury to be truly 'representative' would be a problematic and unworkable approach.[28] An accused person has no right to a specific number of individuals of a certain race or background on either the jury roll, jury panel, or the trial jury.[29] The requirement of representativeness is imposed on the process used to compile the initial jury roll, rather than on the composition of the final 12-member trial jury.[30] It was on this basis that a majority of the Supreme Court in *Kokopenace* developed a test for representativeness that significantly circumscribes the meaning of the term 'representative' in Canadian law. Justice Moldaver, writing for the majority, articulated the representativeness test as follows:

> To determine if the state has met its representativeness obligation, the question is whether the state provided a fair opportunity for a broad cross-section of society to participate in the jury process. A fair opportunity will have been provided when the state makes reasonable efforts to: (1) compile the jury roll using random selection

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23 *Ibid* at paras 47—58.

24 *Canadian Charter of Rights and Freedoms*, ss 11(d) and (f), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11.

25 *R v Williams,* [1998] 1 SCR 1128 at para 46, [1998] SCJ No 49; *Kokopenace*, supra note 5 at para 148.

26 *Sherratt, supra* note 2 at para 35; *R v Church of Scientology*, 33 OR (3d) 65, [1997] OJ No 1548 (CA) at para 48, leave to appeal refused: [1997] SCCA No 683 9 [*Church of Scientology*].

27 *R v Biddle*, [1995] 1 SCR 761, [1995] SCJ No 22 at para 58, McLachlin J, concurring in the result.

28 *Kokopenace*, *supra* note 5 at para 39.

29 *Church of Scientology, supra note 26; R v Kent, Sinclair and Gode,* 1986 CarswellMan 178, [1986] MJ No 239 (CA) [*Kent*].

30 *Kokopenace*, *supra* note 5 at para 40.

> from lists that draw from a broad cross-section of society, and (2) deliver jury notices to those who have been randomly selected. In other words, it is the act of casting a wide net that ensures representativeness. Representativeness is not about targeting particular groups for inclusion on the jury roll.[31]

In a forceful dissenting opinion, Justice Cromwell urged the Court to adopt a significantly broader conception of representativeness, stating that a "representative jury roll is one that substantially resembles the group of persons that would be assembled through a process of random selection of all eligible jurors in the relevant community."[32] The majority emphasized that they were "in no way suggesting that the state should not take action to address this pressing social problem" but maintained that an accused's right to a representative jury was "not the appropriate vehicle for this task."[33] Justice Cromwell strongly disagreed:

> I do not regard compliance with the Constitution as either optional or as a matter of social policy. An Aboriginal man on trial for murder was forced to select a jury from a roll which excluded a significant part of the community on the basis of race – his race. This in my view is an affront to the administration of justice and undermines public confidence in the fairness of the criminal process. … [T]he *Charter* in my view ought to be read as providing an impetus for change, not as an excuse for saying that the remedy lies elsewhere.[34]

The majority in *Kokopenace* distort the plain meaning of the word 'representative', stating that while the jury roll must be representative, it need not be *proportionately* representative of the community from which it is drawn. They justify this position by conflating the problems occasioned by requiring a proportionately representative *trial jury* with those of a proportionately representative *jury roll*.[35] Certainly, it would be impossible to find a group of twelve people who proportionately represent every facet of Canadian society. But proponents of a strengthened representativeness requirement do not advocate for that position. Justice Cromwell simply asks that the jury roll be roughly proportionately representative of the judicial district. If one third of the population of that district is Indigenous, roughly one third of the names on the jury roll should be those of Indigenous people. It is debatable whether efforts that fall so substantially short of their purported goal are ever "reasonable." As Justice Cromwell notes, in no other area of Canadian law is the state required only to make "reasonable efforts" not to breach a citizen's *Charter* rights.[36]

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31 *Ibid* at para 61.

32 *Ibid* at para 226.

33 *Ibid* at para 65.

34 *Ibid* at paras 195–196.

35 *Ibid* at paras 42–43. Justice Moldaver quotes an Ontario Court of Appeal decision, *R v Brown,* (2006) 215 CCC (3d) 330 (CA), outlining the problems created by requiring a representative trial jury. He then makes the significant assumption that these problems are equally applicable to the jury roll, stating that "even if a perfect source list were used, it would be impossible to create a jury roll that fully represents the innumerable characteristics existing within our diverse and multicultural society." That it may be impossible to achieve absolute perfection does not mean that Canadian law and policy should not try to come as close as reasonably possible.

36 *Ibid* at para 250.

B. Source Lists

The type of source list used to compile the jury roll for a judicial district plays an important role in ensuring a representative jury. While the requirement set out in *Kokopenace*—random selection from a list drawing from a broad cross-section of society—would seem to be fairly easy to satisfy, jury rolls have historically been compiled from lists that are far from representative. For centuries, juries were composed exclusively of white, property-owning men, and provinces only began to allow women to serve as jurors in the mid-1960s.[37] The use of provincial electoral lists in compiling jury rolls effectively barred Indigenous people from serving as jurors until most provinces extended the franchise to include them in the mid-twentieth century.[38] As the *Report of the Aboriginal Justice Inquiry of Manitoba* aptly stated in 1999, "for a century the legal system made it clear that it did not want or need Aboriginal jurors. It is a message that Aboriginal people have not forgotten."[39]

The use of health records in compiling the jury roll is widely seen as a best practice, as virtually every Canadian citizen accesses the country's universal healthcare system.[40] While a majority of provinces now employ health records as the source list for their jury rolls, British Columbia and Quebec continue to rely on provincial electoral lists.[41] Ontario used municipal property assessment records to compile its jury roll for many years, until it switched to health records in 2019, in accordance with the recommendations made in Justice Iacobucci's 2013 Report.[42]

Sheriffs in British Columbia and Ontario are directed to supplement their jury rolls by obtaining lists of names of those living on reserves from First Nations officials.[43] As detailed in Justice Iacobucci's 2013 report, this approach is largely ineffective.

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37 Susan Altschul & Christine Carron, "Chronology of Some Legal Landmarks in the History of Canadian Women" (1975) 21 McGill L J 476, online: <https://lawjournal.mcgill.ca/wp-content/uploads/pdf/7591703-carron.pdf> [https://perma.cc/2A44-UX9P].

38 John F. Leslie, "Indigenous Suffrage", *The Canadian Encyclopedia* (1 March 2016), online: <https://www.thecanadianencyclopedia.ca/en/article/indigenous-suffrage/> [https://perma.cc/746B-4CZG].

39 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries.

40 Mark Israel, "The Underrepresentation of Indigenous Peoples on Canadian Jury Panels" (2003) 25:1 L & Policy at 38.

41 The source list to be used in each province is sometimes specified in the provincial legislation itself or in the regulations, while in other provinces the source list is specified in a policy manual or guidelines which may or may not be publicly accessible. The Quebec *Jurors Act* specifies that electoral records are the source to be used in compiling the jury roll: *Jurors Act*, RSQ c J-2, ss 3(c), 7.1. British Columbia does not specify either in the provincial legislation or regulations that electoral records are the source to be used. The British Columbia *Jury Act* gives the sheriff wide discretion to select jurors through any procedures the sheriff deems appropriate (s 8). The Sheriff Policy Manual, which provides that the roll is compiled from voting records, does not appear to be publicly available.

42 *Juries Act*, RSO 1990, c J-3, ss 6(2), 6(8); See generally: Robert Cribb & Jim Rankin, "Ontario abandons property ownership as source of jurors", *Toronto Star* (18 April 2019), online: <https://www.thestar.com/news/investigations/2019/04/18/ontario-abandons-property-ownership-as-source-of-jurors.html> [https://perma.cc/AZ3G-WYM6].

43 For British Columbia, see: "Sheriff Policy Manual", 2011, published on the website of the BC Civil Liberties Association after being obtained through an access to information request, online: <https://bccla.org/wp-content/uploads/2012/03/2011-BC-Sheriffs-Office-Response-Policy.pdf> [https://perma.cc/2VUR-GKX4]. For Ontario, see: *Juries Act*, RSO 1990, c J-3, s 6.

First Nations leaders place great importance in safeguarding the privacy of their members and are therefore often unwilling to divulge the list of names sought by the sheriff's office. Chiefs whom Iacobucci spoke with expressed their beliefs that they were under an obligation to consult with their members before releasing their personal information, that more education about the jury system was needed, and that "it was unfair to subject their people to what they regarded as a completely foreign process."[44]

With regard to the 'reasonable efforts' test developed in *Kokopenace*, Justice Cromwell noted in his dissent that one significant, "obvious" effort that the province of Ontario had not made was to consult with First Nations leaders to determine why response rates to summonses were so low among Indigenous communities.[45] This echoes many of the recommendations made by Justice Iacobucci in his report, which squarely places the issue of Indigenous underrepresentation on juries within the wider context of systemic racism and colonial attitudes towards Indigenous people in Canada's criminal justice system. Engaging Indigenous leaders in a government-to-government relationship is crucial to addressing the issues that continue to plague the jury selection process.

As a final point in regard to the choice of source list, it should be noted that the use of provincial health records is in itself no guarantor of a representative jury roll and certainly does not guarantee a representative trial jury. Gerald Stanley was tried by an all-white jury in Saskatchewan, in an area of the province where roughly 30 percent of the population is Indigenous, despite that province's use of health records as a source list. In a recently published book focused on the Stanley trial, professor Kent Roach concludes that at least 20 of the 178 people who attended the jury selection for the trial were Indigenous. [46] That perhaps only 11 percent of the jury panel was Indigenous, in a 30 percent Indigenous judicial district, suggests that Indigenous people were likely underrepresented on the jury roll in the first place. The use of a representative source list is an important step in working towards a representative trial jury, but it is no panacea.

III. THE JURY PANEL

Even in cases where Indigenous people are represented on a jury roll in rough proportion to their population in a judicial district, they face numerous barriers to participation at the second stage of the juror selection process. When a jury trial is scheduled, a sheriff mails notices to potential jurors whose names have been randomly selected from the jury roll. This 'summons' cautions recipients that service is not optional and that a fine may be imposed on those who fail to respond. Despite this, response rates amongst Indigenous people tend to be far lower than those of the general population. In *Kokopenace*, for example, the response rate amongst residents of the district living on First Nations reserves was a dismal 10 percent, while the response rate amongst off-reserve residents was 56 percent.[47] This section considers some of the factors driving this disparity, as well as proposed solutions.

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44 Iacobucci Report, *supra* note 4 at para 231.

45 *Kokopenace*, *supra* note 5 at para 240.

46 Kent Roach, *Canadian Justice, Indigenous Injustice: the Gerald Stanley and Colten Boushie case* (Montreal & Kingston, McGill-Queen's University Press, 2019) at 97—98.

47 *Kokopenace, supra* note 5 at paras 18, 24.

The *Report of the Aboriginal Justice Inquiry of Manitoba* concluded that "the summoning procedure works against Aboriginal people in a number of ways."[48] Mail and telephone service is slower and of poorer quality in Indigenous communities than in the rest of Canada, and Indigenous people living in urban areas are more likely to be renters, who change addresses frequently.[49] For these reasons, Indigenous people living in both rural and urban areas are less likely to receive a summons than their non-Indigenous counterparts. In *Kokopenace*, nearly 28 percent of the summonses mailed to those living on a reserve in the judicial district were returned undelivered, compared to an overall provincial rate of less than 6 percent.[50] The time it takes a potential juror to respond to the summons is also important. Despite the warning of penalties for failure to respond, sheriffs do not typically follow up when a summons goes unanswered. Anticipating that some of those selected will not respond, sheriffs mail notices to far more potential jurors than are actually required for the in-court selection stage. If a recipient responds to the summons after the necessary number of people required for the jury panel has been reached, the sheriff may tell them they are no longer needed.[51]

A. Juror Qualifications

Prospective jurors who receive a summons must return the form, either online or by mail, within a specified number of days. They must also attest that they meet the qualifications to serve as a juror in their province. Though these qualifications vary slightly by jurisdiction, every province and territory requires that jurors be ordinarily resident therein and be Canadian citizens over the age of majority. Members of certain professions are also excused from serving on a jury: members of the Legislature or Parliament, judges, lawyers, sheriffs, and others involved with the justice system or law enforcement.[52] Citizens with a criminal record or those who are facing charges at the time of jury selection will also generally be disqualified.[53]

While the requirement that jurors be Canadian citizens would seem relatively uncontroversial, and has been upheld by the courts as constitutional,[54] many Indigenous people in Canada identify exclusively as citizens of their First Nation, not as Canadian citizens. Indicating on

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48 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries.

49 *Ibid.*

50 *Kokopenace*, *supra* note 5 at para 270.

51 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries.

52 While all provinces exempt persons involved with the justice system or law enforcement on the basis that they may not be impartial between the prosecution and the accused, the scope of the exemptions varies slightly by province. Some exclude law students or anyone with a law degree, for example, while others exempt only lawyers. Some provinces exclude certain professions on the basis that what they do is of more value to society than serving on a jury—typically doctors and firefighters, and in some provinces dentists and veterinarians as well.

53 "Here as well, qualifications vary by province. Ontario, for example, allows persons convicted of certain summary offences to serve on juries. Even where some offences will not disqualify a potential juror, these rules are not always clear and may lead to some people indicating they are ineligible when they are not in fact disqualified. See Ontario Ministry of the Attorney General, "Instructions and Information About Completing the Juror Questionnaire", online: Ontario Ministry of the Attorney General <https://www.attorneygeneral.jus.gov.on.ca/english/courts/jury/instructions.php> [https://perma.cc/NU4S-H3YD]."

54 *Church of Scientology*, *supra* note 26.

the summons that they are not Canadian citizens automatically disqualifies them from serving as jurors. Providing Indigenous people with the option to declare on the summons that they are First Nations citizens (and therefore legally Canadian) would easily remove this obstacle.[55]

Disqualification based on a criminal record also creates a significant hurdle for would-be Indigenous jurors, due to the pervasive overincarceration of Indigenous people in Canada.[56] Some provinces, such as British Columbia, disqualify all jurors with a criminal record, while others, such as Ontario, only disqualify those convicted of a more serious offence that may be prosecuted by indictment.[57] If a juror has been convicted of an offence for which they have received a pardon, they are eligible to serve. However, a lack of awareness of pardon procedures amongst Indigenous people, as well as costs associated with applying for a pardon, may nevertheless lead to the exclusion of a significant number of Indigenous jurors, often due to an old conviction for a minor offence.[58] The Iacobucci Report recommends that provinces amend their respective jury legislation to achieve uniformity with the federal *Criminal Code* provisions, which disqualify only those convicted of an offence for which they were sentenced to a term of imprisonment of two years or more.[59]

B. Economic Barriers

A sheriff or judge can excuse potential jurors if serving on the jury would cause them serious personal hardship.[60] Universally low rates of juror compensation lead to frequent exclusion of Indigenous jurors on this basis, as Indigenous people are more likely to be unable to afford the cost of missing work to serve on a jury.[61] Juror compensation rates currently range from no compensation for the first ten days of trial in Ontario, to $20 per day in British Columbia, to $103 per day in Quebec.[62] Compensation for elder and child care, meals, and accommodation varies by province, but in all cases jurors are reimbursed for these expenses after the trial concludes. This further disadvantages Indigenous jurors who lack

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55 see Iacobucci Report, *supra* note 4 at para 238.

56 See "Indigenous overrepresentation in the criminal justice system" (January 2017), online: Department of Justice <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jan02.html> [https://perma.cc/6RYZ-ML8W].

57 *Jury Act,* RSBC 1996 c 242, s 3(1)(p); *Juries Act*, RSO 1990 c J-3, s 4(b).

58 Iacobucci Report, *supra* note 4 at para 244.

59 *Ibid* at para 376 (Recommendation 14). See also *Criminal Code of Canada*, RSC 1985, c C-46, Part XX – Procedure in jury trials, s 638(1) [*Criminal Code*].

60 See provincial jury acts.

61 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries; Iacobucci Report, *supra* note 4 at para 243.

62 British Columbia pays $20/day for the first ten days of trial, $60/day for days 11 to 49, and $100/day thereafter (*Jury Regulation*, BC Reg 282/95, s 1). British Columbia's initial rate is the lowest in the country after Ontario, which provides no compensation for the first 10 days of trial. The highest is Quebec, which provides $103/day, rising to $160/day if the trial exceeds 57 days (*Jurors Act*, Regulation respecting indemnities and allowances to jurors, Chapter J-2, r 1). For a general overview of compensation by province, see Miriam Katawazi, "Can you afford jury duty? Here's how each province compensates you for your service," *Toronto Star* (16 February 2018), online: <https://www.thestar.com/news/investigations/2018/02/16/can-you-afford-jury-duty-heres-how-each-province-compensates-you-for-your-service.html> [https://perma.cc/74E7-HSET].

credit and cannot pay these extra expenses out of pocket.[63] In many cases, compensation rates have not been adjusted in several decades. Increasing compensation apace with cost-of-living increases would provide more equitable access to jury duty for Indigenous people as well as other economically disadvantaged segments of society.[64]

C. Geographic Area

The delineation of the geographic, or 'catchment,' area from which the jury panel is drawn can significantly impact the jury's representativeness. A jury panel selected from a smaller area will be more representative of that area, but many jurors may know the complainant, accused, lawyers, or judge involved in the case. A jury panel drawn from a larger area will be more impartial but will also cause hardship for jurors who have to travel long distances, and the jury may be less representative of the community in which the offence took place.[65]

In assembling a jury panel, sheriffs typically summon people who live within a certain radius of the courthouse. As many Indigenous people live far from major city centres, they may never have the chance to serve on a jury for this reason.[66] The Quebec *Jurors Act*, for example, disqualifies all persons living in certain northern judicial districts from serving on juries, unless they live within 60 kilometres of a courthouse.[67] Crime does not limit itself to within a certain radius of courthouses, however. Policies such as Quebec's can obstruct the assembly of a representative jury in cases of alleged offences committed in remote communities.

The Northwest Territories ("NWT") has taken a distinctly different approach to this issue.[68] The NWT encompasses a vast expanse of Canadian tundra, interspersed with many small communities accessible only by air or winter ice road.[69] As in many of the provinces, jurors are drawn from within a certain radius of the court.[70] However, the location of that court is flexible, and the practice in the territory has long been to hold the trial in the community where the alleged offence took place.[71] While this may lead to more prospective jurors being excused for a lack of impartiality, it virtually guarantees that the jury is representative of the

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63 Aboriginal Justice Inquiry, *supra* note 3 at Chapter Nine: Juries; Iacobucci Report, *supra* note 4 at para 242.

64 As recommended in the Iacobucci Report, *supra* note 4 at para 379.

65 Israel, *supra* note 40 at 47.

66 *Ibid.*

67 *Jurors Act*, CQLR c J-2, s 4(k).

68 *Jury Act*, RSNWT 1988, c J-2.

69 For an interesting, though now slightly dated, discussion of the NWT's unique approach to the jury system, see Christopher Gora, "Jury Trials in the Small Communities of the Northwest Territories" (1993) 13 Windsor YB Access Just at 156.

70 In British Columbia, for example, the Sheriff's Policy Manual directs Sheriffs to obtain names of inhabitants of reserves only if those reserves are located within 100 kilometres of the Sheriff's Office. As the British Columbia Civil Liberties Association notes, many reserves are located in remote parts of the province far outside this radius. Ontario appears to draw jurors from the entire judicial district. However, this approach may simply result in a greater number of jurors being excused by the judge or sheriff for hardship when they are called to appear, rather than being overlooked at the jury roll stage as occurs in provinces with a set radius.

71 *R v Tatatoapik*, 1995 CarswellNWT 65, 28 WCB (2d) 493 (SC(AD))

community. Courts in the NWT have recognized not only the right to a jury of one's peers, but also the right to be tried in one's own judicial district.[72]

The practice in the NWT accords with the recommendation of the Aboriginal Justice Inquiry of Manitoba that trials be held in the community in which the alleged offence took place, and that jurors be drawn from within 40 kilometres of that community. If that radius yields an insufficient number of jurors, the inquiry recommended that additional jurors be summoned from demographically and culturally similar communities.[73]

Unfortunately, concerns have arisen in recent years regarding practical difficulties in implementing the NWT approach described above. The very small size of communities outside the NWT capital, Yellowknife, has led to difficulties in finding a suitable number of impartial jurors to hear trials in those locations.[74] A 2014 CBC News article reported that the inability to find sufficient numbers of jurors had led to 11 mistrials in the preceding two years, with the retrials then being moved to Yellowknife.[75] However, if larger southern provinces were to follow the NWT approach of holding trials in the community where the offence took place, the problems encountered by the NWT courts may be less pronounced by reason of those provinces' larger geographic size and populations. Moreover, it may be easier and less expensive in many provinces to bring in jurors from demographically similar nearby communities, as recommended by the Aboriginal Justice Inquiry.

IV. THE TRIAL JURY

Indigenous people whose names make it onto the jury roll, who receive a summons and attend court for jury selection, then face the possibility of being excluded at the in-court selection stage. A major issue and source of criticism following Gerald Stanley's trial was his defence counsel's use of the peremptory challenge mechanism, discussed further below, to exclude every prospective juror who appeared to be Indigenous. This tactic gave Colten Boushie's family the impression that the "deck was stacked against them."[76] Regardless of the verdict's legal merit, justice in this case was not seen to be done through the eyes of the Boushie family. There are three ways in which Crown or defence counsel can attempt to prevent members of the jury panel from appearing on the 12-member trial jury. This section considers each of these three challenge procedures in turn.

Before proceeding, however, it must be acknowledged that a further major barrier to enhanced Indigenous participation on juries is the perceptions and desires of many Indigenous people themselves. Many people from all walks of life seek ways to avoid the time, expense, and effort

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72 *R v Pudlook*, 1972 CarswellNWT 20 at para 4, [1972] 6 WWR 641 (SC(AD)).

73 Aboriginal Justice Inquiry, *supra* note 3.

74 See e.g. *R v Blackduck*, 2014 NWTSC 48 (CanLII).

75 "Filling juries in small N.W.T. communities a growing problem", CBC News (14 August 2014), online: <https://www.cbc.ca/news/canada/north/filling-juries-in-small-n-w-t-communities-a-growingproblem-1.2735550> [https://perma.cc/D7CV-WW4E].

76 Kent Roach, "Colten Boushie's family should be upset: Our jury selection procedure is not fair," *The Globe and Mail* (30 January 2018), online: <https://www.theglobeandmail.com/opinion/colten-boushies-family-should-be-upset-our-jury-selection-procedure-is-not-fair/article37787115/> [https://perma.cc/C5KD-GWY9].

that service as a juror entails. Indigenous people have a much more compelling reason for wanting to avoid serving as jurors—Canada's shameful history of deeply embedded racism in the country's criminal justice system. Moreover, aspects of the Canadian criminal process are frequently at odds or incompatible with traditional precepts of justice in many Indigenous cultures. As recognized in the Iacobucci Report, such cultural barriers must be meaningfully addressed if the problem of Indigenous underrepresentation on juries is to be fully resolved. A fulsome discussion of these cultural barriers and how they might be overcome is beyond the scope of this paper. However, in order to make progress on this issue, the federal and provincial governments must build meaningful, respectful, nation-to-nation relationships with Indigenous communities and must demonstrate that they are prepared to make changes to the Canadian legal system to identify and address cultural barriers to Indigenous participation on juries. By making some of the legislative and policy reforms outlined in this paper, the government could demonstrate it is acting in good faith and that the Canadian state values the perspectives of Indigenous people as jurors.

A. Challenge to the Entire Panel

At the outset of the jury selection process, section 629 of the *Criminal Code* allows either the accused or the prosecutor to challenge the jury panel in its entirety based on "partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned."[77] Successful challenges on this basis are exceedingly rare, and as some form of deliberate wrongdoing by the sheriff is required, it is unlikely to be an effective means of remedying underrepresentation of Indigenous people on jury panels. In one of the only recorded instances of a successful challenge on this ground, *R v Butler*, the Indigenous accused's counsel alleged in an affidavit that the sheriff had told him in the courthouse hallway that "Indians" had been deliberately excluded from the jury panel because they were "unreliable – they may show up one day for trial and then not come the next because they've gone out and gotten drunk the night before."[78] Absent such a "smoking gun" as the sheriff's admission of deliberate discrimination in *Butler*, the vast majority of attempts to challenge underrepresentation of Indigenous people on jury panels have been unsuccessful.[79]

If the federal government were serious about remedying the problem of Indigenous underrepresentation on juries, it would compensate for the Supreme Court's timid ruling in *Kokopenace* by amending the *Criminal Code.* Specifically, section 629 could be amended to provide a method by which Crown or defence counsel could challenge substantial underrepresentation of Indigenous people on the jury panel in cases involving an Indigenous accused or victim. Gross disparities in representation, such as the 30 percent Indigenous judicial district in the *Kokopenace* case where only 4.1 percent of those on the jury roll were Indigenous, are unacceptable and threaten public confidence in the fairness of jury trials involving Indigenous people. The slippery-slope objection that such a challenge procedure

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77 *Criminal Code*, *supra* note 60 at s 629. Courts have set a high bar for excluding jurors on this basis: see *R v Butler*, 1984 CarswellBC 526, [1984] BCJ No 1775 (CA) [*Butler*]; *Kent*, *supra* note 29.

78 *Butler*, *supra* note 77. On appeal, the BCCA held that the affidavit raised sufficient doubt about the jury selection process and that the trial judge's failure to investigate warranted a new trial.

79 Roach, *supra* note 46 at 97.

would need to be extended to guarantee the representation of myriad other groups on jury panels can be answered by reference to Indigenous peoples' treaty and constitutional rights, as well as Canada's sordid, genocidal history involving Indigenous people. The *Criminal Code* already contains provisions directing the courts to accord special consideration to Indigenous people in certain contexts, and there is no reason that such rights cannot be extended to the jury system.[80] Contrary to the rhetoric of some judges that any interference with the jury will be its downfall, guaranteeing true representation of Indigenous people will only serve to strengthen the jury system and public confidence in that system overall. Given that this federal legislative change would require provinces to take substantial action to remedy underrepresentation, the coming into force of the amended section could be delayed, allowing provinces adequate time to bring their jury selection processes into compliance.[81]

Once the jury panel has been accepted, the trial judge may excuse jurors who have an obvious personal interest in the outcome of the trial or a relationship to one of the parties to the case.[82] The judge can also excuse people who would suffer personal hardship if forced to serve as jurors.[83] This provision often eliminates Indigenous or other marginalized people who cannot afford the economic toll of serving on a jury.[84] As previously discussed, increasing rates of juror compensation would be preferable to the current practice of excusing jurors, which essentially limits service as a juror to those privileged enough to afford it.

B. Challenge for Cause

In most cases, no challenge to the entire panel is made, and jury selection proceeds to the second stage, in which the accused or the prosecutor can challenge either an unlimited number of individual jurors, or the panel as a whole, 'for cause.' While somewhat collateral to the issue of Indigenous underrepresentation on juries, the challenge for cause stage of the process can play a key role in addressing the type of widespread racial prejudice displayed by part of Saskatchewan's population in the lead-up to Gerald Stanley's trial.

Challenges for cause are typically based on the ground that the juror "is not impartial."[85] As jurors are presumed to be impartial, counsel making a challenge on this ground must convince the judge that there is a reason to doubt the impartiality of members of the jury

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80 See e.g., *Criminal Code*, *supra* note 59 at s 718.2(e) and *R v Gladue*, [1999] 1 SCR 688, [1999] SCJ No 19.

81 Roach, *supra* note 46 at 213.

82 Steve Coughlan, *Criminal Procedure*, 3rd ed (Toronto: Irwin Law, 2016) at 354. Note that this exclusion is only applied in obvious situations where consent of counsel to excuse the juror can be presumed. If counsel does not consent, the matter will be dealt with under the challenge for cause procedure.

83 *Criminal Code, supra* note 59 at s 632.

84 Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill L J 147 at 153.

85 *Criminal Code*, *supra* note 59 at s 638. Prior to the passage and coming into force of Bill C-75 in 2019, which amended s 638, the relevant ground of challenge was that the juror "is not indifferent between the Queen [in whose name prosecutions are conducted in Canada] and the accused." In my view, the amendment is simply a modernization of the language and should not change the test for a challenge for cause on this ground. Indeed, the Supreme Court of Canada affirmed in *R v Williams*, [1998] 1 SCR 1128, 1998 CanLII 782 at para 9 that "indifference" and "partiality" are interchangeable terms.

panel in judging the case. However, in contrast to the American system in which defence counsel and prosecutors may question jurors in great detail and conduct extensive research into their backgrounds,[86] lawyers in Canada are only provided with each juror's name, address, and occupation. The presumption of impartiality, combined with the limited information counsel receives about each potential juror, means that successful challenges for cause are rare.

In the 1993 case of *R v Parks*, defence counsel argued that anti-black racism in Toronto was so prevalent that each potential juror should be asked whether the fact that the accused was black and the alleged murder victim was white would affect their ability to judge the case impartially. The trial judge's refusal to allow this question to be put to members of the jury panel was overturned on appeal.[87] Five years later, in *R v Williams*, a unanimous Supreme Court held that evidence adduced by the accused of widespread racism against Indigenous people in Canadian society was sufficient to displace the presumption of juror impartiality. Accordingly, both the trial judge in the accused's second trial and the Court of Appeal had erred in refusing to allow defence counsel to question potential jurors as to whether their ability to act impartially would be affected by the fact that the accused was Indigenous and the complainant was white.[88]

In the first trial of the accused in *Williams*, the judge allowed jurors to be questioned as to potential bias, but a mistrial was subsequently declared on procedural grounds.[89] Out of the 43 members of the jury panel who had been questioned, 12 were dismissed due to a risk that they would be racially biased against the accused.[90] Twenty years after *Williams*, however, it is fair to wonder whether most potential jurors in today's society would admit to overt racism against Indigenous people or other minorities. Unfortunately, attempts by defence counsel to ask more nuanced questions of jury panel members, such as "would you agree or disagree that some races are, by their nature, more violent than others?" or "would you agree or disagree that discrimination against racial minority groups is no longer a problem in Canada?" have been rejected by courts on the grounds that they would result in longer, more expensive jury trials and be overly invasive of juror privacy.[91]

While courts often raise the spectre of the American jury system as an argument for the status quo,[92] modest reforms to the challenge for cause stage can be made while avoiding the pitfalls inherent in the US selection process. Given that the Supreme Court in *Williams* unanimously

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86 See e.g. the 15-page questionnaire distributed to prospective jurors in a recent US federal court civil case involving the singer Taylor Swift, which includes questions such as "What are your primary sources of news?"; "Is anyone in your immediate family a fan of Taylor Swift?"; and "Have you, your spouse/partner, or your children, ever been inappropriately touched?" online: <http://www.cod.uscourts.gov/Portals/0/Documents/Media/15cv1974/15-cv-1974_Juror_Questionnaire.pdf> [https://perma.cc/W6YS-3Z3Q].

87 See *R v Parks*, 1993 CarswellOnt 119, [1993] OJ No 2157 (CA).

88 *R v Williams*, [1998] 1 SCR 1128, 1998 CanLII 782.

89 *Ibid* at para 3. Defence counsel argued that the application for a mistrial was really an attempt to re-litigate the challenge for cause application before a new judge.

90 *Ibid.*

91 See e.g. *R v Gayle*, [2001] OJ No 1559, 2001 CanLII 4447 (CA).

92 See e.g. *R v Williams, supra* note 88 at para 51.

endorsed the value of questioning jurors in some contexts in order to root out those with racist attitudes, a strong argument exists that the question to be asked of jurors should be more effective than merely asking what amounts to "are you a racist?". Such a question, asked in open court in front of the whole jury panel, has only one socially acceptable answer in modern-day Canada. More nuanced questions regarding jurors' attitudes towards interracial relationships or whether members of certain races tend to be more violent would be far more effective and would still be a far cry from the detailed inquiries conducted in American courts.

C. Peremptory Challenges

Until recently, a third stage in the challenge process allowed Crown and defence counsel to use 'peremptory challenges' to prevent a certain number of jury panel members from sitting on the trial jury without having to provide any justification for the challenge. Gerald Stanley's use of these peremptory challenges to secure an all-white jury prompted widespread calls for reform following his acquittal. Critics argued that the lack of a requirement that lawyers give reasons for their use of peremptory challenges allowed for blatant racial discrimination in jury selection. In response, the federal government abolished peremptory challenges altogether, as part of a larger reform to the *Criminal Code*.[93] The Supreme Court of Canada recently held that the abolition of these challenges was not unconstitutional.[94] While the move to eliminate these challenges was criticized by some defence lawyers,[95] it is very unlikely that any future federal government will move to reinstate them, and therefore this article does not discuss the issue of peremptory challenges further.

V. VOLUNTEER JURORS

In his 2013 Report, Justice Iacobucci recommends that Ontario develop a process whereby Indigenous people living on reserves could volunteer for jury service as a way to supplement the jury roll developed from other source lists that may overlook or underrepresent Indigenous people.[96] The state of New York has allowed residents to volunteer for jury duty for several decades in order to supplement its jury roll, which is developed from five different source lists.[97] In 2014, a member of the New Jersey legislature introduced a bill that would have allowed the government to compile a separate list of citizen volunteer jurors, which would then be added to the jury roll drawn from the regular source lists.[98]

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93 Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, cl 271 (first reading), cl 271. The peremptory challenge provision is abolished in favour of giving the trial judge the power to stand by any juror for reason of personal hardship, maintaining public confidence in the administration of justice, or any other reasonable cause.

94 *R v Chouhan*, 2020 CanLII 75817 (SCC). As of this paper's publication, written reasons for judgment (and the accompanying neutral citation) had yet to be released by the SCC.

95 See e.g. Justin Ling, "Why are we eliminating peremptory challenges?", *CBA National* (19 October 2020), online: < https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2020/why-are-we-eliminating-peremptory-challenges> [https://perma.cc/M895-GS2B].

96 Iacobucci Report, *supra* note 4 at para 376 (Recommendation 12).

97 *Ibid* at para 200.

98 US, *An Act concerning voluntary jury service and amending NJS2B:20-2 and supplementing Title 2B of the New Jersey Statutes*, 216th Legislature, Assembly No 2949, NJ, 2014 (not passed), online:<https://www.njleg.state.nj.us/2014/Bills/A3000/2949_I1.PDF> [https://perma.cc/CEL2-ZDXG].

While that private member's bill did not pass, the policy merits serious consideration as a means to make jury rolls more representative of the community overall.

The most common objection to volunteer jurors is that it would interfere with the foundational principle that jurors are to be randomly selected from a broad cross-section of society. If volunteer jurors were placed directly onto a 12-member trial jury by virtue of them having volunteered, this would clearly be problematic. What these volunteers would actually be volunteering for, however, is simply for their names to be added to the jury roll, on which they did not already appear. Insofar as this increases the overall pool of available jurors, it not only does no damage to the principle of random selection, but actually furthers representativeness by broadening the cross-section of the community from which jurors are chosen. Despite this, Justice Moldaver in *Kokopenace* criticized attempts to "carve out special rules allowing Aboriginal people to volunteer for jury duty", warning that this would "destroy the concept of randomness that is vital to our jury selection process."[99] This was an unfortunate and unwarranted criticism of a reform that was not before the Court. If it is accepted that Indigenous people are significantly underrepresented on jury rolls, the current selection process cannot fairly be characterized as randomly drawing from society. Efforts to remedy the disparity, such as allowing for volunteer jurors, do not detract from the goal of random selection—they further it.

As previously mentioned, central to the Iacobucci Report is an awareness that Indigenous underrepresentation on juries is situated in the broader context of Indigenous peoples' historical and continuing alienation from and distrust of the Canadian justice system and colonial government generally. Mere amendments to federal and provincial jury legislation and policies will not solve this problem. Instead, the Canadian and provincial governments must engage with Indigenous leadership in good faith and on a nation-to-nation basis with respect to jury underrepresentation as well as other criminal justice issues. Following extensive consultation, Justice Iacobucci reported that "First Nations observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent."[100] He noted that "substantive and systemic changes to the criminal justice system are necessary conditions for First Nations participation on juries in Ontario."[101] A fulsome discussion of the types of systemic changes that are necessary is beyond the scope of this article, yet it is important to bear in mind that specific jury reforms will not achieve their goal absent an awareness of their place in a broader push for Indigenous rights and self-determination. The jury system is a foundational component of our criminal justice system and is unlikely to be abolished in the foreseeable future. If we are to achieve meaningful reforms that will successfully address the issue of Indigenous underrepresentation on juries, Indigenous people and their governments must be at the *centre* of the discussion.

A change that allows Indigenous people to volunteer to have their names added to the jury roll would first require an amendment to provincial legislation. A successful volunteer program would require much more than simply mailing a letter to each Indigenous community

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99 *Kokopenace*, *supra* note 5 at para 88.

100 Iacobucci Report, *supra* note 4 at para 210.

101 *Ibid* at para 207.

or its members, however. The distrust between many Indigenous people and the justice system necessitates a more involved outreach effort. One possible model would involve court services officials meeting with Indigenous officials to discuss the program with them and listen to any concerns they may have. With Indigenous leaders' permission, court services workers could hold educational events in each community in order to provide information on the jury system and the benefits of jury service. Those interested in volunteering could complete a form, similar to a jury summons questionnaire, to determine whether they are eligible, and court services workers could answer questions regarding their eligibility to ensure that eligible persons are not erroneously disqualified. The names of eligible persons would then be added to the province or territory's jury roll, if they did not already appear on it. Wherever possible, information distributed to community members regarding the jury system should be translated into Indigenous languages or delivered in other culturally relevant ways. Ultimately, experts with cultural expertise and experience should be engaged to help design this outreach process.

CONCLUSION

The current jury selection process in Canada leads to the widespread exclusion and underrepresentation of Indigenous people at each of the process's three stages. This pattern of exclusion denies Indigenous people the many benefits of jury service catalogued in *Sherratt* and reinforces perceptions that the Canadian criminal justice system is indifferent or even hostile to Indigenous concerns and perspectives. The persistent phenomenon of non-Indigenous juries hearing cases in parts of Canada where large percentages of the population are Indigenous threatens public confidence in the administration of justice in this country. Cynthia Petersen, then a University of Ottawa professor and now a Justice of the Ontario Superior Court, eloquently summarizes the message sent by all-white juries in a 1993 article on the need for reform to Canada's criminal jury selection process:

> The disproportionate over-representation of white people on jury panels implies that their values are more important, that their judgment is more respected, and that their perspectives are more legitimate than the values, judgment and perspectives of those who are under-represented. Jurors are invested with the power to make vital decisions which not only affect the outcome of individual trials but also contribute to the formation of community standards. The concentration of that power in the hands of white people constitutes institutionalized racism.[102]

The problem of Indigenous underrepresentation is complex and multi-faceted, but it does not lack potential solutions. While fundamental reform to the criminal justice system is ultimately required to repair Indigenous peoples' broken relationship to that system, many proposed reforms to jury selection procedures are process-oriented and can be implemented fairly quickly. Many of these reforms were proposed by Manitoba's Aboriginal Justice Inquiry twenty years ago, and it is long past time that these recommendations were acted upon. These reforms could be criticized as merely tinkering with a broken system. Alternatively, they

102 Petersen, *supra* note 84 at 165.

could be seen as the first step in an ongoing and evolving process of working with Indigenous people and governments to restore their faith in the country's criminal justice system. To be clear, the problem will not be solved merely by implementing the reforms discussed in this paper, but key to addressing the issue as a whole is ensuring that the message sent by Canada's legislation and policies is one of inclusion. As the Supreme Court has stated, a representative jury acts as the "conscience of the community."[103] Serving on a jury allows members of the public to increase their understanding of the criminal justice system, and the public's involvement increases confidence in that system as a whole.[104] Service on a jury can help "demystify" the legal system.[105] The systematic underrepresentation of Indigenous members of the community on juries unfairly denies Indigenous people these benefits. Moreover, it sends a clear message to Indigenous people in Canada that the Canadian justice system values the perspectives and judgment of some members of society above others. Ensuring that Indigenous people are properly represented on juries is critical to enhancing the confidence they place in the justice system. Proper representation affirms Indigenous peoples' value within the Canadian community and allows the public to see justice being done for *all* members of society.

103 *Sherratt*, *supra* note 2.

104 *Ibid.*

105 Petersen, *supra* note 84 at 165.

ARTICLE

DRILLING TO THE BOTTOM OF THE ORPHAN WELL PROBLEM: SUGGESTIONS FOR A BETTER REGULATORY FRAMEWORK FOR PREVENTING AND REMEDIATING ORPHANED OIL WELLS IN BRITISH COLUMBIA

Holly Stewart *

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ABSTRACT

When an oil firm goes bankrupt, its non-productive oil wells are classified as "orphans" and must be plugged and remediated by provincial regulatory bodies. The number of orphan oil wells has increased significantly in the western oil-producing provinces in the past several years. This paper examines the scope of the orphan well problem in British Columbia, policy tools used to address orphan wells in other jurisdictions, and shortcomings of British Columbia's current regulatory framework. It considers the intersection of bankruptcy law and orphan well remediation recently addressed by the Supreme Court of Canada in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, and makes the argument for upfront environmental bonds despite the strong environmental stance taken in that decision.

* Holly Stewart recently completed her JD at the University of Victoria. She is grateful for the support and advice of Rachel De Graaf and the editorial board of *Appeal*. This paper was written prior to the commencement of the author's judicial clerkship at the Supreme Court of British Columbia and reflects her views alone.

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INTRODUCTION

Legacy pollution from defunct natural resource infrastructure and industrial facilities presents a vexing and pervasive environmental problem. Improperly closed mines, for example, can threaten human health and cause environmental damage long after production has shut down, and they are costly for taxpayers to clean up and remediate.[1] The saying that an ounce of prevention is worth a pound of cure is particularly apt when it comes to legacy pollution from natural resource industries. The best way to deal with legacy pollution is to ensure that it is cleaned up earlier, rather than later, thus preventing it from becoming a problem for future taxpayers.

The growth in oil and gas activities across Canada has resulted in tens of thousands of oil wells, mostly spread across the western provinces, a substantial number of which are now in need of decommissioning and restoration. The rest will eventually need sealing and reclamation once they are no longer productive. Oil wells that are not properly sealed, decontaminated, and reclaimed can threaten human and environmental health by leaking contaminants, including methane and brine, into groundwater, and they can release methane into the atmosphere where it contributes to climate change.[2] Legislation in most oil and gas producing jurisdictions requires oil and gas producers to seal a well and reclaim the site once the well is no longer productive.[3] When oil and gas producers go bankrupt before doing so, their oil wells become classified as orphans, meaning there is no legal owner who could be held responsible for sealing and reclamation.[4] These orphan oil wells are financial liabilities, requiring remediation and having no monetary value, and they must be cleaned up by provincial governments. They present a significant risk of becoming a taxpayer burden.

The problem of orphaned oil wells in Alberta received significant media and academic attention after a 2014 downturn in oil and gas prices resulted in thousands of oil wells being added to the list of orphan sites.[5] Remediation of these orphan wells will cost tens of

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1 See e.g. University of Victoria Environmental Law Centre, "BC Mining Law Reform: A Plan of Action for Change" (Victoria: University of Victoria Environmental Law Centre, 5 November 2019) online (pdf): <elc.uvic.ca/wordpress/wp-content/uploads/2019/11/BCMLR-Briefs-print-lowres.pdf>[https://perma.cc/Z2EV-2QPZ].

2 See Vanessa Alboiu & Tony R Walker, "Pollution, management, and mitigation of idle and orphaned oil and gas wells in Alberta, Canada" (2019) 191:611 Environmental Monitoring & Assessment at 4–8.

3 See e.g. *Drilling and Production Regulation*, BC Reg 282/2010, Part 5 [DPR]. See also *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 27. See also *The Oil and Gas Conservation Regulations, 2012*, RRS c O-2, Reg 6.

4 Most jurisdictions set out the power to classify an oil well or other site or facility as an orphan in legislation. See e.g. *Oil and Gas Activities Act*, SBC 2008, s 45(2) [*OGAA*].

5 See e.g. Tracy Johnson, "Alberta attempts to tackle its abandoned well problem", *Canadian Broadcasting Corporation* (10 May 2017). See also Tony Seskus, "Orphan well clean-up costs could sting Alberta taxpayers if regulator loses court battle", *Canadian Broadcasting Corporation* (21 February 2018). See also Lucija Muehlenbachs, "80,000 Inactive Oil Wells: A Blessing or a Curse?" (2017) 10:3 U Calgary School Public Policy Publications.

millions of dollars.[6] Taxpayer money, in the form of government grants and loans, now funds much of that remediation work.[7] Less attention has focused on British Columbia, where the booming oil and gas sector and its concomitant price volatilities have also caused an increase in the number of orphaned oil wells.[8] Oil and gas production in that province, mostly in the northwestern region, has nearly doubled in the past 10 years.[9] It has been a welcome source of economic growth, contributing $498 million in government royalties and land sales in fiscal 2018.[10] That economic prosperity obscures some of the hidden financial and environmental costs of oil and gas production. These costs include an exponential increase in the number of orphaned oil wells in British Columbia over that same period, mostly due to a 2016/2017 downturn in the industry.

One of the purposes of oil and gas regulation is to ensure that oil and gas producers, and not taxpayers, pay for any pollution associated with oil and gas production. This paper considers how oil and gas regulations in British Columbia could be improved in order to ensure that taxpayers are not liable for current and future orphan oil well remediation costs. Part I addresses the number of orphan oil wells in British Columbia, the recent history of oil company bankruptcies, and the meagre security collected by the provincial regulatory body to seal and reclaim the orphan wells of bankrupt companies. Part II discusses policy tools used in other jurisdictions to address the problem of orphan wells. It introduces the concept of an environmental bond, which is a deposit that an oil well permit holder leaves with a regulatory body as security against the remediation obligations associated with that permit. Part III describes the two orphan well regulatory tools used in British Columbia. One is aimed at funding remediation for the current inventory of orphan wells. The other is similar to, but is not quite, an environmental bond; it is meant to assess the financial riskiness of an oil well permit holder and requires security from that permit holder based on its ratio

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6 The exact cost of remediating Alberta's current inventory of orphan oil wells is hard to estimate with precision because costs vary by site. The 2019 Annual Report from Alberta's Orphan Well Association gives an average reclamation cost of $25,000 per well, with costs ranging from $5,000 to $45,000 per site. Given the 2019 inventory of 3,319 orphan sites in Alberta, total reclamation costs should be around $83 million. See Orphan Well Association, *Annual Report 2019* (Calgary: Orphan Well Association, June 2020) at 10 [*OWA 2019 Annual Report*].

7 See Government of Alberta, "Cleanup boost for old oil and gas sites to create jobs" (18 May 2017), online: *Government of Alberta* <www.alberta.ca/release.cfm?xID=4694019572224-D73F-7246-523724CDE750729C> [https://perma.cc/9PRW-Z3P6]. See also *OWA 2019 Annual Report*, *supra* note 6 at 3. The *OWA 2019 Annual Report* notes two provincial loans to the Orphan Well Association, a $235 million loan in 2017 with interest on this loan covered by a $30 million federal grant, at 8, and repayment set to occur from 2021–2027, at 23; and a $100 million loan in 2020 at 0% interest, with repayment beginning in 2028, at 25. It also notes a $200 million interest-free loan commitment by the federal government in 2020 as part of a COVID-19 stimulus plan with terms yet to be finalized, at 25.

8 Part I of this paper discusses the number of orphan wells in British Columbia in more detail.

9 See British Columbia Oil and Gas Commission, *British Columbia's Oil and Gas Reserves and Production Report* (Victoria: British Columbia Oil and Gas Commission, 2019).

10 See Office of the Auditor General of British Columbia, *The BC Oil and Gas Commission's Management of Non-operating Oil and Gas Sites* (Victoria: Office of the Auditor General of British Columbia, 2019) at 15 [*Management of Non-Operating Sites*].

of productive oil wells to non-productive, liability-laden wells. In theory, both tools are economically efficient. In practice, they tend to be ineffective. Part IV considers the provincial regulator's ability to recover the orphan well remediation costs from a bankrupt permit holder. The regulator's ability to recover in bankruptcy proceedings depends on where it ranks among the other creditors, which in turn requires considering how a recent Supreme Court of Canada decision, *Orphan Well Association v Grant Thornton Ltd* [*Redwater*], might apply in British Columbia.[11] It is not yet clear how that decision will apply in British Columbia and, as a result, it is not apparent whether the regulator will recover ahead of, or behind, the bankrupt permit holder's other creditors. Part V puts forward the argument that, given the weaknesses in the current regulatory framework and the uncertainty when it comes to the provincial regulator recovering costs in bankruptcy proceedings, a framework that incorporates upfront environmental bonds would be preferable to the current one.

I. THE SCOPE OF THE ORPHAN WELL PROBLEM IN BRITISH COLUMBIA

A. How Oil Wells Become Orphans

Once an oil well is no longer productive, it must be sealed and plugged with concrete to avoid contamination of ground and surface water and to prevent methane from leaking from the well.[12] This process is often termed plugging, decommissioning, or abandonment.[13] Surface structures must be removed and the site returned to its original condition, with any contaminants cleaned up.[14] This process is referred to as restoration or reclamation.[15] The terms used to describe these processes vary between jurisdictions. For simplicity, this paper will refer to both processes collectively as remediation. An orphan well is one that is no longer productive and requires remediation but has no legal or financial owner who could be held accountable for those remediation obligations, typically because the permit holder is insolvent or cannot be located.[16] The distinction between an "orphan well" and an "abandoned well" is key, despite the similarity in how those terms are used colloquially. An "abandoned" well is one that has been plugged and remediated and has no pending regulatory obligations

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11 2019 SCC 5 [*Redwater*].

12 See Alboiu & Walker, *supra* note 2 at 4–8.

13 See *DPR*, *supra* note 3, Part 5, which refers to "abandoning, plugging and restoring wells". See also Jacqueline Ho et al, "Managing Environmental Liability: An Evaluation of Bonding Requirements for Oil and Gas Wells in the United States" (2018) 52:7 Environmental Science & Technology 3908 [Ho et al, "Evaluation of Bonding Requirements"], discussing regulations in American states that require plugging and abandonment, and the environmental risks associated with improperly plugged wells, at 3908. See also *OWA 2019 Annual Report*, *supra* note 6 at 8, explaining that the Orphan Well Association uses the term "decommission" to refer to the "responsible abandonment of energy infrastructure".

14 See *DPR*, *supra* note 3, s 28. See also Ho et al "Evaluation of Bonding Requirements", *supra* note 13 at 3908, discussing well site reclamation in American states.

15 *DPR, supra* note 3, s 28.

16 See Benjamin Dachis, Blake Shaffer & Vincent Thivierge, "All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells" (2017) 492 CD Howe Institute Commentary at 5 for a succinct description of the term orphan well.

attached to it, whereas an "orphan well" is one that needs to be abandoned but has no legal or financial owner.[17] The term "orphan well" is used nearly uniformly across jurisdictions in Canada and the United States.[18]

Legislation in Alberta and British Columbia allows the provincial regulatory body to designate a non-productive oil well requiring remediation as an orphan if the permit holder or licensee goes bankrupt.[19] The British Columbia Oil and Gas Commission ("Commission")—the regulatory body for oil and gas within that province—may designate an oil well, facility, pipeline, or oil and gas road as an "orphan site" if the permit holder is insolvent or if the Commission cannot identify or locate the permit holder.[20] The Commission has statutory authority to remediate sites designated as orphans.[21] The vast majority of orphan sites in British Columbia are orphan wells.[22] For that reason, this paper will use the term orphan well.

B. The Scale of the Orphan Well Problem in British Columbia

Most jurisdictions aim to prevent orphan sites from becoming taxpayer liabilities, but weak regulations create the risk that provincial or federal governments will ultimately pay for orphan site remediation. Understanding the scope of the potential financial risk facing taxpayers requires consideration of recent surveys of the number of orphan sites in British Columbia and what it will cost to remediate them.

The number of orphan sites in British Columbia has grown exponentially in recent years. There are currently 770 orphan sites in the province, roughly a seventeen-fold increase over the last five years, and the Commission has remediated 56 of those sites.[23] A recent list of those orphan sites, dated 24 June 2020, shows the vast majority of those 770 are orphan wells.[24] In 2010, there were only 38 orphan sites in British Columbia, all "historical sites with no identifiable owner".[25] That number remained fairly steady for five years, and in the 2015/2016 fiscal year there were only 45 orphan sites.[26] In the 2017/2018 fiscal year, the inventory jumped to 307 due to the economic downturn in the oil industry.[27]

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17 See Dachis, *supra* note 16 at 4 for a discussion of the distinction between these terms.

18 See Ho et al, "Evaluation of Bonding Requirements", *supra* note 13 at 3908.

19 See *OGAA supra* note 4, s 45(2). See also *OGAA Act*, *supra* note 3, s 70(2).

20 *Ibid.*

21 *Ibid,* s 45(1).

22 See British Columbia Oil and Gas Commission, *List of Current Orphans (v2)* (Victoria: British Columbia Oil and Gas Commission, 24 June 2020), online (pdf): <www.bcogc.ca/files/resources/Current-Orphans.pdf> [https://perma.cc/S9PN-NSFH].

23 See British Columbia Oil and Gas Commission, "Former Ranch Energy Assets Declared Orphan Sites (IB 2020-05)" (17 June 2020), online: *Government of British Columbia* <www.bcogc.ca/news/former-ranch-energy-assets-declared-orphan-sites-ib-2020-05/> [https://perma.cc/3LTC-3NA6] [Ranch Energy]. All 401 orphan sites added to the orphan site inventory were oil wells.

24 See *List of Current Orphans (v2)*, *supra* note 22. Less than 15 orphan sites are facilities, and the rest are oil wells.

25 See Office of the Auditor General of British Columbia, *Oil and Gas Sites Contamination Risk: Improved Oversight Needed* (Victoria: Office of the Auditor General, 2010) at 10.

26 See Office of the Auditor General of British Columbia, *Management of Non-Operating Sites*, *supra* note 10 at 44.

27 *Ibid*.

The number of orphan sites doubled in June 2020 when the bankruptcy of Ranch Energy Corporation added 401 oil wells to the list of orphan sites.[28]

Based on existing estimates from the Office of the Auditor General of British Columbia ("Auditor General") and the Commission, the total cost for remediating existing orphan sites in British Columbia lies between $77 million and $100 million. The Commission estimates abandonment costs at $130,000 for an average site around Fort St. John, but costs per site could be as low as $30,000 and as high as $250,000 depending on site and well characteristics.[29] In 2019, the Auditor General estimated remediation costs for the then-current 307 orphan sites at $33 million, which calculates to roughly $107,000 per site.[30] The Commission estimates that the 401 orphan wells resulting from the Ranch Energy bankruptcy add up to a liability of $40 million to $50 million.[31] These sources show that remediation costs per orphan site range from $100,000 to $130,000. Multiplying those averages by the current inventory of 770 orphan sites in British Columbia gives an estimate of $77 million to $100 million in total orphan well liabilities.[32]

It is difficult to predict whether this strong uptick in the number of orphan wells will continue. Low oil prices and economic fallout due to the COVID-19 pandemic may cause more bankruptcies and more orphaned sites in the near future.[33] The Auditor General notes that total restoration costs for all the non-operating well sites in British Columbia in 2019 add up to roughly $3 billion.[34] That number suggests that if the number of orphan wells continues to increase, then there will be cause for taxpayer concern.

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28 See British Columbia Oil and Gas Commission, "Ranch Energy", *supra* note 23.

29 See British Columbia Oil and Gas Commission, *2018/19 Annual Service Plan Report* (Victoria: BC Oil and Gas Commission, July 2019) at 11 [*2018/19 Service Plan*].

30 See Office of the Auditor General of British Columbia, *Management of Non-Operating Sites*, *supra* note 10 at 44. The Auditor General's report also estimates total restoration costs (to abandon the sites and completely restore them to their original condition) for the then-inventory of 307 sites at $73 million to $103 million.

31 See Betsy Trumpener, "Collapsed Alberta energy company leaves behind 401 'orphan' wells in BC, more than doubling total" *Canadian Broadcasting Corporation* (19 June 2020). See also British Columbia Oil and Gas Commission, *2020/2021–2022/2023 Annual Service Plan Report* (Victoria: BC Oil and Gas Commission, February 2020) at 15, estimating $50 million in additional orphan well remediation costs due to "receivership of major well operator".

32 See British Columbia, Legislative Assembly, Committee, "Bill 15 – Energy, Mines and Petroleum Resources Statutes Amendment Act, 2018", 41-3, No 125 (25 April 2018) [Hansard]. In 2018, Honourable Michelle Mungall estimated it would cost $62 million to clean up 307 sites, suggesting that the range of $77 million to $100 million errs on the low end. The sources relied on in making these calculations are not always clear on whether those costs would include just plugging and abandonment (i.e. sealing the well with concrete) or assessment, removing existing structures, and site restoration, which all significantly add to the costs. Again, this suggests that these calculations might underestimate total costs.

33 See Kyle Bakx, "More Canadian oilpatch companies seek CCAA protection to restructure", *Canadian Broadcasting Corporation* (30 June 2020).

34 See Office of the Auditor General, *Management of Non-operating Sites*, *supra* note 10 at 20. In May 2018, there were 27,526 oil and gas wells in British Columbia. Of these, 7,474 were inactive wells that had not been decommissioned (i.e. plugged or sealed), and 3,198 had been decommissioned but the sites not fully restored, for a total of 10,672 non-operating well sites that need some form of remediation work.

Governments have already started providing some funding for orphan well remediation in the form of grants and loans. For instance, the federal government recently announced $1.7 billion to clean up orphan sites in British Columbia, Alberta, and Saskatchewan.[35] Orphan well remediation in Alberta is increasingly funded through grants and government loans.[36] Public funding suggests orphan wells are increasingly becoming a taxpayer problem.

II. SOME POLICY TOOLS FOR ADDRESSING THE PROBLEM OF ORPHAN WELLS

A. Environmental Bonds: Security Deposits Against Future Environmental Liabilities

Financial assurance mechanisms are common tools for addressing unpredictable future risks and anticipated future financial obligations across a range of hazardous activities. A classic example is car insurance, which assures other road users that the driver can pay for any accidents caused by their driving.[37] In the natural resources context, these financial assurance mechanisms can protect against unforeseen hazards—oil spills, for instance—and can ensure that operators pay for predictable environmental obligations that will only arise far in the future—for example, reclaiming non-productive mines.[38] More specifically, when it comes to oil wells, financial assurance mechanisms can be used to ensure that oil producers pay for their remediation obligations that will only arise once the well is no longer productive and has no economic value.

Environmental bonds are one form of financial assurance mechanism.[39] The term "environmental bond" describes some form of security deposit given to a regulator against a company's future remediation obligations. The security deposit is returned to the company once it performs those obligations, or it is used by the regulator if the company does not perform those obligations.[40] Environmental bonds are common policy tools in jurisdictions that produce oil and gas.[41]

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35 See Kathleen Harris, "Trudeau announces aid for struggling energy sector, including $1.7B to clean up orphan wells", *Canadian Broadcasting Corporation* (17 April 2020).

36 See Government of Alberta, "Cleanup boost for old oil and gas sites to create jobs", *supra* note 7. See also *OWA 2019 Annual Report*, *supra* note 6 at 10 and 25.

37 See Zachary CM Arnold, "Preventing Industrial Disasters in a Time of Climate Change: A Call for Financial Assurance Mandates" (2017) 41:1 Harv Envtl L Rev 243 at 263.

38 *Ibid* at 270 and 273.

39 See Colin Mackie & Laurel Besco, "Rethinking the Function of Financial Assurance for End-of-life Obligations" (2020) 50 Environmental L Reporter at 10573. FARs include surety bonds, letters of credit, bank guarantees, self-bonds, and cash deposits. See also Arnold, *supra* note 37, on requiring participants to carry insurance as a form of financial assurance mechanism. See Dachis, *supra* note 16 at 8.

40 See Dachis, *supra* note 16 at 8, offering a succinct definition. Most authors use the term "environmental bond" without defining it.

41 See Judson Boomhower, "Drilling Like There's No Tomorrow: Bankruptcy, Insurance, and Environmental Risk" (2019) 109:2 American Economics Rev 391 at 396, discussing environmental bonds used in Texas. See also Ho et al, "Evaluation of Bonding Requirements", *supra* note 13, surveying bonding requirements in 13 states. See also Christopher S Kulander, "Surface Damages, Site-Remediation and Well Bonding in Wyoming – Results and Analysis of Recent Regulations" (2009) 9:2 Wyo L Rev 413 at 440.

Environmental bonds are particularly useful for protecting against what Judson Boomhower, Assistant Professor in the Department of Economics at the University of California San Diego, describes as the "judgment-proof problem" of oil well environmental liabilities.[42] Bankruptcy protection allows companies to take risks knowing that, in the worst-case scenario, their liabilities are discharged in bankruptcy.[43] The judgment-proof problem arises when firms take on liabilities, specifically environmental or public health risks, that exceed the value of their assets, making them effectively judgment-proof.[44] Taking on such risks may give a firm an advantage over competitors.[45] Boomhower notes that oil well remediation obligations can present a judgment-proof problem because, without policy interventions in the oil industry, firms have few incentives to remediate non-productive oil wells or to ensure that the costs of their remediation obligations do not exceed the value of their assets.[46] Bankruptcy protection also creates the risk that a debtor will avoid or delay performing regulatory obligations if those obligations can be discharged in bankruptcy.[47]

Small differences in environmental bonding requirements for oil wells can lead to large differences in effectiveness, as noted in a report by Jacqueline Ho, Alan Krupnick, Katrina McLaughlin, Clayton Munnings, and Jhih-Shyang Shih, researchers at the American non-profit research organization, Resources For The Future.[48] Bond amount is the major policy choice differentiating one regulatory framework from another, and there is significant academic and policy debate on setting optimum bond amounts.[49] Bond amounts fixed at or near actual remediation costs, characteristic of strong regulatory systems, ensure that the regulator can access sufficient funds to carry out remediation work.[50] Factors like well depth, location, and well type all influence remediation costs, so bond amounts set near remediation costs should vary with those factors.[51] Conversely, since environmental bonds tie up capital for long periods of time and increase the costs of entering the industry for new firms, some

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42 Boomhower, *supra* note 41 at 396.

43 *Ibid* at 391.

44 *Ibid*.

45 *Ibid* at 392–393.

46 *Ibid*.

47 See Anna J Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80:1 Sask L Rev 157 at 166. Lund calls this a "moral hazard".

48 See Jacqueline Ho et al, "Plugging the Gaps in Inactive Well Policy" (Washington, D.C.: Resources for the Future, May 2016), online: <www.rff.org/publications/reports/plugging-the-gaps-in-inactive-well-policy/> [https://perma.cc/BD68-N48Z] [Ho et al, "Plugging the Gaps"]. The authors survey inactive well regulations in a number of American states and make policy recommendations, at 16–50.

49 See e.g. Ho et al, "Evaluation of Bonding Requirements", *supra* note 13 at 3914, discussing some of the considerations that factor into setting bond amounts. See also Dachis, *supra* note 16 at 17, noting that the "[t]he optimal bonding amount is less than the full environmental liability due to the economic distortion created by the bond requirement [reference omitted]."

50 See Ho et al, "Plugging the Gaps", *supra* note 48 at 16 and 21. The authors add at 45 that "[s]tates should require an amount of financial assurance that reflects real world plugging costs."

51 *Ibid* at 23.

commentators argue for bond amounts set at less than actual remediation costs in order to encourage resource development.[52] Empirical evidence shows that bond amounts in most jurisdictions are set substantially lower than actual remediation costs, leading to shortfalls in funding for orphan site remediation.[53] For that reason, most commentary calls for more stringent bond requirements, but ones that still account for industry "liquidity constraints."[54]

Texas provides an example of stringent oil well bonding requirements.[55] As of 2001, all oil well permit holders in Texas must post a bond of two dollars per foot of well depth, with the option of providing a "blanket bond" for a large number of wells.[56] Oil companies can either post cash or assets with the regulator themselves, or they can purchase a "surety bond" from a third-party insurer.[57] Third-party insurers charge a premium on the bond amount based on the financial riskiness (or strength) of that particular company.[58] If the company goes bankrupt, the insurer pays the bond amount to the regulator and then attempts to recover from the bankrupt company's estate.[59] Creating a market for third-party insurance transfers the burden of monitoring the financial health and risk levels of oil companies from the regulator to the third-party insurance providers.[60] It avoids creating liquidity problems or tying up capital for long periods of time, a common critique levelled at environmental bonds.[61] It also ensures that the regulator can access the funds to clean up orphan wells; if a company goes bankrupt, the regulator can use the posted cash or assets, or the insurer will pay out the bond amount. One drawback is that insurers might charge high premiums and transaction costs, driving up costs for producers.[62] Another risk is that insurers will underestimate oil company risk levels and set premiums too low.

Boomhower's Texas case study shows how introducing bonding requirements for oil wells can reduce the number of orphaned oil wells but also change industry composition. Following the introduction of bonding requirements in 2001, the number of firms leaving orphan wells behind when they exited the industry decreased from seven percent to three percent.[63]

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52 Dachis, *supra* note 16 at 17. The authors suggest setting low bonding amounts initially with gradual increases.

53 See Ho et al, "Evaluation of Bonding Requirements", *supra* note 13 at 3913. The authors found that plugging and abandonment expenditures exceeded bond amounts in 11 of 13 states.

54 *Ibid* at 3914.

55 Boomhower, s*upra* note 41 at 396, noting that bonding requirements in Texas are among the most strict.

56 *Ibid* at 404. For example, 100 wells or more can be covered with a $250,000 blanket bond.

57 *Ibid* at 403. Boomhower notes that 97% of producers purchase third-party surety bonds.

58 *Ibid* at 396.

59 *Ibid*.

60 *Ibid* at 393. In Texas, "[f]irms were required to purchase an insurance product from private insurers that was specifically designed to address bankruptcy concerns," and insurers charge a premium based on perceived risk.

61 Dachis, *supra* note 16 at 8.

62 Boomhower, *supra* note 41 at 423. Boomhower notes several dozen firms offer insurance in Texas, suggesting pricing is competitive.

63 *Ibid* at 416–417. Boomhower took averages for the two years before and after the introduction of bonding requirements. The bond requirements decreased the "industry-wide orphan well rate by 65 percent", at 421.

Bonding requirements also caused small oil firms to go out of business: a total of five percent of oil producers exited the industry in the 12 months after bonding requirements were introduced.[64] All were small firms who also represent the biggest polluters, as 100 percent of orphan wells in Texas were associated with the 20 percent of production that came from the smallest firms.[65]

It is not entirely clear why small oil firms are disproportionately responsible for orphaned wells and other forms of pollution. Nor is it clear if the same phenomenon exists in British Columbia. Boomhower explains this phenomenon with the theory that small firms may take on excessive environmental risks in order to remain competitive against larger firms.[66] Anthropologist Caura Wood's work offers a more structural explanation, albeit one based on qualitative and anecdotal research.[67] Junior energy companies compete to "amass an inventory of hydrocarbon reserves in a short period of market time" with the anticipated reward of being purchased by a large oil producer, suggesting that industry structure and market forces concentrate high risk (and high reward) in smaller companies.[68] The buy-and-sell nature of the oil industry might also encourage aggregation of risk among small producers. Christopher S Kulander, Professor at the South Texas College of Law Houston, writing in 2009, described the phenomenon in Texas of selling wells with "dwindling production … down the company 'food chain' so that wells circling the drain of economic viability are common in the portfolio of financially unstable corporations."[69] When those companies inevitably go out of business, they end up "orphaning a large group of wells in one fell swoop."[70] Wood's ethnographic account of a small Alberta oil company in the mid-2010s, and the liability-ridden assets it accepted as part of a deal to stave off bankruptcy, suggests this practice existed in Alberta at the time of the 2014 downturn in oil.[71]

One reason why Texas's bonding requirements are so effective is that Texas requires an upfront bond from oil producers against their remediation obligations or a surety bond purchased

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64 *Ibid* at 393.

65 *Ibid* at 406. Data collected was from March 1996 to February of 2002. "One hundred percent of orphan wells, 98 percent of field rules violations, and 41 percent of blowouts are associated with the 20 percent of production that comes from the smallest firms."

66 *Ibid* at 392. Research for this paper did not come across any studies indicating whether environmental risk also concentrates among small producers in the oil and gas industry in British Columbia.

67 See Caura Wood, "Inside the Halo Zone: Geology, finance and the corporate performance of profit in a deep tight oil formation" (2016) 3:1 Economic Anthropology 43.

68 *Ibid* at 44.

69 See Kulander, *supra* note 41 at 440. Kulander describes Alberta's "regulatory experiences with orphaned wells [as] much less problematic" at 442, though his comments were written in 2009, prior to the downturn in 2014.

70 *Ibid*.

71 See Caura Wood, "Orphaned wells, oil assets, and debt: the competing ethics of value creation and care within petrocapitalist projects of return" (2019) 25:S1 J Royal Anthropological Institute 67. Facing severe financial distress, a junior oil company accepted 1,000 wellbores, over half of which needed abandonment or had environmental liabilities attached, used those wells to secure a new loan, then immediately commenced bundling them to pass them off to other distressed firms, at 80–83.

from a third party.[72] Cash deposited upfront with a regulator guarantees the regulator can use those funds for remediation activities, whereas weaker forms of financial assurance—such as liens or proof of financial statements—are less likely to ensure that the regulator can access sufficient funds for remediation.[73] Other policy choices related to environmental bonding for oil wells include the lowest possible bond amount, whether to allow blanket bonds (a discount on the bond amount for a larger number of wells), and whether to link bond amounts to a permit holder's previous compliance history.[74]

Aside from whether and how to rely on environmental bonding, another major policy decision is how to fund remediation for existing orphan wells. Evidence suggests that bond amounts in most oil and gas jurisdictions are nearly always insufficient to cover the actual costs of orphan well remediation, so governments must find other funding sources.[75] This typically involves deciding whether taxpayers, remaining industry participants, or new entrants should fund remediation and how to apportion those costs appropriately.[76] For instance, if current industry participants are funding remediation of orphan sites left by now-bankrupt oil firms, should their contributions be based on their ability to pay or based on their respective risks of going bankrupt and creating more orphaned oil wells? As a final note, policy tools exist aside from environmental bonding, such as direct regulation, relying on the tort system, mandatory insurance, environmental risk-premiums, and minimum asset requirements.[77]

B. Recovery During Bankruptcy Proceedings: Uniquely Canadian Challenges

The regulator's ability to recover its costs is an important piece of the regulatory framework. Depending on applicable laws, it may be easy or difficult for a regulator to recover costs during bankruptcy proceedings. Ho et al, in their report for Resources For The Future, postulate that if recovery of remediation costs is difficult, costly, and litigious, regulators

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72 See Boomhower, *supra* note 41 at 403.

73 See Ho et al, "Plugging the Gaps", *supra* note 48. At 21–22 and at 45, the authors note that cash, guarantees by third parties like surety bonds, letters of credit, and trust accounts are described as 'strong' forms of financial assurance. Liens and financial statements are 'weak forms'. Annual fees are typically set so low that they are ineffective.

74 *Ibid*. Minimum bond amounts varied from $5,000 per well in Kansas to $200,000 in California, at 25. The authors recommend against blanket bonds, at 27, or at least only allowing them with caution, since blanket bond amounts tend to be significantly less than actual remediation costs. They discuss linking bond amounts with previous compliance history at 21–22.

75 See Ho et al, "Evaluation of Bonding Requirements", *supra* note 13 at 3913.

76 See Ho et al, "Plugging the Gaps", *supra* note 48 at 48. The authors recommend that states "develop more sustainable means of funding their orphaned well plugging programs."

77 See Dachis, *supra* note 16 at 8 (on the first four options); see also Boomhower, *supra* note 41 at 423 (on the last).

and governments are less likely to have funds available to perform remediation work.[78] However, granting significant powers to a regulator to recover costs, both before and during bankruptcy proceedings, is not as simple a policy choice as it may first appear.

Anna Lund, Assistant Professor in the Faculty of Law at the University of Alberta, points out that in Canada, the ease with which a provincial regulator can recover remediation costs during bankruptcy proceedings is complicated by the federal power over bankruptcy, which, due to federal paramountcy, will supersede any conflicting provincial environmental legislation.[79] This is further complicated by the legal test applied by courts for determining when a particular claim is a "provable claim", a concept that is "central to insolvency law".[80] Provable claims are automatically stayed in bankruptcy and are subject to specific ordering set out in the *Bankruptcy and Insolvency Act* ("*BIA*").[81] Non-provable claims are not stayed and can continue to be enforced "notwithstanding the insolvency proceedings."[82] Thus, if a regulator advances a claim against an oil producer or its trustee once insolvency proceedings are initiated—for example, in the form of an order that the oil producer or its trustee abandon and reclaim its non-productive oil wells—and that order is considered a provable claim, it is subject to the ordering in the *BIA*, usually landing the regulator amongst the unsecured creditors.[83] If the regulator's claim is not provable in bankruptcy, then it is not stayed and can be enforced regardless of bankruptcy proceedings, allowing the regulator to recover during and after those proceedings.[84]

This paper will later return to the leading case on whether a regulator's remediation order is a claim provable in bankruptcy, *Redwater*, and discuss its potential application in British Columbia.[85] For now, in order to illustrate the particular challenges in designing a regulatory system where a regulator can recover most or all of the oil well remediation costs in bankruptcy proceedings, this section will describe the legal test developed in cases prior to *Redwater* and the criticisms of that test as summarized by Lund. Lund's work shows that the more power a regulator has to recover remediation costs in bankruptcy proceedings and the more steps it takes towards enforcing remediation obligations, the more likely it is that the regulator's claim will end up among the unsecured creditors.[86] Conversely, the less power the regulator

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78 See Ho et al, "Evaluation of Bonding Requirements", *supra* note 13 at 22. The authors make this comment with respect to the different types of financial assurance that can be required under an environmental bonding system. They note liens and other forms where "collection requires legal operation" are "weaker" forms, meaning it is less likely that the regulator will be able to recover their costs. This paper assumes that, similarly, the likelihood of a regulator recovering remediation costs from a bankrupt firm, and the process required for it to do so, will influence whether or not the regulator has sufficient costs for well remediation. The problem of whether or not the bankrupt firm's estate has enough value to cover remediation costs is a separate issue.

79 See Lund, *supra* note 47 at 170.

80 *Ibid* at 159.

81 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 2, 69.3, 121, and 124. See Lund, *ibid*.

82 See Lund, *ibid*.

83 *Ibid* at 167–168.

84 *Ibid* at 159.

85 *Redwater*, *supra* note 11.

86 See Lund, *supra* note 47 at 166–168.

has and the fewer steps it takes, the more likely its claim will not be stayed when the debtor enters bankruptcy, thus allowing the regulator to effectively recover ahead of creditors.[87]

The test for a claim provable in bankruptcy has three requirements, as set out in *Newfoundland and Labrador v AbitibiBowater Inc* [*AbitibiBowater*]:[88]

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation.

If any of the three prongs of the *AbitibiBowater* test are not met, then the claim is not a claim provable in bankruptcy and, therefore, not stayed.[89] The first and third prongs of the test are the most applicable where a regulator is advancing a remediation claim or making a remediation order against a bankrupt firm or its trustee. The test is highly fact-specific, and thus it is hard to predict whether a regulator's remediation order will be considered a claim provable in bankruptcy in any particular set of circumstances.[90]

Lund points out that the nature of the test and its application by courts create "perverse incentives" for all parties involved: creditors, regulators, and legislators.[91] Regulators have an incentive to show that their claims are not provable in bankruptcy.[92] The actions taken by the regulator in issuing a remediation order can influence whether the order is considered a claim provable in bankruptcy.[93] The third prong of the test, as it applies to regulators, asks whether it is "sufficiently certain" that the regulator will perform the work and assert a monetary claim.[94] Lund gives two examples of how the *AbitibiBowater* test has been applied to illustrate this point. In *Nortel Networks Corporation (Re)* [*Nortel Networks*], decided after *AbitibiBowater*, it was not sufficiently certain that the regulator would carry out the remediation work and assert a claim for reimbursement because the orders were made against current and former owners of the properties, who might instead carry out the work.[95] The regulator was not considered a creditor.[96] In *Northstar Aerospace Inc (Re)* [*NorthStar Aerospace*], the regulator had already started the remediation work, so it was sufficiently certain the regulator would undertake the remediation work and advance a claim for reimbursement; thus, the regulator

87 *Ibid*.
88 2012 SCC 67 at para 26 [emphasis in original] [*AbitibiBowater*].
89 *Ibid* at paras 22–26.
90 See Lund, *supra* note 47 at 165.
91 *Ibid* at 166–168.
92 *Ibid*.
93 *Ibid* at 167.
94 *Ibid*. Lund explains how this step was applied at 160–161. See also *AbitibiBowater*, *supra* note 88 at para 37. This step is variously described as whether the regulator will liquidate the obligation, assert a claim for reimbursement, or recover a debt.
95 *Ibid* at 161–162; see 2013 ONCA 599 [*Nortel Networks*].
96 *Ibid*.

was considered a creditor.[97] These cases show that the more steps the regulator takes to enforce the remediation order or assert a claim as the debtor approaches or enters bankruptcy, the more likely the regulator will be considered a creditor, thus discouraging the regulator from taking those steps.[98] Lund also speculates that this test encourages subterfuge, whereby the regulator disguises its efforts, in order to avoid being considered a creditor.[99]

Perverse incentives as described by Lund extend to legislators as well, who grant the regulator its powers to compel compliance with environmental regulators and demand repayment for work done by the regulator.[100] The more power the regulator has to "liquidate instances of non-compliance and collect the resulting debt", the more likely it will be considered a creditor.[101] Legislators may not want to create "rigorous regulatory schemes".[102] However, Lund points out that "these debt-creating provisions are desirable because they enable regulators to collect from noncompliant parties" and reduce taxpayer burdens, making them an important part of the compliance and enforcement toolkit.[103]

Finally, as Lund also notes, debtors have no incentive to perform environmental obligations prior to insolvency if they think they can discharge those obligations in bankruptcy.[104] Creditors might choose to "push a debtor to liquidate, instead of restructuring, to increase the likelihood of a regulatory obligation being deemed a provable claim."[105]

The point made by Ho et al, that strong regulatory systems feature regulators that can easily access remediation costs, should be considered in light of Lund's work.[106] Legislators cannot easily draft recovery powers for a regulator, nor is doing so necessarily effective. The legal uncertainty surrounding recovery in bankruptcy proceedings hinders legislators from ensuring that a regulator can recover remediation costs in bankruptcy proceedings. This uncertainty also makes it difficult for legislators to decide whether to grant those powers to the regulator and to determine whether the debtor's assets will cover the remediation costs. Such challenges demonstrate the sub-optimal nature of a system that relies on recovery in bankruptcy proceedings to fund orphan well remediation.

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97 *Ibid*. 2013 ONCA 600 [*NorthStar Aerospace*]. In *AbitibiBowater*, the fact that the debtor company did not have sufficient funds to do the work, that the timelines for remediation were unrealistically short, and that the government had already expropriated some of the lands at issue allowed the Court to conclude it was "sufficiently certain" the regulator would do the work and advance a claim for reimbursement.

98 *Ibid*.

99 *Ibid* at 167.

100 *Ibid* at 168.

101 *Ibid.*

102 *Ibid*.

103 *Ibid*.

104 *Ibid* at 166. See also Boomhower, *supra* note 41, referring to the "judgment-proof problem".

105 *Ibid* at 167.

106 See Ho et al, "Evaluation of Bonding Requirements", *supra* note 13 at 22.

III. BRITISH COLUMBIA'S REGULATORY FRAMEWORK: PREVENTING AND REMEDIATING ORPHAN SITES

The previous sections discussed the scope of the orphan well problem in British Columbia, introduced the concept of environmental bonds for oil well remediation obligations, and described some uniquely Canadian problems with relying on regulators to recover orphan well remediation costs during bankruptcy proceedings. This part of the paper describes two policy tools used in British Columbia to address the problem of orphaned oil wells and considers their effectiveness. The first, the Liability Management Rating program ("LMR") aims to collect financial assurance from oil companies against their future oil well remediation obligations based on their perceived financial riskiness. The LMR program is meant to prevent those remediation costs from becoming taxpayer liabilities and encourage firms to perform their own remediation work. The second, the Orphan Site Reclamation Fund ("OSRF"), is an industry-wide levy to fund remediation of the current inventory of orphaned wells and sites. Both programs are operated by the provincial regulator, the British Columbia Oil and Gas Commission. This section puts forward the argument that these policy tools are ineffective, that they will force the regulator to seek to recover costs in bankruptcy proceedings, and that upfront environmental bonding requirements would be more effective.

A. The Liability Management Rating program

The Liability Management Rating program is based on a series of policies created by the Commission pursuant to its statutory power to collect financial security from oil and gas producers.[107] In theory, the LMR program allows the Commission to monitor the financial health of oil companies. Oil well permit holders are required to post security against their site remediation obligations only if the ratio of their assets to liabilities falls below 1.0.[108] The LMR rating is based on "deemed" assets and "deemed" liabilities as defined in the Commission's policies, not on the level of overall debt of the permit holder.[109] Security deposits are returned to permit holders if their financial situation improves, through increased asset values or decreased liabilities, or if they remediate their sites.[110] The deposit is used to perform remediation work if the permit holder goes bankrupt.[111] The formula is expressed in Commission policy documents as:[112]

$$\text{LMR (1.0)} = \frac{\text{Deemed Assets + Security Deposit}}{\text{Deemed Liabilities}}$$

107 See *OGAA*, *supra* note 4, s 30.

108 See British Columbia Oil and Gas Commission, *Liability Management Rating Program Manual Version 3.0* (Victoria: BC Oil and Gas Commission, 2020) at 8 [*LMR Program Manual 3.0*].

109 *Ibid* at ch 3 and ch 4.

110 *Ibid* at 18. See also *Fee, Levy and Security Regulation,* BC Reg 8/2014, s 25(4).

111 See British Columbia Oil and Gas Commission, *2018/19 Service Plan, supra* note 29 at 32. Any security deposits not returned are paid into the Orphan Site Reclamation Fund, discussed in more detail below.

112 See *LMR Program Manual 3.0*, *supra* note 108 at 8.

Although the LMR program requires financial security from permit holders, it is atypical in comparison to environmental bond requirements in other oil and gas producing jurisdictions, aside from Alberta.[113] The differences between the LMR and a more conventional environmental bonding system, such as the one used in Texas, illustrate the LMR's shortcomings. In Texas, as noted earlier, a cash deposit or a third-party surety bond based on well depth is required and only returned once remediation work is performed, regardless of the oil firm's perceived riskiness. Unlike a true environmental bonding system, with the LMR program, a company could hold several permits without being required to post any security against its environmental obligations, as long as it maintains the required ratio of deemed assets to deemed liabilities.[114] The amount of the security deposit required under the LMR is not linked to actual costs of remediation obligations. Instead, it is linked to valuations of assets and liabilities and returned if that ratio improves. None of the policy considerations discussed in Part II of this paper are evident in the LMR program. In particular, no link exists between the security required by the LMR and actual variations in remediation costs based on site characteristics. One positive attribute of the LMR program is that it requires what are considered "strong" forms of financial assurance: either cash or an irrevocable letter of credit.[115]

British Columbia's Auditor General issued a 2019 report excoriating the LMR program following a series of oil company bankruptcies in 2016 and 2017.[116] According to the Auditor General, the fundamental problem with the LMR program is that security deposits collected by the Commission are far less than the costs of restoring orphan sites.[117] For instance, before going bankrupt, Quattro Exploration and Production Ltd posted $0 in security against its $18.955 million in environmental liabilities, and Terra Energy Corp posted $952,000 against $54.702 million in liabilities.[118] The LMR program requires such low security deposits because the deposits are not linked to actual site remediation costs. Instead, the security deposit is an attempt to assess the company's financial well-being, based on valuation methods that are unable to keep up with rapid fluctuations in oil prices and do not account for its overall debt levels. Lucija Muehlenbachs, Associate Professor in the Department of Economics at the University of Calgary, points out that systems like the LMR program work well during an economic boom but fail to prevent orphan wells from becoming taxpayer liabilities during a downturn.[119]

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113 See Muehlenbachs, *supra* note 5 at 4, describing the Alberta liability management program as "atypical".

114 *Ibid.* Muehlenbachs makes this point in the context of Alberta, but it is equally relevant in British Columbia, given the similarities between the two regulatory regimes which is discussed in more detail in Parts IV and V.

115 See *Fee, Levy and Security Regulation*, *supra* note 110, s 25.

116 See Office of the Auditor General, *Management of Non-Operating Sites*, *supra* note 10.

117 *Ibid* at 41.

118 *Ibid* at 42. TransEuro Beaver River Inc posted $2.069 million against $10.258 million in liabilities, and Calver Resources Inc posted $108,000 against $1.142 million in liabilities. In total, five bankruptcies in 2016 and 2017 resulted in 262 orphan sites. Note that the liability estimates in the report likely include assessment, equipment removal, and site restoration costs, and not just plugging and abandonment costs.

119 See Muehlenbachs, *supra* note 5 at 5, referring to Alberta's regime, but relevant as the two liability management programs are nearly identical.

Recent adjustments to the LMR program's policies resulted in only slight improvements. For example, the Commission collected $15.6 million as a security deposit prior to the Ranch Energy Corporation bankruptcy, leaving a shortfall of only $25 million to $35 million in site remediation costs.[120] According to its 2019/2020 Annual Report, the Commission holds $144 million in security deposits.[121] The Auditor General estimated in 2019 that total remediation costs for all oil and gas sites in British Columbia was around $3 billion.[122] The disparity between those two figures suggests the security collected by the LMR program is nowhere close to the potential orphan well liabilities.

The LMR program also contains several other flaws that contribute to insufficient collection of security deposits. The program lags behind the rapidly deteriorating financial health of oil companies.[123] According to the Auditor General, by the time the Commission requested a deposit from companies that were close to bankruptcy in 2016 and 2017, "some operators could not pay the required security because of their poor financial status, and became non-compliant."[124] Caura Wood's description of the industry practice of bundling non-productive, liability-ridden oil wells with other more lucrative assets in order to pass them off to financially distressed companies illustrates how quickly regulators must react to changing balance sheets.[125] The Commission's monthly LMR reassessments are not frequent enough to keep up.[126] Nor do the deemed assets and deemed liabilities paint an accurate or holistic picture of a permit holder's financial health: this point was made in the context of Alberta's nearly-identical regulations by Colin Mackie, Lecturer at the School of Law at the University of Leeds, and Laurel Besco, Assistant Professor at the Institute for Management and Innovation and in the Geography Department at the University of Toronto-Mississauga.[127] The "deemed liabilities" are defined by the Commission and include the cost of remediating the permit holder's oil wells, but do not account for the permit holder's overall debt load.[128]

The LMR program overvalues assets, and the risk of low commodity prices leading to bankruptcies in the short-term is not captured in the valuation of those assets. Asset values are calculated by multiplying a fixed five-year average netback (essentially gross profits), based on data from 2008–2013, by expected production of that asset.[129]

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120 Email from Communication Specialist, British Columbia Oil and Gas Commission (14 July 2020), regarding $15.6 million collected from Ranch Energy Corporation.

121 See British Columbia Oil and Gas Commission, *2018/19 Service Plan, supra* note 29 at 28.

122 See Office of the Auditor General, *Management of Non-Operating Sites, supra* note 10 at 20. In 2018, there were 27,526 oil and gas wells in British Columbia. Of these, 7,474 were inactive wells that had not been decommissioned (i.e. plugged or sealed), and 3,198 had been decommissioned but the sites not fully restored, for a total of 10,672 non-operating well sites that need some form of remediation work.

123 See *LMR Program Manual 3.0*, *supra* note 108 at 17.

124 See Office of the Auditor General, *Management of Non-Operating Sites*, *supra* note 10 at 43.

125 See C Wood, *supra* note 71.

126 See *LMR Program Manual 3.0*, *supra* note 108 at 17.

127 See Mackie & Besco, *supra* note 39.

128 See *LMR Program Manual 3.0*, *supra* note 108 at 13.

129 See *LMR Program Manual 3.0*, *supra* note 108 at 10. This interpretation of netback in the *LMR Program Manual 3.0* was confirmed by email with Manager, Financial Risk and Liability, British Columbia Oil and Gas Commission (30 July 2020).

This valuation method "does not do an adequate job of reflecting changing asset values" as it does not capture the risk of short-term low commodity prices leading to bankruptcy.[130] In the context of Alberta, which applies a very similar formula for valuing assets, Mackie and Besco point out that the netback valuation method does not account for variability in value and production between individual sites.[131]

A final weakness of the LMR program is that it is premised on the assumption that the Commission can access a company's assets during bankruptcy proceedings and use those funds to remediate any orphan sites left by that company.[132] Any posted security deposit will always be less than the actual remediation costs; this was shown in the 2016/2017 bankruptcies.[133] More fundamentally, based on the LMR formula, the only situation in which a permit holder would have to post their full remediation costs as security would be if their deemed assets were worth nothing, or only a fraction of their deemed liabilities. Presumably, the difference between the posted security and the actual remediation costs is intended to come from the value of the company's assets. Even if the Commission ranks ahead of creditors (this is discussed in more detail later), there is no guarantee that the remaining assets will cover the company's remediation obligations. Finally, accessing remediation funds during the bankruptcy process is slow, cumbersome, uncertain, and could involve significant transaction costs.

B. The Orphan Site Reclamation Fund

The Commission uses the industry-funded Orphan Site Reclamation Fund to clean up existing orphan sites.[134] Unlike funds paid into the LMR program, funds paid into the OSRF are not returned to oil and gas producers. Prior to 2019, an industry-wide tax based on the cubic metres of oil or petroleum produced by an operator funded the OSRF.[135] In order to fund the increasing number of orphan sites, Bill 15 changed the tax to a levy in 2019, and it delegated power to the Commission to determine the amount collected annually under that levy.[136] The difference is "more than semantic": a tax must be set out in legislation whereas a levy can be amended by the Commission itself through amendments to the *Fee, Levy and Security Regulation*.[137] The Commission decides on the amount to be collected each year, and each producer then pays in proportion to their liabilities as a ratio of total industry liabilities. As noted above, security deposits of bankrupt oil companies are also paid into the OSRF once the firm is insolvent and are earmarked for that firm's orphan sites.[138]

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130 See Dachis, *supra* note 16 at 9, critiquing Alberta's LLR, which also uses a fixed netback valuation method.

131 See Mackie & Besco, *supra* note 39 at 10580–10581.

132 See Dachis, *supra* note 16, making this same point in the context of Alberta's regulatory regime.

133 See Office of the Auditor General, *Management of Non-Operating Sites*, *supra* note 10.

134 See *OGAA*, *supra* note 4, s 45(3).

135 *Ibid*, s 47, as it appeared on 16 May 2018.

136 See "Bill 15 – Energy, Mines and Petroleum Resources Statutes Amendment Act", 2nd reading, British Columbia, *Legislative Assembly Debates*, 41-3, Issue No 123 (24 April 2018), cl 12, effective April 2019.

137 See Hansard, *supra* note 32. Honourable Michelle Mungall discussed the difference between a tax and a levy. See also *Fee, Levy and Security Regulation*, *supra* note 110, Part 4.1.

138 See British Columbia Oil and Gas Commission, *2018/19 Service Plan, supra* note 29 at 32.

The former tax was premised on an "ability-to-pay" model, since it was based on the volume of petroleum products produced.[139] The new levy is more liability-based, in that permit holders who hold a greater portion of the industry's total liabilities pay more in levies.[140] However, permit holders are paying to clean up the orphan sites left by exiting firms in proportion to their current liabilities, which brings up the questions of whether this is truly a polluter-pays model and whether it represents a fair distribution of liabilities across the industry. From an industry perspective, one concern is that the Commission has complete discretion in determining the amount to be raised each year and the number of levies imposed annually, allowing for flexibility but creating unpredictability for oil companies.[141]

The new levy system that funds the OSRF risks breaking down if the number of orphan sites increases and the number of industry participants decreases, as it focuses the increasing remediation costs on a decreasing number of producers.[142] Recent events suggest that this focusing effect is already happening; as noted earlier, the number of orphan wells doubled in June 2020, and presumably the amount collected by the levy will also need to double.[143] The levy itself risks causing more bankruptcies in the industry, though this flaw is not unique to the levy, and any effort to draw funds out of the industry for orphan site remediation may cause more bankruptcies.[144] According to the Honorable Minister Mungall, the Commission will only increase the levy gradually each year, in order to prevent insolvencies and bankruptcies.[145] While gradual increases will allow companies to plan ahead financially, it is unclear how the gradual approach will prevent bankruptcies, since the annual increases are tied to the number of orphan sites the Commission plans to remediate that year and are not tied to fluctuations in oil prices, a more immediate cause of bankruptcies.[146]

IV. ALBERTA'S REGULATORY FRAMEWORK

Alberta provides a helpful point of comparison as it is by far Canada's largest producer of oil and gas, and because its regulatory framework is very similar to, though predates, that

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139 See Hansard, *supra* note 32, where Honourable Michelle Mungall noted that the former tax was based on ability to pay.

140 *Ibid*.

141 *Ibid*. Honourable Sonia Fursteneau pointed out that the new section 47(2) does not state how the Commission will determine the amount to raise under the levy. See also *Fee, Levy and Security Regulation*, *supra* note 110, s 24.3, setting out the amounts to be raised under the levy annually until 2021.

142 See Dachis, *supra* note 16 at 9, critiquing the Alberta system, but the same comments are relevant in British Columbia.

143 See Hansard, *supra* note 32, comments by Honourable Michelle Mungall.

144 *Ibid*. Honourable Michelle Mungall noted, "We don't want to be responsible for triggering more bankruptcies that result in more orphaned wells."

145 *Ibid*. Honourable Michelle Mungall noted that the Commission has the power to implement a second levy in any given year if it determines that the work is more expensive than anticipated, or it can do more than originally planned.

146 *Ibid*. Honourable Michelle Mungall noted that the Commission will base levy amounts on the work it wants to perform.

of British Columbia. Alberta produces 82 percent of Canada's crude oil.[147] Revenues from non-renewable resources in Alberta amounted to $5.9 billion in the 2019/2020 fiscal year.[148] The scale of oil and gas extraction in British Columbia, as well as the scale of the orphan well problem, is modest in comparison to Alberta. The most recent update to Alberta's orphan well inventory indicates that 2,983 orphan wells need abandonment and 3,284 sites need reclamation.[149] Recent financial statements from 2019 indicate each orphan well costs on average $29,000 to decommission and $25,000 to reclaim.[150] At least one news agency has reported on internal documents suggesting that it will cost roughly $100 billion to remediate all the oil wells currently in existence in Alberta.[151]

The Alberta Energy Regulator ("AER") is a statutorily-created corporation charged with overseeing the development of energy resources in Alberta, including the granting of licenses for resource development and regulating the abandonment and closure of wells, pipelines, and other facilities.[152] It does not perform abandonment or reclamation work. Once wells are classified as orphans, they are abandoned and reclaimed by the Orphan Well Association ("OWA"), an independent, non-profit entity that operates under powers delegated by the AER.[153] The OWA is funded in nearly equal parts by an industry-wide levy, titled the Orphan Fund, and government funding, the latter being mostly in the form of federal and provincial loans.[154]

The levy for the Orphan Fund is raised by the AER and transferred to the OWA's operating budget.[155] Similar to British Columbia, the levy is based on the permit holder's liabilities as a ratio of the total industry-wide outstanding liabilities.[156] In other words, an oil producer

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147 See Government of Alberta, "Provincial and Territorial Energy Profiles – Alberta" (29 September 2020), online: *Government of Alberta* <www.cer-rec.gc.ca/en/data-analysis/energy-markets/provincial-territorial-energy-profiles/provincial-territorial-energy-profiles-alberta.html#:~:text=In%202018%2C%20Alberta%20produced%203.91,over%2082%25%20of%20total%20production> [https://perma.cc/JQY7-CEEN].

148 See Government of Alberta, *Energy Annual Report 2019–2020* (Edmonton: Energy Communications, Government of Alberta, July 2020). Bitumen accounts for 69 percent of those revenues, conventional oil counts for 20 percent, natural gas and by-products 6 percent, and land sales, rentals and fees, and coal accounting for the remainder.

149 See Government of Alberta, "Oil and gas liabilities management" (Government of Alberta, 2020), online: *Government of Alberta* <www.alberta.ca/oil-and-gas-liabilities-management.aspx> [https://perma.cc/EMG9-FA9F].

150 See *OWA 2019 Annual Report*, *supra* note 6. The average remediation costs per site are notably lower in Alberta, perhaps because unconventional wells make up a larger portion of British Columbia's oil wells.

151 See Mike De Souza et al, "Cleaning up Alberta's oilpatch could cost $260 billion, internal documents warn", *Global News* (1 November 2018).

152 See *Responsible Energy Development Act*, SA 2012, c R-17.3, Division 1.

153 See *Orphan Fund Delegated Administration Regulation*, Alta Reg 45/2001.

154 See *OWA 2019 Annual Report*, *supra* note 6 at 8.

155 See Alberta Energy Regulator "Orphan Well Association: Project Closure" (*Alberta Energy Regulator*, 2021), online: *Alberta Energy Regulator* <www.aer.ca/regulating-development/project-closure/liability-management-programs-and-processes/orphan-well-association> [https://perma.cc/BU8Q-A6BJ].

156 See Alberta Energy Regulator, *Bulletin 2020-19: 2020/2021 Orphan Fund Levy* (Calgary: Alberta Energy Regulator, 10 September 2020).

who holds more oil wells that need abandonment and reclamation, as a ratio of the total oil wells it holds, will pay more into the fund than one who holds mostly wells that do not need abandonment and reclamation.[157]

Alberta uses a liability management rating ("Alberta LMR") to assess the financial riskiness of an oil producer and to require a security deposit from that producer against its abandonment and reclamation obligations, if the producer is deemed financially risky.[158] This is also similar to the program used in British Columbia. The Alberta LMR is part of the Licensee Liability Rating program ("LLR") and is set out in a policy document issued by the AER.[159] The purpose of the LLR is to "to prevent the costs to suspend, abandon, remediate, and reclaim a well, facility, or pipeline in the LLR program from being borne by Albertans should a licensee become defunct, and to minimize the risk to the Orphan Fund posed by the unfunded liability of licences in the program."[160] The Alberta LMR is a ratio of the licensee's deemed assets to deemed liabilities.[161] Details of how these assets and liabilities are calculated are set out in directives from the AER, but they include using a three-year industry netback.[162] The Alberta LMR is calculated monthly, and if it drops below 1.0, the licensee is required to post a security deposit with the AER sufficient to bring its LMR back up to 1.0.[163] A licensee's LMR also affects its ability to transfer, or receive, licenses from other operators—as of 2016, in order to transfer a license, both the transferor and transferee must have an LMR of 2.0 after the transfer is completed, or the AER will not approve the transfer.[164]

The similarities between the regulatory frameworks in Alberta and British Columbia are apparent, and British Columbia's framework is quite possibly based on Alberta's, given the proximity of the two provinces and their economic interconnectedness. For that reason, many drawbacks of Alberta's regulatory framework are also relevant to British Columbia.

V. THE COMMISSION'S ABILITY TO RECOVER COSTS DURING BANKRUPTCY PROCEEDINGS AND THE SUPREME COURT OF CANADA DECISION IN *REDWATER*

As noted in Part II of this paper, a regulator's ability to recover remediation costs from an oil firm in bankruptcy proceedings has implications for designing the most appropriate orphan well regulatory framework in that jurisdiction. This section considers the 2019 Supreme

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157 *Ibid*.

158 See Alberta Energy Regulator, *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* (Calgary: Alberta Energy Regulator, 12 March 2013).

159 *Ibid.* Alberta uses the term "licensee" whereas British Columbia uses "permit holder".

160 *Ibid.*

161 *Ibid* at 4.

162 *Ibid* at 4, referring to other directives that are used to calculate the assets and liabilities, and at 17, referring to three-year industry netback.

163 *Ibid* at 4.

164 See Alberta Energy Regulator, *Bulletin 2016-21: Revision and Clarification on Alberta Energy Regulator's Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision* (Calgary: Alberta Energy Regulator, 8 July 2016).

Court of Canada decision in *Redwater*.[165] The Court considered the *AbitibiBowater* test for when a regulator's enforcement of an environmental regulation is considered a provable claim in bankruptcy. This test was discussed in Part II, and Part V picks up that discussion.

The Court's conclusion in *Redwater* suggests that most environmental remediation orders issued by a regulatory body are not stayed during bankruptcy proceedings and remain enforceable, thus allowing the regulator to continue enforcing the debt regardless of bankruptcy proceedings and effectively giving it priority over the debtor's creditors.[166] The facts of the case involved Redwater, an oil and gas company holding mostly non-productive and liability-laden oil wells, with only a few productive wells, that experienced financial distress in mid-2014. The Alberta Energy Regulator, Alberta's oil and gas regulator, told Redwater's receiver that the AER would not approve the transfer of any of Redwater's licenses unless the receiver fulfilled Redwater's outstanding remediation obligations. The liabilities of the non-productive wells exceeded the value of Redwater's few productive assets, so the receiver disclaimed the non-productive assets and refused to take possession of them. The AER ordered the receiver to remediate the non-productive assets. The AER and the Orphan Well Association sought a court order declaring the receiver's renunciation of the assets void, and the receiver countered by seeking approval for a sale of Redwater's productive assets.

Chief Justice Wagner, for the majority, applied the three-part test from *AbitibiBowater*.[167] He held that the remediation order issued by the AER was not a claim provable in bankruptcy.[168] The result was that the entire value of the company's assets (some $4 million) went towards its oil well remediation obligations, and its creditors received nothing.[169] A strong dissent, penned by Justice Côté, with Justice Moldaver concurring, argued the majority's decision displaces the polluter-pays model with a lender-pays model.[170]

Roderick Wood, Professor in the Faculty of Law at the University of Alberta, noted that some of the facts emphasized in Chief Justice Wagner's analysis might provide a basis for differentiating *Redwater* from other provincial regulatory regimes.[171] Only the first and third prongs of the *AbitibiBowater* test were at issue in *Redwater*.[172] Under the first part of the test (whether the regulator is a creditor), Chief Justice Wagner noted that the regulator had not yet done any remediation work itself.[173] He implied that if the regulator had done some of the remediation work, then it might be considered a creditor, leaving "such situations to be addressed in future cases in which there are full factual records."[174] Considering both *AbitibiBowater* and *Redwater*, Wood also noted that a regulator might be a creditor if it has

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165 *Redwater, supra* note 11.

166 *Ibid*. See also Lund, *supra* note 47 at 159.

167 *Redwater, supra* note 11.

168 *Ibid* at para 159. The AER's order was for the trustee to abandon and reclaim oil wells orphaned by the firm's bankruptcy.

169 *Ibid* at para 49. Redwater held $4.152 million in assets and had $4.7 million in environmental liabilities.

170 *Ibid* at para 291.

171 See Roderick J Wood, "Environmental Obligations in Insolvency Proceedings: *Orphan Well Association v Grant Thornton Ltd*", Case Comment (2019) 62 Can Bus LJ 211 at 222.

172 See *Redwater*, supra note 11 at para 120.

173 *Ibid* at para 135.

174 *Ibid*.

"taken steps that make it impossible for the debtor to carry out the work."[175] However, Chief Justice Wagner emphasized that the regulator was enforcing a public duty, sending a strong signal to lower courts that in most cases a regulatory body enforcing an environmental law is not a creditor.[176]

Under the third part of the test, which asks whether there is sufficient certainty that the environmental obligation will ripen into a claim for reimbursement, Chief Justice Wagner emphasized that the Orphan Well Association, and not the regulator, would perform the remediation work.[177] On that basis, he concluded that it was not sufficiently certain that the regulator would perform the work and advance a claim for reimbursement.[178] In Alberta, the OWA is non-profit, operating at arm's length from government. The AER is a branch of the Alberta government. The fact that the OWA is independent from the AER was crucial to Chief Justice Wagner's analysis. In British Columbia, unlike in Alberta, the Commission does the remediation work itself, providing a clear factual basis on which to differentiate *Redwater*.[179] For that reason, a regulator's claim is more likely a claim provable in bankruptcy if the regulator does the remediation work itself.

Given the public duty aspect emphasized in Chief Justice Wagner's application of the first prong, *Redwater* would most likely apply to the regulatory framework in British Columbia.[180] However, there is some factual basis for differentiating *Redwater*, suggesting uncertainty—and caution—should the Commission attempt to rely on *Redwater* during bankruptcy proceedings.[181]

Roderick Wood's analysis points out that the Court's decision in *Redwater* creates a remediation stand-off between creditors and regulators.[182] If the regulator takes steps to perform remediation work, it risks being characterized as a creditor.[183] The creditor has no incentive to appoint a receiver, since the longer the creditor waits, the more likely it is that the regulator will begin remediation.[184] A firm's environmental liabilities may exceed asset

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175 See R Wood, *supra* note 171 at 225.

176 *Redwater, supra* note 11 at para 135. See also para 123, regarding the *pro forma* application of step one of *AbitibiBowater*. See also *AbitibiBowater*, *supra* note 88 at para 26.

177 *Redwater*, supra note 11 at paras 145–146.

178 *Ibid*. On the basis of this fact, Chief Justice Wagner concluded that there was not sufficient certainty that the environmental obligation would ripen into a debt because it was not certain that the regulator would perform the remediation work and advance a claim for reimbursement, and the OWA would not advance a claim for reimbursement.

179 See *OGAA, supra* note 4, s 45.

180 See *AbitibiBowater*, *supra* note 88 at para 26. See also *Redwater*, *supra* note 11 at para 135, finding that the regulator was not a creditor, and at para 139, where Chief Justice Wagner continued with an analysis of the third prong of the test despite having resolved the issue under the first prong.

181 *Redwater*, *supra* note 11 at para 135.

182 See R Wood, *supra* note 171 at 226. See also Lund, *supra* note 47. See also *Redwater*, *supra* note 11 at para 221, where Justice Côté, in dissent, argues the majority decision will result in an insolvency standoff.

183 See R Wood, *supra* note 171 at 226.

184 *Ibid*.

values. If so, its creditors might never initiate bankruptcy proceedings. From their perspective, the regulator will receive the entire value of the estate, assuming *Redwater* applies. Initiating bankruptcy proceedings will only cost the creditor time and money, with nothing in return.[185] The other impact of *Redwater* on creditors is that they must now monitor the environmental liabilities of companies they loan money to. One can only speculate that *Redwater* has driven up the cost of credit in the oil industry and decreased its availability for oil companies.[186]

VI. ANALYSIS: WHY BRITISH COLUMBIA SHOULD REQUIRE UPFRONT ENVIRONMENTAL BONDS POST-*REDWATER*

This paper has demonstrated that the recent increase in orphan wells in British Columbia and the modest amount of security collected by the Commission to remediate those wells indicates that the current regulatory framework is not effective at preventing oil wells from becoming orphans. Nor is it effective at collecting funds for orphan well remediation from the firms that profited from those wells. There are many problems with the current regulations and policies that have contributed to the orphan well funding gap, including the ways in which those policies value the assets and liabilities of an oil firm. Many of these same problems are apparent in Alberta's orphan well regulatory model, where the scale of the orphan well problem is far greater.

The fundamental problem with the current framework in British Columbia is that it assumes the Commission can recover some, or all, of a bankrupt oil firm's assets to fund remediation of that firm's orphan oil wells. This regulatory design does not account for the legal uncertainty involved where a regulator attempts to enforce an environmental obligation in bankruptcy proceedings. This uncertainty arises because of the fact-specific nature of the legal test applied in assessing whether the regulator is asserting a provable claim when it enforces remediation obligations and from the "perverse incentives" that legal test creates for creditors and regulators alike. The *Redwater* decision sends a clear signal that bankruptcy does not allow a company to ignore environmental obligations, though it is still not certain how a court in British Columbia would treat the Commission's efforts to enforce remediation obligations. Nor did *Redwater* resolve the "perverse incentives" that the *AbitibiBowater* test created. This leaves the Commission, creditors, and oil firms in a place of uncertainty.

An upfront environmental bonding requirement would do away with the need for the Commission to recover in bankruptcy proceedings, or at least lessen that need, depending on the level at which bond amounts are set. It would also require transparent policy discussions on how to set optimum bond amounts and whether to link those amounts to factors like overall debt load and past compliance history. Environmental bonds can be set slightly below actual remediation costs to encourage economic growth and can link with relevant factors like site location, well depth, and type. Upfront environmental bonding would eliminate

185 *Ibid*.

186 See Tony Seskus, "Alberta seeks to lessen financial hit of Supreme Court ruling on orphan wells", *Canadian Broadcasting Corporation* (14 November 2019). See also C Wood, *supra* note 71 at 80, noting that the lower court decisions in *Redwater* changed the credit market in Alberta.

(or reduce) the need for creditors to monitor the environmental liabilities of oil companies, a criticism of the *Redwater* decision, resulting in greater certainty for creditors and companies. *Redwater* made it clear that permit holders or their creditors must pay for site remediation, and that decision might persuade industry participants that environmental bonding is preferable to the post-*Redwater* credit market.[187] Upfront environmental bonding would also be more transparent than the current levy that funds the OSRF and would avoid that levy's unsustainable funding model.[188]

Finally, environmental bonding is the only true polluter-pays model. The OSRF is funded on a surviving-firms-pay model, and critiques of *Redwater* suggest it created a creditor-pays model.[189] Environmental bonds ensure that companies profiting from oil extraction also pay for the environmental obligations associated with their activities.

The drawback of introducing an environmental bonding requirement for oil site permitting in British Columbia is that it risks drawing capital out of the industry, increasing the cost of entry and pushing existing firms into bankruptcy, thus possibly creating more orphan sites. This is not a policy decision to be taken lightly, as bankruptcy for small oil firms has serious personal consequences for shareholders, managers, and employees.[190] However, any policy response to the orphan site problem will have consequences for individual producers. Poor regulatory design during the early years of oil and gas development in British Columbia did not force firms to internalize their environmental hazards, allowing producers to enter the industry at artificially low cost levels. Any regulatory efforts to improve orphan site remediation funding will drive some producers out of the industry. Allowing firms to purchase surety bonds from third parties, similar to Texas, could ease some of the impacts by allowing firms to retain capital and distributing costs and risk across the industry as a whole. Nonetheless, the consequences of small firm bankruptcy need to be weighed against the benefits of upfront environmental bonds.

CONCLUSION

The orphan well problem in British Columbia illustrates some of the issues with regulatory designs that do not account for the boom-and-bust cycle in natural resource industries or for the implications of legal tests applied in bankruptcy proceedings. Regulatory design needs to account for the realistic prospect of bankruptcies among natural resource companies. Legislators and policy makers must consider whether a provincial regulator can actually enforce remediation obligations or recover costs in bankruptcy proceedings. If the regulator's prospects of recovery are uncertain, then a regulatory framework that creates sufficient funding for remediation but does not rely on recovery in bankruptcy proceedings, such as environmental bonding, is more suitable.

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187 See *Redwater*, *supra* note 11. This statement assumes that the *Redwater* decision applies in British Columbia, or at least that creditors perceive its possible application in British Columbia.

188 See *Fee, Levy and Security Regulation*, *supra* note 110.

189 See *Redwater*, *supra* note 11.

190 See C Wood, *supra* note 67. Wood's work illustrates the kinship ties that link employees, managers, and shareholders in small oil and gas companies, and it shows the personal cost of small oil firm bankruptcies.

ARTICLE

STUDENT SUICIDE ON-CAMPUS: TORT LIABILITY OF CANADIAN UNIVERSITIES AND DETERMINING A DUTY OF CARE

Shailaja Nadarajah *

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Trigger Warning/Content Warning:

This paper and its sources contain information about suicide and/or suicidal ideation. While the paper has been written to follow the Crisis Services Canada ("CSC") guidelines for reporting on suicide, there are certain sections with direct quotes which may be triggering to readers. We encourage readers to reach out to CSC or their local suicide hotline for support. If you are experiencing suicidal thoughts, help is available.

ABSTRACT

Suicide is a devastating issue that is increasingly affecting post-secondary students across Canadian university campuses. Despite growing awareness of this problem, research shows that mental health supports for post-secondary students in Canada remain insufficient and inaccessible. This paper argues that the law is also lagging behind. Currently, no legal recourse exists to find universities civilly liable if students die by suicide, on- or off-campus. In an effort to address this lag, this paper examines the potential consequences of expanding the duty of care owed by universities to their students in tort law. This paper briefly maps the current legal terrain, both in terms of general duties of care that universities owe their students and jurisprudence related to suicide prevention, for example, in the contexts of jails and hospitals. The paper turns to American jurisprudence that has recognized a duty of care for universities to prevent student suicides and considers the potential costs and benefits, for universities and students alike, of adopting such a standard in Canada to create a new and expanded duty.

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INTRODUCTION

In November 2019, a University of Toronto student died by suicide. This was the third suicide in less than two years at the Bahen Centre for Information Technology, a building at the university's downtown St. George campus.[1] The 2018 Annual Report published by the University of Toronto's Campus Police Services provides a detailed statistical overview of reported incidents that occur on campus. In both 2017 and 2018, there were three suicides (or attempted suicides) that occurred on campus.[2] Unfortunately, when it comes to suicides on campus in recent years, the University of Toronto is far from alone. Mental health crises, including suicides, are becoming increasingly common on today's Canadian campuses.

Families who may be seeking to recover after the death of a loved one currently have no legal recourse in Canada against universities, as universities are not liable for student suicides in tort. Expanding tort liability[3] owe a duty of care to their students may be an appropriate direction for the evolution of the law of negligence. Though Canadian courts have not recognized such a duty in the context of preventing student suicides, some American courts have recently shown a willingness to find that, in some circumstances, universities owe a duty of care to students to prevent suicide.

This paper begins by providing a social scientific background on mental health and suicide at Canadian universities, including an overview of statistics, mental health resources, and university policies. It will then outline what the "duty of care" is—the first requirement for finding a cause of action in negligence—and circumstances where positive duties of care can be found. The paper will explore the current Canadian jurisprudence on university liability to students and existing contexts where courts have recognized duties to prevent suicide, such as in prisons and hospitals. Finally, this paper argues that universities should be found liable in tort for failing to prevent student suicides on campus. It looks at American jurisprudence that has already recognized such a duty and provides a brief overview of what the standard of care for universities may look like. The paper concludes with a note of caution by considering the potential unintended consequences of expanding tort liability in this domain. As law and economic scholars on the left and right have long insisted, tort liability can incentivize conduct that undermines the policy goals of the law. Any arguments for expanded tort liability will have to consider that this might incentivize universities to require students with mental health struggles to take temporary or permanent leave to reduce the university's legal exposure. In other words, the solution may create problems all of its own.

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1 Melissa Mancini & Ionna Roumeliotis, "'It's literally life or death': Students say University of Toronto dragging feet on mental health services" *CBC* (20 November 2019), online: <www.cbc.ca/news/canada/toronto/student-suicides-mental-health-support-1.5363242> [perma.cc/73S4-3RW9].

2 University of Toronto, "Campus Community Police, St. George Campus 2017 Annual Report" (2018), online (pdf): *University of Toronto* <campuspolice.utoronto.ca/wp-content/uploads/2019/08/2018-Campus-Police-Annual-Report-University-of-Toronto-Affairs-Board.pdf> [perma.cc/27ZG-ZMK6] at 8.

3 For ease, the term "universities" will be used in this paper to refer to all post-secondary institutions, including but not limited to universities, colleges, and private career colleges.

I. AN OVERVIEW ON MENTAL HEALTH AND CANADIAN UNIVERSITY STUDENTS

The state of mental health on Canadian campuses has long been criticized. Some risk factors in worsening mental health, such as the inherent stress of transitioning into adulthood and independent living, are not created by universities themselves. Others, however, like lack of resources and funding for preventative measures, and undue pressure in certain academic programs are created and influenced by the institutions themselves. While universities have made significant improvements in facilitating access to mental health resources and implementing policies in the past few decades, they do not seem to be providing adequate support for their students.

A. Statistics

According to Statistics Canada, suicide is the second leading cause of death in Canada for those aged 15-24, accounting for almost one-quarter of deaths for this demographic.[4] In 2018, this accounted for the deaths of 534 Canadians in this age range.[5]

The most recent Canadian National College Health Assessment (conducted in 2016), which surveyed almost 44,000 students, found alarming rates of mental health issues among students.[6] The assessment reported 59 percent of students feeling hopeless, 64.5 percent feeling overwhelming anxiety, 44.4 percent feeling so depressed they had difficulty functioning, 13 percent had seriously contemplated suicide, and 2.1 percent had attempted suicide.[7] Additionally, each statistic had increased since the previous survey in 2013, with the most significant increases being overwhelming anxiety (8% increase), debilitating depression (6.9% increase), and hopelessness (5.8% increase).[8]

B. Suicide Risk Factors for Adolescents and University Students

Several risk factors are associated with adolescent suicidality. There is strong evidence supporting a correlation between suicidality and depression, alcohol abuse, use of hard drugs, suicidal behaviour among friends, living apart from parents, family conflict, unsupportive

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4 Statistics Canada, *Depression and suicidal ideation among Canadians aged 15-24*, by Leanne Findlay, Catalogue No 82-003-X (Ottawa: Statistics Canada, 18 January 2017).

5 Statistics Canada, *Deaths and age-specific mortality rates, by selected grouped causes*, Table 13-10-0392-01 (Ottawa: December 2019 update).

6 American College Health Association, "American College Health Association- National College Health Assessment II: Canadian Reference Group Data Report Spring 2016" (2016), online (pdf): *American College Health Association* <https://www.acha.org/documents/ncha/NCHA-II%20SPRING%202016%20CANADIAN%20REFERENCE%20GROUP%20DATA%20REPORT.pdf> archived at [perma.cc/5GKK-PXYC].

7 Shirley Porter, "A Descriptive Study of Post-Secondary Student Mental Health Crises" (2019) 22:1 College Q.

8 *Ibid*.

parents, and a history of abuse.[9] Relationship, academic, and money problems have also been associated with increased suicidality for students.[10]

Many of these factors are prevalent, and perhaps even become exacerbated, when adolescents begin their university education. Many students decide to live in on-campus residences in their first year of university to experience this new stage of their lives with their peers. While this experience can be rewarding, it can also pose significant issues for students' mental health because of the physical distance from a familial support network when living on-campus. The lack of a social support network from family and friends has been identified as an important correlate for student suicidal ideation.[11] While students moving away for university may still have emotional and financial support from parents, the physical separation can cause stress as they navigate being independent for the first time.[12] Research has identified family cohesion, spending time with family, and parental supervision as mitigating factors for adolescent suicidality. In contrast, factors such as poor communication with parents and low perceived support have been identified as risk factors.[13] Therefore, there is likely an increase in risk factors and a decrease in mitigating factors when a student moves away for university, especially if there is a breakdown in communication or perceived lack of support due to the physical separation.

Certain factors are disproportionately associated with suicidality in women. Research has found that for young women in university, chronic recent alcohol consumption and sexual assault trends are important predictors of suicidality.[14] This is especially concerning considering the alarming rates of sexual assault on campus.[15]

For Indigenous students, a host of risk factors result in a higher likelihood for mental health issues, including relocating from their home community and coming from a lower socioeconomic status than the general student population.[16] Negative experiences in universities resulting in poor mental health outcomes may also be attributable to a lack of culturally appropriate training for university staff, which may repeat the cycle of colonization and assimilation.[17]

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9 Emma Evans, Keith Hawton & Karen Rodham, "Factors associated with suicidal phenomena in adolescents: a systematic review of population-based studies" (2004) 24:8 Clin Psychol Rev 957.

10 Hugh Stephenson, Judith Pena-Shaff & Priscill Quirk, "Predictors of College Student Suicidal Ideation: Gender Differences" (2006) 40:1 Coll Stud J 109 at 109–110.

11 Amelia M Arria et al, "Suicide ideation among college students: A multivariate analysis" (2009) 13:3 Archives of Suicide Research: Official J Intl Academy for Suicide Research 230 at 231.

12 *Ibid* at 242.

13 *Ibid* at 240.

14 Stephenson, Pena-Shaff & Quirk, *supra* note 10 at 114.

15 In 2018, a survey on sexual violence experiences was administered on behalf of Ontario's Ministry of Training, Colleges and Universities to participating post-secondary institutions. The results were very concerning: 63.2 percent of university students disclosed experiencing sexual harassment since the beginning of the academic year alone. [Ontario, Ministry of Training, Colleges, and Universities, *Student Voices on Sexual Violence Survey* (CCI Research Inc., 19 March 2019).]

16 Nolan K Hop Wo et al, "The prevalence of distress, depression, anxiety, and substance use issues among Indigenous post-secondary students in Canada" (2020) 57:2 Transcultural Psychiatry 263 at 264.

17 *Ibid*.

C. Barriers to Mental Health Care

While there are clear mental health concerns among university students, studies also show that these individuals are not seeking mental health services. A 2013 study surveying Canadians aged 15-19 found that only 27 percent of suicidal adolescents consulted with a mental health professional.[18] This age range is significant because adolescents typically enter university at age seventeen or eighteen. Institutional barriers contribute significantly to the issue of students receiving and accessing appropriate and adequate mental health support. These barriers include, but are not limited to, lack of funding, inefficient training of staff, underdeveloped policies, and stigmas and stereotypes.[19] These barriers will now be discussed in further detail.

D. Lack of Funding Affects Availability and Access of Mental Health Resources

While treatment from psychiatrists or family doctors is covered by public health insurance (in Ontario, the Ontario Health Insurance Plan—OHIP), other mental health care providers such as psychologists and social workers are not. The Ontario Psychological Association recommends that its members charge patients $225 for a private session.[20] Not all psychologists charge at this rate, and some do offer "sliding-scale" payment options for those who cannot otherwise afford care.[21] However, even at $150 per hour, counselling may still be too costly for many Canadians, especially university students from lower-income households or those financially supporting themselves. For those trying to be proactive and start therapy on a regular basis, rather than seeking medical assistance from a psychiatrist once a major problem develops, the cost may be prohibitive.

A University of Toronto graduate shared her story in a recent CBC article about the insufficient mental health resources at the university.[22] After waiting several weeks to join a campus therapy group, she attempted suicide shortly after. Campus counselling put her on a priority list for one-on-one therapy, but she still had to wait over a month before seeing a counsellor. Under-funding mental health resources can not only make it more difficult for students to access help, but it can also deter them from seeking support at all. This is because they may not want to pay for out-of-pocket private therapy or find it pointless to wait weeks or months for covered counselling on-campus.

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18 Esme Fuller-Thomson, Gail P Hamelin & Stephen JR Granger, "Suicidal ideation in a population-based sample of adolescents: Implications for family medicine practice" (2013) 2013 ISRN fam med 1.

19 Maria Lucia DiPlacito-DeRango, "Acknowledge the Barriers to Better the Practices: Support for Student Mental Health in Higher Education" (2016) 7:2 Can J for Scholarship Teaching & Learning 2.

20 Peter Goffin, "Timely, affordable mental health therapy out of reach for many" *The Toronto Star* (29 December 2016), online: < https://www.thestar.com/news/gta/2016/12/29/timely-affordable-mental-health-therapy-out-of-reach-for-many.html> [https://perma.cc/5SVS-UQCD].

21 *Ibid*.

22 Mancini & Roumeliotis, *supra* note 1.

E. Mental Health Policies at Canadian Universities are Underdeveloped

While universities across Canada have policies on directing students towards available mental health resources, these policies are riddled with problems. Many are outdated because institutions continue to reflect a "weeding-out" philosophy.[23] A "weeding-out" philosophy encourages students to compete against each other, rather than collaborate and work together, to "weed out" or eliminate students who are deemed unfit.[24] This increases students' stress and exacerbates mental health concerns. Additionally, campus mental health policies also tend to be reactive rather than proactive, meaning that university policies do not focus on preventing and combatting student mental health issues before they develop or worsen.[25]

A 2017 study conducted by the University of Calgary surveyed 168 universities to evaluate the current state of mental health policies across Canadian campuses.[26] The results showed that 50 percent of universities reported having policies to address crisis management, while only 40.4 percent reported having policies or procedures to support students with severe mental illness.[27] Surprisingly, only 32.3 percent of universities reported having a policy regarding students who have attempted or threatened to attempt suicide.[28] These statistics illustrate a significant gap in necessary mental health policy. Without proper policies, vulnerable students across Canadian campuses are left without adequate and proactive support.

The University of Calgary survey also found that less than a quarter of the institutions researched student mental health in the last five years.[29] This may indicate why so few universities implement adequate mental health policies. Without first identifying the most urgent problems on campus, universities will not be able to establish formal mental health policies that meet their objectives.

An additional concern about existing mental health policies across Canadian campuses is that many have yet to implement screening methods that actively identify students with serious mental health concerns or those in crisis.[30] Implementing screening methods is an important step for early detection of mental health problems and could consequently lead to earlier intervention. For example, the University of British Columbia has implemented an "Early Alert System", designed for students to report peers that are in distress so that they can be connected with appropriate resources and services.[31] Instead, most institutions rely on self-identification, putting the onus on students to self-identify as requiring mental health support and to independently seek out mental health services.[32]

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23 Elisea De Somma, Natalia Jaworska & Emma Heck, "Campus mental health policies across Canadian regions: Need for a national comprehensive strategy" (2017) 58:2 Can Psychol/psychol Can 161 at 161.

24 *Ibid*.

25 *Ibid*.

26 *Ibid*.

27 *Ibid* at 165.

28 *Ibid*.

29 *Ibid*.

30 *Ibid*.

31 *Ibid*.

32 *Ibid*.

F. Training of University Staff is Insufficient

The 2017 University of Calgary survey also identified a lack of crisis intervention training for university staff. Although 81.7 percent of universities reported providing crisis intervention training for staff providing counselling services, only 54.9 percent provide this training to Residence Advisors (upper-year students that live in residence and provide support to students living in the building).[33] Additionally, only 45.3 percent of institutions offer gatekeeper training (suicide-specific training on how to ask someone if they are contemplating suicide and how to convince this person to seek appropriate professional assistance).[34] Lack of training specifically for Residence Advisors can have grave consequences for the most vulnerable students. As previously discussed, the transition into adulthood when students move away from home is difficult for many of them. Considering that few suicidal students seek help from mental health professionals, providing gatekeeper training consistently across Canada to Residence Advisors may be imperative to ensure vulnerable first-year students living on campus have a more accessible and approachable resource. Further, these statistics do not address the effectiveness of the training provided.

G. Stigma and Stereotyping Contributes to the Problem

Issues of stigmas and stereotypes surrounding mental health and mental illness can affect both students accessing support and the faculty and staff who provide it.[35] Self-stigma exists where students internalize negative attitudes towards mental illness expressed by society—for example, that having a mental illness is shameful or will prevent one from being successful—and can prevent students from accessing necessary support.

Cultural stigmas can also play a role in preventing students from seeking mental health services due to stigmas or concerns that seeking such services are contrary to cultural values.[36] For example, in one study, American Indigenous adolescents with thoughts of suicide reported embarrassment and stigma as reasons for not seeking mental health care.[37] The study also found that this stigma was likely associated with the strong emphasis in traditional healing in Indigenous communities.[38] For racialized individuals, colonialism also contributes to apprehension to access mental health services and distrust in them due to historical abuses and past experiences with mental health professionals who are not culturally-sensitive.[39]

Stigma and stereotyping can also result in university faculty and staff under-reporting cases of students with mental health problems. Staff minimize mental health issues by deeming formal or additional intervention unnecessary.[40] This attitude creates a vicious cycle of university staff

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33 *Ibid*.
34 *Ibid*.
35 DiPlacito-DeRango, *supra* note 19.
36 David B Goldston et al, "Cultural considerations in adolescent suicide prevention and psychosocial treatment" (2008) 63:1 Am Psychologist 14.
37 *Ibid* at 21.
38 *Ibid*.
39 *Ibid* at 26.
40 DiPlacito-DeRango, *supra* note 19.

minimizing mental health issues brought forward by students, which creates apprehension about bringing forward issues in the future, which in turn contributes to staff's views that the mental health crisis is overblown.

II. LAW ON FINDING DUTIES OF CARE

Thus far, this paper has examined the social scientific background of suicide, including the statistics of student suicide, contributing factors, and the significant barriers to accessing mental health care on Canadian campuses. When a student dies by suicide, specifically on campus, do their loved ones have a legal remedy for this devastating loss? Canadian courts have not ruled on this question. However, the most likely remedy would be in a claim of negligence against the university for failing to prevent the suicide of the student.

In negligence cases, the first step in determining defendant liability is finding that a duty of care is owed by that defendant to the plaintiff. Several categories of relationships are recognized as creating a duty of care, such as teacher-student and doctor-patient relationships. [41] However, the duty of care owed to students by their universities is currently not clear in the Canadian case law. Recognizing a novel duty of care would therefore be necessary.

A. Finding a Novel Duty of Care

The test used today by Canadian courts to determine whether a duty of care exists has evolved from the broad *Anns* test first established by the House of Lords.[42] This test involved asking two questions. First, was there a sufficient relationship of proximity between the defendant (the wrongdoer) and the plaintiff (the person who suffered damage), such that it was within the reasonable contemplation of the defendant that carelessness on their part may cause damage to the plaintiff? If so, a *prima facie* duty of care exists. Second, are there any policy considerations that may negate the duty of care?

The Supreme Court of Canada adopted the *Anns* test in *Kamloops (City) v Nielsen*,[43] and redefined it in *Cooper v Hobart*,[44] where the first stage of the *Anns* test was subdivided into two questions. The court must assess: first, whether there was a sufficiently close and direct relationship of proximity between the defendant and plaintiff, and second, whether the harm was a reasonably foreseeable consequence of the defendant's actions. Though the order of these two questions have been treated as being interchangeable in the past, the Supreme Court recently held in *1688782 Ontario Inc v Maple Leaf Foods Inc*[45] that proximity is the "controlling concept." The Supreme Court ruled that this is because proximity informs the foreseeability analysis; thus, it should be considered first.[46]

When assessing proximity, the court must ask whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to

41 See *Childs v Desormeaux*, 2006 SCC 18 at para 15 [*Childs*].

42 See *Anns v Merton London Borough Council*, [1977] UKHL 4, [1977] 2 WLR 1024 [*Anns*].

43 [1984] SCR 2, 10 DLR (4th) 61 [*Kamloops*].

44 2001 SCC 79 [*Cooper*].

45 2020 SCC 35 [*Maple Leaf Foods*].

46 *Ibid* at 21.

impose a duty of care in law."[47] Courts may find a proximate relationship in one of two ways. A court may establish that the relationship falls within a previously established category or is analogous to one.[48] If a court cannot determine an established proximate relationship, the court must then undertake a full proximity analysis.[49] This is done by examining all relevant factors arising from the relationship, including expectations, representations, reliance, and the property or other interests involved.[50]

When assessing if the injury was reasonably foreseeable, the question is whether the type of injury was foreseeable for the class of persons within which the plaintiff falls. This question is different than whether the loss suffered by a particular plaintiff, could have been foreseen.[51]

If the court finds the relationship to be sufficiently proximate and the harm a reasonably foreseeable consequence, then a *prima facie* duty of care is made out. The second stage of the *Anns* test involves considering residual policy consequences. The complete test is often referred to as the "*Anns/Cooper*" test.

There are some cases in which the foreseeability stage of the *Anns/Cooper* test will be sufficient to establish a duty of care. These are typically cases where the defendant's overt action directly causes foreseeable physical harm to the plaintiff.[52] These differ from cases where the defendant's *failure to act* injures the plaintiff—such cases require a closer analysis of the relationship between the defendant and plaintiff.[53] Failing to prevent a student's suicide would fall under this category of cases.

B. When is There a Duty of Affirmative Action?

Canadian tort law has been apprehensive about finding positive duties of care. There is generally no duty to take positive action to rescue a person in the face of danger.[54] However, in *Childs v Desormeaux*, Chief Justice McLachlin stated that "[a] positive duty of care may exist if foreseeability of harm is present *and* if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity."[55] Three categories were established in which this "special link" may exist between a defendant and plaintiff.[56]

The first category of the "special link" includes situations in which a defendant creates or controls an inherently risky situation and intentionally attracts and invites third parties to it.[57]

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47 *Cooper*, *supra* note 44 at paras 32, 34.
48 *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 at para 26 [*Livent*].
49 *Ibid* at para 29.
50 *Cooper*, *supra* note 44 at paras 30, 34.
51 See *Maple Leaf Foods* at para 26, citing *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras 32-33 [*Hill*] and *Livent*, *supra* note 45 at para 78.
52 *Childs*, *supra* note 41 at para 31.
53 *Ibid*.
54 See *Horsley v MacLaren*, [1970] 2 OR 487, 11 DLR (3d) 277 (Ont CA) [*Horsley*], aff'd [1972] SCR 441.
55 *Childs* , supra note 41 at para 34 [emphasis in original].
56 *Ibid*.
57 *Ibid* at para 35.

For example, a boat captain owes a duty of care to rescue passengers who fall overboard.[58] The second category includes situations in which there is a paternalistic relationship of supervision and control between the defendant and plaintiff.[59] These relationships include parent-child or teacher-student relationships, where the plaintiff has a "special vulnerability", and the defendant is in a formal position of power.[60] Finally, the third category includes situations in which the defendant exercises a public function or operates a commercial enterprise.[61] These include cases where the defendant offers a service to the general public, which creates a special duty to reduce risk.[62] For example, a commercial host who serves alcohol to guests owes a duty to highway users who did not attend the gathering and who an intoxicated guest could foreseeably injure.[63] The Court in *Childs* then identified three common features between these three categories: (1) the defendant's material implication in creating the risk or their control of a risk to which others are invited; (2) concern for the autonomy of the persons affected by the positive action proposed; and (3) the theme of reasonable reliance.[64]

III. EXISTING DUTIES OF CARE BETWEEN UNIVERSITIES AND STUDENTS[65]

A. The Contractual Relationship Between a University and a Student May Give Rise to a Duty of Care

The seminal Supreme Court of Canada case, *Bella v Young*,[66] determined whether a university owes a duty of care to its students. In *Bella*, the plaintiff university student wanted to apply to a social work program after her undergraduate degree. In one of her classes, she attached an appendix to her term paper, which detailed a case study of women sexually abusing children. Her professor, the defendant, mistakenly believed this case study to be a confession and reported the plaintiff to the provincial Child Protection Services. The plaintiff was "red-flagged" as a potential child abuser in the social work community, where she hoped to later obtain a job. She brought forward a successful claim in negligence against the professor and the university.

In the *Bella* decision, the Court highlighted that the plaintiff's claim in negligence was a

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58 *Ibid*, citing *Horsley*, *supra* note 54.

59 *Ibid* at para 36.

60 *Ibid*.

61 *Ibid* at para 37.

62 *Ibid*.

63 *Ibid*, citing *Stewart v Pettie*, [1995] 1 SCR 131, 121 DLR (4th) 222 [*Stewart*].

64 *Ibid* at paras 38–40.

65 Much of the Canadian case law featuring university liability in negligence does not question whether a university owes a duty to protect their students from harm (whether that be harm from a third-party or from oneself). With a quick online search, one can find many instances of universities being sued for negligence in failing to prevent injury, sexual assault, etc. However, it is difficult to find *judgements* for these cases. The lack of case law featuring a university failing to protect its students may be because the deep pockets and reputation at stake for universities favour settlement rather than proceeding to trial.

66 2006 SCC 3 [*Bella*].

broad one, encompassing the university's dealings with her generally.[67] The Court emphasized a contractual relationship between the plaintiff and defendant: "[t]he appellant, even as a 'distant' student, was a fee-paying member of the university community, and this fact created mutual rights and responsibilities. The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound in both contract and tort."[68] The Supreme Court's decision in *Central & Eastern Trust Co v Rafuse* provides this common law rule regarding tort liability arising from contractual relationships: "[w]hat is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract."[69] This means that a contract between a university and student may create a relationship of dependency on the part of the student, but the "rights and responsibilities" a student is entitled to may be beyond the terms of the contract. Additionally, the relationship's contractual nature can give rise to a one of sufficient proximity to create a duty of care where one may not have existed otherwise.[70] However, as will be discussed below, this is situational as not every contractual relationship between a university and a student automatically gives rise to such a duty of care.[71]

B. The Duty of Care Analysis is a Circumstantial One

There is no general duty of care between universities and students, and a *prima facie* duty of care will not necessarily arise in every case involving a student and an educational institution.[72] In *Hassum v Conestoga College Institute of Technology & Advanced Learning*, the plaintiff students sued the defendant institution, arguing that the institution owed a duty of care not to charge the students "illegal or otherwise proscribed and impermissible fees".[73] However, the trial judge found that the negligence duty of care analysis is highly contextual, and in this case, no such duty existed.[74] Additionally, the trial judge, applying *Bella*, held that the contractual relationship affording sufficient proximity to give rise to the duty of care was specific to *those circumstances*.[75] A duty of care was not inferred "from the relationship between the defendants *qua* fee charging educational institutions and the plaintiffs *qua* fee paying students at these institutions."[76]

In contrast, in *Creppin v University of Ottawa*,[77] a class action was proposed by the university's varsity hockey team after the university suspended the entire team due to allegations of sexual assault. The suspension happened despite the fact that the university was aware that only two

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67 *Ibid* at para 30.
68 *Ibid* at para 31.
69 *Central & Eastern Trust Co v Rafuse*, [1986] 2 SCR 147 at para 58, 31 DLR (4th) 481 [*Central & Eastern Trust Co.*].
70 *Ibid* at para 57.
71 *Hassum v Conestoga College Institute of Technology & Advanced Learning*, [2008] OJ No 1141 at para 53, 2008 CanLII 12838 (Ont Sup Ct) [*Hassum*].
72 *Ibid*.
73 *Ibid* at para 4.
74 *Ibid* at para 53.
75 *Ibid*.
76 *Ibid*.
77 2015 ONSC 4449 [*Creppin*].

students were involved in the conduct. The plaintiffs made several claims against the university and its president, including in negligence. The trial judge used the duty of care analysis between a university and student from *Bella* to determine that there was a duty of cared owed, and the statement of claim in negligence could not be struck out. The trial judge found that the relationship between the university's president and plaintiff students was "arguably one of such proximity that any harm to the students by the president's actions would have been reasonably foreseeable."[78] Additionally, the court did not find a policy consideration that would negate the duty.

IV. DUTIES TO PREVENT SUICIDE: CURRENT CANADIAN JURISPRUDENCE

The duty to prevent suicide is not recognized in most circumstances because "on the whole, people are entitled to act as they please, even if this will inevitably lead to their own death."[79] Generally, adults do not have a duty to protect each other from the consequences of their own self-harm. As stated by Lord Hoffman in *Reeves v Commissioner of Police of the Metropolis*:

> there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves…People of full age and sound understanding must look after themselves and take responsibility for their actions…[D]uties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.[80]

Despite these generalizations, Canadian case law has identified some instances where there is a positive duty of care to prevent suicide.

A. A Duty to Prevent Suicide Has Been Recognized in the Jailor-Prisoner Relationship

Courts have found a duty of care is owed by police officers (or more generally, "jailors") to prisoners in their care to prevent suicide. Prisoners are entitled to have their jailors exercise reasonable care to protect them from foreseeable risks. In *Funk v Clapp*,[81] Funk was arrested for impaired driving and died by suicide in his cell at the Prince George lock up. His widow brought a claim in negligence against the Royal Canadian Mounted Police ("RCMP") constable who arrested Funk and booked him into lock-up, the jail guard on duty, and the RCMP staff sergeant in charge the night of Funk's death. The British Columbia Court of Appeal found that one of the foreseeable risks for incarcerated individuals is suicide, considering the evidence of a high number of suicide attempts at the specific lock-up.[82] The evidence also showed that the defendants were aware of this high risk of prisoners dying

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78 *Ibid* at para 20.

79 *Reeves v Commissioner of Police of the Metropolis*, [1999] 3 All ER 897 at 913, Lord Hope, [1999] 3 WLR 363 (HL (Eng)) [*Reeves*].

80 *Ibid* at 902, Lord Hoffman.

81 (1986), 68 DLR (4th) 229, 1986 CanLII 1119 [*Funk*].

82 *Ibid* at para 8 (a senior police officer at the lock up where Funk died by suicide counted 20 suicide attempts in a 70-day period proceeding Funk's suicide).

by suicide.[83] Therefore, given the relationship of sufficient proximity, the foreseeable risk of suicide for prisoners as a group, and the lack of policy considerations that ought to negate that duty, there was a *prima facie* duty of care to prevent the prisoner's suicide.[84] This duty of care is owed to all prisoners, although officers are required to be more vigilant regarding prisoners displaying suicidal tendencies.[85]

B. A Duty to Prevent Suicide Has Been Recognized in the Hospital-Patient Relationship

Courts have found that hospitals owe a duty of care to their patients to take reasonable steps to keep them safe while hospitalized. In *Paur v Providence Health Care*,[86] an intoxicated patient, Paur, was brought into the hospital and staff suspected him to be suicidal. While hospitalized, he attempted suicide and suffered a brain injury as a result. In the "foreseeability of harm" stage of the *Anns/Cooper* test, the evidence showed suicide by the specific method was not "predictable" in this case; however, this was not determinative for the legal test of foreseeability.[87] Rather, it is enough if "one can foresee *in a general way* the class or character of injury which occurred".[88] Several factors in the evidence showed that there was information known to the hospital that "Paur was at a foreseeable, real risk of harm by hanging himself in the bathroom."[89] These factors included the knowledge that Paur had suicidal ideation and that he was intoxicated. Further, the hospital had information on suicidal intoxicated patients generally, suicidal patients attempting suicide at this hospital using the method used in this case, the risk of suicide due to the room layout of the specific unit, and what measures to take to prevent suicide.[90] The British Columbia Court of Appeal stated that there was "little question" that the hospital had a duty to keep Paur safe, including a duty to provide him with adequate supervision, premises, and policies to keep him reasonably safe from harm.[91]

C. A Duty to Prevent Suicide Has Been Recognized in the Teacher-Student[92] Relationship

Another instance where there may be a duty to prevent suicide is in the case of teacher-student relationhips. In *Gallant v Thames Valley District School Board*,[93] a 17-year-old student, Gallant, submitted an essay which began with statements about wanting to die by suicide and the specific method he would use. Gallant died by suicide twelve days later by the method he detailed. His teacher had read his essay a few days prior. The school board had

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83 *Ibid* at para 9.
84 *Ibid* at paras 48, 50.
85 *Ibid* at para 48.
86 2017 BCCA 161 [*Paur*].
87 *Ibid* at para 20.
88 *Millette v Cote*, [1976] 1 SCR 595 at para 8, 51 DLR (3d) 244 [*Millette*] [emphasis added]. See also *School Division of Assiniboine South, No 3 v Hoffer et al* (1971), 21 DLR (3d) 608 at 614, [1971] 4 WWR 746 (Man CA), aff'd [1973] 6 WWR 765 (SCC).
89 *Paur, supra* note 86 at para 23.
90 *Ibid*.
91 *Ibid* at para 19.
92 In this case, "student" refers to a student in elementary, middle, or high school.
93 2011 ONSC 869 [*Gallant*].

provided teachers with resources on how to identify a student at risk of suicide after two other students at the school had died by suicide in the year prior. Gallant's parents alleged that the defendant teacher was negligent in failing to inform them of their son's essay, which caused or contributed to his death. There was no evidence of the steps the defendant teacher took to discharge her duty of care owed to the student, which could not be determined without a complete evidentiary record (as this was a motion for a summary judgment).[94] There is no doubt she owed a duty of care *generally* to Gallant as his teacher, but whether she had a duty to prevent suicide was a question left open for trial. Unfortunately, like many cases involving educational institutions, this matter was likely settled after the motion, as there is no record of a trial. However, this leaves open the possibility that a duty may be owed by teachers to students to protect them from self-harm and suicide, even if this duty simply requires informing the student's parents.

D. Policy Considerations in Allowing Recovery for Suicide

The *Anns/Cooper* test's final step to find a novel duty of care is to consider policy reasons to negate the *prima facie* duty of care. Whether the surviving family of a person who dies by suicide can recover damages for their death is a public policy question that Canadian courts have contemplated. The Court in *Gallant* discusses much of the policy rationale from the 1985 decision, *Robson v Ashworth*.[95] *Robson* had important precedential value in answering this question, and the Ontario Court of Appeal later affirmed it. When the court decided *Robson*, the state of the law was that there was "a well-recognized rule of public policy that the survivors of a person who commits suicide [were] not entitled to benefit from the suicide. The Courts have recognized however that there can be circumstances where a tortfeasor may be held responsible for a death by suicide."[96] At the time, these cases were only those where a tortfeasor's negligence caused a mental condition serious enough to render suicide likely.[97] To render the tortfeasor liable, the ensuing suicide required a sufficient causal connection with the negligent act.[98] For example, in *Cotic v Gray*,[99] Cotic was seriously injured in a motor vehicle accident caused by a negligent driver. He was soon after diagnosed with paranoia and described as "overtly psychotic".[100] Sixteen months after the motor vehicle accident, Cotic died by suicide, and his widow was able to recover damages from the negligent driver for his death.

Justice Galligan also cited a comment by Lord Denning in *Robson,* which was, at the time, recent: "though suicide was no longer a crime, it was still unlawful, and his Lordship felt it was most unfitting that the personal representatives of a suicide should be able to claim damages in respect of his death."[101] Justice Galligan later expressed his opinion about allowing recovery for suicide:

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94 *Ibid* at para 32.
95 [1985] OJ No 545, 1985 CarswellOnt 820 (Ont SC, H Ct J) [*Robson*].
96 *Ibid* at para 127.
97 *Ibid* at para 128.
98 *Ibid*.
99 [1981] OJ No 3043, 124 DLR (3d) 641) (Ont CA) [*Cotic*].
100 *Ibid* at para 10.
101 *Robson*, *supra* note 95 at para 131.

> Accordingly, I have asked myself the following question: Does the law permit a sane person deliberately to kill himself and expect that a person who was not the cause of the problems that led to his suicide will be called upon to support his widow and children? Unless the concept of individual responsibility has now been rejected by our law, it seems to me to be repugnant to public policy and to that common sense upon which it is based to answer the question in the affirmative.[102]

Finally, the phrasing of Justice Galligan's finding that the defendant doctor was not liable for the patient's death by suicide provides some insight into the different societal views of suicide at the time the case was decided: "I have reached the conclusion that it would be against public policy for the plaintiff and her children to benefit in any way *at the expense of Dr. Ashworth* for Robson's *deliberate suicide*."[103]

Suicide was decriminalized in 1972 in Canada. Although *Robson* was decided after this, the illegality of suicide had a strong influence in creating the public policy rule that prohibited recovery for survivors of a person who died by suicide.[104] Today, more time has passed since the decriminalization of suicide than when *Robson* was decided. The Court in *Gallant* recognized that *Robson* may not carry the same precedential value that it once did. The court acknowledged that because *Robson* was decided several decades ago (Robson had been decided twenty-five years prior to when *Gallant* was decided), public policy and community views on suicide may have changed.[105] Support for this view is evident in insurance case law, where survivors of a suicide victim are able to recover accidental death benefits, despite suicide not being accidental *per se*.[106]

The Court in *Gallant* also held that *Robson* did not create a rule absolutely precluding survivors of a suicide victim from recovering.[107] Exceptions exist when negligence "might impose liability on someone charged with the care of a person likely to commit suicide if due care is not taken."[108] Professor Klar has also written that the rule precluding survivors from benefiting from a wrongdoing should not apply to dependants of suicide victims who were not parties to the "wrongdoing".[109] This reflects the change in society's views and the law

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102 *Ibid* at para 135.

103 *Ibid* at para 137 [emphasis added]. On the facts of the case, it is possible that the defendant doctor would have been found liable, had the case been heard today. Justice Galligan provided little empathy to a family that had been devastated by the tragedy of a father and husband's suicide. Additionally, it is curious that he chose to use the term "deliberate" to describe the suicide, as most dictionaries would define a suicide as the intentional or deliberate killing of oneself. Is there such a thing as an undeliberate suicide? By choosing to call it a "deliberate suicide", it seems as if he placed moral blameworthiness on Robson for committing some wrongful act, thus implying that no one else should have to "suffer the consequences" for his "deliberate act".

104 *Gallant*, *supra* note 93 at para 34.

105 *Ibid* at para 44. Considering *Robson* was decided almost 35 years ago, it is very much possible that views on suicide have changed.

106 See *Vijeyekumar v State Farm Mutual Automobile Insurance Co.* (1999), 175 DLR (4th) 154, 44 OR (3d) 545 (Ont CA) [*Vijeyekumar*].

107 *Gallant*, *supra* note 93 at para 38.

108 *Robson*, *supra* note 95 at para 130.

109 *Gallant*, *supra* note 93 at para 42.

surrounding suicide—suicide is no longer seen as a "wrongdoing"—leading to the conclusion that dependants should be able to recover in tort if they did not assist the victim in their death.

Finally, the Court in *Gallant* highlights the Supreme Court of Canada's opinion from *Hall v Hebert* that public policy may change over time: "tort cases, which would necessarily involve the consideration of public policy as a bar to recovery, should determine the applicable principles on a case-by-case basis. These principles, like those applicable in the law of tort, should be flexible and evolve with our ever-changing society. What may be contrary to public policy in our decade may be perfectly acceptable in the next."[110]

V. A DUTY TO PREVENT SUICIDE ON CAMPUS: AMERICAN JURISPRUDENCE

A. A Duty of Care to Prevent Student Suicides Has Been Recognized in Some American Jurisdictions

In recent years, some American jurisdictions have found that universities do have a duty to prevent student suicides.[111] *Schieszler v Ferum College*[112] is one of the first cases to recognize this duty of care. In 2000, Michael Frentzel, a first-year student at Ferum College, died by suicide in his on-campus residence dormitory. The university had been aware that he had "emotional problems"—campus police found him in his room a few days before his suicide and found that him had intentionally harmed himself—and that he had sent communications to his girlfriend and another friend about his specific intent and methods. The method described in the communications matched the method that resulted in his death by suicide. Additionally, the Dean of Student Affairs had Frentzel sign a statement that he would not hurt himself again after campus police found out that he had harmed himself. Frentzel's estate representative brought a wrongful death suit against the university, the Dean of Student Affairs, and Frentzel's Residence Advisor. She claimed that the defendants knew or should have known that Frentzel would likely harm himself if not properly supervised, and that they were negligent by failing to take adequate precautions to ensure he did not harm himself, which resulted in his death. The United States District Court for the Western District of Virginia provided a thorough analysis of Virginia case law and that of other American jurisdictions to find that the facts of this case (specifically, the school's knowledge about the potential for self-harm) resulted in a finding that a special relationship might exist. Therefore, there was a duty to protect Frentzel from the foreseeable danger that he would hurt himself.[113]

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110 *Hall v Hebert*, [1993] 2 SCR 159 at para 71, 101 DLR (4th) 129 [*Hall*].

111 Beyond universities, the United States Court of Appeals for the Sixth Circuit recently held a school board to be liable for the suicide of an eight-year-old boy: see *Meyers, et al v Cincinnati Bd of Education*, 2020 WL 7706731 (9th Cir) [*Meyers*]. The Court in *Meyers* found that suicide was a reasonably foreseeable risk given the circumstances surrounding the student's death (harassment and bullying that the student was experiencing at the school). Though these circumstances are very different from the university context discussed in this paper, it shows a willingness of courts to find that suicide may be a reasonably foreseeable consequence that schools may need to be aware of in certain scenarios.

112 236 F Supp (2d) 602 (Va Dist Ct 2002) [*Schieszler*].

113 *Ibid* at 609.

The court denied the university's and Dean's motions to dismiss but granted the Residence Advisor's motion, as she could not have taken any additional steps to protect Frentzel without direction from the university or the Dean.

Nguyen v Massachusetts Institute of Technology[114] is one of the most recent American cases that recognizes a duty to prevent suicide in a university context. Han Duy Nguyen was a 25-year-old graduate student at the Massachusetts Institute of Technology ("MIT") when he died by suicide on campus in 2009. MIT first became aware of Nguyen's mental health issues and past suicide attempts two years before his death. Unlike in *Schieszler*, the university provided him with many resources and encouraged him to seek help, which Nguyen's usually refused. While MIT was not found liable for Nguyen's death, the Massachusetts Supreme Judicial Court (the state's appellate court) found that the relationship between universities and students is a special one. This special relationship gives rise to affirmative duties of reasonable care, creating a duty to rescue, including the duty to prevent suicide.[115]

When analyzing whether a special relationship exists between universities and students, the Court in *Nguyen* recognized that there are competing interests: "[s]tudents are often young and vulnerable; their right to privacy and their desire for independence may conflict with their immaturity and need for protection. As for the universities, their primary mission is to educate…but they still have a wide-ranging involvement in the lives of their students."[116] Various factors are accounted for in the "special relationship" analysis, as suggested by legal scholar Ann MacLean Massie:

> foreseeability of harm to the plaintiff…; degree of certainty of harm to the plaintiff; burden upon the defendant to take reasonable steps to prevent the injury; some kind of mutual dependence of plaintiff and defendant upon each other, frequently (as in these cases) involving financial benefit to the defendant arising from the relationship; moral blameworthiness of defendant's conduct in failing to act; and social policy considerations involved in placing the economic burden of the loss on the defendant.[117]

While the Court in *Nguyen* went on to find that a duty of care should be recognized to protect students from dying by suicide, it was clarified that this duty is not a generalized one.[118] Rather, there are certain conditions that must exist for a non-clinician[119] to owe a duty of care:

> [w]here a student has attempted suicide while enrolled at the university or recently before matriculation, or has stated plans or intentions to commit suicide, suicide is sufficiently foreseeable as the law has defined the term, even for university nonclinicians without medical training. Reliance of the student on the university for assistance, at least for students living in dormitories or away from their parents or guardians, is also

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114 479 Mass 436 (2018) [*Nguyen*].

115 *Ibid* at 437.

116 *Ibid* at 452.

117 Ann MacLean Massie, "Suicide on Campus: The Appropriate Legal Responsibility of College Personnel" (2008) 91:3 Marq L Rev 625 at 639.

118 *Nguyen*, *supra* note 114 at 455.

119 Non-clinician here refers to a university administrator (implying that they do not have formal medical or counselling training).

> foreseeable. Universities are in the best, if not the only, position to assist…They have also "fostered" expectations, at least for their residential students, that reasonable care will be exercised to protect them from harm.[120]

This means that university staff do not simply owe a duty to any student expressing suicidal ideation without a plan or intention to die by suicide; the finding of a duty of care hinges on self-harm being foreseeable.[121]

VI. PROPOSING A NOVEL DUTY OF CARE IN CANADA

A. The *Anns/Cooper* Test, Stage 1(a): Universities May Have a Sufficiently Proximate Relationship With Their Students

While no Canadian jurisdiction has found that universities owe their students a duty of care to prevent suicide, the time may have come to recognize this duty. As discussed previously, courts can employ the *Anns/Cooper* test to determine if a duty of care is owed. The first requirement for finding a novel duty of care is a sufficiently close and direct relationship of proximity between the plaintiff and defendant.[122] This could be found in the context of universities owing a duty to protect students from suicide. The Supreme Court in *Childs* found three categories where a "special relationship" can give rise to a duty to take affirmative actions. These categories had the common features of: the defendant creating and controlling the risk, the concern for the defendant's autonomy in proposing the positive action, and the theme of reasonable reliance.[123] The *Childs* categories and common features also align with the factors used in Massie's analysis of the "special relationship". [124]

Risk creation is one example of why there may be a relationship of sufficient proximity: for example, universities may create risk by implementing "weeding out" philosophies. Such actions can, in turn, contribute to and aggravate mental illness, as the university pits students against each other. It also creates stress for those who realize they may not be able to

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120 *Nguyen*, *supra* note 114 at 455.

121 *Ibid*.

122 Depending on the circumstances, a direct relationship of proximity may be found between the student and an employee of the university (which could result in vicarious liability—the university is held liable for the negligence of an employee acting in their capacity as an employee) *or between the student and the university institution itself*. In the university context, it is more likely that direct liability would be imposed on the institution due to its own negligence. Though this paper has addressed student suicides in public school contexts, the circumstances in these grade schools may tend to involve the negligence of one teacher or staff member that had a close relationship with the student—in these circumstances, an argument of vicarious liability may be a better approach for finding liability. In contrast, within universities, there may be multiple actors as well as systemic factors (such as policies) that contribute to a student's suicide risk. In *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 42, 133 DLR (4th) 1 [*Ross*], the Supreme Court of Canada held that "a school board has a duty to maintain a positive school environment for all persons served by it", thus imposing a duty of care on school boards *themselves*. Similarly, a duty of care could be imposed on universities *themselves*, given the analysis in this paper.

123 *Childs*, *supra* note 41.

124 Massie, *supra* note 117 at 639.

continue in their program if they are at the bottom of their class. While there is concern that imposing a positive duty of care may affect the autonomy of universities, these institutions would only have a positive legal duty to act when they create and control risks.[125]

Additionally, while the relationship between universities and students may not satisfy the "paternalistic relationship of supervision and control" category, students living on-campus are still significantly more dependent on the university for support than students living off-campus. Thus, for first-year students living in residence, the feature of reasonable reliance by a plaintiff student on the defendant university might create a "special relationship."

Finally, the direct financial benefit to universities arising from their relationships with students should be considered, which falls under the third *Childs* category. While *Hassum* does state that the fact that a student pays fees to a university does not in and of itself create a *prima facie* duty, this is a factor that courts should consider in finding a relationship of sufficient proximity.[126]

While the relationship between universities and their students does not appear to neatly fit into a *Childs* category of "special relationships", it seems the relationship takes on many of the common features of the categories.

B. The *Anns/Cooper* Test, Stage 1(b): Suicide may be a Reasonably Foreseeable Consequence

Given that the relationship between universities and their students may be held as sufficiently "close and direct" to find a proximate relationship, whether suicide resulting from a university's actions or omissions is a reasonably foreseeable consequence must be assessed. As emphasized in *Nguyen*,[127] depending on the specific facts of a case, suicide could be a reasonably foreseeable consequence for a student, should their university negligently fail to provide adequate mental health resources and support.[128] Additionally, *Funk* found a duty of care owed to prisoners because suicide was a reasonably foreseeable risk for prisoners as a group, despite Funk not presenting as a suicidal individual himself. A high-pressure university environment is not comparable to that of a jail or prison, where one's liberty is at stake or deprived and prison officials exercise near-absolute control. However, based on the social scientific evidence, it seems clear that university students do represent a group of the population that is particularly vulnerable and at risk for mental health concerns, including suicide. Given the statistics for mental illness and suicide among university students, it may be reasonable in some cases to find that suicide is a foreseeable consequence if a university acts negligently. Considering the sufficient proximity between universities and their students, and the reasonable foreseeability of suicide in certain contexts, courts may find that a *prima facie* duty of care could therefore be made out in certain circumstances.

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125 *Childs*, *supra* note 41 at para 39.
126 *Hassum*, *supra* note 71.
127 *Nguyen*, *supra* note 114.
128 *Ibid* at 455.

C. The *Anns/Cooper* Test, Stage 2: Residual Policy Considerations May Still Not Negate the Duty of Care

Finally, in the *Anns/Cooper* test, policy considerations may weigh against recognizing an otherwise valid *prima facie* duty of care. To reiterate the previous discussion in this paper regarding policy considerations, societal views on suicide have evolved in the last few decades. While a significant stigma still exists, it is not what it once was.

Finding a duty to protect students in *certain circumstances* will not open the floodgates because certain conditions must be met to trigger the duty of care. Massie and the Court in *Nguyen* both suggest that "it is both the *actual knowledge* on the part of the non-clinician college administrator, together with the *imminence* of the threat, that can create the duty to take reasonable steps to prevent self-harm."[129] Relevant factors for this analysis would include whether the university knew of any suicide attempts by a student in the recent past, whether staff or officials knew or acknowledged that a student had mental health issues, and whether the student is living on-campus. Weighed also against countervailing medical confidentiality issues, these non-exhaustive factors would be relevant for courts deciding on a case-by-case basis whether the facts appropriately give rise to a preventative duty of care.[130]

Another policy concern that may emerge relates to imposing liability on non-clinicians for not taking steps to protect students at-risk, despite not being medical professionals who can diagnose clinical issues.[131] However, under this proposed limited duty of care, non-clinicians would not be expected to make medical judgments or decisions. Rather, the duty would impose realistic duties and responsibilities, and non-clinicians would be expected to make decisions based on what a reasonable person in their role would do given the specific facts of the case.[132]

One final policy consideration that may cut against finding a preventative duty of care in this context is the paternalistic and intrusive consequences this may have for the privacy and autonomy of young adults. Courts could attend to this risk both by using a contextual case-by-case analysis and ensuring that the preventative duty is limited to serious cases. As the court stated in *Nguyen*, having a limited duty of care "respects the privacy and autonomy of adult students in most circumstances, relying in all but emergency situations on the student's own capacity and desire to seek professional help to address his or her mental health issue."[133]

D. "Damned if You Do, Damned if You Don't": Finding a Duty of Care May Still Be to the Detriment of Students

One significant issue that remains if a duty of care to prevent suicide is recognized is that universities may mitigate this by forcing students to take a leave of absence—temporarily or permanently—due to mental health concerns. That is, universities may react to avoid the risk

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129 Massie, *supra* note 117 at 670 [emphasis in original].
130 *Ibid*.
131 *Ibid* at 675.
132 *Nguyen*, *supra* note 114 at 457.
133 *Ibid*.

of tort liability in a manner that is to the overall detriment of students and their educational pursuits. If a student is at risk of suicide, a university may attempt to distance itself by forcing the student to take leave, thereby severing the relationship of sufficient proximity.

Such policies have been introduced both in Canada and the United States. In 2018, then Chief Commissioner of the Ontario Human Rights Commission, Renu Mandhane, criticized a mandatory leave policy that had been recently implemented at the University of Toronto: "the *Policy* appears to allow the University to immediately put the student on leave and withdraw essential services (housing, health, and counselling services) at a time when the student is in crisis and most in need of support. This approach is not consistent with the *Policy*'s intent of preventing harm."[134] In the United States, some schools have gone one step further, and demanded withdrawal permanently for "endangering behaviour".[135]

This "damned if you, damned if you don't" situation can negatively affect both universities and students. Universities may risk lawsuits regardless of what they do (either for failing to prevent the suicide of a student if they allow the student to stay in the program, or for forcing a student to withdraw "for their own good").[136] In turn, students may be apprehensive about seeking out services if they know that disclosing mental health issues may force them to take a temporary or permanent leave from the university.

However, the hope with recognizing a duty of care is that it may act as an accountability mechanism for universities so that they recognize they have certain obligations to protect their students physically and mentally. Recognizing a duty of care in tort law does not mean that suicide is evidence of a breach in every case. There will be cases where suicide occurs, despite universities meeting their respective standard of care. The law should emphasize meeting this standard of care, which may mitigate universities resorting to mandatory leave policies in cases where there are mental health concerns.

VII. STANDARD OF CARE: A BRIEF OVERVIEW

Most of this essay discussed duties of care and why one should be found for universities to protect their students from self-harm and suicide. A brief overview of what the standard of care would entail will now be discussed. *Creppin* provides that the relationship between the university and plaintiff students "gave rise to a duty of care which carried a standard of care requiring the university's conduct not create an unreasonable risk of harm."[137] Meeting this standard of care requires that universities take certain reasonable measures. *Nguyen* suggests that if the university has developed a suicide prevention protocol, it must be employed when the university knows one of its students is at risk.[138]

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134 Letter from Renu Mandhane to Claire MC Kennedy, Chair of the Governing Council at University of Toronto (29 January 2018), online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/re-university-mandated-leave-absence-policy-%C2%ADraises-human-rights-concerns> [https://perma.cc/4WTE-56HD] (Then Chief Commissioner Renu Mandhane has now been appointed a judge of the Ontario Superior Court of Justice).

135 Massie, *supra* note 117 at 671.

136 *Ibid* at 672.

137 *Creppin*, *supra* note 77 at para 23.

138 *Nguyen*, *supra* note 114 at 456.

In the absence of a protocol, several reasonable steps can be taken, including contacting the appropriate university officials empowered to assist the student in obtaining clinical care.[139] Should the student refuse such care, reasonable steps may include contacting the student's emergency contact.[140] In the case of an emergency, reasonable steps would include contacting police and emergency medical personnel.[141] These suggestions entail reactive measures taken only when there is an imminent threat that the student may harm themself or attempt suicide. Meeting the standard of care may also require taking preventative measures to ensure students are supported before an emergency arises. As discussed earlier in this paper, this may include: providing adequate counselling (with increased accessibility for at-risk students), properly training university staff (including professors), training Residence Advisors to support first-year students (at minimum, by providing them with gatekeeper training), and implementing better policy, including proper suicide prevention protocols.

CONCLUSION

Suicide remains the second leading cause of death among Canadian adolescents and young adults, including university students. Courts have found in limited circumstances that institutional actors and officials may owe a duty of care to prevent suicide, for example, to prisoners, patients, and potentially grade-school students. University students are vulnerable to mental illness, and private law might play a potentially productive role in incentivizing universities to provide better supports and services. Given this, it may be time for courts to recognize that universities owe a duty of care to protect their students from self-harm and suicide.

Courts should assess this duty on a case-by-case basis. This analysis would involve determining whether there was reasonable foreseeability that the university's negligence could result in a student dying by suicide and whether the relationship between the university and student was sufficiently proximate to give rise to such a duty. Factors to consider in this analysis include whether the student depended on the university (creating a sufficiently proximate relationship) and the university's knowledge about the student's suicide risk (foreseeability). One might argue that there are policy considerations to negate this duty of care, such as the propensity of Canadian courts not to allow recovery in tort for suicides and wanting to respect the autonomy of adults. However, changing societal views about suicide and the recognition of the magnitude of mental health issues on campuses may negate such policy concerns. Finally, a duty of care would only be found in limited circumstances, so a general duty owed by universities to every student is not implied. A plaintiff would still need to overcome the substantial hurdles of finding that the university breached the standard of care and proving causation. Some American courts have begun to recognize a duty of care to protect university students from suicide. While no case of student suicide has been brought to a Canadian court yet, the issue will likely arise in the near future, and hopefully, courts will acknowledge that recognizing a duty of care is a step forward in better protecting vulnerable students.

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139 *Ibid.*
140 *Ibid.*
141 *Ibid.*

ARTICLE

A GENDERED APPROACH TO "QUALITY OF LIFE" AFTER SEPARATION UNDER THE BRITISH COLUMBIA *FAMILY LAW ACT* RELOCATION REGIME

Meredith Shaw *

CITED: (2021) 26 *Appeal* 121

ABSTRACT

As established in existing literature, the separation of spouses has gendered consequences. Women are likely to suffer more severely, financially, from the dissolution of a relationship and are more likely to experience family violence. Mothers in heterosexual relationships are more likely to have care of children after separation than are fathers. In the face of those challenges, many guardians will apply to relocate for reasons that include seeking out emotional support from extended family and new partners, better financial opportunities, and housing affordability and availability. This article charts and analyzes British Columbia court decisions made under the Division 6 Relocation provisions of the *Family Law Act*. In Division 6, legislators have directed courts to consider the effects of a proposed relocation on a child's quality of life and that of the guardian who proposed relocation. This article examines how courts have engaged with the many gendered aspects of quality of life following separation. It finds that courts' recognition of family violence's repercussions is uneven and recommends the explicit inclusion of family violence in the Division 6 quality of life provision. It identifies the following as areas for further judicial education: first, family violence and its connections to courts' assessment of female applicants' credibility and to barriers to accessing housing and, second, potential biases in assessments of new female versus new male partners of applicant parents in heterosexual relationships.

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INTRODUCTION

When a child's guardian applies for a court's permission to relocate after separating from their spouse, it is often part of the broader work of reconfiguring life for themselves and their children after separation. Separating from a spouse has financial ramifications. To maintain two households, parties may need to retrain to seek out higher-paying jobs or work outside the home. In some cases, those opportunities will not be available where they lived during the relationship. In addition to seeking to relocate for educational or employment opportunities, a person might also seek to move somewhere with a lower cost of living or because more housing is available there. For some couples, separation will also mark the end of serving as a source of emotional support or community for a spouse. Therefore, a person might seek to relocate to where they have a network of friends, extended family, or the support of a new partner. Where a person's spouse is abusive, relocation may also be a part of attempting to secure housing and a new community away from their abuser.

Relocation is, therefore, a gendered issue in at least two senses. First, because it is still more common for mothers than for fathers to have substantially more parenting time and responsibilities following separation, the majority of guardians seeking to relocate with their children are mothers.[1] Although under British Columbia's *Family Law Act* ("*FLA*"), a guardian must give notice of their planned relocation even if they do not intend to bring the child or children with them,[2] such moves are less likely to be contested. In all 56 discrete cases examined for this paper, the guardian was seeking to move with the child or children. Second, relocation factors tied to financial need and family violence are, in general, more acute for women post-separation than for men. The "Gender-Based Statistical Report" prepared for Statistics Canada in 2018 found that "women typically experience marked declines in family income after union dissolution, compared with men."[3] Canadian women are also

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1 Dan Fox & Melissa Moyser, "Women in Canada: A Gender-based Statistical Report – The Economic Well-Being of Women in Canada" (May 16, 2018), online: Statistics Canada <www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54930-eng.html> [https://perma.cc/5P7M-NQE8]; and Part II of this paper. This paper examines applications for relocation made under British Columbia's *Family Law Act*, SBC 2011, c 25 [*FLA*] and will use language specific to the *FLA*. The *FLA* defines a "relocation" at s 65(1) as a "change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with (a) a guardian, or (b) one or more other persons having a significant role in the child's life." In the *FLA*, a child's guardian(s) are the people who have "parental responsibilities" with regard to the child (which refers to decision-making authority for the child as defined at s 41 and includes "making decisions respecting where the child will reside") and "parenting time" with the child (which refers to time that the child is with a guardian and during which the guardian generally has day-to-day decision-making authority and the "care, control and supervision of the child," as set out at s 42). It is a child's guardian who may object to a relocation of a child by another guardian (s 68). S 39 of the *FLA* establishes that "parents are generally guardians," if both parents lived together with the child prior to separation. If, however, one of the parents has never resided with a child, that parent will not be a guardian of the child unless there is a parentage agreement that establishes that they are a parent under s 30 of the *FLA*, the parent and the guardian(s) of the child have an agreement that establishes the parent as a guardian, or "the parent regularly cares for the child" (s 39(3)).

2 *FLA*, *supra* note 1 at s 66(1).

3 Fox, *supra* note 1.

more likely to experience violence at their spouse's hands than are men.[4] Therefore, both the high incidence of mothers seeking to move with their children, and the specific factors that motivate relocation, are reflections of the gendered consequences of separation on the quality of life of women and their children.

The relocation regime in Division 6 of the *FLA* explicitly directs courts to consider the effects of the proposed relocation on the child's quality of life and that of the guardian who proposed relocation. In light of the gendered effects of separation on quality of life, I will assess the impact of gender and gendered concerns on how courts have assessed those quality of life factors by looking at the applications of mothers and fathers, respectively. By making quality of life following separation an explicit part of the analysis, legislators created a space within the relocation analysis where courts could be particularly attuned to gender-based ramifications of separation. Conversely, the analysis also leaves space for existing biases against female applicants to be introduced. The research question at the core of this paper pertains to how courts have used that space since the introduction of the *FLA* in 2013. It asks whether the combination of the quality of life provision and judicial education has facilitated decisions that take into account the particular disadvantages that women face following separation and, if not, what areas for improvement the trends in the application of the provision suggest.

Based on the cases considered for this paper, I argue that courts have been uneven in how they have treated family violence's relevance to relocation. Thus, I argue that explicitly including family violence in the Division 6 quality of life factors would help produce better decisions. Similarly, given the prevalence of housing as a cited motivation for relocation, and the particular barriers to acquiring housing faced by separated mothers and mothers who have experienced family violence, housing merits particular attention as a motivation for relocation. Lastly, the courts' pattern of lauding the new female partners of fathers applying to relocate while making less positive findings regarding mothers' new male partners is a trend to be monitored, and a topic on which further research and judicial education would be helpful.

I proceed through those arguments in four parts. In Part I, I outline the law around relocation, as set out in the *FLA* and interpreted by the courts. In Part II, I address gender-based trends in relocation applications under Division 6 and guardians' stated motivations for relocation. In Part III, I address the cited incidence of family violence in the cases and the degree to which it figures in the relocation analysis. In Part IV, I look at the significance of affordability and availability of housing as a financial motivator for female applicants and at the barriers to securing housing that they are particularly likely to face. I conclude with comments on areas for improvement.

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4 See Shana Conroy, Marta Burczycka & Laura Savage, "Family violence in Canada: A statistical profile, 2018" (December 12, 2019), online: *Juristat, Canadian Centre for Justice Statistics, Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=zvttOx9r> [https://perma.cc/4MYN-JL3N]. The most recent Statistics Canada profile on family violence in Canada is from 2018. Its writers found that 8 out of 10 victims of intimate partner violence were female (79%).

METHODOLOGY

To assess the gendered implications of British Columbia courts' quality of life analysis, I used LexisNexis and CANLII to search for the cases in which, as part of the relocation analysis, the court drew specifically on the quality of life factors in Division 6, section 69(6), of the *FLA*. Since the *FLA* came into force in 2013, there have been 58 recorded decisions that meet this criterion. Because this paper aims to chart how the courts have grappled with the section 69(6) quality of life factors, I have limited the research parameters to those 58 cases, which are a subset of the 130 decisions made since 2013 that deal with Division 6. The British Columbia Court of Appeal decided two of the 58 decisions on the basis of the standard of review. Those decisions are therefore not included in the trends charted in Part II of this paper. Of the other 56 decisions, 32 were made by the British Columbia Supreme Court ("BCSC") and 24 by the British Columbia Provincial Court ("BCPC").

My research methodology meant that I used reported decisions only. Given the proportionately higher number of oral decisions given in the BCPC than in the BCSC and the lower rate at which they are transcribed and made publicly available, the trends recorded here more accurately reflect practices at the BCSC than the BCPC. Furthermore, trial decisions do not address the experiences of people facing similar conditions but who settled out of court or, through choice or lack of access, did not enter the legal system at all. Interviews with individuals in those situations are beyond the scope of this paper but would be a helpful basis for further study.

I. THE LAW: GOOD-FAITH REASONS FOR RELOCATION AS PART OF THE *FLA* RELOCATION REGIME

Guardians who seek to relocate make their applications under the *Family Law Act* if they and their spouse have not been married.[5] Married spouses may also make applications under the *FLA* and will be required to do so if they seek to make their application at the BCPC, as opposed to the BCSC, as the former does not have jurisdiction over the *Divorce Act*.[6] If a guardian wishes to relocate once there is already an agreement or order regarding parenting arrangements, they apply under the "Division 6 – Relocation" section of the *FLA*. Division 6 differs in several ways from both the approach to mobility cases adopted by the courts when applying the *Divorce Act*, and the approach set out at section 46 of the *FLA* for situations in which there are not existing agreements or orders regarding parenting arrangements. What is pertinent to this paper is that it is only in Division 6 of the *FLA* that legislators provided the

5 While the *Divorce Act* applies only to married couples (*Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2(1)), the *Family Law Act* applies both to unmarried parties in a marriage-like relationship and to married parties, to the extent that it does not conflict with the provisions of the *Divorce Act* (*FLA*, *supra* note 1, s 3(1)).

6 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91-92, reprinted in RSC 1985, Appendix II, No 5

courts with specific aspects of quality of life to consider in their relocation analysis.[7] Section 69(6)(b) of Division 6 sets out the applicable quality of life factors "including increasing emotional well-being or financial or educational opportunities." The court is to consider those factors when deciding whether the applicant's proposed relocation is in good faith. Given the explicit reckoning with those gendered factors that courts undertake in their section 69 analysis, it is the formal relocation regime under Division 6 that is considered in this paper.

Under the Division 6 Relocation regime, whether the guardian decided to relocate in good faith is an influential part of the analysis. To permit a move, the court must be satisfied on three points: first, that "the proposed relocation is made in good faith;" second, that "the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life;" and third, that the relocation is in the best interests of the child.[8] Per the legislative intent of the *FLA* as a whole, the "overriding factor" is the "best interests of the child."[9] However, where one guardian has the substantial majority of the parenting time, the proposed relocation will be presumed to be in the best interests of the child if the court accepts that the application was made in "good faith" and is satisfied that the proposed arrangements are "reasonable and workable."[10] Relocating guardians with substantially equal parenting time to that of the remaining guardian(s) do not benefit from that presumption and bear the onus of satisfying the court on all three points.[11]

There has been some disagreement in the case law over whether "good faith" and "reasonable and workable arrangements" are threshold requirements. The language of the individual sections read alone would suggest that they are threshold requirements. In contrast, the construction of the *FLA* as a whole suggests that the best interests of the child remains the deciding factor for all decisions made under Part 4 of the Act, including section 69.[12]

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7 When making mobility decisions under the *Divorce Act*, the courts have turned to the leading case, *Gordon v Goertz*, [1996] 2 SCR 27, 1996 CanLII 191 (SC). In that case, the court established that when deciding on mobility under the *Divorce Act*, courts are to apply the best interests of the child assessment but are not, except in exceptional circumstances, to consider the parent's reasons for the move (para 49). Note, though, that the amended *Divorce Act* will, when it comes into effect in 2021, include the "reasons for relocation" as an additional best interests of the child factor for courts to consider in relocation decisions (Bill C-78, An Act to amend the *Divorce Act*, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, SC 2019, c 16, cl 16.92(1)(a)). The amended *Divorce Act* still will not include specific quality of life factors as seen in Division 6. S 46 of the *FLA* applies when an application for relocation is made without there first having been an agreement or order regarding parenting arrangements in place. Under s 46 of the *FLA*, judges are to consider the relocating guardian's reasons for the proposed relocation along with the best interests of the child.

8 *FLA*, *supra* note 1 at s 69(4).

9 Susan B Boyd & Matt Ledger, "British Columbia's New Family Law on Guardianship, Relocation, and Family Violence: The First Year of Judicial Interpretation" (2014) 33 Can Fam LQ 317 at 337.

10 *FLA*, *supra* note 1 at s 69(4).

11 *FLA, supra* note 1 at s 69(5).

12 Scott Booth et al, *Family Law Sourcebook for British Columbia*, ed by Jennifer M Hicks (Vancouver: BC CLE, 2019) at ch 2 s 2.55, online: <pm.cle.bc.ca/clebc-pm-web/manual/42801/book/view.do#/C/1395843> .

In one of the earliest cases on relocation under the *FLA*, *LJR v SWR*, the court reasoned that the language of the statute made "failure to satisfy either precondition under s 69(4)(a) ["good faith" and "reasonable and workable arrangements"] fatal to the application to relocate."[13] The court would, therefore, have to turn to its *parens patriae* jurisdiction to make the best interests of the child the determinative factor.[14] However, later that same year, the court in *Hadjioannou v Hadjioannou* ("*Hadjioannou*") held that it would be "inconsistent to interpret s 69 in a way that would preclude the court from assessing the child's best interests." The court in *Hadjioannou* ruled that even where the "good faith" and "reasonable and workable arrangements" factors are not made out, the court is to carry on to consider whether the relocation might still be in the best interests of the child.[15] Courts have continued to cite the approach set out in *Hadjioannou* with approval and have described the *Hadjioannou* approach as being in line with the "modern approach" to statutory interpretation of reading the "words of an Act" together in their "entire context."[16] In practice, findings on good faith and on the best interests of the child are, in the majority of cases, consistent. The court's finding on good faith was consistent with its best interests of the child finding in 82 percent of the cases assessed in this paper, and thus with the final decision on whether to permit or prohibit relocation.[17]

The courts have interpreted the good faith analysis as involving two main steps. In the first step, the court considers whether, subjectively, the relocating guardian made a good faith decision. This is a credibility-based analysis in which the judge considers "whether the reasons asserted by [the relocating guardian] for the proposed relocation are the real reasons for the move."[18] In the second step, the court is to consider objectively whether "the reasons for seeking to relocate are reasonable."[19] The reasonableness assessment is an informal one in which the judge is to decide whether the stated reasons "accord … with common sense."[20] I turn in the following parts of this paper to cases where the courts have found the reasons for the move credible and how the courts have assessed what moves are reasonable.

II. TRENDS IN THE APPLICATIONS FOR RELOCATION

A. Gender-based Trends

This paper provides data on 56 BCSC and BCPC cases, decided between 2013 and 2020, in which a guardian sought to relocate. In 48 of those cases (86%), it was the mother who sought to relocate. The predominance of applications by mothers is in line with the broader

13 *LJR v SWR*, 2013 BCSC 1344 at para 85.

14 *Ibid* at paras 85, 86.

15 *Hadjioannou v Hadjioannou*, 2013 BCSC 1682 at para 17 [*Hadjioannou*].

16 *CMB v BDG*, 2014 BCSC 780 at para 71.

17 In only 10 of the 56 cases were relocation proposals found to be in good faith but were not permitted, or vice versa.

18 *Pepin v McCormack*, 2014 BCSC 2230 at para 69 [*Pepin*].

19 *CC v RV*, 2016 BCPC 477 at para 15.

20 *Kowalchuk v Dass*, 2016 BCSC 1857 at para 40 [*Kowalchuk*].

trend in relocation cases that is recorded in the secondary literature.[21] However, the data recorded here are specific to the subset of British Columbia Division 6 Relocation cases in which the court dealt explicitly with the good faith analysis.

Gender Role of Guardian Seeking to Relocate	Gender Role of Guardian Opposing Relocation	Number of Applications
Mother[22]	Father	47
Mother	Mother	1
Father[23]	Mother	8
Father	Father	0

In 26 of the 56 cases (46%), the court permitted relocation. Of the total 48 attempts to relocate by mothers, the court permitted 23 (48%). There were eight attempts to relocate made by fathers. Three were successful (38%). Given the small numbers involved, the fact that fathers' rate of success was 10 percent lower than that of mothers cannot bear the weight of much analysis.

	Applications by Mothers	Applications by Fathers
Relocation Permitted	23	3
Relocation not Permitted	25	5

A more significant divergence is evident between the cases of relocating mothers and fathers in the percentage of cases in which mothers or fathers had a substantially greater share of parenting time. It remains the case that where one guardian has substantially more parenting time, it is likely to be the mother. Of the 48 cases involving mothers seeking to relocate, 26 involved mothers with substantially more parenting time (54%). In contrast, only two of the eight fathers seeking to relocate had substantially more parenting time (25%).

As discussed in Part I, the factors that the court considers are the same whether one guardian has substantially more of the parenting time or the two guardians have substantially equal parenting time. In both situations, the relocating guardian must be found to have proposed relocation in good faith, proposed "reasonable and workable arrangements," and proposed a relocation that is in the best interests of the child. However, if one guardian has substantially

21 See Nicholas Bala et al, "Study of Post-Separation/ Divorce Parental Relocation" (2014), online: *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/spsdpr-edpads/spsdpr-edpads.pdf> [https://perma.cc/7UA4-4G2Z] for Canadian trends from the period of 2001 to 2011; See also Boyd & Ledger, *supra* note 9 for discussion of the first year of the implementation of the *FLA* relocation provision regime.

22 In 36 of the applications where a mother was seeking to relocate, she made the application. In 13 others, it was the other guardian (the father, in all but one case) who made an application opposing the mother's planned or realized relocation, and the mother was the Respondent.

23 In six of the applications where a father was seeking to relocate, he made the application. In two others, it was the mother who made an application opposing the father's planned or realized relocation, and the father was the Respondent.

more of the parenting time, the move is presumed to be in the best interests of the child so long as the court is satisfied on the issues of good faith and workable arrangements. In those cases, guardians opposing relocation bear the onus of refuting that presumption.[24] On the other hand, relocating guardians with substantially equal parenting time bear the onus of proving all three factors.[25]

In the cases examined for this paper, having substantially more parenting time did not guarantee that a guardian's relocation application would be successful. Neither of the two fathers who had substantially more parenting time was permitted to relocate, and 11 of the 26 mothers (42%) who had substantially more parenting time were not permitted to relocate. However, of the 23 mothers who were allowed to relocate, 15 of them (65%) had substantially more parenting time. Therefore, the proportionately higher number of applicant mothers with substantially more parenting time is one possible explanation for mothers having a higher rate of successful applications. However, as set out above, given the small number of applications by fathers, the difference between the rate at which fathers' applications succeeded (38%) and mothers' applications succeeded (48%) is not necessarily significant.

	Applications by Mothers	**Applications by Fathers**
Relocating Guardian had Substantially More Parenting Time	26	2
Successful Applications by Relocating Guardian with Substantially More Parenting Time	15	0
Unsuccessful Applications by Relocating Guardian with Substantially More Parenting Time	11	2
Relocating Guardian had Substantially Equal or Less Parenting Time	22	6
Successful Applications by Relocating Guardian with Substantially Equal or Less Parenting Time	8	3
Unsuccessful Applications by Relocating Guardian with Substantially Equal or Less Parenting Time	14	3

24 *FLA*, *supra* note 1 at s 69(4).

25 *Ibid* , s 69(5).

B. Factors Prompting Relocation

Under section 69(6)(b), judges are to consider whether the proposed relocation would increase the quality of life of the relocating guardian, as well as that of any children. Specifically, they are to look to factors "including increasing emotional well-being or financial or educational opportunities."[26] Most parties cite a number of those factors. There were only seven cases in this study where the relocating party relied on a single factor to justify their move.[27]

Financial opportunity is the motivation for relocation most often cited by both mothers and fathers. Drawing on the specific motivations for relocation emphasized by applicants, I have broken down financial opportunity into employment opportunities and affordability. Post-separation, applicant guardians frequently sought to relocate either for higher-paying employment,[28] or for flexible employment that would allow them to take on childcare duties themselves.[29] In keeping with existing literature on the negative financial ramifications of separation, over a third of cases involved parties seeking to relocate to lower their living expenses or find less expensive housing.[30] The general presumption expressed by judges in the cases assessed for this paper is that increases in financial opportunities for a guardian, especially a guardian with whom the children live primarily, will have a direct and positive impact on children. The court expressed that common understanding particularly clearly in *Hansen v Ferguson*, in which it held that, "[a]s the primary caregiver, this improvement in the mother's general quality of life will also benefit the children."[31]

The second most common motivation for relocation is emotional support, either from a party's extended family or a new partner. Canadians are increasingly mobile, and many people who have separated from a spouse find themselves far from the support network that their extended family could offer them.[32] Others have entered into new relationships and seek to move to share a home with their new partner. As with financial gains made by a guardian, the courts have recognized that increases in a guardian's emotional well-being have positive effects for the guardian and their child and can "translate into a positive family environment for the child."[33] How the courts have addressed the benefits and risks of relocating for the financial or emotional support of family or new partners is addressed in Part IV of this paper.

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26 *Ibid*, s 69(6)(b).

27 Those seven cases, and the corresponding factors, are: *JPL v CMM*, 2014 BCPC 302 (employment opportunities); *MM v CJ*, 2014 BCSC 6 (employment opportunities) [*MM v CJ*]; *NLS v CRT*, 2017 BCPC 125 (employment opportunities) [*NLS v CRT*]; *AP v JC*, 2018 BCSC 1381 (emotional support of extended family); *BH v RS*, 2016 BCSC 1027 (emotional support of new partner); *CJC v MDC*, 2016 BCSC 472 (affordability) [*CJC v MDC*]; and, *RDD v INA*, 2015 BCPC 264 (employment opportunities).

28 See e.g. *AV v MD*, 2014 BCPC 252 and *LK v MM*, 2013 BCPC 225.

29 See e.g. *Pepin*, *supra* note 18 and *BDH v SNH*, 2014 BCSC 2010.

30 See Part IV for further discussion of the cases pertaining to affordability and availability of housing.

31 *Hansen v Ferguson*, 2015 BCSC 588 at para 48 [*Hansen*].

32 Linda C Neilson, "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases", Canadian Legal Information Institute, 2017 CanLIIDocs 2, <http://www.canlii.org/t/ng> at 16.1.

33 *TC v SC*, 2013 BCPC 217 at para 70 [*TC v SC*].

The third most common motivations are educational opportunities for the relocating guardian and for the child. Although section 69(6)(b) separates educational opportunities from financial opportunities, a relocating guardian's educational opportunities are often tied to their employment and financial goals. While 13 mothers cited their educational opportunities as a reason for relocation, none of the applicant fathers drew on the factor. Those numbers fit with the existing research into the particularly deleterious financial effects of separation experienced by women and related efforts by women to retrain to improve their financial prospects.[34]

A number of relocating guardians highlighted the educational opportunities that would be available to their children in their chosen relocation destination. Judges were loath to accept the reasoning that children's education was necessarily better in a metropolitan area as opposed to more rural districts, or vice versa.[35] In the few cases in which they found educational opportunities for the children to be sufficiently divergent to have weight in the analysis, the educational opportunities had specific relevance to the identity of either the relocating guardian or the guardian opposed to relocation. For example, in *NLS v CRT*, the court found it important that relocation would mean a move away from the child's francophone school, which provided her with an important entry point to the francophone culture of the non-relocating guardian.[36] Cultural and ethnic identity arose again in two applications in which the applicant guardian argued that the need to connect the child with their traditional culture militated in favour of relocating to their country of origin or Indigenous territory.[37] Neither of those applications was successful. However, in another case, the importance of preserving the child's Indigenous culture by remaining in their traditional community became central at the best interests of the child stage of the assessment. As a result, although the application was found to be in good faith, the best interests of the child test was not satisfied, and the court held that the child was not to be relocated.[38]

In just 4 of the 56 decisions was family violence considered in the quality of life analysis. Women made all four of those applications. In a number of other decisions, the court notes the presence of family violence, but found it not to be relevant to the quality of life assessment or to the relocation decision at all. See Part III of the paper for discussion of the inconsistent treatment of family violence in these relocation decisions.

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34 Fox, *supra* note 1.

35 *MDG v CJG*, 2016 BCPC 298 at para 32 [*MDG v CJG*].

36 *NLS v CRT*, *supra* note 27 at para 8.

37 *MS v DE*, 2019 BCPC 182; *MH v AM*, 2018 BCPC 401 [*MH v AM*].

38 *LA v DT*, 2019 BCPC 181.

Quality of Life Factors relied on by Relocating Guardian	Mothers	Father	Total
Employment opportunities	31	5	36
Emotional Support and Community (with extended family)	24	5	29
Emotional Support and Community (with new partner)	21	3	24
Affordability (cost of living and housing)	18	3	21
Educational opportunities for the guardian	13	0	13
Educational opportunities for the child	6	2	8
Distance from abusive ex-spouse	4	0	4
Availability of housing	3	0	3
Ability of child to connect with traditional culture	0	2	2

III. FAMILY VIOLENCE AS A MOTIVATION FOR RELOCATION

Parts III and IV of this paper build on the analysis that was set out in Parts I and II of the legal framework for relocation and cases decided under it. Parts III and IV address the gaps in the relocation provisions and their implementation. I begin this part by considering the role that family violence plays in the reported decisions examined in this paper and its inadequate integration into the good-faith analysis. I recommend the explicit inclusion of family violence as a factor in the good-faith analysis. Family violence is a more significant aspect of relocation than would be suggested by the low number of decisions charted above in which courts explicitly recognized it as a motivation for relocation. Understanding the pervasive effects of family violence helps to inform the analysis of housing and the barriers in accessing it that follows in Part IV.

The existing literature makes it clear that family violence is a significant reason for guardians to relocate. As Linda Neilson notes in her report, "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases," the perpetration of family violence in a relationship may function on one hand to motivate the perpetrating guardian to threaten to relocate as another means "to retaliate, to intimidate, to regain control." On the other hand, it may also motivate the targeted guardian to relocate as a "response to fear and the overpowering need for community support, safety, stability and freedom from control."[39]

39 Neilson, *supra* note 32.

That need for safety and freedom from family violence may persist well after the time of separation. In addition to the risk of long-lasting psychological and physical repercussions stemming from family violence, separation, and related litigation have themselves been proven to be common triggers for family violence.[40]

Of the cases considered for this paper, there is one in which the court identified the proposed relocation as part of the perpetrating guardian's pattern of alienation and family violence.[41] The court was quick to deny that proposed relocation on the grounds that "the Court should not condone such misconduct."[42] In four cases, the court identified a targeted guardian's experience of family violence as a part of their motivation to relocate. In 15 other decisions, the court referenced family violence but either assessed it separately from the good-faith analysis or considered it irrelevant to the relocation analysis as a whole. This section of the paper addresses that inconsistent framing of family violence in the cases and argues that the inclusion of family violence in the good-faith analysis could help the court take into account the long-lasting effects of such violence.

In the decisions considered for this paper, the courts noted family violence in far more instances than the four in which they considered it as a quality of life factor. In *SMK v SK*, for example, the court provided a detailed analysis of the family violence perpetrated by the guardian opposing relocation,[43] but it did not reference that family violence when addressing the quality of life factors or whether relocation would be in the best interests of the child.[44] Rather, the court in *SMK v SK* found first that relocation should not be permitted. Only after making that finding did the court in *SMK v SK* then return to the issue of mitigating the father's anger management issues to facilitate co-parenting while both guardians remained in the same city.[45] In structuring its decision in that way, the court appeared to give little weight to the relevance of family violence to the best interests of the child and the quality of life assessments that underpin the relocation regime.

Similarly, in several other decisions in which the court considered family violence solely in its best interests of the child analysis, it focused on the question of whether there were, or were likely to be, current or recurring instances of family violence.[46] In those decisions, where the court interpreted the family violence as being in the past, it held it to be irrelevant to the

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40 *Ibid* at 4.5.1. See also Crystal Bruton & Danielle Tyson, "Leaving Violent Men: A Study of Women's Experiences of Separation in Victoria, Australia" (2018) 51:3 Australian & New Zealand J Criminology 339; Brittany E Hayes, "Indirect Abuse Involving Children During the Separation Process" (2015) 32:19 J Interpersonal Violence 2975.

41 *Silverman v Silverman*, 2015 BCSC 236.

42 *Ibid* at para 37.

43 *SMK v SK*, 2017 BCSC 1242 at paras 23–28 [*SMK v SK*].

44 *Ibid* at paras 119, 131.

45 *Ibid* at paras 134–141.

46 The best interests of the child analysis set out at s 37 of the *FLA* includes two factors that pertain directly to family violence. S 38 sets out the factors used to assess family violence (as defined in s 1 of the *FLA*) in the context of the best interests of the child analysis, which include, amongst others, "how recently the family violence occurred" and its frequency.

relocation application.[47] For example, in *Burseth*, the court considered "the impact of any family violence on the children's safety, security or well-being," against whom the violence had been directed, and whether the family violence carried out by the father would "indicate" that he was "impaired in his … ability to care for the children and meet the children's needs."[48] The court tied the father's family violence to his "stress due to the breakdown in the relationship." Despite finding "ongoing conflict between the parties," the court held that "any family violence is firmly in the past, and there are no current family violence issues that affect the children's safety, security and well-being."[49] The court did not address any potential emotional concerns stemming from the family violence in its quality of life analysis. The court in *Burseth* did, however, find the financial reasons for moving sufficient to permit the move. As in *Burseth*, the court in *NLS v CRT* emphasized that the reported family violence was two years in the past.[50] Combined with the father's completion of a counselling program, that the family violence had not continued was one of the factors that led the court to hold that the best interests of the child would be served by preventing their relocation. Unlike in *Burseth*, that finding was not outweighed by other factors, and the relocation of the child was therefore not permitted.[51]

In contrast, several of the decisions in which the court integrated family violence into the quality of life analysis demonstrate a more expansive understanding of how past and present violence can motivate relocation. These decisions do not appear to include any significant acknowledgment by the courts of how family violence can recur or be sparked by events, including litigation. However, they do demonstrate greater regard for the ongoing effects of past family violence. *GH v MJS* is one of the four cases in which the court took into account in its quality of life analysis the family violence to which the other guardian had subjected the relocating guardian. As in the *Burseth* decision, the judge in *GH v MJS* did "not believe there is any real risk of family violence being repeated in the future."[52] However, unlike in *Burseth*, in *GH v MJS*, the court considered relevant the "emotional toll" that the conflict had on the mother. This finding led the court to hold that the Applicant would "enjoy more emotional stability when she has some distance from [the Respondent]" and that their child, "in turn, … will benefit."[53] Similarly, in *Dowell v Hamper*, the court conceived of the planned relocation as an "opportunity to recalibrate the relationship between the child and her father."[54] In another of the decisions in which the court considered family violence in its quality of life analysis, the court accepted the Applicant's view that she and her children would experience greater "emotional security" if permitted to move away from the remaining guardian, who was "cruel and abusive."[55]

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47 See *Burseth v Burseth*, 2017 BCSC 2076 at para 101 [*Burseth*]; *Campbell v Campbell*, 2018 BCSC 330 at paras 28, 62; *NLS v CRT*, *supra* note 27 at paras 11–18, 29–36; *Hadjioannou*, *supra* note 15 at para 83; and *Mercado v Sani*, 2016 BCSC 1724 at para 10 [*Mercado*].

48 *Burseth*, *supra* note 47 at paras 91–103.

49 *Ibid* at paras 98, 101.

50 *NLS v CRT*, *supra* note 27 at para 30.

51 *Ibid* at paras 35–37.

52 *GH v MJS*, 2017 BCPC 322 at para 95.

53 *Ibid* at para 25.

54 *Dowell v Hamper*, 2019 BCSC 1592 at para 25.

55 *JKC v BFGP*, 2016 BCSC 2392 at paras 21, 79, 88 [*JKC v BFGP*].

By considering family violence as part of the quality of life analysis, judges are simply ensuring that a relevant piece of a party's experience figures in the analysis. It remains open to the court to find that other factors outweigh their findings concerning family violence. *KW v LH* provides one such example. The decision is one of the four in which the court considered family violence as part of their quality of life analysis. In the decision, the court accepted that the mother's proposed move was, in part, "motivated by her desire to remove her son from the present difficult environment."[56] However, the court found that the proposed relocation carried with it too high a risk of "fracturing the relationship" between the father and child and that the mother's perception of the violence that she and the child experienced from the father in Vancouver was not sufficient to substantiate the need for relocation.[57]

As noted throughout the relocation literature and case law, relocation decisions require judges to make decisions with severe consequences for children and their guardians on the basis of their current knowledge of dynamic circumstances.[58] Existing decisions that consider family violence within the quality of life analysis provide a helpful framework for understanding past and current violence as part of the circumstances that underpin a guardian's desire to relocate. The nuance of those decisions supports the explicit inclusion of freedom from family violence as a factor in the quality of life analysis.

For the inclusion of a family violence factor to be effective, it would also need to be paired with broader judicial education on engaging with applicants alleging family violence. It is still the case that female applicants risk negative credibility assessments when bringing evidence of family violence before the court.[59] The court's assessment of an applicant's credibility is pivotal to its findings in any hearing. In relocation decisions, the court's assessment of a guardian's subjective intentions regarding the relocation is also part of its threshold assessment of good faith. The long-standing trend of courts penalizing female applicants who allege family violence telegraphs to applicants and their counsel that bringing forward such claims risks

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56 *KW v LH*, 2017 BCSC 1441 at para 34 [*KW v LH* SC].

57 *Ibid* at paras 57–59. The applicant mother appealed this decision of the BCSC. The BCCA found that the trial judge had erred in law in deciding the matter under Division 6 of the *FLA*. It ruled that, absent a pre-existing agreement or order regarding parenting arrangements, the matter would rightly be decided under s 46 (*KW v LH*, 2018 BCCA 204 at para 92–94 [*KW v LH* CA]). As a result, the appeal decision does not address the quality of life factors that are specific to Division 6 and is therefore not one of the decisions under consideration in this paper. Note, however, that the BCCA held on appeal that the trial judge was wrong to exclude deeper analysis of the family violence from the best interests of the child analysis (*ibid* at paras 123–125). The BCCA did not address whether the trial judge also erred in not taking family violence into account in the quality of life analysis.

58 See Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2011) 30 Can Fam LQ 271; *Hansen*, *supra* note 31 at paras 31, 72; *TC v SC*, *supra* note 33 at paras 83–84.

59 Deborah Epstein & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399 at 431; Tara Carman, "Survivors of Domestic Abuse Told to Keep Quiet about it in Court or Risk Jeopardizing Child Custody", *CBC News* (27 September 2020), online: <www.cbc.ca/news/canada/domestic-abuse-custody-1.5738149> [https://perma.cc/58NT-KWRJ]; Susan B Boyd & Ruben Lindy, "Violence Against Women and the B.C. Family Law Act: Early Jurisprudence" (May 2016) 35:2 Can Fam LQ 101 at 112–113.

damaging their credibility in the court's eyes. That dynamic means that family violence was likely a factor in more of the applicant mothers' lives than was reported in the decisions or raised in court. I turn next to the courts' analysis of affordability and availability of housing as part of the quality of life analysis. As addressed below, family violence remains relevant in the context of housing.

IV. AFFORDABILITY AND AVAILABILITY OF HOUSING AS MOTIVATIONS FOR RELOCATION

Over a third of the cases considered for this paper involve parties relocating to seek better housing in a less expensive area or to share housing with family or a new partner.[60] Taken together, housing affordability and availability were at issue in 38 percent of the cases. The particular significance of housing for female applicants stems from a number of issues, including both that women are more likely to be left in a worse financial position following separation than are men and that women are more commonly the targets of family violence.[61] Women's options in securing housing are also limited by the court's pattern when dealing with heterosexual relationships of making less positive findings about women's new male partners than about men's new female partners. Those findings make the court more reluctant to allow women to relocate to reside with a new partner. It is therefore particularly important for applicant mothers that courts receive the necessary education to be attuned to their economic and social realities.

A. Affordability and Availability of Housing

Housing affordability and cost of living arise frequently in the relocation decisions considered in this paper. The court addresses those factors as facets of guardians' financial opportunities and emotional well-being. In a number of the cases, the relocating guardian sought to lower their cost of living by moving out of the Lower Mainland or out of the province.[62] While the court does require evidence of the relative affordability in the proposed destination for relocation, it is widely accepted that the cost of living in the Lower Mainland is high.[63]

In an additional three applications, the courts identified housing availability as a ground for relocation. Mothers brought forward all three. In two of the applications, the mother lived in a remote area where the only available housing was "off the grid" or a "rustic cabin rental", which the court held to be insufficient to her needs and those of the children.[64] In the third, the mother was in a metropolitan area, and the issue was one of combined affordability and availability limitations. The mother and children had a pet and, though the mother had searched diligently, she had been unable to find anywhere available that would meet the family's specific needs.[65]

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60 See the Quality of Life Factors table in Part II of this paper.

61 Fox, *supra* note 1; Conroy, *supra* note 4.

62 See *Hansen*, *supra* note 31; *Bonar v Bonar*, 2016 BCSC 2065; *JKC v BFGP*, *supra* note 55; *SMA v MLJ*, 2016 BCPC 174; *CJC v MDC*, *supra* note 27; *SAW v PJW*, 2018 BCPC 376 [*SAW v PJW*].

63 See discussion of required evidence in *JKC v BFGP*, *supra* note 55 at paras 74–76.

64 *CAP v MSP*, 2015 BCSC 183 at para 34; *SAW v PJW*, *supra* note 62 at para 5.

65 *CJC v MDC*, *supra* note 27.

B. Reliance on Relational Ties to Secure Housing

Many relocating guardians rely on extended family and new partners for housing. That a relocating guardian's extended family could provide both emotional and financial support is, like the high cost of living in the Lower Mainland, generally accepted in the case law.[66] The value of such support has been more contentious when it is provided by a relocating guardian's new partner. Judges note the challenges posed by these cases.

Courts noted in a number of decisions that the increased stability that a guardian expected to find in a new family unit would be beneficial for the children.[67] However, courts also recognized the concern frequently raised by the guardian opposing relocation that, in moving to unite with a new partner, the relocating guardian prioritized their interests over those of the children.[68] As a result of that inherent uncertainty, the courts' decisions on whether a proposed move to unite with a new partner is in good faith frequently seem to turn on judges' assessment of the new partner. The resulting analyses suggest a problematic trend.

In the decisions in which fathers proposed to relocate to join a new partner (all of whom happened to be female), the court viewed the women as positive influences. In *JJA v KAC*, for instance, the court noted with approval that the father's new partner "works only part time" and would therefore "have the time to assist in any reunification plan that the counsellors propose," and that she is "a caring, calm and thoughtful woman."[69] The descriptions of the fathers' new partners in *MM v CJ* and *NLB v CEB* were similarly positive.[70] Although this paper's sample size of the trend is small, the data are consistent with a more long-standing trend charted in the literature of courts privileging the applications of fathers who can provide a "mother figure" for the child and, in particular, one who will spend time at home with the children.[71]

In the case of the mother applicants' new partners, courts' assessments were more mixed. On an individual basis, some of the findings may seem intuitive. The fathers' new female partners were described as calm, caring, and highly invested in the children's lives. On the other hand, in some cases, the mothers' new partners (all of whom were male in the cases considered for this paper) were described as getting into confrontations with the children's father or as themselves being perpetrators of family violence.[72] The best interests of the child

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66 See *SMK v SK*, *supra* note 43; *Pepin*, *supra* note 18; *MH v AM*, *supra* note 37; *Burseth*, *supra* note 47.

67 See *TC v SC*, *supra* note 33 at para 77; *Kowalchuk*, *supra* note 20 at para 47.

68 *MDG v CJG*, *supra* note 35 at paras 34–35, 62; *Hansen*, *supra* note 31 at para 36.

69 *JJA v KAC*, 2017 BCPC 127 at para 280 [*JJA v KAC*].

70 *MM v CJ*, *supra* note 27 at paras 11, 84, 87; *NLB v CEB*, 2017 BCSC 1463 at paras 81, 130, 146, 154, 168 [*NLB v CEB*].

71 See Susan B Boyd, "Child Custody, Ideologies, and Employment" (1989) 3:1 Can J Women & L 111; Cheri L Wood, "Childless Mothers? The New Catch-22: You Can't Have Your Kids and Work for Them Too" (1995) 29:1 Loy LA L Rev 383. Of the applications by male applicants considered for this paper, *JJA v KAC*, *supra* note 69, exhibits most directly the privileging of what Boyd refers to as "female care" of the children. One would, however, expect courts' reliance on such considerations to continue to decline over time as societal mores change.

72 See *NLB v CEB*, *supra* note 70; *MDG v CJG*, *supra* note 35 at para 50.

are, of course, paramount, and there is no reason to second-guess the courts' findings on the best interests of the child in those cases individually. However, if it remains the case in a more expansive study of the case law that judges consistently regard new women in children's lives in significantly more positive terms than new men in their lives, then that would be a concerning trend. It is a trend to which applicants, their counsel, and the courts would need to be alive to and interrogate.

C. Affordability, Availability, and Family Violence

As already discussed, difficulties in finding affordable and available housing are relevant to female applicants, broadly. However, they are particularly relevant for women and their children who are leaving situations of family violence. As set out in the 2019 report on "Overcoming Barriers to Housing After Violence" prepared by the British Columbia Society of Transition Houses, the lack of affordable and available housing is putting women experiencing violence in a situation where they are "forced to trade safety for housing":

> Research shows that the lack of affordable housing forces women to make the difficult choice to return to a violent situation or face homelessness – both of which may put her safety and her children's safety at risk.[73]

The barriers posed by lack of affordable housing are further heightened by the "pervasive stigma against women who have experienced violence" perpetuated in private rental markets and in broader public responses to transition housing.[74] Furthermore, disturbance or damage caused by a violent former spouse can result in the eviction of women experiencing family violence from the accommodation that they had secured.[75]

The decisions made at the interstice of housing and family violence suggest the need for courts and the legislature to clarify the relevance of both factors to applicants' quality of life and to that of female applicants in particular. For example, in *Mercado v Sani*, the court found that family violence was not relevant to the relocation decision.[76] The court made that finding despite the applicant mother's move to a shelter following what the court described in mutualizing terms as the parties' "conflicts," and her attempt to relocate to somewhere with a lower cost of living.[77] In *KW v LH*, the court recognized that it was "rational" for the applicant to remain briefly in the same home as her abusive partner, given that "she had few friends to rely on in Vancouver, had begun training as a nurse, and was not employed."[78] However, the court then explained the respondent's abuse as resulting, in part, from the fact

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73 Tanyss Knowles et al, ed, "Getting Home Project: Overcoming Barriers to Housing After Violence" (2019) at 13, 14, online (pdf): *BC Society of Transition Houses* < https://bcsth.ca/wp-content/uploads/2019/06/Getting-Home-Project-Community-Needs-Assessment.pdf>[https://perma.cc/V3WE-DYV4].

74 *Ibid* at 15.

75 Leslie M Tutty et al, "I Built My House On Hope: Abused Women and Pathways into Homeless" (2014) 19:12 Violence Against Women 1498 at 1506.

76 *Mercado v Sani*, *supra* note 47 at para 10.

77 *Ibid*.

78 *KW v LH* SC, *supra* note 56 at para 32.

that the applicant had remained in the home.[79] In both cases, greater attention to the effects of housing and family violence on the applicants' quality of life would have helped the court gain a more fulsome appreciation of the applicants' motivations and their reasonableness.

CONCLUSION

This paper examined the 58 recorded decisions since the implementation of the *FLA* in which British Columbia courts grappled directly with the quality of life of relocating applicants and their children post-separation. As is evidenced in the existing secondary literature and in the trends charted in Part II of this paper, gender plays a role in post-separation quality of life. Mothers are more likely to have care of children after separation and are likely to suffer more severely financially from the relationship's dissolution. In the cases examined for this paper, there were six times more applicant mothers than applicant fathers, and over half of those mothers held the majority of the parenting time. For both applicant mothers and fathers, financial considerations were the most common motivations for relocation. For mothers, the need to relocate to seek out re-education was particularly acute. Women are also more likely to face family violence in a relationship. Although the court addressed family violence as part of its quality of life assessment in only 4 of the 58 decisions, there were another 15 decisions in which family violence was raised. Given the barriers that many women face when bringing family violence to the court's attention, it was likely even more prevalent in the cases than those numbers would suggest.

Therefore, the quality of life analysis as set out in Division 6 of the *FLA* is already gendered. As such, I conclude that courts and the legislature could make space in the analysis for attention to the gendered experiences of family violence and the socio-economic realities that many applicants, the majority of them mothers, face. In the decisions in which family violence was integrated directly into the quality of life analysis, courts' analyses demonstrated a more expansive understanding of family violence as a motivator for relocation. Although the courts have dealt explicitly with separated guardians' need to relocate due to housing constraints, applicant mothers appear to face more barriers when applying to relocate to live with new partners than do applicant fathers. Gaps also arose where the court did not consider in tandem the exigencies of housing affordability and availability, and the effects of family violence. Further judicial education on those topics would help fill such gaps.

When given specific factors by the legislature to be used in their analysis—"emotional well-being or financial or educational opportunities"—courts considered those factors directly in at least 58 out of the recorded 130 decisions. I therefore propose the inclusion of freedom from family violence as a specific quality of life factor. However, this analysis makes clear that for such a reform to be effective, it would need to be accompanied by further judicial education on the gender dynamics that underpin the situations of so many applicants.

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79 *Ibid* at para 33. The mother's appeal of the BCSC's decision was allowed, but on other grounds. The BCCA accepted the trial judge's finding that "the effect on both parties of continuing to live in the same house was profound" and, like the trial judge, noted that, "in hindsight, the Mother's decision to return to East 17th was most unfortunate" (*KW v LH* CA, *supra* note 57 at para 19).