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The Editorial Board also thanks the University of Victoria's Faculty of Law for its institutional support, as well as the sponsors whose contributions to Appeal Publishing Society made publishing this volume of *Appeal: Review of Current Law and Law Reform* possible.

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PREFACE

I write entirely to find out what I'm thinking, what I'm looking at,
what I see and what it means. What I want and what I fear.

Joan Didion, *Why I Write, 1976*

Welcome to the 27th volume of *Appeal: Review of Current Law and Law Reform.* This year the vibrancy of life has reemerged as we ease out of the pandemic. The world is reopening, leaving us to wonder what to make of it all.

Appeal has been filled with a rousing energy and an eagerness to express that which we have experienced in isolation. We ran *Appeal* with a full Editorial Board. We met each other in person for the first time since March 2020. We rebooted our podcast, *Stare Indecisis.* We recruited a record-high number of volunteers. We adapted where the ebbs and flows of life required novel ideas. We reflected on our history–as an alternative law journal that began in 1995. We cleaned out our dormant offices, desiring a reset of sorts. Following the words of Joan Didion, we took pen to paper in order to understand our surroundings as we stumbled out of the hazy pandemic slumber.

We bring to you, Volume 27, born out of creativity, the pursuit of knowledge, teamwork, resilience and the need to understand and challenge our legal world.

This year at *Appeal* is special for another reason. This is the last year where Professor Ted L. McDorman will be the faculty advisor to *Appeal.* Professor McDorman has been the advisor to *Appeal* for ten(!) years. He provided wisdom, stability, problem-solving, and importantly, he allowed *Appeal* to take on a life of its own. Conversations with members of past Editorial Boards are quick to turn into nostalgic questions on "how is Ted doing?" From all the past Editorial Boards, we sincerely thank Professor McDorman for his work inside and outside the classroom.

Volume 27 features cutting-edge legal work by six authors from across Canada. Our authors are law students and articling students from the University of Victoria, McGill University, the University of Toronto, York University, and the University of Alberta.

Larissa Parker considers the role of section 15 in identifying and remedying adverse effects discrimination in pollution hotspots that are created and sustained by provincial legislation. Parker highlights the implications of the Supreme Court of Canada's recent decision in *Fraser v Canada (Attorney General)* for *Charter* claims on environmental inequality.

Vanessa Di Feo delves into *Callow v Zollinger,* finding that the decision has perpetuated confusion about the principle of good faith in Anglo-Canadian contract law. Di Feo challenges the approach embraced by the Court and reconceptualizes *Callow* through the lens of negligent

misrepresentation, an analysis that helps draw a clearer line between contracting parties' disclosure obligations and the duty of honesty.

Ryan Ng tackles the law of environmental assessment and its intersection with the duty to consult under section 35 of the *Constitution Act, 1982*. To advance the related goals of sustainable development and reconciliation between Canada and Indigenous peoples, Ng proposes reforms to environmental legislation such as the federal *Impact Assessment Act* and to the common law.

Sarah Nixon provides an in-depth exploration of what is at stake with Canada's approach to reconciliation by contrasting two prevailing forms: 'reconciliation to Crown sovereignty' and 'reconciliation as treaty'. She explores both through the recent decision in *Coldwater et al v Canada (Attorney General).* Nixon argues that the two forms are mutually exclusive and that reconciliation as treaty ought to be the preferred approach.

Darren Wagner critiques the Supreme Court of Canada's decision to abolish the promise doctrine from intellectual property law in *AstraZeneca Canada Inc v Apotex Inc.* Wagner examines the Court's reasoning, the doctrine's history, and its effect on the pharmaceutical industry. He argues that the doctrine was frequently mischaracterized, and suggests that the doctrine still had advantages and should not be discarded entirely.

Camas Ussery problematizes the myth of the "ideal victim" as an unrealistic and damaging standard held against sexual assault survivors when assessing credibility, especially considering that survivor demeanour on the stand can be impacted by trauma. She explores existing under-utilized tools available in the Canadian criminal justice system and argues that legal professionals should more readily employ these tools to remedy wrongful acquittals and support survivors through the trial process.

These six pieces would not have been possible without all those who contributed to the success of Volume 27. We are grateful for our expert reviewers and volunteers who generously gave their time to *Appeal.* We thank our sponsors for their support of *Appeal.* Thank you to the Faculty of Law, the staff at the school's Diana M. Priestly Law Library, and the University of Victoria Law Students' Society who provided support throughout the year. We recognize the work of all the authors who submitted to *Appeal* for their dedication to legal scholarship.

On a personal note, I wish to express my gratitude to our outstanding Editorial Board who worked tirelessly to make this journal a reality: Brett Jenkins, Camille O'Sullivan, Hilary Mutch, Jinjae Jeong, Kyra Graham, Layne Clarke, Sarah Lachance, Stephanie Lawless, and Vinson Shih.

Happy reading.

Frances Miltimore
Editor-in-Chief

ARTICLE

THE MYTH OF THE "IDEAL VICTIM": COMBATTING MISCONCEPTIONS OF EXPECTED DEMEANOUR IN SEXUAL ASSAULT SURVIVORS

Camas Ussery *

CITED: (2022) 27 *Appeal* 3

ABSTRACT

When a sexual assault survivor testifies in court, it is highly likely that their demeanour will be impacted by the trauma they suffered. Despite an array of research on how trauma can affect demeanour, legal professionals and juries often have misconceptions about how a sexual assault survivor "should" behave on the stand. As the standard of proof in criminal law is incredibly high, and often only the survivor and the accused have firsthand knowledge of what happened, the outcome of the case can hinge on the survivor's credibility. If a misconception about demeanour impacts the assessment of their credibility, the accused may be wrongfully acquitted. This paper explores the research on trauma and demeanour and explains why it is critical that the legal profession appreciates its importance. The paper looks at many available yet underused options within the Canadian criminal justice system to mitigate the effects of trauma on demeanour and support survivors, and argues that their increased use would benefit survivors while maintaining the presumption of innocence that lies at the heart of a criminal trial.

* Camas Ussery is in her second year of the JD program at the University of Victoria Faculty of Law. She is appreciative of the guidance and support from the *Appeal* team, and grateful to the Victoria Sexual Assault Centre for opening her eyes to the challenges facing sexual assault survivors.

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INTRODUCTION

One in three women in Canada will be sexually assaulted in her lifetime.[1] However, only one in ten sexual assaults in police-reported data resulted in a conviction—roughly half the conviction rate of physical assault.[2] Despite the prevalence of this crime, lawyers and judges hold many misconceptions about sexual assault and in doing so, contribute to the low conviction rate. Justice McLachlin (as she then was) stated in *R v Seaboyer* that "the woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies."[3] The *Criminal Code* now prohibits some long-standing myths and allows Crown counsel or judges to intervene if they are used, but the myth of the "ideal victim" persists.[4]

Generally, the ideal victim is characterized as a well-dressed, middle-class, virginal white woman who is sexually assaulted by a stranger.[5] This characterization necessarily excludes sex workers and intimate partners, even though over half of sexual assault survivors know the perpetrator.[6] Also excluded are marginalized individuals, despite factors such as Indigeneity, homelessness, or diverse sexual identities and orientations increasing the risk of sexual assault.[7] This myth encompasses all stages of a sexual assault, from the survivor's behaviour before and during the assault to their demeanour during a police statement or while giving testimony. However, this paper focusses on the specific concept of the ideal victim in the courtroom.[8]

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1 "Quick Facts" (last visited 25 July 2021), online: *Sexual Violence: support and prevention* <www.uottawa.ca/sexual-violence-support-and-prevention/quick-facts> [perma.cc/MZ38-EZM2].
Sexual assault can be a difficult subject to engage with. Should readers wish to access support at any point during their engagement with this paper, they can visit the Ending Violence Canada website for a list of resources, see "Sexual Assault Centres, Crisis Lines, and Support Services" (last visited 29 July 2021), online: *Ending Violence Association of Canada* <endingviolencecanada.org/sexual-assault-centres-crisis-lines-and-support-services/> [perma.cc/RFX6-246S].

2 Statistics Canada, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 October 2017).

3 [1991] 2 SCR 577, 1993 CarswellBC 512 at para 146 [*Seaboyer*].

4 *Criminal Code*, RSC 1985, c C-46, s 276.

5 The terms 'real', 'genuine' or 'expected victim' or 'good witness' are also used throughout sexual assault literature to convey the same meaning. See Janice Du Mont, Karen-Lee Miller & Terri L Myhr, "Role of Real Rape and Real Victim Stereotypes" (2003) 9:4 Violence Against Women 466 at 470; Melanie Randall, "Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming" (2010) 22:2 Canadian J Women & L 397 at 407.

6 Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy & Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 July 2017) at 13.

7 *Ibid* at 8.

8 While people of all ages and genders survive sexual assaults, women are disproportionately represented among survivors. Additionally, the mythology surrounding sexual assault centres around expectations for women's behaviour. This paper focusses on misconceptions and experiences common to adult women survivors, but all the accommodations discussed benefit sexual assault survivors of any age or gender, therefore gender-neutral language is used throughout.

In a courtroom setting, the ideal victim describes a survivor who displays enough emotion to indicate they have experienced trauma, but still maintains a professional and composed manner when addressing the court. They can provide consistent answers on cross-examination regardless of the tactics used by defence counsel. They will cry when recounting particularly painful memories, but they will not be overly emotional or nervous.[9] However, a survivor's demeanour[10] may not align with the ideal victim stereotype, and this dissonance may have a resulting impact on the assessment of their credibility.[11]

Sexual assault trials are commonly "two-witness cases," meaning that the narratives of the survivor and the accused are the only admissible accounts of the incident. These two versions of events often directly contradict one another and there are rarely other witnesses to support the survivor's version of events.[12] In order to navigate discrepancies between the two narratives, judges and juries may look for subtle clues in body language to determine whether a survivor is telling the truth. The limitations of demeanour evidence have been acknowledged by the judiciary, and reliance on demeanour often does more harm than good.[13] Yet, a small seed of doubt in the mind of the trier of fact can be all it takes to necessitate an acquittal. Because of the requirement to prove guilt beyond a reasonable doubt before convicting the accused, any damage to a survivor's credibility in a sexual assault trial can have a magnified effect on the outcome of the case.

The ideal victim myth is not a new concept—this terminology has been in use for over 30 years.[14] Although neither the myth itself, the research on trauma, nor the courtroom accommodations available to mitigate the ideal victim myth are new, case law and survivor accounts show trauma research is rarely considered and testimonial accommodations are often unused. As many sexual assault cases hinge on credibility, judges and lawyers who practice in this area are responsible for staying abreast of knowledge on this topic. As legal professionals, we have an ethical responsibility to further our understanding on these topics

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9 Lisa Frohmann, "Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections" (1991) 38:2 Social Problems 213 at 213; Regina A Schuller et al, "Judgements of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes" (2010) 13:4 New Crim L Review: An Int & Interdisciplinary J 759 at 770.

10 Bryan A Gardner, ed, *Black's Law Dictionary,* (St. Paul, MN: Thompson Reuters, 2019) sub verbo "demeanor": Outward appearance or behaviour, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions.

11 Lori Haskell & Melanie Randall, "The Impact of Trauma on Adult Sexual Assault Victims" (2019) at 8, online (pdf): *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf> [perma.cc/4BNF-NMUB].

12 See e.g. Louise Dickson, "Judge must decide whether woman consented to bondage during sex", *Times Colonist* (25 July 2021), online: <timescolonist.com> [perma.cc/ALK2-Z2K4].

13 See generally Hamish Stewart et al, *Evidence: A Canadian Casebook,* 5th ed (Toronto: Emond Montgomery Publications, 2020) at 377 (many case authorities are referenced within this section).

14 See e.g. Beth Gorham, "Looking for the ideal victim: 'virginal, vice-free' women get better police treatment in sex-assault cases, Nfld. study says", *Kitchener - Waterloo Record* (19 September 1991) D1.

and look for ways to mitigate their effects until the myth of the ideal victim is forever gone from the courtroom.[15]

This paper explores how a sexual assault can cause trauma, and how the resulting trauma symptoms can impact demeanour. Part I discusses how overreliance on demeanour can impact credibility and contribute to wrongful acquittals. Part II examines what options—such as legal training, jury instructions, and testimonial accommodations—are currently available to help lawyers and triers of fact combat the effects of the ideal victim myth, and argues for their increased use. Part III considers the impact of these options on the presumption of innocence, and explains how many of these options also safeguard the accused's right to a fair trial.

I. TRAUMA, DEMEANOUR, AND CREDIBILITY IN SEXUAL ASSAULT SURVIVORS

Any event that is deeply distressing and leaves a sense of horror, helplessness, serious harm, or threat thereof is classified as traumatic, and sexual assault certainly fits this bill.[16] Heartbreaking survivor accounts tell of nightmares, depression, and suicidal thoughts.[17]

Our brain works hard to protect us in the aftermath of trauma, but this protection often comes at the expense of emotional regulation. While remaining emotionally numb and expressionless may cushion a survivor from recalling the details of an event that was mentally and likely physically painful, they do little to help them achieve the demeanour expected of an ideal victim.[18]

A. Symptoms of Trauma in Sexual Assault Survivors

The trauma of a sexual assault can have a serious and lasting impact on the brain. Specifically, a traumatic experience can permanently alter the prefrontal cortex, the amygdala, and the hippocampus.[19] The prefrontal cortex, responsible for rational thought and impulse

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15 The Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: Federation of Law Societies of Canada, 2019, ch 3.1-1 (a competent lawyer is defined as one that continues to build their legal skills through professional development, and adapts to changes in the techniques and practices of the profession) [*Model Code*]; Canadian Judicial Council, *Ethical Principles for Judges*, (Ottawa: Canadian Judicial Council, 2021) (it is recommended that judges "maintain and enhance their knowledge, skills, and *sensitivity to social context*" at 27 (emphasis added)) [*Ethical Principles*].

16 Department of Health and Human Services, "Coping with a Traumatic Event" (last visited 29 June 2021), online (pdf): *Centers for Disease Control and Prevention* <www.cdc.gov/masstrauma/factsheets/public/coping.pdf> [perma.cc/8THK-CZS7].

17 See generally SurvivorStoriesMod, "Various Posts" (April-May 2020), online (blog): <www.survivorstoriesproject.com/blog> [perma.cc/T4T4-TUX3] (this blog recounts sexual assault survivor experiences in their own words).

18 Cortney A Franklin et al, "Police Perceptions of Crime Victim Behaviors: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors' Trauma Responses" (2020) 66:8 Crime & Delinquency 1055.

19 James Hopper & David Lisak, "Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories", *Time* (9 December 2014), online: <time.com/3625414/rape-trauma-brain-memory/> [perma.cc/7TXU-4YJS].

control, can become unresponsive during states of high stress. When the prefrontal cortex stops responding, the amygdala, or the brain's "fear centre," takes over, and affects how the hippocampus, or "memory centre," encodes the experience. These changes are designed to protect the survivor from the traumatic experience, effectively cushioning their brain from the exertion of processing the trauma.

While changes to the brain due to trauma can be temporary, they can also linger well after the initial trauma has passed, resulting in a variety of physical manifestations, including:

- Mood swings and irritability;
- Numbness or emotional detachment from anything that requires emotional reactions;
- Depersonalization (feeling as if you are watching yourself);
- Difficulty concentrating;
- Difficulty expressing oneself; and
- Withdrawal and apathy.[20]

Any or all these trauma symptoms may be present when a survivor recounts their traumatic experience or faces the stress of giving testimony.[21] Mental health issues, addictions, or other life stressors can further exacerbate these symptoms.

B. The Impact of Trauma Symptoms on Demeanour and Credibility

The symptoms of trauma can appear consistently throughout trial, or only intermittently. Many survivors use detachment, withdrawal, or emotional numbing as a coping strategy while testifying.[22] Addressing the court, especially during cross-examination, can be uncomfortable and distressing, and mentally detaching oneself from the re-telling of the experience is a common way for the brain to protect itself. While these coping strategies may be helpful in making the experience less painful for the survivor, they may seriously weaken the case against the accused due to their effect on demeanour and therefore credibility.

Survivors displaying trauma symptoms during testimony do not conform to the ideal victim stereotype: consistent, professional, composed demeanour with timely displays of tearful or upset behaviour. Survivors' credibility can be harmed by a lack of emotion or sudden changes in demeanour during testimony, as emotionless or inconsistent testimony is generally

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20 Center for Substance Abuse Treatment (US), "Trauma-Informed Care in Behavioral Health Services" (2014) at 62, online (pdf): *National Center for Biotechnology Information* <ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf> [perma.cc/L8AD-WTCH].

21 See e.g. Canada, Department of Justice, *A Survey of Survivors of Sexual Violence in Three Canadian Cities*, by Melissa Lindsay, Catalogue No J2-403/2014E-PDF (Ottawa: Department of Justice, 2014).

22 Schuller et al, *supra* note 9 at 769.

perceived as less credible.[23] In some cases, the symptoms of trauma can even be interpreted as signs of deceit or dishonesty.[24] If a judge or jury is concerned that a survivor may be dishonest, their view of the survivor's credibility is often damaged beyond repair.

Despite the extent of trauma research describing the potential for inconsistent emotional responses after a traumatic event, survivors commonly feel they were not believed throughout their interactions with the justice system.[25] Many survivors even feel that their negative experience at trial re-traumatized them.[26] While the presumption of innocence is paramount to a criminal trial, the legal system must keep pace with research showing the impact of trauma on demeanour and the resulting impact on credibility.

C. Trauma and Credibility in the Courtroom

As Justice L'Heureux-Dubé states, "the most injurious myth is that women and children are not credible in this area of criminal law."[27] Again, this is not a novel issue. Throughout history, men have described women as deceptive, whether it be accounts from the late Middle Ages of women as liars by nature, or a 1970s detective writing that women were "notorious" for fabricating complaints.[28] The pervasiveness of this belief was eventually recognized by the Supreme Court of Canada in *R v Seaboyer*,[29] although its contribution to unreliable appraisals of demeanour evidence had likely already led to many wrongful acquittals in Canadian sexual assault cases. For survivors, "[t]he ability to successfully convey their description of the incident and its impact is often critical to the successful prosecution of the case."[30]

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23 See generally Marc A Klippenstine & Regina A Schuller, "Perceptions of Sexual Assault: Expectancies Regarding the Emotional Response of a Rape Victim over Time" (2012) 1 Psychology Crime & L 79 (consistent emotional responses throughout trial positively corresponded with assessments of credibility, as did tearful or upset reactions to a lesser degree). See also Schuller, supra note 9 at 767; Louise Ellison & Vanessa E Munro, "Jury deliberation and complainant credibility in rape trials" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law International and Comparative Perspectives*, 1st ed (New York: Routledge-Cavendish, 2010) at 281.

24 *Cf* Franklin et al, *supra* note 18 at 1060 (this article is specific to police perceptions of survivors, but findings are generally consistent with studies of mock jurors).

25 Katherine Lorenz, Anne Kirkner & Sarah E Ullman, "Qualitative Study of Sexual Assault Survivors' Post-Assault Legal System Experiences" (2019) 20:30 J Trauma Dissociation 263 at 264.

26 *Ibid*.

27 Claire L'Heureux-Dubé, "Still Punished for Being Female in Sexual Assault" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, legal practice, and women's activism* (University of Ottawa Press, 2012) at 3.

28 Jan Jordan, "Beyond Belief? Police, rape and women's credibility" (2004) 4:1 Crim Justice 29 at 30.

29 *Seaboyer, supra* note 3.

30 Allyson Clarke, "In the Eyes of the Law: Survivor Experiences and Image Construction Within Sexual Assault Cases" (2014) at 14, online (pdf): *University of Toronto* <tspace.library.utoronto.ca/bitstream/1807/68431/1/Clarke_Allyson_K_201411_PhD_thesis.pdf> [perma.cc/YH6S-4ZE2].

At the heart of evidence law lies a balance between the probative value[31] and the prejudicial effect[32] of a piece of evidence. If the prejudicial effect exceeds the probative value, the trial judge can exclude an otherwise admissible piece of evidence.[33] This is typically done when the evidence would be used to make an impermissible inference.

In sexual assault cases, demeanour has little probative value and a highly prejudicial effect.[34] A judge or jury's expectation of how a survivor should display emotion while giving testimony can negatively impact their judgement of the case.[35] Body language and facial expressions can be unpredictable and misleading when affected by trauma. For example, conduct that comes across as uncertain or insincere can actually indicate nervousness or shyness.[36] In mock jury trials, jurors have erroneously characterized the complainant as "cold," "calculating," or a "good actor" if they were expressionless while testifying.[37] While the prejudicial effect of demeanour evidence may not be so great as to render it inadmissible, such evidence should be considered with great caution.

While examining the weight given to demeanour evidence is an important task, there are two serious limitations to doing so. Firstly, judges do not always provide written reasons in sexual assault cases, and when they do, they do not always explain the role of demeanour in their assessment of survivor credibility.[38] Secondly, juries never have to give reasons, and can even be charged with an offence if they disclose any information not disclosed in open court.[39] Information for this paper was sourced from written reasons and mock jury studies, but there may well be overreliance on demeanour within judgements that will never be made public.

II. MITIGATING THE EFFECTS OF TRAUMA ON CREDIBILITY

Lawyers have a responsibility to behave honourably and with integrity when interacting with clients, the public, and other members of the profession.[40] Judges are also encouraged to conduct themselves with integrity and foster the public's confidence in the justice system.[41] These standards suggest that those accessing the Canadian justice system should not be

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31 Stewart et al, *supra* note 13 ("the trial judge's estimate of how important the evidence, used for a legitimate purpose, is likely to be in the jury's reasoning" at 93).

32 *Ibid* ("the trial judge's estimate of how likely it is that the jury, even if properly instructed, will use the evidence for an improper purpose or as the trial judge's estimate of the detrimental effect of the evidence on other aspects of the trial process" at 93).

33 *Ibid* at 92.

34 See especially *R v G(G)*, 99 OAC 44 (ONCA), 1997 CarswellOnt 1886 at para 14.

35 Klippenstine & Schuller, *supra* note 23 at 82.

36 CED 4th (online), *Evidence*, "Credibility: Demeanour" (VI.2) at §324.

37 Ellison & Munro, *supra* note 23 at 284.

38 See generally Bill C-3, *An Act to amend the Judges Act and the Criminal Code,* 2nd sess, 43rd Parl, 2020, cl 3(a) (assented to 6 May 2021), SC 2021, c 8 (the passing of Bill C-3 on 6 May 2021 now requires judges to either enter their reasons in the record or provide them in writing in sexual assault cases, but many historical sexual assault cases lack reasons).

39 Halsbury's Laws of Canada (online), *Trial Procedure*, "Jury Trials: Evidentiary Issues" (VIII.5(3)) at HC2-361 "Disclosure of jury proceedings" (2020 Reissue).

40 *Model Code, supra* note 15, ch 2.1-1.

41 *Ethical Principles, supra* note 15 at 18.

traumatized by their experience. However, renowned trauma expert Judith Herman states that "if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law."[42]

The Canadian justice system offers many opportunities, both before and during trial, to support survivors and compensate for involuntary physical or emotional responses resulting from trauma. These options, which include training for legal professionals, jury instructions, and testimonial accommodations, can all be provided in a way that maintains fairness to the accused. Unfortunately, case law and survivor accounts show that these opportunities to mitigate trauma responses are often unused. If the legal profession aims to better support sexual assault survivors and to reduce wrongful acquittals, then lawyers and judges should ensure that they are up to date on trauma research and its impact on their roles in the courtroom.

A. What Can Judges Do?

Some judges are already cautious with the weight they put on demeanour evidence. This caution both protects the presumption of innocence of the accused by preventing the complainant's credibility from being unfairly bolstered,[43] and appreciates the potential for a survivor's demeanour to be affected by trauma.[44] Unfortunately, caution is not always exercised. Many decisions are overturned on appeal when the trial judge has improperly relied on demeanour evidence without considering the effects of trauma on the survivor or the importance of trial fairness to the accused.[45]

One recent example of an appellate court overturning a trial judge's impermissible reliance on stereotypical reasoning in a sexual assault trial comes from the Court of Appeal of Newfoundland and Labrador in *R v DR*.[46] In this case, the appellate court held that the trial judge's misconceptions about how a sexual assault survivor should act impacted his assessment of the survivor's credibility. Relying on established reasoning from the Supreme Court of Canada, White J.A. held that "[r]eliance on stereotypes about how victims of sexual assault are expected to act in the assessment of a complainant's credibility is an error of law."[47]

While a judge's written reasons can be reviewed for errors such as overreliance on demeanour evidence, jurors are not permitted to discuss their reasons for reaching a verdict. Therefore, it is difficult to determine how often and to what extent judges instruct juries that there is no "typical" demeanour for a sexual assault survivor to display. Further judicial training and consistent jury instructions regarding trauma symptoms can reduce improper inferences about credibility based on a survivor's demeanour during testimony.

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42 Judith Herman, "Justice from the Victim's Perspective" (2005) 11:5 Violence Against Women 571 at 574.

43 *R v Loonfoot*, 2014 ONSC 3240 at para 42; see also *R v Duffney*, 2011 NLTD 124 at para 30.

44 *R v L(R)*, 2013 ONSC 4003 at para 90; see also *R v M(R)*, 2007 CarswellOnt 9513 (ONCJ) at para 64; see also *R v Nanka-Bruce*, 2006 CarswellOnt 1139 (ONSC) at para 18.

45 *R v Rhayel*, 2015 ONCA 377 at para 93; see also *R v G(G)*, *supra* note 34 at para 14.

46 2022 NCLA 2.

47 *Ibid* at para 17, citing *R v ARJD*, 2018 SCC 6 at para 2.

i. Judicial Training

Bill C-3, which mandates training in sexual assault law for judges, became law in May 2021. The bill specifies that judicial training seminars should be developed in consultation with groups considered appropriate by the Canadian Judicial Council. While this bill lacks a provision to ensure current judges receive the same education as new judges, it is still a step in the right direction. There is great opportunity to develop training seminars in consultation with trauma specialists that focus on the effects of trauma on demeanour, and how judges can incorporate trauma-informed practice into the trial process.

Specifically, this training should focus on the effects of trauma on the brain and how the resulting neural changes can translate to behaviours that impact demeanour during testimony. When a trier of fact is educated on the impact of trauma symptoms on demeanour, behaviours such as nervousness on the stand can be attributed to trauma as opposed to evidence of deceit.[48] Training should also examine how the judge can make the survivor feel comfortable in the courtroom without compromising trial fairness. Showing compassion in ensuring the survivor's immediate needs are met, such as providing tissues, water, or breaks during cross-examination, does not show bias.[49] A judge trained in the effect of trauma on demeanour will also be better able to appreciate the necessity for comprehensive jury instructions and will be more likely to account for trauma when assessing credibility in their own judgements.

ii. Jury Instructions

Despite many people's confidence that they can identify when someone is lying, the average person is generally unable to reliably determine dishonesty based on demeanour.[50] As a result, there is serious danger that a juror's overconfidence in their ability to interpret demeanour evidence could affect the trial outcome.[51] Because of this risk, judges should ensure that juries do not place too much weight on demeanour in their analysis and decision.

The National Judicial Institute has produced a set of model jury instructions that provide standardized language for judges to use when instructing juries before and during trial.[52] There are a variety of instructions relevant to sexual assault cases, which include reminders to the jury that there are no typical victims of sexual assault, not to be influenced by sympathy or prejudice, and to keep an open mind. However, one set of model instructions is specific to demeanour:

> What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on the witness's manner. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and

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48 Jordan, *supra* note 28 at 52.

49 Elaine Craig, *Putting Trials on Trial* (Montreal: McGill-Queen's University Press, 2018) at 176.

50 Danielle Andrewartha, "Lie Detection in Litigation: Science or Prejudice?" (2008) 15:1 Psychiatry, Psychology & L 88 at 91.

51 Schuller et al, *supra* note 9 at 760.

52 Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions", online: *National Judicial Institute* <nji-inm.ca/index.cfm/publications/model-jury-instructions/> [perma.cc/EM8A-JJTP] [Model Jury Instructions].

> appear differently. Witnesses come from different backgrounds. They have different intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.[53]

Judges are encouraged to use their discretion regarding the exact wording of these instructions, but it is critical that the fallibility of demeanour is relayed to juries in sexual assault cases. While these instructions do not specify how trauma may affect demeanour, a judge who has received training in this area would be able to choose appropriate wording to caution juries of the potential for trauma to alter demeanour.

Instructions such as the above have proven to be effective. Jurors who received education or instructions on the potential for external circumstances in the survivor's life to impact their demeanour made fewer references to their demeanour when reaching a verdict.[54] Well-informed jurors were also more likely to offer thoughts as to what could account for unexpected aspects of a survivor's demeanour drawing from information they had been given throughout the trial.[55]

While instructions on unreliability of demeanour in assessing credibility are helpful, they are not mandatory. All the model instructions authored by the National Judicial Institute are templates for judges that may or may not be followed.[56] Judges will pick and choose the instructions they provide and adapt them to each case. If judges were to consistently use the above instructions as a template in two-witness cases, juries would be more open-minded to the range of behaviours a survivor may exhibit while giving their testimony.

B. What Can Lawyers Do?

Survivor complaints about both Crown and defence counsel are regrettably common in Canada.[57] While many of these complaints centre around the conduct of defence counsel, this paper focusses on the options available to Crown counsel that will support survivors before and during trial and assist in mitigating the effects of trauma on demeanour, as defence counsel's primary responsibility is to the accused. Though responsibility lies with judges to ensure that demeanour is not over-relied on, judges and jurors are only human, and it is inevitable that they may make an inappropriate inference from demeanour. Therefore, Crown counsel should do their best to prepare a survivor for trial and ensure to request testimonial accommodations that would help them be comfortable on the stand. The more prepared and supported a survivor feels at trial, the better they will regulate their emotions while on the stand, reducing the impact of trauma on their demeanour.[58]

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53 *Ibid*, 4.11.

54 Ellison & Munro, *supra* note 23 at 287

55 *Ibid*.

56 Model Jury Instructions, *supra* note 52.

57 See e.g. Alana Prochuk, "We are Here: Women's Experiences of the Barriers to Reporting Sexual Assault" (2018) at 37, online (pdf): *West Coast LEAF* <https://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf> [perma.cc/28DZ-A99L].

58 Amanda Konradi, "Understanding Rape Survivors' Preparations for Court: Accounting for the Influence of Legal Knowledge, Cultural Stereotypes, Personal Efficacy, and Prosecutor Contact" (1996) 2:1 Violence Against Women 25 at 33; Clarke, *supra* note 30 at 14.

i. Preparing for Trial

Trauma symptoms may be exacerbated when a survivor feels unprepared and anxious while testifying. Despite this, survivors report dissatisfaction with the level of support and preparation provided before trial, with two-thirds surveyed in one study reporting a lack of confidence in the court process.[59] Specifically, concerns have been raised about the availability of Crown counsel to answer questions about the trial process, the status of the case, and the lack of information regarding available resources for survivors.[60]

In some provinces, Crown counsel policy manuals address the importance of informing a witness about the trial process and providing regular updates about the case. For example, Nova Scotia stresses the importance of minimizing stress and trauma to survivors, keeping the survivor informed, and explaining the court process and associated timelines.[61] While it is important that this preparation does not cross the line into coaching the survivor on how to act or what to say at trial, providing the survivor with an overview of what to expect in terms of procedure and timelines can help them emotionally prepare for the experience. To mitigate any concerns that these conversations may constitute witness coaching, Nova Scotia's policy manual also requires a third party to be present during interviews with sexual assault survivors.[62]

Having a consistent point of contact within the justice system who can explain the trial process and ensure the survivor is supported within the courtroom can streamline the process for survivors. Ontario has navigated concerns about lack of information by providing free legal representation to sexual assault survivors.[63] This program provides up to four hours of free legal advice but does not include representation in court. While independent legal advice is likely of great assistance to survivors, having more contact with Crown counsel before and during trial may be equally, if not more, beneficial. Although Crown counsel does not represent sexual assault survivors, it is still in the best interests of the Crown's case to ensure a survivor is as prepared as possible to take the stand, as comprehensive preparation allows survivors to find strategies to manage their emotions while on the stand.[64]

Reducing the number of people to whom a survivor must recount their story also reduces the impact of trauma. British Columbia's Crown counsel policy manual addresses this, suggesting that the same prosecutor, ideally with specialized training in sexual assault files, should handle the case from start to finish whenever possible.[65] While this is set out as a best practice, it is

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59 Lindsay, *supra* note 21 at 7.

60 See e.g. *ibid* at 25.

61 Nova Scotia, Public Prosecution Service, *Sexual Offences - Practice Note*, (Practice Note), (Halifax: Public Prosecution Services, 29 February 2008).

62 Nova Scotia, Public Prosecution Service, *Interviewing Witnesses (Other than Experts or the Police)*, (Practice Note), (Halifax: Public Prosecution Services, 20 January 2006).

63 "Independent legal advice for sexual assault victims" (last modified 15 July 2021), online: *Ontario* <www.ontario.ca/page/independent-legal-advice-sexual-assault-victims> [perma.cc/6WU3-JNET].

64 Clarke, *supra* note 30 at 14.

65 British Columbia, Prosecution Service, *Sexual Offences Against Adults*, (Crown Counsel Policy Manual) (Victoria: Prosecution Services, 15 January 2021) at 3.

not mandatory, and likely not always possible in smaller cities. Requiring that a specialized Crown counsel take on sexual assault files consistently would help survivors feel supported within the justice system.

Crown counsel should also recognize that the survivor needs support outside of the justice system. Even if a survivor feels educated about the trial process, prepared for the discomfort of cross-examination, and has a positive relationship with the Crown assigned to their case, the experience can still bring up the trauma of the sexual assault. Moreover, the often aggressive strategies of the defence counsel might expose the survivor to new traumas. Taking the time to discuss support systems with the survivor and provide resources can go a long way to help them navigate the trial process. Ideally, Crown counsel should inquire about the existing supports in a survivor's life, and provide them with information for a counsellor, sexual assault centre, or victims' services as needed, as these services are beyond the scope of what Crown counsel can offer. Not only can these services provide the survivor with more information about the justice system and much-needed emotional support, they can also help with longer-term needs or goals such as regaining a feeling of control over one's life.[66]

ii. Accommodations Available During Trial

The *Criminal Code* provides many avenues to make the trial process more comfortable for a survivor. However, Crown counsel must apply to the judge to make use of these accommodations. If any of the options available within section 486 of the *Criminal Code* would be of assistance, Crown counsel should discuss these with the survivor, with the caveat that all are subject to the judge's approval.[67]

Crown may apply for the survivor to have a chosen support person close by while they testify.[68] While this person cannot intervene in the survivor's testimony or during cross-examination, their presence can be calming for the survivor and help prevent withdrawal or dissociation. The survivor may also be able to testify outside the courtroom, or behind a screen or other device.[69] Ensuring that the survivor does not have to see the accused while testifying can be incredibly helpful in preventing trauma symptoms from arising, as being exposed to something, or someone, that serves as a reminder of a traumatic experience can cause a strong emotional reaction such as a surge of panic.[70] A screen can be set up in such a way that the survivor is unable to see the accused, but the court can still observe the survivor, reducing a judge or jury's concerns over being unable to assess demeanour.[71]

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66 Nicole Westmarland & Sue Alderson, "The Health, Mental Health, and Well-Being Benefits of Rape Crisis Counseling" (2013) 28:17 J of Interpersonal Violence 3265.

67 See generally *Criminal Code*, *supra* note 4, s 486 (several subsections offer accommodation options).

68 *Ibid*, s 486.1(2)

69 *Ibid*, s 486.2(2).

70 Center for Substance Abuse Treatment (US), *supra* note 20 at 68.

71 See e.g. Louise Ellison & Vanessa E Munro, "A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials" (2014) 23:1 Social & Legal Studies 3 at 7 (this study set up a mock courtroom in such a way that the judge and jury could still see the complainant, but the accused could not).

In cases where the accused is self-represented, counsel can be appointed to conduct the cross-examination.[72] This serves the dual purpose of avoiding re-traumatization of the survivor and promoting efficiency and fairness of the trial. Qualified legal counsel are not only less likely to be triggering to the survivor, but also better able to conduct the cross-examination in a way that adequately tests a survivor's credibility without relying on harmful myths, such as that of the ideal victim.

Finally, a specially trained dog may be present to support the survivor during testimony. This was first done in British Columbia in 2016, where Intervention K-9 Caber supported a child witness through several days of testimony in a sexual assault trial by lying quietly at her feet.[73] This accommodation is likely not always practical as courtroom dogs require specialized training, and some survivors may not be comfortable with dogs. However, in cases where it is feasible, a dog can provide great comfort to a survivor, and keep them grounded and present during their testimony.

III. WHAT ABOUT TRIAL FAIRNESS AND THE PRESUMPTION OF INNOCENCE?

The presumption of innocence lies at the heart of criminal law. In a criminal trial, the Crown bears the highest standard of proof possible in law: proof beyond a reasonable doubt. The trier of fact must be almost certain that the accused is guilty and unable to find any other plausible explanation for the facts before they convict. In sexual assault cases especially, there is good reason that the burden is so high. A sexual assault conviction can be life-altering, with a minimum sentence of at least six months and likely long-term consequences for employment and relationship prospects.[74] Any education or accommodation can and should keep trial fairness paramount.

All options discussed in this paper can be implemented while maintaining the presumption of innocence. Education for judges on the effects of trauma and the resulting dangers of overreliance on demeanour can benefit both the survivor and the accused. While this paper raises concerns about overreliance on demeanour harming the credibility of the survivor, there are many cases where overreliance on demeanour has impacted trial fairness at the expense of the accused.[75] When judges understand how easily a trauma can affect a survivor's demeanour, they can better appreciate that there is no ideal victim and that a survivor's emotions on the stand should not strengthen or weaken their testimony.

A well-educated judge will also ensure juries receive proper instructions regarding trial fairness. Model jury instructions recommend a thorough explanation of the presumption of

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72 *Criminal Code, supra* note 4, s 486.3(2).

73 See generally *ibid*, s 486.7 (The judge can make any order if they are of the opinion it is necessary to protect the security of the witness); "Update on Canine Assisted Intervention Dogs in BC Courts" (9 August 2016), online: *Provincial Court of British Columbia* <www.provincialcourt.bc.ca/enews/enews-09-08-2016> [perma.cc/MVT8-W6CQ].

74 *Criminal Code, supra* note 4, s 271.

75 See e.g. *R v Amaya*, 2010 ABCA 398 at para 17.

innocence and the definition of "beyond a reasonable doubt."[76] Additionally, mock jurors who received instruction on the potential for trauma to impact a survivor's demeanour found these instructions helpful, but did not perceive them as vouching for the complainant's credibility.[77] The instructions developed by the Canadian Judicial Council are designed to maintain trial fairness and avoid creating bias in jurors' minds.

Preparing a survivor for trial can also benefit the accused. If the survivor understands the legal process and is emotionally prepared for trial, the trial will be more fair and efficient. The judge will not have to slow down the trial to explain procedure to the survivor, only to find out they were never adequately prepared for court in the first place.[78] A well-prepared survivor allows defense counsel to perform a thorough and effective cross-examination and allows the judge to focus on applying the law to the facts of the case.

Finally, all *Criminal Code* provisions discussed above are employed at the discretion of the trial judge, and only if they do not impact trial fairness. Testifying out of view of the accused does not violate the accused's *Charter* rights to a fair trial and to be presumed innocent until proven guilty.[79] Appointing counsel for cross-examination of the survivor when the accused is self-represented requires evidence that cross-examination by the accused will prevent a full and candid account from the survivor.[80] Both of the former, as well as use of a support person or animal, are only to be used if necessary and only if in the opinion of the trial judge they support the proper administration of justice. A judge would decide whether to approve an application for accommodation by balancing the impact on the presumption of innocence with the impact of trauma on the survivor's testimony.

CONCLUSION

There have been many positive changes in sexual assault law in Canada in the last few decades, such as the criminalisation of marital rape, the prohibition of reliance on the twin myths, and the removal of a requirement for recent complaint.[81] However, survivors still often feel the justice system does more harm than good.[82] The low conviction rate in sexual assault cases directly conflicts with the prevalence of this crime in Canada, meaning that many wrongful acquittals still occur. Judicial education, jury instructions, adequate trial preparation for survivors, and applications for in-court accommodations are all achievable within the current structure of the justice system to combat wrongful acquittals stemming from myths about the ideal victim. Yet, there is still much work to be done.

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76 Model Jury Instructions, *supra* note 52, 5.1.

77 Ellison & Munro, *supra* note 23 at 291

78 See e.g. Craig, *supra* note 49 at 152.

79 *R v S(J),* 2008 BCCA 401 at para 11, aff'd 2010 SCC 1 (the accused could not prove use of a screen did not impair cross-examination, impact the presumption of innocence, or impact the burden of proof).

80 *R v Tehrankari,* 246 CCC (3d) 70 (ONSC), 2008 CarswellOnt 8750 at para 19 (evidence from reliable sources with intimate knowledge of the witness to satisfy the court on a balance of probabilities must be provided).

81 Kwong-leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 Intl J Offender Therapy & Comparative Criminology 258 at 260.

82 Lorenz, Kirkner & Ullman, *supra* note 25.

This paper focusses on what can be done to navigate the impact of trauma on demeanour in the courtroom, but many sexual assault cases never make it to court. There are several potential explanations for this attrition: charges are not approved by Crown counsel, police do not recommend charges, or survivors do not report to police in the first place. However, further research would be beneficial to clarify where most attrition occurs. There are likely larger-scale changes required to the Canadian justice system to make the reporting process more inviting to survivors and ensure any bias from police, lawyers, or the judiciary does not impact a survivor's case.

While people of all genders can be affected by sexual assault, at the root of this issue is gender inequality. In the words of Justice Cory, "[s]exual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. The reality of the situation can be seen from the statistics which demonstrate that 99 % of the offenders in sexual assault cases are men and 90 % of the victims are women."[83] Ultimately, a major societal change is needed to reduce gender-based inequality in Canada.

In the interim, the training, jury instructions, and accommodations recommended in this paper provide several methods to ensure that trauma does not unduly impact a survivor's demeanour and that a judge or jury weighs demeanour evidence appropriately. Judges and lawyers have a responsibility to the public to maintain the presumption of innocence of the accused, but they also have a responsibility to ensure justice is done in cases of rights violations. As legal practitioners in a country with distressingly high rates of sexual assault, judges and lawyers are responsible for staying up to date on trauma research, sexual assault law, and strategies for trauma-informed practice.

The unfortunate reality is sexual assault is a crime that almost every lawyer and judge will encounter at some point in their career, either in a criminal or civil context. As legal professionals, we must be prepared to treat survivors with the understanding and compassion we would wish to see directed at our loved ones. We likely all have survivors in our lives who have not yet shared their stories and are quietly observing the treatment of those whose cases do proceed to trial.

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83 *R v Osolin,* [1993] 4 SCR 595, 1993 CarswellBC 512 at para 33.

ARTICLE

NOT IN ANYONE'S BACKYARD: EXPLORING ENVIRONMENTAL INEQUALITY UNDER SECTION 15 OF THE *CHARTER* AND FLEXIBILITY AFTER *FRASER V CANADA*

Larissa Parker *

CITED: (2022) 27 *Appeal* 19

ABSTRACT

Pollution hotspots exist across Canada and disproportionately affect low-income and racialized populations. Examples include Indigenous communities like Aamjiwnaang First Nation in Ontario or Beaver Lake Cree Nation in Alberta; predominantly Black communities in rural Nova Scotia; and poor neighbourhoods in urban cities like Toronto or Vancouver. Such communities face disproportionate environmental burdens due to their proximity to landfills, fossil fuel infrastructure, plastic pollution, and toxic waste. This proximity causes harrowing health effects that would otherwise not be acceptable elsewhere in Canada. Although these inequalities stem from a number of interrelated factors, the role of the state in regulating (and facilitating) polluting activity is key. Across jurisdictions, ministries grant pollution permits to new and existing facilities based on deficient regulatory standards laid out under environmental protection legislation. Ministry officials have direct control over when and where pollution occurs. This paper contends that the inequality that results from these regulatory frameworks triggers constitutional scrutiny under section 15 of the *Charter of Rights and Freedoms*. It is an example of adverse effects discrimination from a legislative framework that appears neutral on its face. Although the application of section 15 to environmental inequality is underexplored, recent developments in the jurisprudence suggest that remedying adverse (environmental) effects discrimination may be more viable than ever. This viability stems from the majority decision in *Fraser v Canada (Attorney General)*, 2020 SCC 28, which introduced significant flexibility into the causation and evidentiary requirements needed to establish adverse effects discrimination under the section. Under the new framework, the popular slogan "Not in Anyone's Backyard" might just be given room to transform from a longstanding aspiration to a new reality.

* Larissa Parker is a recent graduate of the BCL/ JD program at the McGill Faculty of Law. She received the David L. Johnston Medal upon graduation. Many thanks to Me Lex Gill, Nathaniel Reilly, and Gabriel D'Astous for their unwavering support and comments on earlier drafts of this paper.

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INTRODUCTION

Depending on where you are, you can smell environmental racism in Canada.[1] In some communities, you can feel it too; proximity to pollution can cause dizziness, muscle twitching, body rashes, and nausea.[2]

Pollution hotspots exist across Canada and predominantly affect low-income and racialized populations.[3] Examples include Indigenous communities like Aamjiwnaang First Nation in Ontario[4] or Beaver Lake Cree Nation in Alberta;[5] predominantly Black communities in rural Nova Scotia;[6] or poor neighbourhoods in urban cities like Toronto or Vancouver.[7] Such communities—referred to in literature as "shadow places,"[8] "poverty pockets,"[9] and "sacrifice zones"[10]—face disproportionate environmental burdens due to their proximity to landfills, fossil fuel infrastructure, plastic pollution, and toxic waste.[11] This proximity causes harrowing

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1 Deborah Jackson, "Scents of Place: the Dysplacement of a First Nations Community in Canada" (2011) 113:4 American Anthropologist 606 (for an account on the disruption caused by chemical smell in Aamjiwnaang First Nation).

2 Sarah Marie Wiebe, "Bodies on the line: The In/security of Everyday Life in Aamjiwnaang" in Matthew A Schnurr & Larry A Swatuk, eds, *Natural Resources and Social Conflict* (Palgrave Macmillan, London, 2012) 215.

3 Fiona Koza et al, "Canada's Big Chances to Address Environmental Racism" *The Tyee* (26 November 2020), citing UN Human Rights Council, "Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes", 47 sess, A/HRC/45/12/Add.1 (2 October 2020).

4 Sarah Marie Wiebe, *Everyday exposure: Indigenous Mobilization and Environmental Justice in Canada's Chemical Valley* (UBC Press, 2016) at 29 (Aamjiwnaang) [Wiebe].

5 Steven M Hoffman, "Chapter 12 - If the Rivers Ran South: Tar Sands and the State of the Canadian Nation" in John R McNeill & George Vrtis, eds, *Mining North America* (University of California Press, 2017) 339. See also Maia Wikler & Crystal Lameman, "Beaver Lake Cree stand strong as Canada and Alberta attempt to derail tarsands legal challenge" *Briarpatch* (5 June 2020).

6 See Ingrid Waldron, "Experiences of Environmental Health Inequities in African Nova Scotian Communities" (10 September 2016), online (pdf): *The ENRICH Project* <enrichproject.org/wp-content/uploads/2016/10/Final-Environmental-Racism-Report.pdf> [https://perma.cc/N3DC-VN47] [ENRICH].

7 Melissa Ollevier & Erica Tsang, "Environmental Justice in Toronto Report" (2007) City Institute at York University Report [Ollevier & Tsang].

8 Val Plumwood, "Shadow Places and the Politics of Dwelling" (2008) 44 Australian Humanities Review 139 at 139–141.

9 Robert D Bullard, "Anatomy of Environmental Racism and the Environmental Justice Movement" in Benjamin Chavis and Robert Bullard, eds, *Confronting Environmental Racism: Voices from the Grassroots* (South End, 1993) 23 at 17 [Bullard, "Anatomy of Environmental Racism"]; Robert Bullard, "Confronting Environmental Racism in the 21st Century" (2002) 4 Global Dialogue: The Dialogue of Civilization 34 [Bullard, "Confronting Environmental Racism"].

10 Steve Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (MIT Press, 2012). See also Dayna Scott & Adrian Smith, ""Sacrifice Zones" in the Green Energy Economy: Toward an Environmental Justice Framework" (2017) 62:3 McGill Law Journal 861 [Scott & Smith].

11 Robert D Bullard, "Environmental Racism and Invisible Communities" (1994) 96 West Virginia L Rev 1037 at 1042; Robert J Brulle & David N Pellow, "Environmental Justice: Human Health and Environmental Inequalities" (2006) 27 Annu Rev Public Health 103 [Brulle & Pellow]; Paul Mohai, David Pellow & J Timmons Roberts, "Environmental Justice" (2009) 34 Annual Review of Environment and Resources 405.

health effects (also known as "pollution burdens") that would otherwise not be acceptable elsewhere in Canada. These unequal burdens constitute a form of environmental inequality.[12]

Although these inequalities stem from a number of interrelated factors, the role of the state in regulating (and facilitating) polluting activity is key.[13] Across jurisdictions, ministries grant pollution permits to new and existing facilities based on deficient regulatory standards laid out under environmental protection legislation.[14] Ministry officials have direct control over *when* and *where* pollution occurs.

I contend that the inequality that results from these regulatory systems triggers constitutional scrutiny under section 15 of the *Charter of Rights and Freedoms* ("*Charter*"), which imposes limitations on statutory authority. It is an example of adverse effects discrimination[15] from a legislative framework that appears neutral on its face.[16] Although the *Charter* has not yet been interpreted to extend to the unequal distribution of environmental burdens,[17] scholars have argued that there is scope within section 15 to capture environmental claims.[18] In addition, recent developments in equality-focussed jurisprudence signal a new emphasis on flexibility in establishing an equality rights infringement, which I argue, render environmental claims under section 15 more viable than ever before.[19]

The application of section 15 to environmental inequality is underexplored. Given that the recognition and remedying of adverse discrimination is crucial to the realization of substantive

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12 See e.g. Robert Bullard, "Overcoming Racism in Environmental Decision-making" (1994) 36:4 Environment: Science and Policy for Sustainable Development 10.

13 Rachel A Morello-Frosch, "Discrimination and the Political Economy of Environmental Inequality" (2002) 20:4 Environment and Planning 477 [Morello-Frosch]. See also Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step is Admitting we have a Problem" (2016) 29 Journal of Environmental Law & Practice 305 at 313–328 [Mitchell & D'Onofrio]; Michael Mascarenhas, "Where the Waters Divide: First Nations, Tainted Water and Environmental Justice in Canada" (2007) 12:6 Local Environment 565 [Mascarenhas].

14 David Boyd, *Unnatural Law Rethinking Canadian Environmental Law and Policy* (UBC Press, 2003) at 231–233 [Boyd] ("excessive discretion" is labelled as a "systemic weakness" in Canadian environmental law). See also Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52 UBCL Rev 293 at 295–296 [Collins & Sossin]; Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52:3 Osgoode Hall LJ 985 [Stacey].

15 Note, other terms are also used by Canadian courts to describe adverse effects discrimination, including "adverse impact discrimination" and "indirect discrimination."

16 Jennifer Koshan, "Redressing the Harms of Government (In) Action: A Section 7 Versus Section 15 Charter Showdown" (2013) 22 Constitutional Forum 31 at 31–35. See also Margot Young, "Change at the Margins: *Eldridge v British Columbia (AG)* and *Vriend v Alberta*" (1998) 10 Canadian Journal of Women & Law 244.

17 Mari Galloway, "The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?" (2021) 52:2 Ottawa Law Review 5 at 11.

18 Nathalie J Chalifour, "Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?" (2015) 28 J Env L & Prac 89 [Chalifour, "Enviromental Justice"].

19 *Fraser v Canada (AG)*, 2020 SCC 28 [*Fraser*].

equality,[20] jurisprudence on section 15 should evolve to capture the distinct dynamics of environmental inequality. While numerous scholars have undertaken detailed socio-legal analyses of disproportionate exposure to environmental hazards across North America,[21] and many have focussed on the regulatory causes for such harms,[22] few scholars have explored the potential application of adverse effects discrimination to environmental regulatory regimes in Canada.[23] Additionally, while there is a wealth of literature on the challenges associated with adverse effects discrimination litigation, few scholars have explored the implications for environmental claims under this framework, particularly after the 2020 Supreme Court of Canada decision in *Fraser v Canada (Attorney General)* ("*Fraser*").[24]

This paper is structured as follows. Part I introduces disproportionate pollution burdens through the case study of Aamjiwnaang First Nation in 'Chemical Valley' and the permitting system under the Ontario *Environmental Protection Act* ("*EPA*").[25] Part II considers the application of section 15 to environmental inequality in this context and the complexities that arise under the adverse effects discrimination framework. Part III explores the newfound flexibility in *Fraser* and its promising implications for environmental claims.

I. TOXIC BURDENS AND STATE RESPONSIBILITY

In the 1980s, the concept of environmental inequality emerged to stand for the simple premise that environmental degradation does not affect everyone equally. Low-income and racialized

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20 Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2014) 19:2 Rev Const Stud 191 [Hamilton & Koshan, "Adverse Impact"].

21 Mitchell & D'Onofrio, *supra* note 13. See also Morello-Frosch, *supra* note 13.

22 Dayna Nadine Scott, "Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution" (2008) 46 Osgoode Hall LJ 293 explores how the prevailing regulatory approach is incapable of capturing the essence of contemporary pollution harms.

23 Nathalie Chalifour, "Environmental Discrimination and the Charter's Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43 Revue Générale de droit 183 at 103 [Chalifour, "Environmental Discrimination"] (application of section 15 to the governance of drinking water in Indigenous communities).

24 See however Nathalie J Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The Charter's Section 15 Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 Journal of Law & Equality 1 (for a paper on section 15 and climate litigation).

25 I focus on Chemical Valley because of the significant and ongoing empirical work that scholars have done to document environmental pollution in the region. See Wiebe, *supra* note 4; Scott & Smith, *supra* note 10; Scott, *supra* note 22; Jen Bagelman & Sarah Marie Wiebe, "Intimacies of Global Toxins: Exposure & Resistance in 'Chemical Valley'" (2017) 60 Political Geography 76; Sarah Marie Wiebe, "Guardians of the Environment in Canada's Chemical Valley" (2016) 20:1 Citizenship Studies 18; Deborah Davis Jackson, "Shelter in Place: a First Nation Community in Canada's Chemical Valley" (2010) 11:4 Interdisciplinary Environmental Review 249.

communities living in close proximity to environmental hazards and externalities experienced health and social consequences, while those who lived comfortably away from them did not.[26]

A. Introducing Disproportionate Pollution Burdens

In Canada, environmental racism is a widespread problem. The paradigmatic example is "Chemical Valley," which is widely reported as the most polluted area in Canada. Chemical Valley is located in Lambton County, Ontario and is replete with 66 smokestacks that pepper the horizon.[27] The region is home to Aamjiwnaang First Nation, an Ojibwe community that lies within a five kilometer radius of this pollution.[28] In 2016–2017, a total of 45,357 tonnes of pollution was emitted from industries within a 25 kilometer radius from Aamjiwnaang, according to Canada's National Pollutant Release Inventory. This accounted for 10 percent of all air pollution in the province. Strikingly, Ecojustice reported in 2005 that the region's pollution was greater than that of the entire provinces of Manitoba, New Brunswick, or Saskatchewan.[29]

Extreme pollution exposure in Chemical Valley has caused significant health-related harm in Aamjiwnaang First Nation. In particular, toxic pollution is linked to increased risk and incidences of cancer, endocrine disruption, neurobehavioral abnormalities, cardiovascular disease, diabetes, and altered immune function.[30] These risks and effects are compounded by the fact that residents in the area are not exposed simply to one or two dangerous pollutants from one or two sources

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26 Paul Mohai & Bunyan Bryant, *Race and the Incidence of Environmental Hazards: A Time for Discourse* (Boulder, CO: Westview Press, 1992) at 1–9; Robert D Bullard, *Unequal Protection: Environmental Justice and Communities of Color* (San Francisco: Sierra Club Books, 1994); Richard Hofrichter, *Toxic Struggles: The Theory and Practice of Environmental Justice* (Philadelphia: New Society Publishers, 1993); Dorceta Taylor, "The Rise of the Environmental Justice Paradigm" (2000) 43 American Behavioral Scientist 508.

27 Elaine MacDonald, "Exposing Canada's Toxic Secret" (24 October 2017), online (blog): *EcoJustice* https://ecojustice.ca/exposing-canadas-toxic-secret> [perma.cc/V6EW-GAQK]; see also "The Chemical Valley" (7 August 2013), online: *Vice News* <https://www.vice.com/en/article/4w7gwn/the-chemical-valley-part-1> [perma.cc/2NJD-3UHC].

28 Wiebe, *supra* note 4 (for a comprehensive account on the community's proximity to pollution and the social and cultural impacts associated with that proximity). I note that Aamjiwnaang First Nation is located on reserve land, which has a distinct colonial history. See also Max Liboiron, *Pollution is Colonialism* (Duke University Press, 2021) (for a powerful account of how disproportionate pollution on reserve lands is a product of colonialism).

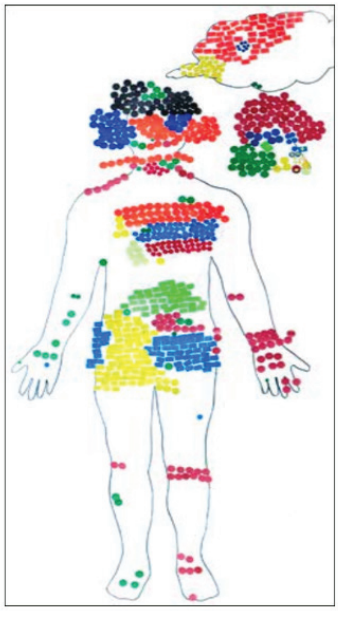
29 Elaine MacDonald, "Return to Chemical Valley - Ten years after Ecojustice's report on one of Canada's most polluted communities" (June 2019), online (report): EcoJustice <https://ecojustice. ca/wp-content/uploads/2019/06/Return-to-Chemical-Valley_FINAL.pdf> [perma.cc/WG9N-YVX5]. See also Elaine MacDonald & Sarah Rang, "Exposing Canada's Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area" (October 2007) at 10, online (pdf): *Ecojustice* <https://ecojustice.ca/wp-content/uploads/2015/09/2007-Exposing-Canadas-Chemial-Valley.pdf> [https://perma.cc/HD7B-725J]. Note that Sarnia and Aamjiwnaang only total about 177 km of land in Ontario, which represents only 0.015 percent of the surface area of the entire province.

30 Wiebe, *supra* note 4 at 117–119; Isaac Luginaah, Kevin Smith & Ada Lockridge, "Surrounded by Chemical Valley and 'living in a bubble': the case of the Aamjiwnaang First Nation, Ontario" (2010) 53:3 Journal of Environmental Planning and Management 353 at 354 [Luginaah, Smith & Lockridge].

at a given time, but rather, are continuously exposed to dozens of different pollutants all the time.[31]

Given the latency of environmental pollution, environmental harm is difficult to track.[32] This has propelled various community-led efforts to document and shed light on the cumulative harm experienced by residents in Chemical Valley. The Aamjiwnaang Health and Environment Committee, for instance, directed a mapping exercise that enabled community members to learn about the pattern of individual and shared impacts of toxins in the region (See Figure 1). [33]

Figure 1: Body Mapping the Body Burden of Chemical Valley



Source: Sarah Marie Wiebe, Everyday Exposure: Indigenous Mobilization and Environmental Justice in Canada's Chemical Valley, (UBC Press, 2006) at 109.

The exercise revealed a number of startling statistics, including that 25 percent of children suffered from learning and behavioural problems (when compared to the national average of 4.4 percent) and about 40 percent of women had experienced a miscarriage or stillbirth

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31 Wiebe, *supra* note 4.

32 Scott, *supra* note 22 ("[i]n light of all this 'accumulating trouble,' residents of affected communities find it increasingly difficult to characterize the incidence of 'harm' from pollution as deriving from a few discrete, isolated events" at 319). See also Thomas D. Beamish, "Accumulating Trouble: Complex Organization, a Culture of Silence, and a Secret Spill" (2000) 47 Social Problems 473 at 477.

33 According to Dayna Scott, body mapping is "a way of pooling the collective health complaints of people so that patterns can be identified. Residents were asked to place colour-coded sticky dots on maps of a human body to represent their symptoms." See Scott, *supra* note 22 at 319.

(when compared to the national average of 15–20 percent).[34] Indeed, several researchers point out that the Sarnia region reports more hospital admissions for respiratory and cardiovascular illnesses than nearby Windsor and London.[35]

B. A Structural Approach to Identifying Responsibility

How environmental inequality emerges has long been a subject of debate. Although there is extensive literature about the distribution of social groups around environmental hazards—including hazardous waste sites, manufacturing facilities, superfund sites, chemical accidents, and air pollutants—much of this literature focusses on the unequal outcomes linked to such pollution, rather than how the pollution emerged in the first place.[36] According to David Pellow, expert in envrionmental justice, environmental inequality originates through complex processes that can only be understood through a framework that assesses the underlying "structural dynamics" of such inequality.[37] Rather than approaching environmental inequality as being linked to a discrete event (e.g. a particular polluting actor), it is important to understand what creates and sustains pollution in a given community (e.g. the regulatory system that allows the actor to operate).[38]

In Canada, scholars have linked environmental inequality to environmental protection legislation, which gives public officials the discretion to grant pollution permits.[39] These regulatory regimes delineate the types and amounts of pollution that may be emitted by a given project based on various pollution standards.[40] Ultimately, through such regimes, provincial and federal ministries act as "gatekeepers" of pollution, deciding what types, levels, and sources to "let in" in a given region. Since environmental protection laws do not consider

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34 Scott, "Confronting Chronic," *supra* note 22 at 319 as cited in Wiebe, *supra* note 4 at 109.

35 Karen Fung, Isaac Luginaah & Kevin Gorey, "Impact of Air Pollution on Hospital Admissions in Southwestern Ontario, Canada: Generating Hypotheses in Sentinel High-Exposure Places" (2017) 6:1 Environmental Health 18.

36 Bullard, "Anatomy of Environmental Racism", *supra* note 9; Andrew Szasz & Michael Meuser, "Environmental Inequalities: Literature Review and Proposals for New Directions in Research and Theory" (1997) 45:3 Current Sociology 99; Adam S Weinberg, "The Environmental Justice Debate: A Commentary on Methodological Issues and Practical Concerns" (1998) 13:1 Sociological Forum at 25–31. See generally Dorceta Taylor, *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility* (NYU Press, 2014) [Taylor, *Toxic Communities*].

37 David N Pellow, "Environmental Inequality Formation: Toward a Theory of Environmental Injustice" (2000) 43:4 American Behavioral Scientist 581 at 588 [Pellow, "Environmental Inequality"].

38 *Ibid*. See generally David Pellow "Environmental Racism: Inequality in a Toxic World" in *The Blackwell companion to social inequalities* (Wiley-Blackwell, 2005) 147; Brulle & Pellow, *supra* note 11 at 107–108, who identify two key social dynamics that systematically create environmental inequality are (a) the functioning of the market economy and (b) institutionalized racism.

39 Collins & Sossin, *supra* note 14 at 308.

40 *Ibid*.

whether environmental harm is fairly distributed among all members of the public,[41] pollution burdens are disproportionately allocated to vulnerable communities.[42]

The Ontario environmental protection legislation is a useful case study because it has created and sustained inequality in Chemical Valley for decades. In 2016, the Office of the Auditor General reported that the Ontario *Environmental Protection Act* did not effectively manage the risks to the environment and human health from polluting activities.[43]

There are three key issues with pollution permitting under the *EPA*.[44] First, the Ministry issues permits without fully considering the cumulative pollution of such approvals. Under the *EPA*, there are no limits placed on the number of industries that can operate in a region and the Ministry is typically not required to consider the cumulative effects of pollution before issuing another permit.[45] Although industries might be individually meeting particular standards set by the government, there is no limitation on having multiple polluters close together.[46] The Ministry grants pollution permits to each facility as though they exist in isolation. This results in the approval of projects in areas that are already subject to significant environmental stresses.[47]

Although there has been progress in considering cumulative pollution by the Ministry, it remains limited and insufficient.[48] As of November 2017, the government announced that it would consider the cumulative impacts of air emissions of benzene and benzo[a] pyrene in the Hamilton/Burlington area and benzene in the Sarnia/Corunna area. Notably, this announcement excluded a wide number of contaminants of concern, such as sulphur dioxide. Given the limited scope of Ontario's cumulative effects policy, the conclusions of

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41 The various achievements and shortcomings of environmental assessment as a tool for helping to protect the environment have been extensively reviewed and discussed in the literature. See e.g. Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham: LexisNexis Butterworths, 2008); Andrew Green, "Discretion, Judicial Review, the Canadian Environmental Assessment Act" (2002) 27 Queen's L J 785.

42 *Ibid*; Collins & Sossin, *supra* note 14.

43 Auditor General of Ontario, "Ministry of Environment and Climate Change: Environmental Assessments" (2016) online (pdf): *Office of the Auditor General of Ontario*, <https://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf> [https://perma.cc/5EAV-ZXG9] (who identified the following issues: approvals do not have expiry or renewal dates; a significant number of emitters may not have proper approvals at all; there are no mechanisms to ensure emitters obtain all required approvals, that the Ministry's monitoring and enforcement was insufficient to deter violations; and the ministry does not assess the cumulative impact of emissions on human health when issuing approvals).

44 *Ibid*.

45 *Ibid* at 340.

46 The term "cumulative effects" is defined as exposures, public health, or environmental effects from the *combined* emissions and discharges in a given geographic area.

47 Wiebe, supra note 4 at 17–19; Scott, supra note 22 at 321-326. See also Ontario, Office of the Auditor General of Ontario, *Good Choices, Bad Choices: Environmental Rights and Environmental Protection in Ontario* (Toronto: Environmental Commissioner of Ontario, 2017) at 130.

48 "After eight and a half year delay, Ontario delivers disappointing cumulative effects policy" (9 November 2017) online (article): *Ecojustice*, <https://ecojustice.ca/pressrelease/cumulative-effects-delay/> [perma.cc/6ZHC-C54G].

a 2017 report by the Environmental Commissioner of Ontario ("ECO") remain largely true today: "Ontario regulates each facility's air emissions as if it were the only emitter."[49] In communities with one or two significant polluters, this might not be an important distinction, but in a pollution hotspot like Chemical Valley, it is "literally a life-threatening defect in environmental policy."[50]

Second, permitting in the province is often based on outdated standards. One example is the standard for sulphur dioxide (SO_2), which—until 2018—had not been updated in over 40 years.[51] In 2017, the ECO reported that this standard was over six times the recommended standard set by the federal government.[52]

Finally, the Ministry also has discretion to modify a standard if a proponent identifies that it cannot be met. In 2017, the ECO observed that government officials lowered standards or allowed various industries to opt out of them on a case-by-case basis. In the context of benzene, which is a known carcinogen, the government set a more stringent health-based air standard in 2016.[53] However, the ECO reported that because several industries were not able to meet the 2016 benzene standard, the government made exceptions for such facilities and developed a new technical standard that these industries could comply with instead.[54]

These three issues within the permitting system expose how pollution hotspots are not only created, but also sustained by the regulatory regime under the *EPA*. Government officials control the amount, type, and concentration of pollutants emitted in any given area of the province, and consequently permit persistent harmful pollution levels in Chemical Valley.

As I will explore below, pollution hotspots can be conceptualized as an indirect consequence of government legislation[55] that amounts to "adverse impact discrimination."[56] As the Office of the Human Rights Commissioner in Ontario identified in a 2009 report, indirect discrimination includes "measures such as authorizing toxic and hazardous facilities in large numbers in communities that are predominantly composed of racial or other minorities,

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49 *Ibid*.

50 Collins & Sossin, *supra* note 14 at 299–300.

51 Environmental Commissioner of Ontario, *supra* note 47 at 128.

52 *Ibid* (for a one hour averaging time, Ontario's standard for SO_2 before 2018 allowed for 259 parts per billion to be emitted, while Health Canada recommends only 40).

53 *Ibid* at 135.

54 *Ibid* at 129.

55 Sheila Foster, "Vulnerability, Equality, and Environmental Justice: the Potential and Limits of Law" in Ryan Holifield, Jayajit Chakraborty & Gordon Walker, eds, *Handbook of Environmental Justice* (Routledge, 2016). See also Tracy R Le Sage, "Environmental Discrimination: Eenie Meanie Miney Mo, Where Should All the Toxins Go" (1994) 22 W St UL Rev 143.

56 *Fraser, supra* note 19 ("[a]dverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground" at para 30).

thereby disproportionately interfering with their rights, including their rights to life, health, food and water."[57]

II. INDIRECT DISCRIMINATION & SECTION 15 OF THE *CHARTER*

Under section 15, discrimination exists when facially neutral government action "frequently produce[s] serious inequality."[58] This type of discrimination, referred to as "adverse effects discrimination," focusses on "the results of a system" and how it *impacts* a particular group. As the Abella Report asserts, "[i]f [government action] is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."[59]

Disproportionate pollution burdens created and sustained by environmental protection legislation are an example of this type of inequality. Although such legislation aims to manage the release of pollutants to regulate the environmental and social effects of pollution, the combined flaws in permitting systems across the country have the effect of allowing dangerous levels of pollution in certain regions. Through these systems, environmental inequality is not only created, but sustained in pollution hotspots. In this way, the *EPA* in Ontario is indirectly producing outcomes that are inconsistent with the overarching goals of the legislation—outcomes that disproportionately affect already vulnerable communities.[60] In other words, the disproportionate pollution burden on a particular group represents a distinction "in its impact" under section 15 of the *Charter*.[61]

Charter claims invoking the equality guarantee must be based on an enumerated ground—whether race, national or ethnic origin, religion, sex, age or disability—or an analogous ground, which must be established based on a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.[62] Marginalized communities affected by pollution hotspots will need to establish what ground they intend to plead. When the community in question is Indigenous or racialized, the protected ground can be race or ethnicity.[63] If by contrast, the community does not fall into an enumerated ground,

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57 Human Rights Council, "Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", A/HRC/37/5, 37th session, Agenda item 3 at 8, citing Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social, and cultural rights at para 10.

58 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CarswellBC 16 at 164.

59 Rosalie S Abella, *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984), cited in *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1138.

60 Collins & Sossin, *supra* note 14 at 295–296. See also Stacey, *supra* note 14.

61 *Centrale des syndicats du Québec v Quebec (Attorney General),* 2018 SCC 18 at para 22.

62 *Withler v Canada (Attorney General),* 2011 SCC 12 at paras 30–33.

63 Chalifour, "Environmental Justice", *supra* note 18. See also Kate Malleson, "Equality law and the protected characteristics" (2018) 81:4 The Modern Law Review 598; Jennifer Koshan, "Inequality and Identity at Work" (2015) 38 Dalhousie LJ 473; Colleen Sheppard, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5:1 Onati Socio-Legal Series (for a discussion about identity and socio-economic rights).

claimants will need to establish an appropriate analogous ground in the circumstances. Due to the established links between poverty and disproportionate pollution burdens, there may be an opportunity to recognize socio-economic status as such a ground. Although courts have rendered mixed decisions on whether poverty is an analogous ground in the past,[64] scholars have found poverty to be the most significant factor in determining unequal distribution of air pollution. Poorer communities tend to be exposed to higher concentrations of air pollution, compared to richer communities.[65]

Given that government legislation enables a regulatory system that creates unequal geographies of pollution, the *Charter* can be engaged to "strike down laws that allow pollution at levels that interfere with human health and well-being."[66]

A. Sketches of Potential Claims

There are a number of different ways to structure a claim alleging environmental discrimination under the *Charter* and this section does not purport to be a comprehensive overview of all of the options available. Rather, the goal of this analysis is to demonstrate, with some imagination, how environmental equality rights claims can be fashioned with existing tools in the section 15 toolbox.

Consider, for example, the claim in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, where an appellant bookstore—which carried a specialized inventory of books catering to the gay and lesbian community—was disproportionately targeted by customs officials. The officials were conducting classification exercises related to the importation of literature "deemed to be obscene," pursuant to a provision of the *Customs Tariff Act*.[67] The appellants successfully established that these searches were disproportionately affecting them, which led to delays, confiscations, and destruction of materials imported by the appellant bookstore. Although "[t]here is nothing on the face of the Customs legislation, or in its necessary effects, which contemplate[d] … differential treatment based on sexual orientation,"[68] "a large measure of discretion [was] granted in the administration of the Act, from the level of the Customs official up to the Minister," which was indirectly discriminatory to the appellant.[69]

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64 Some early trial court decisions in British Columbia and Nova Scotia recognized poverty-related grounds as analogous under section 15. See *Federated Anti-Poverty Groups v British Columbia (AG)*, [1991] B.C.J. No. 3047, 1991 CarswellBC 349 (BCSC) ("it is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of s. 15" at para 91); *R v Rehberg*, [1994] W.D.F.L. 378, 1994 CarswellNS 410 (NSSC), ("poverty is analogous to the listed grounds in s. 15" at para 83). But see *R v Banks*, 2007 ONCA 19, (accepted that various proposed grounds relating to economic disadvantage—including homelessness, "beggars" and extreme poverty—did not constitute analogous grounds). See generally Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the Charter" (2013) 2:2 Canadian Journal of Poverty Law 1 at 16–20.

65 Anjum Hajat, Charlene Hsia & Marie S O'Neill, "Socioeconomic disparities and air pollution exposure: a global review" (2015) 2:4 Current Environmental Health Reports 440.

66 Chalifour, "Environmental Discrimination," *supra* note 23 at 103.

67 *Little Sisters Book and Art Emporium v Canada (Minister of Justice),* 2000 SCC 69 [*Little Sisters*].

68 *Ibid* at para 125.

69 *Ibid* at paras 125, 133 [emphasis added].

A claim could similarly challenge a permitting regime for causing indirect discrimination to proximate communities. More specifically, in Ontario, a claim could challenge specific sections of the *EPA*, including sections 18, 157, 157.1, 157.2, and 196. These sections allow companies to operate outside or above minimum standards and do not require public officials to consider the majority of cumulative impacts associated with their approvals. A claim could also include a challenge to the standards in the *Air Pollution – Local Air Quality* O Reg 419/05, which sets minimum pollution standards that both the Environmental Commissioner and the Auditor General have criticized as being outdated.[70] Such a claim could seek declaratory and compensatory relief under sections 24(1) and 52 from the government to amend the sections of the legislation that cause indirect effects on the equality rights of the people living in polluted hotspots, to be compliant with section 15.

A claim could also take the form of a judicial review application, as was the case in *Lockridge v Director, Ministry of the Environment*. The case involved a judicial review application commenced by Ada Lockridge and Ronald Plain of Aamjiwmaang First Nation in April 2010 (and discontinued in December 2017).[71] They sought a judicial review of the Ministry of Environment decision that concerned the sulphur output of a specific Suncor plant in Sarnia. They claimed that the failure of the Director to conduct a cumulative effects assessment prior to making his decision infringed the applicants' sections 7 and 15 rights under the *Charter*, as well as their rights to procedural fairness.[72] Lockridge and Plain sought declarations under sections 24(1) and 52, although the latter remedy was later dropped given that section 52 relief is not available on an application for judicial review. [73] The *Lockridge* claim was thus amended to exclude their original claim for a declaration that certain sections of the *EPA* are inoperative "in so far as they allow for the additional discharge of contaminants to air in Chemical Valley absent an assessment and minimization of the cumulative effects of pollution on the Applicants' health."[74]

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70 I note also that there would also be ample opportunity for potential claimants to plead rights infringements under section 7 given the significant health effects associated with pollution hotspots. See Lauren Wortsman, "Greening the Charter: Section 7 and the Right to a Healthy Environment" (2019) 28 Dalhousie J Legal Stud 245 [Worstman].

71 *Lockridge v Director*, *Ministry of the Environment*, 2012 ONSC 2316 [*Lockridge*].

72 *Ibid* at para 1.

73 *Ibid* at para 30.

74 *Ibid* at para 30.

The advantage of a more narrow judicial review application is that the claim is less likely to be struck for non-justiciability,[75] however, the disadvantage is that it will likely be more difficult to establish a causal connection between the specific permit at issue in the application and the environmental harms associated with it. As Justice Harvison Young held in *Lockridge*, "only evidence relating to the [specific permit being challenged] and any synergistic effects of the increase in sulphur production authorized by it are relevant for that purpose…. not any earlier approvals or pre-existing contaminants in the absence of evidence of synergistic effects with the increased level of sulphur production."[76] Given that it is virtually impossible to connect a particular approval with specific health effects, it may be difficult to succeed on judicial review of a particular permit when the claimants are experiencing a multitude of harm connected to a wide range of polluters.

Recourse through judicial review may also limit the ability for courts to affect the status quo. In *Lockridge*—where the claimants had initially wanted to tackle the permitting regime as a whole—it became clear that the judicial review format was unable to affect how permitting was regulated in Ontario—and ultimately, the levels of pollution in the region—given that its focus was on a single approval. According to the Court:

> The consequences of success would be the quashing of the April 2010 Decision and would not affect general emissions from the refinery, and could not generally impose a cumulative effects assessment into the regulatory process, though the applicants and Ecojustice advocate on behalf of such change. [77]

Despite these drawbacks however, it is conceivable that in cases where large sources of pollution can be linked to particular approvals, resorting to judicial review might be very effective.

While it is beyond the scope of this paper to fully explore the opportunities and challenges associated with different courses of action, it is possible to imagine different types of environmental claims that could be launched as adverse effects discrimination cases.[78]

B. Challenges Associated with Adverse Effects Discrimination Claims

Adverse effects discrimination claims have had mixed success over the years. Until recently, only three cases were successful at the Supreme Court: *Eldridge v British Columbia (Attorney General)*, *Vriend v Alberta*, and *Little Sisters*.[79] Classifying these claims into two categories, Dianne Pothier identifies that adverse effects cases can focus on "categorical exclusions," where

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75 Larissa Parker, "Let Our Living Tree Grow: Beyond Non-Justiciability for Public Interest Environmental Claims" (13 September 2021), online: *The Canadian Bar Association* <https://www.cba.org/Sections/Public-Sector-Lawyers/Resources/Resources/2021/PSLEssayWinner2021> [perma.cc/83JR-EDPE]. See also Nathalie Chalifour, Jessica Earle & Laura MacIntyre, "Detrimental deference" (18 November 2020), online: *The Canadian Bar Association Magazine* <https://nationalmagazine.ca/en-ca/articles/law/opinion/2020/detrimental-deference> [perma.cc/L68L-DRCA].

76 *Lockridge, supra* note 71 at para 80.

77 *Ibid* at para 162.

78 Chalifour, "Environmental Justice," *supra* note 18.

79 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 1997 CarswellBC 1939; *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CarswellAlta 210; *Little Sisters, supra* note 67.

all members of a group or sub-group are adversely impacted by a neutral rule or policy, or "disproportionate impact", where only some members of a group are adversely affected.[80] This distinction is important as Pothier, and later, Hamilton and Koshan argue that the latter type of cases—focussed on disproportionate impact—are more difficult to prove.[81]

Historically, establishing a sufficient causal relationship between the adverse effects and government action has been a key challenge for claimants alleging adverse effects discrimination.[82] It was also more difficult to meet the evidentiary burden required to establish how the impact of the government action or law is discriminatory on a particular group.[83] Over the last two decades, judges focussed on whether the impugned law actually *created* the claimants' disadvantage.[84] As a majority of the Supreme Court held in the oft-cited *Symes v Canada* decision, courts were to "take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision."[85] In other words, the "social costs, although very real, exist outside of the [government action at issue]."[86]

Reliance on *Symes* was an important feature of the Federal Court of Appeal's 2018 decision in *Fraser v Canada*, where the judges concluded, "the mere fact that women disproportionately take advantage of a government program does not mean that the pension treatment afforded to those who participate in the program creates a distinction on an enumerated or analogous ground.[87] Similar arguments also factored into all of the dissenting judges' reasons at the Supreme Court.[88] Justices Brown and Rowe in particular, summarized the Court's (past) approach to causation in section 15 inquiries, as follows:

> A search for impact is a search for causation. The inquiry here is into whether the gap in outcomes is *fully* explained by pre-existing disadvantage or whether state conduct has contributed to it. In other words, s. 15 is concerned with state conduct that contributes to — that is, augments — pre-existing disadvantage.[89]

For years, scholars have criticized this rigid approach for failing to adequately consider the relationships between the broader inequalities that a claimant could be facing and the equality claim they are actually making.[90] Indeed, it is antithetical to the recognition of adverse effects

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80 Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17 at 23.

81 Hamilton & Koshan, "Adverse Impact", *supra* note 20 at 193.

82 *Ibid* at 201–202, 224–225.

83 Jennifer Koshan & Jonnette Watson Hamilton, "Tugging at the Strands: Adverse Effects Discrimination and the Supreme Court Decision in *Fraser*" (9 November 2020), online (article): *ABlawg*, < https://ablawg.ca/2020/11/09/tugging-at-the-strands-adverse-effects-discrimination-and-the-supreme-court-decision-in-fraser/> [perma.cc/CKK2-8JHR] [Koshan & Hamilton, "Tugging at the Strands"].

84 *Ibid.*

85 *Symes v Canada*, [1993] 4 SCR 695, 1993 CarswellNat 1178 at para 134.

86 *Ibid*.

87 *Fraser v Canada (Attorney General),* [2019] 2018 FCA 223, rev'd 2020 SCC 28 at paras 53–54.

88 *Fraser, supra* note 19 at para 247 (Côté J citing *Symes*).

89 *Ibid* at para 175, citing *Kahkewistahaw First Nation v Taypotat, 2015 SCC 30* at para 17 at para 20 [*Taypotat*]; *Quebec (AG) v A,* 2013 SCC 5 [*Quebec v A*] [emphasis added].

90 Hamilton & Koshan, "Adverse Impact", *supra* note 20 at 201.

discrimination to reject claims on the basis that a claimant's disadvantage cannot be fully explained by government action. The very purpose of recognizing this form of discrimination stems from the recognition that some groups may be adversely affected by government action due to their historical disadvantage that is produced and sustained by broader contextual and systemic factors. As Joshua Sealy-Harrington writes:

> "Causation" cannot be limited to its overt, active, and inequality-exacerbating interventions if a meaningful conception of equality is to be realized. Indeed, ubiquitous inequality — linked to "social attitudes and institutions" — can be traced to historical and contemporary government policy, making "causation" defences deceptive and misleading.[91]

Overall, strict causation requirements have had the effect of excluding adverse effects discrimination claims from section 15.[92] The consequence of this was—at least until *Fraser*—that discrimination embedded in apparently neutral government policies or decisions was consistently not recognized as discriminatory.

Such doctrinal requirements related to establishing causation under section 15 might seem particularly insurmountable in the context of environmental problems.[93] Due to the nature of environmental harm—typically transboundary, latent, and large in scope—causation is often difficult to pinpoint with precision. Indeed, understanding environmental harm can be complex because of its temporal and spatial characteristics.[94] That is, the harm itself moves across time and space, covering wide areas and imposing long lasting effects. Although environmental harm may originate in a specific location, it is often impossible to link that harm to a particular polluter.[95] Moreover, toxins accumulate over time. They have a cumulative impact on environments and communities. In an area with multiple polluters, these accumulations make it even harder to identify the cause of harm and its extent.[96]

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91 Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Constitutional Forum 53 at 79.

92 Hamilton & Koshan, "Adverse Impact", *supra* note 20. See also Jonnette Watson Hamilton, "Cautious Optimism: *Fraser v Canada* (Attorney General)" (2021) 30:2 Constitutional Forum 1 at 6. See also Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of British Columbia *(Public Service Employee Relations Commission) v BCGSEU*" (2000) 46 McGill LJ 533.

93 Chalifour, "Environmental Justice," *supra* note 18 at 24, 33–37.

94 Richard J Lazarus, *The Making of Environmental Law* (University of Chicago Press, 2008) at 5–15, 29–40. See also Simon JT Pollard et al, "Characterizing Environmental Harm: Developments in an Approach to Strategic Risk Assessment and Risk Management" (2004) 24:6 Risk Analysis: An International Journal 1551 at 1551. See also Rob White, *Global Environmental Harm: Criminological Perspectives* (Taylor and Francis, 2010) 3 at 6, 17.

95 Worstman, *supra* note 70 at 251.

96 Rob White, *Environmental Harm: An Eco-Justice Perspective* (Policy Press, 2013) [White] (for a comprehensive and critical overview of differing approaches to understanding environmental and social harm).

Harm can be perpetual and potentially intergenerational.[97] Thus, there is a degree of nebulousness inherent in delineating environmental harm that often troubles causation and evidentiary requirements in any legal analysis.[98]

III. FLEXIBILITY AFTER *FRASER*

The *Fraser* decision was the first successful adverse effects claim at the Supreme Court in over twenty years. The case concerned the adverse effects of an RCMP pension plan and its treatment of retired female members with children who had participated in job-sharing work. The program allowed two or more RCMP members to split the responsibilities of one full-time position at reduced pay.[99] While the claimants believed that their job-sharing services should be purchasable under the RCMP pension plan, the RCMP ultimately informed them that their work in the program was equivalent to part-time work, for which no buy back was available under the plan.[100] In response, the claimants brought an application alleging adverse impact contrary to section 15 of the *Charter* in Federal Court.

While the Federal Court and the Federal Court of Appeal denied the application, Justice Abella—writing for the majority—held that the job sharing program created a distinction based on sex and denied a benefit in a manner that has the effect of perpetuating disadvantage.[101] In her reasons, Justice Abella reiterated the importance of recognizing and protecting against adverse effects discrimination and provided clarity on how courts should approach the section 15 analysis when confronted with this type of discrimination. As Justice Abella found, "[i]ncreased awareness of adverse impact discrimination has been 'a central trend in the development of discrimination law'"[102] which means that governments should be "'particularly vigilant about the effects of their own policies.'"[103]

In providing clarity on the section 15 analysis for adverse effects discrimination, Justice Abella explicitly loosened the rules around the causation, evidence, and choice for adverse effects-related claims. As Hamilton and Koshan write, the majority "methodologically unravelled the [challenges]" that have plagued this area of law for decades.[104] In what follows, I consider

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97 In Chemical Valley, a number of studies suggest that the pollution is affecting long-term genetic makeup of the population. See Nancy Langston, "Toxic Inequities: Chemical Exposures and Indigenous Communities in Canada and the United States" (2010), Natural Resources Journal 393 at 400. See also Jedediah Purdy, "The Politics of Nature: Climate Change, Environmental Law, and Democracy" (2010) The Yale Law Journal 1122.

98 Richard J Lazarus, "Restoring What's Environmental About Environmental Law in the Supreme Court" (1999) 47 UCLA L Rev 703 at 748–755.

99 *Fraser, supra* note 19 at para 8.

100 *Ibid* at paras 11, 15.

101 *Ibid* at para 106.

102 *Ibid* at para 31, citing Denise G. Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001), 2 Theor. Inq. L. 349 at 350–51.

103 *Ibid* at para 31, citing Sophia Moreau, "The Moral Seriousness of Indirect Discrimination" in Hugh Collins and Tarunabh Khaitan, eds, *Foundations of Indirect Discrimination Law* (Oxford: Hart Publishing, 2018) 123 at 145.

104 Koshan & Hamilton, "Tugging at the Strands", *supra* note 83. See also Hamilton, *supra* note 92.

three of these unravellings and reflect on why they may render environmental claims under section 15 more viable than ever.

A. Flexibility in Causation

To recall, under section 15, a claimant must show, on a balance of probabilities, that they experienced discrimination. This requires establishing that a law, program, or activity created a distinction based on an enumerated or analogous ground and that this distinction *caused* a disadvantage by perpetuating prejudice or stereotyping.[105]

In *Fraser,* Justice Abella appears to have added a significant degree of flexibility to the causation component of the section analysis by dismissing some of the causal connections that may have been required in the past. These changes can be summarized into three broadenings of causation. Claimants no longer need to prove that: (1) their protected characteristic caused the disproportionate impact;[106] (2) the impugned law created the claimants' disadvantage;[107] and (3) the challenged policy would "affect all members of a protected group in the same way."[108] Rejecting the Federal Court of Appeal's concern that the job sharing program did not *create* the claimants' disadvantage,[109] Justice Abella held: "[i]f there are clear and consistent statistical disparities in how a law affects a claimant's group, I see no reason for requiring the claimant to bear the additional burden of explaining *why* the law has such an effect."[110]

Claimants thus only need to demonstrate that a law has a disproportionate impact on members of a protected group. If a rule is shown to contribute to or worsen a group's disadvantaged position, this should be sufficient to establish the necessary connection between the rule and the disadvantage.[111] In line with principles of substantive equality, this analysis requires attention to the "full context of the claimant group's situation", to the "actual impact of the law on that situation", and to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that group's members.[112]

These changes are promising for environmental claims. Due to the transboundary and latent nature of environmental harm, establishing causation is more difficult in environmental contexts.[113] As introduced earlier, this difficulty arises because temporal and spatial uncertainties around environmental harm render it virtually impossible to establish that X permit caused Y harm. According to Nickie Vlavianos, causation is "the greatest hurdle" for

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105 *Quebec (Attorney General) v A*, 2013 SCC 5 at para 118 [*Quebec v A*]; *Centrale des syndicats du Québec v Quebec (Attorney General),* 2018 SCC 18 at para 75.

106 *Fraser, supra* note 19 at paras 69–70.

107 *Ibid* at para 63.

108 *Ibid* at para 72.

109 *Supra* note 87.

110 *Fraser, supra* note 19 at para 63.

111 *Ibid* at para 70.

112 *Ibid* at para 42; See also *Taypotat, supra* note 89.

113 Lynda M Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Free doms" (2009) 26 Windsor Rev Legal & Soc Issues 7 at 42; Robert L Rabin, "Environmental liability and the tort system" (1987) 24 Hous L Rev 27.

rights-based environmental claims.[114] In adding flexibility to how causation is considered under section 15, future claimants are now more easily able to meet the section's causation threshold if they can establish a disproportionate impact on members of a protected group.

There is opportunity in this flexibility for identifying discrimination in pollution hotspots, like Chemical Valley. Justice Abella's loosening of the causation requirements under section 15 render it easier to demonstrate that the environmental effects of a law (or a regime of laws) have a disproportionate impact on members of a protected group. Now, data on the extent of pollution in a given area and the significant health effects associated with it, along with data on the number of permits awarded would likely establish a sufficient causal connection for the purposes of section 15 on a balance of probabilities.[115]

Further, given the systemic and historical nature of environmental inequality,[116] it is unlikely that claimants bringing cases involving environmental inequality would ever, as the dissenting judges contend, be able to prove whether a specific legal regime itself "was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group."[117] Instead, by stressing that the analysis should be focussed on disproportionate impact, Justice Abella assured that adverse effects discrimination—although its origins are not necessarily completely tied to the government action at issue—is still protected under section 15.

Finally, the Court's assertion that "heterogeneity within a claimant group does not defeat a claim of discrimination," is promising for the application of section 15 to contexts of environmental inequality.[118] As introduced above, environmental pollution does not cause harm in a uniform way. Health problems are not only experienced differently across community members, but they are also constantly evolving. Indeed, residents of pollution hotpots, like those in Aamjiwnaang, typically experience respiratory issues, reproductive problems, and cancer at different rates.[119] Requiring potential claimants to establish identical injuries would have the effect of excluding environmental harm from section 15.

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114 Nickie Vlavianos, "The Intersection of Human Rights Law and Environmental Law", Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmen tal Damage at University of Calgary (23–24 March 2012) at 9. See also Tim Hayward, "Constitutional Environmental Rights: a Case for Political Analysis" (2000) 48:3 Political studies 558 at 561, 564, 569.

115 The key difference between environmental adverse effects claims and the type of claim in *Fraser* is a difference between benefits and burdens. In *Fraser*, the issue is providing a fairly concrete benefit that we all agree is a benefit (because buying back pension hours gets you more money). But here, the issue is a harm that may arise. It is difficult to say how courts will respond to such differences, but the scientific and statistical research available would certainly assist in making an analogous claim.

116 Randolph Haluza-Delay, "Environmental Justice in Canada" (2007) 12:6 Local Environment (who describes histories and pathways of inequality in the Canadian context at 557). See also Morello-Frosh, *supra* note 13 (for an example in the US context).

117 *Fraser, supra* note 19 at para 71.

118 *Quebec v A*, *supra* note 105 at para 354, cited in *Fraser, supra* note 19 at para 75.

119 Luginaah, Smith & Lockridge, *supra* note 35.

B. Flexibility in Evidentiary Requirements

To establish adverse discrimination, the section 15 framework requires evidence of how the impact of the government action or law is discriminatory on a particular group.[120]

Justice Abella identifies two types of evidence that are "especially helpful" in adverse effects cases under section 15: evidence about the claimant group's situation and evidence about the results of the law.[121] On the first type of evidence, which aims to show that members in a particular group experience a disadvantage, Justice Abella finds that it "may come from the claimant, from expert witnesses, or through judicial notice."[122] This adds flexibility to the evidentiary burden by recognizing the value of testimonial evidence and other types of knowledge in assessing whether a group is experiencing a disadvantage.[123] According to Justice Abella, there was no "universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact" on some members of the group.[124]

This broadening of evidentiary requirements is significant for communities experiencing disproportionate pollution burdens, especially those that deploy community-based strategies to expose pollution impacts. The mapping exercise conducted by the Aamjiwnaang Health and Environment Committee, as referenced in section 1 of this paper, is one such example. According to Professor Scott, "[these strategies] seek to marshal the evidence that is needed to demonstrate that chronic exposures to pollution are causing environmental health harms, even at the 'safe doses' permitted by existing regulations."[125] Justice Abella's reasons suggest that such evidence would be admissible for a section 15 claim about disproportionate pollution burdens in communities like Chemical Valley.

The second type of evidence concerns the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately impacted. Justice Abella acknowledges flexibility in this area by stating that "clear and consistent statistical disparities can show a disproportionate impact on members of protected groups, even if the precise reason for that impact is unknown."[126]

This newfound flexibility around evidence goes hand in hand with the loosening of causation requirements. Since the specific causal pathways of environmental harm are unknown, statistics about pollution permitting and quantities of pollution emitted in a given region will be important to establish. Together, such statistics and data about health impacts form a full picture of environmental inequality in the region, and reveal how permitting is at the root of the problem.

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120 *Fraser*, *supra* note 19 at paras 50, 52.

121 *Ibid* (neither type of evidence is necessary; sometimes, the disproportionate impact on a group "will be apparent and immediate" at paras 56–61).

122 *Ibid* at para 57, citing *Withler v Canada (AG),* 2011 SCC 12 at para 43.

123 *Ibid*.

124 *Ibid* at para 59.

125 Scott, *supra* note 22 at 298.

126 *Fraser, supra* note 19 at para 62.

C. A Note on Choice

A final unravelling related to causation is the role of claimants' choices in the section 15 analysis. In the past, courts have considered whether differential treatment amounts to a discriminatory distinction if it is linked to choices made by the affected individual or group.[127] According to this position, it is not the law which creates the adverse impact, but rather, the choices made by the claimants.

In *Fraser*, lower court decisions relied on the premise that it was a "choice" to job-share in order to find no distinction under section 15. A majority of the Supreme Court rejected this analysis, finding that the court "misapprehended" section 15 jurisprudence by relying on the claimant's "choice" to participate in the job sharing program. Instead, according to the majority, the Supreme Court "has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group."[128]

According to Justice Abella, for many women, deciding to work part-time is not a true choice—the "choice" is between staying above or below the poverty line.[129] In coming to this conclusion, Justice Abella acknowledged "the critical point" that choices are themselves shaped by systemic inequality. The Court cited the following passage by Professor Sonia Lawrence, who poignantly writes:

> . . . a contextual account of choice produces a sadly impoverished narrative, in which choices more theoretical than real serve to eliminate the possibility of a finding of discrimination . . .
>
> *Any number of structural conditions push people towards their choices, with the result that certain choices may be made more often by people with particular "personal characteristics".* This is a key feature of systemic inequality — it develops not out of direct statutory discrimination, but rather out of the operation of institutions which may seem neutral at first glance. [Emphasis original].[129]

By removing choice from the inquiry, Justice Abella signalled it is the recognition of connections between the disproportionate impact that government action has on a particular group, in addition to the historical disadvantages produced and sustained by systemic factors, that allows judges to better identify and protect against adverse effects discrimination.

These conclusions are useful for applicants looking to extend the application of section 15 to environmental inequality. Like the decision to work on a part-time basis, the choice to remain living and working in a pollution hotspot is often outside of an individual's control. Although some may wonder why communities "choose" to stay in pollution hotspots, Dorceta Taylor discusses why moving is typically not feasible for low income and racialized

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127 Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" (2006) 33 Supreme Court Law Review [Lawrence].

128 *Fraser, supra* note 19 at para 86.

129 Lawrence, *supra* note 127, cited in *Fraser, supra* note 19 at para 90.

communities for financial and cultural reasons.[130] Drawing from the work of Evers, Taylor explains that access, ownership, and connection to land are three key reasons why people do not move.[131] Similarly, as Ingrid Waldron summarizes, not only can residents of polluted communities not afford to move elsewhere, but perhaps more importantly, they do not want to because these areas have been home to their communities for generations.[132] The people of polluted communities feel a sense of belonging in their neighbourhoods, just as anyone does, pollution or not.[133] Put simply, home is home.

Cultural connections to land are particularly acute in Indigenous communities like Aamjiwnaang. In *Corbière,* the Supreme Court found that choosing to live on a reserve is connected to First Nations cultural identity and cannot be changed without great costs to band members.[134] According to Justice L'Heureux-Dubé, "the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental."[135]

Ultimately, one might posit instead that the question should not be whether or not communities should choose to move or stay in pollution hotspots, but rather, why industries in these communities were placed there in the first place.

CONCLUSION

For decades, section 15 has been plagued by a rigid reliance on categories and rules that do not map neatly onto today's complex issues—particularly, environmental ones. Rules around causation, evidentiary requirements, and choice have limited the ability for claimants to rely on courts and section 15 to identify and rectify adverse effects discrimination linked to government action. This has fostered a recurring tension among judges to balance the need for certainty in the rules regarding section 15 and the flexibility required to adequately apply these rules to reality. However, as Professor Colleen Sheppard aptly insists, when strict adherence to rigid rules does not adequately fulfill section 15's goals, we must return to the fundamental promise of substantive equality, which lies in equitable outcomes and equal opportunities for disadvantaged groups.[136]

To adequately fulfill the promise of substantive equality, the section 15 analysis requires a more principled and flexible approach, where anyone experiencing discrimination from a government action is entitled to a true equality in outcomes. As a majority of the Supreme Court stressed in *Fraser,* section 15 should move towards a conceptualization of equality which promotes the flourishing of all individuals in all of their particularity, even when it is

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130 Taylor, *Toxic Communities*, *supra* note 36 at 2–3, 69–97.

131 *Ibid*.

132 Waldron, *supra* note 6.

133 Taylor, *Toxic Communities*, *supra* note 36 at 90.

134 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CarswellNat 663 at paras 14–15.

135 *Ibid* at para 62.

136 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Queens McGill University Press, 2010) at 61–64, 146–148.

impossible to establish that a particular government action fully caused the discrimination at issue.[137] In a way, flexibility in the section 15 analysis refocusses the inquiry around dignity of the person,[138] which is intimately connected to where we live and our environments.[139]

Flexibility in the application of section 15 is also necessary to accommodate environmental claims under the section. Given that environmental pollution and harm carry complex temporal and spatial dimensions, it does not fit neatly within the *Charter* framework. The focus on specific pathways of causation and harm—which are inherently difficult to delineate with precision and difficult to prove with evidence—has the quasi effect of barring the application of section 15 to environmental problems. Maintaining these doctrinal limitations risks losing sight of the important rationale behind section 15 in the first place, which is to rectify inequality when it presents itself. Indeed, rigid rights-based frameworks distract from the very real equality issues at stake.

Cases of environmental inequality are prevalent in the backyards of poor and racialized communities across Canada. While affluent—and traditionally white—communities have long opposed infrastructure and other development projects in their backyards, it is undeniable that the burdens of development and pollution have been displaced—almost exclusively—into the backyards of marginalized communities.

The role of discretionary legislative regimes in creating and sustaining these inequalities is well-documented. As a result, governments have a responsibility to rectify such environmental discrimination under section 15 of the *Charter.* Although jurisprudence on adverse effects discrimination signalled that environmental claimants would be faced with significant challenges around causation and evidentiary requirements to establish environmental discrimination under the section, newfound flexibility in the section 15 framework after *Fraser* signals that the path to challenge unequal pollution burdens may be more possible than ever.

Under the new framework, the popular slogan "Not in Anyone's Backyard" might just be given room to transform from a longstanding aspiration to a new reality—one where the law is able to respond to the widespread environmental discrimination that plagues vulnerable communities across Canada.

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137 Andrea Wright, "Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate" in Margaret Denike, Fay Faraday & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006).

138 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CarswellNat 359.

139 Chalifour, "Environmental Justice," *supra* note 18.

ARTICLE

TWO VISIONS OF RECONCILIATION IN CANADA

Sarah Nixon *

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ABSTRACT

Reconciliation has become a popular and contentious term in Canadian politics, media, jurisprudence, and legal education. In this paper, I explore what is at stake in our approach to reconciliation by contrasting two prevailing forms. The first is a form pursued in Canadian jurisprudence which I refer to as "reconciliation to Crown sovereignty." The second is a form advocated by numerous scholars and Indigenous leaders which I call "reconciliation as treaty." Reconciliation to Crown sovereignty is a process whereby Indigenous polities' interests in political autonomy and control of land are systematically undermined or rendered legally inert, thereby reconciling these interests with the sovereignty of the Crown. Reconciliation as treaty, by contrast, entails building and renewing treaty relationships through Crown engagement with Indigenous peoples robustly constrained by a principle of non-domination. I argue that these two forms of reconciliation are mutually exclusive and that reconciliation as treaty should be preferred because it respects and protects Indigenous peoples' law and ontologies. I use the recent Federal Court of Appeal decision in *Coldwater et al v Canada (Attorney General)* as a case study to explore these two approaches to reconciliation.

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INTRODUCTION

Reconciliation has become a popular and contentious term in Canadian politics, media, jurisprudence, and legal education. Some invoke it as an aspiration essential to mending Canada's relationship with Indigenous peoples, while others vehemently criticize it as a modern form of colonization.[1] Controversy surrounds not only its implementation but also its basic meaning, to the extent that editors of a recent book on reconciliation refuse to assign it a definition altogether.[2] In this paper, I[3] explore what is at stake in Canada's approach to reconciliation by contrasting two prevailing forms. The first is a form pursued in Canadian jurisprudence, which I refer to as "reconciliation to Crown sovereignty." The second is a form advocated by numerous scholars and Indigenous leaders, which I call "reconciliation as treaty."[4] Broadly, reconciliation to Crown sovereignty is a process whereby Indigenous peoples' political autonomy is forcibly diminished or extinguished, while reconciliation as treaty is a process of constant relationship-building and renewal between equally powerful parties. I argue that Canada should pursue reconciliation as treaty because this form of reconciliation respects and protects Indigenous law and ontologies. In so doing, it also begins to resolve a persistent tension underlying Canadian sovereignty—the tension between recognizing Indigenous peoples' inherent rights and asserting Canada's ultimate authority over Indigenous peoples.

This paper proceeds in three main parts. In Part I, I describe reconciliation to Crown sovereignty and reconciliation as treaty. In Part II, I analyze the recent Federal Court of Appeal decision in *Coldwater et al v Canada (Attorney General)*[5] as a case study. In this recent decision, the Court demonstrates how the asserted opposition of Indigenous communities to a major extractive project which severely impacts their interests becomes legally inconsequential within the framework of reconciliation to Crown sovereignty. In Part III, I explore what reconciliation as treaty would demand in the context of a dispute like that which gave rise to the *Coldwater* decision.[6]

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1 See e.g. Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota, 2014).

2 John Borrows & James Tully, "Introduction," in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) 3 at 9.

3 Throughout, I use first person pronouns rather than writing with a disembodied voice. As a settler, I will use 'we' predominantly to refer to settler people, but occasionally, to refer to both Indigenous and non-Indigenous peoples together. I think it is also important to be clear that what I offer is only my understanding: that of a settler and student very early on in my legal education, and with a particularly novice understanding regarding Indigenous perspectives.

4 For example, John Borrows, James Tully, Aaron Mills, Michael Asch, Harold Cardinal, and Elder Danny Musqua, whom I cite throughout.

5 *Coldwater et al v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater*].

6 The drive to write this paper arose from the jarring experience I had reading the *Coldwater* decision. I spent my first year of law school in classrooms where professors, classmates, and the authors of the decisions and commentaries we studied respectfully discussed Indigenous law and ontologies. Upon reading *Coldwater*, I felt that the decision did not reflect this same respect for Indigenous perspectives that I believed was integral to Aboriginal law in Canada, and I wanted to understand why.

Before continuing, I would like to acknowledge that the two approaches to reconciliation developed in this paper are not watertight compartments, to borrow a judicial phrase.[7] Although the argument presented in this paper is that reconciliation to Crown sovereignty is the overarching trend that characterizes jurisprudence on Aboriginal law, Canadian courts have also been nimble and creative in their approaches to reconciliation.[8] In particular, the Supreme Court of Canada (the "Court") has repeatedly recognized the importance of treaty.[9] Yet, while many judges have made an earnest effort to assist in healing the relationship between Indigenous peoples and the Crown, members of the bench also find themselves in a constrained position. Not only is the legitimacy of their authority intimately bound up with the legitimacy of Canadian sovereignty (which, as I will show, is in the crosshairs here), but further, judges must apply the law as it is rather than as they might like it to be. While the Court could develop jurisprudence that would more effectively honour the treaty relationships Canada is founded upon, it may not be the best-suited institution to lead the renewal of this relationship.[10] Ultimately, reconciliation as treaty cannot be achieved through bold jurisprudence alone.

I. MAPPING RECONCILIATION

Reconciliation is a word with many meanings.[11] It refers to activities as disparate as: creating consistency between incompatible facts, making up after a fight between close friends, and acquiescing to an unfair situation.[12] In recent decades, the concept of reconciliation has animated the political discourse of many nations that have experienced grave injustice.[13] Notably, in 1997, the Truth and Reconciliation Commission invoked the concept to guide South Africa's response to the severe, state-sanctioned oppression enacted by the apartheid regime.[14] In the political context, the term has a distinctively grand and emotive quality. Depending on the listener, it may conjure the image of an egalitarian society where diverse and previously antagonized groups live peacefully alongside one another. Yet, for others, the term rings hollow.[15]

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7 *Canada (Attorney General) v Ontario (Attorney General)*, [1937] 1 DLR 673 at 684, [1937] 1 WWR 299 (PC)

8 See e.g. *R v Van Der Peet,* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van Der Peet*] (where Chief Justice Lamer asserts, in concurring opinion, that Aboriginal law is a form of "intersocietal law" at para 42).

9 See e.g. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida Nation]; *Coldwater*, *supra* note 5; see also Ryan Beaton, "*De facto* and *de jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Const Forum Const 25.

10 The Right Honourable Beverley McLachlin, PC Chief Justice of Canada, "Respecting Democratic Roles" (2005) 14:3 Const Forum Const 15.

11 Donna Pankhurst, "Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace" (1999) 20:1 Third World Q 239 at 240–1.

12 *Ibid*. See also Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) at 165.

13 *Ibid*.

14 *Ibid* at 165.

15 See e.g. Brian Egan, "Sharing the colonial burden: Treaty-making and reconciliation in Hul'qumi'num territory" (2012) 56:4 The Can Geographer 398 at 412, DOI: <10.1111/j.1541-0064.2012.00414.x.>.

In Canada, the Trudeau government has relied heavily upon commitments to reconciliation and a "nation-to-nation" relationship in political discourse.[16] However, the government has been subject to harsh criticism for various failures to act in a manner that is consistent with this rhetoric.[17] In early 2020, anger and frustration over the Trans Mountain Pipeline Expansion and the government's treatment of Indigenous rights catapulted the sentiment that "reconciliation is dead" into mainstream media.[18] While numerous flashpoints have highlighted the mounting tensions regarding Indigenous rights in Canada in recent years, this political controversy is by no means new or sporadic.[19] Indeed, struggle has marked Indigenous-settler relations for centuries.

Approaches to reconciliation have significant consequences for Indigenous rights in the realms of both politics and law. In 1982, Indigenous rights in Canada were constitutionally entrenched under section 35 of the *Constitution Act, 1982*, which states: "[t]he existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed."[20] Jeremy Webber, an expert in constitutional law, recounts that many Indigenous peoples opposed the wording of this provision for its vagueness on the content of rights and the limiting use of the word "existing."[21] However, after four ensuing conferences failed to produce agreement on revised wording, section 35 was implemented in its original form.[22] As a result, interpretation of the rights protected by section 35 has fallen to the courts.[23]

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16 Sheryl Lightfoot, "A Promise Too Far? The Justin Trudeau Government and Indigenous Rights" in Norman Hillmer & Philippe Lagacé, eds, *Justin Trudeau and Canadian Foreign Policy* (Cham, Switzerland: Palgrave Macmillan, 2018) 165.

17 *Ibid*. See also Hayden King and Shiri Pasternak, "A Different PM Trudeau, Same Buckskin Jacket, But Where is the 'Real Change' for Indigenous Peoples?" (2018) 29:1 Indigenous Policy J.

18 Riley Yesno, "Is reconciliation dead? Maybe only government reconciliation is", *The Star* (19 February 2020) online: < https://www.thestar.com/opinion/contributors/2020/02/19/is-reconciliation-is-dead-maybe-only-government-reconciliation-is.html> [perma.cc/Q9XH-ZQ7K]; Alex Ballingall, "Reconciliation is dead and we will shut down Canada", *The Star* (11 February 2020) online:<https://www.thestar.com/politics/federal/2020/02/11/reconciliation-is-dead-and-we-will-shut-down-canada-wetsuweten-supporters-say.html> [perma.cc/N77T-ZWVC].

19 See generally Jeremy Webber, *Constitutional Law of Canada: A Contextual Approach* (Oxford: Hart Publishing, 2015) (for example, an infamous 1969 White Paper "provoked a very strong reaction" at 231); Todd Gordon, "Canada, empire and indigenous Peoples in the Americas," (2009) 47:1 Socialist Studies ("[t]he last fifteen years have also been witness to a renewal of Indigenous militancy [with the] increasing resort by Indigenous communities to road blocks, occupations, and armed standoffs like those at Oka, Gustafson Lake and Burnt Church" at 62).

20 *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Section 35*].

21 Webber, *supra* note 19 at 232. See also Kiera L Ladner & Michael McCrossan "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order," in James B Kelly and Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2010) 263 (authors state that the majority of First Nations representatives opposed the wording of s. 35(1) at 267).

22 *Ibid* at 232.

23 *Ibid* at 233. These three minor amendments had the effect of "clarifying that land claims agreements would benefit from constitutional protection, specifying that aboriginal and treaty rights were guaranteed equally between men and women, and providing for the subsequent conferences on Aboriginal rights" which failed to produce further amendments (see Webber, *supra* note 19 at 47–48).

Courts are institutions where disputes between parties are heard by one or more judges who decide how the relevant law applies to settle the parties' conflict. Hearings are adversarial—parties are pitted against one another in a process that produces a winner and a loser. These institutions were not designed to assist in processes of reconciliation between states and Indigenous peoples in colonial contexts. However, determination of the content and import of Indigenous rights and treaties has been largely left to the courts through the broad wording of section 35. Therefore, the courts have become pivotal sites of influence over the rights of Indigenous peoples from the perspective of the Canadian legal system.[24] Court decisions thus have immense consequences for the lives and lands of Indigenous peoples.[25] Since the Court has asserted that the process of interpreting section 35 is informed by the pursuit of reconciliation,[26] the Court's approach to reconciliation is crucially important.

In Mark Walters' seminal essay on reconciliation, he identifies three types united by a common theme: "all involve finding within, or bringing to, a situation of discordance a sense of harmony."[27] His typology of reconciliation has inspired fruitful analysis in the rapidly expanding body of scholarship on Indigenous rights in Canada, helping to expose critical conceptual and legal challenges in the process of improving the Crown's relationship with Indigenous peoples.[28] His three forms of reconciliation are: 1) reconciliation as consistency; 2) reconciliation as resignation; and 3) reconciliation as relationship. First, reconciliation as consistency is the process by which incompatible facts are brought into alignment. This form of reconciliation can be arrived at mutually or unilaterally and requires no particular state of mind from either party.[29] Second, reconciliation as resignation is "a one-sided or asymmetrical process in which one adopts an attitude of acceptance about circumstances that are unlikely to change."[30] It requires that the party being reconciled reach a particular mental state: that of resignation. Third, and by contrast, reconciliation as relationship requires active, mutual engagement in determining a voluntarily agreed-upon resolution. Walters elaborates on this third form, writing that it has an "intrinsic moral worth" and "involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship."[31]

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24 Beaton, *supra* note 9.

25 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [Tsilhqot'in]; *Haida Nation*, supra note 9; Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justi- fied?" (1997) 8:2 Const Forum Const 33 [McNeil, "How Can Infringements"].

26 *Van Der Peet, supra* note 8 ("[t]he Aboriginal rights recognized and affirmed by s. 35(1) must be directed toward the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" at para 31).

27 Walters, *supra* note 12 at 167.

28 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 44–5; Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings,* (Toronto: UTP, 2018) 133 at 139–40; Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation" (2017) 13:1 JSDLP 1 at 11–16.

29 Walters, *supra* note 12 at 167.

30 *Ibid*.

31 *Ibid* at 168.

The analysis of reconciliation to Crown sovereignty in this paper is informed by reconciliation as consistency. The two are similar in that both aim to produce cohesion of 'facts' regardless of the attitudes of parties to the process. Of course, when applied to individuals or peoples, reconciliation as consistency may be perceived as involving domination through the exercise of arbitrary power, especially from the perspective of the party whose interests are forcibly reconciled with another divergent set of interests. I explore the tensions that arise as a result of this process in the following section, as I demonstrate how the Canadian jurisprudential approach to reconciliation takes the form of reconciliation to Crown sovereignty.

Reconciliation as relationship, by contrast, resembles and inspires what I call reconciliation as treaty. Both processes are designed to foster mutual respect and to genuinely heal a damaged relationship, and therefore require that the parties to be reconciled foster attitudes of care, trust, and mutual respect toward one another. This demanding approach to reconciliation is developed in the third section of this paper.

A. Reconciliation to Crown Sovereignty

This section characterizes the stated purpose of reconciliation in Canadian jurisprudence as "reconciliation to Crown sovereignty." It then explores how this form of reconciliation is supported through the test for Aboriginal rights infringement established in *R v Sparrow*,[32] the duty to consult established in *Haida Nation v British Columbia (Minister of Forests)*,[33] and the structure of Aboriginal title as developed in *Delgamuukw v British Columbia*.[34]

In *R v Van der Peet*, the Court determined that the purpose of section 35 is reconciliation—but of a particular sort. Former Chief Justice Lamer wrote that "[t]he Aboriginal rights recognized and affirmed by section 35(1) must be directed toward the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[35] As Walters observes, this passage is plainly worded: the fact of pre-existing, never-conquered,[36] complex polities must be brought into alignment with the now-existing "immutable fact" of Crown sovereignty.[37]

To understand reconciliation under section 35 in depth, it is critical to know what interests[38] are incompatible with the sovereignty of the Crown. This implies a need to understand what sovereignty is and what it requires. However, this is notoriously difficult due to the amorphous nature of the concept of sovereignty and its contestation over time.[39] If state sovereignty

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32 *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

33 *Haida Nation*, *supra* note 9.

34 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

35 *Van Der Peet, supra* note 8 at para 31.

36 *Haida Nation, supra* note 9 at para 25.

37 Walters, *supra* note 12 at 180.

38 Here and throughout, I adopt the language of the Court in *Mitchell v MNR,* 2001 SCC 33 at para 10. However, I recognize that referring to Indigenous claims as 'interests', 'rights', or for that matter, 'claims' all give rise to due controversy.

39 Kent McNeil, "Sovereignty and Indigenous Peoples in North America," (2016) 22:2 U.C. Davis J. Int'l L. & Pol'y at 82–87.

simply denotes "the supreme political authority of an independent state,"[40] then exercising political independence and control over land through any structure other than the state is incompatible with state sovereignty. Yet these are precisely the interests many Indigenous communities assert as their right.[41] It follows that if the purpose of section 35 is to reconcile these pre-existing societies with the sovereignty of the Crown, then section 35 must extinguish these interests. To this end, the goal of reconciliation in Canadian law is to produce consistent facts. I refer to this as "reconciliation to Crown sovereignty" because Canadian sovereignty is the fact to which Indigenous peoples and their claims to jurisdiction must be reconciled.

i. *R v Sparrow*

The Court pursued reconciliation to Crown sovereignty from the outset of section 35 jurisprudence. In *Sparrow*, the Court found that the words "recognition and affirmation" in section 35 incorporate a fiduciary duty owed by the Crown to Indigenous peoples.[42] This duty restrains the exercise of sovereign power.[43] The Court stated: "[f]ederal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."[44] Here, the Court asserts that reconciliation of federal power and duty can be achieved by using a test for the justification of rights infringements, which the Court modeled after section 1 of the *Canadian Charter of Rights and Freedoms*.[45] Under this test, infringement of Aboriginal rights by the Crown may be justified if there is: (a) a "compelling and substantial" objective; (b) that objective is pursued in a manner consistent with the honour of the Crown; and (c) the rights are minimally impaired in order to achieve that objective.[46] At the third stage of this analysis, the Court considers "whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the … measures being implemented."[47]

That the Court developed a test to justify infringements on Aboriginal rights as a means of pursuing reconciliation indicates the dynamics of the form of reconciliation the Court envisions. This test enables Canadian courts to unilaterally judge which infringements of Indigenous rights are justified by pressing and substantial objectives and the execution of particular obligations consistent with the honour of the Crown. The Court declares that Indigenous rights can be legitimately contravened based on the objectives of the Crown, so long as the Crown discharges a duty to infringe minimally, compensate where possible,

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40 Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, Minnesota: Thomson Reuters, 2019) sub verbo "state sovereignty."

41 Webber, *supra* note 19; Coulthard, *supra* note 1. See also Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: UTP, 2014) at 77 [Asch, "*On Being Here to Stay*"].

42 *Sparrow, supra* note 32 at 1109.

43 *Ibid.*

44 *Ibid*.

45 Webber, *supra* note 19 at 237; Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

46 *Sparrow*, *supra* note 32 at 1111–1119.

47 *Ibid* at 1119.

and consult. Where courts judge the Crown to have executed these obligations, Indigenous opposition to rights infringements is no longer of legal consequence. This arrangement is standard in the adjudication of legally recognized rights.[48]

Section 35 is meant to protect a distinct set of rights stemming from the pre-existence of Indigenous societies.[49] And yet, there is nothing distinct about the way the Court proposes to evaluate infringements on Indigenous rights. The infringement test performs reconciliation to Crown sovereignty by treating Indigenous rights the same as any other constitutional right, and by entrenching in law the requirement that Indigenous peoples accept rights infringements by the Crown based on the rulings of Canadian courts.

ii. *Haida Nation v British Columbia*

The duty to consult and accommodate is another aspect of Aboriginal law jurisprudence that performs reconciliation to Crown sovereignty. As laid out in *Haida Nation*, the duty to consult and accommodate is a procedural duty to engage with Indigenous communities where proposed state action may affect Indigenous rights prior to their 'establishment' by courts.[50]

In *Haida Nation*, the Court determined that obligations arising under the Crown's duty to consult will vary based on the strength of the *prima facie* right claimed and the severity of potential impacts on that right.[51] Where claims are strong and potential impact on Indigenous rights is severe, deep consultation is required. Deep consultation is a process "aimed at finding a satisfactory interim solution" where an action has the potential to significantly infringe Indigenous rights.[52] Deep consultation does not entail a "duty to agree."[53] Where claims are relatively weak and potential impact minor, the duty to consult may require providing notice, disclosing information, and discussing issues raised.[54] Consultation must always be meaningful and carried out in good faith, with the goal of addressing the concerns of the relevant communities.[55] The dual aims of the duty to consult are to provide Indigenous communities with a role in decisions that affect their interests and, by welcoming this participation, to facilitate reconciliation between Indigenous peoples and the Crown.[56]

The duty to consult has been subject to criticism at the levels of design and implementation. While the jurisprudential approach to reconciliation is arguably not related to issues with the implementation of the duty to consult, these critiques are relevant for two reasons. First, courts created the duty to consult under section 35.[57] Therefore, issues of its

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48 See e.g. *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

49 *Sparrow, supra* note 32 at 1112.

50 *Haida Nation*, *supra* note 9 at paras 42–44.

51 *Ibid*.

52 *Ibid* at paras 43–44.

53 *Ibid* at para 42. See also *Coldwater*, *supra* note 5 at para 119.

54 *Haida Nation*, *supra* note 9 at para 43.

55 *Ibid* at para 42.

56 *Delgamuukw*, *supra* note 34 at para 168. See also Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2009) 23:1 Can L Admin L & Prac 93 at 101.

57 *Haida Nation*, *supra* note 9.

implementation reflect the courts' approach to reconciliation. Second, as courts evaluate whether discharge of the duty to consult is meaningful—and therefore legal—on a case-by-case basis, they are responsible for enabling or constraining particular means of implementing the duty.

At the level of design, the duty to consult has been criticized based on its inherent power imbalance. The critique is simple: consultation cannot foster healthy relations between the Crown and Indigenous communities because it is structured such that "one party, the Crown, has the ability to outwardly reject Indigenous initiatives, but Indigenous peoples do not have the ability to stop the Crown's initiatives."[58] Therefore, the duty assists in reconciliation to Crown sovereignty because it enables the Crown to impose initiatives despite Indigenous opposition. Section five will explore this process in more depth.

At the level of implementation, lawyer Kaitlin Ritchie organizes issues arising from the duty to consult into three useful categories, those resulting from: (1) delegation of the duty; (2) resourcing the consultation process; and (3) cumulative effects of consultation.[59]

Although delegation is an essential activity in modern governance, it increases the complexity of government functions. As Ritchie explains, in the context of the duty to consult, complexity resulting from delegation can impede meaningful consultation.[60] The duty to consult is increasingly being delegated to a variety of entities: some agents of the Crown, some not (for example, project proponents), and some falling in between the two (including entities created by legislation that are not themselves 'government').[61] While delegation offers the advantage of increasing opportunities for relationship-building between Indigenous communities and the various entities whose actions may affect their interests, it also diminishes the opportunities for Indigenous communities to consult directly with the Crown. Each loss of direct engagement erodes opportunities for reconciliation between the Crown and Indigenous communities.[62] Delegation can also constrain possible accommodations. For instance, desired accommodations may exceed the financial or administrative capacity of project proponents.[63] Finally, delegation can increase confusion about what activities form part of formal consultation, particularly when the Crown delegates consultation to other entities in an informal way.[64] All these features of delegation erode the capacity for the duty to consult to ensure meaningful engagement between Indigenous communities and the Crown. As such, delegation of the duty to consult supports reconciliation to Crown sovereignty.

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58 Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Risa Schwartz et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 65 at 69.

59 Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46 UBC L Rev 397 at 400–401.

60 *Ibid* at 407–408.

61 *Ibid* at 408–409.

62 *Ibid* at 413–416.

63 *Ibid* at 420.

64 *Ibid* at 423.

With respect to resourcing the consultation process, the duty to consult places significant strain on Indigenous communities' financial and human resources through requirements to review, research, and develop a response to every proposed project.[65] Proposed projects can number in the hundreds or even thousands for some communities.[66] Developing responses to proposals may involve significant expenses, such as the hiring of experts to conduct assessments of potential impacts on land, water, and ecological health.[67] While courts have occasionally ordered the Crown to provide resources to communities to support consultation, the Crown is not yet legally obligated to do so in every case.[68] Some provinces have attempted to remedy this issue by creating funding opportunities themselves, but this move has not remedied resourcing inequalities in a uniform way.[69] As the duty to consult is a creature of jurisprudence, courts are implicated in the ramifications of under-resourcing, whereby Indigenous communities are placed at a disadvantage in the defence of their interests.

Last, the duty to consult creates problems at the level of implementation because of the cumulative effects of this process, which Ritchie identifies as the most troubling of her three categories. She puts the case plainly: "more consultations will lead to more development, and more development will lead to a reduced land base upon which a First Nation is able to exercise its traditional practices and Aboriginal or treaty rights."[70] Thus, pre-existing Aboriginal societies are reconciled to Crown sovereignty by the erosion of the contested land base that challenges that sovereignty.

iii. *Delgamuukw v British Columbia*

The structure of Aboriginal title within Canadian jurisprudence also illustrates how reconciliation to Crown sovereignty takes place under section 35. In *Delgamuukw*, the Court established that Aboriginal title is a right "to exclusive use and occupation of the land."[71] However, even where the Court has confirmed Aboriginal title, the Crown retains the underlying title.[72] In *Tsilhqot'in*, former Chief Justice McLachlin wrote that underlying title confers "the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35."[73] Underlying title also creates "a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands."[74] This approach to underlying title limits the autonomy conferred by Aboriginal title.

As highlighted by legal scholar, Kent McNeil, the Court has shifted its position on the proper deployment of the slippery notion of the 'public interest' in Aboriginal rights adjudication

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65 *Ibid* at para 56.
66 Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Prurich Publishing Ltd, 2014) at 71.
67 Ritchie, *supra* note 59 at 423.
68 Newman, *supra* note 66 at 71.
69 *Ibid*.
70 Ritchie, *supra* note 59 at 429.
71 *Delgamuukw*, *supra* note 34 at para 117.
72 *Ibid* at para 145.
73 *Tsilhqot'in, supra* note 25 at para 71.
74 *Ibid*.

from outright rejection in *Sparrow* to tacit acceptance in *R v Gladstone*.[75] In *Tsilhqot'in*, there is explicit endorsement of the role of public interest in evaluating the parameters of Indigenous rights. Importantly, the Court also elaborated on projects that might justify title infringements if in the public interest. These include: "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations."[76] Regarding this passage, Walters observes: "[f]or judges to say that Aboriginal societies must be reconciled to 'the settlement of foreign populations' who desire to exploit their lands and resources does seem an odd approach to reconciliation as a mechanism of decolonization."[77] Through this approach, the Court endorses the deployment of the notion of the 'public interest' under section 35 in a manner that implicates the courts in reconciliation to sovereignty. The Court does this by enabling the notion of the public interest to function such that the interests of a predominately settler population override Indigenous claims to full jurisdiction on Aboriginal title lands.

According to legal scholar, Jeremy Webber, the fiduciary duty owed by the Crown to Indigenous communities as a result of underlying title "requires that the non-Aboriginal governments act in the Aboriginal party's interest, as trustees act in the interest of beneficiaries."[78] By contrast, the Court defines the fiduciary duty as a procedural duty that can be discharged by the fulfillment of the third prong of the *Sparrow* test for rights infringement, which again, imposes an obligation to infringe Aboriginal rights minimally, compensate where possible, and consult.[79] As a preliminary observation, it is difficult to see how the fulfillment of these obligations is the same as an obligation to act *in* Indigenous peoples' interests.

At the same time, the Crown's fiduciary duty has teeth. Communities have received remedies where Courts have found the duty to consult (which arises from the fiduciary duty) to be breached.[80] But the mere existence of the fiduciary duty indicates that Aboriginal title does not confer the exclusive right to use and occupation of land asserted in *Delgamuukw*. Instead, fiduciary duty is a mechanism that exists to justify infringements upon a purportedly exclusive right—that of the use and occupation of Aboriginal title lands. From the perspective of reconciliation as treaty, the fiduciary duty is weak: it is evaluated as discharged even in the face of ongoing opposition from Indigenous communities to proposed infringements.[81] Discharge of the fiduciary duty makes Indigenous opposition to Crown action irrelevant where the action is found to be in the public interest. In this way, the duty preserves Crown sovereignty and undermines Indigenous political autonomy even as it emerges from the recognition of Indigenous polities' land rights. Therefore, the fiduciary duty is also implicated in reconciliation to sovereignty. As a whole, the legal structure of Aboriginal title and the test

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75 McNeil, "How Can Infringements", *supra* note 25 at 33–35. See also *R v Gladstone,* [1996] 2 SCR 723, 137 DLR (4th) 648.

76 *Delgamuukw, supra* note 34 at para 165.

77 Walters, *supra* note 12 at 182.

78 Webber, *supra* note 19 at 246.

79 *Sparrow*, *supra* note 32 at 1111–19.

80 See e.g. *Mikisew Cree First Nation v Canada,* 2005 SCC 69.

81 *Coldwater*, *supra* note 5 at 54; *Haida Nation, supra* note 9 at paras 62–63.

to justify its infringement leave Aboriginal title lands vulnerable to encroachment in a manner that reconciles the pre-existence of Aboriginal societies to Crown sovereignty.

These illustrations of reconciliation to sovereignty in section 35 jurisprudence are particularly troubling because the Court itself has recognized the 'imperfection' of Canadian sovereignty, and yet upholds its legality.[82] The Court acknowledged this tension in *Haida* with its reference to Crown sovereignty as "*de facto*," and its indication that reconciliation requires the honourable negotiation of treaties to 'perfect' Canadian sovereignty.[83] In *Tsilhqot'in*, the Court clarified that the Crown has not only a moral but also a legal duty to negotiate agreements in good faith; however, by *Tsilhqot'in*, the agreements to be negotiated became land claim settlements rather than treaties.[84] The Court's assertions about the importance of negotiation between the Crown and Indigenous peoples hold something in common with reconciliation as treaty: namely, the idea that Crown sovereignty lacks legitimacy if it is not grounded in treaties with those who were here before us. However, a legal duty to negotiate land claims settlements is a narrower obligation than what reconciliation as treaty would demand. Land claims processes have been criticized for their inherent power imbalance, their unilateral design and implementation, and their inability to support the full political autonomy of Indigenous peoples.[85] Notably, the modern British Columbia Treaty Process has been subject to similar criticisms.[86] The Court's indication that reconciliation requires the negotiation of new treaties overlooks the fact that Crown sovereignty cannot be 'perfected' simply by covering remaining geographic spaces with treaties. As will be shown, reconciliation as treaty demands more transformative action on the part of the Crown to renew and honour existing but gravely damaged treaty relationships, and action aimed at an outcome very different from 'perfect' Crown sovereignty.

B. Reconciliation as Treaty

This section explores a form of reconciliation advanced by certain scholars and Indigenous leaders that I call "reconciliation as treaty." I begin with essential elements of Indigenous perspectives on treaty-making. Then, I outline how early settlers recognized these perspectives and committed themselves to a relationship of sharing and non-domination with Indigenous

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82 Beaton, *supra* note 9 at 28.

83 *Ibid* at 28 to 31. See also Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) 293 at 302 [McNeil, "Indigenous and Crown Sovereignty in Canada"].

84 *Tsilhqot'in*, *supra* note 25 at para 17. See also Beaton, *supra* note 9 at 29.

85 Colin Samson, "Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims" (2016) 31:1 Can JL & Soc'y 87, DOI: <10.1017/cls.2016.2>; Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements" (2006) 22 Windsor Rev Legal Soc Issues 29; Colin Samson, "The dispossession of the Innu and the colonial magic of Canadian Liberalism," (1999) 3:1 Citizenship Studies 5, DOI: <10.1080/13621029908420698>.

86 See e.g. Egan, *supra* note 15 ("it is hard to consider treaty making as fair or even a process of negotiations at all, where the parties are on a somewhat equal footing and engage in a process of give and take … Aboriginal groups have very little ability to shift the Crown from its negotiating position" at 414).

peoples. Last, I explain how these commitments inform reconciliation as treaty today.

To develop this argument, I draw primarily upon scholars who write about Anishinaabe history and law. This is the result of three factors. First, there are practical academic constraints which are themselves rooted in colonization. So far as I am familiar with the burgeoning body of legal scholarship on Indigenous treaties in Canada, it is predominately rooted in Anishinaabe perspectives.[87] However, what qualifies as 'legal scholarship' is structured by colonization and racism, as Indigenous peoples and their legalities have been systematically excluded from and devalued within legal education, practice, and law-making. Second, the early treaties through which the Crown committed itself to a relationship of non-domination with Indigenous peoples were created with First Nations in the territory surrounding the Great Lakes.[88] Much of this land mass is historically Anishinaabe territory.[89] Finally, the authors I cite indicate that even where treaty relations were never historically established (including much of British Columbia where the *Coldwater* dispute is based), reconciliation as treaty should nonetheless be preferred across Turtle Island[90] as a means of rejecting further domination and assimilation of Indigenous peoples.[91]

i. Indigenous Perspectives on Treaty

A growing body of evidence demonstrates that Indigenous peoples have lived on Turtle Island for more than 10 thousand years.[92] Indigenous peoples were organized in diverse and often

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87 John Borrows, *Canada's Indigenous Constitution* (Toronto: UTP, 2010); Aaron Mills, "What is a Treaty? On Contract and Mutual Aid" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 208 [Mills, "What is a Treaty?"]; Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remedying the Right(s) Relationship," in John Borrrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: UTP, 2017) 248.

88 See e.g. the *Treaty of Niagara, 1764* which was created with representatives of the following Nations: Algonquins, Chippewas, Crees, Foxes, Hurons, Menominees, Nipissings, Odawas, Sacs, Toughkamiwons, Winnebagoes, Cannesandagas, Caughnawagas, Cayugas, Conoys, Mohawks, Mohicans, Nanticokes, Oniedas, Onondagas, Senecas, and, it is believed, the Lokata, MicMac, and Pawnee Confederacies. See John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 163, n 68 [Borrows, "Wampum at Niagara"].

89 Kenneth C Favrholdt, *Indigenous Peoples Atlas of Canada* (Ottawa: Royal Canadian Geographical Society, 2018).

90 Turtle Island is the name used by some Indigenous peoples to refer to the continent of North America, including Alongquin and Haudenosaunee peoples in particular. See e.g. Eldon Yellowhorn & Kathy Lowinger, *Turtle Island: The Story of North America's First People* (Toronto: Annick Press, 2017).

91 James Tully, "Reconciliation Here on Earth" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) 83 [Tully, "Reconciliation Here on Earth"]; Michael Asch, "Confederation Treaties and Reconciliation: Stepping Back into the Future" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) 29 [Asch, "Stepping Back"]; Mills, "What is a Treaty?" *supra* note 87 at 219.

92 It is also important to recognize that Indigenous oral histories assert presence on Turtle Island since "time immemorial." See Kerry M. Abel, *Drum Songs – Glimpses of Dene History* (Montreal: McGill-Queen's University Press, 1993) at 5.

non-hierarchical political structures upheld by unique systems of constitutionalism and law.[93] Treaties were the means through which many distinct peoples entered into relationships with one another.[94] The meaning and function of treaty as a legal mechanism varies based on the ontology and constitutionalism within which it is formed.[95] For instance, Aaron Mills argues that within Anishinaabe constitutionalism, a treaty is not akin to a contract.[96] Instead, from an Anishinaabe perspective, a treaty embodies a commitment to extend mutual aid relationships at the intra-group level to the inter-group level.[97] While I recognize that glossing over a description of Anishinabe constitutionalism is problematic, I rely on Mills' own sketch of the logic of this constitutionalism to frame the pre-colonial history of treaty. This context will be essential to exploring settlers' own foundational legal commitments on Turtle Island.

According to Mills, a basic tenet of Anishinaabe ontology is "radical interdependence."[98] Radical interdependence refers to an understanding of personhood as constituted by and through relationships.[99] The logic of mutual aid is also central to Anishinaabe constitutionalism. Mills describes this logic as grounded in the notion of our inherent interdependence on the other gifts of Creation for our survival.[100] From this premise, he draws the humility thesis, which proposes that each element of Creation has been bestowed a gift and needs, as well as the corresponding responsibility to share both.[101] Within this ontology of interdependence, treaty becomes intelligible only as an extension of the logic of mutual aid—that is, "the sharing of our gifts to meet each other's needs."[102] As such, Indigenous treaties can only be understood within Anishinaabe ontology as representations of commitments to a "living relationship" wherein peoples mutually support one another by sharing gifts and presenting needs.[103] Crucially, if treaty is understood as a living relationship, it requires constant engagement, renewal, and collaboration between parties.[104] Mills puts it this way:

> Treaties aren't [strictly] legal instruments; they're frameworks for right relationships: the total relational means by which we orient and reorient ourselves to each other through time, to live well together and with all our relations within creation. They have a legal

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93 Aaron Mills, *Miinigowiziwin: All That Has Been Given for Living Well Together: One vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished] [[Mills, *Miinigowiziwin*].

94 Asch, *On Being Here to Stay, supra* note 41 at 75. See also William N Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman, Oklahoma: University of Oklahoma Press, 1998).

95 Mills, "*Miinigowiziwin*", *supra* note 93; McNeil, "Indigenous and Crown Sovereignty in Canada," *supra* note 83.

96 Mills, "What is a Treaty?" *supra* note 87.

97 *Ibid.*

98 Mills, *Miinigowiziwin, supra* note 93 at 79–84.

99 *Ibid* at 79–82.

100 *Ibid* at 100–14.

101 *Ibid* at 68–84.

102 Mills, "What is a Treaty?" *supra* note 87 at 233.

103 *Ibid* at 241.

104 *Ibid* at 225.

> quality in the sense that they constrain behaviour and they are at once political, social, economic, spiritual, and ecological.[105]

This perspective on treaty as an ongoing relationship crafted to facilitate mutual aid is critical to understanding what reconciliation as treaty demands.

ii. Settlers Adopt Commitments to Non-Domination

John Borrows documents how early settlers recognized Indigenous peoples' relationships to land and their political institutions by participating in "councils, feasts, ceremonies, orations, discussion, treaties, intermarriage, adoptions, games, contests, dances, spiritual sharing, boundaries, buffer zones, occupations, and war."[106] He describes a history of French and Anishinaabe treaty-making through ceremony and represented by wampum belts spanning from 1693 to 1779.[107] Michael Asch also demonstrates how, since our arrival, settlers "have recognized that Indigenous peoples were living in societies at the time of contact with Europeans, and that as a consequence we were required to gain their assent to settle on their lands."[108] He uses the *Royal Proclamation of 1763* to support this claim. Specifically, Asch relies upon language in the *Royal Proclamation* guaranteeing "that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds." He takes this as a clear commitment to refrain from taking up Indigenous peoples' lands without their consent—a commitment to non-domination.[109] Asch explains that hundreds of treaties were negotiated between settlers and Indigenous peoples under this commitment, including the numbered treaties that cover much of the land mass now called Canada.[110] Numerous scholars have offered compelling accounts of how the *Treaty of Niagara*, 1764, the Covenant Chain, and the Twenty-Four Nations Belt also indicate that treaty was a means of committing the Crown and Indigenous peoples to a relationship of non-domination.[111]

However, today, settler and Indigenous views on the import of the numbered treaties are often in "diametric opposition."[112] From a settler perspective, these treaties are viewed as valid contractual cessions of land. Indeed, Treaty 4 includes a clearly worded clause, replicated almost exactly throughout the numbered treaties:

> The Cree and Salteaux Tribes of Indians, and all other the [sic] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and

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105 *Ibid.*

106 Borrows, *Canada's Indigenous Constitution, supra* note 87, page number unavailable due to online format.

107 *Ibid*.

108 Asch, *On Being Here to Stay*, *supra* note 41 at 73.

109 Asch, "Stepping Back," *supra* note 91 at 33.

110 Asch, *On Being Here to Stay, supra* note 41 at 74–76.

111 Mills, "What is a Treaty?" *supra* note 87 at 238–41; Asch, *On Being Here to Stay, supra* note 41; John Borrows, "Wampum at Niagara," *supra* note 88.

112 Asch, *On Being Here to Stay, supra* note 41 at 76.

> yield up to the Government of the Dominion of Canada, for Her Majesty the Queen, and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits.[113]

And yet, Asch writes, Indigenous parties to the numbered treaties "speak with one voice in asserting that what the Crown asked for was permission to share the land, not to transfer the authority to govern it."[114] In fact, many Indigenous leaders and scholars assert that the prospect of selling or ceding land is completely unintelligible within Indigenous ontologies.[115] Instead, Indigenous parties to treaties "unanimously hold that [settlers] pledged to enter into the kind of caring relationship that one associates with close family members such as 'first cousins'"[116] and that settlers would not wield power over Indigenous peoples or bring them harm.[117] Instead, they "would be free to continue as they always had; no changes would be forced on them."[118] Lending support to this perspective, Saulteaux Keeseekoose Elder Danny Musqua refers to treaties as a "relationship, a perpetual land-use agreement" between the parties.[119] Therefore, the plain wording of these treaties contrasts entirely with the perspectives of Indigenous parties to them.

Although there is extensive evidence to demonstrate that the Crown did not respect treaty commitments to build and honour kin-like relationships of non-domination, close study of the historical record indicates that settlers did not enter into treaties with the intention of domination. For example, Commissioner Alexander Morris (who represented the Crown in the negotiations of Treaties 3, 4, 5, and 6) approached treaty negotiation with the understanding that treaties were a necessary precursor to settlement. He wrote of treaty negotiations that "their purpose [was] to build relationships with those already here, not impose our ways on them."[120] His approach indicates a significant degree of respect for the autonomy of Indigenous peoples who were already living here, and an understanding of the advantages to be gained by the Crown through development of healthy relationships with these peoples.

However, even if relationship-building was initially desired, the Crown did not sustain this goal. J.R. Miller attempts to explain this transition, arguing that the Crown's indisputable retreat from its commitments likely resulted from somewhat benign political incentives. As settler populations on Turtle Island grew and their political institutions were consolidated, Miller explains that "it became all too easy in a parliamentary democracy in which votes—something First Nations did not have, of course—were what counted for politicians to drop treaty obligations down the priority list when it came to allocating resources."[121]

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113 *Treaty No 4 Between Her Majesty the Queen and the Cree and Saulteaux tribes of Indians at Qu'Appelle and Fort Ellice*. (Ottawa: Queen's Printer and Controller of Stationery, 1966).

114 Asch, *On Being Here to Stay, supra* note 41 at 77.

115 Mills, *Miinigowiziwin*, *supra* note 93 at 121–25; Asch, "Stepping Back," *supra* note 91 at 35.

116 Asch, *On Being Here to Stay, supra* note 41 at 78.

117 *Ibid*.

118 *Ibid*.

119 *Ibid*.

120 *Ibid* at 162.

121 J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: UTP, 2009) at 296.

Therefore, divergent interpretations of the numbered treaties may not result from the Crown's representatives' insidious intentions at the time of their creation, nor misunderstandings on the part of Indigenous negotiators, but instead, from prevailing political perspectives and priorities as they shifted over time.

Alternatively, if one accepts that treaties were the product of diametrically opposed views from the outset, they become highly vulnerable to perceptions of invalidity under common and civil law rules of contractual interpretation.[122] This vulnerability is exacerbated by the plain unfairness of the terms of the numbered treaties, and the Crown's historical failure to fulfill even these extremely weak commitments.[123] Therefore, it is actually advantageous for the Crown to heed the advice of the Royal Commission on Aboriginal Peoples and "reach a shared agreement as to the treaties' meaning based on the assumption that both interpretations carry equal weight."[124] Mills goes further, explaining why accepting treaty as the authorizing mechanism for Canadian statehood is, in fact, preferable for all Canadians:

> Treaty, we are breathless from saying, constitutes political community without predication on violence… On the contract story, citizenship is violent from the outset: instead of sharing, disagreeing, and slowly learning with and from one another—the treaty story—[proponents of treaties as land cession agreements] strive to erase the existence of Indigenous peoples. Canadians have settled *on* Indigenous peoples' lands, *over* their existing constitutional orders, and hence *for* violence to Indigenous peoples. In excluding the peoples who were already here from the formation of our political community, they've accepted violence as a foundational constitutional principle.[125]

Rather than accept this foundational constitutional principle, the historical context offered in this section illuminates an alternative approach. The logic of that approach is as follows: in the earliest interactions between settlers and Indigenous peoples on Turtle Island, settlers recognized Indigenous peoples' political structures and relationships to land. Through the formation of historical treaties, settlers committed themselves to relationships of non-domination over Indigenous peoples. Therefore, if Indigenous perspectives are to be taken seriously in Canadian law,[126] and the historical record of treaty formation to be respected, historical treaties should not be interpreted as contracts for land cession that made way for Canada's assertion of sovereignty. Instead, treaties found the shared political community of Canada upon a commitment to non-domination of Indigenous peoples. According to this perspective on treaty, the Crown is under both an ethical and legal obligation to create, renew, and honour relationships of non-domination with Indigenous peoples.

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122 *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 20–33.

123 Asch, "Stepping Back," *supra* note 91 at 33–35.

124 Asch, *On Being Here to Stay*, *supra* note 41 at 140–49.

125 Mills, "What is a Treaty?" *supra* note 87 at 219 [emphasis in original].

126 That the "Aboriginal perspective" must be used to approach questions of law alongside the common law perspective, and that this perspective included "laws, practices, customs and traditions of the group" was confirmed in *Tsilhqot'in Nation*, *supra* note 25 at paras 34–35.

iii. Defining Reconciliation as Treaty

So, how does this understanding of the role of treaty in the founding of Canada inform reconciliation? This perspective leads to the conclusion that reconciliation will only take place through the creation and renewal of a relationship of non-domination between Indigenous peoples and the Crown. Here, Walters' concept of reconciliation as relationship comes squarely into view. If that form of reconciliation "involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship,"[127] it bears great resemblance to reconciliation as treaty. Both reconciliation as relationship and as treaty demand that parties in the process of reconciliation respect one another's autonomy as they work together to develop mutually agreed upon solutions to conflict and harm in their relations. Stated bluntly, reconciliation as treaty demands that nothing happens on Indigenous land without Indigenous consent. It demands that representatives of the Crown and Indigenous communities reach agreement before an action that affects Indigenous interests is carried out. In practice, this means recognizing Indigenous communities' right to veto Crown action that would affect their land and interests—a possibility repeatedly denied under section 35.[128] Reconciliation as treaty is a radical perspective because it seeks to fundamentally alter the distribution of political power in Canada. Today, it also requires a great deal of work and reckoning on the part of the Crown to begin to heal a relationship gravely harmed through 250 years of domination.[129]

iv. Bracketing Earth Reconciliation

The authors I relied upon in this paper to trace reconciliation as treaty assert that reconciliation between peoples also requires a commitment to reconciliation with the earth.[130] James Tully explains:

> If we try to reconcile Indigenous and non-Indigenous people with each other without reconciling our way of life with the living earth, we will fail, because the unsustainable and crisis-ridden relationship between Indigenous and non-Indigenous people that we are trying to reconcile has its deepest roots in the unsustainable and crisis-ridden relationship between human beings and the living earth. To put it more strongly, as long

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127 Walters, *supra* note 12 at 168.

128 *Coldwater*, *supra* note 5 at para 53; *Haida Nation,* supra note 9 at paras 62–63; *R v Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658 at para 110; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 59; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 83.

129 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 130–76. See also Shin Amai, "Consult, Consent, and Veto: International Norms and Canadian Treaties" in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 370 at 372.

130 John Borrows, "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Re- lations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 49; Tully, "Reconciliation Here on Earth," supra note 91; Mills, *Miinigowiziwin, supra* note 93.

> as our unsustainable relationship to the living earth is not challenged, it will constantly undermine and subvert even the most well-meaning, free-standing efforts to reconcile the unsustainable relationship between Indigenous and non-Indigenous peoples through modern treaties and consultations, as we have seen over the last thirty years.[131]

These observations lead Tully to conclude that reconciliation between peoples and our reconciliation with the earth are in a state of "interconnected 'dual crisis'" which can only be addressed holistically.[132] In a related way, Mills concludes that reconciliation requires settlers to renew and honour relationships of mutual aid with all of Creation.[133] Understanding this commitment to reconciliation with the earth is integral to a deeper understanding of reconciliation as treaty. This matter is, however, bracketed because it is beyond the scope of this paper to explore the complexity of this argument and its implications in the depth they deserve.

C. The Difference Between the Two Forms of Reconciliation

Reconciliation to Crown sovereignty is a process whereby Indigenous polities' interests in political autonomy and control of land are systematically undermined or rendered legally inert, thereby reconciling these interests with the sovereignty of the Crown. Reconciliation as treaty is a process of renewing the treaty relationship through Crown engagement with Indigenous peoples—a process robustly constrained by a principle of non-domination. The outcomes envisioned by these two forms of reconciliation are, therefore, fundamentally different. The former aims to create a state of uncontested Crown sovereignty by providing a limited set of Indigenous rights that will not, in any combination, support Indigenous peoples' political independence from the Crown. As Asch puts it, "[o]ur sovereignty comes first; their rights come second."[134] Reconciliation as treaty recognizes the violence done to Indigenous peoples through the erasure of their sovereignty, and calls upon the Crown to honour its commitment to treaty relations with Indigenous peoples on equal footing.

The difference between the origins of these two perspectives is this: the first is premised on the validity of a unilateral assertion of authority over Indigenous peoples; the second on the treaty process whereby settlers recognized and committed to Indigenous peoples' non-domination. The difference between the two perspectives is the chasm between recognizing the validity of Indigenous peoples' law, ontologies, and their humanity, or denying them altogether. Therefore, the logics underlying each perspective are incompatible—we must choose one or the other.[135]

II. RECONCILIATION TO SOVEREIGNTY IN COLDWATER

In this section, I attempt to bolster the claim that Canadian jurisprudence engages in a process of reconciliation to sovereignty through an analysis of the *Coldwater* decision.

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131 Tully, "Reconciliation Here on Earth," *supra* note 91 at 84.

132 *Ibid*.

133 Mills, *Miinigowiziwin*, *supra* note 93 at 281.

134 Asch, *On Being Here to Stay*, *supra* note 41 at 149.

135 This conclusion is inspired by Mills' thesis that we must avoid attempting to forge a 'middle path.' See Mills, *Miinigowiziwin*, *supra* note 93.

This decision is the most recent substantive[136] judicial response to efforts by several Indigenous communities to challenge the construction of the Trans Mountain Pipeline Expansion project ("the Project") in Canadian courts. The Project would increase capacity for the transport and export of Alberta tar sands oil from 300,000 to 890,000 barrels per day, with a corresponding increase from five to 34 oil tankers in the Vancouver port per month.[137] The legal dispute over this project entered the courts in 2017, when several applicants challenged the Federal Cabinet's ("Cabinet") approval of the Project in the Federal Court of Appeal ("FCA").[138] Before the release of the FCA's decision regarding the Project, the Trudeau government announced it would purchase the Project from its proponent, Kinder Morgan.[139] Three months later, the FCA issued its decision to remit the approval of the Project to Cabinet due to defects in both the environmental assessment process and in consultations with affected Indigenous communities.[140] Specifically, the court found that the environmental assessment was inadequate because it failed to study the impacts of increased marine shipping that would result from the project. It also found that the duty to consult was inadequate at its third stage, where the court ruled that Canada failed to "engage in a considered, meaningful two-way dialogue."[141] Cabinet was required to remedy these flaws before making its decision on the project anew.[142]

Consultation began again in October 2018.[143] After less than five months—and before renewed consultation was complete—the National Energy Board issued the Reconsideration Report that would form the basis of Cabinet's decision.[144] Cabinet approved the Project again in June 2019.[145] Again, 12 communities applied to have Cabinet's approval of the Project reviewed by the FCA. The leave to appeal process eliminated six applications.[146] Two applicants subsequently withdrew. The remaining four applicants were barred from presenting arguments based on the environmental effects of the pipeline, because this issue was deemed to have been resolved during the process of leave to appeal.[147] The FCA ruled, instead, solely on the question of whether Cabinet's decision to approve the Project was unreasonable on its merits. These four applicants maintained that consultation was insufficient, and

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136 I say substantive because the Supreme Court dismissed the applications for leave to appeal this decision on 2 July 2020, without releasing reasons, as is customary.

137 Trans Mountain Expansion Project, "Expansion Project," (2020) online: *Trans Mountain* <https://www.transmountain.com/project-overview> [perma.cc/PSP7-6WEK].

138 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*TWN*].

139 Steven Chase, Kelly Cryderman & Jeff Lewis, "Trudeau government to buy Kinder Morgan's Trans Mountain for $4.5 billion", *The Globe and Mail* (29 May 2018), online: <https://www.theglobeandmail.com/politics/article-trudeau-government-to-buy-kinder-morgans-trans-mountain-pipeline/> [perma.cc/4PQY-BQGG].

140 *TWN, supra* note 138 at paras 5–6.

141 *Ibid* at para 558.

142 *Coldwater, supra* note 5 at para 2.

143 *Ibid* at para 19.

144 *Ibid*.

145 *Ibid.*

146 *Raincoast Conservation Foundation v Canada (Attorney General),* 2019 FCA 224.

147 *Ibid*.

therefore, that Cabinet's decision was unreasonable. In *Coldwater*, the FCA ruled against the applicants and upheld Cabinet's decision.[148]

The FCA referred to reconciliation as a "controlling concept" in its reasons.[149] Interestingly, in characterizing reconciliation, the court explicitly invoked Walters' concept of reconciliation as relationship, and referred to the centrality of modern treaties in "creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities."[150] The court neglected to mention that none of the four applicants have ever signed a treaty with the Crown.[151] It asserted that reconciliation is "meant to be transformative, to create conditions going forward that will prevent recurrence of harm and dysfunctionality."[152] Yet the way the relevant legal framework managed Indigenous opposition to the Project in question did not align with these assertions. Instead, the FCA engaged in reconciliation to Crown sovereignty by applying a framework for evaluating consultation and accommodation that effectively rendered Indigenous opposition legally inconsequential. The decision demonstrates that the form of reconciliation underlying the FCA's reasons is reconciliation to Crown sovereignty, despite the court's assertions about the importance of preventing harm and dysfunctionality in Crown-Indigenous relations.

A. Issues with Consultation

In *Coldwater,* the FCA stated that for consultation to support reconciliation, the Crown must proceed "by listening to, understanding and considering the Indigenous peoples' points with genuine concern and an open mind throughout."[153] Yet, this decision provides specific examples of just how frustrating the duty to consult can be for Indigenous parties who oppose the matter subject to consultation. For example, Coldwater First Nation asserted that the renewed consultation process was inadequate because it was concluded prior to the execution of a hydrogeological study that would assess the pipeline's potential impacts on their aquifer.[154] On this basis, the Nation claimed that consultation was flawed because it was concluded while "essential information was lacking."[155]

Here, the issue is obvious: how can meaningful consultation and accommodation take place when the impacts of the Project on Coldwater First Nation's aquifer are not yet known? From the perspective of the Nation, it was unable to engage in meaningful consultation in the absence of this information. The Court of Appeal responded to this concern by explaining that once the study is complete, the National Energy Board (now the Canadian

148 *Coldwater*, *supra* note 5 at para 65.

149 *Ibid* at para 47.

150 *Ibid* at para 47, 50, quoting from *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para 10.

151 Indigenous and Northern Affairs Canada, "Pre-1975 Treaties Map in British Columbia," (2014) online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1371838763214/1611593372816> [perma.cc/B8YQ-JYPB]. Additionally, these communities have not signed a modern treaty.

152 *Coldwater*, *supra* note 5 at para 49.

153 *Ibid* at para 56.

154 *Ibid* at para 95.

155 *Ibid*.

Energy Regulator) would have "the occasion to inform itself of the impact to the aquifer and take the rights and interests of Coldwater First Nation into account before making a final decision."[156] Here, the Nation was told that while they may perceive the hydrogeological study as essential to meaningful consultation, the law on consultation was not on their side. Instead, the FCA asserted that the mere opportunity given by the Crown in taking Coldwater First Nation's interests into account—even when making a decision that may critically affect their interests—must suffice. This demonstrates how the duty to consult can be too weak to foster a Crown-Indigenous relationship characterized by mutual respect.

Multiple applicants also alleged that consultation was inadequate due to the short timeline within which it was conducted.[157] They asserted that the Crown's commitment to post-approval consultation did not assuage their concerns.[158] Indeed, it is difficult to understand how a commitment to post-approval consultation could enhance the meaningfulness of consultation from the applicants' perspective: post-approval, the Crown's options for mitigation are significantly constrained. Further, it seems problematic that renewed consultations were not yet complete at the time that the National Energy Board issued the Reconsideration Report upon which the Cabinet based its decision to approve.[159] The meaningfulness of consultation seems severely impaired if it occurs after crucial decisions about the matter subject to consultation have already been made.

B. Issues with Accommodation

The *Coldwater* decision also provides examples of how the duty to accommodate is implicated in reconciliation to Crown sovereignty. On the matter of accommodations, Squamish Nation submitted that "proposed measures were unilaterally developed by Canada, without any effort by Canada to collaborate with Squamish in developing them so as to address Squamish's concerns."[160] The FCA found that Canada did, in fact, make modifications designed to address Squamish Nation's concerns.[161] However, the Squamish Nation maintained that these accommodations were not successful in *actually addressing* their concerns. Fortunately for the Crown, "accommodation cannot be dictated by Indigenous groups,"[162] meaning that whether or not Squamish Nation felt that the accommodations addressed their concerns was not necessarily of legal consequence. What mattered was whether the Crown can demonstrate responsiveness to these concerns.

The dispute over the Crown's proposed Quiet Vessel Initiative elucidates the tensions that arise in this context. This project is aimed at "examin[ing] how quieter tankers can be made"[163] in order to mitigate the impact of shipping on endangered Southern Resident killer whales

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156 *Ibid* at para 97.
157 *Ibid* at paras 20, 150, 231.
158 *Ibid* at para 60.
159 See e.g. *ibid* at para 142, 168 (consultations continued with Squamish and Tsleil-Waututh well past February, 2019).
160 *Ibid* at para 130.
161 *Ibid* at para 131.
162 *Ibid* at para 58.
163 *Ibid* at para 128

living near Vancouver's ports.[164] Squamish Nation opposed this "inadequate" measure because it is "untested and unproven" to actually mitigate negative impacts on the whale population.[165] Yet, perplexingly, the FCA relied upon this accommodation as an example of the Crown's responsiveness to Indigenous interests, alongside the Crown's commitment that "there would be no net noise increase from vessel traffic associated with the Project."[166] The FCA failed to address how the Crown can make good on this commitment through an initiative designed merely to explore quieter vessel technology. The FCA also did so in the face of a finding in the Reconsideration Report that the Project "is likely to cause significant adverse environmental effects" on these whales.[167] Reconciling conflicting perspectives on this crucial accommodation measure by accepting that the Crown has been responsive to Indigenous concerns—despite Squamish Nation's ongoing opposition—is a flawed approach to preventing the recurrence of harm and supporting the development of mutual respect in Crown-Indigenous relations.

Further, the disagreement in *Coldwater* about whether a commitment to "develop baseline information" qualified as an accommodation also elucidates the tensions that result from the structure of the duty to consult and accommodate.[168] Both Squamish Nation and Tsleil-Waututh Nation asserted that the Crown's commitment to gather information about the pipeline's potential impacts on their interests did not constitute a meaningful response to their concerns, and should not be taken as an indicator that their concerns were accommodated.[169] Certainly, it seems illogical that a commitment to gather information about how a Crown initiative will affect Indigenous interests *once implemented* can assist in the accommodation of Indigenous concerns *prior to* the approval of the initiative. But the Court has stated that the development of baseline information is, in fact, an appropriate accommodation measure.[170] In the eyes of the FCA, this settles the matter.

These observations expose the paradox in claiming that reconciliation aims to foster a mutually respectful relationship while also asserting this can be achieved within a dynamic where only one party to the relationship has the power to say 'no'. A relationship characterized by this dynamic does not foster mutual respect, nor does it prevent harm or dysfunctionality. To this end, Tsleil-Waututh Nation explicitly asserted that "Canada's mandate [in consultation] should have included seeking or obtaining [their] consent."[171] The FCA replied by repeating the assertion that mandating consent would equate to providing Indigenous groups a veto that they do not—and cannot—have.[172] In a sense, the two forms of reconciliation I have traced throughout this article can be reduced to this question of a veto power. Under reconciliation to

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164 Christopher Clark, "Potential Acoustic Impacts of Vessel Traffic from the Trans Mountain Expansion Project on Southern Resident Killer Whales" (Vancouver: Raincoast Conservation Foundation, 2015) at 4.

165 *Coldwater*, *supra* note 5 at para 128.

166 *Ibid* at paras 131–32.

167 *Ibid* at para 165.

168 *Ibid* at para 134.

169 *Ibid* at para 134, 181–82.

170 *Ibid* at para 134; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74 at paras 43–44.

171 *Coldwater, supra* note 5 at para 194.

172 *Ibid*.

Crown sovereignty, the veto must be denied: to grant it would pose a fundamental challenge to Canadian sovereignty, because it would enable Indigenous polities to assert authority over their land and thereby disrupt the jurisdiction of the state. Under reconciliation as treaty, a veto is implicit: the Crown and Indigenous peoples would renew their commitments to a relationship of non-domination by reaching agreement about initiatives that would affect Indigenous interests. In the absence of agreement, the Crown would not proceed. I develop this framework further in the following section.

III. RECONCILIATION AS TREATY IN *COLDWATER*

If reconciliation as treaty were pursued in the context of the *Coldwater* dispute, it would entail the *building* of a treaty relationship between the Crown and the applicants, followed by negotiations on the Project *until an agreement is reached*. It would mean that a court could not declare accommodations to be adequate in the face of the 'accommodated' party's ongoing assertions that these measures are inadequate. In effect, this framework would amount to recognizing a veto power held by Indigenous polities. While this is a radical perspective, there are three compelling reasons to support it.

First, reconciliation as treaty is truly "inter-societal."[173] It takes Indigenous legal orders seriously by, for example, rejecting the notion that negotiations can foster mutual respect and exemplify good faith regardless of whether an agreement is reached.[174] In the context of *Coldwater*, this approach would remedy the tension that is caused by claiming both that reconciliation aims to foster mutual respect and that this respect can be achieved while only one party has the power to reject the initiatives of the other. Reconciliation as treaty would, instead, foster mutual respect by inviting in and addressing the concerns of Indigenous communities who oppose projects on their unceded land, rather than barring their applications for judicial review and unilaterally narrowing the arguments they may bring forward. Essentially, it would mean that Indigenous opposition to Crown initiatives would always be legally consequential.[175]

Second, reconciliation as treaty is consistent with Canada's international commitments. When Canada adopted the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"), the federal government signalled its commitment to respect Indigenous peoples' rights to self-determination, cultural preservation, and interests in traditional territories.[176] Crucially, *UNDRIP* endorses the notion that free, prior, and informed consent would be required for projects such as the Trans Mountain Pipeline Expansion to proceed.[177] As Aboriginal law practitioner and professor Shin Amai explains, if Canada is to honour *UNDRIP*, it must

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173 *Van Der Peet*, *supra* note 8 at para 42.

174 Morales, "Braiding the Incommensurable," *supra* note 58 ("[t]his notion that a good faith negotiation process is not dependent on reaching an agreement runs counter to several Indigenous legal principles" at 69).

175 Notably, an innovative model has been pursued in New Zealand that bears some resemblance to what I suggest here. See generally *Te Awa Tupua (Whanganui River Claims Settlement) Act* (NZ), 7/2017.

176 Amai, *supra* note 129 at 376.

177 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) at Article 32.

change its approach from one that is "Crown-centric"—focussed on evaluating whether Crown action that impacts Indigenous peoples is justified—to one that centres on Indigenous communities' provision of consent.[178] While this international instrument does not give rise to legal obligations, Canada finds itself in an openly contradictory position by endorsing these commitments internationally, but failing to honour them domestically. Implementing the standard of free, prior, and informed consent would greatly advance the Crown's ability to renew its treaty relationship with Indigenous peoples.

Third, reconciliation as treaty is consistent with emerging industry best practices which increasingly strive for Indigenous consent.[179] It seems that Indigenous-led activism has begun to tip the scales so that fossil fuel projects often entail too much uncertainty and economic risk in the absence of Indigenous consent.[180] Leaders in extractive industries have already begun to adopt the standard of obtaining consent from potentially affected Indigenous communities in order to proceed with their projects. Therefore, although implementation of reconciliation as treaty would certainly be radical, it may not be as destructive to extractive industries and Canada's economy as opponents might allege.

Further, at the level of implementation, it is possible that the ambiguous wording of section 35 could be employed to the advantage of Indigenous peoples: courts could lend a new interpretation to Aboriginal treaty rights that reflects this commitment to non-domination.[181] In so doing, the courts would effectively rule themselves out of the equation, to be replaced by treaty relations between Indigenous and Crown representatives.

IV. ACKNOWLEDGING COUNTER CLAIMS

There are doubtlessly multiple grounds upon which one may oppose the way I have characterized these two forms of reconciliation and asserted their incompatibility. This section focusses on two key objections: that this analysis is inattentive to the role of democracy in Canada, and that it requires an impossible approach to settling land questions.

The democracy objection might be framed like this: in a democracy, the interests of a small minority should not eclipse the interests of a majority. In Canada, Indigenous peoples constitute about 4.9 percent of the population.[182] Their interests, while important, should not dictate the nation's agenda nor justify a transformative redistribution of political power. One way of responding to this objection is by relying upon the Court's recognition that

178 Amai, *supra* note 129 at 391–92.

179 *Ibid*.

180 Winona LaDuke and Deborah Cowen, "Beyond Wiindigo Infrastructure" (2020) 119:2 The South Atlantic Q 243 at 255; George Hoberg, "How the Battles over Oil Sands Pipelines have Transformed Climate Politics (2019) (Working Paper delivered at Annual Meeting of the American Political Science Association, 2019, Washington, DC) at 4–7.

181 Amai, *supra* note 129 (Amai suggests courts could reinterpret section 35 such that a standard of free, prior and informed consent could be implemented domestically).

182 Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Métis, and Inuit National Household Survey 2016* (Ottawa, Statistics Canada catalogue no 11-001-X, 2016).

the protection of minority rights is an underlying constitutional principle.[183] While this underlying constitutional principle certainly does not support an assertion that minority rights are or ought to be absolute, it does indicate that majority interests should not always outweigh minority interests. Recognition of this constitutional principle indicates that determining how and when minority rights can be limited in favour of a majority is a deeply moral, political, and complex process, rather than one that can be settled through the simple and clear-cut application of legal principles. Therefore, the assertion that the primacy of democracy defeats the proposal for reconciliation as treaty is overly simplistic, insofar as it is inattentive to the interaction between minority and majority rights and interests within democracies.

The second way to respond to the democracy objection relates to the first: if determining when majority interests ought to outweigh minority interests is a morally and politically charged task, then the morality and politics of Canada's claim to sovereignty over Indigenous peoples ought to matter. For some, this may not be enough to justify the prospect of recognizing an Indigenous veto power, but for others, it certainly would be.[184]

The second objection has to do with the impossibility of demarcating land under reconciliation as treaty. The question here is: if nothing happens on Indigenous land without Indigenous consent, how do we go about determining 'what land is Indigenous'? One way to resolve this dilemma is very partial—by suggesting that the process to determine land demarcation would resemble negotiation on equal footing rather than the unbalanced dynamic inherent in current land claims processes. Another response, which is more radical still, is to suggest that land demarcation is not, in fact, necessary under reconciliation as treaty, at least as it is espoused by Mills and Tully. In their view, reconciliation does not require the erection of borders between Indigenous polities and Canada to enable treaty commitments to non-domination to be honoured.[185] Instead, reconciliation requires settlers to adopt politics, economies, and ontologies of non-domination that would make these borders obsolete. Of course, neither response to the land objection definitively settles the matter, but either response may offer a viable way to begin to think through the mechanics of reconciliation as treaty.

CONCLUSION

The deployment of reconciliation in Canadian jurisprudence runs contrary to the form of reconciliation advocated by numerous jurists, scholars, and Indigenous leaders. This tension is illustrated by comparing how Indigenous rights claims are handled in Canadian jurisprudence with what it would mean for the Crown to honour Canada's foundational treaty

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183 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 49.

184 Mia Rabson, "Without Indigenous consent for pipelines, more protests to be expected: experts," *The Canadian Press* (5 March 2020), online:< https://globalnews.ca/news/6634179/indigenous-consent-pipeline-protests/> [perma.cc/QZ6D-ZPKJ]; Laura Kane "Protests against TMX pipeline expansion expected to ramp up in BC", *CTV News* (5 February 2020), online: <https://bc.ctvnews.ca/protests-against-tmx-pipeline-expansion-expected-to-ramp-up-in-b-c-1.4799129> [perma.cc/EC8U-KVKX] ; Victoria M Massie, "To understand the Dakota Access Pipeline protests, you need to understand tribal sovereignty", *Vox* (28 October 2016), online: <https://www.vox.com/2016/9/9/12851168/dakota-access-pipeline-protest> [perma.cc/R5HG-G335].

185 Mills, *Miinigowiziwin, supra* note 93 at 121–25; Tully, "Reconciliation Here on Earth," *supra* note 91.

commitments. As land and jurisdiction continue to be passionately and violently contested, it is clear that the Supreme Court of Canada's approach to reconciliation throughout the past 30 years has not successfully fostered healing in Crown-Indigenous relations. Perhaps progress has been made, and certainly there is no reason to think that reconciliation could be 'completed' in a few decades. Indeed, the question of how Canada should pursue reconciliation is one with which many more capable jurists have grappled throughout their long careers.[186] Today, reconciliation is not yet dead; it is alive and well, in multiple forms. But if Crown-Indigenous relations are to be truly healed, we must reanimate reconciliation in a form that rejects domination and embraces treaty relationships.

186 Here I think of, for example, John Borrows, Mark Walters, and Justices Lance Finch and John Reilly who have written and spoken on these matters (quoted in Mills, "What is a Treaty?," *supra* note 87 at 226–28), among many others.

ARTICLE

THE BROKEN PROMISE DOCTRINE: *ASTRAZENECA CANADA INC V APOTEX INC* AND THE FUTURE OF PHARMACEUTICAL PATENTS

Darren N. Wagner *

CITED: (2022) 27 *Appeal* 70

ABSTRACT

In *AstraZeneca Canada Inc v Apotex Inc,* the Supreme Court of Canada abolished the so-called promise doctrine in patent law. Large pharmaceutical companies that sought greater patent protections through litigation routinely mischaracterized the promise doctrine. To demonstrate that mischaracterization, this case comment begins by examining historical and international perspectives that informed the Supreme Court's decision. This paper then turns to a critical yet subjective element of the decision: the analysis of the meaning and purpose of "use" and "useful" in the *Patent Act.* The reasons for the decision are then considered against the advantages that more stringent utility requirements offer to both patent law and the pharmaceutical industry. This paper concludes with the recent legacy of the decision and recommendations for why and how the courts might seek a middle ground for utility promises in patents.

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INTRODUCTION

In the 2005 decision *Merck & Co Inc v Apotex Inc*, the Federal Court of Canada confirmed and applied the test for sound prediction of utility in patent filings that the Supreme Court of Canada (the "Supreme Court") had set out two years earlier in *Apotex Inc v Wellcome Foundation Ltd*.[1] In the years following *Merck*, this approach to the utility requirement for patent validity became known in legal commentary as the promise doctrine.[2] The doctrine stipulates that any promised utility in a patent application must be fulfilled by the claimed invention. If the patent application describes no specific utility, the invention need only fulfill a mere scintilla of utility. In the eleven years following *Merck*, the Federal Court found 28 patents invalid either wholly or partially due to utility issues, representing a marked increase in such invalidations.[3] All the invalidations applied to pharmaceutical patents, three of which were wholly due to inutility. In 2017, Justice Rowe wrote a unanimous decision for the Supreme Court of Canada in *AstraZeneca Canada Inc v Apotex Inc*, effectively abolishing the promise doctrine by declaring it "not good law."[4] However, despite the unanimity, the Supreme Court's refutation of the promise doctrine is not beyond question and criticism as some of the arguments advanced are ill-founded and certain consequences of the decision are underappreciated.

This paper briefly sets out the background for *AstraZeneca* before discussing two persuasive but erroneous considerations of the Supreme Court: the promise doctrine's history and its potential conflict with treaty obligations. I then turn to the crux of the legal question unravelled by the Supreme Court: how to interpret the statutory meaning and effect of "use" and "useful." Lastly, I explore the advantages lost with the total abandonment of the promise doctrine: protections against "evergreening" patents, ensuring drug trials are of a standard, and providing access to reasonably priced, generic medications. Ultimately, *AstraZeneca* represents a needed correction towards greater fairness for the patentee but is also a missed opportunity to consolidate a middle ground for utility requirements and patent promises. In other words, the Supreme Court removed uncertainty and unfairness for patentees but, in so doing, discarded important public benefits from the patent bargain.

I. BACKGROUND TO *ASTRAZENECA*

A patent is routinely described as a bargain struck between an inventor and the Crown: the former discloses their invention for the benefit of public knowledge and, in return, the latter grants the inventor a monopoly over that invention for a discrete period. In *Apotex*, Justice

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1 *Apotex Inc v Wellcome Foundation Ltd*, 2002 SCC 77 [*Apotex*]; *Merck & Co Inc v Apotex Inc* 2005 FC 755 [*Merck*].

2 I will use "promise doctrine" to mean the patent requirement for utility promises to be met or soundly made. Notably, "promise doctrine" was initially used by commentators to criticize the utility requirement, rather than by the courts. See Richard Gold & Michael Shortt, "The Promise of the Patent in Canada and Around the World" (2013) 30:1 CIPR 35.

3 Kristina M Lybecker, "Intellectual Property Rights Protection and the Biopharmaceutical Industry": How Canada Measures Up" (2017), online (pdf): *Fraser Institute* <fraserinstitute.org> [perma.cc/7MH6-5R98].

4 *AstraZeneca Canada Inc v Apotex Inc*, 2017 SCC 36 at para 51 [*AstraZeneca*].

Binnie characterized disclosure in a patent application as "the quid pro quo for valuable proprietary rights to exclusivity which are entirely the statutory creature of the *Patent Act*."[5] Despite the common claim that patent law is an equal and universal set of rules for all varieties of invention, the patent bargain for pharmaceutical inventions is unique. The *Patent Act* includes many sections specific to medicines, including section 76.1 and sections 79–134, tallying to more than a third of that act.[6] In addition, there is an immense amount of special regulation for the creation, production, and marketing of pharmaceutical inventions.[7]

The public has a special interest in the disclosure of pharmaceutical inventions because of potential health benefits from the development of novel therapies. However, the patentee's monopoly can result in prohibitively high costs for desperately needed drugs.[8] To ameliorate this potential conflict, there are several regulatory instruments for balancing innovator and public interests in patented medicines, including the *Patented Medicines (Notice of Compliance) Regulations* ("*NOC Regulations*") and Canada's *Food and Drug Regulations*.[9] Nonetheless, the *Patent Act* is at the center of the disclosure-for-protection arrangement relating to pharmaceutical inventions.

Like many major pharmaceutical patent cases, *AstraZeneca* involved a large pharmaceutical research and development company litigating against a generic drug manufacturer, Apotex Inc. ("Apotex"). The drug in question was esomeprazole (marketed as Nexium), a proton pump inhibitor used in the reduction of gastric acid and the treatment of reflux esophagitis and related maladies. The appellant sought to overturn the Federal Court of Appeal's invalidation of their patent for esomeprazole, the 2,139,653 patent ("'653 patent"). The respondent, Apotex, had been granted permission under the *NOC Regulations* to sell a generic version of the appellant's successful drug, contrary to the appellant's presumed patent rights. AstraZeneca Canada Inc. ("AstraZeneca Inc.") had initially applied to have the generic drug prohibited under the *NOC Regulations*. The Ministry of Health rejected that application, and Apotex subsequently began to sell its generic version of the drug. AstraZeneca Inc. brought an action against Apotex for patent infringement, and Apotex counter-claimed to have the '653 patent declared invalid. Writing for the Federal Court of Appeal, Justice Rennie noted that the '653 patent contained two promises: 1) that the optically pure salt of esomeprazole would be useful as a proton pump inhibitor; and 2) that esomeprazole provided an improved therapeutic profile over the chemical's racemate omeprazole.[10] The Appellate Court found no demonstration or sound prediction of this second promise at the filing date and consequently invalidated the '653 patent.[11]

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5 *Apotex*, *supra* note 1 at para 37.

6 *Patent Act*, RSC 1985, c P-4 [*Patent Act*].

7 Lybecker, *supra* note 3 at 7.

8 John Ivison, "The Math of Saving Lives — Canada's Drug Battle Leaves Patients Caught in the Middle" *National Post* (31 Oct 2020), online: <nationalpost.com/opinion/john-ivison-the-mathof-Saving-lives-canadas-drug-battle-leaves-patients-caught-in-the-middle> [perma.cc/P88J-NMLV].

9 *Patented Medicines (Notice of Compliance) Regulations*, SOR/1993-133; *Food and Drug Regulations*, CRC 2020, c 870.

10 *AstraZeneca Canada Inc v Apotex Inc*, 2014 FC 638 at para 86.

11 John Norman & Alex Gloor, "Canada's Supreme Court Abolishes 'Promise of the Patent'" (2017) 7:1 Pharmaceutical Patent Analyst 1.

On appeal, the Supreme Court scrutinized and rejected the promise doctrine as a question of law and, therefore, held AstraZeneca Inc.'s patent to be valid. The Supreme Court held the promise doctrine to be an extra-statutory requirement in a purely statutory area of law. The doctrine was inimical to the patent bargain because it potentially discouraged full disclosure by patent applicants apprehensive of promising anything that appeared to not be "sufficiently demonstrated or soundly predicted by the filing date."[12] Policy-based criticisms described the promise doctrine as a notorious obstacle and an element of uncertainty for intellectual property protections, making Canada a less inviting arena for innovation investment.[13] The Supreme Court's decision followed the oft-cited observation that the promise doctrine imposed a singularly high standard for utility, unlike any other national or regional patenting schemes.[14] This observation, however, is inaccurate and misleading.

II. LEGAL HISTORY AND INTERNATIONAL COMPARISONS

In *AstraZeneca*, the Supreme Court referred to the research of Norman Siebrasse, an expert in Canadian intellectual property law. Siebrasse characterizes the doctrine as a legal construct abandoned in English law and inadvertently straying into Canadian jurisprudence.[15] Siebrasse's assessment of the promise doctrine—as a historical oddity without current-day equivalents in other jurisdictions—is patently wrong. The research of two Montreal-based authorities in intellectual property Richard Gold and Michael Shortt rigorously refuted many of Siebrasse's characterizations of Canada's pre-*AstraZeneca* utility requirement.[16] Gold and Shortt demonstrate that "the promise of the patent has a long history in Canadian and British (pre-1977) patent law, and that similar tests are used in other Commonwealth countries, notably Australia and New Zealand."[17] The Australian utility requirement in patent law is remarkably similar, reading as "claims that do not fulfil each aspect of the stated advantages listed in the patent specification will fail."[18] Canada's promise doctrine was not as inconsistent with other national and regional patent regimes as Siebrasse and many other commentators insisted.[19] There are also analogs in European and American patenting schemes.[20] In 2005, for instance, US courts addressed overly broad claims in pharmaceutical patents by raising the utility requirement to "specific and substantial utility."[21] Despite these analogous approaches to utility and promise, some academics

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12 *AstraZeneca*, *supra* note 4 at para 50.

13 Norman & Gloor, *supra* note 11 at 2.

14 *AstraZeneca*, *supra* note 4 at para 21.

15 Norman Siebrasse, "The False Doctrine of False Promise" (2013) 29 CIPR 3, cited in *AstraZeneca*, *supra* note 4 at paras 33–35.

16 Gold & Shortt, *supra* note 2. See also Norman Siebrasse, "Form and Function in the Law of Utility: A Reply to Gold & Shortt" (2015) 30:2 CIPR 109.

17 Jerome H Reichman, "Compliance of Canada's Utility Doctrine with International Minimum Standards of Patent Protection" (2014) 108 Proceedings Annual Meeting Am Society Intl L 313 at 314. See Gold & Shortt, *supra* note 2.

18 Jane Nielsen & Dianne Nicol, "Patent Law and the March of Technology – Did the Productivity Commission Get It Right?" (2017) 28:1 Australian Intellectual Property J 4.

19 Gold & Shortt, *supra* note 2; Reichman, *supra* note 17.

20 Gold & Shortt, *supra* note 2.

21 Reichman, *supra* note 17 at 314.

and commentators depicted the promise doctrine as rendering "Canadian law highly divergent from the worldwide norm."[22] This view bolstered the ill-founded arguments that Canadian utility requirements breached international treaty obligations.

III. INTERNATIONAL OBLIGATIONS

In the period preceding *AstraZeneca*, many academics, lobbyists, advisors, and jurists argued that Canada's patent utility standard was higher than, and inconsistent with, international norms. The utility standard, which represented the lowest hurdle in patenting before *Merck*, became a major stumbling block for pharmaceutical companies regarding intellectual property rights protection in Canada.[23] According to a 2017 Fraser Institute report, Canada's patent utility requirement "creates significant uncertainty for innovators and undermines the incentives for investment, especially in the biopharmaceutical sector."[24] However, such industry analyses routinely included mistakes and inaccuracies about the legal relationship of promises, utility, and validity. For instance, the Fraser Institute report wrongly noted that a drug patent would be invalidated if an additional application for the drug was discovered after the patent was granted.[25]

A more common error was cited by Fédération internationale des conseils en propriété intellectuelle, an intervenor at the Supreme Court on behalf of AstraZenca Inc. That intervenor argued that Canada's promise doctrine was so at variance with international standards as to be in breach of obligations under the *North American Free Trade Agreement* ("*NAFTA*") and the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("*TRIPS*").[26] These treaties purportedly created an obligation to directly align Canadian patent law with American practices. Such claims cropped up in financial reports, industry summaries, and law reviews, occasionally with unfettered hyperbole: "a new, unprecedented super-utility test is introduced [in Canada] that goes radically far beyond the traditional test (in place when [*TRIPS*] was signed), that new test violates the treaty obligation."[27] Contrary to what many legal writers believed, no international agreement obliges Canada to keep its laws static or fixedly aligned with American standards. As American professor of intellectual property law Jerome Reichmann observes, such an obligation would be akin to France prescribing uniform patent law since 1883, following the adoption of the Paris Convention.[28] Yet, this same argument was at the center of similar patent litigation initiated by another major pharmaceutical company and running concurrent to *AstraZeneca.*

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22 Robert Merges, "National Sovereignty and International Patent Law" (2019) Mich L Rev 1249.

23 Lybecker, *supra* note 3.

24 *Ibid* at 14.

25 *Ibid* at 15.

26 John McDermid, "A NAFTA Challenge to Canada's Patent Utility Doctrine is Necessary" (11 June 2014), IP Watchdog (blog), online: <www.ipwatchdog.com/2014/06/11/a-nafta-challengeto-canadas-patent-utility-doctrine-is-necessary/id=49994/> [perma.cc/AXP8-GBJS].

27 Merges, *supra* note 22 at 1274.

28 Reichman, *supra* note 17 at 317.

Eli Lilly and Company v The Government of Canada was heard by the International Centre for Settlement of Investment Disputes ("ICSID").[29] The case relates to patents for olanzapine (Zyprexa) and atomoxetine (Strattera) that the pharmaceutical company, Eli Lilly and Company ("Eli Lilly"), had lost in Canada partly due to their not meeting the promised utility. For instance, Eli Lilly's Canadian patent for Strattera claimed effective long-term treatment of attention-deficit/hyperactivity disorder ("ADHD"). In support of their promise, Eli Lilly disclosed their pilot study of 21 patients treated over seven weeks with Strattera. Eleven of the patients showed a 30 percent or greater reduction in ADHD symptoms during the study.[30] The Canadian Federal Court found this study to fall short of a sufficiently demonstrated or soundly predicted promise.[31] With much noise and sabre-rattling, Eli Lilly launched a suit against Canada, claiming a breach of international treaty obligations under *NAFTA* and *TRIPS*.[32] While advancing this claim against Canada, Eli Lilly remained quiet about the invalidation of its Strattera patent by the U.S. District Court of New Jersey on inutility grounds just prior to the Canadian Federal Court's decision.[33] To Eli Lilly's disappointment, and in direct refutation of those suggesting the promise doctrine was a radical new invention in Canadian law, the ICSID Tribunal found that "Canada's current promise utility doctrine was somehow part of Canadian law when Lilly's patents were granted."[34] This decision confirmed state sovereignty in determining and balancing national patent schemes and public interests; it also put to rest arguments that Canada's promise doctrine is at odds with treaty obligations.[35]

IV. "USE" AND "USEFUL"

Patent law is a statutory creation that is revealed and fine-tuned by judicial interpretation. Section 2 of the *Patent Act* defines "invention" as "any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter."[36] Subsection 27(3) sets out the requirements for patent applications, including that specifications:

> (a) correctly and fully describe the invention and its operation or use as contemplated by the inventor;

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29 *Eli Lilly and Company v The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2.

30 Merges, *supra* note 22 at 1274–75.

31 *Eli Lilly & Co v Teva Canada Ltd,* 2011 FCA 220.

32 James Billingsley, "*Eli Lilly and Company v The Government of Canada* and the Perils of Investor-State Arbitration" (2015) 20 Appeal 27 at 27.

33 Brook K Baker & Katrina Geddes, "Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines – Eli Lilly v. Canada and the Trans-Pacific Partnership Agreement" (2015) 23:1 J Intell Prop L 1 at 40.

34 Paul Webster, "Canada Wins Legal Battle to Set Patent Rules" (2017) 189:15 Can Med Assoc J E578, online: <www.cmaj.ca/content/189/15/E578> [perma.cc/U3DL-XAZZ].

35 These issues were thrown into sharp relief by the recent Investor-State Dispute Settlement mechanism introduced in the Trans-Pacific Partnership. See Rochelle Cooper Dreyfuss & Susy Frankel, "Reconceptualizing ISDS: When Is IP an Investment and How Much Can States Regulate It" (2018) New York University School of Law [working paper].

36 *Patent Act*, *supra* note 6.

> (b) set out clearly the various steps in a process, or the method of constructing, making, compounding or using a machine, manufacture or composition of matter, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it pertains, or with which it is most closely connected, to make, construct, compound or use it.[37]

The Supreme Court has repeatedly stated that patent law is wholly statutory. Yet, the courts interpret and apply that statutory law with reference to jurisprudence. To elucidate the utility requirements set out in sections 2 and 27(3) of the *Patent Act*, Canadian courts routinely refer to the landmark Supreme Court decision *Consolboard Inc v MacMillan Bloedel (Sask) Ltd.*[38] As Justice Dickson stated in *Consolboard*, a patent is "not useful" if it "will not do what the specification promises that it will do."[39] In *AstraZeneca*, the Supreme Court offered a *de minimis* interpretation of "useful," construing it to mean "any single use of that subject-matter that is demonstrated or soundly predicted by the filing date is sufficient to make an invention useful for the purposes of s. 2."[40] The purpose of the section 2 utility requirement is, according to the reasoning in *AstraZeneca*, "to prevent the patenting of fanciful, speculative or inoperable inventions."[41] If a patent description fails to meet the section 2 requirement, it is not an invention and is therefore unpatentable or invalid.

The promise doctrine derived from a constructive interpretation, which held the utility requirement as both a matter of disclosure (section 27) and a principal part of defining invention (section 2).[42] However, courts interpreted utility promises disclosed for section 27 purposes as setting the standard for section 2 utility requirements, leading to severe all-or-nothing results in validity disputes. A seemingly small mistake could unfairly lead to complete invalidation. Yet, as Gold and Shortt reason, "it would be unjust if the patentee suffered no disadvantage when it subsequently came to light that he or she did not, in fact, have a sufficient basis on which to support the promise on the filing date."[43] The promise doctrine functioned as a mechanism to ensure an invention's usefulness derived from sufficient demonstrations or sound predictions rather than misleading fabrications or groundless speculations. For pharmaceutical patents, use is crucial to defining the invention. Even a person skilled in the art or science (a "POSITA") needs to be told what a new pharmacological compound does.[44] Esomeprazole, sildenafil, or atomoxetine did not have apparent or implicit uses. As inventions, these compounds are defined by their physiological actions and therapeutic applications. In other words, the use of these compounds, as described in the patent application, is essential to their definition as inventions.

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37 *Ibid*.

38 *Consolboard Inc v MacMillan Bloedel (Sask) Ltd*, [1981] 1 SCR 504.

39 *Ibid* at 525, Dickson quoting Halsbury's Laws of England, (3rd ed).

40 *AstraZeneca, supra* note 4 at para 49.

41 *Ibid* at para 57.

42 *Ibid* at para 31.

43 Gold & Shortt, *supra* note 2 at 40.

44 POSITA properly refers to a person of ordinary skill in the art, the approximate equivalent of Canada's legal fiction.

A balance should be struck between requiring a full disclosure that soundly promises what a would-be invention does and allowing for reasonable mistakes in those promises. A candid and reasonable disclosure of potential utility should not result in a fatal "self-inflicted wound," to use Justice Pelletier's phrase.[45] On the other hand, it is unfair to grant a patent and, in so doing, a major competitive advantage for a drug without reasonably certain or reliably predicted uses. Nor is it fair to grant patents with multiple false or speculative promises that mislead competitors and the public. This balance does not square easily with Justice Rowe's pronouncement that "promises are not the yardstick against which utility is to be measured."[46] If a patent applicant's promises about use do not speak to their prospective invention's utility, what purpose do such promises serve and how is utility to be discerned? Moreover, requiring only a mere scintilla of use will not prevent "the patenting of fanciful, speculative or inoperable inventions."[47] As the Supreme Court noted, the creation of statutes is a legislative prerogative. However, the interpretation of statutes is the responsibility of the courts. The Supreme Court chose a pared-down interpretation of utility requirements, leaving it as a meager statutory condition. The relative centrality of "use" and "useful" in the *Patent Act* conveys a more significant meaning. Requiring a full disclosure of a prospective invention's use based on soundly predicted and sufficiently demonstrated promises is a standard that strikes an appropriate balance between the interests of the patentee and the public.

V. ADVANTAGES OF KEEPING PROMISES

The *Patent Act* is designed to apply special scrutiny to medicines. The promise doctrine was, in effect, an additional restriction on granting advantageous patent protections to innovator pharmaceutical companies. A meaningful utility requirement provides many benefits for the public but also the pharmaceutical industry.

For the public, scrutiny of pharmaceutical patents helps moderate prohibitively high costs and restricted access to valuable medical treatments. This issue is so pressing that the US Congress introduced legislation attempting to remedy the high costs of pharmaceuticals by allowing third-party importation of pharmaceuticals, thereby sidestepping their own patent scheme.[48] The promise doctrine ensured that pharmaceutical innovators did not obtain a legal monopoly on the basis of speculative claims about increased utility—especially claims about therapeutic efficacy—that were unsubstantiated at the time of filing.[49] Uncertainty in the patent scheme leads to higher application and litigation costs, which, in turn, adds to the costs incurred by pharmaceutical developers and their customers. A clear and robust utility requirement results in either better quality patent applications by pharmaceutical innovators or the invalidation of patents allowing for use by generic producers. Such a requirement also prevents so-called evergreening of pharmaceutical patents. Evergreening occurs when patents

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45 *Sanofi-Aventis v Apotex Inc.*, 2013 FCA 186 at para 54.

46 *AstraZeneca, supra* note 4 at para 63.

47 *Ibid* at para 57.

48 Frederick M Abbott, "Legislative and Regulatory Takings of Intellectual Property: Early Stage Intervention Against a New Jurisprudential Virus" in Carlos M Correa & Xavier Seuba, eds, *Intellectual Property Development: Understanding Interfaces* (Singapore: Springer Nature Singapore, 2019) 21 at 22.

49 Reichman, *supra* note 17 at 313.

are sought for minor variations to existing patented products, thereby lengthening the effective term of the patent holder's monopoly, and thus keeping drug prices high.[50] Pharmaceutical companies attempt this through selection patents, which claim a new patent for a small number of compounds within a larger category of previously patented compounds.[51] In protecting against evergreening, Canadian law guarantees the availability of generic drugs in Canada without undue delay.[52]

For the pharmaceutical industry, there are also advantages to a more stringent utility requirement that holds would-be patentees to their promises. More rigorous utility standards guard against false claims and overpromises, ultimately encouraging fair and open competition. As the Supreme Court noted in *AstraZeneca*, the *Patent Act* guards against the mischief of overpromising. Section 27(3) of the *Patent Act* requires correct and full disclosure that includes substantiated uses or operation.[53] Section 53 stipulates that a promise "wilfully made for the purpose of misleading" can void a patent. Overly broad claims can also be declared invalid (although remaining valid claims can be saved by section 58). Yet, under the current patent regime, pharmaceutical companies file as early as possible, often sacrificing conclusive results for the competitive advantage of a patent.[54] This over-eager filing promotes overpromise. Patent application examiners may be convinced of an invention by impressive promises of utility.[55] A minimal utility requirement also impairs "follow-on" innovators by allowing for ill-devised patents with broad, speculative claims.[56] Canada suffers from a low number of small and medium-sized pharmaceutical companies.[57] Narrowing patents through stricter utility requirements could promote smaller pharmaceutical developers that tend to pursue follow-on innovations.[58] The promise of the patent ensures that patentees are careful and disciplined in drafting applications, and eventually realize the promises they disclosed.[59] The promise doctrine also has the potential to encourage and regulate reproducibility within science innovation, which is an expanding crisis.[60] Robust utility requirements can correct some of the problems now plaguing the pharmaceutical industry.

A more-than-minimal utility requirement that enforces patent promises also protects against fraudulent medical products. Some bemoaned the constraints that the promise doctrine placed on the medical industry and especially in the patenting of alternative therapies.

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50 Arne Ruckert, Ashley Schram & Ronald Labonté, "The Trans-Pacific Partnership Agreement: Trading Away our Health?" (2015) 106:4 Canadian Public Health Association 249.

51 Reichman, *supra* note 17 at 313.

52 Webster, *supra* note 34.

53 *AstraZeneca*, *supra* note 4 at para 46.

54 Jacob S Sherkow, "Patents, Promises, and Reproductibility" (2017) 49 Geo J Intl L.

55 *Ibid*.

56 Nielsen & Nicol, *supra* note 18; Norman Siebrasse, "Overbreadth in Canadian Patent Law" (2019) SSRN Electron J (preprint), online: <papers.ssrn.com/abstract=3393044> [perma.cc/2CWA-LQRC].

57 "CABC Policy Recommendations to Enhance Innovation in Canada" (summer 2016), Canadian American Business Council (report), at 22–23, online: <cabc.co/wp-content/uploads/2020/06/CABC_innovation_paper.pdf> [perma.cc/29W9-2RR4].

58 *Ibid*.

59 Nielsen & Nicol, *supra* note 18.

60 Sherkow, *supra* note 54.

For instance, a research paper published in the *Boston College Intellectual Property and Technology Forum* challenged this very issue regarding unproven ultraviolet light therapy for treating Lyme disease.[61] Contrary to what that author argues, the gatekeeping effect of the promise doctrine is a valuable social benefit. Alternative medicines of unproven efficacy are roundly disparaged by reputable health authorities and professionals as grievous impositions on the public, and especially the ailing and the vulnerable.[62] The health and finances of Canadians are better off if unproven "cures" and speculative treatments with no demonstrable use remain unpatentable. The history of pharmaceuticals illuminates this gatekeeping feature of patent law. Prior to the twentieth century, American medical professionals generally viewed pharmaceutical patents as unethical.[63] Medicines that typically had proprietary protections were then known as patent medicines—remedies and nostra of uncertain virtue granted patent letters and representing notorious impositions on the public. The history of patent law reveals its crucial role as a quality check on medicines that cannot fulfil a promised use. As Eli Lilly's Strattera aptly instances, new drugs without proven or demonstrated therapeutic use should not receive the benefit of a patent.

By encouraging competition from other pharmaceutical companies of various sizes and kinds, less intervention is required in the pharmaceutical market through the patent bargain and government actors. As a single-payer insurer, Canada mandates the Patented Medicine Prices Review Board to negotiate prices for pharmaceuticals under patent protection. A return to a mere scintilla utility requirement further strains the bargaining between pharmaceutical innovators and the public.

CONCLUSION

Innovator pharmaceutical companies are at the forefront of the legal resistance to the utility requirements, and for good reason, as patent litigation is largely directed at pharmaceutical patents. In that effort, *AstraZeneca* represents a major win. This decision was predicted to benefit innovators in high-technology areas, especially pharmaceutical patent applicants.[64] *AstraZeneca* is now a well-cited decision, appearing in no less than 41 decisions in the subsequent three years to date. Cases citing *AstraZeneca* have mostly involved patent claims for pharmaceuticals, but also include patents relating to everything from natural gas pipelines, packing wrap, and track assemblies on all-terrain vehicles to ice skates, gaming software, and digital networks of patient files. Ultimately, the Supreme Court pursued fairness in the patent bargain and, in doing so, instanced the true impartiality of the courts, with no special preference given to a particular industry, the Canadian government, or the public.[65] For pharmaceutical companies, the doctrine resulted in severe and unfair consequences for promises disclosed in

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61 Sarah Murphy, "The Patent Utility Requirement and its Impact on Alternative Medical Treatments for Lyme Disease" (2017) Boston College Intellectual Property and Technology Forum 1.

62 Franklin G Miller et al, "Ethical Issues Concerning Research in Complementary and Alternative Medicine" (2004) 291:5 JAMA 599.

63 Joseph M Gabriel, *Medical Monopoly: Intellectual Property Rights and the Origins of the Modern Pharmaceutical Industry* (Chicago: University of Chicago Press, 2014) at 7– 41.

64 Nielsen & Nicol, *supra* note 18 at 19.

65 Contrary to the assertions made by Eli Lilly.

good faith that remained—contrary to reasonable expectation—unrealized.

However, in doing away with the promise doctrine, the Supreme Court may have discarded real benefits for the public and the pharmaceutical industry. The Supreme Court heard and cited misleading arguments about the legal history and international analogs of the promise doctrine. These arguments were not only incorrect but also distracted from the real issue: the proper interpretation of "use" and "useful" as a patent requirement. That issue allows for consideration of the patent bargain and the proper role of promises about utility. The courts have articulated that such promises should be "sufficiently demonstrated or soundly predicted by the filing date."[66] For the sake of fair patent practices, upholding patent standards, and guarding against unproven medicines, these promises should be closely scrutinized by the courts. A patent should fail to the extent that its subject matter relates to a promise made without sufficient demonstration or sound prediction. If that promised use is central to the subject matter of the invention, the patent should fail entirely. If that promised use relates to an ancillary aspect of the invention, the patent should fail to the extent of that promise for the invention. In the absence of statutory amendment, this interpretation is in keeping with the legislative intention of the *Patent Act*, encourages careful disclosure, ensures public benefit in exchange for the monopoly, and significantly improves the operation of patents. Some promises are meant to be kept.

66 *AstraZeneca*, *supra* note 4 at para 50.

ARTICLE

REVITALIZING RIGHTS: PRACTICABLE PROPOSALS FOR THE LAW OF SECTION 35 CONSULTATION AND ENVIRONMENTAL ASSESSMENT

Ryan Ng *

CITED: (2022) 27 *Appeal* 82

ABSTRACT

The duty to consult and accommodate Indigenous peoples under section 35 of the *Constitution Act*, *1982* is frequently fulfilled through environmental assessments. However, environmental statutes and the common law do not always properly reflect the constitutional nature of the duty, nor do they ensure that decisions are environmentally sound. In light of these shortcomings, this paper recommends three reforms: (1) a revision of the federal *Impact Assessment Act;* (2) the codification of environmental rights; and (3) a change in the standard of review applied to administrative decisions stemming from environmental assessments. These adjustments would not subvert the current legal framework. Nonetheless, they have the potential to assist in advancing the related goals of sustainable development and reconciliation between Canada and Indigenous peoples.

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INTRODUCTION

The intersection between the duty to consult Indigenous peoples under section 35 of the *Constitution Act, 1982*[1] and the law of environmental assessment ("EA") is no secret. It has been well-documented by scholars and is frequently the subject of litigation.[2] The purpose of this paper is limited: to suggest potential reforms to the law of section 35 consultation and EA. Specifically, I propose amendments to sections 22 and 63 of the federal *Impact Assessment Act* ("*IAA*");[3] the legislation of environmental rights; and the use of the correctness standard in reviewing the adequacy of consultation carried out by administrative actors. The overarching objective of these proposals is to make environmental decision-making more sustainable and attuned to the concerns of Indigenous peoples.

My aim is not to review the relationship between the duty to consult and EA in a comprehensive manner—nor is it to assess the normative foundations of the two frameworks, though these are by no means beyond reproach.[4] Instead, this paper proceeds on the basis that the convergence of the duty to consult and EA is a given, accepting their stated objectives—reconciliation[5] and environmental protection and sustainable development,[6] respectively—at face value. Before turning to my suggested reforms, however, I begin with a brief explanation of the merger and its drawbacks.

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1 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 The secondary literature and jurisprudence are voluminous. Academic commentary includes Kirk Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina, SK: University of Regina Press, 2013); Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53:2 Osgoode Hall LJ 632; Matthew Hodgson, "Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board" (2016) 54:1 Osgoode Hall LJ 125; and Jocelyn Stacey, "The Deliberative Dimensions of Modern Environmental Assessment" (2020) 43:2 Dal LJ 865. High-profile cases include *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*]; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*]; and *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh Nation*].

3 *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].

4 For discussion of the duty to consult, see Gordon Christie, "A Colonial Reading of Recent Jurisprudence" (2005) 23:1 Windsor YB Access Just 17; Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation" (2006) 21 Windsor Rev Legal Soc Issues 33; and Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729. For discussion of environmental assessment, see Nathalie Chalifour, "Bringing Justice to Environmental Assessment: An Examination of the Kearl Oil Sands Joint Review Panel and the Health Concerns of the Community of Fort Chipewyan" (2010) 21 J Envtl L & Prac 31; Robert Gibson, Meinhard Doelle & John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) 29 J Envtl L & Prac 257.

5 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida Nation*].

6 Lambrecht, *supra* note 2 at 39.

I. THE MERGER BETWEEN SECTION 35 CONSULTATION AND ENVIRONMENTAL ASSESSMENT

As environmental law scholar Neil Craik points out, there are practical and theoretical reasons to merge the duty to consult and EA. On a practical level, "much of the information and analysis of the environmental effects of a proposed activity will be required to assess the impacts of that same activity on Aboriginal rights and interests."[7] It is therefore more efficient for governments to fuse the two processes. At the same time, Indigenous communities that may be affected by projects undergoing EAs have an incentive to participate in the combined procedure. These projects can have wide-ranging and lasting impacts—including the exacerbation of climate change, which affects Indigenous communities in a "significant and differential" manner.[8] As constitutional and human rights scholar Brenda Gunn notes, climate change has direct effects on Indigenous peoples' traditional territories, cultural practices, and diets.[9] It also worsens existing inequalities in healthcare and housing.[10] In short, while the duty to consult and EA are not perfectly congruent,[11] an activity's environmental consequences will often dovetail with its consequences for Aboriginal rights and title and *vice versa*.[12]

From a theoretical point of view, the duty to consult and EA share an underlying assumption that, as Craik puts it:

> by requiring decision makers to consider the impacts of an activity on the natural environment or on the rights and interests of Aboriginal peoples, those interests will be accounted for and reflected in the outcome of the decision, notwithstanding the absence of formal substantive obligations to arrive at a particular result.[13]

In this way, the duty to consult and EA both serve as conduits for input that should assist the Crown in decision-making. However, the Crown need not be the only beneficiary of this consonance. As Gunn argues, Indigenous participation in decision-making is a precondition to the meaningful exercise of other rights, such as the right to manage lands and resources and, crucially, the right to self-determination.[14] Procedural entitlements can thus complement substantive ones.

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7 Craik, *supra* note 2 at 633.

8 Brenda L Gunn, "Protecting Indigenous Peoples' Rights Through Indigenous Peoples' Participation in Decision-Making: A Climate Change Example" (2020) 17:1 MJSDL 3 at 9. See also the SCC's recent comment in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 11.

9 Gunn, *supra* note 8 at 7–9.

10 *Ibid* at 9.

11 Diana Audino, Stephanie Axmann, Bryn Gray, Kim Howard & Ljiljana Stanic, "Forging a Clearer Path Forward for Assessing Cumulative Impacts on Aboriginal and Treaty Rights" (2019) 57:2 Alta L Rev 297 at 318–324 (as the authors rightly point out at 318, EAs will not be triggered in every instance where the duty to consult arises).

12 Latin term indicating that the statement remains true if the main items are flipped. That is, an activity's impacts on Aboriginal rights and title are frequently environmental in nature.

13 Craik, *supra* note 2 at 634–635.

14 Gunn, *supra* note 8 at 23–24. See also John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 177–179 (noting the link between weak environmental protections and barriers to the exercise of Indigenous sovereignty).

The merger goes beyond functional and conceptual harmony. Indeed, it has been formalized in Canadian law by courts and legislatures. In *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, one of the first duty to consult cases, the Supreme Court of Canada ("SCC") held that British Columbia fulfilled its duty to consult by following the process under its *Environmental Assessment Act*.[15] Six years later, in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, the SCC confirmed that the Crown could delegate its duty to consult to an administrative tribunal.[16] The SCC has reaffirmed in subsequent decisions that an EA overseen by a body like the National Energy Board can effectively fulfill the duty to consult.[17]

Legislatures have been active in this area as well. For example, the *IAA* requires bodies conducting EAs to consider "the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*."[18] The *Canadian Energy Regulator Act*, which created the successor to the National Energy Board in 2019, contains a similar directive.[19]

II. DRAWBACKS TO THE MERGER

It would not be an overstatement to say that, so far, the merger's formalization—initially through judicial decisions and more recently in legislation—has not achieved the goal of dispute resolution through regulatory processes. The protracted litigation over the Trans Mountain Pipeline expansion exemplifies this failure.[20]

The problem lies partly in the design of both the duty to consult and EA. While they seek to mediate between diverse viewpoints and generate compromise, neither is necessarily equipped to do so. With respect to the duty, the SCC remarked in *Haida Nation v British Columbia (Minister of Forests)* that "[t]here is no duty to reach agreement" and "[t]he Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns."[21] In 2017, the Court reinforced these statements in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*.[22] Former Chief Justice McLachlin and Justice Rowe wrote that "[t]he s. 35 right to consultation and accommodation

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15 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 22.

16 *Rio Tinto Alcan Inc v Carrier Sekani Tribunal Council*, 2010 SCC 43 at para 56 [*Carrier Sekani*].

17 *Clyde River*, *supra* note 2 at paras 30–34; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at paras 32–34 [*Chippewas of the Thames*].

18 *IAA*, *supra* note 3, s 22(1)(c). For a provincial example, see Ontario's *Mining Act*, RSO 1990, c M.14, ss 2, 78.2, and 170.1. These provisions were all added or amended by the *Mining Amendment Act, 2009*, SO 2009, c 21.

19 *Canadian Energy Regulator Act*, SC 2019, c 28, s 10, s 56.

20 Rhianna Schmunk, "Supreme Court of Canada will not hear challenges against Trans Mountain pipeline expansion" *CBC News* (5 March 2020), online: <www.cbc.ca/news/canada/british-columbia/trans-mountain-pipeline-appeals-supreme-court-of-canada-1.5486592> [perma.cc/NB8C-UK3C]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at paras 1–4, leave to appeal denied, 2020 CanLII 43130 (SCC) [*Coldwater First Nation*].

21 *Haida Nation*, *supra* note 5 at paras 10, 45.

22 *Ktunaxa Nation*, *supra* note 2.

is a right to a process, not a right to a particular outcome" and, therefore, "in some cases [reconciliation] may not be possible."[23] While consultation may give rise to a duty to accommodate in some cases, there is no guarantee that a requested accommodation will be granted.[24] Similarly, statutes like the *IAA* require decision-makers to consider factors such as sustainability and climate change in approving projects but do not compel them to select the most environmentally responsible option.[25] The ultimate test under the *IAA* is whether the project is "in the public interest."[26]

Another obstacle to satisfactory outcomes is the fact that the duty to consult and EA generally focus on individual projects; neither consistently places decisions in a broader context or addresses the aggregate impacts of industrial activity.[27] Consequently, the extent of the inquiries that the two processes mandate is limited. Historical grievances, however inextricable they may be from the decision in question, are set aside.[28] For example, in *Carrier Sekani*, Justice Binnie rejected "the logic of the poisoned tree," which would "preclude the Crown from subsequently benefitting from [past wrongs]."[29] In that case, the lack of consultation on a dam and water diversion project in the 1950s did not justify a pause on further development and an overhaul of the resource's management.[30]

Relatedly, the existing regime also neglects the problem of long-term environmental degradation. As Justice Burke stated in *Yahey v British Columbia*, which involved an infringement claim under Treaty 8, "reliance on the duty to consult to prevent an infringement … presupposes both the ability of those consultation processes to consider and address concerns about cumulative effects as opposed to simply single projects or authorizations, as well as the success of those consultations."[31] The same is true of EA: reliance on discrete assessments to prevent environmental harm presumes the assessments' capacity to take in the necessary information and facilitate truly sustainable development. As environmental

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23 *Ibid* at para 114.

24 *Ibid* at para 79.

25 *IAA*, *supra* note 3 at s 63. See also *Environmental Assessment Act*, SBC 2018, c 51, s 2.

26 *IAA*, *supra* note 3 at ss 60, 62, 63.

27 To its credit, the *IAA* does require that the "cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out" be considered: *ibid*, s 22(1)(a)(ii). However, as I argue in Part III.A.(i) of this paper with respect to s 22(1)(c), the factors are not arranged in a hierarchy such that the decision-maker must assign particular importance to certain items. Instead, the decision-maker is essentially free to weigh the factors as they see fit.

28 *Chippewas of the Thames*, *supra* note 17 at para 41; Janna Promislow, "Irreconcilable? The Duty to Consult and Administrative Decision-Makers" (2013) 22:1 Const Forum Const 63 at 67–68.

29 *Carrier Sekani*, *supra* note 16 at para 54.

30 *Ibid*.

31 *Yahey v British Columbia*, 2021 BCSC 1287 at para 500 [*Yahey*]. Burke J found that BC had unjustifiably infringed Treaty 8 "in permitting the cumulative impacts of industrial development to meaningfully diminish [the Blueberry River First Nation's] exercise of its treaty rights" (para 1894). The Province declined to appeal: Government of BC, "Attorney General's Statement on *Yahey v British Columbia*" (28 July 2021), online: *BC Gov News* <news.gov.bc.ca/releases/2021AG0117-001488> [perma.cc/3Y7Z-WJZ3].

and natural resources law scholar Martin Olszynski observes, there is a danger that EA's narrow and short-term outlook will lead to the environment's "death by a thousand cuts."[32] The duty to consult and EA thus create pathways to improved decision-making but do not ensure it. The state ultimately retains the power to approve a project over the objections of affected Indigenous peoples.[33]

Moreover, the procedural nature of the duty to consult and EA means that judicial review only offers partial or temporary solutions to parties dissatisfied with a government decision. For example, the Federal Court of Appeal ("FCA") quashed the initial approval for the Trans Mountain Pipeline expansion in *Tsleil-Waututh Nation v Canada (Attorney General)*, in part because the required consultation with Indigenous communities had been deficient.[34] However, a subsequent judicial review application, *Coldwater First Nation v Canada (Attorney General)*—which came after Canada had redone the assessment and consultation in accordance with *Tsleil-Waututh Nation*—was unsuccessful.[35] The FCA upheld the second authorization of the project and noted:

> this was anything but a rubber-stamping exercise. The end result was not a ratification of the earlier approval, but an approval with amended conditions flowing directly from the renewed consultation. It is true that the applicants are of the view that their concerns have not been fully met, but to insist on that happening is to impose a standard of perfection, a standard not required by law.[36]

The Trans Mountain affair shows that Indigenous litigants' recourse is generally limited to delay and a rerun of the decision-making process. At best, they can hope that reconsideration will lead to a different outcome or the attachment of conditions to an approval. But provided that the Crown or its delegate follows the prescribed procedure, the state can proceed regardless of the impact on the claimed rights or title.[37]

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32 Martin Olszynski, "Impact Assessment" in William Tilleman et al, eds, *Environmental Law and Policy*, 4th ed (Toronto: Emond Montgomery, 2020) 453 at 459.

33 Karen Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation" (2020) 48:4 Fed L Rev 570 at 584–585 [Drake, "Invitation"]; Hamilton & Nichols, *supra* note 4 at 736.

34 *Tsleil-Waututh Nation*, *supra* note 2 at para 754.

35 *Coldwater First Nation*, *supra* note 20 at paras 75–78.

36 *Ibid* at para 77.

37 The analysis differs where a treaty is involved because treaty rights, unlike freestanding Aboriginal rights and title, are not claimed. Courts presume that the Crown knows the treaty's contents: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34 [*Mikisew Cree 2005*]. Moreover, state action may at some point constitute an unjustified infringement of the treaty: *ibid* at para 48 and *Yahey*, *supra* note 31 at paras 499–543. For commentary on this second point, see Robert Hamilton & Nick Ettinger, "*Yahey v British Columbia* and the Clarification of the Standard for a Treaty Infringement" (24 September 2021), online (blog): *ABlawg*, <www.ablawg.ca/wp-content/uploads/2021/09/Blog_RH_NE_Yahey_Infringement.pdf> [perma.cc/27RT-ZRNF]. While I reference some cases that involve treaties in this paper, my principal concern is the non-treaty context, which is exemplified by *Coldwater First Nation* and *Ktunaxa Nation*.

For example, in *Ktunaxa Nation*, the Ktunaxa claimed that a proposed ski resort would drive away Grizzly Bear Spirit, a principal spirit in their religious tradition.[38] The SCC majority acknowledged that the resort's negative effects on the Nation's spiritual practices could manifest long before the Ktunaxa are able to formally establish section 35 rights or title.[39] They nonetheless held that the court could not make "far-reaching constitutional declarations in the course of judicial review proceedings incidental to, and ill-equipped to determine, Aboriginal rights and title claims."[40] This statement underscores the lack of substantive constraints on government actors in this area of law, even where the potential infringements are serious and the establishment of section 35 rights are distant and impractical.

III. POTENTIAL SOLUTIONS

How, then, can EAs that incorporate consultation avoid creating a negative synergy between the twin processes and instead realize section 35's promise? To my mind, it is possible to move towards this goal by fine-tuning legislation and the common law pertaining to the duty to consult and EA. There are two connected obstacles standing in the way. First, environmental statutes like the *IAA* do not properly reflect the constitutional nature of the duty to consult—nor, for the most part, do they contain independent protection for lands and waters. As a result, Indigenous communities are given an incomplete box of legal tools with which to challenge administrative decisions. Second, courts have been overly deferential in enforcing the duty in the EA context. This deference weakens constitutional guarantees and leaves judicial review applicants without a meaningful oversight mechanism vis-à-vis the state.

My suggested changes can be implemented within the existing legal framework. For present purposes, I do not consider more thoroughgoing reforms, including proposals based on Indigenous laws. That is not to say that these proposals are in any way undesirable or impracticable. They are simply beyond the narrow scope of this paper and, in any case, have been convincingly canvassed by other authors.[41] As well, I believe that notwithstanding the manifest structural problems in Canadian Aboriginal law,[42] incremental steps in the right direction are worth examining—at least as temporary solutions pending a more comprehensive reworking of the framework. Accordingly, I argue here that the law would benefit from a renewed effort at developing—to borrow public law scholar Kate Glover Berger's phrasing—

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38 *Ktunaxa Nation*, *supra* note 2 at para 5.

39 *Ibid* at para 86.

40 *Ibid*.

41 Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions," (2017) 50 UBC L Rev 95 at 152–160; Aaron Mills, "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9 Indigenous LJ 109 at 139—147; Karen Drake, "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law" (2015) 11:2 MJSDL 184 at 213—217 [Drake, "Trials and Tribulations"]; Drake, "Invitation", *supra* note 33 at 579–585.

42 Christie, *supra* note 4 at 42–53; Drake, "Invitation", *supra* note 33 at 570–573 (both (1) observing that Canadian Aboriginal law rests on a colonial foundation—and continues to reinforce that foundation—and (2) arguing that a fundamental departure is needed).

"statutory frameworks of principle, procedure, and obligation" on the part of legislatures and a rediscovery of "healthy vigilance and skepticism" on the part of the courts.[43]

However, I would be remiss to skate over the concept of "free, prior, and informed consent" ("FPIC"), which has application in Canadian law as part of the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("*UNDRIP Act*") that was enacted by Parliament in June 2021.[44] Prior to the passage of the *UNDRIP Act*, there was significant advocacy for the implementation of FPIC but also disagreement about what it would look like in practice. Some, like climate law scholar Grace Nosek, felt that FPIC should supplant the duty to consult. Nosek argued that, unlike the malleable duty, FPIC would empower Indigenous communities and create legal certainty; it was therefore a better basis for Crown-Indigenous relationships.[45]

Others suggested that the principle of consent was compatible with the existing framework.[46] For example, the Expert Panel for the Review of Environmental Assessment Processes wrote in its 2017 report to the Minister of Environment and Climate Change: "FPIC is not in conflict with the duty to consult and accommodate; to the contrary, it should strengthen and supplement consultation and accommodation."[47] The federal government has since taken a similar position, writing on the Department of Justice website that FPIC "builds on and goes beyond" the duty.[48] The webpage goes on to say that "the [*UNDRIP Act*] does not immediately change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in legislation like the *Impact Assessment Act*."[49]

Given the infancy of the *UNDRIP Act* and the contending interpretations of FPIC's precise meaning, it is difficult (and perhaps unwise) to predict how the legislation will affect the law of consultation and EA—not to mention how it will interact with various Indigenous perspectives. For these reasons, I leave a more detailed discussion to another day and proceed with my analysis of the law as it stands, beginning with environmental statutes.

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43 Kate Glover Berger, "Diagnosing Administrative Law: A Comment on *Clyde River* and *Chippewas of the Thames River First Nation*" (2019) 88 SCLR (2d) 107 at 127, 136.

44 *United Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIP Act*]. "Application" is the word used in ss 2(3), 4. FPIC is mentioned in arts 10, 11, 19, 28, 29, 32 of the *Declaration*: see the Schedule to the Act.

45 Nosek, *supra* note 41 at 124–141.

46 Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235 at 265–267.

47 Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa, ON: Canadian Environmental Assessment Agency, 2017) at 29.

48 Government of Canada, "About the legislation" (last modified 10 December 2021), online: *Department of Justice* <www.justice.gc.ca/eng/declaration/about-apropos.html> [perma.cc/C4TA-F497].

49 *Ibid*.

A. Statutory Frameworks

i. EA Statutes

Legislatures should amend statutes that govern EAs to reflect the constitutional status of section 35 obligations. While this suggestion applies equally to provincial EA legislation, I spotlight the *IAA* for two main reasons: (i) as a federal statute, it has wide application; and (ii) it is the easiest to build on because it clearly intends to integrate the law of section 35.[50]

As previously mentioned, the *IAA* mandates consideration of the impact that a project may have on any Indigenous group and on section 35 rights. Sections 22 and 63 read (in part):

> 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
>
> …
>
> (c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982;
>
> …
>
> 63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:
>
> …
>
> (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982; …[51]

However, at the impact assessment stage (section 22), this factor is only one of 20; at the decision-making stage (section 63), it is one of five.[52] What is more, the Act does not require that this factor be given particular weight, despite the fact that other enumerated factors—such as "comments received from the public"—are non-constitutional in nature. [53] As the SCC noted in *Carrier Sekani*, "the constitutional dimension of the duty to consult gives rise

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50 Compare, for example, Ontario's *Environmental Assessment Act*, RSO 1990, c E.18, which is less clear about the position of Aboriginal and treaty rights (not to mention Indigenous concerns more generally): ss 2.1, 16(6).

51 *IAA, supra* note 3 at ss 22(1)(c), 63(d).

52 *Ibid* at ss 22(1)(a)–(t), 63(a)–(e)

53 *Ibid* at s 22(1)(n).

to a special public interest" that surpasses economic concerns.[54] This statement should apply equally to all non-constitutional concerns.[55]

That is not to say that the other factors are unimportant. Indeed, the *IAA*'s list represents a significant improvement over the one in its predecessor, the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*"), which contained only 10 factors—none of which mentioned Indigenous peoples.[56] On top of section 22(1)(c), section 22 of the *IAA* requires that the following be taken into account: "Indigenous knowledge provided with respect to the designated project," "considerations related to Indigenous cultures raised with respect to the designated project," and "any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project."[57] I see the inclusion of such items as a positive development because it alerts decision-makers to potential nonphysical impacts of industrial projects and thereby promotes EA's capacity to gather pertinent information.

Nonetheless, the point stands: although some of the other factors may be relevant, they do not amount to constitutional responsibilities—unlike the duty to consult. The *IAA* could be improved by making clear the unique position of the duty. Analogous amendments have been made in the *Charter* context.[58] For example, in 2017, the *Criminal Code* was revised to include provisions that recognize—in light of section 2(b)'s guarantee of freedom of the press—the need for additional procedural protections for journalists whose work product is sought by the police in the course of a criminal investigation.[59] Section 488.01(3) of the *Code* reads:

> (3) A judge may issue a warrant, authorization or order under subsection (2) only if, in addition to the conditions required for the issue of the warrant, authorization or order, he or she is satisfied that
>
> > (a) there is no other way by which the information can reasonably be obtained; and
> >
> > (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.[60]

In my view, this provision legislates a variation on the dissent by Justice McLachlin (as she then was) in *Canadian Broadcasting Corp v Lessard*, where she proposed that search warrants

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54 *Carrier Sekani*, *supra* note 16 at para 70. See also *Clyde River*, *supra* note 2 at para 40.

55 Huyer, *supra* note 4 at 48.

56 *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s 19 [*CEAA 2012*]. Martin Olszynski has compared the two Acts in detail: Olszynski, *supra* note 32 at 466–485.

57 *IAA*, *supra* note 3, s 22(1)(g), (l), (q). These are not, however, mandatory considerations under s 63. Under the *CEAA 2012*, assessments were permitted—but not required—to consider "Aboriginal traditional knowledge" (*CEAA 2012*, *supra* note 56, s 19(3)). Several other items pertaining to Indigenous peoples were listed as possible environmental effects under s 5.

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

59 *Criminal Code*, RSC 1985, c C-4, ss 488.01, 488.02 [*Criminal Code*]. These provisions were added by the *Journalistic Sources Protection Act*, SC 2017, c 22. Amendments were also made to the *Canada Evidence Act*, RSC 1985, c C-5, respecting the production of journalistic materials in judicial proceedings. The SCC interpreted the latter in *Denis v Côté*, 2019 SCC 44 [*Denis*].

60 *Criminal Code*, *supra* note 59, s 488.01(3). See also *Canada Evidence Act*, *supra* note 59, s 39.1(7).

targeting journalists be justified under section 1 of the *Charter*.[61] Like Justice McLachlin's inquiry, section 488.01(3) of the *Criminal Code* is meant to ensure that journalistic materials, which are protected by section 2(b) of the *Charter*,[62] are accessible to law enforcement only (i) as a last resort and (ii) if the investigative need exceeds the negative impact on press freedom. For the purposes of this paper, it shows how legislatures can weave together constitutional guarantees and statutory processes, with the intention of making certain—*ex ante*[63]—that discretionary decisions are lawful.

There is no reason why a similar harmonization of EA legislation and the duty to consult could not occur. Such an alignment would not completely remove the discretion that decision-makers need to respond to complex factual matrices. It would merely remind them of the unique relationship between the state and Indigenous peoples and the responsibilities that flow therefrom.[64] Relatedly, my proposal would be a natural extension of the reasoning in *R v Sparrow*, where the SCC held that Aboriginal rights under section 35, though not absolute, should be given priority by governments in regulating access to resources.[65] This logic should apply equally to the duty to consult, which (though not an Aboriginal right *per se*) enjoys constitutional status. A foregrounding of the duty, like the elevation of press rights in the *Criminal Code*, is necessary to ensure that government action is constitutionally compliant—not a bonus.

Therefore, consultation and accommodation should be brought to the fore and made preconditions to the advancement of a project in a revised *IAA*. This revision would move the Act towards a reaffirmation of section 35 interests, including the right to consultation and accommodation, and away from a *Gladstone*-like model, under which section 35 is placed on the same footing as an array of non-constitutional objectives.[66]

If Parliament amended the *IAA* in light of the above discussion, drawing in particular on the example of the *Criminal Code*, sections 22 and 63 might look like the following:

> 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
>
> …

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61 *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421 at 455–457, 130 NR 321.

62 *Denis*, *supra* note 59 at para 46.

63 Latin term meaning "before the event."

64 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 21 [*Mikisew Cree 2018*].

65 *R v Sparrow*, [1990] 1 SCR 1075 at 1116, 1119, 111 NR 241. That is, "after valid conservation measures have been implemented."

66 *R v Gladstone*, [1996] 2 SCR 723 at paras 56–75, 200 NR 189. Lamer CJ expanded the list of government objectives that can be asserted in infringing s 35 rights without "internal limitations". For an explanation of how *Gladstone* departed from *Sparrow*, see John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials, & Commentary*, 5th ed (Toronto: LexisNexis Canada, 2018) at 135, 141–142.

> (c) the impact that the designated project may have on any Indigenous group and whether the obligations owed to the Indigenous peoples of Canada under section 35 of the *Constitution Act, 1982*, including the duty to consult and accommodate, have been fulfilled; …
>
> 63 (1) The Minister's determination in respect of a designated project under paragraph 60(1)(a) or the Governor in Council's determination in respect of a designated project under section 62 that the designated project is in the public interest must be based on the report with respect to the impact assessment and shall be made only if:
>
> …
>
> (d) the obligations owed to the Indigenous peoples of Canada under section 35 of the *Constitution Act, 1982*, including the duty to consult and accommodate, have been fulfilled; … [emphasis added]

There are, of course, other ways to revise the *IAA*. I recognize that these modest amendments would not change the law to the extent that consultation is already required and its parameters are governed by *Haida Nation* and its successors. I recognize as well that they would not be foolproof; there will undoubtedly be cases where consultation is alleged to be insufficient and must be contested via judicial review. My proposed revisions should nonetheless advance the objectives of making the special status of section 35 obligations explicit and ensuring that genuine consultation—which "substantially addresses the concerns" of the Indigenous peoples involved[67]—occurs prior to the authorization of a project by the Minister of the Environment or Cabinet, thereby averting costly litigation after the fact.

ii. Environmental Rights

Another possible improvement in the legislative arena would be the codification of environmental rights, such as the right to a healthy environment. This right has been recognized in international law[68] and exists in several provincial and territorial statutes. For example, Yukon's *Environment Act* provides "the right to a healthful natural environment."[69] Quebec's *Environmental Quality Act* goes further, promising the "right to a healthy environment and to its protection, and to the protection of the living species inhabiting it."[70] The same province's *Charter of Human Rights and Freedoms* similarly provides "[the] right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards

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67 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 220 NR 161, Lamer CJ ("consultation must be in good faith, and with the intention of substantially addressing the concerns of aboriginal peoples whose lands are at issue" at para 168). Of course, *Delgamuukw* preceded *Haida Nation* and Lamer CJ was referring to situations in which Aboriginal title had already been established.

68 *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*, UN Doc A/CONF.48/14/Rev. 1 (1972) at 3. Also, article 6 (the right to life) of the *International Covenant on Civil and Political Rights* has been interpreted by the Human Rights Committee as encompassing environmental rights: *General Comment No 36*, UN Doc CCPR/C/GC/36 (2019) at 13.

69 *Environment Act*, RSY 2002, c 76, s 6 [*Environment Act*].

70 *Environmental Quality Act*, CQLR c Q-2, s 19.1 [*Environmental Quality Act*].

provided by law."[71] However, the right is not recognized at the federal level,[72] nor has it been read into the Constitution[73]—though the SCC has acknowledged it, without elaborating, on occasion.[74]

While rights like the right to a healthy environment would apply to the general public, environmental rights can also be specific to Indigenous peoples. For example, article 29 of *UNDRIP*—now part of the aforementioned *UNDRIP Act*—provides that "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources."[75] It bears repeating that much about the *UNDRIP Act* remains uncertain. The numbered provisions merely commit Canada to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration" and, more specifically, to "prepare and implement an action plan to achieve the objectives of the Declaration."[76] This language implies that further steps are needed to operationalize the right contained in article 29 before it can have the effects contemplated below. Thus, for now, this paper continues on the assumption that legislation of environmental rights is not a moot point.

How might statutory rights interact with the duty to consult and EA? I suggest that they would provide a meaningful check on administrative decision-making as one of the "contextual constraints [that] dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt."[77] In the absence of a treaty, environmental rights may help bridge the gap between asserted rights or title, which currently give rise to the purely procedural protection of the duty to consult, and established rights or title, which are costly and time-consuming to prove. *Ktunaxa Nation* illustrated the remedial lacuna between an unsatisfactory decision-making process and a successful section 35 rights or title claim that would result in enforceable obligations. In the interim, until they established Aboriginal rights or title, the Ktunaxa were faced with the despoliation of the lands that they held to be sacred. However, even where there is a treaty, statutory rights could act as a supplement.

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71 *Quebec Charter of Human Rights and Freedoms*, CQLR c C-12, s 46.1.

72 *Canadian Environmental Protection Act, 1999*, SC 1999, c 33. An amendment was proposed by the House of Commons Standing Committee on Environment and Sustainable Development in 2017 and rejected by the federal government: Sara Bagg & Katie Sykes, "Human Rights and Animal Rights" in William Tilleman et al, *Environmental Law and Policy*, *supra* note 32, 575 at 586.

73 Proponents have argued that environmental rights can be located in the *Charter*: David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at 176–185; Nathalie Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation Under the *Canadian Charter's* Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vt L Rev 689 at 714–767. Similar arguments have been made in litigation: *La Rose v Canada*, 2020 FC 1008 (granting motion to strike *Charter* claim under ss 7 and 15(1)); *Misdzi Yikh v Canada*, 2020 FC 1059 (granting motion to strike); and *Mathur v Ontario*, 2020 ONSC 6918 (dismissing motion to strike).

74 *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55, 24 OR (3d) 454.

75 *UNDRIP Act*, *supra* note 44, Schedule, art 29.

76 *Ibid*, ss 5, 6.

77 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 90 [*Vavilov*].

Specifically, statutory rights could provide protection to lands or waters that happen to be culturally or economically significant to an Indigenous community. Such protection might have made a difference, for example, in the two *Prophet River First Nation v Canada (Attorney General)* cases, which proceeded in tandem through the British Columbia and Federal Courts.[78] The Prophet River First Nation ("PRFN") unsuccessfully challenged the approval of a hydroelectric dam, the construction of which is ongoing and will eventually flood significant tracts of Treaty 8 territory.[79] The dam was greenlighted despite the finding that the project would have "significant adverse environmental effects" within the meaning of the *CEAA 2012*—including effects on Indigenous peoples' ability to use the land for traditional purposes.[80] The government had decided that these effects were "justified in the circumstances" under section 54(2) of the Act.[81] There was no possibility of further consultation, as the process was judged to have been adequate.[82] Both the British Columbia Court of Appeal and the FCA rejected the PRFN's remaining argument that the government was required to determine whether the dam's impact would constitute an unjustified infringement of its treaty rights.[83]

The legislation of environmental rights would create a "floor" of entitlements with which decision-makers would have to engage. It is true that the *IAA*, with its explicit mentions of health and sustainability,[84] would have called for a more rigorous assessment than that which occurred under the *CEAA 2012* and gave rise to the *Prophet River* litigation. Still, health and sustainability are only factors to be balanced against the various others in the Act, rather than actionable commitments.

Environmental rights would have bolstered the PRFN's claim for additional consultation and—more importantly—accommodation, because there would have been standalone protection for the land being flooded. Significantly, in cases where there is no treaty, statutory rights would apply regardless of the "strength of the case supporting the existence of the right or title."[85] In *Haida Nation*, the SCC held that the consultation and accommodation required varies with the circumstances. However, an environmental right will always require accommodation, no matter where the claim falls on the *Haida Nation* spectrum and even where it is said to be

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78 *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15, leave to appeal denied, 2017 CanLII 40511 (SCC) [*PRFN FCA*]; *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58, leave to appeal denied, 2017 CanLII 40513 (SCC) [*PRFN BCCA*].

79 *PRFN FCA*, *supra* note 78 at para 7; Andrew Kurjata & Meera Bains, "Site C dam budget nearly doubles to $16B, but BC NDP forging on with megaproject" *CBC News* (25 February 2021), online: <www.cbc.ca/news/canada/british-columbia/site-c-announcement-friday-1.5928719> [perma.cc/24CM-EGTD].

80 *PRFN FCA*, *supra* note 78 at para 5.

81 *Ibid*.

82 *PRFN BCCA*, *supra* note 78 at para 67.

83 *Ibid* at para 33; *PRFN FCA*, *supra* note 78 at para 74. See also *Mikisew Cree 2005*, *supra* note 37 at paras 31, 59 (where the SCC held that not every "taking up" of lands by Canada under Treaty 8 would require a *Sparrow* justification analysis). But see the clarification of the standard for infringement in *Yahey*, *supra* note 31 at paras 499–543 and the discussion in Hamilton & Ettinger, *supra* note 37.

84 *IAA*, *supra* note 3, s 22(1)(a)–(h).

85 *Haida Nation*, *supra* note 5 at para 39.

"dubious or peripheral."[86] In other words, the right would fix a baseline for project approvals. At the very least, the government would have to demonstrate that it took steps to address, in a substantive manner, concerns about the activity's impact on the environment.

To be clear, my argument is not that statutory environmental rights would be a panacea, nor that they can act as substitutes for constitutional rights. Legislation is easily repealed or amended, and the SCC has held that the legislative process itself is not subject to the duty to consult.[87] Despite these shortcomings, I believe that they could supplement the duty to consult and EA framework by constituting part of the "constellation of law" that would inform a decision.[88]

So far, I have spoken generally about environmental rights, advocating for their belonging in that constellation without indicating their precise location. They could be incorporated directly into regulatory statutes like the *IAA* and *Canadian Environmental Protection Act*. Alternatively, they could be written into separate legislation, like Ontario's *Environmental Bill of Rights*.[89]

Another wrinkle that must be ironed out is the procedural mechanism that would allow rights-holders to claim relief. Would it be broadly phrased like section 24(1) of the *Charter*, which allows anyone whose rights or freedoms have been infringed to "apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances"?[90] Or would it be more structured and tailored to the EA context?

Potential models include the statutes mentioned at the top of this section: (i) Yukon's *Environment Act*, which provides a right of action to everyone who has reasonable grounds to believe that "a person has impaired or is likely to impair the natural environment" or that the Yukon government has "failed to meet its responsibilities as trustee of the public trust to protect the natural environment";[91] and (ii) Quebec's *Environmental Quality Act*, which gives Superior Court judges in the province the power to grant injunctions to prevent breaches of section 19.1.[92] However, even if a means of enforcement were set out in legislation, the question of how the right should interact with administrative procedures would remain.

These questions do not have straightforward answers and, therefore, warrant more fulsome consideration in another forum. However, the premise that statutory environmental rights have a gap-filling role to play in this area of law should not be controversial, particularly in light of the disappointing—from the perspectives of sustainability and reconciliation under section 35—outcome of the *Prophet River* appeals.

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86 *Ibid* at paras 37, 43–45.

87 *Mikisew Cree 2018*, *supra* note 64 at paras 50 (Karakatsanis J), 144 (Brown J, concurring), 171 (Rowe J, concurring). But see para 92 (Abella J, concurring in the result but dissenting on this point).

88 *Vavilov*, *supra* note 77 at para 105.

89 *Environmental Bill of Rights, 1993*, SO 1993, c 28 (I note, in passing, that the "right to a healthful environment" is in the Preamble to the legislation but not any of its numbered provisions).

90 *Charter*, *supra* note 58 at s 24(1).

91 *Environment Act*, *supra* note 69 at s 8.

92 *Environmental Quality Act*, *supra* note 70 at s 19.2.

B. Judicial Review

As shown in the previous two sections, many of the disappointments illustrated by the case law are attributable to the legislative schemes within which administrative actors operate, rather than to the courts. These schemes favour flexibility, leaving the balancing of competing factors to frontline decision-makers and allowing Canadian governments to move forward despite lingering disagreements between them and other stakeholders. That said, courts have also contributed to the attenuation of section 35 by adopting a deferential posture in reviewing government decisions.

Deference has principled rationales: respect for the legislature's choice to delegate decision-making authority; recognition of non-judicial decision-makers' expertise and proximity to the evidence; and an acknowledgement that administrative proceedings are often more accessible than judicial proceedings.[93] Tying these rationales together is the notion that law is not the sole province of judges—i.e., that administrative actors may take part in applying and shaping it. A corollary of this notion is courts' increasing comfort with, or toleration of, statutory decision-makers deciding not only "ordinary" legal questions but also constitutional matters.[94]

This trend has resulted in an elision of administrative and constitutional law, or what is sometimes referred to by scholars as "administrative constitutionalism."[95] For example, the SCC has moved away from the *Oakes* justification framework[96] when dealing with individual state decisions that engage the *Charter*, instead conducting reasonableness review.[97]

Arguably, an analogous development has occurred in the duty to consult context. The default position is now that the determination of the scope of the duty is reviewed on the correctness standard, while the determination of whether the duty has been fulfilled is reviewed on the reasonableness standard.[98] In *Ktunaxa Nation*, the majority explained: "[a] decision that

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93 *Vavilov*, *supra* note 77 at para 29. I leave to other commentators the question of whether all decision-makers are equally entitled to deference: Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult" (2015) 65:4 UTLJ 382; Joseph Robertson, "Administrative Deference: The Canadian Doctrine That Continues to Disappoint" (2018) at 26–30, online: *CanLII* <www.canlii.ca/t/stvr> [perma.cc/3WWE-5K4F].

94 *Carrier Sekani*, *supra* note 16 at para 56; *R v Conway*, 2010 SCC 22 at paras 78–81.

95 Matthew Lewans, "Administrative Constitutionalism and the Unity of Public Law" (2018) 55:2 Osgoode Hall LJ 515.

96 *R v Oakes*, [1986] 1 SCR 103 at 138–140, 53 OR (2d) 71. See also *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, especially Charron J's remarks at paras 15–23.

97 *Doré v Barreau du Québec*, 2012 SCC 12 at paras 33-58. See also *Loyola High School v Quebec*, 2015 SCC 12; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32. In *Doré*, the court maintained that there was "conceptual harmony between reasonableness review and the Oakes framework" (para 57). On that point, see also *Loyola* at para 40.

98 *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 at paras 82–83 [*Ermineskin*].

an adequate consultation and accommodation process occurred is entitled to deference."[99] Therefore, "[a] reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks whether the decision…, on the whole, was reasonable."[100] This kind of review requires, as the FCA put it in *Coldwater First Nation*, "that we refrain from forming our own view about the adequacy of consultation," as "this would amount to what has now been recognized as disguised correctness review, an impermissible approach."[101]

This bifurcation of the duty into questions of scope and adequacy can be said to derive from *Haida Nation*. There, the SCC wrote that while the "existence or extent of the duty … is a legal question" that may require correctness review (to the extent that it is isolable from the facts), "the process itself would likely fall to be examined on a standard of reasonableness."[102] The Court went on: "[s]hould the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable."[103]

However, in a subsequent decision, *Beckman v Little Salmon/Carmacks First Nation*, the SCC appeared to contradict itself, stressing that decision-makers are "required to respect legal and constitutional limits" in exercising their discretion.[104] The majority continued: "In establishing those limits no deference is owed … The standard of review in that respect, *including the adequacy of the consultation*, is correctness."[105] Accordingly, "[a] decision maker who proceeds on the basis of inadequate consultation errs in law."[106] On the other hand, "if there was adequate consultation," then the remainder of the decision should be reviewed for reasonableness.[107]

In a recent paper regarding the impact of *Vavilov* on the duty to consult, Professors Howard Kislowicz and Robert Hamilton argue that *Haida Nation*'s reference to process does not encompass adequacy—thus leaving room for courts to follow *Beckman*, which has been sidelined.[108] Kislowicz and Hamilton state:

> The consultation "process" refers to the procedures and means of consultation and asks whether they were designed in such a way that they *could* permit sufficient consultation

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99 *Ktunaxa Nation*, *supra* note 2 at para 77. However, note that—paradoxically—the SCC gave no deference to the Minister on the freedom of religion question: *ibid* at paras 58–75; Paul Daly, "The Supreme Court of Canada and the Standard of Review: Recent Cases" (11 November 2017), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2017/11/11/the-supreme-court-of-canada-and-the-standard-of-review-recent-cases/> [perma.cc/V5EJ-63GC].

100 *Ktunaxa Nation*, *supra* note 2 at para 77.

101 *Coldwater First Nation*, *supra* note 20 at para 28.

102 *Haida Nation*, *supra* note 5 at paras 61–62.

103 *Ibid* at para 63.

104 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 48 [*Beckman*].

105 *Ibid* [emphasis added].

106 *Ibid*.

107 *Ibid*.

108 Howard Kislowicz & Robert Hamilton, "The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of *Vavilov*?" (2021) 59:1 Alta L Rev 41 at 48.

> to occur. Adequacy of consultation speaks to whether the Crown's consultation as actually carried out was sufficient to discharge its constitutional obligations to consult and accommodate.[109]

If this distinction is maintained, as the authors advocate and as they read *Beckman* as doing, then courts can defer to the decision-maker's choice of procedure while ensuring that the consultation itself is adequate by performing correctness review.[110]

In a brief response to Kislowicz and Hamilton, administrative law scholar Paul Daly asserts that the duty to consult, being procedural, should not be subject to the *Vavilov* framework—which focusses on the substance of decisions—at all.[111] Instead, it should be assessed under a separate framework based on *Haida Nation*, just as procedural fairness is governed by *Baker v Canada (Minister of Citizenship and Immigration)*.[112]

Although Daly's argument is attractive, it is unlikely that the courts would jettison the jurisprudence described above (*Ktunaxa Nation*, *Coldwater First Nation*, etc.). It is more likely that they could be persuaded to rediscover *Beckman*. Moreover, Daly concedes that his proposed avenue would lead to "(more or less) the destination that Kislowicz and Hamilton seek" in that the courts "would have the 'last word' on whether consultation was adequate in all the circumstances."[113]

Meaningful oversight should be the goal of judicial review. There may be different ways to achieve this goal: correctness review, *Haida Nation* and procedural fairness review, or perhaps even "robust" reasonableness review.[114] However, applying *Beckman*—which would allow courts to scrutinize the adequacy of consultation to a greater degree—would be the most direct.

As Kislowicz and Hamilton write, "[consultation] is one process through which constitutional authority and jurisdiction are worked out, and it plays a legitimating function in seeking to mitigate the effects of the most colonial features of Canada's Constitution."[115] In my view, litigants turn to courts for relief because they perceive the latter as enjoying a degree of independence from the executive-legislative apparatus that statutory decision-makers do not share. Consequently, it is important to accept that administrative actors and courts have different roles to play in this sphere. Daly's comments in another piece, on administrative law's relationship to the *Charter*, are apposite—:"Courts and administrative decision-makers need not apply the same analytical frameworks in their respective roles. Indeed, there are good reasons to

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109 *Ibid* at 46 [emphasis in original].

110 *Ibid* at 59–60. The authors also make the case for recognizing adequacy of consultation as one of the "rule of law" exceptions to the presumption of reasonableness established in *Vavilov*: *ibid* at 54–59.

111 Paul Daly, "The Duty to Consult and the Standard of Review: A Suggestion" (26 August 2021), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2021/08/26/the-duty-to-consult-and-the-standard-of-review-a-suggestion/> [perma.cc/8HPJ-E3A8].

112 *Ibid*; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699.

113 Daly, *supra* note 111.

114 *Vavilov*, *supra* note 77 at para 13.

115 Kislowicz & Hamilton, *supra* note 108 at 59.

keep their functions distinct: administrative decision-makers' primary role is the attainment of their statutory objectives, while the courts' primary role is the enforcement of legal values."[116]

While administrative actors may be required—as they are, for example, under the *IAA*—to balance an Indigenous community's claimed rights or title against other considerations, courts are not similarly bound. Applying *Beckman* to a hypothetical project approval shows what a sharper delineation of administrative and judicial roles might look like. A reviewing court would not defer to the decision-maker's assessment of the adequacy of consultation. Adequacy is a "threshold question;"[117] consultation is either adequate or it is not. If the consultation was inadequate, then the decision cannot be upheld. This assessment would be similar to the inquiry that courts already undertake when determining whether a decision-maker has properly answered the question of scope.[118] However, once adequacy has been established, subsequent determinations (e.g., the determination of whether the project is "in the public interest" under the *IAA*) can be subject to reasonableness review.[119] From that point on, with the decision's basic constitutionality having been established, the decision-maker's weighing of the statutory factors and objectives need not be "correct", only "reasonable"—though, under *Vavilov*, a reasonable decision must still be "internally coherent and rational" and "justified in relation to the facts and law that constrain the decision-maker."[120]

To clarify, using the correctness standard does not mean that there would be a single "correct" answer that applies in all cases. The content of the duty will continue to vary with the circumstances, as required by *Haida Nation*, and the form of engagement preferred by the Indigenous community or communities involved.[121] However, the problematic practice of having decision-makers validate the adequacy of their own consultation and deferring to their self-evaluations at the judicial review stage, exemplified by *Ktunaxa Nation*,[122] would be curtailed.

CONCLUSION

The critiques and proposals covered in this paper are instantiations of a simple proposition: that administrative decision-making in the field of EA and consultation must be constrained through legislation and judicial oversight in light of the constitutional character of the duty to consult. The legislative and judicial branches of government have ceded too much ground to the executive and should step back into the picture. Fortunately, they can do so without

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116 Paul Daly, "Modes of Rights Protection III: *Doré v Barreau du Québec*" (15 December 2016), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2016/12/15/modes-of-rights-protection-iii-dore-v-barreau-du-quebec-2012-1-scr-395/> [perma.cc/B7YE-UDAP]. See also *Mikisew Cree 2018*, *supra* note 64 at para 87 (Abella J, concurring).

117 Kislowicz & Hamilton, *supra* note 108 at 58.

118 *Coldwater First Nation*, *supra* note 20 at para 27; *Ermineskin*, *supra* note 98 at paras 82–83.

119 *Beckman*, *supra* note 104 at para 48; Kislowicz & Hamilton, *supra* note 108 at 59–60.

120 *Vavilov*, *supra* note 77 at para 85. Moreover, a decision-maker must demonstrate any institutional expertise and experience through reasons: *ibid* at para 93.

121 Drake, "Trials and Tribulations", *supra* note 41 at 214–215 (highlighting two Anishinaabek legal principles relevant to consultation and giving the specific example of the Kitchenuhmaykoosib Inninuwug First Nation's consultation protocol).

122 *Ktunaxa Nation*, *supra* note 2 at para 82.

rewriting the law from scratch. Changes such as the revision of EA statutes, the entrenchment of environmental rights and the selective curtailment of deference are highly feasible. Most importantly, they would re-centre section 35 in the legal discourse and thereby effectuate what I see as *Haida Nation*'s intent—to require that discretionary decisions comply with, and indeed nourish, the Constitution.

I want to emphasize that these relatively simple suggestions are not ends in themselves. As I have said throughout this paper, none of my suggestions—alone or together with the others—promise to provide a complete answer to the myriad issues that beset the juridical relationship between Indigenous peoples and the Crown. However, they can serve as a means to nudge the law away from condoning unilateral action by the state and towards the ideal of responsive, responsible, and reconciliatory decision-making.

ARTICLE

CM CALLOW V ZOLLINGER, RECONCEPTUALIZED THROUGH THE TORT OF NEGLIGENT MISREPRESENTATION

Vanessa Di Feo *

CITED: (2022) 27 *Appeal* 103

ABSTRACT

This article argues that *CM Callow Inc v Zollinger* was wrongly decided, and that the Supreme Court of Canada unnecessarily expanded the duty of honest contractual performance established in *Bhasin v Hrynew.* In this decision, the Supreme Court applied a contract law analysis to a fact scenario that did not entirely call for it. This is to say that the contract that Mr. Callow hoped to incentivize through freebie work never came into existence, so it should not have been assessed through the lens of the duty of honesty. This article argues that this approach was erroneous, given Canadian contract law's strong stance against imposing pre-contractual duties of good faith. While the article agrees that the duty of honesty was applicable to the *ongoing* contract between Mr. Callow and Baycrest, it submits that the tort of negligent misrepresentation should have addressed Baycrest's statements in relation to the potential future renewal. Such an analysis would have allowed for greater clarity in Canadian contract law, and it would have allowed for a more pronounced dividing line between contracting parties' disclosure obligations and the duty of honesty. As a result, this article predicts that the Supreme Court's decision will perpetuate confusion in the law pertaining to good faith and contracting parties' disclosure obligations. Further, this decision is likely to have a chilling effect on contracting parties' communications, given the justified fear of painting a misleading picture for the other side *vis-à-vis* potential future endeavours.

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INTRODUCTION

CM Callow v Zollinger has pushed Canadian contract law in a new direction.[1] At the heart of *Callow* lies a key legal tension: to what extent can contracting parties withhold information without violating the duty of honesty? *Callow* not only tested the contents of this duty, but also its relationship with a potential duty to disclose. Given that *Callow* involved more than just contractual issues, it also cast doubt on contract law's adequacy to address rights and obligations pertaining to contracts that do not yet exist.

This article argues that the Supreme Court of Canada (the "SCC") came to the wrong result in *Callow*. Rather, the analysis should have distinguished two elements: (1) the ongoing winter agreement between the parties (the "Current Contract"), and (2) the agreement that Mr. Callow hoped to incentivize, but which never came into existence (the "Future Contract"). Given that there is no pre-contractual duty of good faith in Anglo-Canadian contract law,[2] the SCC should have resolved the issues surrounding the Future Contract using the tort of negligent misrepresentation. By imposing contractual rights and obligations in a context that should not have been entirely governed by contract law, the SCC has perpetuated confusion about the applicability and scope of the duty of good faith.

While it has garnered significant discussion,[3] the literature has not attempted to reconceptualize *Callow* using tort law. This article aims to fill this scholarly gap by proposing a clearer way to address comparable cases without further tangling Anglo-Canadian contract law. Fundamentally, it calls for caution, given the potential for "*ad hoc* judicial moralism or 'palm tree' justice."[4]

This article is divided into two parts. First, it delves into *Callow*'s role in advancing good faith in Anglo-Canadian contract law. Second, it argues for a two-part analysis that distinguishes between the Current and Future Contracts. Regardless of the legal avenue undertaken, Mr. Callow had a weak legal position. His success at trial was exactly the kind of judicial moralism that Justice Cromwell (as he then was) sought to avoid in *Bhasin.*[5]

I. *CM CALLOW INC V ZOLLINGER:* PERPETUATING CONFUSION ABOUT GOOD FAITH

The decision of the SCC in *Callow* may have provided more questions than answers about good faith, the duty of honesty, and non-disclosure. Citing *Bhasin,* Justice Kasirer emphasized that the duty of honesty "does not impose a duty of loyalty or of disclosure or require a party

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1 2020 SCC 45, [2020] SCJ No 45 [*Callow*].

2 *Martel Building Ltd v Canada*, 2000 SCC 60 [*Martel*].

3 See, for example, Daniele Bertolini, "Toward a Framework to Define the Outer Boundaries of Good Faith Contractual Performance" (2021) 58:3 Alta L Rev 573; Stephen Waddams, "Good Faith in the Supreme Court of Canada" in Michael Furmston, ed, *The Future of the Law of Contract* (Milton: Taylor and Francis, 2020) 28 (discussing the appellate decision); Brandon Kain, "A Matter of Good Faith: The Treatment of *Bhasin v Hrynew* by Appellate Courts (Part I)" (2020) 51:1 Advocates' Q 1.

4 *Bhasin v Hrynew,* 2014 SCC 71, [2014] 3 SCR 494 at para 70 [*Bhasin*].

5 *Ibid.*

to forego advantages flowing from the contract."[6] Yet, it is difficult to square this statement—which aligns with *Bhasin* in theory—with the outcome in *Callow*. *Bhasin* concerned a case in which Can-Am outwardly lied to Bhasin.[7] In *Callow,* however, the SCC expanded *Bhasin's* message by punishing Baycrest for painting a misleading picture.[8] This shows the law's trajectory in a more interventionist direction that aligns with the civil law.[9] Good faith has evolved from precluding outright lies to knowingly misleading behaviour. The latter is difficult to define without imposing some level of disclosure. As such, it remains unclear to what extent (and how long) parties can choose to remain silent.

A. Background

Callow concerned a long-term winter maintenance agreement between Mr. Callow, the owner of a snow removal and landscaping business, and Baycrest, a group of condominium corporations.[10] Pursuant to Clause 9 of the Current Contract, Baycrest was entitled to terminate that agreement upon providing 10 days' notice if Mr. Callow failed to give satisfactory services or for any other reason.[11] In March or April of 2013, Baycrest's Joint Use Committee ("JUC") voted to terminate the Current Contract.[12] Baycrest did not immediately inform Mr. Callow following this decision.[13] Instead, it waited until September 2013 to give Mr. Callow 10 days' notice.[14]

Meanwhile, Mr. Callow had come to believe that his contractual future with Baycrest was secure, that the contract would be renewed, and that Baycrest was satisfied with his services. [15] His belief was supported by several brief exchanges with two JUC members.[16] Further, Mr. Callow "performed work above and beyond [the] summer maintenance services contract, even doing freebie work,"[17] to incentivize a renewal.[18] As a result of the termination and his reliance on the JUC members' comments, Mr. Callow did not explore other opportunities and lost significant income following the termination.[19]

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6 *Bhasin, supra* note 4 at para 73.
7 *Ibid* at para 30.
8 *Callow, supra* note 1 at para 40.
9 See e.g. "The Common and Civil Law Traditions" online (pdf): *Berkeley Law* <https://www.law.berkeley.edu> [perma.cc/5548-7JXY].
10 *Callow, supra* note 1 at paras 6–7.
11 *Ibid* at para 8 (clause 9 is not publicly available, nor is the contract itself included in the parties' materials before the SCC).
12 *Ibid* at para 10.
13 *Ibid* at para 14.
14 *Ibid.*
15 *Ibid* at para 11.
16 It is worth noting also that both JUC members were aware of Mr. Callow's belief that the contract would be renewed: *ibid* at para 13.
17 *CM Callow Inc v Zollinger,* 2020 SCC 45 (Factum of the Appellant at para 42) [*Callow* FOA].
18 *Callow, supra* note 1 at para 12.
19 *Ibid* at para 15.

At first instance, Justice O'Bonsawin stated that "this is not a simple contract interpretation case."[20] Even though Baycrest abided by the unambiguous termination clause in the Current Contract, she held that it acted in bad faith for two key reasons. First, Baycrest withheld its decision to terminate the Current Contract to ensure that Mr. Callow would perform his services throughout the summer.[21] Second, Baycrest continuously represented that the contractual relationship was not in danger, and allowed Mr. Callow to complete extra tasks to bolster the chances of renewal.[22] The communications between the parties from March or April until mid-September 2013 were especially damaging to Baycrest's legal position.[23] Justice O'Bonsawin found that these conversations—coupled with Baycrest's delay in disclosing the termination—deceived Mr. Callow and deprived him of a fair opportunity to protect his business interests.[24]

The Court of Appeal for Ontario allowed Baycrest's appeal.[25] The court determined that Justice O'Bonsawin improperly expanded the duty of honesty, and that Baycrest owed Mr. Callow nothing beyond the 10-day notice period.[26] Protective of the central tenets of Anglo-Canadian contract law, the court maintained that "[the SCC] was at pains to emphasize that the concept of good faith was not to be applied so as to undermine longstanding contract law principles, thereby creating commercial certainty."[27] While Baycrest may have failed to act honourably, the court refused to find that its behaviour rose "to the high level required to establish a breach of the duty of honest performance."[28] The court emphasized that the duty of honesty pertains to matters *directly linked* to a contract's performance—not the parties' "freedom concerning future contracts not yet negotiated or entered into."[29] As such, the communications between the JUC members and Mr. Callow about the Future Contract did not preclude Baycrest from exercising its right to terminate the Current Contract.[30]

B. The Decision at the SCC: A Divided Court

The SCC allowed Mr. Callow's appeal. Mr. Callow's legal victory is likely to perpetuate confusion about good faith and non-disclosure. Not only did the decision of the SCC comprise three sets of reasons, but the majority's comparative analysis failed to clarify the contracting parties' disclosure obligations in relation to the duty of honesty. The result is an expansionist approach that effectively applies contractual rights and obligations to *future* contracts. This section reviews each set of reasons for judgment.

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20 *CM Callow Inc v Tammy Zollinger,* 2017 ONSC 7095 at para 58 [*Callow* ONSC].
21 *Ibid* at para 65.
22 *Ibid.*
23 *Ibid.*
24 *Ibid* at para 67.
25 *CM Callow Inc v Zollinger,* 2018 ONCA 896 [*Callow* ONCA].
26 *Ibid* at para 8.
27 *Ibid* at para 11.
28 *Ibid* at para 16.
29 *Ibid* at para 18.
30 *Ibid.*

i. The Majority Reasons for Judgment

Writing for the majority, Justice Kasirer found that the Court of Appeal should not have interfered with Justice O'Bonsawin's findings.[31] He wrote that Baycrest breached its duty to act honestly because it knowingly misled Mr. Callow into believing that the Current Contract would not be terminated.[32] Justice Kasirer's analysis focussed on the *manner* in which Baycrest exercised the termination, finding that it "breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied."[33] He continued that "[n]o contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith."[34] To illustrate the link between the dishonest behaviour and Baycrest's exercise of Clause 9, Justice Kasirer relied upon Québec civil law's notion of abuse of contractual rights.[35] The appropriateness of this "comparative exercise" is a topic left for another article; however, the use of this civilian doctrine has attracted criticism.[36]

In terms of contracting parties' disclosure obligations, Justice Kasirer noted that the duty of honesty extends beyond precluding outright lies to include "half-truths, omissions, and even silence, depending on the circumstances."[37] According to Justice Kasirer, if a party is led to believe that their counterparty is satisfied with their work and that their ongoing contract is likely to be renewed, then it is reasonable for this party to infer that the contractual relationship is in good standing.[38] In the words of Justice Kasirer:

> While the duty of honest performance is not to be equated with a positive obligation of disclosure, this too does not exhaust the question as to whether Baycrest's conduct constituted, as a breach of the duty of honesty, a wrongful exercise of the termination clause. Baycrest may not have had a free-standing obligation to disclose its intention to terminate the contract before the mandated 10 days' notice, *but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. In circumstances where a party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct the false impression created through its own actions.*[39]

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31 *Callow, supra* note 1 at para 5.

32 *Ibid* at para 40.

33 *Ibid* at para 5.

34 *Ibid* at para 48.

35 *Ibid* at paras 63ff.

36 *Ibid* at paras 121ff (Justice Brown's concurrence strongly criticizes Justice Kasirer's use of the doctrine). See generally Catherine Valcke, "Bhasin v Hrynew: Why a General Duty of Good Faith Would Be Out of Place in English Canadian Contract Law" (2019) 1:1 J Commonwealth L 65 (on the subject of civilian concepts being imported into Anglo-Canadian contract law); Rosalie Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019) 1:1 J Commonwealth L 1.

37 *Callow, supra* note 1 at para 91.

38 *Ibid* at para 37 (as will be discussed later in this article, this approach overlooks the text of the contract, which explicitly allowed for termination regardless of whether there was cause).

39 *Ibid* at para 38 [emphasis added].

Given the behaviour of Baycrest, Justice Kasirer imposed an obligation to correct Mr. Callow's mistaken impression because it knowingly painted a misleading picture.[40]

While this finding rewards the sympathetic plaintiff, it will negatively impact commercial contexts for three reasons. First, contracting parties will be more alive to the manner in which their counterparties will construe their actions and communications. One could counter that this is actually a positive outcome: contracting parties will likely be more precise and honest in their conversations, given the amplified potential for liability. The response is that a key value in Anglo-Canadian contract law is the freedom to pursue economic self-interest. In the business setting, this decision has the potential to chill communications between contracting parties.

Second, the majority's analysis delves into the parties' subjective intentions. Given Anglo-Canadian contract law's focus on the parties' objective intentions, this is problematic. The reasoning of the majority crosses the line into the civilian approach, which emphasizes the parties' subjective and objective intentions.[41] It also begs the question of who might impugn a corporation, what kind of behaviour might lead a party to come to a certain conclusion and to what extent such an inference might be reasonable. In *Callow*, Mr. Callow spoke with only 20 percent of Baycrest's JUC.[42] During those casual conversations, these individuals did not guarantee that Mr. Callow's contract would be renewed, nor did they officially speak on behalf of Baycrest.[43] These communications consisted of short emails and conversations "throughout the property."[44] Although there was objective email evidence to prove Baycrest's knowledge of Mr. Callow's mistaken impression about the agreement, this will only continue the slippery slope of subjective analysis that started with *Bhasin*.[45]

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40 *Ibid.*

41 See e.g., on Québec civil law: François Gendron, *L'interpretation des contrats,* 2nd ed (Montréal: Wilson & Lafleur, 2016), ch 5 at 76 [Gendron]: "Dans tout contrat, il y a donc un élément subjectif, qui tient à ce que les parties ont déclaré, et un élément objectif, qui vient le compléter à titre impératif, et qui tient à ce qui en découle, *ipso jure,* sans nécessiter le soutien de la volonté des parties, suivant les usages, l'équité ou la loi." See also *Jean Coutu Group (PJC) Inc v Canada (Attorney General)*, 2016 SCC 55.

42 *Callow, supra* note 1 at para 11.

43 *CM Callow Inc v Zollinger,* 2020 SCC 45 (Factum of the Respondent at para 42) [*Callow* FOR].

44 *Callow, supra* note 1 at paras 9, 13, 14.

45 Numerous scholars have commented on the disconnect between the objective and the subjective in *Bhasin*, see e.g. Stephen Waddams, "Good Faith in the Supreme Court of Canada" in Michael Furmston, ed, *The Future of the Law of Contract* (London: Informa Law from Routledge, 2020) 28 (Waddams notes that "it is a little surprising that the court should go to such lengths to establish a principle of good faith only to declare that the motives of the parties are irrelevant" at 41). Traditionally, the common law of contract has remained loyal to contractual interpretation based on the parties' objective intentions, see Lord Hoffman, "The Intolerable Wrestle with Words and Meanings" (1997) 114 S African LJ 656 (Lord Hoffman himself opined that "interpretation according to subjective intent is a logical contradiction" at 661). Anglo-Canadian contract law has illustrated its loyalty to its English roots in this sense, see *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129, 161 DLR (4th) 1 at para 54. The irony is that morally infused doctrines like good faith inherently imply a subjective element, see Gendron, *supra* note 90 at 76; Vincent Karim, *Les Obligations*, v1, 4th ed (Montréal: Wilson & Lafleur, 2015) at 76 at para 194 (Québec has recognized this tension and recognizes both a subjective and objective element of good faith).

Third, the breach in *Callow* was not actually directly linked to the performance of the ongoing contract.[46] Rather, the communications between Mr. Callow and the JUC members pertained to the Future Contract.[47] Mr. Callow interpreted weak signals that he himself sought out. By finding that Baycrest breached the duty of honesty in relation to a non-existent contract, the SCC blurred the boundary between contractual and pre-contractual performance. The exchanges in *Callow* did not constitute formal negotiations. Rather, they were casual conversations that preceded the potential Future Contract. As such, the SCC's decision triggers questions about whether there might now be a duty to negotiate in good faith in Anglo-Canadian contract law, in addition to any corresponding disclosure requirements.[48]

ii. The Concurring Reasons for Judgment

Justice Brown supported the outcome in *Callow.* He stated that, although contracting parties do not have a positive duty to disclose material information, "a contracting party may not create a *misleading picture* about its contractual performance by relying on half-truths or partial disclosure."[49] Even though Baycrest argued that its representations related only to the renewal of the Future Contract, Justice Brown deferred to the trial judge's conclusions.[50]

Nonetheless, Justice Brown opposed the use of "comparative exercise[s]" where domestic law is sufficient to resolve a dispute.[51] He argued that it was inappropriate to resort to the civilian doctrine of abuse of rights because the applicable common law principles were "determinative and settled."[52] *Callow* presented an opportunity to develop good faith and the duty of honesty (in addition to other potential legal avenues[53]) to resolve the issues at play.

Justice Brown also criticized the majority's decision as eliding the distinction between the duty to exercise a contractual discretion in good faith and the duty of honesty.[54] In his reasons, Justice Kasirer asserted that "the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by

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46 *Callow*, *supra* note 1 at para 215.

47 *Ibid* at para 214.

48 In *Martel*, *supra* note 2 at para 73, the SCC recognized that the duty to bargain in good faith has not been recognized in Canadian law to date: para 73. In *Bhasin, supra* note 4, the SCC formally established the organizing principle of good faith contractual performance. It appears that the principle is restricted to contractual performance as it stands now, and that there is no common law duty to negotiate a contract in good faith. There are exceptions where such a duty may arise, but this is broadly on the basis of certain special relationships like employment, insurance, and tendering contexts. See also Joshua Chalhoub & Aleksandar Tomasevic, "Good Faith Bargaining: The Law Governing Contract Negotiations" (Paper delivered at the 39th Annual Civil Litigation Conference, Mont Tremblant, Quebec, 15–16 November 2019).

49 *Callow, supra* note 1 at para 132 [emphasis added].

50 *Ibid* at para 135.

51 *Ibid* at paras 155ff.

52 *Ibid* at para 156.

53 Several scholars have observed that the common law can rely on other doctrines to achieve similar outcomes as the principle of good faith: Valcke, *supra* note 36; Krish Maharaj, "An Action on the Equities: Re-Characterizing *Bhasin* as Equitable Estoppel" (2017) 55:1 Alta L Rev 199.

54 *Callow, supra* note 1 at para 176.

fixing … on the wrongful exercise of a contractual prerogative."[55] Justice Brown disagreed with this proposition, arguing that these two duties should be kept analytically distinct:

> *We are bound by Bhasin to treat the duty of honest performance as conceptually distinct from the duty to exercise discretionary powers in good faith*... This is not simply a matter of *stare decisis* and incremental legal development… there is also the practical concern that blurred and ambiguous treatment of these two duties has a meaningful impact on the outcome for contracting parties. Contrary to the majority's suggestion, *the wrong at issue in each category of cases is distinct, and the damages available differ accordingly.* The award for a breach of the duty of honest performance addresses the effect of the dishonesty. In contrast, the award for a breach of the duty to exercise discretion in good faith addresses the effect of the exercise of discretion itself. *Placing both duties under the umbrella of the "wrongful exercise of a contractual right" obscures these distinctions and thus represents an unfortunate departure from* Bhasin.[56]

Given the disagreement between the judges about how to conceptually distinguish both duties, there is a need for clarification in the law following *Callow*.

With regards to damages, Justice Brown found that the duty of honesty vindicates the plaintiff's reliance interest, rather than their expectation interest.[57] He reasoned that the breaching party should be liable to compensate the injured party "for any foreseeable losses suffered in reliance on the misleading representations."[58] The problem in this case was not a failure to perform the contract. Rather, Baycrest harmed Mr. Callow by making dishonest extra-contractual misrepresentations concerning that performance, upon which Mr. Callow detrimentally relied.[59] So, the issue did not pertain to the lost value of performance, but rather to Mr. Callow's detrimental reliance upon dishonest misrepresentations.[60] Overall, Justice Brown's concurring reasons for judgment emphasized that the majority's expansive approach—and its corresponding damages analysis—will obscure the scope and operation of the duty of honesty.

iii. The Dissenting Reasons for Judgment

In her dissenting reasons, Justice Côté opined that the appeal should be dismissed:

> Absent a duty of disclosure... a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has materially contributed to it… Parties that prefer not to disclose certain info – *which they are entitled not to do* – are not required to adopt a new line of conduct in their contractual relationship simply because they chose silence over speech.[61]

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55 *Ibid* at para 51.
56 *Ibid* at para 181 [emphasis added].
57 *Ibid* at para 145.
58 *Ibid.*
59 *Ibid* at para 142.
60 *Ibid.*
61 *Ibid* at paras 201 – 202 [emphasis added].

Justice Côté interpreted the facts as meaning that Baycrest did not knowingly mislead Mr. Callow. According to her, none of the conversations between Baycrest's representatives and Mr. Callow guaranteed that Mr. Callow's contract would be renewed.[62] In any case, she found that the misrepresentations did not relate directly to the performance of the Current Contract.[63] As such, Justice Côté argued that Baycrest should not be found liable.[64]

Justice Côté's dissent serves to warn lower courts dealing with the duty of honesty and its relationship with potential disclosure obligations. Her comments pertaining to the Current Contract are especially instructive. In particular, she emphasized that a contracting party is entitled to withhold its decision to terminate before the requisite notice period.[65] This remains loyal to the law as stated in *Bhasin,* where Cromwell J quoted *United Roasters, Inc v Colgate-Palm Olive Co*:

> … there is very little to be said in favor of a rule of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. *It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do.*[66]

Justice Cromwell noted that "the situation is quite different" in cases where one of the parties has been actively misled or deceived.[67] However, this qualification is insufficient to justify the finding in *Callow.* Justice Côté's interpretation of the facts, in addition to the Court of Appeal's, would suggest that there was no actively misleading behaviour sufficient to rise to the level of dishonesty in this case. In accordance with *United Roasters*, Baycrest said nothing about the Current Contract (and gave the requisite 10-day notice). Accordingly, it should not have been punished because it had no contractual duties in relation to the Future Contract.

Ironically, when Justice Côté questioned Mr. Callow's counsel about this case, he conceded that it was acceptable for a party to withhold its decision to terminate as long as the party does not say anything at all.[68] According to Mr. Callow's counsel, Baycrest should be held liable because the JUC members told a half-truth and painted a misleading picture for Mr. Callow.[69] This position overlooked the fact that Baycrest's communications did not refer to

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62 *Ibid* at para 217.

63 *Ibid* at para 215.

64 *Ibid* at para 216.

65 *Ibid.*

66 *United Roasters Inc v Colgate-Palmolive Co*, 649 F (2d) 985 (4th Cir 1981) [*United Roasters*] cited in *Bhasin, supra* note 4 at para 87 [emphasis added].

67 *Ibid.*

68 "Supreme Court Hearings: Webcast of the Hearing on 2019-12-06" (6 December 2019) at 00h:24m:46s, online (video): *SCC* <www.scc-csc.ca/case-dossier/info/webcastview-webdiffusion-vue-eng.aspx?cas=38463&id=2019/2019-12-06--38463-38601&date=2019-12-06> [perma.cc/6WTT-64RC] [*Callow* SCC Hearing].

69 *Ibid.*

the Current Contract. Justice Côté's observations buttress this point:

> … *A party that intends to end an agreement does not have to convey hints in order to alert his counterparty that their business relationship is in danger* … the trial judge also did not consider that the active deception had to be directly linked to the performance of the contract. It is clear that the representations she found had been made by Baycrest were not directly linked to the performance of the *winter agreement*.[70]

Further, Justice Côté argued that extending the duty of honesty beyond a simple requirement not to lie would undermine commercial certainty.[71] Silence "cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak."[72]

II. OVERVIEW OF THE LAW OF GOOD FAITH CONTRACTUAL PERFORMANCE

Before delving into this article's argument, it is important to provide an overview of the organizing principle of good faith in contractual performance, in addition to the corresponding duty of honest performance and the duty to disclose.

A. The Organizing Principle of Good Faith

Prior to *Bhasin,* the law pertaining to good faith developed in a "piecemeal"[73] manner. Anglo-Canadian contract law resisted acknowledging such a generalized doctrine.[74] Specifically, the courts recognized the need for good faith where the parties' contractual relationship was "subject to a carefully circumscribed requirement of good faith performance."[75] Thus, good faith generally applied in three scenarios: (a) contracts imposing a duty to cooperate; (b) contracts limiting the exercise of discretionary powers in the contract; and (c) contracts precluding parties from acting to evade contractual duties.[76] Essentially, the courts justified the use of good faith by addressing a heightened need for fairness in certain relationships.

To clarify the confused legal landscape and bring Anglo-Canadian contract law in line with its key trading partners, the SCC recognized an organizing principle of good faith as an incremental step in the law.[77] According to Justice Cromwell, "[t]hat organizing principle is simply that parties must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily."[78] Yet, this principle has not been so simple to apply in practice,

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70 *Callow, supra* note 1 at para 205 [emphasis added].

71 *Ibid* at para 195.

72 *Ibid* at para 200.

73 Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987) at 169.

74 See generally *Transamerica Life Canada Inc v ING Canada Inc*, 2003 CanLII 9923 (ONCA), 68 OR (3d) 457; *Mesa Operating Limited Partnership v Amoco Canada Resources Ltd,* 1994 ABCA 94, 46 ACWS (3d) 644.

75 Joseph T Robertson, "Good Faith as an Organizing Principle in Contract Law: *Bhasin v Hrynew* – Two Steps Forward and One Look Back" (2015) 93 Can Bar Rev 809 at 811.

76 John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2012) at 839.

77 *Bhasin, supra* note 4 at para 33.

78 *Ibid* at para 63.

and it has attracted mixed criticism in the legal world. In one camp, *Bhasin* has been considered "a huge and welcome step in that it rationalizes a heretofore hopelessly confused area of law."[79] In the other, it has been perceived as potentially generating "an unforeseen host of discrete obligations, and … seems inescapably to pose a significant threat to freedom of contract."[80]

In response to *Bhasin,* many Canadian common law courts have struggled to come to terms with an organizing principle that challenges key tenets of Anglo-Canadian contract law, such as freedom and sanctity of contract. For example, in *Addison Chevrolet Buick GMC Limited et al v General Motors of Canada Limited et al,* the Ontario Superior Court of Justice refused to allow a "radical extension" of the law of contractual interpretation:

> The duty of good faith performance of contractual obligations recently affirmed by the Supreme Court of Canada in *Bhasin* ... [is] not a licence... to invent obligations out of whole cloth divorced from the actual terms of the contract between the parties ...[81]

The court's statements illustrate a widespread concern about protecting the written terms of the contract. For example, in *Styles v Alberta Investment Management Corporation*, the Alberta Court of Appeal stated that "*Bhasin* is not to be used as a tool to rewrite contracts and award damages to contracting parties that the court regards as being 'fair', even though they are clearly unearned under the contract."[82] This demonstrates the judicial fear of using good faith to rewrite contractual terms with the benefit of hindsight.

B. The Duty of Honesty and the Duty to Disclose

In *Bhasin,* the SCC also established the duty of honesty.[83] Justice Cromwell defined this duty as meaning "simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."[84] With regard to the dividing line between honest performance and a potential duty to disclose, Justice Cromwell clarified that there is no positive duty to disclose in Anglo-Canadian contract law:

> Contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their

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79 Geoff R Hall, "*Bhasin v Hrynew*: Towards an Organizing Principle of Good Faith in Contract Law" (2015) 30 BFLR 335 at 336. See also Neil Finkelstein et al, "Honour among Businesspeople: The Duty of Good Faith and Contracts in the Energy Sector" (2015) 53:2 Alta L Rev 349; Tamara Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v Hrynew* and the Organizing Principle of Good Faith in Common Law Canada" (2016) 58 Can Bus LJ 1.

80 Chris DL Hunt, "Good Faith Performance in Canadian Contract Law" (2015) 74:1 CLJ 4 at 7. See also Lisa A Peters, "Tell Me No Lies: The New Duty of Honesty in Contractual Performance" (2014), online: *Lawson Lundell LLP* <www.lawsonlundell.com> [perma.cc/6WB5-BECF]; Daniele Bertolini, "Decomposing *Bhasin v Hrynew*: Towards an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance" (2017) 67:3 UTLJ 348; Valcke, *supra* note 36.

81 2015 ONSC 3404 at para 119, rev'd in part 2016 ONCA 324.

82 2017 ABCA 1 at para 54.

83 *Bhasin, supra* note 4 at para 73.

84 *Ibid* at para 73.

> interests… *But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.*[85]

Considering that this "clear distinction" divided the SCC in *Callow* seven years later, it is useful to provide a brief survey of cases involving non-disclosure.

In *Moulton v British Columbia,* a subcontractor alleged that British Columbia violated the principle of good faith because it failed to inform him that a local Indigenous group had threatened to interfere with their construction contract.[86] The British Columbia Court of Appeal found that British Columbia did not owe Moulton a duty to disclose, that there were no issues going to honest performance in that case, and that Moulton's arguments interpreted *Bhasin* too broadly:

> *Bhasin* provides a new approach to the role of good faith in contract interpretation in Canadian law, but Moulton reads it too broadly in application to this case. There is no basis to say that the Province acted dishonestly, unreasonably, capriciously or arbitrarily in failing to disclose to Moulton that Mr. Behn had threatened to disrupt the logging when the threats were made. *The question in this case is whether it had any obligation to disclose that information within the relationship* created by Moulton entering into the TSLs, given their terms, and, if the Province was so obliged, whether it is liable for failing to do so. *No issues of honest contractual performance, as discussed in* Bhasin*, arise in this appeal.*[87]

The facts in this case are comparable to those in *Callow*, given that a subcontractor was deprived of material information by their counterparty. Yet, while both cases state that there is no duty to disclose, the outcomes demonstrate a progression in the law. In *Moulton,* British Columbia's non-disclosure was legally acceptable.[88] In *Callow*, however, Baycrest's failure to disclose Mr. Callow's termination rendered it liable.[89] While the difference can be explained by the fact that *Callow* involved a half-truth,[90] it demonstrates that the law since *Bhasin* has evolved from precluding outright lies to knowingly misleading conduct that effectively bars non-disclosure.

In *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, British Columbia initiated a tender process for the construction of a highway.[91] British Columbia changed the terms of eligibility to improve one bidder's competitive advantage and accepted that ineligible bidder's bid.[92] It then hid its knowledge of this fact and actively took steps to ensure that this information was not disclosed to the bidders who remained.[93] In this case, British Columbia

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85 *Ibid* at para 86 [emphasis added] .
86 2015 BCCA 89 at paras 8ff, 381 DLR (4th) 263 [*Moulton*].
87 *Ibid* at para 76 [emphasis added].
88 *Ibid* at para 93.
89 *Callow, supra* note 1 at para 5.
90 *Ibid.*
91 2010 SCC 4, [2010] 1 SCR 69 at paras 9ff [*Tercon*].
92 *Ibid* at para 6.
93 *Ibid.*

was found both to have breached its "implied obligation of good faith in the contract and… [to have] breached this obligation by failing to treat all bidders equally."[94] While the breach took place in the bidding context, *Tercon* illustrates the judicial distaste for parties that cover up[95] their actions to reap financial and competitive benefits.

In *Lavrijsen Campgrounds Ltd v Eileen Reville, Steven Reville and Douglas Reville,* the vendor of a campground warranted that it would provide the purchasers with information about prepaid camper deposits and rentals.[96] The agreement of purchase and sale was silent with respect to prepaid rentals, but the purchasers requested this information.[97] In response, the vendor provided them with inadequate information.[98] By providing partial disclosure and withholding material information about the prepaid rentals, the vendor pocketed nearly $75,000.[99] According to the court, the vendor breached the duty of honesty when it "selectively disclosed partial information and actively withheld important information concerning prepaid rentals,"[100] since "active non-disclosure constitutes intentional misrepresentation"[101] under *Bhasin*. This case can be distinguished from *Callow* because the vendor intentionally breached a warranty following the purchasers' request for specific information in the formal setting of a property sale.[102]

In *Baier v Kitchener-Waterloo Skating Club,* a skating club did not tell an instructor that it had decided not to renew her contract (as a dependent contractor).[103] In the meantime, the club allowed Baier to register skaters while aware that they would not permit her to coach them.[104] Additionally, in conversations with the parents of the skaters, the club insinuated that the instructor was "worse than she was."[105] The court found that the club breached its duty of honesty because it knowingly misled Baier about her future with the club by accepting her skater registrations and schedules.[106] By failing to disclose their decision (with the intention of reaping financial benefits), the club "crossed the line 'between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.'"[107]

There are parallels between *Baier* and *Callow*, given the defendants' concealment of their decision not to renew a future agreement. While Baycrest's vague comments contributed to Mr. Callow's positive "impression" about the renewal,[108] the club devised a scheme to remove

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94 *Ibid* at para 58.
95 *Ibid.*
96 2015 ONSC 103 at paras 6ff [*Lavrijsen*].
97 *Ibid* at para 4.
98 *Ibid* at para 13.
99 *Ibid* at para 17.
100 *Ibid* at para 13.
101 *Ibid* at para 15.
102 *Ibid*.
103 2019 CanLII 31632 (ONSCSM), [2019] OJ No 1930 at paras 50ff [*Baier*].
104 *Ibid* at para 151.
105 *Ibid* at para 154.
106 *Ibid* at para 151.
107 *Bhasin, supra* note 4 at para 86, as cited in *Baier, supra* note 103 at para 151.
108 *Callow, supra* note 1 at para 13.

Baier while retaining as many of her students as possible so that they could profit financially.[109] They manipulated the situation such that Baier's students would have paid their fees before discovering that their instructor would not be teaching them.[110] The club's behaviour rose to a higher level of dishonesty than Baycrest's, given its active concealment of the termination, in addition to its attempts to tarnish the reputation of the instructor.[111]

In *Mohamed v Information Systems Architects Inc,* a company terminated a consulting contract on the basis that the contractor, Mohamed, had a criminal record.[112] Mohamed disclosed his record to the defendant and complied with a security check before entering into the contract to consult on a project between the defendant and Canadian Tire.[113] The contract allowed the defendant to terminate the agreement if it was in its "best interest to replace the consultant for any reason."[114] The contract also provided that the defendant would not assign a consultant to the contract if they had a criminal record without the consent of Canadian Tire.[115] After Mohamed started working with Canadian Tire, the company discovered his record and asked the defendant to remove Mohamed from the project.[116] The Court of Appeal for Ontario found that the defendant violated the principle of good faith when it invoked the termination clause.[117] Even though the defendant possessed "a facially unfettered right to terminate the contract, it had an obligation to perform the contract in good faith and therefore to exercise its right to terminate the contract only in good faith."[118] Given that Mohamed disclosed his criminal record before signing the contract and commencing his work with Canadian Tire, the defendant's reliance on the criminal record to terminate him constituted a breach of good faith.[119] The same court found that *Callow* was "very different"[120] from *Mohamed* because Mohamed's contract was terminated *because* of his criminal record, which he had disclosed, and because the defendant made no attempt to resolve the issue.[121]

While there is no positive duty to disclose in Anglo-Canadian contract law, the failure to disclose material facts can breach the duty of honesty where the behaviour of the party is deceptive and they derive a benefit from their dishonesty. Still, the dividing line between the duty of honesty and a potential duty to disclose remains nebulous following *Callow*.

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109 *Baier, supra* note 103 at para 77.
110 *Ibid.*
111 *Ibid*.
112 2018 ONCA 428 at para 2 [*Mohamed*].
113 *Ibid*.
114 *Ibid.*
115 *Ibid* at para 1.
116 *Ibid* at para 2.
117 *Ibid* at para 19.
118 *Ibid* at para 18.
119 *Ibid.*
120 *Callow* ONCA, *supra* note 25 at para 20.
121 *Ibid* at para 19.

III. RECONCEPTUALIZING *CALLOW* THROUGH THE LENS OF THE TORT OF NEGLIGENT MISREPRESENTATION

I argue in this article that the Future Contract in *Callow* should have been resolved by resorting to tort law principles. As such, the analysis should have been divided between the Current Contract and the Future Contract. I now examine *Callow*'s facts using a two-part approach, first assessing the Current Contract through the lens of the duty of honesty, and then applying the test for negligent misrepresentation to the facts surrounding the Future Contract.

A. The Current Contract: The Duty of Honest Performance Applies but Was Not Breached

With regard to the Current Contract, this article agrees with Justice Côté's stance that Baycrest did not knowingly mislead Mr. Callow.[122] Accordingly, Baycrest did not have a duty to correct Mr. Callow's misapprehension or to inform him of its decision to terminate the Current Contract.[123] Beyond that, Baycrest should not have been held liable for contractual obligations *vis-à-vis* the Future Contract.

This article also agrees with Justice Côté that Mr. Callow misinterpreted vague signals that he himself sought out. As mentioned above, Mr. Callow only approached two members of Baycrest's JUC, who did not speak officially on behalf of Baycrest.[124] Further, the two JUC members did not assure Mr. Callow that the Current Contract was secure.[125] These exchanges actually pertained to the Future Contract.[126] While they might have given Mr. Callow hope, the judges deciding the case disputed whether this was enough to knowingly mislead him and justify Baycrest's liability.[127] Given the nature of these conversations, which vaguely alluded to the Future Contract, and the fact that Baycrest gave Mr. Callow 10 days' notice in compliance with Clause 9, why should Baycrest have been punished for its decision to adhere to the agreement? This is exactly the question that lower courts will have to grapple with following *Callow*, and it leaves room for greater judicial interventionism.

Even though *Bhasin* established a less onerous standard for grounding contractual liability where equivocation could be considered actionable dishonesty,[128] it is difficult to square the

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122 *Callow, supra* at note 1 at para 214.

123 *Ibid.*

124 *Ibid* at para 221.

125 The JUC members thanked him for the work he was doing around the property, told him that they would tell the JUC members about the freebie work, and told him that the work was looking good: *Callow* FOR, *supra* note 43 at paras 110ff. Further, at his cross-examination, Mr. Callow specifically stated that he never received assurances and the belief that he had about the Future Contract was his own "impression": *Callow* FOR, *supra* note 43 at para 115.

126 As accepted by the Court of Appeal in *Callow* ONCA, *supra* note 25 at para 18 and Justice Côté's dissent in *Callow*, *supra* note 1 at para 215. For example, Mr. Callow stated at trial that Mr. Peixoto said at trial that "yeah, it looks good, I'm sure they'll be up for it, let me talk to them." When questioned what "they" would be "up for," Mr. Callow responded, "A two-year renewal": *Callow* FOR, *supra* note 43 at para 107.

127 *Callow, supra* note 1 at para 19.

128 *Bhasin, supra* note 4 at para 100.

finding in *Callow* with the lesson from *Bhasin*. In *Bhasin*, Can-Am continuously lied to Bhasin about the nature of the organizational changes at play and was dishonest about its intention to force him out of the company.[129] In *Callow,* however, Baycrest's behaviour did not rise to this level. As interpreted by Justice Côté, Baycrest was silent about the Current Contract that it had already decided to terminate. This was legally acceptable.[130]

One could infer from the result in *Callow* a responsibility for contracting parties to be vigilant about whether their communications will create a misleading impression. In *Callow*, the trial judge and the SCC majority relied on email evidence to objectively establish that Baycrest knew that it was misleading Mr. Callow.[131] But what about cases in which there is no such evidence? While there will always be a burden of proof to discharge, it is worth noting that the SCC in *Callow* has not provided adequate guidance to lower courts with regard to this question. *Callow* highlights unresolved tensions in the law pertaining to good faith: to what extent does one have to look out for the interests of their counterparty, and to what extent must they ensure that their counterparty does not come to erroneous conclusions about the contract?

B. The Future Contract: Using Tort Law to Reconceptualize *Callow*

Given that good faith applies to contractual *performance* and not formation,[132] there is an area of permissibility in the SCC's analysis in *Callow.* The result in *Callow* is out of place in Anglo-Canadian contract law because it has effectively imposed a contractual duty in relation to a contract that never existed. Regardless of the avenue of redress, Anglo-Canadian contract law cannot comfortably accommodate cases like Mr. Callow's. At its core, the majority decision contradicts common law values like *caveat emptor* and moves the law in an expansionist direction.[133] This could have been avoided by addressing the Future Contract through tort law principles.

Given that tort law governs relationships in which there is a common law duty of care—rather than one that the parties have chosen to enter into[134]—I am of the view that the SCC should have addressed Baycrest's behaviour regarding the Future Contract. As Justice Brown

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129 *Ibid* at para 30.

130 In so finding, Côté J wrote in *Callow, supra* note 1 at para 197:

> The requirement that parties not lie is straightforward. But what kind of conduct is covered by the requirement that they not otherwise knowingly mislead each other? Absent a duty to disclose, it is far from obvious when exactly one's silence will 'knowingly mislead' the other contracting party. Are we to draw sophisticated distinctions between 'mere silence' and other types of silence, as Brown J. suggests? If that be so, I wonder how a contracting party — on whom, I note, the law imposes *neither* 'a duty of loyalty or of disclosure' *nor* a requirement 'to forego advantages flowing from the contract'— is supposed to know at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. With the greatest respect, I do not believe such casuistry is compatible with the 'simple requirement' Cromwell J. meant to set out in *Bhasin*.

131 *Callow* ONSC, *supra* note 20 at para 48.

132 *Martel, supra* note 2.

133 This moves the common law into the interventionist direction that is seen in civil law jurisdictions, where judges tend to take a more active role to intervene and protect parties in unfair situations. See e.g. Geoffrey Hazard & Angelo Dondi, "Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits" (2006) 39 Cornell Int'l LJ 59.

134 *Donoghue v Stevenson,* [1932] UKHL 100, [1932] AC 562.

stated in his concurring reasons for judgment, "there is, in the context of misrepresentation, a rich law accepting that sometimes silence or half-truths amount to a statement."[135] It is this rich law that I explore here to demonstrate that negligent misrepresentation would have been more appropriate to address the Future Contract than the duty of honesty.

C. The Tort of Negligent Misrepresentation

The elements of the tort of negligent misrepresentation were first developed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[136] The SCC adopted these principles in *Kamloops v Nielson,*[137] refining them in *Hercules Managements Ltd v Ernst & Young,*[138] *Queen v Cognos Inc*,[139] and *Deloitte & Touche v Livent Inc (Receiver of)*.[140] The five elements of the tort of negligent misrepresentation are as follows: (i) the duty of care must be based on a special relationship; (ii) the representation must be untrue, inaccurate, or misleading; (iii) the representor must have acted negligently in making the representation; (iv) the representee must have reasonably relied on the negligent misrepresentation; and (v) this reliance must be detrimental.[141] Below, the article applies each element to the facts in *Callow.*

i. The Duty of Care Based on a Special Relationship

Mr. Callow and Baycrest did not have a special relationship to ground a duty of care. Given that this is the first step in the negligent misrepresentation analysis, such a finding would render the other elements toothless: "to state that the facts of a case are governed by a common law duty of care is merely to open the door to the resolution of the dispute before the court."[142] Professor Lewis Klar describes the duty of care in the following terms:

> The concept envisages a relationship of proximity which is more restricted than the relationship of proximity based on foreseeability of harm defined by *Donoghue v Stevenson,* but wider than a relationship of proximity which exists between the parties to a contract or parties in a fiduciary relationship. It seems to occupy some middle ground between the two.[143]

In the specific context of negligent misrepresentation, Justice La Forest in *Hercules* located the special relationship test within the two-stage *Anns Test* to "avoid creating a 'pocket' of negligent misrepresentation cases that determined the issue of duty differently from other negligence

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135 Bruce MacDougall, *Misrepresentation* (Toronto: LexisNexis, 2016) at 67, as cited in *Callow, supra* note 1 at para 132.

136 [1963] UKHL 4, [1964] AC 465 [*Hedley Byrne*].

137 [1984] 2 SCR 2, 10 DLR (4th) 641.

138 [1997] 2 SCR 165, 146 DLR (4th) 577 [*Hercules*].

139 [1993] 1 SCR 87, 99 DLR (4th) 626 [*Cognos*].

140 2017 SCC 63 [*Deloitte*].

141 *Cognos, supra* note 139 at para 33.

142 Lewis Klar, Tort Law, 5th ed (Toronto: Thomson Reuters, 2015), ch 9 at 339.

143 Klar, *supra* note 142, ch 7 at 239.

cases."[144] The first stage determines whether there is a *prima facie* duty of care based on the parties' proximity and reasonable foreseeability of injury. The second stage assesses whether there are policy concerns sufficient to negate the *prima facie* duty of care.[145]

a. Stage One of the Anns Test: Prima Facie Duty of Care

It is unlikely that a court would find that Baycrest owed Mr. Callow a *prima facie* duty of care. While they had a proximate relationship in which Mr. Callow's reliance was foreseeable, it was not reasonable for Mr. Callow to rely on the vague and unofficial comments of the JUC members.

Proximity. According to the SCC, proximity is the "controlling concept,"[146] rather than the category of the alleged wrong, the type of loss claimed or foreseeability. Professor Klar has written that "the issue of proximity asks whether it would be just and fair to impose a duty of care on the defendant for the plaintiff's protection."[147] Although the facts in Callow did not fit into the recognized categories of the duty of care, the tort of negligent misrepresentation has arisen in various subcontractor relationships and contexts.[148] Regardless, the courts allow for a duty of care to be imposed in new kinds of relationships by conducting the full proximity analysis.[149] This requires an assessment of the nature of the relationship, the parties' respective expectations, the defendant's undertaking, the plaintiff's reliance on the representation and the parties' respective rights and obligations flowing from their relationship.[150]

In *Martel,* a subcontractor sued the Canadian Government for negligent misrepresentation.[151] Martel had leased a building to the Government under a 10-year lease that had an option for renewal.[152] Before the lease expired, Martel's President and CEO met with the Government Department's Chief of Leasing to express a desire to negotiate a renewal.[153] After multiple unsuccessful attempts to negotiate, the Government moved on to the tendering process and awarded the tender to one of Martel's competitors.[154] When Martel sued the Government, this case raised the difficult question of whether the relationship was sufficient to ground a duty of care in the context of commercial negotiations.[155] The SCC found that there was

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144 *Hercules, supra* note 138 at para 142. The *Anns Test* was developed in *Anns et al v London Borough of Merton*, [1978] AC 728, [1977] 2 All ER 492, and imported into Canadian law in *Cooper v Hobart*, 2001 SCC 79 [*Cooper*]. While the name for this test has varied (including, the *Anns/Cooper* Framework), this article uses the title of the "*Anns Test*."

145 *Deloitte, supra* note 140 at paras 19–20.

146 *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 21 [*Maple Leaf Foods*].

147 Klar, *supra* note 142, ch 5 at 185

148 *Moulton, supra* note 86 (the negligent misrepresentation claim was secondary to that of breach of contract); *Martel, supra* note 2 (a subcontractor sued the Government of Canada for negligent misrepresentation for its conduct during commercial negotiations).

149 Klar, *supra* note 142, ch 3 at 147.

150 *Ibid*; *Maple Leaf Foods, supra* note 146 at para 66; *Cooper, supra* note 144 at para 29.

151 *Martel, supra* note 2 at para 52.

152 *Ibid* at para 2.

153 *Martel, supra* note 2 at paras 6ff.

154 *Ibid* at paras 17–20.

155 *Ibid* at para 31.

a proximate relationship sufficient to ground a *prima facie* duty of care.[156] In particular, the parties' previous lease indicated a close and direct relationship:

> Both the pre-existing lease arrangement and the communications between the appellant and respondent here are indicators of proximity. *That does not mean that any exchange loosely viewed as a negotiation will necessarily give rise to a proximate relationship. The expression of interest does not automatically create proximity absent some evidence of genuine and mutual contracting intent …* The communications between the appellant and Martel disclose a readiness to arrive at an agreement despite the fact one was never reached.[157]

Similar to *Martel,* the parties in *Callow* had a pre-existing arrangement, given that they had embarked upon a long-term contractual relationship in 2010.[158] Additionally, the parties had a long history of communication. For example, Mr. Callow kept the JUC members up to date on his work,[159] and one of the JUC members negotiated the original contract and often went to Mr. Callow if something was wrong.[160] This would likely be sufficient to find a proximate relationship; however, other factors weaken the likelihood that a court would find that Baycrest owed Mr. Callow a *prima facie* duty of care.

Foreseeability. The relationship between Mr. Callow and Baycrest is also sufficient to establish foreseeability. According to Professor Klar, "Canadian courts have applied the Hedley Byrne principle to other relationships (aside from the established categories) where it was foreseeable that one party would reasonably rely on the information."[161] Rather than asking whether the harm to the plaintiff was foreseeable based on the facts of the case, the assessment should focus on whether the type of relationship at play gave rise to a foreseeable risk of injury[162] It was foreseeable that Mr. Callow would rely on Baycrest's representations: the JUC members, given their positions and access to JUC meetings, knew that Mr. Callow generally relied on their signals.[163] Given their contractual relationship, past dealings, and the potential for a Future Contract, it was foreseeable that Mr. Callow would rely on the representations they made. As such, Baycrest had an obligation to be truthful and honest in its representations.[164]

Reasonable Reliance to Establish a Duty of Care. Despite the presence of the other elements necessary to determine a prima facie duty of care, Mr. Callow's reliance on Baycrest's statements was not reasonable. Although this article fleshes out the element of reasonableness below,

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156 *Ibid* at para 53.

157 *Ibid* at para 52 [emphasis added].

158 *Callow, supra* note 1 at para 6.

159 *Callow* ONSC *supra* note 20 at para 66 (the trial judge referred to the "active communications" between the parties); *Callow, supra* note 1 at para 222 (disclosure during Mr. Callow's testimony that he had discussions with one of the JUC members).

160 *Callow, supra* note 1 at para 96.

161 *Fletcher v Manitoba Public Insurance Co,* [1990] 3 SCR 191, 74 DLR (4th) 636 at 209, cited in Klar, *supra* note 142, ch 5 at 179.

162 Klar, *supra* note 142, ch 5 at 180–81.

163 *Callow* ONSC, supra note 20 at para 15.

164 *Cognos, supra* note 139 at 141.

this is also key to the analysis to find a prima facie duty of care.[165] With regard to reasonable reliance in this context, Justice Brown's comments in Maple Leaf Foods are instructive:

> This Court… has tied that requirement in cases of negligent misrepresentation… to the *defendant's undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff*… When a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that intended effect of that is, *where the plaintiff reasonably relies, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement.*[166]

Mr. Callow altered his position based on Baycrest's representations: he rented equipment that he did not ultimately need[167] and decided against exploring other opportunities.[168] Still, the key question is whether Baycrest induced Mr. Callow's *reasonable* (rather than actual) reliance.[169] While Baycrest could have been more forthcoming, its comments were insufficient to induce reliance.[170]

Mr. Callow's reliance was unreasonable because of the context of the conversations. According to Professor Klar, the "seriousness of the occasion is an important factor in determining the special relationship at issue. Advice given during an informal social or non-business occasion will likely not give rise to a duty on the part of the advisor."[171] In *Martel,* for example, the subcontractor and Government spoke during formal negotiations, in which Martel's CEO expressed a desire to negotiate.[172] In *Callow,* however, the communications that grounded Mr. Callow's detrimental reliance are comparable to the "exchange[s]" that the SCC alluded to in *Martel*.[173] Mr. Callow approached members of Baycrest's JUC outside of their residences and had informal conversations with them throughout the property.[174] Further, during email exchanges, the JUC members merely thanked Mr. Callow for his "freebie" work and agreed to tell the other members about his efforts.[175] The situation in *Martel* indicated a much more serious nature of the conversations, so it was reasonable and foreseeable for Martel to rely on the Government's statements.[176] Mr. Callow's reliance was weaker than Martel's because

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165 Klar, *supra* note 142, ch 5 at 181 (given the necessity of reasonable reliance to both elements of the negligent misrepresentation analysis, there is some overlap between this section and section iv below).

166 *Maple Leaf Foods, supra* note 146 at para 33 [emphasis added].

167 *Callow* ONSC, *supra* note 20 at para 81.

168 *Ibid.*

169 Klar, *supra* note 142, ch 5 at 186.

170 *Callow* ONSC, *supra* note 20 at para 47.

171 Klar, *supra* note 142, ch 7 at 247.

172 *Martel, supra* note 2 at para 6.

173 *Ibid* at para 52.

174 *Callow* FOR, *supra* note 43 at paras 107ff (Mr. Callow's cross-examination at first instance).

175 *Callow* FOR, *supra* note 43 at paras 110ff (email evidence from 12–13 June 2013).

176 *Martel, supra* note 2 at para 51. Though, it is noteworthy that even in *Martel*, the *prima facie* duty of care was negated by policy concerns: *ibid* at para 114.

Baycrest was responding vaguely to his comments about his work around the property outside of official channels.[177] As such, I am of the view that Baycrest did not owe Mr. Callow a *prima facie* duty of care.

b. Stage Two of the Anns Test: Policy Concerns

Even if a *prima facie* duty of care existed in *Callow,* it would likely be negated by policy concerns. In *Martel*, the SCC emphasized crucial policy considerations to limit the *prima facie* duty of care in the context of pre-contractual negotiations.[178] These policy concerns included the objectives of negotiations, marketplace considerations, and the traditional concern of indeterminate liability—specifically, that imposing a duty of care could turn tort law into an "after-the-fact insurance."[179] The same policy concerns apply to *Callow*. If courts were to impose a pre-contractual duty of care to casual exchanges prior to contract formation, this would unduly strain contracting parties' communications about potential future endeavours and impose a positive duty to disclose, though one could argue that this is *Callow*'s effect in the realm of contract law.

ii. Untrue, Inaccurate, or Misleading Representations

The next step would be to assess the truthfulness of the representations.[180] This is a question of fact that must be assessed at the time the representation was made.[181] Even though the JUC knew of the decision to terminate the Current Contract and of Mr. Callow's hope for the Future Contract, they repeatedly thanked him for his great work.[182] Although one of the JUC members did assure Mr. Callow that "it looks good, I'm sure they'll be up for it, let me talk to them,"[183] this was a vote of confidence from one (out of 10) JUC members and not a certain representation that the Future Contract would take place.[184] As interpreted by Justice Côté, "it certainly could not be inferred from this statement that a renewal was likely."[185] Aside from this comment, most of the parties' conversations were brief and vague.[186]

Although the JUC members' comments did not establish that the Future Contract would be formed, there was controversy between the judges deciding the case (at all levels of court) about whether the evidence supported the conclusion that Baycrest misled Mr. Callow. These communications, coupled with Baycrest's knowledge of Mr. Callow's desire to form the Future Contract,[187] led the trial judge to find that Mr. Callow was deceived.[188] In her reasons, Justice O'Bonsawin emphasized that:

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177 *Callow* FOR, *supra* note 43 at paras 110ff (email evidence from 12–13 June 2013).
178 *Martel, supra* note 2 at paras 66ff.
179 *Ibid* at para 68.
180 Klar, *supra* note 142, ch 7 at 252.
181 *Ibid,* ch 7 at 253.
182 Email evidence of 12 June 2013, as reproduced in *Callow* FOR, *supra* note 43 at paras 110ff.
183 *Ibid.*
184 This was Côté J's interpretation of the facts: *Callow, supra* note 1 at para 223.
185 *Callow, supra* note 1 at para 224.
186 *Callow* FOR, *supra* note 43 at paras 110ff.
187 *Callow* ONSC, *supra* note 20 at paras 65–66.
188 *Ibid*.

> They were both aware that this was "freebie" work performed by Callow and "no corporation is paying for this." Mr. Campbell emailed Mr. Peixoto … regarding the "freebie" work: "Yeah, I was talking to him about it last week and he was mentioning he was going to do that. He's basically doing this to try and make sure we keep him for summer grounds, which is fine by me." Mr. Peixoto then responds: "I figured as much. It's nice he's doing it but I am sure it's an attempt at us keeping him. Btw, I was talking to him last week and he is under the impression we're keeping him for winter again. I didn't say a word cuz I don't wanna get involved but I did tell Tammy…[189]

As acknowledged by the Court of Appeal, this is insufficient to rise to the level of dishonesty.[190] The JUC members' internal comments show that Baycrest speculated about Mr. Callow's *desire* to form the Future Contract; however, speculating about a counterparty's beliefs (based on casual conversations) does not mean that a party has made negligent misrepresentations or breached their duty of honesty.[191] In any case, if the comments painted such a clear picture in Mr. Callow's mind, why did he feel the need to seek out reassurances?

Although Baycrest's comments were not fully transparent, it flies in the face of Anglo-Canadian contract law to require parties to disclose their bottom line.[192] Further, extending tort law to the "minutiae of pre-contractual conduct"[193] would place undue scrutiny upon commercial parties and lead courts to act as regulators. In the context of negligent misrepresentation, the scope of misleading communication is broader than in the duty of honesty, which must pertain directly to the performance of the contract.[194] Yet, even in tort law, holding Baycrest liable would overlook the content of its communications and diminish the abilities of the parties to fully participate in negotiations.

iii. The Representor Must Have Acted Negligently in Making the Representation

It is arguable whether Baycrest acted negligently when one considers the nature of the occasion, the purpose for which the statements were made, the foreseeable use of the statements, and the probable damage resulting from the statements.[195] While there is no need for a guarantee to ground negligent misrepresentation, the standard in such cases is higher than one of honesty.[196] The applicable standard of care is the objective standard of the reasonable person.[197] In *Arland and Arland v Taylor,* Justice Laidlaw defined the reasonable person as follows:

> He is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time… He is a person of normal

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189 *Ibid* at paras 12, 48.
190 *Callow* ONCA, *supra* note 25 at para 16.
191 *Ibid.*
192 Buckwold, *supra* note 79.
193 *Martel, supra* note 2 at para 70.
194 *Bhasin, supra* note 4 at para 73.
195 Klar, *supra* note 142, ch 7 at 254.
196 *Cognos, supra* note 139 at 140.
197 *Ibid.*

> intelligence who makes prudence a guide to his conduct… His conduct is the standard 'adopted in the community' by persons of ordinary intelligence and prudence.[198]

It is unlikely that a court would find that Baycrest violated the standard of care in tort law. The JUC members did not reveal the potential for the Future Contract (aside from one favourable, unofficial opinion, as discussed above).[199] Instead, they thanked Mr. Callow for his work when he emailed them to "let him know" what they thought,[200] and they agreed to notify the JUC that Mr. Callow was doing "freebie" work.[201] This did not constitute a misleading statement that could reasonably lead Mr. Callow to form his incorrect impression. Thus, it is unlikely that a court would find that Baycrest violated the standard of care. Mr. Callow himself admitted that the JUC members never talked to him about the Current Contract. In particular, at the hearing at first instance, Mr. Callow explicitly said that the JUC members led him to believe that everything was "fine," and that they were "absolutely interested in extending the contract for a future couple of years." He explicitly noted that they "weren't even talking about the current one."[202]

Further, the JUC members never communicated that the Future Contract would take place. Mr. Callow conceded that he took it upon himself to do the additional work throughout the property. Also at the hearing at first instance, Mr. Callow expressly stated that he was "under the impression that [his] contracts were going to be renewed for another couple of years and [he] was doing this additional work as a show of good faith to try and improve the appearance of the property as well as an incentive to gain a future renewal."[203] Specifically, Mr. Callow explained that he "was under the impression it was likely to be renewed" and "hopeful" that it would be. Yet, when asked if he told anyone at Baycrest that he was doing the freebie work because he understood his contracts would be renewed, he replied that he "did not use those specific words."[204]

Not only do these statements buttress this article's thesis that the analysis should have been divided between the Current and Future Contracts, but they also show that the JUC members never told Mr. Callow that he would receive the Future Contract. His perception was based on his hope and efforts to incentivize the Future Contract, but this would be insufficient to ground liability in tort.

iv. Reasonable Reliance

As discussed above, it is also unlikely that a Court would find Mr. Callow's reliance to be reasonable. The judges deciding *Callow* made it clear that Mr. Callow relied on the JUC members' comments, given the "real and substantial effect" that they had on his decision not

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198 *Arland and Arland v Taylor,* 1955 CanLII 145 (ONCA) at para 27, [1955] 3 DLR 358.
199 *Callow* FOR, *supra* note 43 at paras 110ff.
200 *Ibid.*
201 *Ibid.*
202 *Ibid.*
203 *Ibid.*
204 *Ibid.*

to seek other opportunities and to lease equipment.[205] Beyond *actual* reliance and its financial ramifications, the negligent misrepresentation analysis also requires *reasonable* reliance.[206] In *Hercules,* Justice La Forest stipulated the five indicia of reasonable reliance.[207] These indicia, rather than forming a strict, cumulative test, serve as factors to assess the reasonableness of the plaintiff's reliance.[208] The indicia are as follows: the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made; the defendant was a professional or possessed special skills, judgment, or knowledge; the information was provided in the course of the defendant's business; the information was deliberately given, and not on a social occasion; and the information was given in response to a specific enquiry.[209] The relevant indicia in *Callow* were Baycrest's financial interest in the transaction, whether the information was deliberately given, and whether the representation was made on a social occasion.

a. Baycrest's Financial Interest in the Transaction.

In *Callow,* the trial judge explicitly noted that Baycrest had a financial interest in the subject of the alleged misrepresentations (the Future Contract).[210] Given the parties' long-term contractual endeavour, the future of this relationship would impact Baycrest's finances. It was in Baycrest's financial interest to ensure that Mr. Callow continued to work as their subcontractor throughout the summer. This would allow Baycrest to reap the value of the Current Contract.[211] As Justice Moldaver observed at the SCC hearing, Mr. Callow would be enthusiastic about his work over the summer, as opposed to bitter (and, therefore, less motivated to work effectively).[212] As a result, Baycrest was able to get its value for money over the summer months, especially as Mr. Callow did "freebie" work.[213]

b. The Information was Given Deliberately and Not on a Social Occasion

As discussed above, the JUC members' conversations with Mr. Callow occurred outside of official channels when they saw each other around the property.[214] In the words of Lord Denning, however, "representations made during a casual conversation in the street; or in a railway carriage; or an impromptu opinion, given offhand; or 'off the cuff'… are excluded from the principle of *Hedley Byrne*."[215] The context and content of the alleged misrepresentations in *Callow* were more akin to such a casual conversation than a formal, deliberate event to

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205 *Callow,* ONSC, *supra* note 20 at para 23.
206 *Hercules, supra* note 138 at para 43.
207 *Ibid.*
208 *Ibid.* It is worth noting, though, that Mr. Callow would not be able to satisfy all of the criteria (as will be discussed in the following sections).
209 *Ibid.*
210 *Callow* ONSC, *supra* note 20 at para 65.
211 *Ibid* at para 65.
212 *Callow* SCC Hearing, *supra* note 68.
213 *Callow, supra* note 1 at para 97.
214 *Ibid* at para 224 (Justice Côté emphasized in her dissent that the JUC members did not speak on behalf of Baycrest).
215 *Howard Marine v Ogden & Sons*, [1978] QB 574 at 591 (CA) Lord Denning, cited in Klar, *supra* note 142, ch 7 at 247.

seriously discuss the Future Contract, given that the parties spoke briefly on the premises and via email without the specific purpose of negotiating the Future Contract.[216]

The contrast between *Callow* and *VK Mason Construction v Bank of Nova Scotia* bolsters this point.[217] In *Mason,* the bank made representations in a formal letter to a third party (Mason) to induce him into entering a construction contract with one of its clients.[218] However, this letter contained insufficient information.[219] The bank assured Mason that the client had adequate financing to meet its payments, even though the bank's loan would not cover the construction costs.[220] According to the SCC, Mason foreseeably relied on this assurance and was not adequately informed.[221] Given the bank's representations in the letter, which formally assured Mason of the client's sufficient finances for construction, the SCC found Mason's reliance to be foreseeable and reasonable.

There was no such formality in the context of Baycrest's representations. Not only were the JUC members' emails and conversations casual, but they also never assured Mr. Callow that the Future Contract would occur.[222] Further, unlike in *Mason,* where the letter was written specifically to assure Mason of its client's financial condition, the conversations in *Callow* were not planned, nor did they have the specific purpose of discussing the Future Contract.[223] Rather, Mr. Callow initiated the emails and conversations to keep the JUC abreast of his progress and indicate his interest in the Future Contract.[224] Unlike the bank's letter in *Mason,* Baycrest's comments were informal responses to Mr. Callow's prompts.[225] If Mr. Callow had been invited to a formal Board meeting with the purpose of discussing the Future Contract—as he had been invited to discuss snow removal complaints in January of 2013[226]—then the nature of the occasion might have been appropriate to ground a claim. Given the casual nature of their conversations, and the fact that they were pre-contractual, Anglo-Canadian contract law would likely not find Mr. Callow's reliance to be reasonable.[227]

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216 *Callow* FOR, *supra* note 43 at 106ff; *Callow* ONSC, *supra* note 20 at para 8 (these conversations were nothing like the formal meeting they had on 14 January 2013 to discuss snow removal complaints prior to Zollinger joining the JUC).

217 *VK Mason Construction Ltd v Bank of Nova Scotia*, [1985] 1 SCR 271, 16 DLR (4th) 598 [*Mason*].

218 *Ibid* at 277.

219 *Ibid* at 284.

220 *Ibid* at 277.

221 *Ibid* at 284.

222 *Callow* FOR, *supra* note 43 at 106ff.

223 *Ibid.*

224 *Ibid.*

225 *Ibid.*

226 *Callow,* ONSC, *supra* note 20 at para 8.

227 *Martel* stands for the proposition that there is no pre-contractual duty to negotiate, and in that case the communications were much more formal than in *Callow*. It bears noting that *Martel* was decided 21 years ago and the law pertaining to pre-contractual behaviour may change, given the current SCC's emphasis on moral contractual behaviour. Given that the judges are moving in a more expansionist direction, good faith could one day be extended to contractual formation, as is the case in Québec: *Bhasin*, supra note 4 at para 83.

It is worth noting that the strength of Mr. Callow's claim would have been different if Baycrest had initially represented its intention to form the Future Contract, but, over time, that representation became untrue and Baycrest never disclosed this change. In this situation, Baycrest would have had a duty to disclose and Mr. Callow's reliance would have been reasonable: this scenario occurred in *de Groot v St Boniface Hospital.*[228] In *de Groot,* the plaintiff surgeon applied for general and specialized surgical privileges at the defendant hospital.[229] The hospital, after telling him that he would be granted both privileges, decided to only grant specialized privileges.[230] Yet, it did not inform Dr. de Groot of this change until he arrived at the hospital to start working.[231] By then, he had already left a position in South Africa and moved to Manitoba in reliance on the hospital's representations.[232] Although the hospital initially told Dr. de Groot the truth, the trial judge held it liable for negligent misrepresentation because it failed to tell Dr. de Groot about the change.[233] In particular, Dr. de Groot's reliance on the representations was reasonable because he had been led to believe "in a state of facts that [was] obviously material to his future conduct"[234] through extensive communications.

Outside of the employment context, the English case *With v O'Flanagan* is also relevant.[235] In *O'Flanagan*, the parties entered into formal negotiations for the sale of a medical practice.[236] At negotiations, the vendor truthfully represented the practice's revenues; however, by the time the contract was signed five months later, the vendor had fallen ill and the practice had dwindled.[237] Prior to signing the contract, the purchasers discovered that a *locum tenens* was managing the practice.[238] Even though they raised this concern, the vendor never informed them about the loss in revenues following his original representations.[239] When the purchasers ultimately took possession of the practice, they discovered that it was nearly non-existent.[240] They successfully sued for rescission of the contract.[241] The English Court of Appeal emphasized that the impugned representation was a continuing one, and that it was made to induce the purchasers to enter into the contract.[242] Even though the representation was truthful before the contract's formation, the court held the vendor liable for failing to communicate the changed circumstances to the purchasers.[243]

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228 *De Groot v St Boniface General Hospital,* [1994] 6 WWR 541, 1994 CanLII 16687 (MBCA) [*de Groot*].
229 *Ibid* at para 6.
230 *Ibid* at para 10.
231 *Ibid* at para 12.
232 *Ibid* at para 23.
233 *Ibid* at para 34.
234 *De Groot v. St. Boniface Hospital,* [1993] 6 WWR 707, 1993 CanLII 14741 (MBQB) at para 17.
235 [1936] Ch 575 [*O'Flanagan*].
236 *Ibid* at 576.
237 *Ibid.*
238 *Ibid* at 577.
239 *Ibid.*
240 *Ibid.*
241 *Ibid* at 576.
242 *Ibid* at 578.
243 *Ibid.*

In *Callow,* however, the JUC never indicated that they would sign the Future Contract.[244] Unlike in *de Groot* and *O'Flanagan*, there was no representation that was once true but later changed. As such, the JUC members' words of gratitude and encouragement were insufficient to reasonably ground reliance. If Baycrest or one of the JUC members had communicated that the Future Contract would take place, then voted to terminate him, and then failed to disclose this change, then it would have breached the standard of care and Mr. Callow's reliance would have been reasonable. But these were not the facts in *Callow.* The parties never held a formal meeting to discuss the Future Contract, nor did they ever posture their position regarding the Future Contract. As such, Justice Côté's observation that there was no duty to correct Mr. Callow's misapprehension is relevant to this analysis.

Overall, Mr. Callow's reliance was not reasonable and could not ground a claim in negligent misrepresentation. Mr. Callow formed an impression based on two JUC members' vague responses to his attempts to gauge their interest in the Future Contract. It would fly in the face of Anglo-Canadian contract law to require negotiating (or even casually conversing) parties to be completely transparent about their objectives or to anticipate how their counterparties will react.[245] Finally, with respect to the specific context of *Callow,* "there is nothing unlawful or unfair about accepting a contractor's incentives offered in the hopes of securing a new contract."[246] This, in and of itself, should not ground a finding of reasonable reliance.

v. Detrimental Reliance and Damages

It is unlikely that Mr. Callow would satisfy all of the prior requirements; however, it is undeniable that he detrimentally relied upon his conversations with the JUC members. In particular, by the time the contract had been terminated in the fall of 2013, Mr. Callow had not pursued any other business opportunities and lost a year's worth of work (valued at $80,383.70).[247] Further, Mr. Callow had leased machinery for the agreement (valued at $14,835.14), which he would not have leased if he had known that the contract would be terminated.[248] Thus, Mr. Callow had sufficient proof that he detrimentally relied upon Baycrest's representatives' statements; however, he likely could have mitigated his damages by bidding on other projects or exploring other opportunities. While it could be argued that it was too late for mitigation, it is important to emphasize that Mr. Callow only bargained for 10 days' notice in a scenario of termination.[249] If that was insufficient, why did he not bargain for

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244 *Callow* FOR*, supra* note 43 at paras 106ff.

245 *Martel, supra* note 2 at 105.

246 *Callow* FOR, *supra* note 43 at paras 110ff.

247 After expenses, Mr. Callow's profit would have been $64,306.96 had Baycrest not terminated the contract: *Callow* ONSC, supra note 20 at paras 80ff.

248 *Ibid* at para 81.

249 As per section 9 of the contract, Baycrest needed only provide 10 days' notice: *ibid* at para 49.

more at the outset? Also, there is no evidence to indicate that the contract stopped him from exploring other opportunities prior to receiving news about the termination.[250] Regardless, it is doubtful that a court would reach this stage of the negligent misrepresentation analysis.

CONCLUSION

I have taken the stance that *Callow* was incorrectly decided. While the facts in *Callow* engaged the organizing principle of good faith and the duty of honesty, there was much more to the picture. The Supreme Court blended the analysis and assessed it only through the lens of contract law. That said, when one disentangles the complex factual matrix in *Callow*, it becomes clear that a two-part approach was necessary to come to a correct conclusion that could effectively guide lower courts.

The complicating factor in *Callow* was that the parties, who were already involved in a contractual relationship, casually discussed the potential for renewing a contract in the future. Thus, there were two parallel legal analyses that the judiciary should have undertaken. First, the courts should have carried out a contractual legal analysis, namely, to assess whether Baycrest's statements pertained to the performance of the Current Contract and breached the duty of honesty. Given that these statements did not discuss the Current Contract, the second analysis should have assessed the representations in relation to the Future Contract through the lens of tort law. Specifically, the tort of negligent misrepresentation would have allowed the courts to gauge whether Baycrest's representations were negligent, and whether Mr. Callow's detrimental reliance upon these representations was reasonable. This analysis would have remained loyal to Anglo-Canadian contract law's persistent rejection of a pre-contractual duty of good faith, in addition to the applicability and scope of the organizing principle. Further, if no relief was called for on the basis of the tort of negligent misrepresentation either, it must be assumed that the right outcome according to Anglo-Canadian common law would have been one in which Mr. Callow lost the appeal (as per Justice Côté's reasoning).

The SCC's fragmented decision in *Callow* is likely to cause a great deal of confusion in contract law. Not only did it impose contractual rights and obligations in relation to a non-existent contract, but its reasoning regarding the contents and appropriate analysis of the duty of honesty was confounding in its own right. Consequently, the SCC's decision in *Callow* is likely to trigger insecurity between contracting parties both at the proverbial bargaining table and in their general communications about potential future endeavours. *Callow* is also likely to cloud the law pertaining to disclosure requirements in relation to termination clauses. Given that Baycrest did provide Mr. Callow with 10 days' notice, contracting parties are likely to be uncertain about whether they will also be held liable for failing to immediately disclose their decision to terminate.

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250 Although the contract itself has not been made available online, none of the judges deciding the case referred to any such covenants and none of the transcripts reproduced in the facta before the SCC indicated such legal constraints.

Going forward, the SCC's approach to the duty of honesty is overly expansive and is likely to result in commercial uncertainty. While the SCC refuted this concern, insisting that the scope of the duty of honesty is controlled by its direct link to the performance of the contract's terms, its words do not match the outcome because Baycrest's comments did not have a direct link to the Current Contract. Consequently, the SCC's analysis of the duty of honesty in *Callow* is incomplete and likely to inject greater uncertainty into the law pertaining to good faith. It remains to be seen how future courts will assess the nexus between express contractual terms and contracting parties' belief that their expectations will be protected by the organizing principle and its manifest duties. In short, *Callow* has only intensified the very concern that has plagued *Bhasin*'s legacy. The saga continues.

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