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APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

ARTICLES

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Sarah N. Kriekle

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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

… traces of the storyteller cling to the story the way
the handprints of the potter cling to the clay vessel.

Walter Benjamin, *Illuminations: Essays and Reflections*, 1968

Dear reader,

Welcome to Volume 28 of *Appeal: Review of Current Law and Law Reform*. This was a year of reflection on *Appeal's* journey since its beginning in 1995, its present, and its future.

Appeal has always been an alternative to the traditional law journal. The vision was, and continues to be: (1) to provide a forum for discussing Canadian law and its possibilities; (2) to deliver legal knowledge in an accessible and challenging manner; and (3) to center the voices of law students, who bring fresh perspectives but have too few forums for expression. We came together as a newly formed Board of Editors, reminded ourselves of *Appeal's* important role in the law journal landscape, and charted a new course ahead.

This year has been full of changes for both UVic Law and for *Appeal*. Our campus is preparing for the construction of the new National Centre for Indigenous Law, which meant we had to navigate new hallways and new sidewalks. In the same way, *Appeal* has gone through new changes, fueled by the passion and audacity of our incredible Board of Editors.

The number and quality of the student scholarship we receive continues to grow, as well as our engagement in the UVic Law community through our Volunteer Editors. Our podcast, *Stare Indecisis*, has entered its fourth season, and the Podcast Managers managed the incredible—they interviewed the Honourable Michelle O'Bonsawin of the Supreme Court of Canada. Above all else, the Board of Editors worked tirelessly to ensure *Appeal* highlights excellent student scholarship. To this end, we've selected the following six papers.

Sarah N Kriekle explores the dismal history in Alberta of supporting youth as they transition to adulthood and 'age out' of care. Kriekle then considers merits of various *Charter* claims to protect the youth in care, who may have nowhere to turn once the government removes support.

Pedram Gholipour assesses the effect of Bill C-86 passed in British Columbia, designed to provide First Nation communities greater access to opportunities for economic development. Gholipour focuses on the Senakw development, exploring tensions between self-determination, economic development, and settler institutions in First Nation communities in urban centers.

Lo Stevenson considers the path forward in a post-*Bedford* world—how should sex work be decriminalized to improve sex worker autonomy, dignity, and protection? Stevenson critiques the incompatibility of the liberal economic approach to sex work, and advocates for an anti-poverty feminist approach. A basic income plan, union organizing, and full decriminalization would improve the material conditions of sex work for sex workers.

Serena Cheong brings an in-depth overview of public universities across Canada in order to critique the use of police-like powers by campus security forces. Cheong argues that the *Charter* must apply to the use of police-like powers by campus security forces to adapt to the changing role of public universities in Canada. The blending of private-public space represented by university campuses, and the expansive role of campus security, means we need to carefully reconsider pre-existing jurisprudence on *Charter* application.

Jon Peters considers the application of *Gladue* principles beyond the confines of criminal law. With an eye towards meaningful reconciliation, Peters argues that the Canadian legal system must include Indigenous legal orders within it, and that *Gladue* principles must extend to the civil justice system.

Garima Karia considers how the definition of "systemic discrimination" within the Yukon *Human Rights Act* can, and should, be reformulated. Karia expertly weaves together concepts from the realms of administrative law, access to justice, and writings by Amartya Sen to show that drafting legal definitions can play a broader role beyond the courtrooms to increase the public's accessibility, agency, and trust in the administrative system.

These six articles would not have been possible without all those who contributed to *Appeal*. We would like to thank our new Faculty Advisor, Professor Andrew Buck. We are grateful for our Expert Reviewers and Volunteer Editors who generously gave their time. We wish to thank the members of our community here at the University of Victoria, Faculty of Law, including the staff at the school's Diana M. Priestly Law Library, and the Law Students' Society who recognize the role of *Appeal* in the vibrancy of our community. We thank our sponsors for their support of student scholarship and our vision.

On a personal note, I would like to thank the Board of Editors that made this volume possible: Mariyam Ali, Sophie Chase, Sophie Chen, Shermaine Chua, Clancy McDaniel, Patrick McDermott, Cassidy Menard, Tom Ndekezi, Megan Pratt-Ahmad, and Paula Rasmussen. I hope that you, dear reader, get a chance to work with them one day as I have. Their hard work shaped every part of *Appeal* this year, and I hope you feel their handprints as you read through our volume.

Jinjae Jeong
Editor-in-Chief

ARTICLE

NOWHERE TO TURN: ALBERTA'S DISMAL HISTORY OF SUPPORT FOR YOUTH IN TRANSITION TO ADULTHOOD - *A.C. AND J.F. V. ALBERTA*

Sarah N. Kriekle *

CITED: (2023) 28 *Appeal* 1

ABSTRACT

This article explores the existing standard of care for youth transitioning from government care into independent adulthood. The article will first explore the history of Alberta's child welfare laws and policy, specifically regarding youth who 'age out' of care. It will then review the existing literature on the impact of the 'aging out' process on the individual and on society before examining the current case of A.C. and J.F. v. Alberta, where two youth who had a support agreement expected to continue to age 24 are challenging the constitutionality of removing supports from youth 'aging out' of care 2 years earlier than expected. Finally, this article will provide an analysis on the rights of youth in transition to adulthood under the Charter of Rights and Freedoms and the Alberta Human Rights Act, with a particular focus on the rights of Indigenous children and youth.

* Sarah N. Kriekle graduated in 2021 with a Juris Doctor from the University of Alberta Faculty of Law. She was called to the Alberta Bar in 2022 and her practice is focused on supporting Indigenous law revitalization and self governance through work with communities, government, and organizations. Ms. Kriekle has an interest in advancing discussions about equity and human rights, particularly the rights of vulnerable youth. Ms. Kriekle is especially grateful to Dr. Hadley Friedland who encouraged and supervised the first iteration of this article.

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INTRODUCTION

When we discuss child welfare, the focus is often on intervention to save a child from harmful situations; however, children apprehended into government care transition into youth, and eventually are expected to become well-adjusted adults who contribute to a functioning society. Most often, these youth in transition, or youth 'aging out' of government care, have been an afterthought, and recently were even excluded from the federal legislation that set a minimum standard of care for Indigenous children in the child welfare system.[1] A growing body of research into the outcomes of intervention during and after care raises concern for whether the children 'saved' by the system are sufficiently supported by that system in a manner that enables them to become well-adjusted adults who can contribute to a functioning society.

Part I of this article provides context on youth in care, including statistics and demographics. Part II provides background information on Indigenous overrepresentation in child welfare and colonial and Indigenous approaches to Indigenous child protection, given the significant overrepresentation of Indigenous children in care. Part III of the article will then explore the history of Alberta's child welfare regime, focusing on policy for youth who transition out of government care. This section will also discuss recent developments in child welfare policy that are likely to impact Indigenous children and youth in care.

Part IV will review the economic and social impacts of supporting or not supporting youth as they transition out of care. Part V examines the current case of *A.C. and J.F. v. Alberta*, where two youth who had support agreements with the government expected to continue to age 24 are challenging the constitutionality of removing supports from youth 'aging out' of care 2 years earlier than expected. Finally, Part VI will provide an analysis on the rights of youth in transition under the *Charter of Rights and Freedoms*.[2]

In the interest of disclosure, I approach this article from the perspective of a former child in care, and as someone who has experienced 'aging out' firsthand. Throughout the research process, I allowed myself to relate sensitive topics to my personal experiences, hoping to lend my voice to these vulnerable young people who are so often invisible and left on the margins of society to survive without support.

I. CONTEXT ON YOUTH TRANSITIONING OUT OF GOVERNMENT CARE

As noted previously, youth transitioning out of care are often overlooked in child welfare research and policy. This section provides information on children in care and transitioning out of care, as well as a discussion of the commonly used term 'aging out' applied to affected youth.

---

1 *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [*ARFNIM*].

2 *AC and JF v her Majesty the Queen in Right of Alberta*, (19 March 2020), Edmonton 2003-048252020 (ABQB) [*Interlocutory Injunction Judgment*]; *AC and JF v Alberta*, 2020 ABCA 251 [*Reconsideration Decision*]; *AC and JF v Alberta*, 2020 ABCA 309 [*Intervenor Decision*]; *AC and JF v Alberta*, 2021 ABCA 24 [*Injunction Appeal*].

A. Children in Care and Transitioning out of Care

In Alberta, approximately 15,000 children and youth between the ages of 0 and 24 are either in government care, receiving supports following adoption or private guardianship out of care, or receiving supports through supported independent living programming.[3] For approximately 8,000 children "in care", there are a variety of care arrangements, but mainly these are categorized as temporary or permanent. When a child becomes the subject of a Permanent Guardianship Order (PGO), the Government of Alberta becomes the sole guardian of the child and all other guardians are terminated by statute.[4] Alberta is the sole guardian of approximately 5,000 children in Alberta at any given time.[5] Many of these children will eventually leave care, either through adoption, private guardianship by a caregiver, or 'aging out' of care. Children under a TGO may 'age out' of care as well, particularly if they enter care in their teens. Under a TGO, parental guardianship is not terminated, but the Alberta government becomes a joint guardian, usually given sole decision-making authority.[6] Like any other young person transitioning to adulthood, youth in care must look to their legal guardian for support in the transition to adulthood.

Reports on family living situations since 2016 have found that nearly 60% of Canadians aged 20-24 still live at home, and 97% of parents surveyed reported providing financial support to children between the ages of 18 and 35.[7] That young adults continue to live with their parents has been given judicial notice in Alberta in the cases of *Brear v. Brear* and *KMR v. IWR*.[8] In *KMR,* the court, relying on the comments of Pentelechuk JA in *Brear,* stated at para 40:

"…the current social and economic conditions may support an order of child support for a reasonable transitionary period for an adult child who is not in school full-time, or who has ceased their post-secondary education or training. Pentelechuk JA's comments may provide support for an extension of that transition period." [9]

In general, it is supported in law that Canadian youth are able to make a gradual and supported transition to adulthood where it is needed. However, for youth transitioning or "aging out" of care, this process has traditionally left young people to transition to adulthood unsupported and very suddenly upon reaching the age at which supports are terminated.

---

3 *Child Intervention Information and Statistics Summary: 2019/20 Fourth Quarter (March) Update* (Alberta: Government of Alberta, 2020), tbl 3,7,8.

4 *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 [*CYFEA*], s 34(4).

5 Child Intervention Information and Statistics Summary, *supra* note 3, tbl 3.

6 *CYFEA*, *supra* note 4, s 31(2).

7 *2019 RBC Family Finances Survey* (Toronto, Ontario: Royal Bank of Canada, 2019); Stacey Hallman et al, "Young adults living with their parents in Canada in 2016" (2 August 2017), online: *Statistics Canada* <www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016008/98-200-x2016008-eng.cfm>; Statistics Canada, *Diversity of young adults living with their parents*, By Anne Milan, Catalogue no 75-006-X (Ottawa: Statistics Canada, 2016) [perma.cc/BTZ6-V7TG].

8 *Brear v Brear*, 2019 ABCA 419 [*Brear v Brear*]; *KMR v IWR*, 2020 ABQB 77 [*KMR v IWR*].

9 *KMR v IWR*, *supra* note 8 at para 40.

B. What is 'Aging out' of Care?[10]

'Aging out' is what eventually happens to most children who go into government care. It is not a term that is applied to children generally, as most families do not cut off all financial, emotional, and other supports at a particular age. 'Aging out' is a term specifically applied to children who have been in care. It means that a child has reached the arbitrary age at which the government expects them to be wholly independent and at which supports for that child are terminated. The age at which supports are terminated can vary depending on the region, type of care arrangement, and individual capability of the child, but typically planning for transition begins in the late teens and supports can be available into the early 20s.[11]

Not every child in care goes through the 'aging out' process. Most jurisdictions aim to support family reunification efforts where possible, and some children are adopted when reunification does not occur within the timeframe required by the courts; however, even in these situations, outcomes are not always positive. Many families do not receive adequate support in reunification and children end up back in care or in unstable housing situations.[12] Adoptions, too, may 'break down' in the child's teens and these children, again, end up back in government care.[13] It is important to note that when a child is the subject of a permanent guardianship order under the *Child, youth and family enhancement act,* all other existing guardians of that child have their guardianship rights automatically terminated by statute.[14] The government becomes the sole guardian and provider for the child, who in many instances, has been removed from their family and/or community, and too often cannot even remain permanently in a single placement for the duration of their time in care.

---

10 I have adopted the practice of the National Council of Youth in Care Advocates which puts the term 'aging out' in single quotes to de-normalize a term that is widely and casually applied to very abnormal treatment of youth; see Dr Melanie M Doucet, *A Long Road Paved with Solutions: 'Aging out' of care reports in Canada: Key Recommendations and Timelines (1987-2020)* (Canada: National Council of Youth in Care Advocates, 2020) at 5.

11 *Ibid* at 9.

12 Tonino Esposito et al, "Family reunification for placed children in Québec, Canada: A longitudinal study" (2014) 44 Children and Youth Services Review 278 at 279; Sonia Hélie, Marie-Andrée Poirier & Daniel Turcotte, "Risk of maltreatment recurrence after exiting substitute care: Impact of placement characteristics" (2014) 46 Children and Youth Services Review 257 at 261–263; Elaine Toombs et al, "First Nations parenting and child reunification: Identifying strengths, barriers, and community needs within the child welfare system" (2018) 23:3 Child & Family Social Work 408 at 411; Sophie T Hébert, Tonino Esposito & Sonia Hélie, "How short-term placements affect placement trajectories: A propensity-weighted analysis of re-entry into care" (2018) 95 Children and Youth Services Review 117 at 120.

13 See e.g. Richard P Barth, *Adoption and Disruption: Rates, Risks, and Responses* (Routledge, 2017) at 441; Gerald P Mallon & Peg McCartt Hess, *Child Welfare for the Twenty-first Century: A Handbook of Practices, Policies, & Programs* (Columbia University Press, 2014), ch 4; Various studies have found adoption breakdown rates ranging from 2% to 20%. It should be noted that this data is difficult to track, because there is no legal difference between an adopted child who enters government care after adoption breakdown, and a biological child who enters care.

14 *CYFEA*, *supra* note 4, s 11(1).

II. CHILD WELFARE AND INDIGENOUS YOUTH

As we delve into the issues faced by youth in transition, it is imperative to remain aware of the staggering disproportionality of Indigenous youth in care. Currently, 70% of children in care in Alberta are Indigenous.[15] The legacy of hundreds of years of colonial oppression through displacement, disenfranchisement, racist policy, over-incarceration, residential schools, and intergenerational trauma carry on in today's child welfare system. Because of this, this article will not specifically address the effects and outcomes on Indigenous youth in comparison to non-Indigenous youth. The youth who 'age out' of care in Alberta are disproportionately Indigenous, and throughout the process of researching and writing this article, it was this statistic that was front of mind. It is imperative that the reader proceeds with the knowledge that 70% of children in care in Alberta are Indigenous. It is this staggering number that will make the implementation of the National Standard set out in the *Act respecting First Nations, Inuit and Metis children and families* such a critical element in the process of transitioning out of care.[16] While a fulsome review of this legislation is beyond the scope of this article, it is useful to illustrate the shifting legal landscape in child welfare to acknowledge reconciliation and colonial harm.

A. Overview of Colonial Laws for Indigenous Children in Care

The *Act respecting First Nations, Inuit and Metis children and families* does not specifically address youth 'aging out' of care, despite zealous advocacy to include them.[17] The *Act* can be separated into two parts. The first part sets out national standards which establish the minimum standards applicable to Indigenous children in care. These national standards require that Indigenous identity be protected, that relationships with family and community be maintained and/or cultivated, and that placements are subject to ongoing reassessment which can be triggered on request of an interested party.[18] These provisions affect Indigenous youth who are 'aging out' of care because they work to keep Indigenous children in their families or communities and to maintain a lasting support network that is not available to many youth today when leaving government care.[19] Further, the act places an emphasis on

---

15 Child Intervention Information and Statistics Summary, *supra* note 3 at 4.

16 *ARFNIM*, *supra* note 1.

17 Canada, Parliament, Senate, Standing Committee on Aboriginal Peoples, Ashley Bach, President, Youth in Care Canada, *Proceedings and Evidence*, 42nd Parl, 1st Sess, (1 May 2019).

18 *ARFNIM*, *supra* note 1, ss 10, 16, 17.

19 See the following cases where the new minimum standards were applied to support ongoing connection for the child with their identity, community, and family, even where the simplest answer was an available foster placement. These cases take a more individualized approach to child welfare and give more consideration to the long term impacts of apprehension on a child. *CAS v CE, ME, NC, LB and T B,* ONSC 2020 6314 [*CAS v. C.E., M.E., N.C., L.B. and T. B.*]; *CAS v K C and Constance Lake First Nation,* 2020 ONSC 5513 [*CAS v. K. C. and Constance Lake First Nation*]; *Children's Aid Society of the Regional Municipality of Waterloo v NH*, 2021 ONSC 2384 [*Children's Aid Society of the Regional Municipality of Waterloo v. N.H.*]; *Kina Gbezhgomi Child and Family Services v MA*, 2020 ONCJ 414 [*Kina Gbezhgomi Child and Family Services v. M.A.*]; *Protection de la jeunesse -- 209343*, 2020 QCCQ 13410 [*Protection de la jeunesse -- 209343*]; *TL (Re)*, 2021 SKQB 2 [*T.L. (Re)*]; *Youth protection - 206762*, 2020 QCCQ 7952 [*Youth protection - 206762*].

prevention over intervention, and provides for mandatory reassessment of placements to evaluate whether the child can be placed with family or community.[20]

The second part of the *Act* affirms the inherent jurisdiction of Indigenous governing bodies over child welfare, and provides the framework for giving notice of intention to exercise that jurisdiction. It should be noted that the sections of the *Act* that give Indigenous law the same force and effect as federal laws, and paramountcy in a conflict with provincial law were recently challenged before the Supreme Court of Canada, with decision reserved. The *Act* is intended to respond to the overrepresentation of children in care by establishing a minimum standard for Indigenous children in care nationwide, and by supporting communities and Peoples in caring for children in their own way. Despite the exclusion of youth transitioning out of care from this act, it is an important development in child welfare law, in particular because Indigenous child raising practices and definitions of family can vary greatly from western child raising practices.

B. Indigenous Laws for Indigenous Children

Canada is home to more than 50 distinct First Nations across over 630 communities, in addition to multiple Metis and Inuit communities and Peoples. Child raising practices will vary across Nations, communities, and Peoples. This section will provide some examples of Indigenous child rearing practices to illustrate the ways in which they vary from western practices. In many Indigenous cultures, the development of Indigenous children throughout childhood, adolescence and into adulthood includes roles beyond those of biological parents. Members of a child's nuclear, extended, community, nationhood, clan, and cultural families are all integral to a proper upbringing.[21] These various forms of family comprise a natural protective network for a child. A consultation with Anishinaabe elders on best practices in child development between the ages of 13 and 18 found that it was critical for youth to develop supported independence.[22] Making mistakes should be permitted and accepted as an important part of youth learning to make good decisions. However, during the phase of learning independence, youth are still in need of consistent parenting, which includes supervision, rules, routines, expectations, and obligations to all levels of family.[23] In many Indigenous cultures, children are cherished as gifts from the spirit world, and their upbringing is an obligation of the entire community. Children are taught throughout their lives about the interconnected systems of life between people, communities, animals, the earth, and the spirit world.[24] Further, and importantly, this consultation process found that while there are rough age ranges for when children will be taught certain things, they are allowed to learn and develop at their own pace and they remain supported by family and community until they are ready for the next stage of development.[25]

---

20 *ARFNIM*, *supra* note 1, ss 14, 16(3).

21 Estelle Simard & Shannon Blight, "Developing a Culturally Restorative Approach to Aboriginal Child and Youth Development: Transitions to Adulthood" (2011) 6:1 First Peoples Child & Family Review 28 at 42.

22 *Ibid* at 46.

23 *Ibid* at 47.

24 *Ibid* at 44.

25 *Ibid* at 45.

A community engagement process in Coast Salish territory brought together 20 Nations to discuss the transition of youth to adulthood. Part of the process included the development of a narrative with Knowledge Holders from each Nation that is designed to teach the 'aging out' process in a way that reflects Indigenous child rearing best practices. The last portion of this narrative is:

> *You are this fire.*
>
> *We will work to keep it lit.*
>
> *Because one day you will be the fire keeper.*
>
> *When you are ready, when it is your time.*
>
> *You carry these wisdoms within you.*
>
> *As does your family.*
>
> *And your community*
>
> *But we need to weave them together.*
>
> *Because the fabric of the teachings frayed a little.*
>
> *You will decide how to receive these teachings.*
>
> *When you step out of the forest.*
>
> *But we are all listening.*
>
> *When you are ready to tell your story.*[26]

This portion of the narrative tells us that a youth is the leader of their own journey to adulthood, but that coming of age takes community, and that we are all stronger together.[27] Both examples are also reflected in the child rearing best practices for Indigenous youth in Alberta. Dr. Hadley Friedland has participated in several community engagements on Indigenous child welfare, and when asked the appropriate age for youth to receive support during transition to adulthood, the response from the community is always "as long as they need it." [28]

These Indigenous best practices dictate a youth led, fully supported transition to adulthood. Historically, if an Indigenous youth was not ready for a full transition to adult obligations, then the family and community provided the needed support until the youth was ready. This practice is in line with the current social and economic conditions in families across

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26 Andrea Mellor, Denise Cloutier & Nick Claxton, "'Youth Will Feel Honoured if They Are Reminded They Are Loved': Supporting Coming of Age for Urban Indigenous Youth in Care" (2021) 16:2 International Journal of Indigenous Health 308 at 315–316.

27 *Ibid* at 316.

28 Dr Hadley Friedland, *Class Discussion* (University of Alberta, Faculty of Law: Indigenous Peoples, Law, Justice and Reconciliation, 2020).

Canada, where youth are not leaving home until much later and do so with the support of their family. In fact, 2019 amendments to family legislation has eliminated age limits of 18 and 22 for adult child support, creating a statutory obligation for separated or divorced parents to provide for support in situations where a young adult is unable by reason of illness, disability, student status, or other cause to "withdraw from his or her parents' charge or to obtain the necessaries of life."[29] We must ask, why should it be any different for youth who have been taken out of the care of their family and community and placed in the care of the government?

III. YOUTH 'AGING OUT' OF CARE IN ALBERTA SINCE 1985

This section will review the history of child welfare in Alberta, including incredible efforts by child advocates to improve supports for youth transitioning to adulthood. After years of gradual improvement to these services, the Alberta government suddenly announced it would reduce supports for affected children.

A. The old regime: Caring for youth when the focus is caseload reduction

Reports advocating for Alberta's vulnerable youth date back decades. Child welfare legislation in Alberta has historically defined a child as any person under the age of 18; however, the social worker in contact with the child often had full discretion as to whether adolescent youth received care or supports beyond the age of 15.[30] Often there was a reluctance to provide care to youth over 15, and when provided, it was typical for support to take the form of assisted independent living supports (financial assistance).[31] A regular approach to adolescent support was to discontinue services for failing to meet very high standards for school and work attendance or documentation of attendance, cleanliness of their living space, or merely personal conflict with their social worker.[32] While the option to extend benefits for up to 2 years beyond the age of 18 did exist, it was seldom exercised and significantly more common for youth to be prematurely removed from benefits instead.[33]

B. Improving care with unreasonable expectations

In the early 2000s, emerging research showed that youth were transitioning to adulthood with adult support well into their 20s.[34] Employment that enabled self-sufficiency required a higher level of education and training beyond a high school diploma, and the cost of living

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29 *Family Law Act,* SA 2003, c F-45, s 46(b) [*Family Law Act*].

30 *Child Welfare Act*, SA 1984, c C-81 [*Child Welfare Act*].

31 OYCA Alberta, *OCYA Annual Report 1997-1998* (Alberta: Office of the Child and Youth Advocate, 1998) at 22.

32 *Ibid* at 23; OYCA Alberta, *OCYA Annual Report 1999-2000* (Alberta: Office of the Child and Youth Advocate, 2000) at 23–26.

33 OYCA Alberta, "OCYA Annual Report 1999-2000", *supra* note 32 at 24–26.

34 See e.g. Richard A Settersten Jr & Barbara Ray, "What's Going on with Young People Today? The Long and Twisting Path to Adulthood" (2010) 20:1 Future of Children 19 at 26–28.

was such that low-wage entry-level work was not sufficient to support living independently.[35] The Office of the Children's Advocate, as it was then known, advocated for improved educational and transitional supports for youth in care.[36] This, and other advocacy efforts, led to a review of the *Child Welfare Act* in which the Ministry of Children's Services acknowledged the increased risk for youth 'aging out' of care for harmful behaviours, substance abuse, minimal education, unemployment, and involvement in crime, sex work, and suicide as compared to their peers who have not been in care.[37] The recommendations that came out of the *Strengthening Families* review specific to youth in care included:

- an emphasis on unique needs of youth;
- separating youth provisions into their own section of the legislation;
- increasing service and support availability to age 22;
- ensuring individual and comprehensive independence planning; and
- enabling lasting connections for youth.[38]

The *Child, Youth, and Family Enhancement Act* came into force in 2004 and incorporated the recommendations of the *Strengthening Families* review regarding youth.[39] Along with the development of new legislation, the government of Alberta increased the age limit for supports to age 22 and established a bursary program for current and former youth in care up to age 24 to pursue education or vocational training.[40]

In 2013, the Office of the Child and Youth Advocate released a special report on youth in transition. Much like the motivation for this article, the OYCA found the report was necessary given that readiness for independence remained an issue continually brought up by youth.[41] The report re-iterated that compliance-based short-term support agreements left youth in a constant state of precarity regarding their ongoing support.[42] These agreements provided a minimum level of support and held youth to standards that most youth who have never been in care cannot achieve. Most youth cannot imagine being evicted and unable to eat if they do not have a clean room, perfect attendance at school, or get perfect grades.[43]

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35 *Ibid*.

36 OYCA Alberta, *OCYA Annual Report 2002-2003* (Alberta: Office of the Child and Youth Advocate, 2003) at 9, 12.

37 *Strengthening Families, Children and Youth: Report and Recommendations from the Child Welfare Act Review, 2002* (Edmonton, Alberta: Alberta Children's Services, 2002) at 22.

38 *Ibid*.

39 *CYFEA*, *supra* note 4; "Strengthening Families", *supra* note 37 at 22.

40 *Alberta Children's Services response to the Children's Advocate annual report / 2002/2003* (Edmonton Alberta: Alberta Children's Services, 2003) at 2.

41 *Where do we go from here? OCYA: Special Report on Youth Aging out of Care* (Alberta: Office of the Child and Youth Advocate, 2013) at 7; An average of 70 youth per year voiced concerns of inadequate support and preparation in transition.

42 *Ibid* at 2.

43 OYCA Alberta, "OCYA Annual Report 1997-1998", *supra* note 31 at 23; OYCA Alberta, "OCYA Annual Report 1999-2000", *supra* note 32 at 16-23.

Overall, the agreements failed to account for the stage of development of people in their youth, generally. Finally, and most crucially, these agreements failed to consider that these particular youths have experienced significant trauma through no fault of their own and likely need more support than their peers who are not in care, not less. Additional concerns included a lack of youth specific training for social workers, and a need for improved awareness of additional community supports, strengthened relationships with supportive adults, and access to mental health care.[44] This report issued five broad recommendations, which the Ministry of Children's Services accepted in full, inclusive of a detailed action plan for each recommendation.[45] Notable actions included a promise to review the support agreements and possibly expand them and to allow youth to stay supported in their foster homes where those homes were willing.[46]

C. The gold standard: Supporting youth transitions

These promises came to fruition in the 2014 Speech from the Throne, when Alberta expanded the age of support for youth 'aging out' to age 24 and guaranteed these supports to any youth who wanted them.[47] The expansion of the age of support was reflective of the factors required for youth independence, and the age at which youth typically become self-sufficient. As discussed above, nearly 60% of Canadians aged 20-24 still live at home, and 97% of parents surveyed report providing financial support to children between the ages of 18 and 35.[48] This means that the typical Canadian youth can make a gradual and supported transition to adulthood that includes making some youthful mistakes, pursuing vocational training, or pursuing personal interests rather than focusing on becoming self-sufficient. Removing the compliance based, discretionary eligibility, and allowing youth 'aging out' of care to access support until age 24, afforded youth a transition experience more in line with their peers who were not in care. This expansion was not offering youth 'aging out' of care an opportunity to take a gap year and travel the world, but merely providing a guaranteed safety net for transition to occur with less risk of harm, exploitation, or impeded advancement.

By increasing the age of support to age 24, Alberta positioned itself as a leader in transition to adulthood.[49] Besides the expanded age limit, the policy for administering the Support and Financial Assistance Agreement (SFAA) was modified to take a significantly more youth centered approach (*fig. 1*). The policy guaranteed support for any youth who wanted it. It removed worker discretion for determining when supervisor approval was needed and

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44 "Where do we go from here?", *supra* note 41.

45 Ministry of Human Services, *Ministry of Human Services' Response to the Office of the Child and Youth Advocate Youth Aging Out Of Care Special Report: "Where Do We Go From Here?"* (Alberta: Government of Alberta, 2013).

46 *Ibid* at 3.

47 Alberta, Legislative Assembly, *Speech from the Throne*, 28th Leg, 2nd Sess, (14 March 2014) at 3.

48 Rutman & Hubberstey, *supra* note 7; "RBC Survey", *supra* note 7; Statistics Canada, *supra* note 7; Stacey Hallman et al, *supra* note 7.

49 Ingrid Mir Iniesta, "Alberta government improving services for youth leaving care", *Calgary Journal* (7 November 2016), online: <https://calgaryjournal.ca/2016/11/07/child-and-youth-advocates- push-for-stronger-support-systems/> [perma.cc/SQ6D-Y6FH].

instead required supervisor or third party approval in cases where a youth was declining services.[50] The policy for negotiating the agreement accounted for the power dynamic between a vulnerable youth and a social work professional, and removed the ability to terminate an agreement for non-compliance.[51] The 2018 policy also left open-ended the resources available to youth and specified that the process is youth-led and may or may not involve financial supports. These changes in the administration of the SFAAs significantly narrowed the gap in transitional support between youth 'aging out' of care and other youth in Canada.

Fig. 1

Comparison of Transitional Supports for Youth 'Aging Out' of Care			
Terms of Support	Governing Policy		
	Child Welfare Act, 198552	CYFEA Policy 201353	CYFEA Policy 201854
Post-intervention support to age	20	22	24
Eligibility	Must be 16 or older, provided at the discretion of the social worker	If the youth wishes to enter into a post-intervention agreement and worker deems support necessary and is of the opinion that other methods for support have been exhausted and are insufficient	If the youth wishes to enter into a post-intervention agreement, the director must enter into the agreement. Supervisor review required if youth does not wish to enter into the agreement.
Negotiation of Agreement	Terms as stipulated by worker; youth voice recommended	Considered an adult-to-adult agreement, with each term negotiated between the youth and the worker	Services provided as well as the 4 Areas of Connection (cultural, relational, physical, and legal) must be discussed as the relationship between the young adult and caseworker is supportive. The young adult may require the support of an advocate (such as a formal advocate from the OCYA, former caregiver, youth worker.)

50 *Enhancement Policy Manual* (Alberta Children's Services, 2018), s 5.2.6.

51 *Ibid*.

52 *Child Welfare Act*, *supra* note 30, ss 8(2), 35(2); *General Regulation*, Alta Reg 38/2002 [*General Regulation*], s 5; *Enhancement Policy Manual* (Alberta Children's Services, 2013), s 5.2.6.

53 *"Enhancement Policy Manual"*, *supra* note 52, s 5.2.6.

54 *"Enhancement Policy Manual"*, *supra* note 50, s 5.2.6.

Length of Agreement	6 months	9 months	6 months
Termination	Either party can terminate services at will	Youth can terminate at will; director can terminate if youth is otherwise receiving support or for non-compliance	Youth can terminate at will; director can terminate if youth and worker agree that support is no longer required.
Review required to terminate?	no	Yes	Yes
Notice required for director to terminate services	None specified	30 days	30 days
Re-entry to program	Not specified in act/ regulation	Yes	Yes

D. The silver standard? Backsliding to save a buck

In October 2019, the UCP announced to a standing committee its intention to reduce the age of transitional supports through SFAAs to age 22.[55] The Minister of Children's Services at the time, Rebecca Shultz, cited as the reason for the rollback in service: a 6% increase in young people accessing the program over the prior year, a natural decline in program usage in young people over age 22, and the existence of adult support programs and the *Advancing Futures Bursary* program as sufficient to meet the needs of these youth in transition.[56]

The increase in overall uptake of the program can likely be attributed to the change in the policy to a more youth centric approach for administering the benefit as noted in *fig. 1*. When youth are guaranteed transitional support, cannot opt out of the program without supervisor approval and are not subject to compliance-based termination, it follows that there will be more users of the service. However, in subsequent legislative sessions, then Minister Schultz relied mainly on the evidence of youth exiting the program voluntarily by age 22, and the existence of alternative supports to replace the SFAA program for these young people. Minister Schultz stated that of approximately 2,200 young people under an SFAA, approximately 500 of those would fall between the age of 22 and 24.[57]

This would suggest that by age 22, around 80% of young people will voluntarily exit the program, while just over 20% remain in need of the supports provided by an SFAA. Increasing the age to 24 involved an extensive process that included consultation with youth, former children in care, the Office of the Child and Youth Advocate, child welfare workers,

55 Alberta, Legislative Assembly, *Standing Committee on Families and Communities (Hansard)*, 30th Leg, 1st Sess, (31 October 2019) at FC-83

56 *Ibid.*

57 *Ibid.*

and child welfare experts.[58] The decision to reduce the age does not appear to have undergone any similar formal process of consultation. The proposed amendment was due to take effect in April 2020 but was stopped by an interlocutory injunction that was later overturned. Despite the reversal of the injunction, Alberta announced in March 2021 that they would not change transitional benefits during 2021 because of the impacts of the COVID-19 pandemic on employment and self-sufficiency plans.[59] This announcement was followed by another in March 2022, with an announcement of a new Transition to Adulthood Program (TAP).

Under TAP, participants still have all financial support terminated at age 22, but are able to continue accessing social and emotional transition supports. The Advancing Futures bursary program has been encompassed by TAP, and it is unclear how the total funding allotment of $48 million for the administration of both programs will be distributed. Overall, this budgets for $9.7 million less than these programs have been allocated in prior years, which is concerning given an uptake in use of the programs.[60] Unlike the SFAA program and the increase in eligibility to age 24, it does not appear that TAP has been developed with any consultation with stakeholder groups, but rather to prevent the charter litigation that is the subject of this article from proceeding.[61] Under TAP there is a maximum financial benefit of $1,810 per month to age 22, where under the SFAA, financial support was needs based. In fact, J.F. who is one of the applicants in the constitutional challenge was receiving $2,500 per month based on her needs, which is significantly more.[62] Overall, the new program lacks transparency in how it will maintain supports for youth transitioning out of care in a time where a record breaking number of youth receiving these supports died while receiving intervention services.[63]

While adult support services do exist for young adults between the age of 22 and 24, the supports provided by an SFAA are not always financial. Additionally, the program aims to have the young person work through transition with the same worker they have known since they came into care or with a worker who understands the unique circumstances of youth who have been in care and need to transition into adulthood. These agreements require review at six-month intervals, and termination needs review by a supervisor. Some of these young people may require lifelong supports provided by other social programs, but others, like A.C. and J.F., may just fall into the 60% of young Canadians between the age of 20 and

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58 *AC and JF v her Majesty the Queen in Right of Alberta*, (Affidavit of John McDermott) [*McDermott Affidavit*] at paras 10–14; Exhibit B; *Transition Framework for Youth with Disabilities: The DTF*, Report of the Advisory Committee on Transitions for Youth with Disabilities (Government of Alberta, 2003) at 1, 18, 19.

59 Andrea Huncar, "Province won't cut benefits for young adults formerly in government care", *CBC News* (12 March 2021) online: <https://www.cbc.ca/news/canada/edmonton/young-adults-sfaa-bene- fits-alberta-1.5946961> [perma.cc/SM4S-75JH].

60 "Alberta promising to reinstate social workers for young adults formerly in government care following cuts", *Edmonton Journal* (7 March 2022) online: <https://edmontonjournal.com/news/politics/alberta-introduces- some-supports-for-young-adults-formerly-in-government-care-following-cuts-last-year> [perma.cc/478F-ZM26].

61 *Ibid*.

62 *AC and JF v her Majesty the Queen in Right of Alberta*, (December 2021), Edmonton 2003-048252020 (Amended Originating Application) [*Amended Originating Application*].

63 OYCA Alberta, *OCYA Annual Report 2021-2022* (Alberta: Office of the Child and Youth Advocate, 2022) at 26.

24 who require support for a gradual transition to adulthood. All of these youth deserve to be properly supported in the transition to the next stage of their life by the guardian responsible for their care.

E. Advancements in Transitional Support

One exciting development is the Agreement in Principle signed in December 2021 by the Assembly of First Nations and the Government of Canada. This agreement arises from the class action settlement brought against Canada for discriminating against Indigenous children in care. While this Agreement has been rejected by the Canadian Human Rights Tribunal due to the settlement portion being insufficient and exclusionary to some affected parties, the long term commitments show recognition of support requirements for youth transitioning to adulthood. Under the long term reform portion of the agreement, child and family services funding will be allocated to support Indigenous youth 'aging out' of care up to the age of 26, or to the age of post-majority services under applicable provincial or territorial legislation.[64] The Agreement is currently being renegotiated to address the concerns of the CHRT, but it highlights important recognition of the standard of care that youth should receive when exiting the child welfare system.

Another sign of progress is the increasing number of Indigenous governing bodies seeking to exercise their inherent jurisdiction over child welfare matters, including drafting of Indigenous child raising laws and taking over the administration of programming. Progress in this area is slow, but gaining traction. With the high numbers of Indigenous children in care, and transitioning out of care after being separated from community and family supports, it is heartening to see the government taking Indigenous law and jurisdiction seriously. However, this process is not without issues. The Louis Bull First Nation in Alberta will be entering into a coordination agreement with Canada to define the delivery of child welfare services for Louis Bull children. The province of Alberta will not be a party to this agreement after Alberta refused to negotiate further with the Nation.

IV. ECONOMIC IMPACT OF SUPPORTING OR NOT SUPPORTING YOUTH IN TRANSITION

The proposed amendments to the *Child, Youth, and Family Enhancement Act* will immediately impact approximately 500 young people. Research involving a detailed cost/benefit analysis of extending the age of support for youth in transition is limited but gaining more attention as we learn about the development of the adolescent brain in the late teens and early 20s.

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64 Government of Canada; Indigenous Services Canada, "Long-term reform of First Nations Child and Family Services and long-term approach for Jordan's Principle", (10 March 2022), online: <https://www.sac-isc.gc.ca/eng/1646942622080/1646942693297#chp5> [perma.cc/E777F-KFV3].

To date, there are several studies from Canada, the US, and Australia that have compared the economic impact of supporting youth through transition to the long-term costs of not providing support.[65]

These reports looked at the economic cost of the difference in rates between former youth in care and those who were never in care for outcomes in:

- Incarceration
- Homelessness
- Educational attainment
- Early pregnancy
- Health, mental health & addictions services
- Adult social programs

Each of these studies predicted a cost savings to making an up-front investment to provide former youth in care with a level of support similar to that received by their peers who had not been in care.

The Ontario study *25 is the New 21* calculated a return of $1.36 for each dollar spent in transition programming. For one youth, the cost of transitional supports to age 25 would total $33,155, while the financial benefit from an increase in tax revenue from lifetime earnings and reduced cost of incarceration and adult social programs would total $43,859.[66]

The BC report *Opportunities in Transition* covered additional cost and benefit factors and cited a higher up front cost at $99,000 per youth to extend support to age 25. However, this report also found that these supports would significantly reduce the cost of adverse outcomes in these youth which are currently estimated at between $222,000 and $268,000 per youth.[67] The adverse outcomes considered in this report included lower rates of educational attainment, employment, and income and higher rates of premature death, homelessness, involvement in

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65 *25 is the New 21: The Costs and Benefits of Providing Extended Care & Maintenance to Ontario Youth in Care Until Age 25* (Ontario, Canada: Office of the Provincial Advocate for Children & Youth, 2012); Marvin Shaffer, Lynell Anderson, & Allison Nelson, *Opportunities in Transition: An Economic Analysis of Investing in Youth Aging out of Foster Care*, Summary Report (SFU School of Public Policy: Fostering Change, Vancouver Foundation, 2016); Thomas Packard et al, "A cost-benefit analysis of transitional services for emancipating foster youth" (2008) 30:11 Children and Youth Services Review 1267; *Cost Avoidance: Bolstering the Economic Case for Investing In Youth Aging Out of Foster Care* (USA: Cutler Consulting, 2009); *Cost Avoidance: The Business Case for Investing in Youth Aging Out of Foster Care* (USA: Jim Casey Youth Opportunities Initiative, 2013); Jim Casey Youth Opportunities Initiative, *Future Savings: The Economic Potential of Successful Transitions From Foster Care to Adulthood* (Baltimore, Maryland: The Annie E. Casey Foundation, 2019); Sunitha Raman, Brett Andrew Inder & Catherine Scipione Forbes, *Investing for success: The economics of supporting young people leaving care* (Sydney, Australia: Centre for Excellence in Child and Family Welfare, 2005).

66 "25 is the New 21", *supra* note 65 at 49.

67 Marvin Shaffer, Lynell Anderson, & Allison Nelson, *supra* note 65 at 2, 5.

the criminal justice system, substance use and abuse, mental health issues, and early pregnancy. This report also found that even without considering the cost savings of adverse outcomes, the additional per household cost of increasing the support age to 24 was approximately $2.75 per month and would not require tax increases.[68]

According to Minister Rebecca Schultz, the cost for Alberta's SFAA program in 2018 was $28 million, which translates to approximately $13,000 per each of the 2,100 youth in the program.[69] Reducing the age to 22 directly impacts only about 500 of these youth, resulting in approximately $6.5 million in estimated savings per year. Even applying Ontario's more conservative estimate, which includes only a difference in lifetime tax revenue and a reduction in the cost of incarceration and delivery of adult social programs, the benefit of investing $13 million to continue support for 500 youth up to age 24, is an estimated net lifetime benefit of about $9 million, or $18,000 per youth. Analyzing these figures, it is difficult to rationalize the short term cost savings when there is an unsettling social cost in addition to the greater financial cost associated with not supporting these youth.

V. BACKGROUND OF A.C. AND J.F. V. ALBERTA

A.C. and J.F brought a joint application before the Alberta Court of Queen's Bench upon learning that the supports they had been receiving under Supported Financial Assistance Agreements (SFAAs) would end earlier than expected. Supports would end for A.C upon their 22nd birthday and for J.F. immediately upon the coming into force of the proposed amendments to the *Child, Youth, and Family Enhancement Act.* Both A.C. and J.F. had prepared transition plans under their respective SFAAs that were designed to prepare them for independence by the age of 24, and both had made significant life decisions with the understanding that this benefit would remain in place.

The original application challenged the validity of the proposed amendments to the *CYFEA* on the basis that these amendments constitute an infringement on the Section 7 and Section 12 *Charter* rights of A.C., J.F, and other young people affected by the change to the *Act.*[70] The pleadings have since been amended to include a claim of infringement on section 15 *Charter* rights as well.[71] According to A.C. and J.F., Alberta owes a fiduciary obligation to continue providing support through these agreements until age 24 for all people currently receiving supports under an SFAA.[72] The application also requested relief in the form of an interlocutory injunction preventing the amendments from taking force and effect until the *Charter* challenge can be heard and decided.[73] LEAF and the BC Civil Liberties Association

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68 *Ibid* at 2.

69 Janet French, "Alberta Benefit Changes Throw Plans by Vulnerable Young Adults Into Disarray," *Edmonton Journal* (4 November 2019), online: <https://edmontonjournal.com/news/politics/alberta-benefit-changes-throw-plans-by-vulnerable-young-adults-into-disarray> [perma.cc/MN5B-32QJ].

70 *AC and JF v her Majesty the Queen in Right of Alberta*, (19 March 2020), Edmonton 2003-048252020 (Originating Application) [*Originating Application*] at 2.

71 *Amended Originating Application*, *supra* note 62.

72 *Originating Application*, *supra* note 70 at 2.

73 *Ibid* at 2–3.

have both applied for intervenor status in the proceedings, which Alberta is opposing. At the time of writing, only the interlocutory injunction had been heard before the courts.[74]

A. Circumstances of A.C. and J.F.

Young people transitioning to adulthood from government care typically come from a background of trauma, abuse, physical and mental health struggles, exposure to substance dependencies, and poverty. A.C. and J.F. are no exception.

i. A.C.

A.C. is a 22-year-old Indigenous single parent who survived a childhood wrought with abuse and poverty.[75] A.C. survived sexual exploitation from a young age, became pregnant at age 15, and eventually lived through substance dependency and suicide attempts while still managing to support her child and herself through sex work.[76] A.C. credits the SFAA program with providing the tools she required to put her life on a more sustainable path to independence.[77] Under this program A.C received one-on-one support from the support worker who had been assigned to her file since she was 11 years old and who A.C. looks to as a significant support in her life.[78] Together, they developed an attainable plan that would see A.C. transitioning to independence gradually, and ultimately become fully independent by age 24.[79] A.C. planned to exit the program at age 24 with her driver's license, employment education, progress toward a post-secondary degree, an alcohol free home, and the emotional and social readiness to provide for herself and her child.[80]

The premature removal of these supports for A.C. would mean losing the support of the worker she has learned to count on for encouragement and counselling. It is likely that A.C. would have to abandon the educational plan she developed and return to sex work to support herself and her child.[81] The emotional impact of returning to work that she expected to be done with would have a traumatic impact on A.C.'s health and wellbeing and could lead to falling back into substance use and suicidal thoughts.[82]

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74 *Interlocutory Injunction Judgment*, *supra* note 2; *Injunction Appeal*, *supra* note 2.

75 While detailed accounts of pain and trauma are useful in the context of providing evidence to a court, I have deliberately chosen not to exploit the personal traumas of these young persons for emotional impact in this article. This choice was made with a deep awareness of just how traumatic and painful a childhood that ends with a youth 'aging out' of care can be, and is not intended to downplay the personal and lived experiences of these young people.

76 *Originating Application*, *supra* note 70 at 3; See also Omar Mosleh, "She survived a childhood of sexual abuse and addiction. Now she's suing the Alberta government to keep the support she says she needs", *The Toronto Star* (14 March 2020), online: <https://www.thestar.com/edmonton/2020/03/14/she-survived-a-childhood-of-sexual-abuse-and-addiction-now-shes-suing-the-alberta-government-to-keep-the-support-she-says-she-needs.html> [perma.cc/WX7J-FEW3].

77 *Interlocutory Injunction Judgment*, *supra* note 2 at 2.

78 *Originating Application*, *supra* note 70 at 8.

79 *Ibid*.

80 *Ibid*.

81 *Ibid* at 9.

82 *Ibid*.

ii. J.F

J.F. was 23 at the time the application was filed. She is an Indigenous single parent to two young children, who survived abuse, trauma, and homelessness before being taken into care with her two children at age 17.[83] J.F. lives with several health issues that affect her ability to become fully independent. From the time that J.F. and her children came into the SFAA program, she was informed that the emotional and financial supports offered to her under the program would be available to support her transition to independence until age 24.[84] J.F.'s supports include continual contact and one-on-one support with her worker. Under the SFAA program, J.F. receives access to more services and funding than would be available under adult government programs. J.F credits the program with pulling her and her children out of homelessness, and she has been able to further her education, get her learner's license and reconnect with family because of these supports.

If J.F. is prematurely removed from the program, she will be stuck in a lease contract for housing that is beyond what she can afford with adult assistance programs or employment.[85] Because J.F. is still very reliant on the emotional and financial supports she receives, removal is likely to leave her and her children homeless and impoverished and is likely to result in her children being removed from her care.[86]

B. Procedural History

i. Injunction Hearing

The first step in this case was to apply for an interlocutory injunction. Constitutional challenges do not move quickly, and with the amendments coming into force before there would be an opportunity to present the case, there was some urgency to stop the implementation of the amendments. A.C. brought the injunction application alone because the COVID-19 pandemic thrust the province into a state of partial shut-down just prior to the hearing and prevented J.F. from presenting evidence.[87] The injunction application sought a stay of the implementation of the amendments to the legislation rather than just an exemption from the legislation for A.C.[88]

The Chamber's Judge granted the injunction after applying the test for injunctive relief as set out in *RJR-Macdonald v. Canada (Attorney General)* and refined in *AUPE v. Alberta* for injunctions that would prevent the implementation of otherwise valid legislation.[89] In applying the *RJR* test, Justice Friesen noted that A.C has a difficult constitutional case to make, particularly with respect to a section 7 infringement.[90] However, the Court found

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83 *Ibid* at 3.
84 *Ibid* at 9.
85 *Ibid* at 11.
86 *Ibid* at 12.
87 *Interlocutory Injunction Judgment*, *supra* note 2 at 3.
88 *Ibid*.
89 *RJR - MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334 [*RJR*]; *AUPE v Alberta*, 2019 ABCA 320 [*AUPE*].
90 *Interlocutory Injunction Judgment*, *supra* note 2 at 21–22.

neither the section 7 nor the section 12 claim to be vexatious or frivolous and the serious potential negative effects on young people did constitute a serious issue to be tried.[91] Justice Friesen found that there would be irreparable social, psychological and financial harm to A.C. and to similarly situated young people.[92] This harm would be irreparable in that it could not be compensated by a future financial judgment in A.C.'s favour.[93] At the balance of convenience stage of the test, after making the presumption set out in *AUPE* that the legislation is constitutional and in the public interest, Justice Friesen relied on *RJR* to find that the benefit of preventing the amendments from taking effect would outweigh the harm. Here, preventing the legislation would mean maintaining a status quo supported by medical and sociological evidence.[94] As there would be no change to the existing SFAA program if the injunction is granted, the harm to Alberta did not outweigh the potential harm to the affected young people if the age reduction was allowed to take effect before the merits of the case can be decided.[95]

ii. Alberta Appeals the Injunction

Alberta subsequently appealed the special chambers decision of Justice Friesen on the grounds that she applied the threshold test incorrectly in deciding whether there was a serious issue to be tried, and in the treatment of the presumption that legislation is constitutional in the balance of convenience stage of the test.[96] A.C simultaneously applied for leave to argue for the *AUPE* decision to be reconsidered as it incorrectly created a more stringent test when an injunction is sought to prevent legislation from being implemented.[97] The key issue to be clarified from *AUPE* on appeal was whether the strong presumption that legislation is constitutional modified the test from *RJR* when determining whether to grant injunctive relief in a case challenging the constitutionality of legislation.[98] Here, the Court of Appeal found that a presumption of constitutionality was not supported at any stage of the test for injunctive relief and is a question that had been considered and dismissed by the Supreme Court in *Manitoba (AG) v Metropolitan Stores Ltd.*[99] In the lower court decision, Justice Friesen had applied the third branch of the test with the presumption of constitutionality from *AUPE*. Thus, the appeal would proceed on the issue of whether she had erred in law in granting the injunction.

a. Injunction Reversal

In reapplying the tripartite test from *RJR*, part two of the test, the question of irreparable harm, was not at issue. With respect to the first stage of the test, the Court of Appeal noted that whether the constitutional claim will be successful could require an expansion of section

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91 *Ibid* at 23.
92 *Ibid* at 24.
93 *Ibid*.
94 *Ibid* at 25.
95 *Ibid*.
96 *Reconsideration Decision*, *supra* note 2 at para 4.
97 *Ibid*.
98 *Injunction Appeal*, *supra* note 2 at para 35.
99 *Ibid*; *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 [*Metropolitan Stores*].

7 to include positive rights, but that this does not mean the claim could not succeed.[100] The Court found that there was a serious issue to be tried based on the preliminary analysis of the section 7 claim and declined to comment on the merits of the section 12 claim or whether there was a breach of fiduciary duty.

The injunction was reversed at the third stage of the test. The Court of Appeal found that the chamber's Justice had not given proper weight to the presumed public interest of otherwise valid legislation.[101] In *Metropolitan Stores*, the Court noted that legislation serves an important purpose for the public and its important sectors such that deprivation of the protection and advantages of that legislation should not occur without giving the public interest of the legislation the weight it deserves.[102] In the earlier decision, Justice Friesen had not fully considered the public interest beyond the limited information provided by Alberta, and instead looked to the well supported evidence she had before her about the previous government's policy. The Court of Appeal stated that relying on previous policy decisions would "hamstring the government from making any changes to policy" that might negatively affect any part of the population.[103]

The Court of Appeal further noted that the chambers judge failed to consider that other support programs would meet or exceed the supports available to A.C. under the SFAA program.[104] Finally, the Court determined that the likelihood that the case would succeed, and the nature and extent of the irreparable harm, needed to be considered in the balance of convenience portion of the test and was not.[105] On these points, the Court of Appeal found the barriers to the success of the case too insurmountable such that it could not be termed the "clearest of cases." Moreover, it found that the alternative supports mitigated the harm to A.C. and other young people substantially enough that the balance of convenience did not favour A.C.[106]

iii. Leave to Appeal to the Supreme Court of Canada

On March 25, 2021, A.C. filed for leave to appeal the injunction decision to the Supreme Court of Canada.[107] A.C. argued in their application for leave, that the jurisprudence in applying the third stage of the *RJR* test for injunctive relief is lacking clarity which has led to differing outcomes between courts and jurisdictions. In particular, the application sought clarification on whether a party must demonstrate a strong likelihood of success to meet the "clear case" threshold, and whether a Judge is required to consider public interest factors outside of the evidence led. The issue of injunctive relief has been an issue before the Supreme court on several other occasions, and ultimately the questions at issue in this case were not

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100 *Injunction Appeal*, *supra* note 2 at para 52.
101 *Ibid* at para 64.
102 *Metropolitan Stores*, *supra* note 99 at para 57.
103 *Injunction Appeal*, *supra* note 2 at para 65.
104 *Ibid* at para 66.
105 *Ibid* at paras 67–69.
106 *Ibid* at paras 69–70.
107 *AC and JF v her Majesty the Queen in Right of Alberta*, (25 March 2021), Supreme Court of Canada 39551 (Memorandum of Argument for Leave to Appeal) [*Leave to Appeal*].

enough to warrant further intervention. Leave to Appeal was dismissed, and the Court of Appeal decision stands. The affected youth in Alberta remained in a state of precarity until March 2022, when TAP was announced.

iv. Will A.C. and J.F. Proceed in the face of TAP

After taking some time to review the new services provided with TAP, the plaintiffs decided to proceed with the litigation in June 2022. The assessment by counsel for the plaintiffs was that TAP provides supports, both financial and emotional, only on a conditional basis. While public information on the program is limited, many youth, including A.C., are claiming difficulties in qualifying for TAP since the program was rolled out in April 2022. At the date of writing, the matter has not yet been heard.

VI. MERITS OF CONSTITUTIONAL CLAIMS AND THE RIGHTS OF YOUTH IN TRANSITION

While the constitutional claims in *A.C. and J.F. v. Alberta* have yet to be heard by the courts, both the Chambers Judge and the Court of Appeal carried out a preliminary assessment of the merits of the claims during the injunction decisions. The Chambers Judge noted that A.C. and J.F. would have an "upward battle" in proving their claim while the Court of Appeal mentioned that an expansion of the existing jurisprudence would be required for the claim to succeed.[108] Both courts noted that these difficulties did not mean that the case could not succeed.

The claims made in the originating application and the amended originating application are that the policy change to terminate SFAA agreements at age 22 rather than age 24 is an infringement on the section 7 right to life, liberty and security of the person, an infringement on section 12 right to be free from cruel and unusual treatment, and an infringement on the section 15 right to equal treatment. This section will evaluate the claims made by A.C and J.F.

A. Section 7: Life & Security of the Person

To show a violation of section 7 of the *Charter*, there must be infringement on the right to life, liberty, and security of the person; and the infringement must not accord with the principles of fundamental justice.[109]

The issue here is whether Alberta's decision to terminate the SFAA program two years earlier would constitute "state action" in the context of a section 7 infringement. Here, A.C. and J.F. entered into an agreement that could be terminated with notice by either party, so the right to access the SFAA program until age 24 may require proving some level of fiduciary duty by the government to continue support.

Positive rights with respect to social benefits have been a point of contention at the Supreme Court level in the past. In *Gosselin v. Quebec (Attorney General),* the door was left

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108 *Injunction Appeal*, *supra* note 2 at paras 43, 52.

109 *Canadian Charter of Rights and Freedoms,* s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *R v CP*, 2021 SCC 19 [*R v CP*] at para 125.

open for positive rights that "sustain life, liberty or security of the person" under "special circumstances."[110] However, the court ultimately ruled against a positive right to access sufficient social supports, due to insufficient evidence.[111] Importantly, this case was a very close decision (a 5/4 split) even at the time it was decided nearly two decades ago. The supporting research and transition to adulthood patterns since *Gosselin* show that young people are now relying on support well into their 20s to successfully transition to independence. Further, positive rights have been recognized in other contexts, and particularly with respect to children. In *G.(J.)* the SCC recognized a limited positive right to state funded counsel where a child and parents right to security of the person are engaged through the apprehension of that child and the principles of fundamental justice demand state funded counsel for a fair hearing.[112]

i. Is the right to life, liberty, or security of the person engaged?

While there is no free-standing right to government support or assistance currently, A.C., J.F., and other young people receive more than merely financial support through the SFAA program. To be eligible for the SFAA or TAP program, youth must have been the subject of state action taking them into government care. This is an action that children are powerless against. Transitional support programs like SFAA and TAP are developed for the purpose of supporting a transition out of care to adulthood. SFAA in particular was a needs-based program which provided wrap-around style supports specific to the needs of each youth. Removal of these supports prematurely engages the right to life, liberty and security of the person.

The link between death by suicide and time in government care is supported in the reports by child advocacy groups across Canada.[113] Suicide is the second leading cause of death in youth under 24.[114] In Alberta, we lose 11 youth each year to suicide, which is among the highest rates of youth suicide in Canada.[115] Indigenous youth are over six times more likely to die of suicide than non-Indigenous youth.[116] The risk factors associated with suicide are well aligned with the experiences of young people in care who are more likely to have experienced abuse and trauma, suffer from a mental disorder, disability, or substance dependency, live in poverty, be involved in the criminal justice system, etc. It is no surprise then, that youth who have lived in care are three times more likely to commit suicide than youth

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110 *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 83 [*Gosselin*].

111 *Ibid* at para 5.

112 *New Brunswick (Minister of Health and Community Services), v G(J)*, [1999] 3 SCR 46 [*G(J)*] at para 107.

113 Manitoba Advocate for Children and Youth, *"Stop Giving Me a Number and Start Giving Me a Person": How 22 Girls Illuminate the Cracks in the Manitoba Youth Mental Health and Addiction System* (Manitoba: The Manitoba Advocate for Children and Youth Office, 2020); Manitoba Advocate for Children and Youth, *Finding the Way Back: An aggregate investigation of 45 boys who died by suicide or homicide in Manitoba* (Manitoba: The Manitoba Advocate for Children and Youth Office, 2021); OYCA Alberta, *Toward a Better Tomorrow: Addressing the Challenge of Aboriginal Youth Suicide* (Alberta: Office of the Child and Youth Advocate, 2016).

114 *Ministry of Children's Services, Building Strength, Inspiring Hope: a provincial action plan for youth suicide prevention 2019 - 2024* (Alberta: Government of Alberta, 2019) at 3.

115 *Ibid*.

116 *Ibid*.

who have not lived in care.[117] Past suicide attempts are also an indicator of risk for future attempts because 37% of people who attempt suicide once will attempt it again. Nearly 7% of those people will eventually die of suicide.[118]

When state action results in an increased risk of death, either directly or indirectly, the right to life has been infringed.[119] This standard is flexible, meaning that if A.C. and/or J.F.'s life becomes imperilled, and this can be linked to the state action by reasonable inference that the state action contributed, the standard is met.[120] Security of the person is engaged by any state action that causes physical or serious and profound psychological suffering.[121] The SFAA program is a unique program that provides support that is not available through other social programs. There are other financial supports available, but the supports provided by the SFAA program are not always financial in nature and are provided based on the needs of the recipient. Prematurely terminating the primary support network of 500 young people will have long term effects that must be considered. With respect to A.C., she is concerned that the removal of support will mean she must return to sex work. Additionally, she fears that termination of support will lead to severe anxiety about how to support herself and her child as well as depression and possible death from suicide. For J.F., the removal or reduction of supports puts her at increased risk of eviction and homelessness, and removes the non-financial supports which keep her and her children safe while she works one-on-one with a worker on her plan to transition off the program. The risk of continuing the cycle of apprehension with A.C. and J.F's own children must also not be ignored, given that this has been found in *G.(J.)* to engage section 7 rights.

Given A.C.'s history of suicide attempts, being left with no option but to return to sex work, both A.C. and J.F.'s ongoing mental health struggles, and J.F.'s risk of homelessness, the premature removal of a primary support system, and the potential of having their own children removed from their care is will certainly lead to serious psychological harm beyond typical stress and anxiety, and may even pose a risk to their lives. This can clearly be linked to state action, which engages section 7 rights.

ii. Does removing or reducing supports accord with the principles of fundamental justice.

Youth who face 'aging out' of care come from a background of trauma and uncertainty. The government assumes the role of caring for children brought into care, and often in doing so, statutorily terminates guardianship of any other existing guardians.[122] The termination of guardianship is only typical in the child welfare context. In private family law, it is very

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117 Rhiannon Evans et al, "Comparison of suicidal ideation, suicide attempt and suicide in children and young people in care and non-care populations: Systematic review and meta-analysis of prevalence" (2017) 82 Children and Youth Services Review 122 at 123.

118 Isabel Parra-Uribe et al, "Risk of re-attempts and suicide death after a suicide attempt: A survival analysis" (2017) 17:1 BMC Psychiatry 163 at 163.

119 *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 62 [*Carter*].

120 *Canada v Bedford*, 2013 SCC 72 at paras 74–78 [*Bedford*].

121 *G(J)*, *supra* note 112 at para 60.

122 *CYFEA*, *supra* note 4, s 11(1).

difficult to show that it is in the best interests of a child to have a guardian removed as any issues related to access and decision making can be resolved through a parenting order. However, upon government apprehension of a child and the granting of a permanent guardianship order under the *Child, youth and family enhancement Act*, all other guardians are terminated automatically and without recourse.[123] The government takes on the sole obligation to the child and becomes responsible for providing all the care and support that is normally expected of parents. To actively remove the role of existing guardians and then argue that the government is no longer responsible for the child at age 18, and that any support agreement entered into beyond age 18 can be terminated by either party, shows outdated and detached thinking about how children successfully transition to adulthood.

Additionally, the unilateral termination of support for children is not supported by other Canadian family law statutes. Under the federal *Divorce Act* and the *Family Law Act* in Alberta, children are entitled to support from their parents for as long as they are unable to withdraw from their parents' charge.[124] The unique and imbalanced relationship between the government and children in care deserves due weight when considering whether it is time to move towards a positive right to social assistance in the context of the government providing for children that it assumes responsibility for until they are able to withdraw from its charge. It is this unique relationship that does not permit termination of life sustaining supports to accord with the principles of fundamental justice.

B. Section 12: Cruel & Unusual Treatment

A.C. and J.F. also state that refusal to exempt current program participants is cruel and unusual treatment under section 12 of the *Charter*. Cruel and unusual treatment is not usually considered in the civil context and, as a result, may be more available for expansion than section 7 jurisprudence. However, the threshold for establishing a breach of section 12 is high, particularly where a law is designed to meet a "worthy social goal."[125] A.C. and J.F. must first show that the state action constitutes "treatment" under section 12, then demonstrate that the treatment in question is so excessive as to outrage the standards of decency.[126] For state action to be considered treatment, it must involve active exercise of state control over the individual whether it be positive action, inaction, or prohibition.[127] Secondly, the court will ask whether the treatment is cruel and unusual.

In *Canadian Doctors for Refugee Care v. Canada (Attorney General).* the court found that the government had intentionally targeted a vulnerable, poor, and disadvantaged group constituted "treatment" for the purpose of section 12 when it reduced the health care coverage for refugees to Canada. [128] In that case, many of the recipients were statutorily barred from

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123 *Ibid*.

124 *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*], s 2(1); *Family Law Act*, *supra* note 29, s 46(b).

125 *McNeill v Ontario (Ministry of Solicitor General and Correctional Services)*, [1998] OJ No 2288 (QL), 53 CRR (2d) 294 [*McNeill v. Ontario (Ministry of Solicitor General and Correctional Services)*] at para 24.

126 *Interlocutory Injunction Judgment*, *supra* note 2 at 19.

127 *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519 at paras 67, 182 [*Rodriguez*].

128 *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 at para 587 [*Refugee Care*].

earning employment income, and were entirely dependent on the government for these benefits. This was found to constitute "active exercise of state control over the individual."[129]

In determining whether a treatment is cruel and unusual the court will look to several factors including:

- Does the treatment go beyond what is necessary to achieve the objective?
- Are there adequate alternatives?
- Is the treatment arbitrary?
- Does it have a valuable social purpose?
- Is the treatment unacceptable to a large portion of the population?
- Does it shock the general conscience?
- Is it degrading to human dignity and worth?[130]

i. Is the removal or reduction of supports "Treatment"?

Because of the contractual nature of the agreement between A.C. and J.F. and Alberta that allows for termination upon notice, treatment will require A.C. and J.F. to demonstrate that the relationship between children in care and government is unique. Through this relationship of child dependency on the government for adequate care and support, A.C. and J.F. may be able to show that even beyond age 18, there is an element of state control over young people in state decisions that alter or remove these supports arbitrarily. Protection of the needs and best interests of children is codified in both international conventions, to which Canada is a signatory, and woven throughout Canadian law.[131] Part of this codification is in the authority of the state to exercise *parens patriae* jurisdiction where necessary to protect the best interests of the child, and permits the termination of all natural guardians of the child by statute. In *Baker*, the SCC recognized that the needs of children should be given substantial weight as "central humanitarian and compassionate values."[132]

In the case of youth transitioning from care, these are not children under the *CYFEA*, as children under that act cease to be children upon reaching the age of majority. All supports provided after the age of majority are provided by agreement, which either party can terminate at will. Youth are dependent on the government for support up until they reach the age of majority, and most at this stage will not have any other transition support available to them than supports through SFAA or TAP. This relationship of dependence, established by state action of taking on the guardianship obligation to a child should constitute treatment for the purposes of section 12.

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129 *Ibid* at paras 608–610.

130 *R v Smith*, [1987] ACS no 36, [1987] SCJ No 36 (QL) at para 44 [*R v Smith*].

131 *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*UNCRC*], art 6(2); *Family Law Act*, *supra* note 29; *Divorce Act*, *supra* note 125; *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 [*CYFEA*]; *ARFNIM*, *supra* note 1.

132 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 39 (QL), [1999] SCJ No 39 (QL) at paras 67, 70 [*Baker*].

ii. Is the treatment "Cruel and Unusual"

The objective of the reduction or removal of supports under the SFAA is to reduce costs of social spending. While this will be reviewed more fulsomely under section 1 analysis, on its face, the treatment does not go beyond what is necessary, and in fact does not appear to achieve the objective at all. As shown in earlier sections, the overall costs of reducing supports to this vulnerable population outweigh any short-term cost savings.

While there are alternative supports available for people over the age of majority, these are not a suitable alternative to the supports available under the SFA. The wrap around, needs based, recipient specific supports were unique to this program. The program was developed in response to lengthy consultations and studies that showed everyone benefits when youth are supported, and that youth 'aging out' of care often require additional support as compared to their peers who have not been in care. Alberta argues that the alternative benefits will fill any gap created by the change from the SFAA program to the TAP program, however, the new program remains deficient. Following the reasoning in *Refugee Care,* the extreme economic deprivation of youth transitioning from care, places self sufficiency upon 'aging out' beyond the reach of most youth.[133]

While legislators are afforded deference in decisions about the distribution of scarce social resources, the age limit of 22 is arbitrary and does not follow the treatment of youth the same age in the majority of the population. Looking again to other Canadian family law statutes, children are entitled to support from their parents for as long as they are unable to withdraw from their parents' charge.[134] For children not entitled to child support, the available data shows that parents are willing and do continue to support their children well beyond the age of majority based on their needs.[135] Again looking to the reasoning in *Refugee Care*, placing youth who are entirely dependent on the government as their guardian "in a position where they must beg" for life sustaining supports is demeaning. "It sends the message that their lives are worth less than the lives of others. It is cruel and unusual treatment that violates section 12 of the Charter."[136]

The decision in the *Refugee Cares* case turned on the intentional targeting of the disadvantaged group, so A.C. and J.F.'s success on a section 12 claim may depend on ability to frame the SFAA cuts as one that intentionally targeted youth 'aging out' of care, a group that is demonstrably vulnerable, poor and disadvantaged. They may also need to demonstrate that the result of this reduction in services was the predictable and preventable physical and psychological suffering of youth transitioning out of government care.[137]

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133 *Refugee Care*, *supra* note 128 at para 675.

134 *Divorce Act*, *supra* note 124, s 2(1); *Family Law Act*, *supra* note 29, s 46(b).

135 "RBC Survey", *supra* note 7; Statistics Canada, *supra* note 7; Rutman & Hubberstey, *supra* note 7.

136 *Refugee Care*, *supra* note 128 at para 688.

137 *Ibid* at para 587.

C. Section 15: Equality

Section 15 of the charter protects against discrimination. For a government policy to infringe on section 15, it must, on its face or in its impact, create a distinction based on an enumerated or analogous ground; and it must impose a burden or deny a benefit in a manner that perpetuates a disadvantage.[138]

The enumerated grounds under section 15 include: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[139] Factors identified by the Supreme Court of Canada that should be considered when determining whether a ground is analogous include:

- Whether a link can be shown between the ground and historical stereotyping, prejudice or disadvantage.[140]
- Whether the group claiming discrimination can be considered a "discrete and insular minority…lacking in political power or influence";[141]
- The immutability of the characteristic, meaning the characteristic is beyond an individual's control or is "changeable only at unacceptable personal cost";[142] and
- Whether the characteristic is recognized as a prohibited ground of discrimination under federal or provincial human rights laws.[143]

i. Family status as an analogous ground

When we look at whether the proposed change to the SFAA program is discriminatory under section 15, the enumerated grounds of age and race appear immediately applicable. The intersectional element between age, race, and family status cannot be ignored when considering the potential for this proposed legislation to be discriminatory. These are youth, who are mainly Indigenous youth, have been stripped of all natural guardians and taken into the care of the government. When these grounds are taken together, we have a group of people, the majority of whom have been the object of historical disadvantage or prejudice, and who will be further disadvantaged by a policy that applies to them only because of their age and their family status. This intersectional element shows a clear link between the historical disadvantage and family status. Further, youth 'aging out' of government care

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138 *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27 [*Fraser v Canada (Attorney General)*].

139 *Canadian Charter of Rights and Freedoms,* s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

140 *Miron v Trudel*, [1995] 2 SCR 418 (124 DLR (4th) 693) [*Miron v. Trudel*] at para 158; *Egan v Canada*, [1995] 2 SCR 513 (124 DLR (4th) 609) [*Egan*] at 554; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 (176 DLR (4th) 513) [*Delisle*] at para 44; *Baier v Alberta*, [2007] 2 SCR 673 (283 DLR (4th) 1) [*Baier*] at para 65.

141 *Andrews v Law Society of British Columbia,* 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at 152 [*Andrews v. Law Society of British Columbia*]; *R v Turpin*, [1989] 1 SCR 1296 (Supreme Court of Canada) at 1333 [*R. v. Turpin*]; L'Heureux-Dubé J Concurring in Miron v Trudel, supra note 140 at para XIII."

142 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 (Supreme Court of Canada) at paras 13, 60 [*Corbiere*]; *Miron v Trudel*, *supra* note 140 at para 148.

143 *Corbiere*, *supra* note 142 at para 60; *Miron v Trudel*, *supra* note 140 at para 148.

are a clear minority, with limited resources or supports to influence policy in their favor. Youth in care possess this family status through no fault of their own, and given that the decision to apprehend occurs before the age of majority, family status is not a characteristic that the youth has any ability to change. In addition, family status is already protected under human rights legislation, though the SCC recently had an opportunity to recognize family status as an analogous ground protected under the *Charter* and stopped short of doing so.[144] Family status has been recognized as an analogous ground under section 15(1) in lower courts, with respect to age limits for child support in Alberta's *Family Law Act*, infants of incarcerated mothers, and in dissenting reasons with respect to the tax consequences of child support.[145]

The discrimination element with respect to age and family status becomes even more apparent and significant when the proposed amendments to the SFA's are viewed alongside the contemporaneous amendments to the Alberta *Family Law Act*, which eliminated age limits of 18 and 22 for adult child support where a young adult is unable by reason of illness, disability, student status, or other cause to "withdraw from his or her parents' charge or to obtain the necessaries of life."[146] The *Family Law Act* is a piece of legislation that applies to families who are not subject to the *Divorce Act*, which means it applies primarily to families with unmarried parents. Under the *Divorce Act,* there is no upper age limit that disentitles a child from parental support, but rather the definition of a "child of the marriage" allows for support for any child unable to withdraw from the care of their parents. Following a successful *Charter* challenge in Ontario, which was the only other province to impose an upper age limit on child support for children of unmarried parents, Alberta amended the *Family Law Act.*[147] In essence, the government of Alberta agreed following the outcome in *Coates*, that it was discriminatory for children of unmarried parents to be disentitled from parental support at age 22. In spite of this, the year after that amendment came into force, Albert has determined that children under the sole care of the government should no longer require financial support beyond age 22.

While the Supreme Court of Canada in *Fraser* declined to recognize family status as an analogous ground on the basis that the enumerated ground of sex was sufficient to grant relief in that case, the door was left open for the possibility of recognizing family status as an analogous ground subject to protection under the *Charter.*[148] Here, the reduction in support for youth in transition creates a distinction primarily on the basis of family status. Age and race are important intersecting factors, but the main reason these youth will receive less support for a shorter time period than their peers, is because the government was their guardian as a child.

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144 *Fraser v Canada (Attorney General)*, *supra* note 138 at para 123.

145 *Ryan v Pitchers*, 2019 ABQB 19 at para 25 [*Ryan v Pitchers*]; *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 567 [*Inglis v British Columbia (Minister of Public Safety)*]; *Thibaudeau v Canada*, [1995] 2 SCR 627 at 644–646, 722–723 [*Thibaudeau v Canada*].

146 *Family Law Act*, *supra* note 29, s 46(b).

147 *Coates v Watson*, 2017 ONCJ 454 [*Coates v. Watson*].

148 *Fraser v Canada (Attorney General)*, *supra* note 138 at para 27.

ii. Reducing support for youth in transition perpetuates historical disadvantage

To infringe upon section 15 rights, the distinction created by the change to SFAA support policies must reinforce, perpetuate or exacerbate disadvantage for youth transitioning to adulthood from government care. Youth who have been in care are at increased risk of adverse outcomes such as lower rates of educational attainment, employment, and income, and higher rates of premature death, homelessness, involvement in the criminal justice system, substance use and abuse, mental health issues, and early pregnancy as compared to youth who have never been in care.[149] Further, these youth are disproportionately Indigenous. The overrepresentation of Indigenous children in care, and the intergenerational trauma caused by the removal of children from their homes, families and communities has been recognized by the Truth and Reconciliation Commission, and by the Canadian Human Rights Tribunal.[150] Indigenous youth are particularly vulnerable to abuse, mental disorders, substance use, exposure to criminal activity, and suicide.[151] Youth going through the 'aging out' process likely need more support than their peers who are not in care, not less.[152]

A change to SFAA supports that does not sufficiently address the increased vulnerability of youth transitioning out of government care perpetuates the historical disadvantages for all youth, but in particular for Indigenous youth.

For A.C. and J.F., and many other young women like them, this discrimination leaves them disproportionately vulnerable, given that Indigenous women 'aging out' of care face a greater risk of violence, becoming "street-engaged", or death.[153] All of these vulnerabilities place them, as young mothers, at risk of having their own children apprehended, thus perpetuating the cycle of child removal. The effects of a reduction in support are disproportionately severe and reinforce, exacerbate, and perpetuate these pre-existing disadvantages.

D. Is it saved by section 1?

Section 1 provides for limits on *Charter* rights, where the state can show that an infringement is "demonstrably justified in a free and democratic society."[154] This justification requires a two-part test. First, the objective of the policy or provisions in question must relate to a pressing and substantial concern. Second, the discriminatory measure must be proportional to the objective.[155]

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149 Marvin Shaffer, Lynell Anderson, & Allison Nelson, *supra* note 65 at 2, 5.

150 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada.* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 104; *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 [*FN Caring Society childrens case*].

151 "Building strength, inspiring hope", *supra* note 115 at 3.

152 Rutman & Hubberstey, *supra* note 7.

153 National Inquiry into Missing & Murdered Indigenous Women and Girls, *Reclaiming Power and Place*, The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a (Vancouver: Privy Council Office, 2019) at 297–298.

154 *Charter*, *supra* note 109, s 1.

155 *R v Oakes*, [1986] 1 SCR 103 [*R v Oakes*] at paras 68–71.

A pressing and substantial objective must be "of sufficient importance" and not "trivial."[156] Deference to legislators is appropriate in determining whether the infringing measure is directed towards a pressing and substantial objective. [157] The proportionality branch of the test, asks whether the provision is rationally connected to the objective, whether the provision is minimally impairing to those impacted, and whether the deleterious effects are proportionate to the objectives of the law. If an impugned provision fails at any step of the test, the infringement is not justified.

On its face, the changes to the SFAA do not appear unobjectionable. The objective is to reduce public spending, which is a beneficial objective of more than trivial importance. It must be noted that at this stage of the analysis, there is a presumption that legislators are in the best position to craft laws that take into account a variety of considerations, in particular with respect to the distribution of scarce public resources. Little evidence is required at this stage, and any conflicting evidence is most appropriately dealt with in the proportionality steps of the test. A reduction to benefits of SFAA recipients is rationally connected to the objective of reducing spending.

Minimal impairment is a more arguable step of the test. Alberta has expressed the position that there are other social supports available to these youth that can serve to minimize the negative impact of a reduction to the more fulsome SFAA supports. However, these youth are particularly vulnerable, and where they were accessing services up to the age of 24, are likely in need of more support than was even available under the SFAA program.

Where this change may fail, is when the deleterious effects of the change are compared to the objective. The deleterious effects are quite severe. As this article has shown, youth transitioning out of care are particularly vulnerable, and at increased risk for adverse outcomes. The government assumes guardianship of these children when it apprehends or otherwise takes them into care, which comes with a corresponding obligation to provide support that has historically not been met. The personal cost to the youth directly impacted is very high, and the social cost for the increase in adverse outcomes, including the risk and costs of apprehension of the children of these youth, cannot be fully accounted for. The sole benefit to Alberta in depriving youth of necessary supports is a $15 million per year savings. Studies have shown that such a saving may be outweighed by a loss in tax revenue, an increase in costs for social supports, incarceration, further child welfare involvement, or criminal activity. Even where youth can access other supports, these are financial only and do not involve the same wrap-around care that youth receive under the SFAA program. Further, they may not be eligible for funding under adult programming at all. The deleterious effects of any reduction in support to youth transitioning out of care will not be outweighed by a short term cost savings. The impugned provisions may not withstand the proportionality branch of a section 1 analysis.

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156 *Ibid* at para 69; *Sauvé v Canada*, 2002 SCC 68 at para 20 [*Sauvé v Canada*].

157 *Andrews v Law Society of British Columbia, supra* note 141.

CONCLUSION

Alberta's history of supporting youth as they transition to adulthood is dismal with a brief bright(er) spot from 2014 to 2019 where the government engaged with youth, academics, and youth advocates to reform the *Child, Youth, and Family Enhancement Act* and corresponding policy to better support youth through their transition to adulthood. The announcement in 2019 to roll back supports to force youth to 'age out' of their transition years by age 22 came as a shock to young people like A.C. and J.F. who had developed a transition plan that included support to age 24. At the time that this change was announced, A.C. and J.F. were fully dependent on government support, and faced being placed in a dangerous position if supports were terminated. While the TAP program was rolled out to avoid the *Charter* litigation brought by these two young adults, it lacks transparency and appears to be deficient in ensuring that youth are properly supported when transitioning out of government care.

The constitutional questions raised by A.C. and J.F. have yet to be determined by the courts, but this may be a suitable case for a determination on positive section 7 rights to social supports following the 5/4 split decision 20 years ago in *Gosselin.* Further, this may be an opportunity for the courts to expand upon cruel and unusual treatment under section 12 in the civil context.

The section 15 analysis allows for the most forward-looking possible outcomes. This article asked the question of whether young people 'aging out' of care are entitled to a level of support that matches that of their peers who have never been in care, and whether the government must provide that support. This article has shown that there are significant economic disadvantages in failing to support youth transitioning out of care. These youth are a vulnerable population with an increased risk of adverse outcomes such as lower rates of educational attainment, employment, and income, and higher rates of premature death, homelessness, involvement in the criminal justice system, substance use and abuse, mental health issues, and early pregnancy as compared to youth who have never been in care.[158] Further, these youth are disproportionately Indigenous. The overrepresentation of Indigenous children in care, and the intergenerational trauma caused by the removal of children from their homes, families and communities has been recognized by the Truth and Reconciliation Commission, and by the Canadian Human Rights Tribunal.[159] Indigenous youth are particularly vulnerable to abuse, mental disorders, substance abuse, exposure to criminal activity, and suicide.[160]

All of these adverse outcomes have significant social and economic costs associated, that appear to exceed the financial costs of preventing adverse outcomes through the provision of adequate support. It is difficult to justify such significant risk of harm to such a vulnerable population for a relatively small short term economic benefit.

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158 Marvin Shaffer, Lynell Anderson, & Allison Nelson, *supra* note 65 at 2, 5.

159 Truth and Reconciliation Commission of Canada, *supra* note 150 at 104; *FN Caring Society Childrens Case, supra* note 150.

160 "Building strength, inspiring hope", *supra* note 115 at 3.

In spite of Alberta's dismal history of supporting youth transitioning out of care, there have been some exciting developments in this area, particularly with respect to Indigenous youth. The Agreement in Principle will provide for supported transition up to the age of 26, and jurisprudence and legislation are beginning to recognize Indigenous laws as more communities exercise jurisdiction and engage in law revitalization processes with respect to child welfare.

The bottom line is that children do not put themselves into government care. They end up in care through no fault of their own, and face barriers in transition that are both resource related, and experience related. Youth going through the 'aging out' process likely need more support than their peers who are not in care, not less.[161] Ultimately supporting these youth with wrap-around, needs-based services makes sense from a moral standpoint, a legal standpoint, and a policy standpoint.

161 Rutman & Hubberstey, *supra* note 7.

ARTICLE

UNLOCKING THE ECONOMIC POTENTIAL OF URBAN RESERVES

Pedram Gholipour *

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ABSTRACT

The *Indian Act* is the default legislation governing reserves. Its provisions set out a rigid and paternalistic land use planning regime that makes it difficult for First Nations to exercise their inherent right to self-determination. While the *Indian Act* was the only legislation governing land use decisions on reserves for much of the 19th and 20th centuries, First Nations led-advocacy has facilitated fundamental changes to the reserve system by delivering legislative alternatives to the *Indian Act* regime. These alternative regimes were strengthened further in 2018 through Bill C-86, which made it easier for First Nations to control revenue derived from reserves and create or add to existing reserves. This paper considers the effect of these changes on urban reserves, that is, reserves that are adjacent to urban population centres. While the reserve system remains an imperfect settler institution, I argue that the contemporary system provides a viable means for First Nations with urban reserves to develop their land in a manner that is consistent with their right to self-determination and economic interests. Upon discussing the laws and potential benefits of developing on urban reserves under the contemporary system, I conduct a case study on Senakw to highlight how the current regime can facilitate economically advantageous developments for First Nations. I conclude with a discussion on the generalizability of the Senakw model to other urban reserves in Canada.

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INTRODUCTION

Ever since Confederation, Canadian institutions have perpetuated the imposition of Crown sovereignty over Indigenous lands. This imposition has led to the ongoing forced dispossession of First Nations from their traditional territory and suppressive settler laws that make it difficult for First Nations to prosper and exercise their inherent right to self-determination.[1] Perhaps the most pervasive and prevalent intrusion on First Nations' right to self-determination is the *Indian Act*,[2] which sets out the default rules governing reserves.[3]

While the *Indian Act* was the only legislation governing reserves for much of the 19th and 20th centuries, First Nations-led advocacy has facilitated fundamental changes to the reserve system by delivering legislative alternatives to the *Indian Act* regime. Today, First Nations can exercise greater jurisdiction over reserve lands through the *First Nations Land Management Act* (*"FNLMA"*)[4] and the *First Nations Fiscal Management Act* (*"FNFMA"*).[5] These alternative regimes were strengthened further in 2018 through Bill C-86,[6] which made it easier for First Nations to control revenue derived from reserves and create or add to existing reserves. Indigenous Services Canada (ISC) maintains that Bill C-86 and its associated changes to existing legislation ensures that First Nations have greater access to opportunities for economic development.[7]

In this paper, I assess this claim with regard to reserves that are in or adjacent to urban centres ("urban reserves"). While the reserve system remains a settler institution, I argue that the changes culminating in Bill C-86 to the reserve system are a step in the right direction. More specifically, the current reserve system provides a viable means for First Nations with urban reserves to develop their land in a manner that is consistent with their right to self-determination and economic interests. To demonstrate my argument, this paper will have four parts. In Part I, I introduce the challenges associated with the default rules governing reserves and highlight how the *FNLMA* and *FNFMA* regimes alleviate those challenges. In Part II, I discuss how Bill C-86 further alleviates those challenges by making amendments to

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1 See especially *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 1. See also Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Durham: Duke University Press, 2020) at 42.

2 RSC 1985, c I-5 [*Indian Act*].

3 Though Indigenous Peoples in Canada also include Métis and Inuit peoples, the *Indian Act* that sets out the reserve system only applies to First Nations. See Robert Irwin, "Reserves in Canada" (31 May 2011), online: *Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/aboriginal-reserves> [perma.cc/7GEP-YNDL] ("Métis and Inuit do not hold reserve land").

4 SC 1999, c 24 [*FNLMA*].

5 SC 2005, c 9 [*FNFMA*].

6 Bill C-86 *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, (assented to 13 December 2018) [Bill C-86].

7 Indigenous Services Canada, "Changes to legislation ensure First Nations have greater access to lands and opportunities for economic development" (13 December 2018), online: *Government of Canada* <www.canada.ca/en/indigenous-services-canada/news/2018/12/changes-to-legislation-ensure-first-nations-have-greater-access-to-lands-and-opportunities-for-economic-development.html> [perma.cc/4ZJU-86B8].

the *FNLMA* and *FNFMA* regimes while also expediting the Additions to Reserve process. Upon completing my discussion on the relevant rules that govern the current reserve system, in Part III, I discuss the appeal of, and potential for, developing on urban reserves. Specifically, I highlight how factors related to federalism, contemporary national politics, and market demand make developments on urban reserves especially attractive. In Part IV, I conduct a case study of Senakw developments, where I highlight how First Nations could take advantage of the contemporary reserve system and other factors (outlined in section 3) to develop on urban reserves. The case study will also include a discussion on the generalizability of the Senakw model.

I. THE RESERVE SYSTEM: LEGISLATIVE REGIMES

A. Background: Reserves and the Reserve System

Reserves are a significant form of land holding for First Nations in Canada. Most First Nations communities have interests in reserve land, with about 40 percent of First Nations members living on one of more than three thousand reserves.[8] There are reserves in every single province, with some reserves serving as major population centres, while others are small plots of land with no permanent settlement. Part of the reason for this variance is that there is no single formula for creating a reserve. Rather, some reserves are a product of treaties or other agreements with settler institutions,[9] and others are unilaterally imposed by settler institutions.[10] However, irrespective of their location, size, purpose, or genesis—all reserves are wholly or partly governed by the *Indian Act.*

The *Indian Act* is the default legislation governing reserves and it sets out the legal status of reserves. Unlike fee simple lands, legal title over reserve land is held by the Federal Government, which holds it "for the use and benefit of the respective bands for which they were set apart."[11] This classification has negative symbolic ramifications since First Nations' rights in land are framed as being derived from settler institutions rather than existing by virtue of the inherent rights of First Nations to their traditional territory.[12] This symbolic ramification paves the way for a fundamental practical limitation of the reserve system—it is a settler institution and, therefore, ultimately subject to settler laws. Specifically, ownership and authority to make and delegate decision-making power rests with the Federal Government. This fundamental limitation is especially problematic when considering the decision-making structure and restrictions within the *Indian Act*.

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8 Statistics Canada, *A Snapshot: Status First Nations people in Canada,* Catalogue No 41-20-002 (Ottawa: Statistics Canada, 20 April 2021); Natural Resources Canada, "Indigenous Natural Resources" (last modified 10 May 2021), online: *Government of Canada* <www.nrcan.gc.ca/aboriginal-land-claim-boundaries/10714> [perma.cc/TQC9-ZPHN].

9 See e.g. Michelle Filice, "Treaty 4" (last modified 1 November 2016), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/treaty-4> [perma.cc/25B4-HANL].

10 See e.g. Douglas Harris, "Property and Sovereignty: An Indian Reserve in a Canadian City" (2017) 50:02 UBC L Rev 321 at para 10.

11 *Indian Act*, *supra* note 2, s 18(1).

12 See generally Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretentions" in Julie Evans et al, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2012) at 37; Harris, *supra* note 9 at para 9.

B. Indian Act: Intrusion on First Nations' Autonomy

First Nations operating under the *Indian Act* regime are subject to a paternalistic decision-making structure. Technically, ultimate jurisdiction over reserves lies with the Governor in Council[13]—a constitutional reference connoting the Governor General acting on the advice of the Queen's Privy Council for Canada. In practice, most decisions are made through an interplay between the Band Council and the Minister of Indigenous Services ("Minister"), who operates the ISC. The Band Council is a First Nations decision-making body consisting of an elected chief and councillors.[14] The Band Council has general by-law creating powers, including powers to create zoning regulations.[15] However, of the 122 sections in the *Indian Act* that govern First Nation private and public life, about 90 grant authority to the Minister (or a different Cabinet Minister) over the Band Council.[16] Consequently, for a Band Council to make major land use or money management-related decisions, per the *Indian Act*, they must first seek the approval of the Minister.[17] This invariably leads to administrative hurdles that make it inefficient to develop land. However, even if a land use decision is approved, the *Indian Act* constrains the options available to First Nations through restrictive land use and economic management provisions.

The *Indian Act* sets out a rigid process for First Nations to lawfully occupy land on reserves. Section 20(1) of the *Indian Act* specifies that First Nations are not in legal possession of land in a reserve "unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band." The mechanism permitted by the *Indian Act* for this allotment process is the certificate of possession system. A certificate of possession ('CP') grants transferable legal possession of reserve lands. In that respect, it emulates a fee simple interest; however, there are notable limitations on the rights associated with CPs.

A major limitation of the CP with regards to developing reserve lands relates to the difficulty of using the CP to access secured loans. Since a CP is not considered an interest in real property, a holder of a CP would have difficulty using it as collateral to obtain a mortgage or other loan. Though the legislation does not explicitly prohibit the use of certificates for collateral, the unique legal status of reserves and interests in the reserves makes it risky for third-party lenders to loan funds. Risk arises due to a lack of clarity concerning the extent to which a lender could enforce the debt obligation on reserve lands through a CP. It is unclear, in large part, because non-members, such as banks, cannot have the same interests in reserve land as First Nations members.

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13 *Indian Act*, *supra* note 2, s 18(1).

14 *Ibid*, ss 74-80.

15 *Ibid*, ss 81-83.

16 Shalene Jobin & Emily Riddle, "The Rise of the First Nations Land Management Regime in Canada: A Critical Analysis" (2019) at 11, online (pdf): *Yellowhead Institute* <yellowheadinstitute.org> [perma.cc/QMX9-MXQR].

17 *Ibid*.

While non-members can have interests in reserve land, the *Indian Act's* procedures make it challenging to do so. As a starting point, non-members on reserves are presumed to be in trespass and subject to a fine or imprisonment.[18] For non-members to avoid a trespass infraction, the Band Council must first absolutely surrender or designate a plot of reserve land. An absolute surrender emulates a transfer in fee simple, but one that could only be transferred to the Federal Government.[19] Since an absolute transfer necessitates the *permanent* relinquishing of reserve land; it is more common for First Nations to designate lands for non-member use and occupation temporarily.

The designation of lands is a time-consuming process, where the Band Council must seek the approval of ISC to conditionally surrender the land.[20] After the land is designated, it is ISC, not the Band Council, that makes decisions relating to land management, leases, licenses, or any other transaction affecting designated lands.[21] In practice, this usually involves ISC entering into a head lease with a corporation, who then becomes the landlord capable of issuing registrable subleases in a centralized register— the Surrendered and Designated Lands Register.[22] Once this time-consuming process is complete, any subsequent revenue from that transaction is declared as *Indian moneys.*

Indian moneys refers to revenue that is derived from reserves and held in trust by the Federal Government. The Federal Government, then "determine[s] whether any purpose for which Indian moneys are used or are to be used for the use and benefit of the band."[23] Though the revenue is intended to be used for the use and benefit of the First Nations, ultimate discretion on whether - and how much of - the revenue is distributed back to First Nations lies with ISC.

Altogether, the legal status of reserves sets the stage for the *Indian Act's* restrictive land use and revenue management provisions, making it difficult to develop reserve lands. The legal status of reserves makes all decisions subject to and contingent on settler institutions and laws. In its current form, this manifests as a rigid system of administrative hurdles that creates inefficiencies and uncertainty for First Nations and investors alike. This dynamic is exacerbated by the fact that the *Indian Act* places substantial limitations on the types of interest First Nations and non-members can have. These restrictions make it even more difficult to secure private investment by setting out a complex procedure to designate lands. In the absence of private investment, First Nations operating under the *Indian Act* are at a competitive disadvantage when seeking to fund developments on reserves – a disadvantage that is exacerbated by a lack of control over revenue. While the legal status of reserves remains unchanged, subsequent legislations have provided a mechanism for First Nations to *opt out* of the restrictive portions of the *Indian Act* that relate to land use and money management.

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18 *Indian Act*, *supra* note 2, s 30.

19 *Ibid*, ss 37, 38(1).

20 *Ibid*, s 38.

21 *Ibid*, s 53(1).

22 Indigenous Services Canada, "Indian Lands Registration Manual" (12 October 2017), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1100100034806/1611945250586> [perma.cc/Z4T9-RD4V].

23 *Indian Act*, *supra* note 2, s 61(1).

C. FNLMA Regime

In 1996, 13 First Nations successfully lobbied for the creation of the *Framework Agreement on First Nation Land Management* (*FA*).[24] This initiative was premised on the recognition of First Nations' inherent right to govern their lands independently. To properly respect those inherent rights, the *FA* sets out an alternative regime where First Nations could opt out of 44 land management-related sections of the *Indian Act* upon enacting a land code.[25] The Federal Government ratified the *FA* in 1999 through the *FNLMA.*

There are many associated benefits for First Nations should they decide to enact a land code under the *FNLMA.* Importantly, that land code is not imposed on First Nations; rather, it is a deliberate product developed by First Nations in accordance with their respective laws, customs, and interests. Land codes could govern a wide breadth of rules and procedures, including land use and occupancy, alienability of interests, money management, and delegating management authority over reserve land.[26] Unlike in the *Indian Act,* these general bylaw-creating powers need not be subject to the approval of ISC since First Nations under the *FNLMA* regime are deemed to have the full legal capacity to exercise those powers.[27] These powers include acquiring and holding property, entering into contracts, borrowing money, and investing money.[28] Any subsequent bylaws created under a land code also have the force of law and are enforceable in settler courts.[29] Due to these broad powers and independence, the land governance administration is effectively transferred to First Nations upon enacting a land code.

By facilitating more effective land management, the *FNLMA* makes it easier for First Nations to develop their respective reserves. Since ISC plays little if any role in reserve operation under the *FNLMA* regime, First Nations could make decisions more quickly regarding land use. In a study conducted in 2014, permits and lease decisions took an average of 17 days amongst participating First Nations. That same sample averaged 584 days before they opted for the *FNLMA* regime.[30] One First Nation operating under the *FNLMA* regime even had an average processing time of three days. Efficiency and greater certainty in land management decisions make reserves much more attractive for developers and investors. About a decade after the introduction of the *FNLMA*, one study found that a sample of 32 First Nations had created 4000 jobs with internal and external investments totalling $270 million.[31] The *FNLMA* regime's benefits for economic development could be further enhanced by combining it with the *FNFMA* regime.

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24 *Framework Agreement on First Nation Land Management*, 12 February 1996, online (pdf): *First Nation Land Management Resource Centre* <labrc.com> [perma.cc/ZTR9-Y6P7]; Lands Advisory Board, "Framework Agreement on First Nation Land Management", online: *First Nation Land Management Resource Centre* <labrc.com/framework-agreement/> [perma.cc/H9RD-N4AS] .

25 *Ibid*.

26 *FNLMA*, *supra* note 4, s 18(1).

27 *Ibid*, s 18(2).

28 *Ibid*.

29 *Ibid*, s 15(1).

30 Jobin & Riddle, *supra* note 16 at 7.

31 *Ibid*.

D. FNFMA Regime

To exercise greater jurisdiction over taxation and fiscal management, First Nations could also opt for the *FNFMA*. The legislation's mandate is to provide First Nations with "support and tools to strengthen their communities and build their own economies" through financing, investments, and advisory services to First Nation governments that voluntarily schedule to the regime.[32] To administer this broad mandate, the *FNFMA* creates institutions to assist First Nations and nullifies restrictive provisions that relate to borrowing and taxing, under subsection 73(1)(m) and section 83 of the *Indian Act,* respectively. As a result, First Nations operating under the *FNFMA* could borrow money for developments without the approval of the Federal Government and are granted broader taxation enactment and collection powers that no longer need approval from ISC. In 2018, the Federal Government committed $50 million to *FNFMA* institutions through Bill C-86—which, as I will elaborate on below, also made other significant contributions to the reserve system.

II. BILL C-86: CHANGES TO RESERVE SYSTEM

A. Overview

Bill C-86 is an omnibus legislation passed by the Federal Government in 2018. It is the first federal instrument that explicitly references Canada's commitment to the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").[33] Bill C-86 includes several changes to the reserve system, including amendments to the *FNLMA* and *FNFMA*, and a new streamlined procedure for additions to reserves.

B. Amendments to FNLMA and FNFMA

Bill C-86 amended the *FNLMA* regime so that First Nations have more flexibility and control over revenue. Amendments to the voting threshold for ratification of land codes made it easier for First Nations to opt into the *FNLMA* regime.[34] For First Nations who are scheduled to the *FNLMA*, Division 12 of Part 4 makes a subtle amendment to section 19(1) of the *FNLMA.* Previously, section 19(1) declared that only *revenue moneys* held by ISC for the use and benefit of the respective First Nation must be returned once a custom land code is enacted. The amendment declared that ISC must also transfer *capital moneys* directly to First Nations. Since *revenue moneys* refers to revenue other than *capital moneys*, and *capital moneys* is no longer held in trust, this subtle amendment effectively transfers money management directly to First Nations.

For First Nations that only opted into the *FNFMA* regime, Bill C-86's amendments provide an alternative means to control *capital moneys*. Specifically, an amendment to section 90(1) made it so a Band Council could submit a resolution requesting the payment of *capital moneys* and

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32 Crown-Indigenous Relations and Northern Affairs Canada, "First Nations Fiscal Management" (last modified 8 February 2023), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1393512745390/1673637750506> [perma.cc/QYR9-H78F].

33 GA Res 61/295, UNGAOR, 61st Sess, Supp No 49 Vol III, UN Doc A/61/49 (2007) 06-51207.

34 *FNLMA*, *supra* note 4, s 12, as amended by Bill C-86, *supra* note 6, s 363.

revenue moneys that are currently held or will be collected by the Federal Government in trust. Once the ISC approves the resolution, the provisions of the *Indian Act* that set out the trust arrangement over a First Nations' revenue from reserves cease to apply.[35]

Regardless of which route a First Nation employs to access capital moneys, the economic ramifications of the immediate access to those funds are immense. Since capital moneys refers to revenue from the sale of reserve land, resources, or capital assets—revenue from construction and infrastructure projects need not be held in trust. This is important because revenue moneys alone account for significantly less than the total revenue derived from reserves. In 2018, the trust balance for Indian moneys was $634 million, of which $400 million was capital moneys.[36] Through greater access and control over significant amounts of capital, First Nations operating under the *FNLMA* or *FNFMA* could effectively change the trust arrangement where the Federal Government collects and disburses the funds on behalf of First Nations. Thereby amendments to the *FNLMA* and *FNFMA* could facilitate more certainty and control for First Nations over virtually all revenue derived from reserves.

C. New Additions to Reserve Regulations

Bill C-86 also made it easier to create new reserves or add to existing ones. Division 19 of Bill C-86 introduced the *Additions to Reserve and Reserve Creation Act* (*ARLRC*).[37] While there has been an Addition to Reserve policy since 1972,[38] the *ARLRC* streamlines the process for First Nations. Previously, there was a four-step process for approval, with average wait times ranging from five to seven years.[39] Part of the reason for this delay was because the requests required the express approval of the Governor General through an Order in Council. Now, all requests are administered through a Ministerial Order made through Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC).[40] Since CIRNAC, as a federal department, has more resources than the office of the Governor-General, it has a greater capacity to process requests. Moreover, CIRNAC is authorized under *ARLRC* to transfer additional land to First Nations before the process prescribed by the *ARLRC* is complete.[41]

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35 *Indian Act*, *supra* note 2, ss 61-69.

36 Shiri Pasternak, Robert Houle & Brian Gettler, "The Indian Trust Fund: Debunking Myths & Misconceptions" (2019) at 2, online (pdf): *Yellowhead Institute* <yellowheadinstitute.org> [perma.cc/PFQ9-AYQ6].

37 SC 2018, c 27, s 675 [*ARLRC*].

38 Indigenous Services Canada, "Additions to Reserve" (last modified 10 September 2019), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1332267668918/1611930372477> [perma.cc/T5XB-NGGZ].

39 *Report of the Auditor General of Canada to the House of Commons,* (Ottawa: Minister of Public Works and Government Services Canada, 2005) <oag-bvg.gc.ca> [perma.cc/C7N2-4PK5] at 1.

40 *ARLRC*, *supra* note 37, s 4(1).

41 *Ibid*, s 5(1).

III. URBAN RESERVES: OPPORTUNITIES & BENEFITS

A. Overview

Institutional and contemporary factors make developments on urban reserves especially attractive. While the institutional factors have existed since the inception of the *Indian Act*, the contemporary reserve system allows First Nations to take greater advantage of the unique legal status of reserves. Regarding contemporary factors, there is a political and market-driven demand for developments on urban reserves, which First Nations could capitalize on.[42] Importantly, with the current reserve system, any decision on whether and how to capitalize on these contemporary factors ultimately rests with First Nations. I elaborate on these favourable conditions below.

B. Urban Reserves – A Means to Circumvent Municipal Bureaucracy

Whereas the legal status of reserves has historically had negative implications for First Nations' ability to develop on reserves, the contemporary reserve system presents new opportunities for First Nations. Constitutionally, First Nations lands are subject to federal administration and within the exclusive jurisdiction of the Federal Parliament under section 91(24), *Constitution Act, 1867*.[43] However, since Provincial Governments have the exclusive power to regulate municipalities,[44] they are generally responsible for land management in urban areas. In the absence of equivalent federal legislation governing land management, and the ability of First Nations to opt out of land management provisions of the *Indian Act*, First Nations could potentially exercise considerably more autonomy over land management relative to private actors with interests in fee simple land, especially in the urban context.

Since provincial laws do not apply to reserves, by extension, municipal laws and procedures for permits and zoning also do not apply directly to reserves. Conventionally, urban developments require a permit to commence construction projects in Canadian municipalities. Obtaining a permit often involves extensive research, consultation with City staff, and other fees associated with the application process. Once an application is submitted, it could face incredibly burdensome processing times. Furthermore, since zoning regulations do not apply, developers could prioritize architectural design, cost-saving practices, and economic viability when constructing projects. Therefore, First Nations and developers alike can make decisions expeditiously by bypassing the permit approval process and exercising more flexibility to build in accordance with their economic interests. As such, these changes facilitate a land management regime that is more in line with the inherent jurisdiction of First Nations over their land.

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42 It is worth acknowledging that such decisions may be heavily influenced and constrained by the capitalistic system that has historically and contemporaneously been imposed on Indigenous Peoples by settler laws and practices.

43 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

44 *Ibid*, s 92(8).

C. Political and market factors: More funding and opportunities for urban reserve developments

There are several overarching political considerations that make developments on urban reserves attractive for First Nations and the public generally. They stem from two different national priorities of the Federal Government—the first relates to a commitment to reconciliation with Indigenous peoples in Canada and the second relates to the housing crisis that plagues Canadian cities.

In the 2021 Speech from the Throne, incumbent Governor-General Mary Simon spoke about the Government's direction and goals. The speech had symbolic importance because of its source and its content. Mary Simon is the first Indigenous person to hold the office of Governor General of Canada, and her speech emphasized that *now* "is the moment to move faster on the path to reconciliation" and "build a better relationship between Indigenous Peoples and non-Indigenous Peoples."[45] Notably, the Governor General insisted on the need to take concrete action.

In practice, the Federal Government's renewal of its commitment to reconciliation manifests through greater deference to First Nations' decision-making autonomy and funding to facilitate that autonomy. Thus, even if the Federal Government retains legal title over reserve lands, it is implied that the Federal Government would exercise considerable restraint in making any incursions into reserve land. This implication can be deduced by the motivating reasons for the Federal Government's creation of ISC in 2019—where Prime Minister Trudeau acknowledged that the *Indian Act's* paternalistic structure was inconsistent with the current approach of the Federal Government towards First Nations and that a new department with a more deferential approach was needed to facilitate this new approach.[46] At the same time, the Federal Government has and continues to provide substantial investments to First Nations communities. In 2021, the Federal Government invested $18 billion over five years to Indigenous communities to, inter alia, "create new opportunities for people living in Indigenous communities."[47] Within that investment, specific funds were allocated to Indigenous entrepreneurship and infrastructure projects on reserve lands.[48] Federal funding has also been increased to address the housing crisis in Canada.

Expediting the construction of residential units, especially affordable housing, is a key priority for the Federal Government. In budget 2022, the Federal Government set aside $4 billion to help create 100,000 new housing units across Canada over the next five years

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45 Senate of Canada, *Building a Resilient Economy: Speech from the Throne to Open the Second Session of the Forty-Fourth Parliament of Canada*, 44-1 (23 November 2021) (Rt Hon Mary May Simon) at 5 <canada.ca> [perma.cc/VR44-K3JM].

46 Bill Curry, Shawn McCarthy & Robert Fife, "Trudeau pledges to end Indian Act in cabinet shuffle", *The Globe and Mail* (28 August 2017), online: <www.theglobeandmail.com> [perma.cc/EN3P-JNYQ].

47 Department of Finance Canada, "Budget 2021: Strong Indigenous Communities" (13 May 2021) online: *Government of Canada* <www.canada.ca/en/department-finance/news/2021/04/budget-2021-strong-indigenous-communities.html> [perma.cc/TY6N-YBMP].

48 *Ibid*.

and an additional $4.3 billion dedicated specifically to Indigenous housing projects.[49] Since most of the current market demand for housing takes place in urban areas and cities, urban reserves could capitalize on that federal funding by utilizing their desirable locations to attract investments from members and non-members alike.

Therefore, developments on urban reserves could be branded as a solution to the housing crisis in many cities across Canada, as well as a step toward reconciliation. There is a prospect that developments on urban reserves could simultaneously be subsidized by federal funding and take advantage of existing market factors that make it lucrative to develop on urban areas. A lucrative opportunity for First Nations has the potential to facilitate several benefits that go directly to First Nations.

D. Economic and Social Benefits for First Nations

Once a First Nation has chosen to develop on an urban reserve, there are many potential associated economic benefits. First Nation Governments could derive significant and longstanding revenue from developments on urban reserves through, for example, rental income or taxation which have become easier under the contemporary reserve system. Though that revenue may be transferred to members as a dividend, developments also have economic benefits that relate to employment for First Nations members. For example, a Costco built on a Tsuut'ina Nation's reserve near Calgary has 68 out of 88 positions filled by Tsuut'ina members.[50] These economic benefits are enhanced by the tax exemptions on income earned by First Nation members when working on a reserve.[51]

There is also a notable social benefit that developments on urban reserves could foster. Developments could provide an avenue to strengthen relations between First Nations and the local municipality through economic opportunities and collaboration. For example, the City of Edmonton, in collaboration with the city's First Nation partners, developed an "Urban Reserve Strategy" in 2021 in response to the growing popularity and interest in existing and new urban reserves.[52] Furthermore, developments on reserves could also provide greater connectivity between First Nations members that live on and off reserves by providing a shared space for members to work and benefit together. Moreover, since many First Nations live in urban areas,[53] urban reserves provide a space for First Nations to engage with and deliver services for members living in nearby urban areas. Developments could enhance the delivery of such services.

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49 Office of the Prime Minister of Canada, News Release, "Making housing more affordable" (8 April 2022), online: <pm.gc.ca/en/news/news-releases/2022/04/08/making-housing-more-affordable-canadians> [perma.cc/D7VY-34XX].

50 James Barsby, "The Untapped Potential of Urban Reserves in Northern Ontario" (2022) online: *Northern Policy Institute* <www.northernpolicy.ca/untapped-potential> [perma.cc/534A-TCUE].

51 *Indian Act, supra* note 2, s 87.

52 See generally Indigenous Relations Edmonton, "Urban Reserve Strategy" (2020), online (pdf): *City of Edmonton* <edmonton.ca> [perma.cc/VH49-RKJP].

53 Statistics Canada, *A Snapshot: Status First Nations people in Canada,* Catalogue No 41-20-002 (Ottawa: Statistics Canada, 20 April 2021).

IV. SENAKW: CASE STUDY

A. Overview

The Senakw development began construction on September 6th, 2022, with a ceremony intended to demonstrate the Federal government's commitment to reconciliation with the Squamish Nation. The ceremony included Sḵwx̱wú7mesh Úxwumixw (Squamish Nation) Council Chairperson Khelsilem, who summarized the potential of the project:

> This investment will build many needed rental apartments and generate long-term wealth for Squamish People across many generations. The wealth generated from these lands can then be recirculated into our local economies and communities to address our people's urgent needs for affordable housing, education, and social services.[54]

Prime Minister Trudeau was also in attendance, as he pledged $1.4 billion of Federal funding to support the development.[55] The development is a joint venture by the Squamish Nation and Westbank Corporation for a massive development on Kitsilano Indian Reserve 6 ("Senakw") in Vancouver. In this case study, I introduce the background behind the parties, the land, and the partnership. Upon discussing the legal processes involved in the Senakw development, I then discuss the generalizability of the Senakw model for other First Nations.

B. Background

Once completed, the Senakw development is reported to be the largest First Nations-led development in Canadian history.[56] The First Nation leading the development is the Squamish Nation. The history of the Squamish people spans many millennia with Squamish traditional territory covering 6,732 square kilometres in the Lower Mainland region of British Columbia.[57] Today, the Squamish Nation has interests in 26 different reserves in that area.

One of those reserves is the Senakw Reserve, which has a history that is characterized by settler suppression and Squamish resilience. Long before the arrival of the first European settlers, these lands were a Squamish village—serving as an important hub for trade, commerce, and cultural practices for Squamish people.[58] As European settlement and developments increased in the surrounding areas, the Government of British Columbia forced the illegal surrender of Senakw and relocated Squamish peoples to other Squamish reserves in 1913.[59] In 2002, after nearly a century of advocacy, the Squamish nation succeeded in a settlement with the

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54 Office of the Prime Minister of Canada, News Release, "Historic partnership between Canada and Sḵwx̱wú7mesh Úxwumixw (Squamish Nation) to create nearly 3,000 homes in Vancouver" (6 September 2022), online: <pm.gc.ca/en/news/news-releases/2022/09/06/historic-partnership-between-canada-and-skwxwu7mesh-uxwumixw-squamish> [perma.cc/6RRY-ETC8].

55 The Canadian Press "Canada provides $1.4 billion for 3,000 rental homes in deal with Vancouver-area First Nation", *CBC News* (6 September 2022) <www.cbc.ca> [perma.cc/Q4XH-MC26].

56 "Vision" (2023), online: *Senakw* <senakw.com/vision> [perma.cc/565D-EN37] [Senakw Vision].

57 "About Our Nation" (last modified 2022), online: *Squamish Nation* <www.squamish.net/about-our-nation> [perma.cc/E7NR-VSQ8].

58 "History" (2023), online: *Senakw* <senakw.com/history> [perma.cc/4NLJ-C3N2].

59 *Ibid.*

Federal Government that included the return of, albeit a smaller amount, of Senakw lands that now form Senakw.[60]

Senakw is 10.48 acres and is located by the Burrard Inlet in Vancouver. Though it is relatively small compared to other reserves, it is optimally located in a popular neighbourhood near downtown Vancouver. Its unique shape and small acreage have made it difficult to justify a development in the past; however, its location and growing demand for urban housing in the area make it optimally situated for large-scale residential developments.

This opportunity was not lost on Westbank Corporation, which entered into an agreement with the Squamish Nation to develop on Senakw. Westbank Corporation is one of North America's leading luxury residential and mixed-use real estate developers.[61] They are no strangers to developments in Vancouver and have built several high-rise residential tower developments in the city.[62] However, unlike their previous developments, the Senakw development is a partnership with the Squamish Nation, on a Squamish reserve—which affected the partnership agreement. The terms of the joint venture stipulate that the Squamish Nation is to issue a 120-year lease to Westbank Corporation, which will guarantee a loan of up to $3 billion—constituting the bulk of the upfront costs associated with the construction of the project.[63] After completion, Westbank Corporation would continue to act as property manager for the developments. The revenue allocation is split evenly, with each party receiving 50 percent of the revenue throughout the leasehold's lifetime.

C. Legal Processes

The Squamish Nation is scheduled to the *FNLMA* and has a land code. This *FNLMA*-sanctioned land code empowers the Squamish Government to hold broad administrative powers. In 2018, the Squamish Government exercised this broad decision-making authority through the creation of a Squamish Corporation, Nch'k̲ay̓ Development Corporation ("Nch'k̲ay̓").

Nch'k̲ay̓'s has delegated authority from the Squamish Government to develop, manage and own the active businesses of the Squamish Nation.[64] With regards to the Senakw development, Nch'k̲ay̓ started by soliciting a partnership with Westbank Corporation, putting that partnership to a vote amongst Squamish Nation members in accordance with the land code and associated regulations of the Squamish Government. In 2019, Nch'k̲ay̓ received a historic referendum mandate with the support of 87 percent of Squamish Nation members to move

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60 Canada *(Attorney General) v Canadian Pacific Ltd*, 2002 BCCA 478, 217 DLR (4th) 83.

61 "Westbank Corp." (last modified 2022) online: *Vancouver New Condos* <www.vancouvernewcondos.com/developers/westbank-corp/> [perma.cc/9FGN-JXKB].

62 In 2022 Westbank Corporation completed the construction of "Alberni" a 43-storey tower in Downtown Vancouver: "Alberni by Kengo Kuma" (last modified 2022), online: *Westbank Corporation* <westbankcorp.com/body-of-work/alberni-by-kuma> [perma.cc/W6ZS-MJAQ].

63 Joanne Lee-Young, "Squamish Nation approves $3-billion housing project in Kitsilano", *Vancouver Sun* (11 December 2019), online: <vancouversun.com> [perma.cc/NH64-TQTN].

64 "Nch'kay" (last modified 2022), online: *Squamish Nation* <www.squamish.net/nchkay/> [perma.cc/J2C6-EETH].

forward with the Senakw development.[65] As a result of that referendum, the Squamish Nation and Westbank signed a definitive partnership agreement later that year.[66]

After the partnership agreement concluded, the Squamish Government expeditiously concluded the terms of the construction with Westbank and signed a service agreement with the City of Vancouver.[67] The specific terms of the construction were negotiated by the Squamish Government and were informed by the interests and priorities of their members. The priorities included the commission of Squamish architecture and art, and a real commitment to sustainability. For example, the Senakw development will be a large-scale net zero operational carbon housing development—a first in Canada and one of only a few in the world.[68] To facilitate the construction of such ambitious projects, the Squamish Government executed a service deal with the City of Vancouver in 2022 that will provide water, sewers, and infrastructure to integrate Senakw into the rest of Vancouver.

Once completed, the Squamish Nation is entitled to half the revenue. The bulk of the revenue will come from property taxation, strata leaseholds, and rental income. Revenue from the latter two falls under the categorization of capital moneys since they relate to land and the sale of capital assets—which encompasses investment properties. Notably, had Senakw been governed by the *Indian Act* or the *FNLMA* before the enactment of Bill C-86, at least parts of these revenue streams would have been held in trust by the Federal Government, making this partnership incredibly difficult if not impossible. However, with the *FNLMA* in its current form, the revenue from the investment properties goes directly to the Squamish Nation in accordance with the terms of their partnership with Westbank Corporation.

D. Highlighting the Benefits of Senakw

Unlike many other large-scale developments, the Senakw development takes place on reserve lands. Since reserves are technically federal jurisdiction, City of Vancouver by-laws do not apply to Senakw, despite Senakw being an enclave within the City of Vancouver. Consequently, decision-making and the approval process for the project are streamlined through a single governing body—the Squamish Government. A streamlined approval process is especially valuable in Vancouver, where wait times are notoriously long. Depending on the complexity of a project and demand, average processing times can range from weeks to more than two years.[69] In the case of Senakw, the wait time would have likely been especially long since a significant portion of Senakw is zoned for single-family housing. The project would have thus required changes to zoning rules and a developer permit – both of which could further prolong the process.

In the absence of municipal zoning laws, the Squamish Nation and Westbank Corporation can focus on making the project economically profitable instead of conforming to rigid restrictions

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65 "Senakw" (2020) at 3, online (pdf): *Squamish Nation* <www.squamish.net> [perma.cc/J936-RN4U] [Senakw Presentation].

66 *Ibid* at 1.

67 *Ibid*.

68 Senakw Vision, *supra* note 56.

69 See e.g. Belle Puri, "Permit backlog leaves siblings waiting to restore home two years after blaze", *CBC News* (26 October 2017), online: <www.cbc.ca> [perma.cc/KD2M-326N].

related to height and parking requirements. In Vancouver, the only zoning designation that allows for high-rise residential buildings is a "Comprehensive Development District." Even within this zoning class, buildings are usually subject to restrictive height requirements. For example, Seaforth Place, a Comprehensive Development District metres away from Senakw, has height restrictions of five stories and mandates one street parking spot per dwelling.[70] The Senakw project, in contrast, will have buildings as high as 58 stories with a far lower parking spot-to-dwelling ratio.[71]

The avoidance of City of Vancouver by-laws and bureaucracy has allowed the Squamish Nation to expeditiously introduce, vote, and implement the project in a span of three years. With fewer administrative hurdles, more certainty, and enhanced flexibility—construction commenced on schedule in the fall of 2022, and the Senakw development is on track to meet its 2027 construction completion target.[72] An expeditious process to approve a large-scale residential development in the heart of Vancouver benefits members of the Squamish Nation and non-members alike.

The Senakw development has the potential to house thousands of people. The plan for the Senakw development describes an 11-tower mega project capable of housing thousands in a sparsely populated area in Vancouver. The area adjacent to the Senakw reserve consists of 21 dwellings per acre, while the Senakw reserve would have 545 dwellings per acre upon completion.[73] Consequently, the Senakw development will play a major ameliorative role in the City of Vancouver's housing crisis by providing more than 6,000 units with portions set aside for Squamish Nation members.[74] Of the 6,000 units, 1,200 are designated for affordable housing.[75] There is undoubtedly a demand for more housing in Vancouver;[76] therefore, large-scale residential developments are especially profitable in Vancouver. An independent analysis by Ernst and Young projected that the Senakw development could yield revenue of up to $20 billion—half of which would go to the Squamish Nation under the terms of the partnership.[77]

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70 City of Vancouver, by-law No 7174, *A By-law to amend By-law No. 3575, being the Zoning and Development By-law*, ss 4-5.

71 Alissa Thibault, "Sevices Agreement signed for 11-tower Senakw development in Kitsilano", *CTV News* (25 May 2022), online: <bc.ctvnews.ca> [perma.cc/76XR-SLHB].

72 Senakw Vision, *supra* note 56.

73 "Senakw development raises concerns in Kits Point" (14 May 2021) online (blog): *Upper Kitsilano Residents Association* <upperkitsilano.ca/2021/05/14/senakw-development-raises-concerns-in-kits-points/> [perma.cc/BF4W-NM2Q].

74 Derrick Penner, "Squamish Senakw, City of Vancouver strike service deal for 11-tower, 6,000-unit development", *Vancouver Sun* (25 May 2022), online: <vancouversun.com> [perma.cc/G8VU-66JQ].

75 *Ibid*.

76 Low inventory and high demand have made Vancouver the second least affordable housing market in North America: Wendell Cox & Hugh Pavletich, "16th Annual Demographia International Housing Affordability Survey" (2020) at 3, 12, 16, online (pdf): *Demographia* <demographia.com> [perma.cc/J8D7-JAGV].

77 Squamish Nation Council, "Senakw Lands Presentation" (November 2019) at 20, online (pdf): *Senakw* <senakw.com> [perma.cc/6VPP-CNCL].

E. Generalizability of Senakw Model

Given the early success of the Senakw development, other First Nations with interests in urban reserves may view the Senakw development as a replicable model to obtain economic prosperity on their own terms. However, despite the strengths of the Senakw model, some limitations and considerations may incline First Nations to consider other avenues.

A fundamental limitation of the Senakw model is that it is difficult to replicate in most reserves due to demographic factors. Naturally, high-rise residential developments are only feasible where there is substantial demand for housing, and substantial demand for housing is only present on lands in or adjacent to towns and cities. Not only must a First Nation have an urban reserve, but it must be in or adjacent to a significant population centre. Since most reserves are not in or adjacent to significant population centres, most reserves would likely have difficulty implementing the Senakw model and may be inclined to employ other avenues to generate revenue, such as a smaller housing project.

For First Nations who do not currently have urban reserve holdings but are actively seeking them through a settlement, there are additional challenges unique to urban reserves**.** If successful, an application to add to or create a reserve would entitle First Nations to acquire parts of federal land or settlement funds to purchase land that would then be set aside as reserves. In urban settings, federal land is scarce. It is thereby likely that a successful application would lead to a cash settlement for First Nations. First Nations Governments seeking to use those funds to purchase land in urban areas are, therefore, subject to market rates that might be prohibitively expensive. Moreover, for urban reserves, both existing and those that are pending, there are further geographic challenges that are unique to urban reserves.

By definition, urban reserves are in or adjacent to urban centres, so construction will almost always require some level of cooperation with municipalities or provinces. While the Senakw development were not required to seek a permit from the City of Vancouver for construction directly on the reserve, they did have to negotiate a service deal that would provide water, sewers, and infrastructure to integrate Senakw with the rest of Vancouver. Though the Senakw development proves that it is possible to cooperate with municipalities for service agreements, other First Nations with interests in urban reserves outside Vancouver may need to consider the prospect of working with a more hostile municipality or provincial administration.

Furthermore, it is entirely conceivable that First Nations might not *desire* or have the requisite funding to emulate the Senakw model. Urban reserves, like other reserves, have spiritual and cultural significance for First Nations that may be diluted by the presence of large-scale developments and non-members. Many First Nations have conceptions of land use that go beyond western notions of economic productivity, which may manifest as preferring to make land use decisions that prioritize communal, spiritual, or social purposes. [78]

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78 See generally Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 22. See also Terri-Lynn Williams-Davidson & Janis Sara, "Haida law of gina 'waadluxan gud ad kwaagiida and Indigenous rights in Conservation Finance" (2021) at 13, online (pdf): *Canada Climate Law Initiative* <ccli.ubc.ca> [perma.cc/LKF8-VNRG].

Moreover, the Squamish Nation is comparatively more affluent than other First Nations as they have significant sources of revenue from existing real estate investments through, for example, the MST Corporation. Other First Nations may not have funds or assets to attract a partner or partnership arrangement like the fifty-fifty arrangement between the Squamish Nation and Westbank Corporation.

In short, there are limits to the generalizability of the Senakw model of development on other urban reserves. For the Senakw model to be replicated, there are many prerequisites for First Nations. First Nations need to have an urban reserve where there is demand for housing and development, significant funds or a willing third-party investor, a cooperative municipality, and the support of their membership. Even with these prerequisites met, First Nations may have other land use priorities. Nonetheless, the Senakw development can still offer some insights for other First Nations seeking to develop on reserves. At the very least, it highlights the breadth of what could be done on reserves, as well as the potential associated with increased autonomy in the current reserve system.

CONCLUSION

Ultimately, the reserve system is a settler institution, and there will always be associated challenges and limitations for First Nations seeking to use this system as a means to achieving economic prosperity. Nonetheless, I hope to have conveyed that the recent legislative changes, culminating in Bill C-86, are a concrete step in the right direction. These legislative changes empower First Nations to have greater control over decision-making and revenue management - while also making it more feasible to increase their reserve land holdings. Enhanced autonomy allows First Nations to make long-term and economically profitable decisions relating to reserves.

The Senakw model is just one manifestation of the increased autonomy fostered through the current reserve system—and perhaps one worth considering for other First Nations. With more than 120 urban reserves and potentially more on the way, there is ample opportunity for more developments on urban reserves—whether that be large-scale residential projects or housing projects exclusive to members. Though the Senakw development is in its early days, First Nations from Victoria to Halifax now have a concrete example of the challenges and economic potential of developing on urban reserves under the current reserve system. The institutional, political, and market dynamics remain especially conducive to these kinds of developments, and the reserve system in its current form empowers First Nations to capitalize on these conditions to prosper economically and potentially become financially self-sufficient.

ARTICLE

IMAGINING DECRIMINALIZATION OF SEX WORK IN CANADA

Lo Stevenson *

CITED: (2023) 28 *Appeal* 53

ABSTRACT

Sex worker rights activists are calling for full decriminalization of sex work in post-*Bedford* Canada. Decriminalization raises complications for the inclusion of sex work in contemporary Canadian labour and employment law. A progressive basic income plan, alongside union organizing, would buttress decriminalization to improve sex worker autonomy and solidarity. This paper, rooted in Katie Cruz's critique of liberal economic approaches to sex work labour and employment law in the United Kingdom, maps a feminist basic income proposal onto a sex worker rights organization's proposal for law reform. Following Cruz, I find that sex work is "unmanageable" in mainstream Canadian labour and employment law. However, evidence and sex worker rights advocacy demonstrate that workers rights, with the safety net of a liveable basic income, can offer increased autonomy, dignity, and protection for those who engage in sex work.

* Lo Stevenson is a JD student at Osgoode Hall Law School. They live in Anishinaabe territory in Tkaronto, Ontario. Lo extends their gratitude and solidarity to the sex worker activists and authors whose work forms the foundation of this paper. Many thanks also to an anonymous external reviewer, Appeal's volunteer and editorial board, as well as Shelley Gavigan and Karen Andrews for supporting and strengthening this paper.

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INTRODUCTION

In October 2022, the Ontario Superior Court of Justice heard arguments in *Canadian Alliance for Sex Work Law Reform v Canada* (*CASWLR*).[1] The case concerns the constitutionality of the anti-sex work Criminal Code provisions that Canada enacted in 2014, the *Protection of Communities and Exploited Persons Act* (*PCEPA)*.[2] These provisions were enacted to replace a similar set of laws struck down the year before in *Bedford*.[3] In the decade since that decision, some Canadian sex workers have been campaigning against the harms that the new anti-sex work laws create, arguing that the new provisions in many ways pick up where the pre-*Bedford* provisions left off.[4]

Bearing in mind the re-criminalization of sex work which occurred after *Bedford*, the present wave of litigation raises the question, "What happens if the Applicant wins?". Several legislative pathways will be available to Parliament following a possible striking down of the impugned provisions, but creative and collective strategies focused on sex workers' labour and human rights will be most beneficial.[5] I argue that to protect people from exploitation, as the *PCEPA* purports to intend, we should begin by ensuring that all people are able to organize to advance their goals and have the resources necessary to meet their basic needs.

The *PCEPA* criminalizes the *purchase* of sex, presupposing exploitation in the sex work transaction.[6] It does so without addressing the exploitation that arises from a lack of resources, which often contributes to the choice to enter the sex industry.[7] The Canadian Alliance for Sex Work Law Reform (CASWLR) challenge argues that the *PCEPA* unjustifiably violates *Charter* sections 7, 15, 2(b), and 2(d) rights to life, liberty, and security of the person; equality; freedom of expression; and freedom of association.[8] A global movement of sex worker rights activists is calling not for regulation through legalization, but for full decriminalization.[9] Both legalization and decriminalization, however, would raise novel concerns for the incorporation of sex work into existing labour and employment law. UK sex worker rights activist and legal scholar Katie Cruz has noted that,

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1 *Canadian Alliance of Sex Worker Law Reform v Canada (AG)*, (Factum of the Applicants) [*CASWLR* FOA], online (pdf): <ccla.org> [perma.cc/8M85-XH2B].

2 *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 [*PCEPA*].

3 *Canada (AG) v Bedford*, 2013 SCC 72 [*Bedford*].

4 *CASWLR* FOA, *supra* note 1.

5 Tamara O'Doherty & Ian Waters, "Gender, Victimization, and Commercial Sex: A Comparative Study" (2019) 40:1 Atlantis J 18 at 26; Tuulia Law, "Licensed or Licentious? Examining Regulatory Discussions of Stripping in Ontario" (2014) 30:1 CJLS 31 at 32.

6 *PCEPA*, *supra* note 2.

7 Molly Smith & Juno Mac, *Revolting Prostitutes: The Fight for Sex Workers' Rights*, 2nd ed (London, UK: Verso, 2020) at 43; Cecilia Benoit et al, "Would You Think About Doing Sex for Money? Structure and Agency in Deciding to Sell Sex in Canada" (2017) 31:5 Work Employment & Society 1.

8 *CASWLR* FOA, *supra* note 1; *Canadian Charter of Rights and Freedoms*, ss 2(b), 2(d), 7, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

9 Smith & Mac, *supra* note 7.

while advocates and case law indicate that sex workers are indeed seeking protection under employment law, the material conditions of sex work render it "unmanageable" under liberal frameworks of labour and employment.[10]

It seems clear that decriminalized or legalized employment would not, on its own, go far enough to address the risks which can arise in sex work. New frameworks are required to reconcile the incompatibility of controlling work conditions with sex worker rights advocates' demands for dignity and autonomy. Ultimately, this may require the decoupling of survival resources and labour, as well as organizing and collective bargaining. Therefore, I argue that basic income and other creative strategies likely have more to offer sex workers than conventional labour and employment law. The combination of a progressive basic income plan, collective bargaining, empowered workplace negotiations, and decriminalization together could address or prevent exploitation in sex work much more effectively. Decoupling the provision of survival resources from work, as well as removing barriers to safety and autonomy through decriminalization, should increase the power that sex workers have when negotiating transactions.

This paper is a limited survey of sex worker rights and anti-poverty feminist advocacy. I highlight some of the theoretical frameworks at play, which illustrate the legal and social values underpinning the treatment of women and work in Canada. I note that while people of all genders work in the strip and sex trades, the majority of sex workers are women, who face greater barriers to safe working conditions[11] and the industry is heavily influenced by stigma and ideology which aim to control women.[12] As a person who has not worked in the sex industry, I focus my discussion on the voices of sex workers themselves as much as possible. The law and academia have long histories of paternalistic treatment towards sex workers. It is critical that outsiders and legal professionals interested in this subject centre their voices.

I. SEX WORK & CRIMINALIZATION

A. Sex Work, its Challenges, and Stigma

Because sex work is a deeply heterogenous field, it is difficult if not impossible to describe a generalized set of conditions or challenges shared among *all* sex workers.[13] Cecilia Benoit describes the sex industry as "polymorphous" and "class stratified."[14] As Chris Bruckert and Frédérique Chabot wrote in their report of community-based research by Prostitutes of Ottawa/Gatineau Work Educate Resist (POWER), "sex work is an occupational category rather than a job description or identity."[15] Some sex workers strip, some work in porn,

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10 Katie Cruz, "Unmanageable Work, (Un)liveable Lives: the UK Sex Industry, Labour Rights and the Welfare State" (2013) 22:4 Soc & Leg Studies 486.

11 O'Doherty & Waters, *supra* note 5.

12 Chris Bruckert & Frédérique Chabot, *Challenges* (Ottawa: Prostitutes of Ottawa-Gatineau Work, Educate, and Resist, 2014) at 18; Chris Bruckert, *Taking it Off, Putting it On: Women in the Strip Trade* (Toronto: Women's Press, 2002) [Bruckert, *Taking it Off*].

13 Bruckert & Chabot, *supra* note 12.

14 Benoit et al, *supra* note 7 at 4.

15 Bruckert & Chabot, *supra* note 12 at 16

some work out of their homes or in the homes of their clients, while some workers are street-based.[16] Some sex workers work independently or freelance, while other choose to work for an employer or manager.[17] A clear distinction does seem to exist between indoor and street-based work, wherein street-based workers seems to bear a higher risk of violence.[18] Elsewhere, Bruckert has described the central role that notions of harm, stigma, and misogyny play in shaping the dynamics of the sex industry.[19] While in many ways sex work is shaped by the same social forces that shape all work, these considerations must be factored in to law and policy debates about sex work.[20]

It is important to bear in mind that agency and personal choice are important factors which often inform the choice to enter the sex trade.[21] Cecilia Benoit et al found that while 86% of interviewed sex workers cited the need or desire for money as a reason they entered the sex trade, roughly half of those respondents also named at least one other reason, such as a critical life event or the personal appeal of the work.[22] To further shift legal discourses about sex work away from morality and towards workers' rights, it is useful to understand the risks of sex work as located not inherently in the sexuality of the work, but the criminalization and marginalization of work itself.[23] I argue that sex workers'—like all workers'—agency in the labour transaction can be improved with the support of solidarity mechanisms like collective bargaining and non-transactional social supports like basic income.

B. Sex Work Law in the Canadian Context

The sex work transaction was not illegal in Canada *per se* until after the 2013 Supreme Court decision *Bedford*[24] struck laws which criminalized certain aspects of sex work, such as communication, to deter public nuisance. The claimant sex workers in that case argued that those provisions imposed risk, or created barriers to risk mitigation, in ways that violated their *Charter* protected right to security of the person.[25] In short, because sex work itself was a legal activity, and public nuisance was an insufficient justification for the imposition of risk, the Supreme Court agreed. The Harper-era Conservative Parliament filled in the legislative gap left by *Bedford* with the *PCEPA*, which criminalized the purchase of sex and indirectly criminalized the sale of sex. Parliament pledged $20 million to support the goals of the *PCEPA*. Nearly half the funds were directed to policing, with the other half allocated to agencies which support sex workers to leave the trade.[26] In doing so, Parliament

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16 And some strippers do not describe themselves as sex workers, see Bruckert, *Taking it Off*, *supra* note 12.
17 Benoit et al, *supra* note 7.
18 Bruckert & Chabot, *supra* note 12 at 44.
19 Chris Bruckert & Stacy Hannem, "Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work" (2013) 28:1 CJLS 43; Chris Bruckert, "*Protection of Communities and Exploited Persons Act*: Misogynistic Law Making in Action" (2015) 30:1 CJLS 1 [Bruckert, "*PCEPA*"].
20 Bruckert & Chabot, *supra* note 12.
21 Benoit et al, *supra* note 7 at 13.
22 *Ibid* at 8.
23 Law, *supra* note 5 at 44; Bruckert, *"PCEPA"*, *supra* note 19 at 1.
24 *Bedford*, *supra* note 3.
25 *Charter*, *supra* note 8 at s 7.
26 Bruckert, *"PCEPA"*, *supra* note 19 at 2.

embraced the "Nordic Model," which grants sex workers immunity from prosecution for most sex-work related offenses. While the letter of the law says that sex workers are not criminalized, the reality is quite different.[27]

The *PCEPA* penalizes sex workers' attempts to practice harm reduction. It is now an offense to communicate about the sale of sex in a public space, or in a private space which is publicly visible.[28] This increases vulnerability by encouraging sex workers to screen clients quickly, delay screening, or negotiate in isolated areas.[29] Third parties are prohibited from profiting from sex work. "Legitimate" expenses such as accounting and rent are excluded, though certain safety practices like hiring bodyguards or sharing calls with colleagues are not.[30] Giving advice to peers, including advice on how to mitigate risk, is considered illegal "procurement." It is illegal to help anyone make an advertisement for sex work or mention another sex worker in one's own advertisement.[31] It is also an offense for sex workers to rent an apartment together or supervise each other's calls—both actions which help sex workers conduct their work in relative safety.[32]

Meanwhile, other legal risks run parallel to sex work. For example, sex workers may face eviction or deportation following sex work charges. Together these risks may deter sex workers from reporting incidents of violence or seeking police intervention. [33] Furthermore, when *clients* are criminalized, they are given leverage to refuse to make themselves identifiable to sex workers.[34] Police ability to apprehend and hold accountable violent or exploitative clients is thereby reduced, intensifying the risks of sex work.[35] This intensification of risk has been cited in official reports by the Swedish and Norwegian governments, the first to implement the Nordic Model.[36]

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27 *R v NS*, 2022 ONCA 160 [*NS*].

28 *Criminal Code*, RSC 1985 c C-46, s 213.

29 Maggie's Toronto Sex Workers Action Project, "Criminal Provisions That May Impact Sex Workers" *Maggie's Toronto*, online (pdf): <maggiesto.org> [perma.cc/8665-PW5L].

30 *Ibid*.

31 *Criminal Code, supra* note 14, s 286.4.

32 *Ibid*, ss 286.2-286.4.

33 Brenda Belak & Darcie Bennett, "Evaluating Canada's Sex Work Laws: The Case for Repeal" (2016) Pivot Legal Society at 19, 42, online (pdf): <pivotlegal.org> [perma.cc/9FBG-SHEE].

34 Smith & Mac, *supra* note 7 at 147.

35 *Ibid* at 164.

36 *Ibid* at 145.

Table 1. Current criminal sex work laws in Canada

Criminal Code section	Description of Offense
213	Communication in public to sell sexual services
286.1(1)	Purchasing, or communicating to purchase sexual services
286.2(1)	Receiving compensation relating to someone else's sexual services
286.3(1)	Facilitating the purchase of someone else's sexual services
286.4	Advertising someone else's sexual services

C. Critiques and Challenges Against the PCEPA

The Nordic Model's "denounce and deter" strategies are simply not effective at addressing exploitation, as shown by the countries who have adopted this model. For example, in the five months following the criminalization of purchase in Ireland, sex worker safety organisation Ugly Mugs experienced a 61% increase in reports of violent and abusive clients.[37] Smith and Mac's research shows that it is not the criminal laws on the books, but "*poverty* and people's access to resources"[38] which are the key determinants of the size of a country's sex industry, and that "denounce and deter" strategies have been shown to increase the stigmatization and social vulnerability of sex workers.

It is worth interrogating the proposition that sex work can be deterred through the criminalization of purchase. One of the objectives of the *PCEPA* is to decrease prostitution by reducing *demand* for sex work.[39] In this framework, sex workers are seen as the supply of a good. This characterization is erroneous. As the struggle to meet basic needs supplies the imperative to engage in sex work, we should characterize this exchange in the reverse. In fact, purchasers of sex function as the *supply* of necessary resources. As Smith and Mac have noted, "the person selling sex *needs* the transaction far more than the buyer does; this need makes the sex worker vulnerable."[40]

To the extent that the purchasers of sex can be deterred by criminal penalties, we must interrogate *which* purchasers are deterred. Continued violence against sex workers in Nordic Model countries demonstrates that "clients who remain [despite criminalization] are disproportionately likely to be impulsive, drunk, or violent."[41] The power dynamics of the worker-client relationship must be properly understood by law makers wishing to shape behaviour without amplifying the risk of violence.

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37 *Ibid* at 147 (without equating rates of reporting to rates of violence, this statistic indicates a meaningful shift).
38 *Ibid* at 166.
39 *NS, supra* note 27 at para 21.
40 Smith & Mac, *supra* note 7 at 54.
41 *Ibid* at 144.

Prior to the CASWLR challenge, the *PCEPA* had already been the subject of judicial disagreement. In 2020 the Ontario Court of Justice issued a declaration in *Anwar* that the *PCEPA*'s material benefit (286.2), procuring (286.3), and advertising (286.4) provisions unjustifiably violate section 7 of the *Charter*.[42] The Crown did not appeal, and in February 2022 the Ontario Court of Appeal came to the opposite conclusion in *R v NS*.[43] At the trial level in *NS*, Justice Sutherland interpreted the *PCEPA* as legalizing the sale of sex. Sutherland therefore found the impugned provisions to unjustifiably infringe the section 7 '*Bedford* right' to mitigate legal risk. The Court of Appeal ruled, however, that the *PCEPA* only exempted sex workers from prosecution for most, but not all, sex-work related offenses. Therefore, the sale of sex was not a legal activity with legal protection for risk mitigation. Sutherland's decision was overturned, and a new trial was ordered.[44]

Because the *PCEPA* builds exploitation into the definition of prostitution and states its purpose as denouncing and deterring the practice of sex work, it necessarily implies that exploitation occurs not in the *work*, but in the *sex* of sex work.[45] This denies the reality that sex work is labour and reveals the law's underlying assumption that poor work conditions are not a source of exploitation. Ultimately, the harshness of the law belies its redemptive purpose. To protect people from exploitation, we should begin by ensuring that they have the resources necessary to meet their basic needs. Ineffective strategies of deterrence and denunciation should not be prioritized over preventing the very real harms being committed under the *PCEPA* and other Nordic Model regimes.

In light of these concerns, for years prior to launching their *Charter* challenge, CASWLR and other sex worker rights advocates have been calling on Parliament to improve the conditions of Canadian sex work. Importantly, CASWLR asserts that decriminalization alone is insufficient. Their main recommendations are 1) to repeal the *PCEPA*'s criminal provisions and rely on existing laws against coercion and violence; 2) to engage in broad immigration reforms to protect non-status sex workers; 3) to grant sex workers access to the *Employment Standards Act*[46] statutory complaints process; 4) to grant sex workers the right to form workplace associations; and 5) to expand existing government supports to improve material conditions of impoverished sex workers.[47]

It is important to note that while the violence experienced by sex workers is unacceptable, sex work is not inherently violent, and violence against sex workers is far from inevitable.[48]

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42 *R v Anwar*, 2020 ONCJ 103 [*Anwar*].

43 *NS*, *supra* note 27.

44 Alyshah Hasham, "Are Canada's Sex Work Laws Unconstitutional? Why That Open Question Has Thrown Ontario Law Enforcement into Chaos" *The Toronto Star* (1 October 2021), online: <www.thestar.com> [perma.cc/2PQF-PHMS].

45 *NS, supra* note 27 at para 22.

46 *Employment Standards Act, 2000*, SO 2000, c 41 [*ESA*].

47 Canadian Alliance for Sex Work Law Reform, "Safety, Dignity, Equality: Recommendations for Sex Work Law Reform in Canada" (March 2017), online (pdf): <sexworklawreform.com> [perma.cc/CF2U-WFJP].

48 Bruckert, *"PCEPA", supra* note 19 at 2.

Chris Bruckert rightly asserts that there is more commonality than difference among women experiencing violence in the workplace, regardless of the sector in which she labours.[49]

D. Global Sex Work Laws: Comparative Analysis

i. Decriminalization in Aotearoa New Zealand

To examine the consequences of decriminalization, we can look to Smith and Mac's descriptions of sex work in Aotearoa New Zealand. [50] While sex workers with citizenship or permanent resident status report drastically improved conditions since legalization, non-status sex workers are still criminalized. Because they are left to work illegally, they report intensified police interactions since decriminalization, including profiling and deportation targeting. In part because the criminalization of drug use and migration persists, vulnerability, stigma, and violence against sex workers continues.

The situation in Aotearoa New Zealand illustrates that increasing sex worker empowerment and income stability requires broad and progressive social supports. Specifically, exploitation in sex work cannot be addressed without significant immigration and drug law reforms to remove the barriers to social supports which increase vulnerability. Immigration laws relating to sex work, such as Canada's sex work prohibition for immigrant work permits, are attempts at limiting human trafficking. [51] Smith and Mac note that "the law facilitates the conditions that are required for trafficking by rendering the sex workers who are working as migrants illegal."[52] Furthermore, as CASWLR notes, "the conflation of sex work, human trafficking, and exploitation leads to overly-broad misuse of current anti-trafficking initiatives, [and] places sex workers at further risk of isolation, marginalization and violence."[53]

The position that decriminalization alone is not sufficient to address risk is supported by sex work researchers Pitcher and Wijers,[54] who also highlight the need to clarify the legal context of sex work which would arise upon decriminalization. Pitcher and Wijers note that it is important not to let sex workers fall into *de facto* employee status, without granting rights and benefits of employment. They also raise the critical need for diverse sex worker consultation in developing new legal and policy regimes, to avoid the harms of over-regulation and surveillance experienced in legalized regimes.

ii. Legalization in the UK, the Netherlands, Germany, and Nevada

Legalization is another approach to sex work regulation, which is practiced in the UK, Germany, the Netherlands, and parts of Nevada. [55] Under legalization, certain types of

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49 *Ibid* at 1.

50 Smith & Mac, *supra* note 7 at 193.

51 *Ibid* at 148.

52 *Ibid* at 199.

53 Canadian Alliance for Sex Work Law Reform, *supra* note 47 at 33. More information on human trafficking and sex work here: <butterflysw.org> and here: <swanvancouver.ca>.

54 Jane Pitcher & Marjan Wijers, "The Impact of Different Regulatory Models on the Labour Conditions, Safety and Welfare of Indoor-Based Sex Workers" (2014) 14:5 Criminology & Criminal Justice 560.

55 Smith & Mac, supra note 7 at 185; Bruckert, *Taking it Off*, supra note 12 at 55.

sex work are brought into the ambit of employment legislation. These frameworks were generally not designed to accommodate the different conditions of sex work. Sex work-specific rules, with criminal penalties, are often implemented to fill these gaps. Sex workers must therefore comply with a strictly controlling and invasive regime to avoid arrest. For example, Smith and Mac describe legalized conditions in Germany: sex workers must register with a publicly available government database and carry a sex worker ID card. Women with criminal records or drug dependency are not eligible. To qualify, workers must submit to regular drug use, pregnancy, and STI testing, and attend mandatory counselling. Failing a drug test or becoming pregnant are grounds for license revocation. Under these conditions, workers who do comply must sacrifice their privacy and autonomy. Workers who are not eligible must work in a criminalized system. [56] In Ontario, legal sex work requires a license for which people with criminal records and non-status immigrants are not eligible.[57]

Reports from legalized regimes indicate that inclusion in employment legislation is not a guarantee of protection.[58] Occupational health and safety laws rooted in stigma rather than harm reduction regulate the sex worker's body as a threat to public health, instead of providing resources for the worker's own benefit.[59] The requirement for public registration penalizes workers who seek to protect themselves from potentially violent clients by keeping their legal names and addresses private. Furthermore, indoor workers must work for managers or risk arrest. The level of dependence these laws create reduces managers' incentive to provide adequate work conditions and reduces workers' power to organize for improved conditions. Overall, legalized sex work exists in a complex web of regulation which does not leave much room for worker autonomy.[60]

iii. The Trouble with Legal Classifications of Sex Work

Sex worker rights activism is shifting the discourse away from moral regulation and towards economics. In doing so, it implicitly favours the employment contract as an equitable exchange and model of individual agency and autonomy.[61] If we examine the regulation of already legal sex work in Canada, we can see the incompatibility of existing, mainstream employment frameworks and sex work. Neither employee nor independent contractor status reflect the nature of sex work, but it is possible that dependent contractor status and craft union organizing or, if possible, sectoral bargaining could create opportunities for building solidarity among sex workers.[62]

Business licensing reform may offer another innovative and promising option for improving the material conditions of sex work. Katie Cruz, Kate Hardy, and Teela Sanders have described

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56 *Ibid.*

57 Bruckert & Hannem, *supra* note 19 at 57.

58 Cruz, *supra* note 10 at 467.

59 Smith & Mac, *supra* note 7 at 185; Bruckert, *Taking it Off*, *supra* note 12 at 55.

60 *Ibid* at 180.

61 Cruz, *supra* note 10 at 468.

62 Jenn Clamen & Kara Gillies, "Will the Real Supporters of Workers' Rights Please Stand Up?" in Elya M. Durisin, Emily van der Meulen & Chris Bruckert, eds, *Red Light Labour* (Vancouver: UBC Press, 2018) 305 at 313.

the potential for business licensing regimes to stipulate labour standards for workplaces in the sex industry.[63] If these standards were negotiated with organized sex workers, adequately reflecting their needs and concerns, such a regime could not only increase autonomy and solidarity for sex workers, but also reduce reliance on costly and time-consuming litigation. Because there would be oversight into any contractual changes, and licensing would be regularly reviewed, such a program may offer better proactive protection than employment law. Regulation at the business level may also ameliorate some of the problems with worker licenses discussed in the previous section.

Ontario considered the classification of legal sex work in *Burlesque v Algonquin,* a 1981 class action dispute between erotic dancers and the clubs where they performed.[64] The dancers were defined as independent contractors because their work was not sufficiently controlled by the alleged employers to qualify as employees. The dancers' shifts were mainly arranged by independent agents, the club did not closely supervise the dancers' acts, and none of the claimants regularly returned to the same clubs. The clubs however had demonstrated control by dismissing dancers who refused to perform certain acts, or whose physical appearance was not satisfactory. In deciding that the dancers were not employees, the Labour Board denied the dancers the right to form workplace associations.

The Board admitted that the dancers' work conditions were analogous to the construction industry, which allows for craft unions. However, the Board ultimately discounted this similarity because, in the Board's view, the dancer population turns over too quickly to sustain unionization. The Board did not address the possibility that this high rate of turnover may itself be caused by poor working conditions and lack of union protection. Ultimately, the Board's bias against the claimants was made clear in the decision by the statement that "…some verbal abuse, however distasteful, is probably inevitable," and "comes with the job territory."[65]

Interestingly, the Ontario Labour Board recently granted employee status to a male erotic dancer who made a claim of wrongful dismissal[66] under the *Occupational Health and Safety Act* (*OHSA*),[67] alleging that his dismissal was retribution for accusing a colleague of harassment. The distinction between this claim and *Burlesque* seems to lie in the different conditions afforded to cis men and women in the sex trade. The scarcity of male dancers may make them more valuable, less interchangeable, and apparently more worthy of protection in the workplace than their female counterparts.[68] Nonetheless it is important to note that the Board was only able to classify the dismissed dancer as an employee due to the club's high degree

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63 Katie Cruz, Kate Hardy & Teela Sanders, "False Self-Employment, Autonomy and Regulating for Decent Work" (2017) 55:2 BJIR 274 at 290.

64 *Canadian Labour Congress (Canadian Association of Burlesque Entertainers, Local Union No. 1689) v Algonquin Tavern,* 1981 CanLII 812 (ON LRB), [1981] OLRB Rep August 1057 [*Burlesque*].

65 *Ibid* at para 34.

66 *Mazen Jamal Chams Eddin v 938088 Ontario Ltd*, 2019 ON LRB, 2019 CanLII 37953 (ON LRB) [*Peppermints*].

67 *Occupational Health and Safety Act*, RSO 1990, c O.1, s 50.

68 *Peppermints, supra* note 66 (for more on the impacts of gender in sex work, see O'Doherty & Waters, *supra* note 5).

of control.[69] This control is best exemplified by the club's requirement that dancers work fully nude, despite numerous employee objections. Indeed, the dancer's wrongful dismissal claim was denied because the Board decided that he quit voluntarily to avoid the full nudity requirement, despite his allegations of harassment. This result demonstrates the limits of claims for retroactive damages under employment law as a strategy for improving sex work conditions.

iv. "Unmanageability" of Legal Sex Work and the Need for Organizing

If employee status is not compatible with sex work, independent contractor status, or self-employment, may seem like a better fit. However, many sex workers, particularly those working indoors, experience a level of control in the workplace which is inconsistent with independent contractor status.[70] It is common for indoor sex workers to pay a fee to work and be charged commission, to commit to working on certain days, and to have their dress, appearance, and behaviour supervised. These workers are often required to purchase their own work clothes, are not permitted to arrange substitutes, and are implicitly or explicitly unable to refuse work. [71]

Even if indoor sex workers could be classified as independent contractors, this classification would shut them out of *ESA* and *OHSA* protections and the essential right to collective bargaining.[72] For these reasons, independent contractor status is not amenable to the demands of sex worker rights activists. Furthermore, access to Employment Insurance—an additional benefit of legalized work—is governed by stringent eligibility requirements. These requirements effectively exclude low-wage, part-time and precariously employed workers, as well as those who have left employment voluntarily.[73] This matrix of factors incentivizes workers to tolerate exploitative working conditions so as not to jeopardize their access to the resources they need.[74]

In light of these complexities, Katie Cruz characterizes legal sex work as "unmanageable": incapable of being brought into mainstream employment law due to the high level of autonomy sought by sex worker rights activists.[75] She also notes that UK sex worker rights activists are not proactively seeking designation as employees.[76] Similarly, Chris Bruckert has noted that workers in the strip trade "do not expect protection from the state, since they are well aware that in practice, if not in policy, clubs operate outside of the security afforded by labour laws."[77] The same is true for the CASWLR, who advocate for access to the statutory claims process, but not for proactive employee status.[78]

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69 *Peppermints, supra* note 66 at paras 11-16.

70 Cruz, Hardy & Sanders, *supra* note 63; Bruckert, "*PCEPA*", *supra* note 12 at 61.

71 Cruz, *supra* note 10 at 472; Bruckert, "*PCEPA*", *supra* note 12 at 73.

72 Law, *supra* note 5 at 32.

73 Cee Strauss, "Basic Income & the Care Economy" (4 October 2021) at 27, online (pdf): *Women's Legal Education and Action Fund* <www.leaf.ca> [perma.cc/2MYC-GEKQ].

74 This dynamic is already at play in the legal strip trade: Bruckert, *Taking it Off, supra* note 12 at 60.

75 Cruz, *supra* note 10 at 471.

76 *Ibid* at 472.

77 Bruckert, *Taking it Off*, *supra* note 12 at 64.

78 Canadian Alliance for Sex Work Law Reform, *supra* note 47.

E. Addressing the Feminization of Poverty

While of course there are sex workers of all genders, it is important to note that sex work is a heavily feminized sector. Across employment sectors, women are a disadvantaged class of workers. [79] More than half of low-wage and precariously employed workers are women. Three quarters of part-time workers in 2015 were women, who often work part time out of a need to balance their unpaid care work obligations. These systemic factors contribute to the demand for resources, which often provide an impetus to sex work.[80]

Cruz describes several law reform models which have been developed to counteract the feminization of poverty in the last half century.[81] The caregiver parity model advocates that care work, including domestic work, be remunerated "on a par with paid employment."[82] The breadwinner model incentivizes women's equal participation in the labour market through improved access and benefits for childcare. Under either model, women must choose between worker and caregiver status. Both frameworks rely on the model of paid employment to conceptualize the redistribution of reproductive labour. However, as supported by this paper's analysis thus far, we can understand that the employer relationship is not a sufficient source of protection.

Needs-tested social assistance programs are not effective solutions to the feminization of poverty, either. Eligibility for these programs currently requires applicants to drain their limited assets. This penalizes attempts to save for emergencies and extends precarity and poverty indefinitely into the future.[83] Additionally, current welfare benefits in Ontario are set to amounts well below the poverty line, especially in urban settings. In 2020 in Ontario an unattached adult considered employable received a welfare income of only $10,385, while the 2020 Deep Income Poverty index was considerably higher, at $18,542.[84] Note that the Deep Income Poverty index is 75% of the poverty line income.[85] Furthermore, welfare programs' intense scrutiny and surveillance act as a barrier to sex workers. The stigma, criminalization, and vulnerability of sex work incentivize workers to avoid state surveillance. Thus, sex workers are effectively excluded from welfare programs. This need for privacy, as well as the burden of back taxes, can also act as a barrier to income tax participation, which effectively excludes sex workers from other social benefits.[86] Therefore, far from offering supportive alternatives to unwanted work, current needs-tested social assistance often contributes to the same financial necessity which frequently provides the main impetus for women engaging in sex work.[87]

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79 Strauss, *supra* note 73.
80 Law, *supra* note 5.
81 Cruz, *supra* note 10 at 476.
82 *Ibid*.
83 Strauss, *supra* note 73 at 47.
84 Jennifer Laidley & Mohy Tabbara, "Welfare in Canada, 2020" (December 2021) at 94, 100, online (pdf): *Maytree Foundation* <maytree.com> [perma.cc/FSZ5-6URE].
85 *Ibid* at 99.
86 Smith & Mac, *supra* note 7 at 181.
87 *Ibid* at 151.

II. THE ROLE OF UNION ORGANIZING

To truly unlock the potential of CASWLR's recommendations, barriers to sex worker collective bargaining should be removed. In their research Smith and Mac have found that "the most important source of untapped power for sex workers is not sexual liberation, social rebellion, or even money, but solidarity."[88] Collective bargaining is an essential element in mitigating the risks of sex work while honouring the autonomy of sex workers. Collective bargaining and basic income together would have immense potential to address exploitation not just in sex work but in all workplaces.[89]

Sex worker organizing could take many forms, from craft unions to protests and solidarity actions. Craft unions in particular have enabled organization by workers who don't experience high levels of employer control, but are not fully independent either.[90] Broadening the scope of craft unionism to accommodate the sex industry could substantially empower sex workers. In addition, sectoral bargaining, a model not currently recognized in any Canadian province, would allow unions to organize workers by industry, rather than by individual workplace.[91] This would support organization of small sex industry workplaces with high turnover, as described above.

Should sex work be decriminalized in Canada, sex workers will very likely benefit from support from existing unions and organized labour movements. Already existing unions could play an important role by helping sex workers to organize, providing guidance in navigating labour and employment laws, and supporting negotiations with legislators and employers.[92]

Labour theorists have proposed that basic income would significantly increase bargaining power of unions by guaranteeing the provision of basic needs outside of labour transactions.[93] This would reduce worker dependence on employers and support resiliency during strike actions. Basic income could also weaken the financial incentive for other workers to cross picket lines. These changes would make room in sex workers' lives to organize for better conditions at work, and strengthen the union movement significantly.

III. BASIC INCOME AS HARM REDUCTION

Basic income, a universal income transfer benefit, could vastly increase sex workers' power and security. A version of basic income was offered as emergency support during the first year of the COVID-19 pandemic. The program was targeted at tax-paying workers, meaning that undocumented, migrant, and sex workers either did not qualify or did not feel safe seeking access.[94] Learning from this predictable outcome, basic income should be implemented carefully to avoid these pitfalls.

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88 *Ibid* at 219.

89 Judy Fudge, "What Makes Labour Free? (And Why This Question Matters)" (24 May 2019), online: *Futures of Work* <futuresofwork.co.uk> [perma.cc/38D7-QRMX].

90 Cruz, *supra* note 10.

91 Clamen & Gillies, *supra* note 62 at 313.

92 *Ibid* at 313.

93 Edgar Manjarin & Maciej Szlinder, "A Marxist Argumentative Scheme on Basic Income and Wage Share in an Anti-Capitalist Agenda" (2016) 11:1 *Basic Income Studies* 49.

94 Strauss, *supra* note 73 at 47.

Basic income could improve autonomy for workers by offering a liveable alternative to unwanted or exploitative work conditions. The availability of alternatives may empower workers to refuse exploitative conditions, enabling them to seek or negotiate work on their own terms. A proposal which is especially useful for the context of sex work is the Women's Legal Education and Advocacy Foundation's (LEAF) 2021 report on the potential of basic income to ameliorate the feminization of poverty.[95] The LEAF proposal is premised on an intersectional feminist agenda aimed at providing fundamental supports for the broadest possible population.

A. Progressive Basic Income Plan

LEAF's basic income proposal is based on "universality, non-conditionality, security, autonomy, dignity, stability and reliability, adequacy, rewarding work effort, valuing care, complementing social services, and economic and gender equality."[96] LEAF stipulates that an effective basic income plan must be income-tested, not needs-tested, and set at a liveable amount. The PEI Working Group for a Liveable Income describes a liveable amount as "means enough to pay rent or mortgage and monthly utility bills, to buy nutritious food and medicine, to use transportation, to continue learning, to access childcare or eldercare, to participate in the community, and to cover emergencies."[97] Eligibility should require low- to no surveillance.[98] Additionally, LEAF notes that a basic income program must be codeveloped with Indigenous, First Nations, and Métis peoples to ensure that the program is "culturally appropriate and responsive to local needs."[99]

The choice of whether to distribute basic income benefits to individuals or households seems to place two feminist priorities in opposition.[100] Individual distribution could improve individuals' financial independence—a key feminist goal. This could be especially important for people wishing to leave abusive households. However, individual distribution would likely disadvantage single adults, whose cost of living is not reduced by collective or family living. This is especially true when singles are compared to couples without children, as benefits for couples without children are twice that of singles', while their expenses, per person, are also lower than the expenses of singles.

In any formulation, basic income would not be a panacea for financial autonomy. As LEAF describes, labour and income are rarely distributed equally within households, and it would be practically impossible to prevent benefits from being controlled by abusers.[101] Furthermore, a basic income is likely not sufficient to cover the substantial costs of exiting an abusive relationship. Lump sum supports are likely to be required as additional support.

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95 *Ibid.*
96 *Ibid* at 41.
97 *Ibid* at 45.
98 *Ibid* at 39.
99 *Ibid* at 47.
100 *Ibid* at 56.
101 *Ibid.*

As such, the LEAF proposal offers a "middle ground position"[102] to balance the goals of financial autonomy while limiting the enrichment of higher-income households. Under this approach, benefit amounts are calculated by household, and shares of household benefits are distributed to individuals.

Finally, LEAF's proposal stipulates that a successful basic income plan must be part of a broad reform network including "high-quality, affordable, accessible public care services; valuing paid caregiving work and other gendered occupations; and a shift in workplace norms to allow for flexibility and part-time work arrangements without significant financial penalty." [103] LEAF unequivocally does not support the implementation of a basic income program in the absence of these conditions, since this would likely result in further vulnerability for non-status workers. As such, LEAF notes that permanent residency for all would make the program much easier to administer and thereby more effective. Otherwise, as a state-administered program, the benefits could not be accessible to non-status immigrants. However, with LEAF's conditions, basic income has immense potential to create change for the better in feminized sectors such as sex work.

B. Arguments Against Basic Income

Opposition to basic income is dispersed across the political spectrum and is generally based on cost. These critiques are based on beliefs of scarcity and austerity: states either cannot afford to, or simply will not invest in adequate social services. In fact, an austerity regime might implement basic income in order to "divest themselves of responsibility for providing social infrastructure more than they already have."[104] As such, some critics would prefer to improve existing public services in lieu of basic income. For example, one estimate is that for half the annual cost of a basic income program, governments could instead expand affordable housing, improve childcare and public transit, and drastically reduce the user costs of prescription drugs, dental care, and higher education.[105] While these programs may reduce reliance on the labour transaction, I argue that they do not offer a sufficient "safety net" for workers seeking to reject exploitative work or negotiate for better terms.

Other critics worry that people receiving basic income will exploit social resources by refusing to work.[106] Ironically, those advocating this position might see former sex workers taking basic income as exploiters, not as exploited. In short, this point of view unjustly embraces income tax contribution as a transaction for the provision of basic needs. Feminist tax scholar

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102 *Ibid* at 57.

103 *Ibid* at 51.

104 *Ibid* at 10.

105 *Ibid* at 38.

106 Stuart White, "Reconsidering the Exploitation Objection to Basic Income" (2006) 1:2 Basic Income Studies 4.

Isabel Crowhurst has noted that "taxpayer status is an identity that tends to elevate those who uphold it to a higher position with respect to demanding citizenship rights," and that in this context, those who do not pay taxes are "treated as if they have no earned rights."[107]

By providing resources which have not been "earned," basic income challenges a key tenet of contemporary Canadian culture, the moral investment in the provision of resources. This is especially legible in the public perception of welfare. Janet Mosher has noted that "recipients are characterized as lacking moral virtues that are integral to the constitution of the "model" citizen."[108] This designation of welfare recipients as second-class citizens limits empathy across social classes and entrenches the conditions of inequality. This perception likely intensifies when coupled with the stigma of sex work.

C. An Ongoing Debate with Continued Relevance

The idea of a social safety net as harm reduction is not new. Janet Mosher writes that the early social programs implemented in the aftermath of World War Two were aimed at removing "certain matters—often matters integral to social reproduction—from the play of market forces or regulat[ing] the market in order to minimise and/or socialise risk."[109] Basic income could thus be seen as a means of socializing the risks of exploitative labour. More specifically, the idea of basic income as a tool against the feminization of poverty is not new either. As early as 1970, basic income was put forward as a means of addressing feminized poverty for single mothers.[110]

Basic income does have new and urgent relevance, however, as a subject of recent legislative debate. In the last two years, two provincial committees on basic income (In British Columbia and Prince Edward Island) have reached conclusions in favour of basic income. Federal Parliament has conducted two favourable basic income studies, and Liberal MP Julie Dzerowicz and NDP MP Leah Gazan have both introduced private members' bills concerning basic income.[111] As well, Senator Kim Pate has introduced a basic income bill currently at its second reading in the Senate.[112] At the second reading, Senator Pate was careful to note that Bill S-233 would not cause cuts to other social support and income assistance programs.[113] With the recent wave of litigation against the *PCEPA*, decriminalization, too, is a timely subject.[114]

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107 Isabel Crowhurst, "The Ambiguous Taxation of Prostitution: The Role of Fiscal Arrangements in Hindering the Sexual and Economic Citizenship of Sex Workers" (2019) 16:1 Sexuality Research & Soc Policy 166 at 180.

108 Janet E Mosher, "Welfare Reform and the Re-Making of the Model Citizen," in Margot Young, Susan B Boyd & Gwen Brodsky, eds, *Law and Society: Poverty, Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) at 120.

109 *Ibid* at 50.

110 *Ibid* at 49.

111 Strauss, *supra* note 73 at 33.

112 Bill S-233, *An Act to develop a national framework for a guaranteed livable basic income*, 1st Sess, 44th Parl, 2022.

113 Bill S-233, *An Act to develop a national framework for a guaranteed livable basic income"*, 2nd reading, *Senate Debates*, 44-1, 153:15 (8 February 2022) at 1550 (Hon Kim Pate).

114 Hasham, *supra* note 44.

Neither basic income nor needs-tested supports will, in isolation, effectively address coercion from a lack of resources. Without enabling solidarity and addressing the power imbalance in the labour relationship, social and income supports will not go far enough. However, since basic income directly undermines the employer relationship and is more efficient to administer, it has more potential than needs-tested supports to create change.

CONCLUSION

Change is likely coming in the legal landscapes of sex work and social assistance. It is crucial for the safety and dignity of sex workers that these reforms do not, like the *PCEPA,* create more harm in their attempts to reduce exploitation. This research suggests that basic income, union organization, and decriminalization—if designed with the right conditions—together could improve worker autonomy and solidarity in the sex industry.

Further research would be necessary to explore 1) the possibility that dependent contractor classification or sectoral bargaining could offer protection through the essential right to collective bargaining, and 2) whether the justice system could recognize dependent status among sex workers despite bias and stigmatization.

Ultimately, these reforms would advance the fundamental goals being voiced by sex worker rights advocates around the world: autonomy, dignity, and leaving no one behind. This aspirational conclusion is strongly tempered by the dangers of increased marginalization, which could arise should basic income or decriminalization be implemented without radical immigration and drug law reforms. There is very real cause for concern that the exclusion of non-status immigrants and people who use drugs would exacerbate their risk of exploitation in sex work. Like LEAF, I do not recommend that a basic income plan should be applied in the absence of these reforms. Similarly, basic income should not be used as a substitute for robust social supports like healthcare and housing subsidies. However, the combination of these reforms together with basic income and decriminalization would drastically improve the material conditions of sex work.

ARTICLE

"YOU'RE NOT A REAL COP!" EXAMINING THE POWERS AND LIMITATIONS OF CAMPUS SECURITY IN PUBLIC CANADIAN UNIVERSITIES.

Serena Cheong *

CITED: (2023) 28 *Appeal* 71

ABSTRACT

Campus security is an integral part of life on university campuses, but what they can or cannot do remains a mystery to the general public. Given their quasi police-like status on university campuses, this uncertainty is particularly concerning. This article seeks to provide some clarity on the role of campus security on university campuses by collecting publicly available information on campus security at public Canadian universities and synthesizing the data with relevant jurisprudence and legislation. Based on this analysis, this article concludes that there is a lack of judicial clarity on the powers and limitations of campus security and contends that expanding Charter applicability to public Canadian universities provides the most fulsome solution to protecting the Charter rights of university community members.

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INTRODUCTION

Campus security are found at every public university in Canada. As their name implies, campus security are generally responsible for policing and protecting university property. Beyond these basic responsibilities, the powers and limitations of campus security vary depending on the university. Current scholarship in this area is primarily focused on private policing,[1] resulting in a deficit of literature specifically focused on campus security and its unique position situated between public and private policing. Thus, it is understandable that the public is mostly unfamiliar with the distinct roles and responsibilities of campus security and the impact campus security can have on their activities on university campuses.

This article seeks to fill this gap in the scholarship and to provide some clarity surrounding the role of campus security on university campuses. It aims to answer three questions: What are the powers and limitations of campus security? How have the courts dealt with the exercise of campus security powers? And what should be done to address any legal issues and inconsistencies that arise? Based on the answers to these questions, this article will ultimately conclude that expanding *Charter*[2] applicability to public Canadian universities provides the most fulsome solution to protecting the *Charter* rights of university community members by addressing the lack of judicial clarity on the powers and limitations of campus security.

To answer the first question, this article draws on information gleaned from campus security webpages, university documents, journal articles, and relevant legislation and jurisprudence. Based on this information, two categories of campus security emerge, campus security and special constables,[3] each with their own unique set of police-like powers and limitations. Private campus security have greater restrictions on their powers, but their actions as private individuals generally are not subject to *Charter* scrutiny. Special constables are granted a certain set of police powers, but actions taken using such powers are subject to *Charter* scrutiny. They are also afforded the discretion to choose to enforce either private or public sanctions.

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1 See generally George S Rigakos & David R Greener, "Bubbles of Governance: Private Police and the Law in Canada" (2000) 15:1 Can JL & Soc'y 145 (WL Can); Tanya Scharbach, "Private Law Enforcement – Dodging the Charter" (1995) 1 Appeal 42; Ruth Montgomery & Curt Taylor Griffiths, "The Use of Private Security Services for Policing" (2016), online (pdf): *Public Safety Canada* <www.publicsafety.gc.ca> [perma.cc/EGT4-H363]; Scott Burbidge, "The Governance Deficit: Reflections on the Future of Public and Private Policing in Canada" (2005) 47:1 Can J of Criminology and Criminal Justice 63 (QL Can).

2 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to The Canada Act 1982 (UK), 1982, c 11 [*Charter*].

3 For ease of reference, this article will use the term "special constables" to refer to security personnel employed by universities whose appointments give them the powers of a peace officer under the various provincial police acts.

In answering the second question, this article tracks six decisions that explore the powers and limitations of campus security: *R v Fitch*;[4] *R v Mraz (M.)*;[5] *R v Scott*;[6] *R v Whatcott*;[7] *R v Adams*;[8] and *Jackson v University of Western Ontario*.[9] These decisions highlight the lack of judicial clarity (and in particular, recent judicial clarity) in defining campus security's powers and limitations, particularly when compared to police powers, which results in uncertainty and a lack of uniformity in how the law is applied to campus security. These uncertainties raise the issues of potential *Charter* circumvention, unfettered discretion in choosing to apply public or private laws, and public uncertainty about what (if any) *Charter* protections they are afforded when interacting with campus security. The impact of these issues are significant because they disproportionately affect marginalized and racialized peoples in negative ways.

To answer the third question, this article explores two potential solutions in resolving the issues and inconsistencies it has identified. Taking a more holistic approach in interpreting state agency, a pre-requisite of *Charter* applicability, would prevent campus security from potentially circumventing the *Charter* when performing investigations. Expanding *Charter* applicability to public universities more generally would subject campus security to the same level of *Charter* scrutiny as police officers. Both solutions protect the privacy rights of community members, but the latter has more fulsome *Charter* protection while providing ultimate clarity in dealing with campus security by bringing all actions taken by campus security under *Charter* scrutiny.

I. DEFINING CAMPUS SECURITY

A review of campus security descriptions at public universities in Canada[10] reveals several commonalities. Public universities were chosen as the focus of this article due to uncertainty surrounding potential *Charter* applicability, so campus security in private Canadian universities and Canadian colleges are excluded from this analysis.[11] Based on a review of their webpages, campus security at these institutions generally fall into two distinct categories:

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4 1994 CanLII 761 at paras 1, 2, 5 (BCCA), 1994 CarswellBC 1003 (WL Can) [*Fitch*].

5 2000 CanLII 29685 (SKPC), 2000 CarswellSask 741 (WL Can) [*Mraz*] (the accused was ultimately found not guilty at trial but an appeal by the Crown was successful and the Court ordered a new trial). See also *R v Mraz (M)*, 2001 CarswellSask 13 (WL Can), 48 WCB (2d) 406; *R v Mraz (M)*, 2001 SKQB 296.

6 2004 CanLII 2558 (ONSC), [2004] OJ No 3000 (QL) (the trial decision was unavailable for viewing on CanLII, Westlaw Canada, and Lexis Advance Quicklaw) [*Scott*].

7 2012 ABQB 231 [*Whatcott*].

8 2015 SKQB 78 [*Adams*].

9 2003 CanLII 28232 (ONSCSM), [2003] OJ No 3832 (QL) at para 8 [*Jackson*].

10 See Appendix A for a comprehensive list of public universities reviewed for this article. Public universities in Quebec have been excluded from this article because Quebec's *Charter of Human Rights and Freedoms*, CQLR c C-12 also applies to non-governmental entities and thus creates a unique set of jurisprudence that has no comparison in other Canadian jurisdictions.

11 Private universities do not receive public funding and have less government oversight compared to public universities, making it less likely for private universities to be considered government actors or exercising a governmental function.

private campus security and special constables. Though most universities employ only one category of campus security, there are four universities that hire both private campus security and special constables.[12]

Four further exceptions do not neatly fall within the two categories of campus security. Lakehead University empowers its private campus security to act as city bylaw enforcement officers in its parking lots,[13] but they cannot enforce the *Criminal Code*.[14] The University of Victoria hires special duty police officers to patrol university residences as needed.[15] At the University of Ontario Institute of Technology, police officers also patrol campus property.[16] The University RCMP is unique amongst local police detachments discussed in this article because most of their jurisdiction and work involves incidents on the University of British Columbia's ("UBC") Vancouver campus property; however, they mostly respond to incidents and do not typically patrol UBC's academic campus.[17] UBC's Vancouver campus employs private campus security to patrol its academic campus and have a very close working relationship with the University RCMP. Though the University RCMP does not have the authority to enforce university policies and procedures, they work jointly with UBC's campus security on issues such as bike thefts.[18]

Subsequent sections start with a general overview of private security and special constables, followed by analysis of the data gleaned from campus security's webpages and highlighting noticeable trends. Last, it will set out the powers and limitations of both categories of campus security.

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12 Brock University, University of Alberta, University of Western Ontario, and University of Toronto: see Appendix A.

13 Lakehead University, "About Us" (last visited 28 January 2023), online: *Lakehead University Security* <lakeheadu.ca/faculty-and-staff/departments/services/security/tb/about-us> [perma.cc/FW66-REDQ].

14 RSC 1985, c C-46 [*Criminal Code*]. See generally *R v Laramee*, 1972 CanLII 1365 (NWT TC), 1972 CarswellNWT 12 (NWT Mag Ct); *R v Wright*, 1973 CanLII 858 (SK QB), 1973 CarswellSask 104 (Sask Dist Ct).

15 See generally *R v ES*, 2016 BCPC 270; "Mass Gatherings at UVic" (2 November 2021), online: *Saanich Police* <saanichpolice.ca/2021/11/02/mass-gatherings-at-uvic/> [perma.cc/46HK-HLV5]. In January 2023, Campus Security Services at the University of Victoria informed me that there is no written agreement between it and local police, but that it has a long standing partnership with local police detachments (i.e. Saanich and Oak Bay Police departments).

16 "Security monitoring and equipment" (last visited 28 January 2023), online: *Ontario Tech University* <ontariotechu.ca/campus-services/safety-security/services/security-monitoring-and-equipment.php> [perma.cc/6JTM-FUUQ].

17 Interview of Ali Mojdehi, Associate Director of UBC Campus Security Services (18 March 2022) (approximately 60-percent of the University RCMP's work involves incidents on UBC's academic campus) [Mojdehi]. The University Endowment Lands have Provincial Crown Land status, thus sitting outside of jurisdiction of the Vancouver Police Department: see Ida Chong, "University Endowment Lands Official Community Plan" (14 October 2005), online (pdf): *University Endowment Lands* <universityendowmentlands.gov.bc.ca> [perma.cc/MX36-L8PN]; People, Community & International Committee, "UBC Vancouver Annual Campus Security Report 2021" (2021), online (pdf): *University of British Columbia* <bog3.sites.olt.ubc.ca> [perma.cc/2FM5-8LUC] [UBC 2021 Annual Report].

18 Mojdehi, *supra* note 17.

A. Private Campus Security

Most private campus security forces are directly employed by the university, although there are several universities that outsource their campus security to external security companies.[19] Private campus security is governed by provincial legislation that are responsible for the oversight, licensing, and compliance of security guard licensees.[20] Government accountability is mandated by legislation[21] and training for licensed private security guards is regulated in most provinces.[22] Some provincial legislation also regulate the ability to carry handcuffs and batons.[23] An overwhelming majority of Canada's public universities employ private campus security.[24] Public universities in Ontario that employ private campus security tend to be smaller in geographic size and/or campus population.[25] In British Columbia and Ontario, external security companies are often employed to handle campus security at the smaller universities[26] or the smaller and/or secondary campuses of larger universities.[27]

i. Powers

Private campus security forces are empowered to enforce university policies and procedures. Though the powers and duties granted by their respective universities vary, common duties listed on their webpages include: patrolling; responding to incidents and if required, subsequent investigations; managing building access; maintaining a lost and found; providing emergency first aid; and parking administration.[28] Additionally, private campus security are engaged in proactive community assistance duties and initiatives.[29] A number of private campus security forces also offer violence prevention and safety training to community members.[30]

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19 See Appendix A for a list of universities that hire external security companies to act as its campus security.

20 Campus security webpages often list that their personnel are licensed under the provincial private security acts: see e.g. Mount Royal University, "Our services" (last visited 28 January 2023), online: *Complaints Process* <mtroyal.ca/SafetyRiskDepartment/CampusSafety/PoliciesProcedures> [perma.cc/2TVA-QX7F].

21 Montgomery & Griffiths, *supra* note 1 at 49 (legislation may mandate the agency responsible for private security to conduct full audits of policies and procedures or conduct site visits to locations where a security guard is working).

22 *Ibid* at 51 (the exceptions are Nova Scotia, New Brunswick, and Prince Edward Island ("PEI")).

23 *Ibid* at 52.

24 80 percent, or 44 of the 55 public universities listed in Appendix A. This statistic includes every public university in British Columbia, Alberta, Manitoba, Nova Scotia, Newfoundland and Labrador ("Newfoundland"), and the Yukon.

25 "Student Populations" (last modified August 2022), online: *Ontario Council of University Libraries* <ocul.on.ca/populations> [perma.cc/R7HF-JSXA].

26 See e.g. Toronto Metropolitan University, "GardaWorld Security Positions" (last visited 28 January 2023), online: *Community Safety and Security* <torontomu.ca/community-safety-security/contact/gardaworld-security-positions> [perma.cc/LZ4Q-SWVC].

27 See e.g. "Safety and Security" (last visited 28 January 2023), online: *Capilano University* <capilanou.ca/student-life/support--wellness/safety--security> [perma.cc/5MBK-GNGT] (Capilano University's secondary campus on the Sunshine Coast contracts external security companies to handle campus security).

28 See Appendix B for a more detailed listing of such duties and responsibilities.

29 Examples include safewalk programs, managing the emergency phones on campus, student engagement events and presentations, and conducting safety risk assessments. See Appendix B for a more comprehensive list.

30 See Appendix B for a more comprehensive list.

As agents of the landowner, private campus security also enforce the university's private property rights, usually through provincial trespass acts. Nova Scotia prohibits a person from engaging in "disorderly behaviour" on private property,[31] and, along with three other provinces, also prohibits a person from engaging in "prohibited activity" or "activity prohibited by notice".[32] As no existing definitions of "prohibited activity" nor "activity prohibited by notice" were found,[33] private campus security in Nova Scotia are theoretically afforded ample discretion in deciding what constitutes trespassing. In contrast, New Brunswick exempts persons who are "engaged in a peaceful public demonstration, or doing anything in connection with a lockout or strike that the person is permitted by law to do" from being found trespassing.[34] Alberta, Ontario, and Newfoundland allow either the owner or their authorized representative to arrest trespassers without a warrant, though the trespasser must then be delivered to either a peace officer or provincial court judge.[35] Ontario requires that the trespasser be delivered to a police officer and only permits police officers to arrest without a warrant if the trespasser is off the premises.[36] Four other provinces and the Yukon[37] only permit peace officers to arrest without a warrant, while the trespass acts of Manitoba and New Brunswick do not empower anyone to arrest without a warrant.[38]

Section 494 of the *Criminal Code* permits private campus security to make a lawful arrest as a private individual or agent of a property owner. Under section 494(1)(a), any private individual can arrest a person they find committing an indictable offence if they see the essential elements of the offence.[39] Under section 494(1)(b), any private individual can arrest a person that is freshly escaping from someone who can lawfully arrest them. Section 494(2) allows an agent of the owner or lawful possessor of the property to arrest a person found committing an offence on or in relation to that property. Unlike the provisions under section 494(1), private campus security can make an arrest under section 494(2) if the person is committing either a summary or indictable offence. Most notably, this section would give private campus security the power to arrest persons found committing summary

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31 *Protection of Property Act*, RSNS 1989, c 363, s 7(b) [*NS Trespass Act*].

32 *Ibid*, s 3(1)(f); *Trespass Act*, RSBC 2018, c 3, s 2(1)(c) [*BC Trespass Act*]; *The Trespass to Property Act*, SS 2009, c T-20.2, s 3(1)(b) [*SK Trespass Act*]; *Trespass to Property Act*, RSO 1990, c T.21, s 2(a)(ii) [*ON Trespass Act*].

33 Rigakos & Greener, *supra* note 1 at 157, n 55. I also reviewed post-2000 cases citing the sections of the trespass acts (i.e. British Columbia, Saskatchewan, Ontario, and Nova Scotia) dealing with prohibited activities, and only *R v Davani*, 2017 ONSC 2326 at para 15 provided some insight ("loitering on the premises was not an activity prohibited by notice").

34 *Trespass Act,* RSNB 2012, c 117, s 4 [*NB Trespass Act*].

35 *Trespass to Premises Act*, RSA 2000, c T-7, s 5(1)–(2) [*AB Trespass Act*]; *ON Trespass Act, supra* note 32, s 9(1)–(2); *Petty Trespass Act*, RSNL 1990, c P-11, s 4 [*NL Trespass Act*].

36 *ON Trespass Act, supra* note 32, ss 9(2), 10.

37 *BC Trespass Act, supra* note 32, s 7; *SK Trespass Act, supra* note 32, s 12; *NS Trespass Act, supra* note 31, s 6(1); *School Trespass Act*, RSY 2002, c 199, s 4.

38 *The Trespass Act*, CCSM c T156; *NB Trespass Act, supra* note 34.

39 *R v Gonzalez*, [1996] OJ No 761 (QL) (On Ct J (Prov Div)).

offences such as unlawful assembly[40] and causing a disturbance.[41] Private security guards are also entitled to search the person that they lawfully arrested, though the entitlement seems to flow from a concern for the arrestor's safety (i.e., looking for weapons) rather than to preserve evidence.[42]

ii. Limitations

Private campus security forces, as private individuals, are subjected to certain limitations to their enforcement powers. First, their jurisdiction is limited to university property.[43] Second, private security legislation in most jurisdictions[44] specifically prohibits all private campus security from carrying or using weapons prohibited by the *Criminal Code* unless specifically authorized.[45] Private campus security cannot use batons in Saskatchewan and Nova Scotia unless specifically authorized,[46] while Alberta prohibits the use of batons that are longer than 26 inches.[47] In Ontario, private campus security are prohibited from using cable or strip ties as restraints.[48] Last, two other important consequences serve as limitations to the powers of campus security: restrictions placed upon them by the *Charter*, and the threat of a civil suit by the complainant for false imprisonment and/or wrongful arrest.

a. The Charter

There are two considerations when assessing whether private campus security forces are bound by the *Charter*. First, whether private security guards, in all contexts, have the same constitutional limits as police officers. Second, whether working at a public university results in differences between the limitations of private campus security and security guards generally.

Under section 32, the *Charter* only applies to government actors or entities.[49] Subsequent court decisions expanded the application of this section to include non-government actors that are: essentially controlled by the government, exercising statutory powers delegated to

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40 *Criminal Code, supra* note 14, s 63(1)–(2).

41 *Ibid*, s 175(1). With university campuses often being adjacent to or otherwise near a public place, this subsection could apply to activities within university campuses.

42 *R v Lerke*, 1986 ABCA 15 at paras 35–36, 39 (CanLII), [1986] AJ No 27 (QL) [*Lerke*]. For further discussion about a private individual's power to search incident to arrest, see Part I(A)(2)(i).

43 As agents of the landowner, private campus security can only enforce the university's property rights while on university property.

44 The exceptions are New Brunswick, Newfoundland, and the Yukon. The Northwest Territories and Nunavut were not included because they do not have universities listed under Appendix A.

45 *Security Services Act*, SBC 2007, c 30, s 26 (British Columbia); *Security Services and Investigators Act*, SA 2008, c S-4.7, s 34(1) (Alberta); *Private Investigators and Security Guards Regulations*, 2000, RRS c P-26.01 Reg 1, s 16 [*SK PISG Reg*]; *Equipment*, O Reg 366/07, s 1 [*ON Eq Reg*] (Ontario allows licensees to carry firearms if they are authorized to carry one under s 20 the *Firearms Act*, SC 1995, c 39); *Private Investigators and Private Guards Regulations*, NS Reg 180/2005, s 13(2) (Nova Scotia); *Private Investigators and Security Guards Act Regulations*, PEI Reg EC256/88, s 20(1) [*NS PISGA Reg*].

46 *SK PISG Reg, supra* note 45, s 16(3); *NS PISGA Reg*, *supra* note 45, s 12(5).

47 *Security Services and Investigators Regulation*, Alta Reg 52/2010, s 9(1)(a).

48 *ON Eq Reg*, *supra* note 45, s 4.

49 *Charter, supra* note 2, s 32(1).

them by the government, or implementing government objectives.[50] If the entity is found to be "government", then all of its actions will be subject to the *Charter*.[51] Private security guards are not considered to be under the control of the government because they are either acting as private individuals or agents of property owners. This is clearly articulated in both jurisprudence and the *Criminal Code*.[52]

Nonetheless, the *Charter* applies to private security guards under certain circumstances, as activities performed by a non-government entity that are considered governmental in nature (but only those activities) are subject to the *Charter*.[53] First, arrests by private security guards under section 494 of the *Criminal Code* or provincial trespass acts may be subjected to the *Charter* because such arrests can be seen as an exercise of governmental function.[54] Under such circumstances, a private security guard is also bound by section 8 of the *Charter* because their entitlement to search incident to arrest flows from this governmental function.[55] Use of excessive force during such an arrest would be infringing upon the arrestee's section 7 *Charter* rights.[56] Second, a private security guard is bound by the *Charter* if they are acting as an agent of the state. Three factors are relevant to finding state agency: the character of employment and nature of the duties of the alleged agent; whether there is a nexus between their conduct or status and the state; and the purpose of the contact with the detainee.[57] Jurisprudence surrounding state agency has nonetheless been contradictory. In *Paglialunga*, the court refused to exclude evidence after finding that a civilian employee working at a police force was not an agent of the state, despite his police-like uniform. The court came to this decision because the civilian employee's actions would have occurred without police

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50 *McKinney v University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229 [*McKinney*]; *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624.

51 *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 16 [*GVTA*].

52 *Dendekker v F W Woolworth Co*, 1975 CanLII 233 at para 16 (ABQB), 1975 CarswellAlta 17 (WL Can) ("[s]ecurity officers employed to guard against thefts of merchandise have no higher rights of arrest than those conferred on citizens generally"), cited with approval most recently in *Chopra v T Eaton Co Ltd*, 1999 ABQB 201 at para 108; *Criminal Code, supra* note 14, s 2 (private security guards are not listed under the definition of a peace officer).

53 *GVTA, supra* note 51 at para 16.

54 *Lerke, supra* note 42 at para 23. Appellate authority post-*R v Buhay*, 2003 SCC 30 [*Buhay*] has been split on this issue. The Alberta Court of Appeal affirmed *Lerke* in *R v Dell*, 2005 ABCA 246, stating at paras 17–18 that *Buhay* did not expressly overrule *Lerke* and noted that *Buhay* at para 77 explicitly declined to address whether a private individual's arrest could be construed as state action for purposes of the *Charter*. However, the courts of appeal in Ontario, British Columbia, and Nova Scotia have held that arrests by private individuals are not subject to the *Charter* (*R v NS*, 2004 CanLII 59977 (ONCA), [2004] OJ No 290; *R v J(AM)*, 1999 BCCA 366; *R v Skeir,* 2005 NSCA 86). Mudding the waters are lower court decisions from these jurisdictions that cite *Lerke* with approval (e.g. *Moinzadeh v Loblaws Inc*, 2021 BCSC 793 at para 7; *R v Brissonnet*, 2006 ONCJ 31 at para 16), as well as the Federal Court in *Société des Acadiens et Acadiennes du Nouveau-Brunswick v Canada*, 2005 FC 1172 at para 41.

55 *Lerke, supra* note 42 at para 39.

56 *R v Wilson*, 1994 CanLII 689 (BCSC), [1994] BCJ No 586 at paras 35–36.

57 *R v Paglialunga*, [1995] OJ No 512 (QL), 1995 CarswellOnt 7206 (WL Can) at para 29 (Ont Prov Div) [*Paglialunga*].

intervention or encouragement.[58] Despite sharing similar facts, *R v Brandt* found that a park patroller was a state agent because they were "clothed with the authority of a police officer".[59]

There are a few exceptions to the above scenarios. First, though an arrest by a private security guard may fall within the parameters of section 10(b) of the *Charter*, courts have been more lenient on right to counsel warnings by private individuals and have not excluded evidence whereas they may have done so if the arrest or detention was performed by a police officer.[60] Second, the *Charter* does not apply in situations where private security guards detain or perform a search not incident to arrest on another private individual because both types of conduct are not considered governmental functions.[61] Last, evidence obtained by private security guards are free from *Charter* scrutiny if the search was not prompted or encouraged by police officers or other branches of government.[62] Thus, any evidence obtained in these scenarios cannot be excluded under section 24(2) of the *Charter*.

Under the existing jurisprudence and legislation, private campus security share the same limitations as non-campus private security. To date, there has yet to be a court which finds that universities are government actors or under sufficient governmental control (and thereby subsuming all of its activities under *Charter* scrutiny). Thus, whether the *Charter* applies to private campus security acting as agents for their employer university remains dependant on whether the activity they are carrying out would be considered governmental in nature. Alberta's Court of Appeal recently held that the *Charter* applied to universities in the context of suppressing students' speech on campus,[63] but this decision is inconsistent with jurisprudence of appellate courts in other jurisdictions.[64] The same train of analysis is therefore required to determine whether the actions of private campus security will be bound by the *Charter*.

b. False Imprisonment and Wrongful Arrest

If private campus security wrongfully arrest an individual under section 494 of the *Criminal Code*, then they may be the subject of a claim of false imprisonment. To establish a *prima facie* case of false imprisonment, the claimant must prove that they were detained. As with section 9 jurisprudence, detention under false imprisonment can be physical and/or psychological in nature. Because of their "authority status", private campus security who

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58 *Ibid*.

59 1991 CarswellAlta 684 (WL Can) at paras 9–10 (Alta PC), [1991] AJ No 116 (QL).

60 *R v Voege*, 1997 CanLII 12357 (ONSC), 1997 CarswellOnt 4671 (WL Can) (breach was made in good faith); *R v Miskuski*, [1993] APWLD (Alta QB), 1993 CarswellAlta 922 (WL Can) (evidence was not excluded because the breach was a "technical breach").

61 *R v Shafie*, 1989 CanLII 261at 11–12 (ONCA), 1989 CarswellOnt 71 (WL Can); *R v JC*, [1994] BCJ No 1861 (QL) at para 15 (BCSC) (detention); *R v Swanarchuk*, [1990] MJ No 686 (MBQB) (search and seizure).

62 Rigakos & Greener, *supra* note 1, at 182–183.

63 *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 [*UAlberta*] (the University of Alberta did not apply for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada).

64 *Lobo v Carleton University*, 2012 ONCA 498; *Yashcheshen v University of Saskatchewan*, 2018 SKQB 57 (this was an appeal from the Provincial Court of Saskatchewan); *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162.

do not clearly indicate that an individual is not required to go with them to avoid an arrest will have psychologically detained that individual.[65] Psychological detention also includes agreeing to go with the security guard to avoid public humiliation or embarrassment.[66] Once detention is established, the onus then shifts to the security guard to justify the imprisonment. Unlike police officers,[67] private individuals cannot use the defence of "reasonable and probable grounds"[68] if they exceed their lawful authority in making a private arrest by arresting someone who did not commit an indictable offence.[69] Private campus security can justify arresting the wrong person if an offence was actually committed and there was reasonable grounds to believe that this person was guilty of a crime.[70]

B. Special Constables

Through provincial legislation, special constables receive the powers of a peace officer to the extent and for the specific purpose set out in their appointment. In Alberta, only authorized employers are permitted to engage the services of a peace officer.[71] Ontario does not have this requirement;[72] rather, a memorandum of understanding ("MOU") between the university and the local police detachment governs the special constables and sets out the details of the appointment.[73] Oversight of special constables is typically the university's responsibility, though some legislation allows for government oversight in certain situations.[74] The appointment may also set out whether the special constables are accountable to the local

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65 *Kovacs v Ontario Jockey Club*, 1995 CanLII 7397 at paras 49–50 (ONSC), 1995 CarswellOnt 1231 (WL Can) [*Kovacs*].

66 *Jeeves (Guardian of) v Swanson*, 1995 CanLII 520 (BCSC) at para 20, [1995] BCJ No 1211 (QL).

67 *Criminal Code, supra* note 14, s 495(1)(a).

68 *Ibid*, s 25(1)(a).

69 *Kovacs*, *supra* note 65 at paras 70–71. This view is not shared by courts in all jurisdictions, and the issue has not been brought before a court of appeal in any jurisdiction. Though it appears to be based on the criticized approach to defining "finds committing" in the narrow ruling in *The Queen v Biron*, 1975 CanLII 13 (SCC), [1976] 2 SCR 56, until an appellate court finds otherwise, *Kovacs* remains persuasive. For a discussion of the evolution of the relevant case law, see generally *Mann v Canadian Tire Corporation Limited*, 2016 ONSC 4926 at 29–38 (though the discussion is centred on shopkeepers' privilege, it is equally applicable to security guards).

70 *Kovacs, supra* note 65 at para 74.

71 *Peace Officer Act*, SA 2006, c P-3.5, s 5(1) [*AB POA*].

72 *Police Services Act*, RSO 1990, c P.15, s 53 [*ON PSA*] (it is set to be replaced with the *Community Safety and Policing Act*, 2019, SO 2019, c 1, Sch 1 [*CSPA*], though as of writing, the *CSPA* has not come to force yet).

73 The two MOUs I was able to obtain (i.e. Carleton University and University of Toronto) are similarly formatted and worded, which might indicate that special constables at Ontario universities share many of the same powers and limitations: see Memorandum from The Ottawa Police Board and Carleton University (25 April 2016), regarding the appointment of Carleton University campus safety officers as special constables [Carleton MOU]; Agreement Between The Municipality of Metropolitan Toronto Police Services Board and The Governing Council of the University of Toronto (11 January 1998), regarding the appointment of University of Toronto campus safety officers as special constables [UT MOU].

74 *AB POA, supra* note 71, s 17(1) (the Director can investigate if they find that employer's investigation is not satisfactory); *Police Act*, 1990, SS 1990-91, c P-15.01, s 80 (whether the government can investigate complaints against special constables depends on what is set out in the appointment).

police detachment.[75] Special constables also work closely with local police, and some university special constables forces may also be required to report back to local police as part of their appointment.[76] PEI requires special constables to be in compliance with the police's Code of Professional Conduct and Discipline and take in-service training courses.[77] Approximately 21-percent of public universities employ special constables, most of which are in Ontario.[78] Public universities that employ special constables tend to be larger in geographic size and/or campus population[79] or are one of the only public universities in the province.[80]

i. Powers

The powers of special constables depend on their appointment as peace officers under the various provincial legislation. Special constables in all but one of the universities have the authority to enforce and lay charges under either all or parts of the *Criminal Code* and various provincial offence acts.[81] Three university special constable forces explicitly state that they can only enforce certain *Criminal Code* offences,[82] while six explicitly state that they are granted the authority to enforce provincial trespass acts.[83] Special constables at three universities[84] have the authority to enforce the *Controlled Drugs and Substances Act*.[85] Six university special constable forces have the authority to enforce municipal by-laws.[86] Under the *Criminal Code*, special constables, with certain limitations, can arrest anyone without a warrant: who has committed an indictable offence or who they reasonably believe has committed or is about to commit an indictable offence; who is found committing a criminal offence; or where they

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75 See e.g. Brock University Campus Security Services, "Campus Security Services Annual Report 2020- 21" (2021) at 8, online (pdf): *Brock University* <brocku.ca> [perma.cc/LY26-WC6Y] [*Brock Annual Report*].

76 See e.g. Carleton MOU, *supra* note 73.

77 *Police Act*, RSPEI 1988, c P-11.1, s 46(14)–(15).

78 12 of 55 universities in Appendix A. The University of Alberta, University of Western Ontario, and Brock University employ both special constables and private campus security.

79 See e.g. "About U of T" (last visited 28 January 2023), online: *University of Toronto* <utoronto.ca/about-u-of-t> [perma.cc/7RHP-NBBY] (total enrolment of 95,055 with 22,803 faculty and staff members).

80 For example, the University of Prince Edward Island ("UPEI") is the only public university in the province.

81 The University of Alberta's special constables are only authorized to arrest a person if they find that person committing a criminal offence within university jurisdiction: see "Special Duty Services" (last visited 28 January 2023), online: *University of Alberta Protective Services* <ualberta.ca/protective-services/services/special-duty-services.html> [perma.cc/VN7T-XUB9].

82 See Appendix C (University of Saskatchewan, Carleton University, and UPEI). At UPEI, the local police detachment leads any *Controlled Drugs and Substances Act*, SC 1996, c 19 investigations on university campus property with assistance from UPEI's special constables: see "Security Division" (last visited 2 February 2023), online: *University of Prince Edward Island* <upei.ca/office-vice-president-ad- ministration-and-finance/security> [perma.cc/6AS5-89AR].

83 See Appendix C (University of Alberta, Brock University, University of Guelph, Carleton University, University of Western Ontario, and McMaster University).

84 See Appendix C (University of Guelph, Carleton University, and McMaster University).

85 SC 1996, c 19 [*CDSA*].

86 Appendix C (these universities are all in Ontario: Brock University, University of Guelph, University of Toronto, University of Waterloo, Wilfred Laurier University, and McMaster University).

reasonably believe that a warrant of arrest is in force within the territorial jurisdiction where the person is found.[87] Subject to the terms of their appointment, special constables may also execute arrest warrants.[88]

Special constables are also empowered to enforce university policies and share many of the same duties as private campus security. Because of this dual role, special constables are implied to have the discretion to sanction under university policies rather than laying criminal or regulatory charges.[89] This discretion is not afforded to private campus security or non-campus police officers and greatly expands the powers of special constables beyond traditional police powers. The implications of this discretion will be explored in Part III.

ii. Limitations

Special constables have limitations placed upon them from numerous sources. The *Charter* applies to special constables when they are enforcing the *Criminal Code* and provincial acts as peace officers. Thus, their interactions with the public are constrained in the same manner as police officers.[90] Special constables are also limited by the details set out in their appointments, such as limiting their jurisdiction to the area within the boundaries of their university's campus(es) and the type of offences they can enforce.[91] Because they are limited in what they can enforce, special constables work closely with local police, and may be required to report serious crimes to the local police detachment.[92] Additionally, none of the universities examined in this article appear to allow their special constables to carry firearms. Job postings for special constables at three universities do not require firearms training or licenses, nor do they make any mention of firearms generally.[93] As of 2021, special constables in Ontario do not carry guns.[94]

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87 *Criminal Code*, *supra* note 14, s 495(1).

88 *Ibid*, s 514(2). For example, see Carleton MOU, *supra* note 73 at Schedule B, s 2.

89 This discretion is explicitly referenced in the University of Waterloo Police Service's 2020 annual report: "University of Waterloo Police Service 2020 Annual Report" (last visited 28 January 2023) at 5, online (pdf): *UW Police* <uwaterloo.ca> [perma.cc/5JR5-AB2X].

90 *Adams*, *supra* note 8 at para 17 (Justice B Scherman upheld the trial judge's decision and found that the University of Saskatchewan peace officer's actions did not violate the accused's *Charter* rights).

91 See e.g. Carleton MOU, *supra* note 73, Schedule B, ss 2–3.

92 See e.g. London Police Services Board, "LPSB Public Agenda" (21 October 2021) at 5, online (pdf): *London Police* <londonpolice.ca> [perma.cc/P2E9-W3FJ].

93 University of Alberta, University of Saskatchewan, and UPEI: see "Peace Officer" (last visited 28 January 2023), online: *UAPS Recruiting* <sites.google.com/ualberta.ca/uapsrecruiting/peace-officer?authuser=0> [perma.cc/9TG6-WQCH] [UofA Special Constable Posting]; "Security Police Officer (1 Position) - Security Division - Department of Facilities Management *Reposted*" (last visited 28 January 2023), online: *University of Prince Edward Island* <www.upei.ca/hr/competition/177e21r2> [perma.cc/X7RN-SYGY]; "University of Saskatchewan Protective Services Recruitment Information" (last visited 28 January 2023), online (pdf): *University of Saskatchewan* <usask.ca> [perma.cc/4DEF-LUUU] [US Special Constable Posting].

94 Katie Cook, *"Are you the real police?" "No. We're the campus police." An examination of the way Ontario special constables govern risk on post-secondary campuses* (PhD Dissertation, University of Waterloo, 2021) [unpublished] [hdl.handle.net/10012/17105] at 115.

II. CAMPUS SECURITY AND THE JUDICIAL SYSTEM

Much of the jurisprudence involving universities surrounds appeals from the university's internal review processes, where campus security is usually only mentioned in passing. As such, a case study approach was adopted to explore how Canadian courts (outside of Quebec) have applied the legislation and related jurisprudence discussed in the previous sections to campus security. Cases were selected based on whether there was a substantive discussion about the powers and limitations of campus security. Only six cases matched these criteria: five dealt with criminal or regulatory offences, and the other decision was a civil action against the university.[95]

A. *R v Fitch*

In this 1994 British Columbia Court of Appeal decision, a University of Victoria student appealed a set of convictions for possession of stolen property, citing that the trial judge had erred by refusing his motion to exclude evidence under section 24(2) of the *Charter*. A private campus security officer entered into the student's room to see if it had been abandoned after the student fell into arrears for his rent. The security officer discovered that not only was it not abandoned but that there was stolen property in that room. That security officer then left the room and called his supervisor, who conducted a second search and found further stolen property. The police were called, and after entering the room and being shown the stolen property, left and obtained a warrant.[96]

Justice Donald, writing for an unanimous court, held that the private campus security officers were not state agents, and therefore did not violate the student's section 8 *Charter* rights.[97] The initial search was not an exercise in governmental function because it was a private search for university purposes and was not a criminal investigation.[98] The second search by the supervisor was in violation of university policy but was still a private search (despite effectively becoming a criminal investigation) because the police were not involved.[99] Private campus security did exercise a governmental function during the second search because they acted on their own and not under "a specific request from the police or pursuant to a standing arrangement between them regarding such matters".[100] The warrant could have been obtained based on the first search, so the police did not have the security officers do what they could not.[101] Justice Donald also left open the possibility of binding private campus security to the *Charter* if the university itself is a state agent.[102]

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95 *Ville de Québec c Sadiku*, 2020 QCCM 65, [2020] JQ no 3052 also falls under these criteria, but as the article excludes analysis of campus security in Quebec, it is not included in this section.

96 *Fitch, supra* note 4 at para 6.

97 *Ibid* at para 12.

98 *Ibid* at para 13.

99 *Ibid* at para 14.

100 *Ibid* at para 15.

101 *Ibid*. If the second search was conducted by police officers, it would have violated the student's section 8 *Charter* rights. Thus, if the police had to rely on this search to obtain the warrant, then the implication is that the police would be skirting the *Charter* by having private campus security conduct the search instead.

102 *Ibid* at para 16.

B. *R v Mraz (M.)*

This 2000 Provincial Court of Saskatchewan decision addressed whether a University of Saskatchewan special constable infringed upon the accused's *Charter* rights.[103] The special constable approached a vehicle parked at a location on campus well-known for where individuals would illegally consume alcohol.[104] When the accused produced his driver's license upon request, the special constable saw open cases of beer and the smell of marijuana.[105] Based on these observations, the special constable obtained the accused's consent to search his vehicle and proceeded to conduct a search for more alcohol.[106] Though the special constable now suspected that there might be other drugs in the vehicle, she continued to search for alcohol.[107] It was during this search that she found marijuana, a banned substance under the *CDSA*.[108] Judge Kolenick held that the search at issue was within the lawful authority of the special constable, and that it did not violate the accused's sections 8 and 9 *Charter* rights.[109] Though the special constable's powers did not include the power to enforce the *CDSA*, she had the authority to enforce the *Alcohol and Gaming Regulation Act*.[110] This authority, in conjunction with the common law right of a peace officer to detain and conduct a search, permitted her to lawfully conduct the search at issue.[111]

C. *R v Scott*

In 2004, the Ontario Superior Court of Justice dealt with the question of whether a Brock University special constable had exceeded his authority in questioning the accused during a traffic stop on university property. Under section 33(2) of Ontario's *Highway Traffic Act*,[112] only a police officer is authorized to ask a driver to give reasonable identification of themselves if the driver does not surrender their license. At trial, the special constable testified that he had the "same authority as a police officer on [Brock University's] campus".[113] Based on this uncontradicted testimony, it was open for the trial judge to find that the special constable was a police officer for Brock University purposes and therefore had the authority to make the request for reasonable identification. It was further stated that the special constable was

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103 *Mraz, supra* note 5.

104 *Ibid* at para 4.

105 *Ibid* at paras 5–6.

106 *Ibid* at para 7.

107 *Ibid* at para 8. The special constable had the option to contact the Saskatoon Police and hand over the investigation to them: see "Protective Services" (last visited 28 January 2023), online: *University of Saskatchewan* <usask.ca/protectiveservices/> [perma.cc/X9NH-DJL2] (Protective Services works closely with the Saskatoon Police Services) [USask Protective Services].

108 *Ibid* at para 9 (Marijuana was a banned substance at the time of this incident); *CDSA*, *supra* note 85.

109 *Mraz, supra* note 5 at paras 32-33.

110 SS 1997, c A-18.01; *Mraz, supra* note 5 at paras 10–11.

111 *Mraz*, *supra* note 5 at paras 29–30.

112 RSO 1990, c H.8.

113 *Scott, supra* note 6 at para 3. Note that section 100 of the *Community Safety and Policing Act, 2019*, SO 2019, c 1, Sch 1 will not allow special constables to be called nor hold themselves out to be "police officers" anymore. As of January 2023, this legislation has not come into force.

"a police officer, in all respects, concerning conduct on the Brock University campus".[114] Justice Quinn further held that the rationale for randomly stopping vehicles, with no evidence to the contrary, is equally applicable to both university property and public highways because unlicensed drivers are dangerous wherever they drive. He also agreed with the trial judge that the special constable did not randomly stop the accused because the stop was for the purpose of inspecting the vehicle's university parking permit.[115]

D. *R v Whatcott*

In a 2012 Queen's Bench of Alberta decision, Justice Jeffrey held that the University of Calgary unjustifiably infringed the accused's section 2(b) *Charter* rights when its private campus security arrested him under the *AB Trespass Act*.[116] In response to a complaint that the accused was handing out anti-abortion pamphlets, a private campus security officer sought out and stopped the accused. Upon hearing the accused's name, the security officer learned that the accused had previously been banned from returning to the campus under the *AB Trespass Act*.[117] Rather than removing the accused for violating university policy,[118] the accused was handcuffed and placed in a holding cell until the Calgary Police arrived to charge him with an offence under *AB Trespass Act*.[119] In using provincial trespass legislation to respond to this complaint, Justice Jeffrey held that the University of Calgary and its private campus security were carrying out a governmental function[120] and were thus state agents bound by the *Charter*. Justice Jeffrey then upheld the trial judge's finding that the effect of enforcing the trespass legislation in this manner effectively stopped the accused from expressing his views, thus infringing on his section 2(b) *Charter* rights.[121]

E. *R v Adams*

This 2015 Queen's Bench for Saskatchewan decision discussed whether two University of Saskatchewan special constables arbitrarily detained the accused at a traffic stop while on campus property.[122] One of the special constables stopped the accused's vehicle and asked for her license and registration. The accused refused the request and started rolling up her window. It was at this point that the special constable suspected she may be intoxicated and made an Alcohol Screening Device demand. When the accused still refused to cooperate, the special constable informed her that she was being arrested for obstruction of justice. The accused was eventually forcibly removed from her vehicle and arrested. At this time,

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114 *Ibid* at paras 15–16.

115 *Ibid* at paras 20–21.

116 *AB Trespass Act, supra* note 35.

117 *Ibid.*

118 "Use of University Facilities for Non-Academic Purposes Policy" (2010) at s 5, online (pdf): *University of Calgary* <ucalgary.ca> [perma.cc/A8LS-CU7Z] (the private security officer has the power to "direct, limit or terminate [spontaneous demonstrations]").

119 *Whatcott*, *supra* note 7 at para 1; *AB Trespass Act, supra* note 35.

120 *Whatcott, supra* note 7 at para 31.

121 *Ibid* at para 42.

122 *Adams, supra* note 8.

the other special constable advised the accused of her *Charter* rights and asked if she wanted to call a lawyer. Saskatoon Police were eventually involved, but they were not present and nor did they take part in this initial exchange.[123] Justice Scherman upheld the trial judge's findings that the special constable had reasonable grounds to believe that the accused's ability to drive a vehicle was impaired, that his Alcohol Screening Device demand was made on a reasonable suspicion, and that the arrest for obstruction was lawful.[124] Justice Sherman also held that this interaction was a lawful detention. Ultimately, Justice Scherman upheld the trial judge's decision and found that none of the accused's *Charter* rights were infringed during the entirety of this exchange.[125]

F. *Jackson v University of Western Ontario*

In this 2003 small claims action in the Ontario Superior Court of Justice, a former student at the University of Western Ontario had been prohibited from entering campus property under the *ON Trespass Act*[126] except to visit the law library.[127] On the day of the subject incident, the former student nevertheless entered campus property and was ticketed by a university special constable for violating the *ON Trespass Act*.[128] The special constable then drove the former student to a bus stop and waited with the former student until the bus arrived.[129] The former student sued the University of Western Ontario, alleging false arrest, false imprisonment, and malicious prosecution.[130] Deputy Judge Searle held that the *Charter* applied to the special constable's police-like activities, as it would be "absurd" if police employed by the government were subjected to the *Charter* but those employed by a university carrying out similar activities were not.[131] The student's *Charter* rights were found to be infringed, but Deputy Judge Searle held that the provisions of the *ON Trespass Act*[132] were reasonable limits on the *Charter*.[133]

III. IMPLICATIONS

This section will summarize the notable observations gleaned from the laws, policies and procedures, and jurisprudence discussed in Parts II and III. It will then explore the implications of these observations. Finally, it will highlight some of the issues and inconsistencies in how the law deals with campus security.

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123 *Ibid* at para 4.
124 *Ibid* at paras 8–10.
125 *Ibid* at paras 16–17.
126 *Supra* note 32.
127 *Jackson, supra* note 9 at para 8.
128 *Supra* note 32. As a peace officer and a person authorized by the occupier of the premises, the special constable has the legal authority to enforce the *ON Trespass Act*: *Jackson, supra* note 9 at para 32.
129 *Jackson, supra* note 9 at paras 11–13.
130 *Ibid* at para 1.
131 *Ibid* at para 25.
132 *Supra* note 32.
133 *Jackson, supra* note 9 at para 34.

First, jurisprudence on the powers and limitations of campus security is not settled law. As of January 2023, the Supreme Court of Canada has yet to address this issue, and the decisions discussed in Part II have either never been cited or have not been cited in decisions that involve campus security. *Fitch*[134] was most recently cited with approval in *R v Elite Farm Services Ltd.*, which states that private individuals engaged in an investigation are not state agents,[135] but did not apply this principle to campus security. Similarly, both *Whatcott* and *Mraz* have been cited but not by decisions involving campus security. The three remaining decisions[136] have yet to be cited. Because the law in this area has yet to be settled, it remains somewhat uncertain as to how the courts will handle the actions of campus security. The common law powers of campus security and judicial interpretation of their statutory powers and limitations are essential in setting public expectations on how to handle interactions with campus security. With such a limited catalogue of lower court decisions, however, there remains some level of uncertainty if an individual's situation is not analogous to one of the six decisions in Part II. Human rights jurisprudence is similarly unhelpful due to a lack of tribunal decisions containing a substantive discussion about this topic at both the provincial and federal level.[137] Without judicial consensus regarding campus security's exercise of power, individuals interacting with campus security will remain uncertain as to how the courts may interpret such interactions and whether their *Charter* rights have been potentially engaged.

These decisions may also be inapplicable to present circumstances. Campus security have experienced tremendous change in their roles, duties, and training since *Fitch* was decided in 1994. Previously, campus security were primarily staffed with older men with little to no law enforcement training and mostly responsible for performing security functions.[138] A 1997 study of an in-house campus security force revealed that private campus security were not required to have formal pre-assignment training, while the special constables training program was a nine-week course at a provincial police college.[139] In contrast, campus security are now more familiar with law enforcement work and are hired for their knowledge and experience that approaches the requirements expected of police recruits.[140] For example, job postings for campus security either require or have a preference for applicants with post-secondary education and/or prior policing experience.[141] Special constables at the University

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134 *Supra* note 4.

135 2021 BCSC 2061 at paras 46, 48.

136 *Scott, supra* note 6; *Jackson, supra* note 9; *Adams, supra* note 8.

137 Only two human rights tribunal decisions discussed the actions of campus security, but they lacked a substantive discussion regarding the campus security officer's powers and limitation: see *Park v University of Ontario Institute of Technology*, 2017 HRTO 580; *Lawson v McMaster University*, 2020 HRTO 627.

138 K Cook, *supra* note 94 at 43–44.

139 Ian Gomme & Anthony Micucci, "Loose Connections: Crime and Policing on the University Campus" (1997) 27:1 The Can J of Higher Education 41 at 51.

140 K Cook, *supra* note 94 at 44.

141 The University of Saskatchewan requires applicants to have a college diploma or certification in criminal justice or criminology, though a combination of education and experience may be considered: see US Special Constable Posting, *supra* note 93; whereas the University of Alberta noted a preference for those with a post-secondary education and prior experience in policing: see UofA Special Constable Posting, *supra* note 93.

of Western Ontario must be trained and recertified annually in provincially-mandated "Use of Force" training,[142] while private campus security in most provinces must complete provincially-mandated training and examinations to apply for a security license.[143] Public perceptions of campus security have also evolved and impacted how individuals now interact with campus security, as the negative experiences of marginalized people have with campus security are thrust into the mainstream consciousness.[144] Without court decisions set in the current socio-political atmosphere, previous jurisprudence in this area cannot be regarded as anything but persuasive.

Second, none of the decisions discussed in Part II found that the university itself was a government actor, with two decisions being completely silent on this issue.[145] The two decisions involving private campus security focused on the issue of state agency to determine whether the *Charter* was applicable,[146] while any discussion of state agency was absent in the decisions involving special constables.[147] Instead, the focus in those decisions moved directly to whether there was a *Charter* infringement, as special constables are considered peace officers (and therefore state agents) pursuant to the terms of their appointment. It appears, as with most jurisprudence on freedom of expression at universities,[148] that the courts remain hesitant to apply the *Charter* to universities despite *Fitch* leaving open this possibility as a method to protect students' privacy rights almost 30 years ago. Interestingly, *Fitch* also held that if universities were bound by the *Charter*, private campus security would be limited by the *Charter* in the same manner as police officers.[149]

This hesitancy shows that the courts do not differentiate between private campus security and security guards working for private companies. As noted in Part I(A)(2)(i), the actions of both private security guards and private campus security undergo the same analysis to determine *Charter* applicability. This view ignores the significantly different environments that private security guards[150] and campus security operate in, particularly considering *McKinney*[151] was

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142 Western University, "About Us" (last visited 28 January 2023), online: *Campus Safety and Emergency Services Western Special Constable Service* <uwo.ca/campussafety/about/index.html> [perma.cc/HD6Y-A7KR] [UWO Campus Safety].

143 Montgomery & Griffiths, *supra* note 1 at 51 (Nova Scotia, New Brunswick, and Prince Edward Island do not regulate training in its private security legislation).

144 These experiences will be further explored in a later paragraph in this section.

145 *Mraz*, *supra* note 5; *Adams*, *supra* note 8.

146 *Fitch, supra* note 4; *Whatcott, supra* note 7.

147 *Scott, supra* note 6; *Jackson, supra* note 9; *Mraz, supra* note 5; *Adams, supra* note 8.

148 Kenneth Wm Thornicroft, "Rethinking McKinney: To What Extent Should Universities Be Charter-Free Zones?" (2020) 29:1 Education LJ 79 at 90; Franco Silletta, "Revisiting Charter Application to Universities" (2015) 20 Appeal at 79; Dwight Newman, "Application of the Charter to Universities' Limitation of Expression" (2015) 45 RDUS 133 at 135 (WL Can). *UAlberta, supra* note 63 remains the outlier but has been cited in passing in *Longueépée v University of Waterloo*, 2020 ONCA 830 at para 99.

149 *Fitch*, *supra* note 4 at para 16.

150 With the exception of hospital security; like campus security, hospital security work in institutions that were not found to be governmental entities (*Stoffman v Vancouver General Hospital*, 1990 CanLII 62 (SCC), [1990] 3 SCR 483) but inherently contain some governmental aspects. Hospital security also contain a mix of private security and special constables.

151 *McKinney, supra* note 50.

decided over 30 years ago. First, the duties and responsibilities of private campus security are more expansive than those of non-university private security. Specifically, private campus security are tasked with upholding and ensuring compliance with university policies and procedures while also enforcing the university's property rights. These policies and procedures have no direct equivalent in the non-university private security sphere, as it allows private campus security to impose a wider variety of sanctions on staff and students such as loss of certain privileges and monetary fines. In contrast, restricting access to the property is often the only realistic sanction non-campus private security can take, as the public tends to be more transient in these spaces when compared to university campuses. Second, the jurisdiction of private campus security is more akin to a public space than typical private property. University campuses, especially those in smaller cities and towns, often serve not only students and staff but the general public. For example, university gyms and libraries are often open to community members, universities do not restrict access to its squares and grounds to only students and staff, and public demonstrations and protests by community members are permitted on university property.[152] Private campus security are interacting with individuals in a context more akin to police than private security guards on wholly private property. Therefore, campus security's interactions with the public should not be viewed in the same manner as private security guards under the law.

Third, likely in recognition of campus security working in an environment that is not wholly private, the courts in *Scott* and *Jackson* appear to consider universities to be quasi-municipal entities.[153] *Scott* rejected distinguishing between university property and public highways under the *Highway Traffic Act*. Though Justice Quinn did not explicitly equate university property with public highways,[154] the recognition that there are shared safety concerns surrounding unlicensed drivers indicates that vehicle roads on university property ought to be regulated in the same manner. *Jackson* more explicitly makes the comparison between universities and municipalities. Deputy Judge Searle highlighted that the university has a substantial amount of property, has a community of tens of thousands of people, and employs special constables who are organized and engaged in activities as a police force,[155] all of which is common to most public universities and could also describe a municipality. Highlighting the absurdity of having police employed by a municipality being subjected to the *Charter* but not those employed by a university[156] further drives home this comparison. There are universities that have also recognized this comparison and actively embrace it. Simon Fraser University contributed to, and is a stakeholder in, the UniverCity, a sustainable community built adjacent to its main campus,[157] and the Endowment Lands surround and include UBC's

152 Universities acting as quasi-municipal entities will be discussed in the next paragraph.

153 *Scott, supra* note 6; *Jackson, supra* note 9.

154 *Scott, supra* note 6 at paras 20–21.

155 *Jackson, supra* note 9 at para 24.

156 *Ibid* at para 25.

157 SFU Community Trust, "About Us" (last visited 28 January 2023), online: *UniverCity* <univercity.ca/about-us> [perma.cc/PD5Y-WJXU].

Vancouver campus. Both have their own zoning bylaws,[158] and UniverCity lists food services on university campuses as dining options in their community.[159] With both the courts and universities recognizing the similarities between university campuses and municipalities, it may be reasonable to consider campus security as a university campus' *de facto* police force. This view is one shared by some courts in the next observation.

Fourth, both decisions involving special constables from Ontario universities noted that special constables are essentially police officers for the universities,[160] while this observation is absent from the two decisions involving special constables from the University of Saskatchewan. *Jackson* explicitly calls them "university police" and states that they are "police employed by [the University of Western Ontario]".[161] This is in contrast to *Adams*, where University of Saskatchewan special constables contacted the Saskatoon Police for assistance,[162] and *Mraz*, where the court explicitly states that special constables of the same university do not have the authority as police officers.[163] Unlike *Adams*, the special constable in *Mraz* lacked the authority to search for illegal substances under the *CDSA* but had the authority to search for alcohol under a provincial act.[164] This complication resulted in additional analysis to determine whether the special constable had the lawful authority to engage in a search that eventually revealed marijuana. The difference between the two types of special constables may be attributed to the types of legislation that they are able to enforce. Special constables from Ontario universities are typically empowered to enforce a greater number of offences compared to their University of Saskatchewan counterparts,[165] bringing them closer to essentially having police powers while on university property.

If campus security function as a university's police force, then not subjecting the actions of private campus security to the *Charter* becomes more problematic. Though private campus security are categorically different from special constables, community members may view all types of campus security as having the powers and limitations of full police officers and interact with them in the same manner. In their efforts for legitimacy, private campus security

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158 SFU Community Trust, "Zoning Bylaws" (last visited 28 January 2023), online: *UniverCity* <univercity.ca/planningdevelopment/zoning-bylaws> [perma.cc/J48N-BCDX]; University Endowment Lands, revised by-law, *Land Use, Building and Community Administration Bylaw* (9 Jul 1999).

159 SFU Community Trust, "Dine on Campus" (last visited 23 January 2023), online: *UniverCity* <univercity.ca/retail-services/dine-on-campus> [perma.cc/RW6N-3QKW].

160 *Scott, supra* note 6; *Jackson, supra* note 9,

161 *Jackson, supra* note 9 at para 24. UWO Campus Safety, *supra* note 142 states that "Western Special Constables have many of the same powers and authority on campus as London Police have for the entire Province of Ontario".

162 *Adams, supra* note 8 at para 4.

163 *Mraz, supra* note 5 at para 10.

164 *Ibid* at para 16.

165 For example, Brock University special constables are empowered to enforce the assault and theft provisions in the *Criminal Code*: see Brock Annual Report, *supra* note 75 at 8; while special constables at the University of Saskatchewan only have the authority to enforce the impaired driving provisions in the *Criminal Code*: see USask Protective Services, *supra* note 107. See Appendix C for a selected list of statutes enforced by various university special constable forces.

have reinforced this assumption by stating that they receive the "same type of training" as police officers.[166] This misconception will then result in the *de facto* expansion of the powers of campus security beyond their actual authority. It may also cause confusion as to how campus security are limited by the *Charter*, as the implications from the *Fitch* decision demonstrates in the next observation.

Fifth, *Fitch*[167] exposed a potential loophole for private campus security to skirt the *Charter* while engaging in the search and seizure of evidence later used in a criminal proceeding. If one applies *Fitch* more broadly, all evidence found in searches conducted by private campus security would be admissible, as long as there were no specific requests by police or a general expectation from the police that they are engaging in criminal investigations. As such, even if the actions of the private campus security guard would not have been *Charter*-compliant if they were a police officer, the evidence obtained from that search would still be admissible if it is later used in a criminal proceeding. This scenario is particularly troubling when considering that most campus security forces explicitly state on their webpages that they have a close working relationship with local police but do not appear to have any formal arrangements or agreements in place about that relationship.[168] Previous literature (albeit limited) has highlighted contradictory jurisprudence on this issue,[169] but only *Fitch* deals specifically with campus security and therefore would be more applicable to future cases.

Sixth, based on the nature of their responsibilities, the powers afforded to special constables are greatly expanded when compared to private campus security and police officers. As special constables can enforce both criminal and regulatory laws and university policies, they have the discretion to sanction under public or "private laws". This discretion is not afforded to police officers or private campus security: police officers can only enforce the *Criminal Code* and other federal laws, provincial laws, and municipal laws while on university campuses; and private campus security can only enforce university policies. Universities do not appear to regulate this discretion,[170] so it is likely that these decisions are made solely by special constables.

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166 Kevin Walby, Blair Wilkinson & Randy K. Lippert, "Legitimacy, professionalisation and expertise in public sector corporate security" (2016) 26:1 Policing & Soc'y 38 at 48.

167 *Supra* note 4.

168 Based on publicly available information, UBC's Okanagan campus appears to be the exception: see Santa J. Ono, "Update on UBC's Evolving Relationship with the RCMP" (last visited 28 January 2023), online (blog): *The University of British Columbia* <president.ubc.ca/blog/2020/12/14/rcmp_relationship> [perma.cc/HWU9-FVYY] (UBC's Okanagan campus has a memorandum of understanding with the Okanagan RCMP, though this memorandum is not publicly available). UBC's Vancouver campus is in the final stages of establishing a memorandum of understanding between campus security and University RCMP, but there is no publicly available information about the exact contents of the memorandum: UBC 2021 Annual Report, supra note 17.

169 Scharbach, *supra* note 1; Rigakos & Greener, *supra* note 1 at 179–182.

170 University policies regarding misconduct and sanctions often do not specify whether private or public sanctions are to be taken, especially for "low-level" transgressions. Of the two MOUs that were made available to me, both did not discuss whether to sanction under private university policies or public laws under certain circumstances: see Carleton MOU, *supra* note 73; UT MOU, *supra* note 73. The webpages listed in Appendix B are similarly unhelpful.

Giving special constables this level of discretion is troubling because it can be dangerous to marginalized and racialized community members. Both police and private security have been found to over-police marginalized and racialized communities.[171] Special constables, who fall somewhere between police and private security and often are, or are governed by, former police officers, are also not immune to these tendencies.[172] Black students at Carleton University have spoken out about being racially profiled by the university's special constables, while a student at the University of Toronto was handcuffed by special constables when she tried to seek out mental health treatment.[173] As such, this discretion could result in individuals from these communities not receiving the benefit of the doubt and being charged with a criminal or regulatory offence, rather than being sanctioned under university policy. This concern was realized in a 2010 incident involving special constables at McMaster University. Special constables were accused of racially profiling Kevin Daly, a Black police officer, at a traffic stop and subsequently banning him from the campus "in perpetuity" for allegedly running a stop sign.[174] Rather than issuing a McMaster University ticket for running a stop sign, the McMaster special constable force instead escalated the incident by running Mr. Daley's plates through Hamilton Police and lodging a complaint to his supervisor that resulted in a misconduct investigation.[175]

Last, *Mraz* raises the question of how special constables should deal with offences that they lack the authority to enforce. In *Mraz*, this issue was resolved because the court found that the special constable could legally search under legislation they had authority to enforce.[176]

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171 *R v Le*, 2019 SCC 34 at paras 89–97 (the Supreme Court of Canada reviewed reports on the social context of the relationship between racialized individuals and the police, and concluded that racialized and low-income communities were disproportionately policed); Montgomery & Griffiths, *supra* note 1 at 20 (unhoused and under-housed residents of Vancouver's Downtown Eastside were more likely to have negative encounters with private security, and one-third of the residents had four or more interactions with private security per month).

172 See e.g. Bobby Hristova, "McMaster student union governing body passes motion calling for De Caire's firing" (16 June 2020), online: *CBC News* <cbc.ca/news/canada/hamilton/decaire-students-unions-1.5612947> [perma.cc/X8JS-MJTU] (McMaster University's former head of security was previously a Hamilton Police chief and was criticized for his support of carding and street checks while in this previous role).

173 Temur Durrani, "Black Carleton students speak out about racial profiling" (7 March 2019), online: *The Charlatan* <charlatan.ca/2019/03/black-carleton-students-speak-out-about-racial-profiling> [perma.cc/DA4X-F7AF]; Angelina King, "How a student seeking mental-health treatment got handcuffed by U of T police" (13 November 2019), online: *CBC News* <cbc.ca/news/canada/toronto/u-of-t-student-handcuffed-while-seeking-mental-health-treatment-1.5357296> [perma.cc/QHA2-47N4]. For more instances of over-policing by the University of Toronto's special constables, see also Candice Zhang, "Policing at the University of Toronto: What you should know about Campus Police policies, misconduct, and advocacy for change" (18 August 2020), online: *The Strand* <thestrand.ca/policing-at-the-university-of-toronto> [perma.cc/KXK8-2CN2].

174 Bobby Hristova, "Former Toronto police officer says he was racially profiled by McMaster security" (10 July 2020), online: *CBC News* <cbc.ca/news/canada/hamilton/toronto-police-officer-racial-profiling-mcmaster-university-hamilton-1.5643651> [perma.cc/Q7TU-ZHKY].

175 *Ibid*; "Parking Cost Schedules" (last visited 28 January 2023), online: *McMaster University* <eparking.mcmaster.ca> [perma.cc/NWZ7-C7PD] (failure to obey a regulatory sign is a $30 fine).

176 *Mraz, supra* note 5 at paras 10–11, 29–30.

However, if that special constable conducted the search to find marijuana under the *CDSA*,[177] legislation they lacked the authority to enforce, then the search would not be an exercise of governmental function.

This line of reasoning implies that a special constable would be treated as a private individual in situations where they lack legal authority to enforce a particular offence and therefore raises a few concerns. There are no prior court decisions that directly and substantively address this issue, and applying decisions regarding the conduct of private individuals on special constables is problematic. For example, it would be illogical to give special constables the same level of leniency afforded to private individuals for inadequately giving right to counsel warnings for offences they cannot enforce but hold them to the same standard as police officers when they are enforcing offences under their authority.[178]

It is also unclear as to whether special constables conducting a private search that is effectively a criminal investigation would still escape *Charter* scrutiny.[179] If special constables are required to report all criminal investigations to their local police detachment in accordance with their appointment,[180] it remains to be seen whether the courts will consider this requirement to be either prompting or encouragement by police officers or other branches of government. There would be an expectation from the police that special constables are engaging in criminal investigations, but it is not clear if this principle from *Fitch* would still apply to special constables conducting private searches.[181] Last, the impact of this judicial uncertainty will contribute to public confusion. In addition to the lack of information and education about the role of campus security,[182] university community members also lack judicial direction on what protections they have when interacting with campus security.

IV. RECOMMENDATIONS

This section provides some recommendations and possible solutions to the issues and inconsistencies brought up in Part III. This article will argue that closing the "state agency loophole" highlighted in *Fitch* and having the *Charter* apply to universities are two potential solutions in addressing the above issues. It also provides potential avenues for implementing these recommendations.

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177 *Supra* note 85 (At the time, marijuana was a banned substance under the *CDSA*).

178 For further discussion of right to counsel warnings by private individuals, see the text accompanying note 60.

179 As was the case in *Fitch, supra* note 4 at para 14.

180 See e.g. Carleton MOU, *supra* note 73 at ss 61–62.

181 *Supra* note 4.

182 K Cook, supra note 94 at 74–76; Dana J Campbell-Stevens, "Executive Summary of the Report to: University of British Columbia RE: Campus Security External Review" (15 April 2021) at 16, online (pdf): *The University of British Columbia* <ubc.ca> [perma.cc/UXN9-G9ME].

A. Closing the "state agency loophole" in private investigations

Closing the "state agency loophole" in private investigations by taking a more holistic analysis of various factors in searches by campus security will better safeguard the privacy rights of community members while on university campuses. In *Fitch*, state agency was only established if the search was prompted by a specific request from the police or pursuant to a standing arrangement between private campus security and the police regarding such matters.[183] As discussed in Part III, this narrow interpretation of state agency creates a loophole that is ripe for abuse by local police who work closely with campus security.

In contrast, the more contextual approach taken by the Alberta Court of Queen's Bench in *R v Meyers*[184] in interpreting state agency makes it more difficult for police and campus security to abuse this loophole while conducting searches. *Meyers* considered both the purpose of the private search and the level of police involvement when determining whether there was state agency. If the purpose of the search was to gather evidence with a view to lay criminal charges, then the search was in furtherance of a governmental function. The level of police involvement required was simple collusion, rather than a specific or active request.[185]

This interpretation more adequately addresses the context that campus security operates in, specifically with respect to their closer relationship with local police when compared to private security forces in other settings. It would also close the loophole that would allow private campus security to assist the police in evading the *Charter* by not involving police until the evidence had been collected. Additionally, this interpretation would also help avoid confusion in scenarios where special constables initiated searches as private individuals (e.g. conducting searches with respect to violations of university policy) but find evidence of a criminal or regulatory offence they are authorized to enforce. In this scenario, are the special constables acting as state agents? By taking the approach in *Meyers*, these special constables would clearly be acting as state agents and the individual being searched will be protected under section 8 of the *Charter*.

There are a few possible approaches to closing the state agency loophole. The first approach would involve applying the *Meyers* interpretation of state agency to campus security. First, one could wait for the Supreme Court of Canada to affirm *Meyers* and/or overrule *Fitch*'s interpretation of state agency in private investigations.[186] This approach would be unpredictable, as it would be contingent on waiting for a case involving private searches performed by campus security to be heard at trial and then appealed at least once. The second approach is to require that campus security and police departments have more formalized agreements about their

183 *Supra* note 4 at paras 12–14.

184 1987 CanLII 3419 (AB QB), 1987 CarswellAlta 104 (WL Can) (this decision did not involve campus security, so *Fitch* is still more analogous in situations with campus security) [*Meyers*].

185 *Ibid* at paras 28–29.

186 Rigakos & Greener, *supra* note 1 at 182 ("The 'purpose of the search' test does not have the support of Courts of Appeal that the 'at the instigation of law enforcement' test does"). *R v Chang*, 2003 ABCA 293 is the only Court of Appeal decision that cited *Meyers*, *supra* note 184 with respect to its interpretation of state agency, but was distinguished from *Meyers* based on its different factual matrix.

relationship. Such arrangements would state that there is a standing agreement between the two parties that campus security will conduct criminal investigations on behalf of or with the police;[187] however, this requirement may result in campus security forces taking the opposite approach (i.e., by promptly and explicitly stating that they will not engage in any criminal investigations). This may create the unintended consequence of increased police presence on university property, either by prompting the police to more actively patrol campuses or by campus security calling the police more frequently to investigate potential crimes.

B. Applying the *Charter* to public universities

Having the *Charter* apply to public universities, whether as a government actor or through campus security exercising a governmental function, is a broader solution than merely closing the loophole exposed in *Fitch*. As stated in *Fitch*, the actions of campus security would be bound by the *Charter* if the university itself is a government actor for the purposes of section 32 of the *Charter*,[188] which creates the effect of subjecting campus security to the same level of scrutiny as the police. This will ensure that the privacy rights of university community members are protected while also clearly defining the limitations of the powers of campus security.

Bringing universities under *Charter* scrutiny would also result in protections for university community members in criminal proceedings that include interactions with campus security. For example, it could prevent special constables from over-policing racialized and marginalized communities. Currently, special constables have the discretion to charge individuals from these communities with criminal and/or regulatory offences rather than under university policies or by conducting "private investigations" for offences they do not have the authority to enforce. If the *Charter* applies to universities, this discretion will also be subjected to *Charter* scrutiny. Further, applying the *Charter* to universities may also protect racialized and marginalized individuals from being "over-policed" by university policies because even actions taken by campus security while enforcing university policies would need to be *Charter*-compliant.

i. Universities ought to be considered government actors

The first approach is to find that universities are government actors generally subject to the *Charter*. This approach, admittedly, would upset a line of settled precedent that cite *McKinney* for the proposition that universities are not government actors;[189] however, this issue is not as settled as these later decisions would suggest. In *McKinney*, Justice LaForest,

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187 These types of arrangements are already formalized or are in the process of being formalized at UBC: see UBC 2021 Annual Report, *supra* note 17 (UBC's Vancouver campus is in the final stages of establishing a memorandum of understanding between campus security and University RCMP) and text accompanying note 169 (regarding UBC's Okanagan campus).

188 *Supra* note 4 at para 16.

189 I will note that the recent decision of *Zaki v University of Manitoba*, 2021 MBQB 178 at paras 152–153 contemplated finding universities to be government actors. Justice Champagne noted that "Manitoba legislation mandates a high-ranking government official be a member of the [university's] Senate", which may allow government influence and control over the university. However, this issue was not raised and was left unaddressed.

writing for a narrow majority, noted that the four Ontario universities involved in its case were "not part of government given the manner in which they are *presently* organized and governed."[190] This leaves open the possibility that universities are considered government actors under different circumstances. Justice LaForest also found that universities were not under sufficient government control, despite government funding and regulation, because their independent governing bodies are wholly autonomous.[191] This may have been the case in 1990 for those four Ontario universities, but as Kenneth Wm. Thornicroft, professor of law and employment relations, points out, "Canadian universities have experienced a sea change during the past three decades", with "university autonomy [having been] decidedly eroded in recent years".[192]

There is ample evidence that the universities listed in Appendix A would be considered government actors, as they fall within sufficient governmental control. Though the percentage of overall government funding has decreased since 1990,[193] government funding remains one of the largest sources of revenue for universities.[194] More importantly, government funding has increasingly come with strings attached with the effect of controlling universities by exerting influence over their decision-making. In the years following *McKinney*, both provincial and federal governments have provided funding for post-secondary education and research, with either a priority or the vast majority of the funding going towards particular fields.[195] Recently, Ontario and Alberta have taken the next step and explicitly tied funding for universities to "performance outcomes" based on metrics set by their provincial governments,[196] with New Brunswick and Manitoba considering following suit.[197] The government also treats universities as government actors by subjecting them to judicial review. In his article on *Charter* applicability to university campuses regarding on-campus expressions, Hayden Cook notes that, with recent developments in administrative law, "the

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190 *McKinney, supra* note 50 at 275 [emphasis added].

191 *Ibid* at 272–273.

192 Thornicroft, *supra* note 148 at 91.

193 Janet Davidson, "Where do Canada's post-secondary dollars go?" (16 March 2015), online: *CBC News* <cbc.ca/news/canada/where-do-canada-s-post-secondary-dollars-go-1.2994476> [perma.cc/4EJC-23BU].

194 Statistics Canada, *Financial information of universities for the 2018/2019 school year and projected impact of COVID–19 for 2020/2021*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 2020).

195 Hayden Cook, "Charter Applicability to Universities and the Regulation of On-Campus Expression" (2021) 58:4 Alberta L Rev 957 at 960–961.

196 Mike Crawley, "How the Ford government will decide on university, college funding" (6 May 2019), online: *CBC News* <cbc.ca/news/canada/toronto/ontario-doug-ford-university-college-postsecondary-grants-1.5121844> [perma.cc/JNH3-3R4N]; Emma Graney, "UCP prepares to roll out Ford-flavoured post-secondary changes in Alberta" (6 May 2019), online: *Edmonton Journal* <edmontonjournal.com/news/politics/ucp-prepares-to-roll-out-ford-flavoured-post-secondarychanges-in-alberta> [perma.cc/937S-NJZJ].

197 "New Brunswick MLAs ponder performance-based funding for universities" (7 February 2020), online: *CBC News* <cbc.ca/news/canada/new-brunswick/cbc-nb-political-panel-podcast-universityfunding-1.5455391> [perma.cc/RM8P-Z73Z]; Ian Froese, "Manitoba looks to Tennessee model in efforts to tailor postsecondary education to labour market" (22 Oct 2020), online: *CBC News* <cbc.ca/news/canada/manitoba/manitoba-tennessee-model-higher-learning-performance-based-wfpcbccbc-1.5768684> [perma.cc/N8PF-TPUT].

argument that the *Charter* should not apply to the university because it is merely a "public decisionmaker" appears to hold less water today than it did when *McKinney* was decided."[198] Universities are also regulated and overseen by provincial government ministries, who have increasingly mandated more reporting and "accountability" from universities.[199] With this level of governmental control, the justification in *McKinney* to exclude universities from *Charter* scrutiny may no longer be applicable,[200] as the autonomy of public universities has decreased significantly since 1990.

Opponents of bringing universities under *Charter* scrutiny are primarily concerned with *Charter* applicability restricting the universities' academic freedom and institutional independence;[201] however, *Charter* applicability would not hinder, but instead may even facilitate academic freedom. In resolving this concern, Dwight Newman suggests by drawing upon American jurisprudence that section 2(b) of the *Charter* could be extended to academic freedom.[202] Justice Paperny in *Pridgen v University of Calgary* also found no apparent reason as to why academic freedom and section 2(b) cannot "comfortably co-exist",[203] and *UAlberta* recently affirmed this view, finding that section 2(b) did not threaten the university's independence.[204] Additionally, given that universities are bound by provincial human rights laws and are already obliged to respect "*Charter* values", only an incremental step is needed to have the *Charter* itself apply to universities. Any residual concerns could be addressed under section 1 of the *Charter*, where universities would be given the opportunity to justify their rights-infringing actions as appropriate limitations on fundamental freedoms. In this regard, Krupa Kotecha suggests that courts can apply their deferential approach to applying the *Charter* to administrative bodies when assessing the actions of universities.[205] This is the approach approved of, and ultimately taken, by Alberta's Court of Appeal in *UAlberta*.[206]

ii. The actions of campus security are sufficiently governmental in nature

The second approach to *Charter* applicability involves finding that campus security's actions are an exercise of governmental function, either through exercising delegated statutory authority or engaging in specific activities of universities to further a governmental objective. Though the Supreme Court of Canada has yet to revisit this issue since *McKinney* (and its companion cases), appellate courts have addressed it numerous times since then and are split in their approaches to determining whether the *Charter* applies to the actions of universities (and by extension, campus security). Alberta and Saskatchewan courts have taken a more purposive and holistic approach, where courts look at a university's actions and its broader

198 H Cook, *supra* note 195 at 962.
199 Silletta, *supra* note 148 at paras 40–41; Thornicroft, *supra* note 148 at 91–93.
200 *Supra* note 50 at 233.
201 Silletta, *supra* note 148 at paras 55–56; Newman, *supra* note 148 at 148–156.
202 Newman, *supra* note 148 at 149–150.
203 2012 ABCA 139 at para 117 [*Pridgen*].
204 *UAlberta, supra* note 63 at para 148.
205 Krupa M Kotecha, "Charter Application in the University Context: An Inquiry of Necessity" (2016) 26:1 Educ & LJ 21 at 51 (Kotecha looks at decisions from Alberta, British Columbia, and Ontario).
206 *UAlberta, supra* note 63 at paras 148, 160.

policy and social objectives. As Hayden Cook notes in the context of free expression, "[a] more functional approach to the inquiry would consider not whether the provision of spaces for free expression was *itself* a governmental objective, but whether it was a *necessary prerequisite* to achieving a governmental objective".[207] In contrast, courts in British Columbia and Ontario have taken a narrower, formalistic approach, which only looks at a university's governing structures and statutory schemes.[208]

Krupa Kotecha suggests that courts ought to adopt the more purposive approach, particularly in determining a specific governmental policy or objective; the formalistic approach rests on narrow, and arguably incorrect, constructions of prior decisions and does not consider the modern realities of universities.[209] In looking at decisions made by universities in the abstract (or purely through a legislative lens), one ignores how governments can affect university policies or decisions beyond legislating. The more purposive approach sees recent support in *UAlberta*, where Alberta's Court of Appeal highlighted (and seemingly adopted this suggestion implicitly) that the formalistic approach was a "pinched and technical reading" of section 32 of the *Charter*.[210] *UAlberta* expands on the purposive approach in going beyond the legislative context of universities and looking to its historical context.[211] This context forms part of the five overlapping reasons of why Justice Watson found that the *Charter* applied to universities in the context of the suppression of students' speech on campus.[212]

In adopting the more purposive approach, the actions of campus security appear to be governmental in nature. The *Charter* applies to non-government actors exercising statutory authority, which is particularly relevant when that power has a coercive element not given to private individuals.[213] In *Pridgen*, Justice Paperny held that a university's disciplinary functions were an exercise of statutory authority.[214] In taking a more holistic approach to viewing disciplinary functions, it follows that investigations and searches conducted by campus security are also an exercise of statutory authority. Such investigations form part of a university's disciplinary function—to consider otherwise would be an illogically narrow interpretation of what discipline involves. Though university-sanctioned discipline is often directed at students, community members generally are also subject to disciplinary sanctions

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207 H Cook, *supra* note 195 at 966 [emphasis in original].

208 *Ibid* at 31, 38 (Kotecha looks at decisions from Alberta, British Columbia, and Ontario). In Saskatchewan, *R v Whatcott*, 2014 SKPC 215 also applied the more purposive and holistic approach in applying the *Charter* to the university's actions that involved the exercise of statutorily-based powers of compulsion. *Charter* applicability to universities was also the subject of *Yashcheshen v University of Saskatchewan*, 2019 SKCA 67, leave for appeal dismissed 2020 CanLII 97854 (SCC), but the appellant failed to make any submissions on the connection between the university's actions and any implementation of a specific government policy or program, so the Court of Appeal did not explore this any further: at paras 24–25.

209 Kotecha, *supra* note 205.

210 *UAlberta, supra* note 63 at paras 144, 148.

211 *Ibid* at paras 109–117.

212 *Ibid* at para 148.

213 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 35–36.

214 *Pridgen, supra* note 203 at para 105.

from universities.[215] Thus, such actions involving non-student community members is also an exercise of statutory authority. As mentioned in previous sections of this article, actions stemming from the use of provincial legislation, municipal bylaws, and/or section 494 of the *Criminal Code* engages the power of the state, so such actions are also subject to the *Charter*.

The actions of campus security when they enforce university policy and procedures are also furthering a governmental objective. *UAlberta* held that universities regulating their students' free expression on campus is an exercise of governmental function because it involves furthering a governmental objective.[216] Enforcing the regulation of free expression on campus is often the responsibility of campus security. Given this likely intersection between free expression issues and campus policing, *UAlberta* arguably applies to the actions of campus security. Additionally, by finding in part that the university grounds are physically designed to ensure that students can learn, debate, and share ideas in a community space,[217] *UAlberta* also ought to apply to the actions generally taken by campus security to enforce university policies and procedures. Such enforcement actions can be prohibitive to a student's learning in a community space. For example, campus security exercising police-like powers, such as random searches, towards racialized and marginalized students may dissuade such students from spending time on campus to learn and share ideas with others. In more serious cases, it may even dissuade such students from attending university.

CONCLUSION

In examining the powers and limitations of campus security, there are clear issues and inconsistencies resulting from judicial interpretation of campus security's exercise of their powers. This lack of clarity and consistency has left university community members unsure if the *Charter* applies to their interactions with campus security. Either of the two recommendations could assist in resolving these issues and inconsistencies by bringing either some or all of the actions of campus security under *Charter* scrutiny. Future research that provides empirical evidence of the frequency and types of powers most often exercised by campus security would provide a more fulsome picture of the impact campus security have on university community members. In the meantime, universities should provide more information to its community members about their rights when interacting with campus security.[218]

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215 For example, the University of Victoria allows community members to borrow books from its library, but they are also subject to fines for late returns: University of Victoria Libraries, "Borrowing and loans" (last visited 24 January 2023), online: *University of Victoria* <uvic.ca/library/use/borrow/borrowing/index.php> [perma.cc/3N53-LF56].

216 *UAlberta*, *supra* note 63 at para 148.

217 *Ibid*.

218 Only the University of Windsor has provided any plain-language guidance: see Campus Community Police, "Dealing With Campus Community Police" (last visited 30 January 2023), online: *University of Windsor* <uwindsor.ca/campuspolice/300/dealing-campus-community-police> [perma.cc/A85G-WYF2].

APPENDIX A.

LIST OF PUBLIC UNIVERSITIES EXAMINED IN THIS ARTICLE

Province / Territory	University Name	Type of Campus Security Employed
British Columbia	Capilano University	Private – mix of in-house and outsourced
	Emily Carr University	Private – outsourced
	Kwantlen University	Private – in-house
	Royal Roads University	Private – in-house
	Simon Fraser University	Private – mix of in-house and outsourced
	Thompson Rivers University	Private – outsourced
	University of the Fraser Valley	Private – outsourced
	University of British Columbia	Private – in-house
	University of Northern British Columbia	Private – in-house
	University of Victoria	Private – in-house
	Vancouver Island University	Private – outsourced
Alberta219	MacEwan University	Private – in-house
	Mount Royal University	Private – in-house
	University of Alberta	Special constables
	University of Calgary	Private – in-house
	University of Lethbridge	Private – in-house
Saskatchewan	University of Regina	Private – in-house
	University of Saskatchewan	Special constables
Manitoba	Brandon University	Private – in-house
	University of Manitoba	Private – in-house
	University of Winnipeg	Private – in-house

219 Excluded from this list are: Athabasca University (it is an online university with no physical campus), and Alberta University of the Arts (as of January 2023, the website for its campus security is offline).

Ontario	Algoma University	Private – in-house
	Brock University	Private and special constables
	Carleton University	Special constables
	Lakehead University	Private – in-house
	Laurentian University	Private – in-house
	McMaster University	Special constables
	Nipissing University	Private – in-house
	OCAD University	Private – in-house
	Queen's University	Private – in-house
	Toronto Metropolitan University	Private – outsourced
	Trent University	Private – in-house
	University of Guelph	Special constables
	University of Ontario Institute of Technology	Private – in-house
	University of Ottawa	Private – in-house
	University of Toronto	Private and special constables
	University of Waterloo	Special constables (private for certain buildings)
	University of Western Ontario	Special constables
	University of Windsor	Special constables
	Wilfred Laurier University	Special constables
	York University	Private – in-house
New Brunswick	Mount Allison University	Private – in-house
	Université de Moncton	Private – in-house
	University of New Brunswick	Private – in-house
Nova Scotia220	Acadia University	Private – in-house
	Cape Breton University	Private – in-house
	Dalhousie University	Private – in-house
	Mount Saint Vincent University	Private – in-house
	Nova Scotia College of Art & Design	Private – in-house
	St. Francis Xavier University	Private – in-house
	Saint Mary's University	Private – in-house
Prince Edward Island	University of Prince Edward Island	Special constables
Newfoundland and Labrador	Memorial University of Newfoundland	Private – in-house
Yukon	Yukon University	Private – in-house

220 Université Sainte-Anne was excluded due to lack of information on its website regarding campus security.

APPENDIX B.

ROLES AND RESPONSIBILITIES OF CAMPUS SECURITY [221]

A. Private Campus Security

University Name	Roles and Responsibilities	Source
Acadia University	• Safewalk program • Campus and residence patrol • Event security • Lost and found • Alarm and 911 monitoring • Building access • Medical shuttle service • Emergency response • Parking administration	<www2.acadiau.ca/safety-security/services.html> [perma.cc/CQ4G-Z652]
Algoma University	• Safewalk program • Video surveillance • Dealing with reports of injury and/or hazards	<algomau.ca/students/campus-safety> [perma.cc/W3GS-TXAB]
Brandon University	• Emergency phone monitoring • Responding to incident and hazard reports • Emergency response	<www.brandonu.ca/safety/> [perma.cc/3GYP-N4BB]
Brock University **(mix of private campus security and special constables)**	• Responding to crimes and disturbances • Enforce university statutes • Provide assistance to victims of crime	<brocku.ca/campus-security/about-us/> [perma.cc/8TUN-47US]; <https://brocku.ca/campus-security/wp-content/uploads/sites/80/2020-21-CSS-Annual-Report.pdf> [perma.cc/2E97-Y5LC]

221 Information listed here is based on publicly available information on the provided webpages and is likely incomplete.

Cape Breton University	• Safewalk program • Lone worker program • Emergency response • Incident response • Campus patrol • Building access • Parking administration • Lost and found	<www.cbu.ca/current-students/safety-security-%20respect/campus-security/> [perma.cc/E2CM-KJ8N]
Capilano University	• Safewalk program • Incident response • First aid • Building and property inspection • First aid • Crime prevention programs • Lost and found • Access control • Wildlife management • Responding to missing persons and auto crime reports	<www.capilanou.ca/student-services/community/safety--security/> [perma.cc/VQ2H-6AN8]
Dalhousie University	• Lost and found • Parking administration • Incident response • Building access	<www.dal.ca/dept/facilities/services/security-services.html> [perma.cc/P5A3-MG3C]
Emily Carr University	• First aid • Security patrols • Building access • Safewalk program • Monitor fire and security systems • Investigate thefts and suspicious activity • Emergency phone monitoring • Responding to incident reports	<www.ecuad.ca/on-campus/safety-security> [perma.cc/24WF-EBNA]

Kwantlen University	• Lost and found • Safewalk program • Lone worker program • Incident response	<www.kpu.ca/security> [perma.cc/2UVM-YSYA]
Lakehead University	• Parking administration • Locker rentals • Lost and found • Campus patrol • Respond to security and emergency calls • City of Thunder Bay By-Law enforcement officers • Enforce university's property rights • Monitors video surveillance and emergency phones • Fire prevention and suppression equipment inspection service	<www.lakeheadu.ca/faculty-and-staff/departments/services/security/tb> [perma.cc/XM8A-D9TJ]
Laurentian University	• Monitor emergency telephones • Video surveillance • First aid • Safewalk and work alone programs	<laurentian.ca/support/campus-safety> [perma.cc/C284-FMRR]
MacEwan University	• Lost and found • Emergency response • Responding to reports of crime • Emergency phone monitoring	<www.macewan.ca/safe-at-macewan/> [perma.cc/W2AS-HSX8]
Memorial University of Newfoundland	• Video surveillance • Vehicle and foot patrol of campus • Building access • Responding to crimes • Alarm monitoring • Event security • Emergency phone monitoring • Parking administration • Safewalk program • Enforcement of university policies and procedures • Provide investigative support to local law enforcement when required	<mun.ca/cep/> [perma.cc/L3ZF-PSE9]

Mount Allison University	• Incident response • Emergency phone monitoring	<mta.ca/current-students/safety-and-security> [perma.cc/FB4K-BUDV]
Mount Royal University	• Safewalk program • Accident and incident response • First aid • Campus patrol • Responding to alarms • Student and community engagement • Video surveillance • Assess reports of infrastructure issues • Building access • Emergency response	<www.mtroyal.ca/SafetyRiskDepartment/CampusSafety/index.htm> [perma.cc/3FHE-Q5LZ]
Mount Saint Vincent University	• Emergency response • Incident response • Emergency phone monitoring • Shuttle service for community members with medical or safety/security concerns • Parking administration • Violence prevention training	<www.msvu.ca/campus-life/campus-services/safety-security-at-msvu/> [perma.cc/PNV6-ENU4]
Nipissing University	• Assistance with reporting and documenting any incident/accidents on-site • Emergency phones and emergency buttons • Surveillance cameras • First-Aid and AED • Parking lot safety • Safewalk Program	<www.nipissingu.ca/departments/human-resources/health-safety/campus-safety/security> [perma.cc/JTQ6-66CY]
Nova Scotia College of Art & Design	• Incident response	<navigator.nscad.ca/wordpress/home/services/security/> [perma.cc/2GMV-HLRC]

OCAD University	• Enforcing university policies and procedures • Enforcing the university's property rights • Offers crime prevention programs • Campus patrol • Emergency response • Access control of buildings • Responding to reports of crime • Report writing and investigations • Lost and found • Safewalk program	<www.ocadu.ca/services/safety> [perma.cc/69GL-M86B]
Queen's University	• Missing persons and wellness or status checks • Monitoring emergency, assistance, and pay phones • Bike patrols • Contract security for events • Safety inspections and providing recommendations to specific buildings or areas on campus • Self-defence courses • Operates lost and found • Safewalk and lone worker programs • Enforcing university policies and procedures • Providing first aid	<www.queensu.ca/risk/security/services> [perma.cc/44H7-DTTW]

Royal Roads University	• Providing first aid • Emergency response • Emergency phone monitoring • Safewalk program • Lost and found • Security patrol • Check-in services for on-campus accommodation (after hours or when the Welcome Desk is closed) • Building access and lockup • Video surveillance • Safety education programs • Site and building integrity • Parking and traffic administration and enforcement	<www.royalroads.ca/campus/campus-security> [perma.cc/3LNR-WZLS]
Saint Mary's University	• Incident response • First aid assistance • Lost and found • Alarm monitoring • Parking administration • Safewalk program • Lone worker/student program • Special event security	<www.smu.ca/student-life/university-security.html> [perma.cc/6Y6F-3J3D]
Simon Fraser University	• Safety training programs • Responding to reports of crime and/or hazards • Traffic safety monitoring • Building access • Safewalk program • First aid • Lost and found • Risk assessment • Emergency response • Incident command • Enforcing university policies and procedures	<www.sfu.ca/srs/campus-safety-security.html> [perma.cc/5VLH-LC6K]; <www.sfu.ca/content/dam/sfu/srs/campus-security-safety/about/2020.12.03%20%20CPS%20mandate%20document.pdf> [perma.cc/K34N-XAW8]

St. Francis Xavier University	• Vehicle and foot patrols • Incident response • Emergency response • Residence keys/key card management • Parking administration • Emergency phone monitoring • Alarm monitoring	<www.mystfx.ca/security/about-safety-security> [perma.cc/9T86-J4TM]
Thompson Rivers University	• Campus patrol • Incident response • Lost and found • Safewalk program • Building access • First aid • Event security • Offers safety programs	<www.tru.ca/risk-management-services/security.html> [perma.cc/HD6J-E7AC]
Toronto Metropolitan University	• Enforcing university policies and procedures • Enforcing the university's property rights • Offers crime prevention programs • Emergency response program • Risk management and event risk assessments • Investigations • Foot and bike patrols • Safewalk program • Emergency response • Medical assistance • Planning, installing and managing security system infrastructure on campus • Event security	<www.torontomu.ca/community-safety-security/> [perma.cc/9BYD-HHV5]
Trent University	• Offers crime prevention programs • Emergency response • Responding to reports of crime • Campus patrol • Security awareness training • Safewalk program	<www.trentu.ca/security/welcome> [perma.cc/B77K-5M2L]

Université de Moncton	• Campus patrol • Enforcing university policies and procedures • Enforcing the university's property rights • Parking administration • Emergency phone monitoring • Traffic management • Developing and updating emergency response plans	<www.umoncton.ca/umcm-securite/> [perma.cc/T7ZM-U7HJ]
University of British Columbia	• First aid • Safewalk and blue phones program • Lost and found • Building access • Community watch • Responding to security requests • Site security assessment • Video surveillance • Foot and bike patrols	<security.ubc.ca/home/our-services/> [perma.cc/V298-6773]
University of Calgary	• Safewalk program • Bike patrols • Lost and found • Responding to incident reports • Enforcing university policy • Offers safety programs to the public • Emergency response • Video surveillance • Emergency phones monitoring	<www.ucalgary.ca/risk/campus-security> [perma.cc/YAJ3-LH87]

University of Lethbridge	• Video surveillance • Safewalk program • Lone worker program • First aid • Emergency phones monitoring • Lost and found • Building access • Responding to medical emergencies • Workplace inspections • Incident investigations • Providing training on matters relating to environment, health, and safety	<www.ulethbridge.ca/campus-safety/request-service> [perma.cc/T8VP-9AB5]; <www.ulethbridge.ca/policy/resources/environment-health-and-safety-policy> [perma.cc/TUW6-UYZ8]
University of Manitoba	• Emergency phones monitoring • Lost and found • Video surveillance • Bike patrols • Campus safety programs • Building access	<umanitoba.ca/security/> [perma.cc/2VLC-DJPW]
University of New Brunswick	• Incident response • Attend medical calls • Campus patrol • Enforce traffic regulations • Offer security-related presentations • Event security • Emergency response	<www.unb.ca/fredericton/security/about/index.html> [perma.cc/4AMY-CF9C]; <www.unb.ca/saintjohn/security/> [perma.cc/8D3Z-9WS6]
University of Northern British Columbia	• Safewalk program • Lost and found • Video surveillance • First aid • Building access • Emergency response • Security patrols • Emergency phones monitoring	<www2.unbc.ca/security> [perma.cc/B8P8-SCPL]

University of Ontario Institute of Technology	• Accident/Injury response • Safewalk program • Emergency phone monitoring • Incident reporting • Lost and found • Residence security • Security monitoring • Work Alone program • Campus patrol	<ontariotechu.ca/campus-services/safety-security/services/index.php> [perma.cc/7TCQ-Q2XV]
University of Ottawa	• Offers crime prevention programs • Self-defence courses • Operates lost and found • Foot patrol and Safewalk programs • Enforcing university policies and procedures • Enforcing the university's property rights	<www.uottawa.ca/about-us/administration-services/protection> [perma.cc/KMK6-2A37]
University of Regina	• Campus patrol • Incident response • Safewalk program • Lone worker program • Campus crime investigation • Public safety programs • Risk reduction assessments	<www.uregina.ca/fm/campus-security/about-us/index.html> [perma.cc/YB6R-UVLL]
University of the Fraser Valley	• Responding to reports of incidents and/or hazards • Lone worker program • Building access • Safewalk program • Lost and found • Developing personal safety plan • Additional security for incidents and special circumstances • Event support	<www.ufv.ca/safety-and-security/security/> [perma.cc/3B4A-HKTP]

University of Toronto **(mix of private campus security and special constables)**	• Vehicle, bike, and vehicle patrol • Incident response • Emergency response • Investigation work for the university • Event security • Safety reviews • Lone worker program • Emergency phone monitoring • Safewalk program	<www.campussafety.utoronto.ca/> [perma.cc/J7V8-4VGE]
University of Victoria	• Enforcing university policies and procedures • Enforcing the university's property rights • First aid • Safewalk program • Lost and found • Bike locker rental management • Emergency phones management	<www.uvic.ca/security/> [perma.cc/NW2H-8FLJ]
University of Winnipeg	• Safewalk and Saferide programs • Lost and found • Emergency phone monitoring • Building access • Incident response	<www.uwinnipeg.ca/security/> [perma.cc/V55G-SN8C]
Vancouver Island University	• Responding to incident reports • Additional security requests	<fas.viu.ca/security> [perma.cc/V6Z6-2K9S]
York University	• Campus patrols, including undergraduate residences patrol • Emergency vehicles escort • First aid • Video surveillance • Investigations and threat assessment • Creating safety plans	<www.yorku.ca/safety/security-services/> [perma.cc/9L3V-944V]
Yukon University	• Incident response and report • Safewalk program • Assisting with dead car battery • Building access • Lost and found • Emergency response	<www.yukonu.ca/current-students/campus-safety> [perma.cc/7B6L-C8EJ]

B. Special Constables [222]

Brock University **(mix of private campus security and special constables)**	• Responding to crimes and disturbances • Enforce university statutes • Provide assistance to victims of crime	<brocku.ca/campus-security/about-us/> [perma.cc/N3KU-HUSS]; <brocku.ca/campus-security/wp-content/uploads/sites/80/2020-21-CSS-Annual-Report.pdf> [perma.cc/ED3S-FWUE]
Carleton University	• Campus patrol • Incident response and follow-up • Emergency response • Carrying out investigations • Emergency phone monitoring • Alarm monitoring • Video surveillance • Community engagement for crime prevent programs • Enforcing university policies and regulations • Traffic and parking enforcement	<carleton.ca/patrol/> [perma.cc/ENZ5-ZWFF]
McMaster University	• Campus patrol • Conduct safety/security reviews • Traffic enforcements • Video surveillance • Lost and found • Provide medical assistance and transportation • Provide crime prevention programs • Respond to and investigate all offences and emergencies on university property	<security.mcmaster.ca/about/what-we-do/> [perma.cc/MDG7-QXGH]

222 Offences enforced by special constables are listed under Appendix C for greater clarity and will not be included here.

University of Alberta	• Campus patrol • Incident response • Complaint investigation • Accident response • Traffic safety enforcement • Public education services • Alarm response • Special Duty Services • Community liaison • Controlled goods program • Security survey audits • Enforce university policies and procedures	<www.ualberta.ca/protective-services/index.html> [perma.cc/V366-7LV5]
University of Guelph	• Enforce university policies and procedures • Emergency response • Video surveillance • Alarm monitoring • Emergency phone monitoring • Building access • Lost and found	<cso.uoguelph.ca/about-us> [perma.cc/8GM7-9CTF]; <cso.uoguelph.ca/system/files/Annual%20Report%202019.pdf> [perma.cc/UNE9-TZST]
University of Prince Edward Island	• Vehicle, bike, and foot patrol • Incident response • Enforce university policies and procedures	<www.upei.ca/office-vice-president-administration-and-finance/security> [perma.cc/W8VY-MJWM]; <www.upei.ca/hr/competition/177e21r2> [perma.cc/QL6K-XJD6]
University of Saskatchewan	• Vehicle, bike, and foot patrol • Incident response • Lost and found • Safewalk program • Parking administration • Emergency response • Enforce university policies and procedures	<www.usask.ca/protectiveservices/> [perma.cc/VX6C-ZAYK]

University of Toronto **(mix of private campus security and special constables)**	• Vehicle, bike, and foot patrol • Incident response • Emergency response • Investigation work for the university • Event security • Safety reviews • Lone worker program • Emergency phone monitoring • Safewalk program • Enforce university policies and procedures	<www.campussafety.utoronto.ca/> [perma.cc/C4NV-UPS4]
University of Waterloo	• Community engagement • Conducting investigations • Event security • Incident response • Emergency response • Campus patrol • Video surveillance • Emergency phone monitoring • Parking and traffic enforcement • Enforcing university policies and procedures	<uwaterloo.ca/special-constable-service/about> [perma.cc/Y7PX-H6P4]
University of Western Ontario	• Lost and found • Building access • Safewalk program • Lone worker program • Vehicle, bike and foot patrol • Emergency phone monitoring • Conducting safety and security audits • Conducting criminal, regulatory, and breach of student code of conduct investigations • Enforcing university policies and procedures • Offering safety protection programs • Video surveillance	<uwo.ca/campussafety/index.html> [perma.cc/34RY-QAN3]

University of Windsor	• Emergency phone monitoring • Campus patrol • Event security • Building access • Incident response • Emergency response • Enforcing university policies and procedures • Providing safety plans to university community members	<lawlibrary.uwindsor.ca/Presto/content/Detail.aspx?ctID=OTdhY2QzODgtNjhlYi00ZWY0LTg2OTUtNmU5NjEzY2JkMWYx&rID=MTE0&qrs=RmFsc2U=&q=KFVuaXZlcnNpdHlfb2ZfV2luZHNvcl9DZW50cmFsX1BvbGljaWVzLkFsbFRleHQ6KGNhbXB1cyBwb2xpY2UpKQ==&ph=VHJ1ZQ==&bckToL=VHJ1ZQ==&rrtc%20=VHJ1ZQ==> [perma.cc/2C54-4DED]
Wilfred Laurier University	• Enforcing university policies and procedures • Vehicle, bike and foot patrol • Emergency phone monitoring • Video surveillance • Emergency response • Incident response	<www.wlu.ca/about/discover-laurier/special-constable-service/index.html> [perma.cc/GSG5-5FYT]

APPENDIX C.

SELECTED STATUTES ENFORCED BY SPECIAL CONSTABLES BY UNIVERSITY

***Criminal Code* (limited)**	***Controlled Drugs and Substances Act***
• University of Alberta (only when they find someone committing an offence) • University of Saskatchewan (impaired driving provisions) • Brock University • University of Guelph • University of Toronto • Carleton University • University of Western Ontario • University of Waterloo • University of Windsor • Wilfred Laurier University • McMaster University • University of Prince Edward Island (limited)	• University of Guelph • Carleton University • McMaster University
Provincial trespass acts	**Municipal bylaws**
• University of Alberta • Brock University • University of Guelph • Carleton University • University of Western Ontario • McMaster University	• Brock University • University of Guelph • University of Toronto • Waterloo • Wilfred Laurier • McMaster University

ARTICLE

BEYOND *GLADUE*: ADDRESSING INDIGENOUS ALIENATION FROM THE JUSTICE SYSTEM IN CIVIL LITIGATION

Jon Peters *

CITED: (2023) 28 *Appeal* 119

ABSTRACT

In 1999, the Supreme Court of Canada's seminal decision R v *Gladue* enunciated principles that recognized systemic bias and inter-generational trauma leading to the overrepresentation of Indigenous Peoples in incarcerated populations. Now, nearly a quarter century later, long-evolving efforts to meaningfully include Indigenous Peoples within colonial legal systems have focused primarily on Indigenous Peoples' interactions with the criminal justice system. Such efforts have yet to meaningfully reconcile Indigenous legal orders with Canada's civil justice system. This paper surveys the historical development of Canada's judicial approaches to reconciliation, and within that context, posits applications of *Gladue* principles to contemporary civil litigation.

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INTRODUCTION

This paper was motivated by the belief that true reconciliation is predicated on the meaningful inclusion of Indigenous legal orders within the Canadian legal system. That end goal requires the intermediate process of accommodating Indigenous differences, in order to ensure an equitable justice system in all contexts. The meaningful extension of *Gladue* principles to the civil justice system is an essential part of achieving judicial equity.

Part I of this paper surveys some of the jurisprudence and commissions of inquiry which pre-date *R v Gladue.*[1] This survey provides the necessary legal and social context to understand not only the principles enunciated by the Supreme Court of Canada in *Gladue*, and later affirmed in *R v Ipeelee*,[2] but their applicability to the justice system beyond criminal law. In this work I am indebted to Benjamin Ralston's book, *The Gladue Principles: A Guide to the Jurisprudence,*[3] which identifies, organizes, and neatly summarizes many of these cases and materials. While I have borrowed somewhat from his organization, I have elaborated on his sources to extract ideas that are outside of the strict ambit of criminal law.

These sources identify ways in which the Canadian justice system has failed Indigenous Peoples. Fundamental differences between European settler and Indigenous cultures produce wide-spread collateral consequences when Canadian law is crudely applied. As is evident from these materials, these collateral consequences include inter-generational trauma and persistent social and economic inequality, in addition to the over-incarceration of Indigenous Peoples. Identifying these systemic effects have led to executive, legislative, and judicial endeavours to apply the law in more tailored ways. The broad goal of these remedial actions is a yet unrealized functional equality before the law for Indigenous Canadians.[4]

Part II identifies the judicial principles emanating from these early inquiries. Both *Gladue* and *Ipeelee* were criminal proceedings; however, they paved the way for stronger judicial responses to systemic discrimination outside criminal law. There are two principles emanating from *Gladue* which are particularly applicable outside criminal sentencing:

1. The judicial notice of the presence and effects of systemic discrimination; and
2. The alienation of Indigenous Peoples from the justice system.

Part III explores components of the civil litigation context in which these broad *Gladue* principles have been, or ought to be, considered. It reflects on the systemic challenges identified in Part I and demonstrates the wide applicability of the broadest *Gladue* principles surveyed in Part II. Three interactions between *Gladue* principles and aspects of the civil litigation process are considered:

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

2 *R v Ipeelee*, [2012] 1 SCR 433 [*Ipeelee*].

3 Benjamin Ralston, *The Gladue Principles: A Guide to the Jurisprudence* (Saskatoon: Indigenous Law Centre, University of Saskatchewan, 2021).

4 Canada, Task Force on Aboriginal Peoples in Federal Correction, *Final Report* (Ottawa: Solicitor General of Canada, 1988) at 5, online (pdf): Government of Canada <publications.gc.ca> [perma.cc/L4MM-BQ7B].

1. The acknowledged applicability of *Gladue* principles to sentencing for civil contempt of Court;

2. The recognition of Indigenous alienation from the justice system as a basis to remedy the under-inclusion of Indigenous individuals within the civil jury selection process; and

3. The judicial notice of systemic discrimination mandated by *Gladue,* to offset inherent biases in the assessment of Indigenous witness credibility in civil proceedings.

I. PRE-*GLADUE*

A. Commissions of Inquiry and Review Committee Reports

Efforts were made, prior to the enactment of *Criminal Code* section 718.(2)(e)[5] and the Supreme Court's guidance in *Gladue*, to understand the sociological conditions giving rise to the over-representation of Indigenous people in the criminal justice system. These efforts include commissions of inquiry and pre-*Gladue* jurisprudence, which developed "in dialogue"[6] with one another, and which identified systemic barriers facing Indigenous communities within Canada's legal system.

Notwithstanding these early efforts' focus on criminal justice, many have enunciated principles of broader application. One of the earliest of such inquiries[7] was Justice William Morrow's *Inquiry into the Administration of Justice in the Hay River Area of the Northwest Territories*.[8] The Commission to which Justice Morrow's report is addressed was created in response to a suite of editorials in a local paper in Hay River, Northwest Territories, alleging, among other things, that "all individuals do not receive equal treatment in the courts".[9] In 1967, when the inquiry took place, Hay River was a predominately Indigenous community, with 1545 of approximately 2575 residents, being either First Nations or Métis.[10]

Justice Morrow identified several social factors afflicting Indigenous people within Hay River, including "lack of understanding of what court process means, language difficulties, and lack of communication with his people"[11] that led to disproportionate rates of custodial orders. His report identified systemic barriers affecting the administration of justice in the civil context, including poor access to legal aid,[12] and further opined that there is "failure to treat the native with dignity that perhaps more than any other single thing has given some support to the suggestion of discrimination".[13]

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5 *Criminal Code*, RSC 1985, c C-46, s 718.2(e).
6 Ralston, *supra* note 3 at 18.
7 *Ibid* at 19.
8 Justice William G Morrow, *Inquiry re Administration of Justice in the Hay River Area of the Northwest Territories Report* (Ottawa: Government of Canada, 1968), online (pdf): *Government of Canada* <publications.gc.ca> [perma.cc/BD92-G7LM].
9 *Ibid* at 3.
10 *Ibid* at 1.
11 *Ibid* at 25.
12 *Ibid* at 80.
13 *Ibid* at 96.

The Justice Reform Committee, appointed in 1987 in British Columbia, was "mandated to address citizens' attitudes and offer policy advice in various areas of the provincial justice system"[14] across a broad section of legal areas, rather than just criminal law. Following a review of the Committee's Report and a consultation with Indigenous stakeholders,[15] the province developed five themes for its response, including that "a holistic approach to justice, integrating justice with broader social reconstruction initiatives, should be developed in Indigenous communities".[16]

Describing local-level response to these action items, the 1990 Report describes legal workers arriving in the remote community of Alert Bay one day before court, allowing for greater access to services.[17] This echoes Justice Morrow's observation that further access to members of the "legal fraternity" in Hay River was necessary to alleviate the phenomenon of civil causes of action being "lost by delay."[18] Together, Justice Morrow's statement and Alert Bay's program demonstrate that geographic remoteness, which affects Indigenous communities disproportionately,[19] operates as an impediment to access to justice worthy of redress.

Speaking to a broader disjunction between Euro-Canadian and Indigenous "concepts of law, justice and society"[20] the Osnaburgh Windigo Tribal Council Justice Review Committee made the following remarks in 1990:

> While this Report addresses the justice system, it is but the flashpoint where the two cultures come into poignant conflict. The Euro-Canadian justice system espouses alien values and imposes irrelevant structures on First Nations communities. The justice system, in all of its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness.[21]

The Committee's Report was made in response to an incident in which an Indigenous individual from the Osnaburgh Band had been arrested following his public intoxication and was rendered a quadriplegic sometime between his arrest and release.[22] The arresting officer was acquitted in Provincial Court of aggravated assault in connection with the incident.[23] Like many others, the *Osnaburgh Report* focuses on criminal law; however, it does describe

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14 Ralston, *supra* note 3 at 25.

15 *Ibid* at 26.

16 British Columbia, Ministries of Solicitor General, Ministry of Attorney General & Ministry of Native Affairs, *Native Justice Consultations: Progress Report and Action Plan* (Victoria: Ministries of Solicitor General, Attorney General and Native Affairs, 1990) at 8.

17 *Ibid* at 9.

18 Morrow, *supra* note 8 at 80.

19 See generally: Moazzami Economic Consultants Inc, *Remoteness Indicators and First Nation Education Funding* (Ottawa: Assembly of First Nations), online (pdf): Assembly of First Nations <afn.ca> [perma.cc/78YV-S8KG]

20 Ontario, *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee - Tay Bway Win: Truth, Justice and First Nations* (Toronto: The Osnaburgh/Windigo Tribal Council Justice Review Committee, 1990) at 5.

21 *Ibid*.

22 *Ibid* at 1.

23 *Ibid*.

functional dissimilarities between Indigenous (Anishinaabe) and Euro-Canadian society that apply throughout the Canadian legal system.

> Addressing the barriers that language creates, the Report makes the following observation:
>
> Euro-Canadian society has largely dealt with the fact that Ojibway is the language of the First Nations in this part of Northern Ontario by simply ignoring Ojibway and rendering none of the justice-related documentation in syllabics. Similar problems exist in the First Nations communities on the west coast of James Bay by ignoring the Cree language that predominates there.
>
> […]
>
> First Nations individuals, when dealing with the justice system, from the police through the courts to the correctional process, may encounter difficulty both conceptually and linguistically with the use of the English language.
>
> […]
>
> There can be fundamental problems in comprehension and understanding, especially of technical legal terms.[24]

The *Osnaburgh Report* describes the difficulty Band residents on reserve face attending court, when the only options are off reserve some 35 kilometres away.[25] This isolation from the court system was difficult to reconcile because the Osnaburgh community was reluctant to construct courts on reserve, given that the courts dispense a form of justice alien to their community and which they perceived as "irrelevant" to their needs, while the judges were reluctant to hold court in buildings seen as insufficiently appointed for the purpose.[26]

In 1973, a Board of Review was commissioned in Alberta, chaired by Justice Kirby, to review the operation of the Provincial Courts.[27] Included in the terms of reference were questions related to making the court system more responsive to the needs of the Indigenous community, including:

- Making court more accessible to geographically remote communities;
- Whether procedural changes should be made in the administration of the courts;
- Whether issuing custodial sentences for individuals who have defaulted on fines charged for provincial offences should be continued, and to what extent;
- Whether fines against individuals convicted of traffic offences should continue; and

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24 *Ibid* at 28–29.

25 *Ibid* at 55.

26 *Ibid*.

27 Justice WJC Kirby, *Native People in the Administration of Justice in the Provincial Courts of Alberta - Term of Reference of Report No. 4* (Alberta Board of Review - Provincial Courts, 1978), online (pdf): <www.ojp.gov> [perma.cc/QF2M-GMGC].

- Whether infractions of municipal by-laws as offences in Provincial Courts, and the attending fines collected, should be effected in Small Claims Court or other courts of civil jurisdiction.[28]

Like the previous reports cited, Justice Kirby's 1978 Report noted that a majority of Status and non-Status Indians, as well as Métis, lived in rural areas[29] and that there were higher rates of alcohol abuse among Indigenous individuals (both First Nations and Métis alike).[30] The Report also noted higher rates of incarceration resulting from the failure to pay fines among Status Indians as compared to non-Indigenous, non-Status, and Métis.[31]

To address these issues, the Report suggested the appointment of Indigenous Justices of the Peace, who would have limited jurisdiction over criminal and provincial offences, as well as juvenile delinquencies, and would preside over proceedings conducted on reserve.[32]

The Report identified social and economic problems leading to conflict between Indigenous communities and the judicial system, including alcohol abuse, unemployment, poverty, availability of welfare subsidies, lack of recreation facilities and education (especially the residual and ongoing traumas of residential schools).[33]

It also recommended cultural competency training for officials of the Court, including judges, lawyers and administrators, noting that "it is only from such exposure that these people can come to realize that the Indian is not a brown white man. He is different and these differences must come to be understood before the law will be relevant to him".[34]

A more recent commission of inquiry was initiated in British Columbia to investigate "the relationship between the native people of the Cariboo-Chilcotin and the justice system of this province"[35] in response to "disturbing allegations made against the police, lawyers, judges and other functionaries of the justice system".[36] The Report, released in 1993, made several observations about the difficult reconciliation of Indigenous and settler cultures, including that the "family-centered cultural values" of Indigenous Nations were "irreconcilable with the values of a free-enterprise, individual-oriented, self-acquisitive society".[37] Despite the fact that most complaints giving rise to the inquiry were made against police,[38] the Report acknowledged difficulties experienced by Indigenous people within the Euro-Canadian court system generally. It recognized that "standards of proof and examination and cross-examination

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28 *Ibid* at iv.
29 *Ibid* at 6.
30 *Ibid* at 7.
31 *Ibid* at 9.
32 *Ibid* at 31–32.
33 *Ibid* at 10–12.
34 *Ibid* at 30.
35 British Columbia, *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria: Cariboo-Chilcotin Justice Inquiry, 1993) at 4, online (pdf): <www.llbc.leg.bc.ca> [perma.cc/FML9-3G6W].
36 *Ibid* at 5.
37 *Ibid* at 10.
38 *Ibid*.

of witnesses are foreign to them",[39] echoing the findings made by the Osnaburgh Windigo Tribal Council Justice Review Committee, quoted above.[40]

Perhaps most starkly, the Report drew a connection between the *Indian Act*'s[41] paternalizing narrative that "native people are incapable of managing their own lives, that they cannot make their way in non-native society and that they are inferior to non-natives".[42] It went on to detail how this attitude towards Indigenous people has become ingrained in non-Indigenous society, advanced by the government of Canada through the Department of Indian Affairs,[43] as it was called then, and from which the "dependence, the poverty, the self-destruction to which the natives were reduced"[44] operated as a self-fulfilling prophecy.

These reports, spanning decades and from jurisdictions across the country, demonstrate systemic barriers to the integration of Indigenous communities into the Canadian legal system. Not only do they reflect legislative and executive attempts at understanding the issues facing Indigenous individuals that might cause or contribute to the overrepresentation of Indigenous offenders in the prison system, but equally, they highlight challenges applicable to the legal system generally.

B. Pre-*Gladue* Jurisprudence

Recognition of the conditions of poverty, geographic isolation, and fundamental cultural disjunction resulted in efforts to make the court system more responsive to Indigenous needs by increasing court sittings, introducing Indigenous case workers, and improving access to Legal Aid. These remedial efforts have been supplemented by attempts to integrate Indigenous legal orders within the Canadian civil and common law systems, as well as early cases taking judicial notice of the existence of racial inequality plaguing Indigenous communities in particular ways.

Only a few days after the Dominion of Canada was created through the passage of the *British North America Act,*[45] the case of *Connolly v Woolrich*[46] [*Connolly*] was decided. The case partially related to the validity of a marriage between William Connolly and Susanne Pas-de-nom, a Cree woman. It was contended that William Connolly had been married to Ms. Pas-de-nom under the Cree tradition, at the time he purported to have married Julia Woolrich under the Roman Catholic tradition. Mr. William's son through Ms. Pas-de-nom brought the action for a share of the estate, which he contended had lawfully passed to her.[47] The judge was tasked with finding whether Mr. William's marriage to Ms. Pas-de-nom was valid to the point of displacing the validity of his subsequent marriage to Ms. Woolrich.

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39 *Ibid* at 13.
40 Ontario, *supra* note 20 at 30.
41 *Indian Act*, RSC 1985, c I-5.
42 British Columbia, *supra* note 35 at 11.
43 *Ibid*.
44 *Ibid*.
45 *British North America Act, 1867*, (UK) 30 & 31 Vict, c 3.
46 *Connolly v Woolrich*, [1867] 1 CNLC 70 (Que Sup Ct), [1867] QJ No 1 (QL) [*Connolly*].
47 *Ibid* at paras 1–2.

The Court recognized that "Indian custom" is a foreign law of marriage, but it was available to the British parliament to abrogate the "Indian laws", and since it had not, the Court would not, in its place.[48] It has been written that Justice Monk's decision "went well beyond the law of marriage. He was prepared to recognize Indigenous systems of law and governance generally".[49]

Lest Justice Monk be taken for a particularly enlightened juridical mind, repeated references to Indigenous Peoples as "savages"[50] or "children of the forest"[51] cast his judgment as dimly hopeful, if hopeful at all, as an early exemplar of reconciliation. [52] Nevertheless, it has been cited in a relatively recent British Columbia case that affirms Canadian courts have occasionally recognized and enforced Indigenous laws, and by implication, the legal orders giving rise to them.[53]

As is discussed in Part II of this paper, the alienation of Indigenous Peoples from the Canadian legal system is one social ill that animates the application of *Gladue* principles.[54] Recognition of Indigenous legal systems, and the possibility for their broad integration within Canadian common and civil law, hinted at in judgments like *Connolly*, is a forward-looking means of reducing this alienation. It is suggestive of judicial recognition of three legal traditions: the common law, civil law, and Indigenous legal traditions in various forms.[55]

Notwithstanding a few bright stars; however, the constellation of Canadian jurisprudence suggests that Canada's legal system must still do more to address the harms done by the superimposition of Euro-Canadian law onto Indigenous legal traditions, a superimposition which, in many respects, forms the basis for the poverty, substance abuse and lateral violence seen so pervasively within Indigenous communities.[56]

The seminal judgment *R v Van der Peet*[57] observed that Indigenous societies and Canadian society are "vastly dissimilar",[58] and recognized the need to account for specific differences between different Indigenous cultures and Canadian culture in order to understand the nature of the rights being claimed.[59] The accommodative approach championed by *Gladue* is analogous, in that it too accounts for dissimilarities in ways that directly target the over-incarceration of Indigenous offenders.[60]

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48 *Ibid* at para 144.

49 Mark Walters, "The Judicial Recognition of Indigenous Legal Traditions: Connolly v Woolrich at 150" (2017) 22:3 Review of Constitutional Studies 347 at 352.

50 *Connolly*, *supra* note 46 at paras 78, 116, 159, 174.

51 *Ibid* at para 162.

52 Mark Walters, *supra* note 49 at 349.

53 *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 97, 189 DLR (4th) 333.

54 *Gladue SCC, supra* note 1 at para 65.

55 Mark Walters, *supra* note 49 at 355.

56 Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press and the Osgoode Society for Canadian Legal History, 1998) at 278.

57 *R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 (SCC).

58 *Ibid* at para 42.

59 *Ibid* at para 69.

60 *Gladue SCC, supra* note 1 at para 65.

Other judgments have addressed cultural dissimilarity, including language barriers and spiritual differences, while applying common or civil law. In *R v Machekequonabe*, an appeal from a manslaughter conviction, defence counsel argued that the accused, an Indigenous man, had not intended to shoot a person but instead a Wendigo, an evil spirit disguised as a human.[61] While the appeal was ultimately unsuccessful, the jury did accept that the accused had believed the victim to be a Wendigo and that the Wendigo could be killed by a bullet shot from a rifle, as he had done.[62]

In *R v Louie*[63] the admissibility of an Indigenous woman's dying words were being considered as an exception to the rule against hearsay evidence. In assessing whether the victim had a fear of impending death the judge made a cross-cultural note of the vernacular he felt was often employed by Indigenous individuals, stating "Indians use the term 'think' generally as a statement of fact", in response to the victim's statement "I think I be dying".[64] This decision, like the *Machekequonabe* decision, is a prototypical example of the common law seeking to understand Indigenous perspectives.

Other judgments have recognized the inequity of applying Canadian law in untailored ways to Indigenous offenders. In *R v Itsi*,[65] Justice Sissons of the Northwest Territories Territorial Court upheld an order by a Justice of the Peace disregarding the minimum fine for supplying liquor to a minor. The Justice of the Peace's reasons, which Justice Sissons generally accepted, found Mr. Itsi had not supplied teenage girls with liquor for immoral reasons, which the Justice of the Peace found to be a condition precedent for applying the fine (a condition precedent Justice Sissons rejected),[66] and that the minimum fine would, on account of the accused being Indigenous, have caused the offender and his family "hardships not warranted by the nature of the charge".[67]

The reasons of Justice Sissons recognize the predatory behaviour of white men in the area, and the related vulnerability of Indigenous girls. It was partially on this basis Justice Sissons justified differential sentencing for Mr. Itsi:

> … I agree with the Justice of the Peace that the giving of liquor by a white man to a native girl is ordinarily a prelude to anticipated sexual intercourse.
>
> […]
>
> [T]he first thing some of the visiting boys from Ottawa do when they reach the northern settlements is to put in their pocket a bottle of liquor and inquire where the native girls are. This is notorious. There are other whites in the same category. Included are young researchers or budding anthropologists or sociologists, working on

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61 *R v Machekequonabe*, [1897] OJ No 98 at para 5, 28 OR 309.
62 *Ibid* at para 8.
63 *R v Louie*, [1903] BCJ No 30, CanLII 83 (BCSC).
64 *Ibid* at para 3.
65 *R v Itsi*, 6 CNLC 394 (NWT Terr Ct).
66 *Ibid* at 401.
67 *Ibid* at 396.

> their master's or doctorate's theses, who apparently have been told that the best way, and the most enjoyable way, to study Indians or Eskimos is under a maiden's blanket.[68]

Justice Sissons also accounts for Mr. Itsi's race in sentencing:

> It is a principle of imposing punishment that there should be consideration of all the circumstances. I took into consideration of the circumstances whether the accused was an Indian or an Eskimo or was a white man.[69]

Justice Sissons reasons demonstrate that Indigenous race is not just a superficial difference. It is a difference that justifies nuanced applications of the law because of Indigenous Peoples' unique circumstances (in this case vulnerability to sexual predation and poverty) that are the unfortunate ancillaries to the experience of Indigenous people in Canada.

In *R v Quilt,*[70] the British Columbia Court of Appeal was tasked with determining whether a prison sentence for arson and criminal negligence causing death should be reviewed. The Court rejected the defence counsel's argument that "the fact that these young men reside in a primitive area, are from a primitive culture, and that at the time of the offence they were both under the influence of alcohol"[71] constituted mitigation worthy of a lower sentence. Chief Justice Nemetz's decision chides defence counsel's language:

> I do not accept for one moment that arson is a part of our Native Indian culture in this or any other Indian band. The fact that theirs is a "primitive" culture (I would call it a different culture) does not mean that its moral precepts are lower than in our so-called advanced culture.[72]

Chief Justice Nemetz's approach acknowledges the limits of cultural context as a mitigating factor. While circumstances particular to Indigenous individuals are worthy of consideration by the courts, the Court's decision in *Quilt* is a reminder that they cannot serve as a panacea which completely displaces the principles of just sentencing.

The early commissions of inquiry provided the "theoretical and empirical"[73] support for a more tailored approach to the treatment of Indigenous people in the justice system, which was implemented to varying degrees by judicial decisions like those canvassed above. A significant advance on the road to functional equality for Indigenous people came when the Supreme Court of Canada released *R v Williams*, recognizing the need for judicial notice of systemic racial bias and discrimination.[74]

The issue before the Court was whether the accused, an Indigenous man, had the right to question potential jurors, pursuant to section 638 of the *Criminal Code,* to determine

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68 *Ibid* at 402.
69 *Ibid* at 401.
70 *R v Quilt*, 1984 Carswell BC 859, CanLII 483 (BCCA).
71 *Ibid* at para 7.
72 *Ibid* at para 13.
73 Ralston, *supra* note 3 at 64.
74 *R v Williams,* 1998 CanLII 782 (SCC), [1998] 1 SCR 1128 [*Williams*].

"whether they possess prejudice against aboriginals which might impair their impartiality".[75] In support of that challenge Mr. Williams had filed an affidavit stating, in part, "[I] hope that the 12 people that try me are not Indian haters".[76]

The motion judge made the following observation:

> Natives historically have been and continue to be the object of bias and prejudice which, in some respects, has become more overt and widespread in recent years as the result of tensions created by developments in such areas as land claims and fishing rights.[77]

Despite the recognition of widespread racial bias, the motion judge declined to allow the motion on the basis that jurors "can be expected to put aside their biases and because the jury system provides effective safeguards against such biases".[78] The motion judge's finding there is a presumption of juror impartiality was upheld at the British Columbia Court of Appeal, which held "there are no studies […] in the evidence which conclude that persons in a jury setting may be inclined to find that an aboriginal person is more likely to have committed a crime than a non-aboriginal person".[79]

The Supreme Court recognized that the Canadian approach to challenging jurors on the basis of partiality begins with a presumption that jurors are indifferent or impartial, though the Crown or the accused may raise concerns which displace that presumption.[80] Alternatively, a judge may take judicial notice of bias, where the basis of the concern is "widely known and accepted".[81] Specific to this case was the question of whether the evidence of "widespread bias against aboriginal people in the community" raised a "realistic potential of partiality".[82]

The Supreme Court went on to reject the assumption, held by the motion judge and upheld on appeal, that jurors will set aside their biases in order to properly fulfill their duties, stating such an assumption "is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it",[83] and that judicial safeguards or instructions are insufficient to "eliminate biases that may be deeply ingrained in the subconscious psyches of jurors".[84] The Court was quick to caution that not every potential juror with racial bias would automatically be rejected, instead a judge must determine whether the potential juror's prejudice would affect their partiality and whether or not they are capable of setting aside that prejudice.[85]

The Court also rejected the view that a general bias, that is one directed at a racial group generally, rather than particularized in some way, cannot be equated with partiality.

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75 *Ibid* at para 1.
76 *Ibid* at para 3.
77 *Ibid* at para 4.
78 *Ibid* at para 5.
79 *R v Williams*, 1996 CanLII 3687 (BC CA) at 229–30, [1996] BCJ No 926 (QL) [*Williams* CA].
80 *Williams*, *supra* note 74 at para 13.
81 *Ibid*.
82 *Ibid* at para 14.
83 *Ibid* at para 21.
84 *Ibid* at para 22.
85 *Ibid* at para 23.

The Court recognized that racist stereotypes "may affect how jurors assess the credibility of the accused",[86] a concern equally applicable to civil jury trials in which credibility of parties is likewise assessed.

The Court cited several reports, including the *Report on the Cariboo-Chilcotin Justice Inquiry*, in finding that evidence of widespread racism has translated into systemic discrimination in the criminal justice system, and that these racial tensions had been inflamed due to Indigenous groups asserting land claims and fishing rights.[87]

The Court in *Williams* was tasked with interpreting a specific provision of the *Criminal Code*, and it is understandable that for that reason the Court's decision hems closely to criminal law. Nevertheless, the finding that judges may take judicial notice of widespread racial animus, including animus that is endemic to a particular community,[88] has broad applicability outside criminal law. Consider, for example, the hypothetical "reasonable person"[89] of tort law, who likewise exists in criminal law, and who acts as a standard against which objectively reasonable conduct is measured. This reasonable person is deemed to be a member of the local community, aware of the racial politics and biases present within it.[90] Applied in this context, *Williams* demonstrates, helped in part by the studies and jurisprudence canvassed here, that systemic bias is a persistent feature of Canadian society, which judges must respond to and account for.

C. Conclusion of Part I

The cases and materials reviewed here describe a decades-long process of attempts to recognize and accommodate Indigenous difference in the justice system. The early commissions of inquiry detail the root causes of the overrepresentation of Indigenous individuals in the criminal justice system. The jurisprudence that developed alongside those commissions of inquiry have first sought to identify the uniqueness of the Indigenous experience in Canada, accommodate it through inter-cultural understanding, and finally take judicial notice of the existence and effects of endemic and institutionalized racism.

The Canadian justice system has long recognized that Indigenous Peoples have access to both civil and criminal courts, but access to the court system has not always gone unimpeded or unchallenged, and the "simple statement of juridical equality" has not reflected "the reality of native legal status".[91] It is telling that most of the early cases dealing with Indigenous people in Canada do so through criminal law.[92] The decisions surveyed here provide some reason for optimism that Canada is capable of meaningful reconciliation with Indigenous groups, and *Gladue* and *Ipeelee* provide principles necessary for that reconciliation. That optimism may be muted; however, because the Crown is often in opposition to Indigenous interests

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86 *Ibid* at para 28.
87 *Ibid* at para 58.
88 *Ibid* at para 54.
89 *Vaughn v Menlove*, (1837) 132 ER 490 (UK).
90 *R v S (RD),* 1997 CanLII 324 (SCC) at para 47 [1997], 3 SCR 484 (S(RD)).
91 Harring, *supra* note 56 at 91.
92 *Ibid* at 92.

where it is a party to litigation at the Supreme Court outside criminal contexts.[93] For this reason, strong judicial safeguards, including the broadest tenets of *Gladue*, are necessary to mitigate against a system that has been, since its beginning, prejudicial to Indigenous Peoples.

II. *GLADUE* PRINCIPLES

Many of the commissions of inquiry and jurisprudence surveyed in Part I of this paper, in addition to several others,[94] informed the enactment of Bill C-41,[95] which, in 1995, introduced new sentencing provisions to the *Criminal Code*. These provisions include section 718.2(e), which directs judges to consider all available sanctions apart from imprisonment, with "particular attention to the circumstances of Aboriginal offenders". The Supreme Court of Canada interpreted the provision for the first time in *Gladue.*

The Supreme Court's interpretation of section 718.2(e) in *Gladue* provided the Court an opportunity to affirm the judicial notice of systemic bias made in *Williams*, tethering the over-incarceration of Indigenous individuals to systemic factors. The Court observed general Indigenous "alienation from the criminal justice system",[96] echoing earlier findings like Justice Morrow's, that Indigenous people often lack understanding of court processes and experience language barriers, which lead to higher rates of guilty pleas and custodial orders.[97]

The Court revisited *Gladue* roughly 13 years later in *Ipeelee*, affirming its framework for the application of section 718.2(e), but also the broad principles of Indigenous alienation from the justice system and judicial notice of the effects of systemic discrimination. These broad principles are the focus of Part II of this paper.

A. *R v Gladue*

Ms. Gladue is a Cree woman born in Alberta, who pled guilty to manslaughter in the death by stabbing of her common-law husband. At her sentencing hearing, the judge considered several mitigating factors, including her age, lack of criminal record, and that she was a young mother.[98] The trial judge did not think there were any special circumstances emanating from Ms. Gladue being Indigenous, since both she and the deceased had lived off-reserve and therefore not "within the aboriginal community as such", and therefore, in his view, section 718.2(e) of the *Criminal Code* did not apply.[99] The sentencing judge determined the appropriate sentence was three years' imprisonment and a ten-year weapons prohibition.[100]

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93 Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press: The University of British Columbia, 2011) at 170.

94 Department of Justice Government of Canada, "The Genesis and Content of the Current Statement - A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code", (5 August 2016), online (pdf): <justice.canada.ca> [perma.cc/N9AV-L6KH].

95 *An Act to Amend the Criminal Code (Sentencing)*, 1995 SC c 22.

96 *Gladue SCC, supra* note 1 at para 65.

97 Morrow, *supra* note 8 at 25.

98 *Gladue SCC, supra* note 1 at para 15.

99 *Ibid* at para 18.

100 *Ibid*.

The British Columbia Court of Appeal overturned the judge's ruling that section 718.2(e) did not apply because Ms. Gladue lived off-reserve.[101] However, noting the "viciousness and persistence" of her attack,[102] the court denied Ms. Gladue's appeal.[103]

Dissenting, Justice Rowles noted that an Indigenous offender's heritage "may be more complex" when they do not live on reserve, but that heritage is still relevant to the sentencing process.[104] Coming to this conclusion, she excerpted from the *Report of the Aboriginal Justice Inquiry of Manitoba*, which reads in part:

> … [T]he influence of Aboriginal cultures is present, although difficult to detect. As we have noted earlier, it is important to distinguish between a person's lifestyle, which for some individuals may appear to be one of complete integration into the mainstream, and his or her culture, which is reflective of the values in which a person was raised and which continues to shape that person's behaviour. Thus, it is important for the courts to satisfy themselves as to the true influence of Aboriginal culture. The acceptance of outward appearances is not sufficient. In fact, where the influence of Aboriginal culture is difficult to detect, this itself may be a factor that the courts should take into consideration.[105]

Justice Rowles' reasons also recognize systemic discrimination, which gives rise to the over-incarceration of Indigenous people:

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.[106]

Justice Rowles also recognized a need for implementing criminal justice in ways that align with Indigenous concepts of restorative justice:

> The conception of justice as restorative of the community may be relevant to the degree to which 'justice' may be seen to be done by aboriginal people. Particularly in isolated aboriginal communities, the need for rehabilitation, reintegration and reconciliation may be essential to the community's cohesion.[107]

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101 *R v Gladue*, 1997 CanLII 3015 (BC CA) at para 88, [1997] BCJ No 233 (QL) [*Gladue* CA].
102 *Ibid* at para 89.
103 *Ibid* at para 92.
104 *Ibid* at para 63.
105 *Ibid* at 408.
106 *Gladue CA*, *supra* note 101 at para 55.
107 *Ibid* at para 60.

The Supreme Court found that section 718(2)(e) was not simply "a codification of existing sentencing principles",[108] but rather a direction to sentencing judges "to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case".[109] It was recognized that the circumstances of Indigenous offenders are unique, and that uniqueness may, occasionally, make imprisonment "a less appropriate or less useful sanction".[110]

The Court made notice that Indigenous people are victims of "systemic and direct discrimination",[111] characterizing the high incidents of poverty, unemployment, poor education, substance abuse and "community fragmentation" within Indigenous communities as the frequent result of "years of dislocation and economic development".[112]

In acknowledging these systemic and direct discriminatory effects on Indigenous people, the Court also recognized the inefficacy of incarceration, in part because it would affect Indigenous individuals more adversely, but also because it was less likely to be rehabilitative, since incarceration is "culturally inappropriate" and penal institutions tend to be environments rife with anti-Indigenous discrimination.[113] The Court noted that community-based sanctions "coincide with the aboriginal concept of sentencing",[114] while still appreciating that Indigenous groups are varied, and their approaches to sentencing likewise vary.[115] The Court also cautioned against "reverse discrimination", in that an Indigenous offender's sentence should not automatically be lower by virtue of the fact they are Indigenous.[116] The Court held that the direction provided by section 718(2)(e) should be applied to Indigenous individuals, regardless of where they reside and irrespective of whether they are registered or non-registered "Indians", Métis or Inuit.[117]

Gladue is fundamentally a decision about sentencing in the criminal context, under a framework provided by section 718.2(e) of the *Criminal Code*. However, the Court's recognition of the "greater problem of aboriginal alienation from the criminal justice system",[118] and the systemic causes of that alienation, are applicable in many areas outside criminal sentencing. The attempts to integrate Indigenous conceptions of law and justice into the dominant Canadian legal order harken back to similar early attempts, like that in *Connolly. R v Ipeelee [Ipeelee],* surveyed below, affirms the framework and principles set out in *Gladue* while broadening the scope of matters to which they apply.

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108 *Gladue SCC, supra* note 1 at para 31.
109 *Ibid* at para 33.
110 *Ibid* at para 37.
111 *Ibid* at para 68.
112 *Ibid* at para 67.
113 *Ibid* at para 68.
114 *Ibid* at para 74.
115 *Ibid* at para 73.
116 *Ibid* at para 88.
117 *Ibid* at para 90.
118 *Ibid* at para 65.

B. *R v Ipeelee*

The Supreme Court's decision in *R v Ipeelee* involved the appeals of two separate, though similar, cases involving Indigenous long-term offenders subject to long-term supervision orders ("LTSO"). Mr. Ipeelee had suffered from alcohol dependency and had a history of committing violent offences when intoxicated. His criminal history stretched back decades. His first involvement with the criminal justice system occurred when he was just 12 years old, and his convictions ranged from property offences to violent assaults, including a sexual assault.[119]

Mr. Ladue also had alcohol dependency issues. He had been removed from his family when he was young to attend residential school, where he alleged he had suffered from "physical, sexual, emotional and spiritual abuse".[120] Like Mr. Ipeelee, Mr. Ladue's criminal offences date from when he was a juvenile, and include property-related offences as well as violent offences, such as robbery and sexual assault. Both men were subject to LTSOs, which contained conditions that they abstain from alcohol and other intoxicants. Both men violated those conditions and were sentenced to incarceration as a result.[121]

The issue before the Court was whether section 718(2)(e) of the *Criminal Code* should apply to breaches of LTSOs, providing an opportunity to "revisit and reaffirm" the Supreme Court's judgment in *Gladue*.[122] The need for this revisitation had much to do with inconsistent and incorrect lower court judgments since *Gladue* was released, errors which "significantly curtailed the scope and potential remedial impact of the provision".[123]

The Court noted some decisions in which *Gladue* was incorrectly applied and identified two primary issues with the post-*Gladue* jurisprudence. First, the Court noted cases in which it was determined "an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge",[124] citing *R v Poucette*[125] as a representative example. The Court noted the *Poucette* decision did not adequately identify the "devastating intergenerational effects of the collective experiences of Aboriginal peoples", while at the same time imposing an evidentiary burden not intended by *Gladue*.[126]

The second issue, which the Court identified as potentially the "most significant issue in the post-*Gladue* jurisprudence", was the interpretation that *Gladue* principles do not apply to serious offences.[127] The Court clarified that a sentencing judge owes a statutory duty, in all cases, to apply section 718.2(e), and that a failure to do so will result in a reviewable error justifying appellate intervention.[128]

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119 *Ipeelee*, *supra* note 2 at paras 2–13.
120 *Ibid* at para 19.
121 *Ibid* at paras 19–27.
122 *Ibid* at para 1.
123 *Ibid* at para 80.
124 *Ibid* at para 81.
125 *R v Poucette*, 1999 ABCA 305, [1999] AJ No 1226 (QL).
126 *Ipeelee*, *supra* note 2 at para 82.
127 *Ibid* at para 84.
128 *Ibid* at para 87.

The *Ipeelee* decision does more than simply clarify *Gladue* principles as they relate to section 718.2(e). At its broadest, *Ipeelee* is a decision that follows *Gladue* in its judicial notice of systemic discrimination and the effects of inter-generational trauma.

In its discussion on systemic discrimination, the Court began by quoting former Minister of Justice Allan Rock, who cited the overrepresentation of Indigenous people within Canadian prison populations as part of the social context that animated the introduction of sentencing principles provisions to the *Criminal Code*, including section 718.2(e).[129] Mr. Rock's contention was supported by government figures showing Indigenous people accounted for 10 percent of the federal prison population while forming only 2 percent of the national population, and starker statistics in prairie provinces, where Indigenous people were 32 percent of inmates compared to 5 percent of the general population.[130]

The Court reiterated that section 718.2(e) is remedial, and "designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing".[131] In giving effect to this remedial purpose, judges must take judicial notice of the "broad systemic and background factors affecting Aboriginal people generally", though cautioned that case-specific information will need to come from counsel.[132]

The Court requires judges to take judicial notice of such matters as "the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples".[133]

The Court affirmed Justice Cory and Justice Iacobucci JJ's description in *Gladue* of the root causes of Indigenous criminality, wherein they stated:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.[134]

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129 *Ibid* at para 56.
130 *Ibid* at para 57.
131 *Ibid* at para 59.
132 *Ibid*.
133 *Ibid* at para 60.
134 *Gladue SCC, supra* note 1 at para 65.

Despite contrary efforts since *Gladue*, the Court observed the problem of Indigenous over-incarceration has not only persisted, but worsened. The Court noted that between 1996 to 2001, Indigenous admissions into custody "increased by 3 percent while non-Aboriginal admissions declined by 22 percent",[135] and that section 718.2(e) of the *Criminal Code* "has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system".[136]

C. Conclusion of Part II

While the Court in *Ipeelee* recognized that the applicability of *Gladue* principles is not meant to operate as a "panacea",[137] and despite both decisions relating to a statute that is relatively narrow in its application, the Court has, in both decisions, enunciated valuable principles relating to the judicial notice of both the presence and effects of systemic discrimination. This systemic discrimination, connected to a centuries-long process of imposing alien laws and dislocating Indigenous communities, operates in many instances as a root cause of Indigenous offending. Systemic discrimination is also largely responsible for the alienation of Indigenous Peoples from the criminal justice system.

These broad principles are applicable in most instances where Indigenous people are before the courts, and particularly so when the Indigenous individual has a liberty interest at stake. Part III of this paper explores situations in which these broader *Gladue* principles have been found applicable, outside the strict confines of criminal sentencing.

III. *GLADUE,* BEYOND CRIMINAL SENTENCING

Gladue principles have been explicitly applied outside the narrow context of criminal sentencing in a handful of decisions, including the following notable cases:[138]

- Review Board disposition of an Indigenous person found not criminally responsible; [139]
- Parole eligibility in the context of a life sentence;[140]
- Civil contempt of Court proceedings for engaging in peaceful protest;[141]
- Modification of orders made pursuant to section 161 of the *Criminal Code*, prohibiting an offender from attending a community centre where there were culturally appropriate rehabilitation programs;[142]

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135 *Ipeelee*, *supra* note 2 at para 62.

136 *Ibid* at para 63.

137 *Ibid*.

138 Research and Statistics Division, *Spotlight on Gladue: Challenges, Experiences and Possibilities in Canada's Criminal Justice System* (Government of Canada: Department of Justice, 2017) at 20, online (pdf): <www.justice.gc.ca> [perma.cc/S6XU-6N8D].

139 *R v Sim*, 2005 CanLII 37586 (ONCA), 78 OR (3d) 183.

140 *R v Jenson*, 2005 CanLII 7649 (ONCA), [2005] OJ No 1052 (QL).

141 *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534, [2008] OJ No 2651 (QL) [Frontenac].

142 *R v Sutherland*, 2009 BCCA 534.

- Extradition proceedings, evaluating whether *Gladue* factors are relevant to determining if extradition would be contrary to section 7 of the *Charter*;[143] and
- Determining whether the state made efforts to ensure representative inclusion of Indigenous people in jury selection;[144]

Two of these decisions, *Frontenac* and *R v Kokopenace* [*Kokopenace*] deal with matters wholly applicable outside criminal law.

Frontenac deals with the application of *Gladue* principles in a sentencing appeal for civil contempt. *Kokopenace*, while a criminal law decision, deals with the adequate representation of Indigenous people on a jury, where the accused is Indigenous. As jury trials are a feature of civil litigation, particularly in British Columbia and Ontario,[145] the Supreme Court's decision should apply outside criminal law wherever civil juries are empaneled.

It should be observed that the Supreme Court in *Kokopenace* overturned the Ontario Court of Appeal's decision that the generation of jury rolls were to be guided by the honour of the Crown and *Gladue* principles.[146] As such, *Kokopenace* stands as a counterexample to the argument that Indigenous alienation from the justice system is sufficient justification for the extension of *Gladue* principles outside the context of criminal sentencing. These two decisions are analyzed in more detail below.

Beyond these two important appellate decisions, the judicial notice of systemic discrimination mandated by *Gladue* should limit the effects of inherent biases in the evaluation of Indigenous witness credibility. This applies where lawyers and judges are influenced to improve their intercultural competency, in line with the Truth and Reconciliation Commission's Calls to Action numbers 27 and 28,[147] as well as recognizing the roles systemic discrimination and Indigenous alienation from the criminal justice system have played when civil trials present Indigenous witnesses with criminal records.

A. Civil Contempt of Court: *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*

Frontenac involved an appeal by two Indigenous individuals, Mr. Robert Lovelace and Chief Paula Sherman, as well as Ardoch Algonquin First Nation ("AAFN")[148] against their sentences

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143 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

144 *R v Kokopenace*, 2013 ONCA 273; rev'd *R v Kokopenace*, 2015 SCC 28 [*Kokopenace CA*].

145 W A Bogart, "'Guardian of Civil Rights...Medieval Relic': The Civil Jury in Canada" (1999) 62:2 Law and Contemporary Problems 305 at para 307.

146 *R v Kokopenace*, 2015 SCC 28 (CanLII), [2015] 2 SCR 398 at para 97 [*Kokopenace SCC*].

147 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, 2012).

148 An anonymous report has suggested that AAFN is not an authentic First Nation, and that Mr. Lovelace is not Indigenous. These allegations had not emerged at the time of the motion or its appeal and are currently unproven. See: Amanda Pfeffer and Michelle Allan, "Award-winning Queen's prof questioned over Indigenous identity claim", CBC News (23 June 2021), online: CBC News <www.cbc.ca> [perma.cc/7YTF-9EPM].

for civil contempt. Two court orders allowed the respondent, Frontenac Ventures Corporation, to conduct exploratory drilling on lands the Ardoch Algonquin First Nation ("AAFN") asserted were within their traditional territory. The appellants had engaged in a peaceful protest and blockade, which prevented Frontenac from drilling on the land. The appellants were subsequently held in contempt of the court orders, admitted their contempt, but then argued their conduct "flowed from their adherence to Algonquin law".[149] The individuals, Mr. Lovelace and Paula Sherman, were sentenced to six months' imprisonment, in addition to substantial fines, which were also levied against AAFN for its contempt.

The Indigenous appellants were esteemed members of their communities. Mr. Lovelace is a former chief of AAFN and was at the time of the appeal a spokesman and chief negotiator for the Nation, as well as a university lecturer.[150] Chief Paula Sherman was, at the time of the appeal, co-chief of AAFN, a Professor of Native Studies, and had received a Ph.D. after overcoming a "lifetime of poverty".[151]

Justice Macpherson, writing for a unanimous Court, made several statements in *obiter dicta* regarding the purpose of injunctions and the rule of law. He wrote that granting an injunction requires a "comprehensive and nuanced description of the rule of law", demanding a "careful and sensitive balancing of many important interests",[152] which in this case were the rights of AAFN, Frontenac's private interest in exploration, and the respect for Crown property rights.[153] These interests were to be balanced through "consultation, negotiation, accommodation, and ultimately, reconciliation of aboriginal rights and other important, but at times, conflicting interests".[154] He opined that an injunction should not be granted unless the court had made "every effort to encourage" this process, "even if the affected aboriginal communities choose not to fully participate in the injunction proceedings" (emphasis added).[155] He concluded this point by acknowledging the applicants had not appealed the injunctions, but felt it important to "give judicial guidance on the role to be played by the nuanced rule of law […] when courts are asked to grant injunctions, the violation of which will result in aboriginal protestors facing civil or criminal contempt proceedings."[156]

Justice Macpherson's remarks in *obiter* regarding the choice of Indigenous groups not to fully participate in proceedings are faintly reminiscent of the Supreme Court's remarks in *Gladue* regarding Indigenous alienation in the criminal justice system. It is not difficult to imagine that Indigenous groups and individuals might refuse to participate in contempt proceedings, believing the Euro-Canadian justice system, in all its forms, is a super-imposition that is irrelevant to Indigenous legal systems.

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149 *Frontenac*, *supra* note 142 at paras 1–4.
150 *Ibid* at para 10.
151 *Ibid* at para 11.
152 *Ibid* at para 43.
153 *Ibid* at para 44.
154 *Ibid* at para 45.
155 *Ibid* at para 46.
156 *Ibid* at para 47.

This view was expressed in many of the commissions of inquiry canvassed above and was argued explicitly by Mr. Lovelace in the motion proceedings, where he articulated his view that Algonquin law was supreme.[157]

Addressing the core issue on appeal, the Court noted that the motion judge's reasons for sentencing focused exclusively on punishment and deterrence, ignoring the principles of reformation and rehabilitation.[158] The motion judge had also failed to refer to mitigating factors present, including that both individual contemnors were first offenders, were leaders in their communities, candidly conceded their contempt and had engaged in non-violent, non-destructive protest.[159]

The Court determined *Gladue* principles "are applicable when fashioning a sentence for civil or criminal contempt on the part of aboriginal contemnors". The respondent's arguments that *Gladue* principles should not be extended beyond the criminal context was rejected. The Court noted first that *Gladue* principles had already been applied outside of criminal sentencing,[160] and that *Gladue* was a case that "in a broader sense draws attention to the state of the justice system's engagement with Canada's First Nations".[161] On this point, the Court listed three factors emanating from *Gladue* and of particular relevance to this case:

> I note three factors in particular that were highlighted in *Gladue*: the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation and whether imprisonment would be meaningful to the community of which the offender is a member. Those factors were all at stake in this case.[162]

The Court then applied each of the three factors to the circumstances at issue:

> First, while the appellants did not contest the injunctions and admitted that they were in breach of the orders, the enforcement of the injunctions by imprisonment could not help but emphasize the estrangement of this community and aboriginal peoples generally from the justice system. The use of incarceration as the first response to breach of the injunction dramatically marginalizes the significance of aboriginal law and aboriginal rights. Second, imposing a lengthy term of imprisonment on a first offender fails to recognize the impact of years of dislocation. The fact that persons of the stature of Mr. Lovelace and Chief Sherman saw no meaningful avenues of redress within the justice system and felt driven to take these drastic measures demonstrates the impact of years of dislocation and the other problems discussed in *Gladue*, at paras. 67-69. Finally, imprisonment, far from being a meaningful sanction for the community, had the effect of pitting the community against the justice system.

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157 *Ibid* at para 40.
158 *Ibid* at para 50.
159 *Ibid* at paras 51–52.
160 *Ibid* at para 56.
161 *Ibid* at para 57.
162 *Ibid*.

> That the court found it necessary to imprison the leaders of the AAFN simply serves to emphasize the gulf between the dominant culture's sense of justice and this First Nation's sense of justice.[163]

After describing which *Gladue* principles were applicable in the civil contempt context (Indigenous alienation, dislocation, and the meaningfulness of imprisonment to Indigenous communities), Justice Macpherson turned to an analysis of the unique systemic or background factors that "played a part in bringing AAFN and two of its leaders before the courts to be sentenced for contempt".[164] The Court identified the following background factors:

- An existing land-claim negotiation between Algonquin Nation and Ontario, triggering a duty to consult and accommodate where the proposed activity could impact the claimed rights or title; and
- The fact that Ontario's *Mining Act* is a "remarkably sweeping" law that does not require the consideration of aboriginal land claims or interests.[165]

In the Court's view, the permissive wording of the *Mining Act* was at odds with a "respectable interpretation" of section 35 of the *Charter* and recent Supreme Court jurisprudence.[166] This interpretation, coupled with the "appellants' character, circumstances, [and] conduct", should have operated as "significant mitigation when sentences were imposed on them".[167] The Court ultimately allowed the appeal, set aside the custodial sentences, and disallowed the fines.[168]

B. Indigenous Alienation from the Justice System and Jury Selection: *R v Kokopenace*

The Supreme Court's decision in *R v Kokopenace* rejected the extension of *Gladue* principles to the generation of jury rolls and serves as an example of the Supreme Court's reluctance to apply *Gladue* principles beyond the sentencing stage.[169]

Justice LaForme JA's reasons in the Ontario Court of Appeal decision emphasized the shortcomings of *Gladue*'s application, noting, as the Court had in *Ipeelee*, that despite the promise of *Gladue*, the problem of Indigenous over-incarceration had worsened.[170] He then cited *Frontenac*, among others, for the proposition that *Gladue* principles "properly extend beyond sentencing for criminal offences, and that *Gladue*'s underlying philosophy bears on other aspects of the interaction between Aboriginal peoples and the justice system",[171] before determining that the process by which Ontario generates the jury roll should be

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163 *Ibid* at para 58.
164 *Ibid* at para 60.
165 *Frontenac*, *supra* note 142 at paras 60–61.
166 *Ibid* at para 62.
167 *Ibid*.
168 *Ibid* at para 66.
169 Alexandra Hebert, "Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice" 43:1 Queen's LJ 149 at 173.
170 *Kokopenace CA*, *supra* note 145 at para 141.
171 *Ibid* at para 142.

"viewed in the light of this same context".[172] Justice LaForme held the deficiencies of Ontario's efforts to ensure adequate inclusion of on-reserve residents on its jury rolls was a violation of the accused's section 11(d) and (f) *Charter* rights, and ordered a new trial and the introduction of fresh evidence.[173]

Overturning this ruling, Justice Moldaver, writing for the Supreme Court majority, disavowed the Court of Appeal's application of *Gladue* principles to this context:

> By relying on the honour of the Crown and *Gladue* principles, the majority transformed the accused's s. 11 *Charter* rights into a vehicle for repairing the long-standing rupture between Aboriginal groups and Canada's justice system. In doing so, it raised the bar Ontario was obliged to meet to satisfy its representativeness obligation.[174]

Justice Moldaver's reasons have been criticized as offering virtually no explanation as to why *Gladue* principles should not apply to this situation,[175] and characterized as a "minimalist and fixed interpretation of rights".[176] The Court's reasons have also ignored the insidious nature of disaffection with Euro-Canadian legal systems that might lead to Indigenous residents being unwilling to participate in jury questionnaires. The harms of Indigenous alienation and dislocation identified by the majority in *Frontenac* are fundamentally present in this context, and were observed to be so by LaForme JA, who characterized the interests at stake as belonging not only to the accused, but to the Indigenous on-reserve residents, who were not provided a "fair opportunity to have their distinctive perspectives included in the jury roll".[177]

The Supreme Court's reasons may limit the application of *Gladue* if interpreted from the perspective of the accused, whose *Charter* rights under section 11 are engaged only when subject to criminal and penal proceedings. If considered from the juror's perspective; however, no recourse is necessary to section 11 of the *Charter*, and the idea that *Gladue* principles should apply to the process by which jury rolls are formed may be grounded in the right to equality under law, protected by section 15 of the *Charter*. *Gladue* principles are, at their core, about functional equality (i.e., equitable treatment of Indigenous individuals within the justice system), and so the tension the Court found to exist between *Gladue* principles and section 11 *Charter* rights should not exist between *Gladue* principles and those rights found in section 15. In other words, no transformation should be necessary to make section 15 a "vehicle for repairing the long-standing rupture between Aboriginal groups and Canada's justice system".[178] This goal is implicit in the provision, and entirely aligned with the purpose of *Gladue*.

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172 *Ibid* at para 146.

173 *Ibid* at para 224.

174 *Kokopenace SCC*, *supra* note 147 at para 101.

175 Andrew Flavelle-Martin, "Gladue at Twenty: Gladue Principles in the Professional Discipline of Indigenous Lawyers" (2020) 4:1 Lakehead LJ 20 at 40.

176 *Ibid* at 41.

177 *Kokopenace CA*, *supra* note 145 at para 205.

178 *Kokopenace*, *supra* note 147 at para 101.

Indeed, this issue was argued before the Court of Appeal in *Kokopenace.* The appellant had attempted to invoke public interest standing to argue the Indigenous on-reserve residents' section 15 *Charter* rights had been infringed, but was denied standing.[179] The Supreme Court likewise declined to determine whether the Indigenous on-reserve residents' section 15 rights had been infringed, leaving the possibility open for future challenges.[180]

Justice Cromwell J's dissenting opinion in the Supreme Court appeal offers hope, and perhaps some insight into how such a future challenge may be assessed. His reasons link the low rates of Indigenous participation in the jury questionnaire to alienation from the criminal justice system, making explicit reference to *Gladue* principles in the process:

> […] Again, my colleague believes that the state is not required to address systemic problems contributing to the estrangement of Aboriginal peoples from the criminal justice system in order to achieve its representativeness obligation. These views, as I see it, overlook the state's responsibility for these factors and thus its responsibility to make reasonable efforts to address them. Having played a substantial role in creating these problems, the state should have some obligation to address them in the context of complying with an accused's constitutional right to a representative jury roll.
>
> We must first be clear what the phrase "systemic problems" in this context refers to. It is a euphemism for, among other things, racial discrimination and Aboriginal alienation from the justice system. In *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, and *Williams*, this Court recognized the problem of systemic bias and discrimination against Aboriginal people in the criminal justice system.[181]

Given the same process is generally applicable to the formation of jury rolls in either the criminal or civil contexts,[182] a future constitutional challenge to the inadequate inclusion of Indigenous individuals in jury pools, grounded in the *Gladue* principle of Indigenous alienation and dislocation, would have clear impacts on civil proceedings.

C. Witness Credibility

Assessments of witness credibility are an essential part of the adversarial process inherent to common law. However, despite the purported utility of witness examinations, credibility assessment remains an imperfect process that is more "an art than a science" and is dependent on "intangibles such as demeanour and the manner of testifying" to be achieved.[183]

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179 *Kokopenace SCC, supra* note 147 at para 101.

180 *Kokopenace SCC, supra* note 147 at para 128.

181 *Ibid* at paras 281–282.

182 See *Jury Act*, RSBC 1996, c 242, s. 14 (British Columbia); *Jury Act*, RSA 2000, c J-3, s. 2 (Alberta); *The Jury Act, 1998*, SS 1998, c J-4.2, s. 2 (Saskatchewan); *The Jury Act*, CCSM c J30, s. 1 (Manitoba); *Juries Act*, RSO 1990, c J.3, s.2 (Ontario); *Jury Act*, RSNB 2016, c 103, s. 21 (New Brunswick); *Juries Act*, SNS 1998, c 16, s. 15 (Nova Scotia); *Jury Act*, RSPEI 1988, c J-5.1, s.2(1) (Prince Edward Island); *Jury Act, 1991*, SNL 1991, c 16, s. 31.1 (Newfoundland and Labrador); *Jury Act*, RSY 2002, c 129, s. 2 (Yukon); *Jury Act*, RSNWT 1988, c J-2, s. 2(1) (Northwest Territories); SNu 2002, c 14, s. 2(1) (Nunavut).

183 *S (RD), supra* note 90 at para 128.

The Supreme Court's laudable pronouncement that "[a]t the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics"[184] poses significant challenges when triers of fact are encouraged to ignore cultural differences which may subconsciously influence them to misapprehend the demeanour of witnesses. This in turn may result in determinations regarding credibility that may impact both civil and criminal proceedings a great deal. This effect may be more pronounced when triers of fact are juries, as observed in *Williams*, and especially so where Indigenous jurors are under-included, as in *Kokopenace*.

Lawyers are not immune, as they may craft cross-examination questions calculated to impeach a witness they deem uncredible and invite triers of fact to reduce the weight given to certain witnesses' testimonies.[185] It is likely for this reason the Truth and Reconciliation Commission has proposed Calls to Action numbers 27 and 28, imploring lawyers, judges and law students to achieve intercultural competence and receive anti-racism training.

Consider the following remarks made in the *Osnaburgh Report*, discussed in Part I of this paper:

> In addition to the problems with language, there are cultural differences that are often misunderstood. First Nations individuals do not fare well in the Euro-Canadian trial format with its emphasis on confrontation. The avoidance of eye contact is cultural behaviour that is often misunderstood.
>
> […]
>
> [T]he Euro-Canadian adversarial system, with its desire to seek the truth through searing cross-examination and confrontation, is completely alien to a culture where the hallmark of conflict-resolution was an informal customary process reinforced by a belief in spiritual sanctions.[186]

The reality of fundamental cultural differences, observed in *Van der Peet* and by the writers of the *Osnaburgh Report,* create discordant expressions of language that undermine the efficiencies of demeanour evidence. And yet "the frailty of using demeanour as indicative of credibility […] is certainly at odds with *dicta* from most trial judges who in their reasons frequently use the same as indicating their acceptance or rejection of the testimony of witnesses".[187]

In *R v (S (RD))*, the Supreme Court of Canada dealt with the reasonable apprehension of bias when assessing witness credibility and when the trier(s) of fact are aware of systemic racism in the local community and include that knowledge in their decision making. In delivering her reasons,

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184 *Ibid* at para 131.

185 RJ Currie, "The Contextualised Court: Litigating Culture in Canada" 9:2 International Journal or Evidence and Proof 73 at 82.

186 Ontario, *supra* note 20 at 30.

187 Ronald Delisle & Don Stuart, *Evidence: Principles and Problems*, 6th ed (Toronto: Thomson Carswell, 2001) at 456.

the Youth Court judge had made comments about police in the area being known to mislead the court and had in the past overreacted with non-white groups, which would indicate a questionable state of mind.[188]

Justice L'Heureux-Dubé and Chief McLachlin JJ wrote for a divided Court, though were in the majority on the issues of bias, impartiality, and the relevance of social context. They remarked that the hypothetical "reasonable person," whose apprehension of bias is to be avoided, expects that "triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place."[189] Rather than being neutral, they wrote, judges must strive to be impartial, assisted by their diverse experiences "so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence".[190]

As the racial dynamics of the community were central to the case before her, the trial judge's incorporation of those dynamics were, in Justice L'Heureux-Dubé and Chief Justice McLachlin JJ's view, "simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution to the case".[191] As the Court was deeply divided on this issue, it is difficult to extract a definitive principle from their reasons, though at least one does emerge:

> Simply to proceed from the starting point that everyone is 'equal' and 'neutral' until the facts prove otherwise (which is what the dissent suggests) is, in effect, a formal equality analysis—it renders one oblivious to the social forces which got the witness onto the stand in the first place.[192]

The Supreme Court's judgement in *R v S(RD)*, and Professor Currie's analysis, quoted above, both pre-date *Gladue* and *Ipeelee*. Their references to "social forces" and stereotypes are reminiscent of *Gladue*'s references to facially neutral factors which are, in reality, products of systemic discrimination.[193]

Professor Currie's apposite acknowledgment of these social forces that convey individuals into court systems they would otherwise not appear echoes Justice Cory and Justice Iacobucci JJ's depiction of systemic discrimination as the root cause of Indigenous offending in *Gladue*.[194] Against this backdrop, consider that section 12 of the *Canada Evidence Act,*[195] which is mirrored by several analogous provincial statutes,[196] permits questioning witnesses as to

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188 *S (RD)*, *supra* note 90 at para 5.
189 *Ibid* at para 39.
190 *Ibid* at para 29.
191 *Ibid* at para 59.
192 Currie, *supra* note 187 at para 88.
193 *Gladue CA*, *supra* note 101 at para 55.
194 *Gladue SCC, supra* note 1 at para 65.
195 *Canada Evidence Act*, RSC 1985, c C-5.
196 See e.g. *Evidence Act* (BC), RSBC 1996, c 124, s. 15.

whether they have been convicted of an offence. The purpose of the federal legislation was interpreted by the Supreme Court in *R v Corbett*:

> What lies behind s. 12 is a legislative judgment that prior convictions do bear upon the credibility of a witness [...] There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, but it is a fact which a jury might take into account in assessing credibility.[197]

It is now known, through *Gladue* (and the commissions of inquiry and jurisprudence that preceded it), that systemic discrimination and Indigenous alienation from the criminal justice system operate as root causes of Indigenous offending and conviction – with many Indigenous accused pleading guilty despite being factually innocent, only to hasten the process.[198] To then hold those convictions as suggestive of lower credibility is an abandonment of *Gladue* principles. Instead, triers of fact should heed Justice L'Heureux-Dubé and Chief Justice McLachlin JJ's direction to avoid inappropriate stereotypes by deploying the judicial notice of systemic discrimination required by *Gladue* as social fact evidence that forms a necessary part of the calculus in assessing credibility of Indigenous witnesses.

CONCLUSION

As the Court stated in *Ipeelee, Gladue* principles are not a panacea.[199] They cannot apply as a miraculous salve for centuries of colonial government policy. However, the broadest principles are flexible enough to be adapted to many contexts outside criminal law. They have been applied when Indigenous individuals have a liberty interest at stake, whether personal – as in the prospect of incarceration for civil contempt of Court, or professional – as Professor Andrew Flavelle-Martin has written about regarding the professional discipline of Indigenous lawyers.[200]

The alienation of Indigenous Peoples from the criminal justice system has impacts even within the civil justice system, as when criminal convictions are used to undermine credibility of Indigenous witnesses, and translates to the justice system at large when Indigenous residents are under-represented in the jury selection process.

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197 *R v Corbett,* 1988 CanLII 80 (SCC) at para 22, [1988] 1 SCR 670.

198 Angela Bressan & Kyle Coady, *Guilty Pleas Among Indigenous People in Canada* (Department of Justice Canada, 2017), online (pdf): <justice.gc.ca> [perma.cc/2BTP-GDLV].

199 *Ipeelee*, *supra* note 2 at para 63.

200 Flavelle-Martin, *supra* note 177.

The possibilities identified in this paper for the application of *Gladue* principles in the civil context are narrow case studies. They recognize the broad but not unlimited potential of *Gladue* principles and are far enough outside the dominant criminal law purposes of *Gladue* as to highlight the principles' malleability.

Extending *Gladue* principles outside criminal law would do service to a justice system that is grappling with how to best give expression to meaningful reconciliation. The responsibility to reconcile Indigenous and colonial justice systems lies with the colonial justice system, and not the Indigenous individuals who attempt to use it. For reconciliation to be effective, the Canadian justice system must accommodate Indigenous Peoples in *every* context.

ARTICLE

WHEN WORDS *CAN* DO JUSTICE: ASSESSING THE NOVEL RELATIONSHIP BETWEEN LEGISLATIVE DRAFTING AND ACCESS TO ADMINISTRATIVE JUSTICE IN YUKON AND CANADA

Garima Karia *

CITED: (2023) 28 *Appeal* 148

ABSTRACT

This paper is about legislative definitions and drafting. I will explore if and how a thoughtfully drafted legislative definition of a broad concept in the law, as well as the defining process itself, may be tools for increasing access to justice, specifically in the administrative law context. Given that access to justice strengthens the public's confidence in the administrative justice system (through transparency, predictability, the use of plain language, and the availability of meaningful due process, among other factors), its betterment will reinforce the rule of law.

While this paper begins by discussing far-reaching processes and big concepts, I narrow my analysis to focus specifically on section 12 of the Yukon Human Rights Act, which concerns systemic discrimination and its operability in the Yukon territory. I discuss whether and how re-drafting this provision may occur through an expanded capabilities approach, inspired by Amartya Sen, and complemented by the theoretical ideas of standpoint theory and legal empowerment.

The Yukon case study's teachings and provocations may apply to other situations within Canadian administrative law and beyond. Although there is literature on the place of legislative drafting within the wider Western liberal democratic framework, as well as some separate, limited commentary on the intersection of administrative law and access to justice, my piece is unique in that it combines legislative drafting in the administrative context with considerations of access to justice and the rule of law in a novel way.

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INTRODUCTION [1]

"*The language of law must not be foreign to the ears of those who are to obey it.*"[2]
– Learned Hand

"*[Academics] could only talk and write about it; […] I'd lived it.*"[3]
– Jesse Thistle
Author of the Definition of Indigenous Homelessness

In both the legal and non-legal world, definitions are all around us. We see them in our governing documents, such as the Constitution and the *Criminal Code*; in the literature we use to inform academic arguments and policy decisions; and in our day-to-day lives, as we explain situations or recount lived experiences. Despite our reliance on defined terms, we rarely consider where they came from, how they were determined, and the effect they have on our lives. Narrowing this narrative to the legal sphere, definitions play a particular role in the jurisprudential work of courts and administrative tribunals.

Definitions are the bedrock of legislation and legal tests. They provide the substance necessary to determine, for example, if a contract is unconscionable or performed in good faith; whether a criminal act constitutes murder or manslaughter; or if unfavourable treatment may be considered discrimination as befits Section 15 of the *Canadian Charter or Rights and Freedoms*[4] or the *prima facie* test for discrimination, or "area-ground-nexus" test,[5] as it applies to provincial[6] human rights legislation. However, legislative definitions may also serve as vehicles for accessing justice. Their contours and features determine, for example, whether a human rights complaint can be made, allowing citizens to seek recourse for unfavourable treatment. They are a crucial first step to accessing justice—a precursor to even contemplating redress. Despite their power in the legal realm, most actors in the profession

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1 This article was written by Garima Karia in her personal capacity. The opinions expressed in this article are the author's alone, and are informed by her experiences and reflections upon completing a summer internship at the Yukon Human Rights Commission. The opinions expressed in this article do not reflect the views of the Commission or any other institutions or organizations mentioned.

2 Cynthia Adams, "The Move Toward Using Plain Legal Language", online: *American Bar Association* <americanbar.org> [perma.cc/FEY4-VZ22].

3 Jesse Thistle, *From the Ashes* (Toronto: Simon & Schuster, 2019) at 347.

4 *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 The "area-ground-nexus" test is a term I use throughout this paper. It refers to the *prima facie* test for discrimination that most human rights-related administrative bodies in Canada use to accept a human rights complaint as per *Moore v British Columbia (Education),* 2012 SCC 61. The Yukon Human Rights Commission is one such body. Based on sections 7 and 9 of the Yukon *Human Rights Act*, RSY 2002, c 116 [*YHRA*], the "area" refers to an alleged act of discrimination that falls under an area protected by the legislation in question, such as employment or housing; the "ground" refers to the personal characteristic that are protected from discrimination by the *Act*, such as religion, physical or mental disability, source of income, etc. Lastly, the nexus implies that the complainant must establish a "sufficient link" between their protected ground and the unfavourable treatment they faced. See "What is Discrimination", online: *Yukon Human Rights Commission* <yukonhumanrights.ca> [perma.cc/CEV5-Y7FF].

6 To be concise, I will often use the term "provincial" as encompassing both Canada's provinces and territories.

take their existence for granted. Yet, when we look closely at the elements and origins of a legal definition, we glean that they provide a meaningful choice to claimants: the option to make an informed claim and to enter into an adjudicative process. With a clear, intelligible definition, claimants can put a name to their experience(s) and be empowered to decide, based on their agency and knowledge, whether to act on this definition in a certain way. However, as I will explore, the potential of clear legislative definitions as enablers of greater access to adjudicative systems is not always realized.

A. The Story of "Systemic Discrimination" in the Yukon *Human Rights Act*

Section 12 of Yukon's *Human Rights Act* ("the *Act*") simply states, "Systemic discrimination: Any conduct that results in discrimination is discrimination."[7] I was immediately struck by provision's tautological nature. I thought that this definition of systemic discrimination could be improved, as it lacks clarity and specificity. Therefore, I explored in depth how the term should be defined and considered what a "better" definition—one that addresses the complexities of the term—would look like. This task sparked my curiosity about the legislative drafting process–whose voices were heard and taken into consideration? Do multi-voiced processes necessarily lead to comprehensive legislative drafting? How does a certain conception of access to justice[8] fit into this matrix?

This paper is informed by the above questions. It delves into the process of defining the term "systemic discrimination" and its relationship to access to justice in the administrative legal space. Through an expanded capabilities framework, this paper assesses methods of legislative drafting and evaluates their contribution to clarifying the definition of systemic discrimination both generally and specifically within the Yukon *Human Rights Act*. In Part I, I will examine the facets of defining a term in law. In Part II, I present the expanded capabilities framework through which I will analyze and assess legislative definition drafting. I also contextualize "access to justice" as it pertains to administrative law in the Yukon and Canada. In Part III, I introduce systemic discrimination as a valuable concept of study in Canada and canvas the elements I argue should be included in its eventual definition, as well as why their inclusion may increase access to justice. In Part IV, I apply my expanded capabilities framework and thoughts on systemic discrimination to legislative drafting in the Yukon human rights context. Subsequently, in Part V, I assess whether the process of legislative drafting based on capabilities generally, and its manifestation in the Yukon's systemic discrimination definition specifically, would increase access to justice and bolster the rule of law. Finally, in Part VI, I share lessons that the rest of Canada may learn from the Yukon's inclusion of systemic discrimination in its human rights legislation.

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7 See YHRA, *supra* note 5 at s 12.

8 The term "access to justice" is a complicated one in and of itself. In sections III and VI, I explain and elaborate on the kind of "access" and "justice" to which I refer in this article, and to which legislative drafting in the administrative context pertains.

I. DEFINITIONS

A. The Importance of Definitions in Administrative Law

Professor Jeanne Frazier Price problematizes the legal profession's unquestioning acceptance of the existence and necessity of statutory definitions.[9] She asks "why define? What legislative ends are achieved by the statutory definition? And are those ends furthered by particular types or techniques of definition?"[10] Professor Price's interrogation reveals the undisputed power of definitions in law. In "conferring the authority and establishing a structure that allows the statute's normative provisions to have effect" and "informing and instructing as to how a particular outcome might be achieved or avoided", legislative definitions wield significant potential.[11] While an unelaborated definition may not necessarily cause explicit harm, a well-crafted definition can make a sizeable difference in explaining an otherwise confusing or broad legal term, therefore enabling individuals and organizations to make use of it. A nebulous definition does not afford such possibilities, especially in the context of administrative law where legislatures use definitions to "give directions" to decisionmakers in statutes.[12]

The primary reasons why legislators delegate power to administrative decisionmakers are expertise, time, and information. Legislators, as well as reviewing courts, cannot possibly have sufficient expertise or time to understand and evaluate the various detailed requirements in the vast range of areas that comprise the regulatory and welfare state.[13] Such expertise requires education and training as well as experience in dealing with administrative issues.[14] For example, when deciding issues pertaining to patenting, labour relations, or human rights, specific knowledge allows the decisionmaker(s) to make more informed and context-specific pronouncements. Moreover, legislators rarely have complete information about a statute's future applications. Legislation is therefore necessarily and unavoidably incomplete, and the discretionary power to "fill in" requirements as new information arises is left to administrative decisionmakers.[15]

Bearing in mind these discretionary responsibilities, the way legislators define key terms and legal tests in their statutes becomes increasingly important. These definitions are the first place decisionmakers look when reaching their verdicts or exercising their "filling in" powers. Given that these decisionmakers must be afforded broad deference by reviewing courts, *how* they interpret definitions will often go unchanged by reviewing courts. Reviewing courts must

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9 Jeanne Frazier Price, "Wagging, Not Barking: Statutory Definitions" (2013) Clev St L Rev 999 at 1001.

10 *Ibid* at 1017.

11 *Ibid* at 1002–03.

12 Andrew Green, "Delegation and Consultation: How the Administrative State Functions and the Importance of Rules" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications, 2018) 308 at 309. See also France Houle & Lorne Sossin, "Tribunals and Guidelines: Exploring the Relationship Between Fairness and Legitimacy in Administrative Decision-Making" (2006) 46 Can Pub Admin 283.

13 Green, *ibid* at 312.

14 *Ibid*.

15 *Ibid* at 313.

pay close attention to the legislature's intent.[16] Thus, if definitions are clear, these courts can more effectively respect deference and facilitate consistency in judicial reviews. Clarity from the legislature can also help ensure a degree of predictability in otherwise case-by-case systems in the administrative law space, such as the provincial human rights adjudicative bodies.

Legal scholars Colleen M. Flood and Jennifer Dolling characterize administrative law as "the law for ordinary people", partly because most people will be affected by—if not directly seek out—decisions of administrative bodies in their lifetime.[17] As such, clear directions in the form of comprehensive definitions (among other measures) are of particular importance in administrative law because they are accessed by a wide range of Canadians. Many Canadians do not have legal representation at the initial decision-making stage and remain unrepresented throughout their administrative processes. For this reason, clarity and accessibility are particularly virtuous in the administrative and human rights fields. While I certainly recognize the importance of flexibility in a legislative definition[18], a complete lack thereof does a disservice to administrative complainants who could operationalize the definition in the course of a human rights complaint.

B. Current Problems with the Definition Drafting Process

The two main issues with legislative definitions are that they are vague or unclear, and that consultations with relevant stakeholders, including members of the public, are not adequately considered.

Approximately 65 percent of Canadians with legal problems are not certain about their rights, do not know how to manage legal problems, are afraid to access the legal system, or think nothing can be done.[19] Bearing this reality in mind, legislative definitions ought to be comprised of simple yet thorough language that will help claimants, legal professionals, and courts easily identify whether their situations align with the definition, thus alleviating some of the obscurity that often characterizes the administrative legal system.[20] Through the examples I will present below, most notably the definition of systemic discrimination in the Yukon *Human Rights Act*, one can appreciate that vague definitions

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16 See e.g. Cheryl Laura Bowman, "Presumptive Deference and the Role of Expertise on Questions of Law in Canadian Administrative Law" (2019) [unpublished, archived at Osgoode Digital Commons]; *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417; *Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

17 Colleen M Flood & Jennifer Dolling, "A Historical Map for Administrative Law: There Be Dragons" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications, 2018) 2 at 3.

18 The importance of flexibility has been discussed with noted rigour in scholarship on section 15 of the *Charter*. Many scholars have critiqued how the (very detailed and arguably "clearer") definition of discrimination articulated in *Law* had the effect not of increasing access to justice, but of expanding the list of evidentiary burdens that prospective claimants had to meet. See e.g. Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48:4 McGill LJ 627.

19 Trevor C W Farrow, "What is access to justice" (2014) 51:3 Osgoode Halle LJ 957 at 965, FN 22.

20 For support of simple language in law, see e.g. Ian Waddell, "The Case for Plain Language Legislation" (1992) 15:4 Can Parl Rev 14; Mélanie Raymond, "Plain language: Designed to empower the users" (23 November 2018), online: *The Canadian Bar Association* <nationalmagazine.ca> [perma.cc/YAM7-Q8YN].

tend to hinder the claimant and the courts because ambiguity renders the complaint-filing process more complicated and can lead to inconsistencies in interpretation at the decision-making stage. This nebulousness presents an accessibility problem in its purest sense—where a definition is ambiguous, a potential claimant either cannot access it to define their claim or cannot identify that their claim may be encompassed by the definition to begin with.[21] Moreover, seeing as administrative decisionmakers wield a high degree of binding authority, it is important that they make fair and consistent decisions that uphold a diverse range of needs.[22] As I will illustrate in the Yukon's case, without a clear definition, courts and tribunals reach inconsistent outcomes (and conjure up haphazard definitions), which directly impinges on the predictability inherent to the rule of law.[23]

The second issue I will explore is that law-making bodies do not always incorporate the suggestions of community stakeholders and members of the public when they engage in public consultations. Various stakeholder groups in Yukon warned of section 12's imprecision and provided alternative formulations.[24] Yet, the legislature did not heed these suggestions in 2008, when the *Act* underwent a significant reform, nor did it solicit consultations in 2010, 2013, 2016, 2017 and 2018 when they amended the *Act* again (albeit with a narrower focus than in 2008).[25] These two significant issues may be solved by ensuring clarity in definitions and including public participation in their formulation.

C. Opportunities to Overcome

Drafting a clear and "usable" legislative definition may be perceived as "easier said than done" and legislatures may opt for vague definitions to prevent pigeonholing.[26] Legislatures owe the public, administrative bodies, and the judiciary discernable language as a matter of access to justice (albeit a narrow conception of it, as discussed below) and the rule of law.[27] Without defining central concepts, claimants cannot seek recourse, and decision-makers cannot fairly assess their claims. Moreover, an understanding of people's legal needs and experiences when attempting to access justice provides vital insights for designing policies or laying the groundwork for legislation.[28] Federal, provincial and territorial governments have committed

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21 See e.g. "Plain language – essential for real access to justice" (18 July 2017), online: *Office of the Chief Judge, Provincial Court of British Columbia* <provincialcourt.bc.ca> [perma.cc/7B6T-KMNB].

22 See Suzy Flader, "Alleviating the Access to Justice Gap in Canada: Justice Factors, Influencers, and Agenda for Moving Forward" (2019) [unpublished, archived at the University of Victoria] at 11.

23 See e.g. "Understanding Effective Access to Justice" (2016) OECD Workshop Background Paper.

24 This is discussed at greater length in Section V.

25 In 2008, a Select Committee on Human Rights was struck to lead the amendment process; no such committee was struck in subsequent amending years. See *YHRA*, *supra* note 5; "Select Committee on Human Rights", online: *Yukon Legislative Assembly* <yukonassembly.ca> [perma.cc/KW88-M9QB] [Select Committee on Human Rights].

26 See e.g. Denise G Reaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40:2 Osgoode Hall LJ 113.

27 Raymond, *supra* note 20; "Introduction to Administrative Justice and Plain Language", online (pdf): *Council of Canadian Administrative Tribunals* <ccat-ctac.org> [perma.cc/7FWE-7XE2].

28 World Justice Project, *Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 45 Countries* (Washington, DC: World Justice Project, 2018) at 2.

to and shown that they can organize public consultation processes for lawmaking.[29] At the federal level, Canadians have witnessed relatively successful consultations. In the Truth and Reconciliation Commission, for example, various calls to action, including 5, 10, and 12, require definition-based reforms that are being carried out with some success.[30] As I will explore, the Yukon government held public consultations and did solicit and receive submissions on reforming the *Act*, but chose not to follow the various recommendations to re-word section 12. For public participation to be meaningful, lawmakers should take widely-supported suggestions from the public seriously.

The foundational idea that more "user-friendly" definitions are best produced by those who would or will access them brings me to the framework that will guide my analysis of the "definition problem" and solution, outlined above. This two-pronged solution is a manifestation of philosopher and economist Amartya Sen's capabilities approach, which I will complement with standpoint theory and legal empowerment to provide a framework for the rest of my analysis. In applying an expanded capabilities lens enhanced by standpoint theory and legal empowerment considerations, I argue that comprehensible and actionable legislative definitions are vital for claimants to be able to act on informed agency and engage with the meaningful choice to make a claim of systemic discrimination. If we provide clear definitions that were formulated by active public participation, we are doubly engaging in access to justice—in both process and in outcome. In turn, inclusion and intelligibility strengthen public confidence in administrative decision-making and the rule of law more broadly.

II. THEORETICAL FRAMEWORK: EXPANDED CAPABILITIES APPROACH

Amartya Sen's capabilities framework is the foundation of the framework in which I root my analysis. Sen's approach, which is often discussed in the context of economic development, focuses on the quality of life that individuals are able to achieve. This quality of life is analyzed on the basis of two core concepts: "functionings" and "capabilities". Functionings reflect the various things a person may value doing or being, such as being well-nourished or having shelter.[31] Capabilities refer to real opportunities citizens have to enjoy a functioning rather than to the actual enjoyment of the functioning.[32] Sen pairs functionings with capabilities because his vision of development centres the *availability of meaningful choices* that lead to the enjoyment of particular functionings, rather than the functionings themselves. Sen discusses what the capabilities approach can do for theories of justice or of human rights.

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29 Trevor C W Farrow & Lesley A Jacobs, "Introduction: Taking Meaningful Access to Justice in Canada Seriously" in Trevor C W Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) at 10. See also "Policy Statement and Guidelines for Public Participation", online (pdf): *Department of Justice Canada* <justice.gc.ca> [perma.cc/V9VU-YVAE].

30 "Delivering on Truth and Reconciliation Commission Calls to Action", online: *Department of Justice Canada* <rcaanc-cirnac.gc.ca> [perma.cc/7GHB-6J2F].

31 Tom Jacobson & Leanne Chang, "Sen's Capabilities Approach and the Measurement of Communication Outcomes" (2019) 9 J Informational Policy 111 at 113.

32 *Ibid* at 114.

In applying it to the administrative law context and complementing it with standpoint theory and theories of legal empowerment, I propose that it can accomplish the same goals for a theory of *access* to justice.

Capability concentrates on the *opportunity* to be able to have combinations of functionings and reflects "the alternative combinations of functionings from which the person can choose one combination."[33] Sen's example of "capability as opportunity" is the opportunity to be well-nourished[34]; my example will be the meaningful opportunity to make a human rights complaint about systemic discrimination, and in so doing, to access the administrative justice system. The use of the word "meaningful" in qualifying access to justice has a specific purpose and will be addressed below, as will considerations of the particular kind of "access" and "justice" this proposal entails. This opportunity would be one of many. One could equally address a claim of systemic discrimination through constitutional litigation (if the claim could be attributed to a particular law or government action), through one's union (if the individual experienced systemic discrimination at their workplace, and is a member of a union), or through extra-legal methods (such as non-adversarial modes of justice). Moreover, if the individual so chooses, they can also decide to do nothing at all.

A strong argument can be made in favour of an individual's having the *freedom* to do something. But Sen cautions that this freedom must not be seen as an argument in favour of pursuing that something irrespective of choice. Using Sen's framing: "it's about a person's freedom to choose how she should live [including the opportunity to access justice through a particular administrative process] and it cannot be turned into an argument for that person pursuing that process in particular, irrespective of the alternatives the person has."[35] Along these lines, bettering the definition of systemic discrimination so as to make the human rights complaint process more actionable and accessible should not mean that more people *should* or *must* use it as an avenue for administrative justice. Rather, doing so will give people the veritable option and *agency* to do so. Giving this character to a legal process inherently imbues it with public confidence.

Returning to the use of the word "meaningful", it is crucial that the opportunity to launch a human rights complaint cannot be a hollow one, i.e. a *de jure* but not *de facto* option. Sen agrees that "an adequate theory of normative social choice has to be alive both to the fairness of the processes involved and to the equity and efficiency of the substantive opportunities that people can enjoy"[36], reaffirming the necessity that the opportunity be one with real chance of success. Otherwise, we risk falling into the conundrum of excessive

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33 Amartya Sen, "Human Rights and Capabilities" (2005) 6:2 J Human Development 151 at 154.

34 *Ibid*.

35 *Ibid* at 155.

36 *Ibid* at 156.

neoliberalism, which is a common critique of the capabilities viewpoint.[37] Sen himself says that capabilities "fall short of telling us enough about the freedom of citizens to invoke and utilise procedures that are equitable", otherwise known as "process freedoms".[38] To fill the process freedoms gap, the notion of legal empowerment is useful.

Legal empowerment is embodied by processes of systemic change through which the excluded "become able to use the law, the legal system, and legal services to protect and advance their rights and interests."[39] Although Professor Dan Banik focuses his conceptualization of legal empowerment on the poor and their ability to access the economic marketplace, the same logic can apply to members of the public being included in the drafting of legislation that they may later access when making legal claims, or, in other words, acting on their process freedoms. In Part IV, I will elaborate on the relationship between legal empowerment and access to justice as they pertain to legislative drafting and drafting processes.

A. What kind of "access" and "justice"?

Another consideration related to "meaningful" access to justice is the broader question of the kind of "access" and "justice" to which I am referring. Sen says we must "view our practices *inter alia* from a certain distance; both the understanding of human rights and capabilities are intimately linked with the reach of public discussion… the viability and universality of human rights and of an acceptable specification of capabilities are dependent on their ability to survive critical scrutiny in public reasoning."[40] Access to justice is a broad concept in and of itself. For the purpose of this paper and its context, I will specify its meaning along with the caveat that it is but one conceptualization.

There are two approaches to framing access to administrative justice. The classical, more familiar approach "focuses on timely access to formal legal institutions such as the courts in order to secure redress for some wrongs."[41] However, we can re-imagine access to justice as "meaningful access to justice" centring instead on the idea that

> access to justice is principally concerned with people's ability to access a diverse range of information, institutions, and organizations—not just formal legal institutions such as the courts—in order to understand, prevent, meet, and resolve their legal challenges and problems. Meaningful access to justice measures access for a person not necessarily

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37 See e.g. David A Clark, "The Capability Approach: Its Development, Critiques and Recent Advances" in Robin Ghosh, K R Gupta & Prasenjit Maiti, eds, *Development Studies* vol 2 (New Delhi: Atlantic Publishers, 2008) ch 5; Thomas Pogge, "A Critique of the Capability Approach" in Harry Brighouse and Ingrid Robeyns, eds, *Measuring Justice: Primary goods and Capabilities* (New York: Cambridge University Press, 2010) ch 2.

38 Sen, *supra* note 33 at 156.

39 Dan Banik, "Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication" (2009) 1 Hague J Rule of Law 117 at 120. See also Meena Jagannath, Nicole Phillips & Jeena Shah, "A Rights-Based Approach to Lawyering: Legal Empowerment as an Alternative to Legal Aid in Post-Disaster Haiti" (2011) 10:1 Nw U J Intl Hum Rts 7 at 9.

40 Sen, *supra* note 33 at 163.

41 Jacobs & Farrow, *supra* note 29 at 7. Jacobs and Farrow frame their analysis as it concerns civil justice, but the same principles may apply to administrative justice.

> in terms of access to lawyers and adjudicated decisions but rather by how helpful the path is for addressing and resolving that person's legal problem or complaint.[42]

Jacobs and Farrow identify seven pillars (four main and three complementary) for understanding and measuring meaningful access to justice. Of the seven, there are three that can be viewed as reinforcing the same values as the capabilities approach:

1. Person-centred, as opposed to service provider- or system-centred. The idea is that legal processes and mechanisms which promote meaningful access to justice are "designed to serve the person in need."[43]

2. Legal consciousness. The idea underlying this pillar is that legal consciousness affects when and whether people recognize their problems as legal and the decisions they made about how to address those problems.[44]

3. Acknowledgement that barriers to meaningful access to justice are often systemic injustices.[45] This pillar recognizes that even accessing processes to report situations of systemic discrimination are riddled with structural issues of access, transparency, and comprehensibility.

Within a person-centred, meaningful approach to access to justice, what matters for fair outcomes and fair processes are the paths to justice or legal journeys people take, and not so much (or only) the robustness of the legal services available to them. Innovating in civil and family—and, I argue, administrative—justice is at its core about "developing new ways to bring fairness between people".[46]

Here, the capabilities approach is particularly relevant because it reflects the idea of agency in the legal process and is supported by standpoint theory, notably when we consider public participation in lawmaking as a facet of access to justice. As Professor Colleen Sheppard explains, standpoint theory affirms that those with less power in society—in this case, members of the public and potential claimants—have experiential knowledge that is "unavailable to those with power and authority."[47] When it comes to defining, the public to whom statutes apply may be able to better inform its construction than lawmakers by themselves. As such, standpoint theory explains how public-driven legislative drafting can better meet the needs of claimants. In Parts IV and V, I will explain how standpoint theory substantiates the need for legislators to take public consultation on defining systemic discrimination, specifically in the Yukon, seriously. While outcome is important to people, being heard and feeling like one has control over the speed, steps, and content of the process is just as essential.

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42 *Ibid*.

43 *Ibid* at 8.

44 *Ibid*.

45 *Ibid*.

46 *Ibid* at 9; see generally Sam Muller et al, *Innovating Justice: Developing New Ways to Bring Fairness Between People* (The Hague: HiiL, the Hague Institute for the Internationalisation of Law, 2013).

47 Colleen Sheppard, "Contexts of Inequality: Identifying and Remedying Discrimination" in Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 67.

Sen's framework, enriched by considerations of legal empowerment and standpoint theory, helps us reimagine the potential power of a comprehensive and thoughtful legislative definition. Perhaps, if we define the key terms in human rights statutes in a way that allows their structure to be alive to the needs and realities of users (i.e. through meaningful public consultation), we can endeavour to substantiate and "make tangible" human rights in a way that eschews the conventional critiques of individualism and strives to give teeth to human rights in a way that draws on human agency and capability. I will now apply this framework to defining systemic discrimination generally, and then in Yukon's *Act* specifically.

III. SYSTEMIC DISCRIMINATION AS A VALUABLE CONCEPT OF STUDY IN CANADA

Why should we be concerned with, let alone be concerned with defining, systemic discrimination in Canada? When discussing systemic discrimination in Canada, it is tempting to follow the lead of media outlets and public-facing institutions across the nation who perceive it as a "new" issue. From newspapers to retailers to social media pages, Canadian actors have recently engaged with with systemic discrimination in the context of George Floyd's killing at the hands of police in 2020, framing the issue as Canada's chance to "take a deeper look" at systemic racism and discrimination and grapple with the vast inequality present in our nation.[48] Yet, certain Canadian scholars and grassroots organizations have been discussing and sounding the alarm on systemic discrimination, both within and outside the context of the law, for much longer.[49] Bearing both realities in mind, systemic discrimination is due for consideration by lawmakers because increased public consciousness will likely result in an increase of systemic discrimination-related cases before courts and tribunals.[50] Though systemic discrimination is by no means a new phenomenon, the public is arguably alive to it now more than ever. Its inclusion in human rights legislation is an eventuality,[51] and therefore thinking about an ideal formulation is warranted.

Upon surveying the presence of the term "systemic discrimination" in Canadian human rights legislation and case law, I make two central observations. First, there is no concrete, let alone consistent or operational, definition of systemic discrimination in existing human rights legislation or jurisprudence in Canada. Second, there are, however, common guiding themes or principles that may be drawn upon in formulating a concrete definition.

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48 See e.g. Graham Slaughter, "Five charts that show what systemic racism looks like in Canada" (6 June 2020), online: *CTV News* <ctvnews.ca> [perma.cc/DDD6-6L2P]; Maan Alhmidi, "COVID-19 magnified systemic discrimination against Indigenous women: Bennett" (8 March 2021), online: *CTV News* <ctvnews.ca> [perma.cc/AC9N-G8N8].

49 See e.g. Sheppard, *supra* note 47; Colleen Sheppard, Tamara Thermitus & Derek J Jones, "Understanding how racism becomes systemic" (24 July 2020), online: *Globe and Mail* <theglobeandmail.com> [perma.cc/RC3D-NWSJ].

50 See e.g. Danielle Edwards, "N.S. top court: Judges must consider systemic racism when sentencing Black offenders" (23 Aug 2021), online: *CTV News* <atlantic.ctvnews.ca> [perma.cc/LA2K-WG7H].

51 As I mention in Part I and in the sub-section below, presently, only two provinces and one territory even include the term in their human rights legislation.

A. Lack of a Concrete Definition

There is currently no concrete, consistent, or operational definition of systemic discrimination within Canadian human rights legislation. In addition to the Yukon, Manitoba and Saskatchewan are the only other jurisdictions that attempt to define or include systemic discrimination in their statutes. As mentioned above, the Yukon's *Human Rights Act* houses its section on systemic discrimination under the Part concerning "Discriminatory Practices". The section simply states that "any conduct that results in discrimination is discrimination."[52] As it stands, this definition provides no information to decisionmakers or claimants about how to make or assess a claim of systemic discrimination within the broader human rights complaint process, nor does it acknowledge the various defining elements of systemic discrimination (discussed further below).

Manitoba's *Human Rights Code*, like the Yukon's, has a specific systemic discrimination provision which provides slightly more, although still incomplete information:

> 9(3): Systemic discrimination
>
> Interrelated actions, policies or procedures of a person that do not have a discriminatory effect when considered individually can constitute discrimination under this Code if the combined operation of those actions, policies or procedures results in discrimination within the meaning of subsection (1).[53]

While this definition provides more guidance to help decisionmakers, claimants and even respondents understand systemic discrimination, it is limited to two elements: "effect or impact over intent" and a pattern of continuing phenomenon resulting in significant cumulative effects. A comprehensive definition of systemic discrimination would include most, if not all of the common elements discussed in the next section. The Saskatchewan *Human Rights Code* does not define systemic discrimination explicitly, but it does include the term in its explanation of the duties of the Saskatchewan Human Rights Commission (the "Saskatchewan Commission").[54] The *Code* therefore empowers the Saskatchewan Commission to prevent and address patterns of systemic discrimination of its own volition:

> 24: Duties of Commission The commission shall:
>
> (h) promote and pursue measures to prevent and address systemic patterns of discrimination;[55]

The Saskatchewan Human Rights Commission attributes the term "systemic advocacy" to section 24(h), explaining that the *Code*

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52 See *YHRA*, *supra* note 5 at s 12.

53 *Human Rights Code*, CCSM 1987, c H175. Subsection 9(1) of the *Code* defines discrimination.

54 Saskatchewan *Human Rights Code*, being Chapter S-24.2 of the *Statutes of Saskatchewan, 2018*.

55 *Ibid* at s 24(h).

> allows the Commission to address important human rights issues for groups of people other than through individual complain processes, traditional public education, or equity programs. Systemic advocacy is a rights-based approach to addressing discrimination that can address the concerns of a "class," or classes, of individuals to which a single complainant might belong. When the Commission considers using a systemic advocacy strategy to address an issue, it is in accordance with the Code. Put another way, this process should pertain to a current law, policy or practice which in some manner systemically infringes upon human rights protected under the Code."[56]

While Saskatchewan's *Code* may be commended for conveying sentiments of empowerment to its Commission, this provision faces the same issues of inoperability and lack of direction as its counterparts. Inclusion of terminology pertaining to combatting systemic discrimination is fruitless if claimants and decisionmakers are entirely unaware of how to use or interpret the terms.

B. Presence of Common Guiding Principles

Although existing human rights legislation does not provide much in the way of a practical definition of systemic discrimination, a survey of Supreme Court of Canada (the "Supreme Court") case law, provincial and territorial human rights jurisprudence and Human Rights Commission documents, and academic commentary led me to identify six key characteristics that, if combined, would assist with devising a more comprehensive definition of systemic discrimination. These six elements are the following:

1. The effect or impact of a policy or act, rather than its intention, is at the crux of systemic discrimination. In other words, if a well-intentioned policy or act has the *effect* or *impact* of disadvantageous treatment of a particular protected group, it may be considered to perpetuate systemic discrimination regardless of its intent.[57]
2. Facially neutral policies or acts may cause systemic discrimination.[58]
3. Systemic discrimination is often subtle or "hidden".[59]
4. Systemic discrimination is rooted in long-standing social and cultural attitudes and norms.[60]

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56 "What is Systemic Advocacy?" online: *Saskatchewan Human Rights Commission* <saskatchewanhumanrights.ca> [perma.cc/KAF9-A66M].

57 See e.g. *Gersten v College of Physicians and Surgeons of Alberta*, 2004 AHRC 16 at para 349; *Saskatoon (City) (Re)*, 1987 CanLII 8556 (SK HRT) at paras 31–32; *Reed v Province of Nova Scotia (Department of Environment)*, 2018 CanLII 89418 at para 39 (NS HRC).

58 See e.g. *Commission des droits de la personne et des droits de la jeunesse (Nyembwe) c Ville de Gatineau*, 2021 QCTDP 1 at paras 183–84; *Brar and others v B.C. Veterinary Medical Association and Osborne*, 2015 BCHRT 151 at para 740.

59 See e.g. *Brome v Ontario (Human Rights Commission)*, 1999 CanLII 15060 at para 50 [*Brome*]; *University of Regina v University of Regina Faculty Association*, 1996 CanLII 17878 (SK LA) [*University of Regina*].

60 See e.g. *Ahmad v CF Chemicals Ltd.*, 2019 AHRC 5 at paras 179–181.

5. Systemic discrimination may be embedded or detected in patterns, series, or continuing phenomena that have significant cumulative effects. In other words, "the whole is greater than the sum of its parts" when it comes to the collective effect of various instances of discrimination or differential treatment that result in systemic discrimination.[61]

6. Systemic discrimination often contains an element of intersectionality.[62]

I began with Supreme Court jurisprudence on matters of systemic discrimination. The authoritative case on the matter, *Canadian National Railway Co. (CN) v Canada (Canadian Human Rights Commission)* ("*CN*"), relies on the Abella Report on Equality in Employment (the "Abella Report") for its definition on systemic discrimination, which Chief Justice Dickson characterizes as "a thorough study of systemic discrimination in Canada."[63] In the Report, Judge Abella (as she then was) offered the following comments on systemic discrimination:

> Discrimination … means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics […]
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier 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.
>
> This is why it is important to look at the results of a system … [emphasis added].[64]

Judge Abella's definition features two of the central elements highlighted above: most notably that if the effect or "result" of an act, rather than its intent, is some form of disadvantageous treatment of a particular protected group, it may be considered a perpetuation of systemic discrimination despite its intent.[65] The definition's use of "innocently" also draws on the facially neutral nature of systems which may still cause systemic discrimination.

Based on a broad survey of jurisprudence, courts and tribunals across Canada have relied consistently on this definition.[66] In *Fraser v Canada* ("*Fraser*"), the Supreme

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61 See e.g. *Grange v Toronto (City)*, 2014 HRTO 633 at paras 25–26*; Association of Ontario Midwives v Ontario (Health and Long-Term Care)*, 2014 HRTO 1370 at para 33; *Bhindi v City of Ottawa*, 2021 HRTO 525 at para 11.

62 See e.g. *Bear v Saskatoon Regional Health Authority*, 2011 CanLII 152484 (SK HRT) at para 33 [*Bear*].

63 *Canadian National Railway Co. (CN) v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at 1139, 1987 CanLII 109 (SCC) [*CN*].

64 Canada, Judge Rosalie Silverman Abella, *Equality in Employment*, (Ottawa: Royal Commission on Equality in Employment, 1984) at 2 [Abella Report].

65 The notion of "impact over intent" applies not only to systemic discrimination, but to all forms of discrimination. See e.g. *Fraser v Canada*, 2020 SCC 28 [*Fraser*].

66 See e.g. *British Columbia v Crockford*, 2006 BCCA 360; *Aurora College v Niziol*, 2007 NWTSC 34; *Brooks v Vancouver Career College (Burnaby) o/a CDI College*, 2019 HRTO 137; *Taan Forest Limited Partnership v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937*, 2017 CanLII 5278 (BC LA) [*United Steelworkers*].

Court's most recent pronouncement on discrimination as it pertains to section 15 of the *Charter*, the majority cites the same passage from the Abella Report.[67] Although *Fraser* was a contentious decision with substantial disagreement amongst the judges, even Justices Rowe and Brown's dissenting opinion described systemic discrimination as a "a continuing phenomenon which has its roots deep in history and in societal attitudes [… which] cannot be isolated to a single action or statement" illustrating an appreciation for two additional elements of systemic discrimination (fourth and fifth on the above list).[68] Of the elements that remain, human rights jurisprudence from Ontario (*Brome v Ontario (Human Rights Commission)*), Saskatchewan (*University of Regina v University of Regina Faculty Association*), and Alberta (*Ahmad v CF Chemicals Ltd*) comment on the "hidden" or insidious nature of systemic discrimination.[69] The sixth element on intersectionality, which may also be conceived of as "overlapping grounds of discrimination" appeared in one case, *Bear v Saskatoon Regional Health Authority*, in which the judge recognized that the "impacts of systemic racial discrimination may be experienced differently based on intersection with other grounds of discrimination such as gender, disability, place of origin, thus requiring sensitivity to the interacting and cumulative effects of discrimination on multiple grounds."[70] However, this element is still predominantly confined to academic treatment or to Human Rights Commissions in their materials (e.g. information on websites).[71] Bearing these six elements in mind, I turn to the task of finding a concrete and consistent definition of systemic discrimination.

C. Proposing a General Definition of Systemic Discrimination

To suggest a concrete definition of systemic discrimination for claimants and decisionmakers alike, we must make two considerations. The first is that the definitions must be fulsome, and as such I would argue that they should include each of the elements I outline above. Currently, the most cited definition (from *CN*) includes only two of the five. This first recommendation is informed by the expanded capabilities approach, in that a definition with as many "entry points" as possible provides the most meaningful and empowering option to claimants who seek to exercise it. Second, I would qualify my recommendation by stating that the most effective and accessible definition would be one that is borne out of consultation with those for whom it is written. Access to justice ought to remain at the centre of the definition, beginning from access to its formulation and ending with access to its meaning and operability. Two examples come to mind that will help illustrate my two-pronged argument.

First, let us briefly consider the development of the definition of "consent" in Canadian criminal law. Consent is defined twice in the *Criminal Code*, originally in section 265 and

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67 *Fraser, supra* note 65 citing Abella Report, *supra* note 64.

68 *Ibid* at para 167, citing *Public Service Alliance of Canada v Canada (Department of National Defence)*, [1996] 3 FC 789 at para 16, 1996 CanLII 4067 (FCA).

69 *Brome* and *University of Regina, supra* note 59. See also *Ahmad v CF Chemicals Ltd*., 2019 AHRC 5 at paras 179–181.

70 *Supra* note 62 at para 33.

71 See e.g. "What is Discrimination?" (2008), online: *Ontario Human Rights Commission* <onhr.on.ca> [perma.cc/8L9H-E8CF].

subsequently in sections 273.1 and 273.2 for further clarity.[72] Its earliest significant treatment in *R v Ewanchuk* incited controversy about the scope and parameters of the definition that persists to this day.[73] Judges and academics disapprove of the definition, and its current form has also brought about numerous additional negative externalities, such as low founding, charging, and conviction rates and underreporting of sexual assault.[74] Despite its decades-long consideration by Parliament in response to strong commentary from the judiciary and both public consultation and opinion, the definition remains far from settled.[75] Perhaps this is simply a reality for broad and significant concepts in life and law. However, decisively entrenching a definition should still be the ultimate goal, as it ensures consistency and predictability: two cornerstones of access to justice and the rule of law.

Second, let us reflect on the Canadian Observatory on Homelessness's "National Definition of Indigenous Homelessness in Canada". While the length of this definition is a paragraph, it is accompanied by a 40-page document that goes into detail about each element of the definition.[76] In order to develop this comprehensive definition, the Observatory undertook consultations with Indigenous scholars, front-line workers, community members, knowledge keepers, Elders, and those who have experienced homelessness first-hand or who work in the field of Indigenous homelessness.[77] The consultation pool consisted of over 50 Indigenous individuals and took place over a period of 18 months (from January 2016 to August 2017).[78] In the Observatory's report, its author, Professor Jesse Thistle, shares that the contributions ranged from brief suggestions to extensive input, but "all were valued".[79] Professor Thistle explains that as the Observatory members spoke with First Nations people, Métis people, and Inuit from across the country, 12 specific kinds of Indigenous homelessness came to the fore. In Professor Thistle's words,

> it was apparent that each person and community had experienced degrees of homelessness, and that each had endured them in different ways. […] the 12 dimensions can be layered […] to illustrate the scope and severity of an Indigenous individual's or community's homelessness, as well as to find solutions to their particular needs."[80]

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72 RSC 1985, c C-46. For a detailed breakdown of the law of sexual assault's evolution in Canada, see e.g. Martha Shaffer, "The Impact of the Charter of the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose" (2012) 57 SCLR (2d) 337.

73 *R v Ewanchuk*, [1999] 1 SCR 330; see e.g. Don Stuart, "Ewanchuk: Asserting 'No Means No' at the Expense of Fault and Proportionality Principles" (1999) 20 CR (5th) 39; Kwong-leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 Intl J Offender Therapy & Comp Crim 258.

74 Tang, *ibid*.

75 See e.g. *R v Seaboyer*, [1991] 2 SCR 577; Sean Fine, "Supreme Court ruling tries to clarify definitions of consent and credibility in sexual-assault cases" (14 May 2021), online: *Globe and Mail* <theglobeandmail.com> [perma.cc/96FE-P7H8].

76 For the full definition and all its elements, see Jesse Thistle, *Indigenous Definition of Homelessness in Canada* (Toronto: Canadian Observatory on Homelessness Press, 2017).

77 *Ibid* at 29.

78 *Ibid* at 4.

79 *Ibid* at 4.

80 *Ibid* at 29.

This process reflects another ideal in terms of creating a definition: a thorough and thoughtful consultation process. However, consideration of this definition is missing from federal policy and law.[81] Its absence from lawmaking discussions points to the equal importance of holding public consultations that draw upon the benefits of standpoint theory, and then taking the testimonies and suggestions into serious account.

Together, these two examples illustrate elements to aspire to in the process of creating definitions as well as cautionary realities to be aware of. The evolution of consent illustrates that even entrenched legislative definitions may be contested and inconsistently understood by courts if they are too broad or leave room for interpretation. The definition of Indigenous Homelessness shows that a conscientiously crafted definition loses significant value if those with "power" to define, recalling Professor Sheppard's discussion of standpoint theory, do not consider it. These examples also illustrate how general sociolegal concepts can, over time, transform into statutory (or policy) terminology. The same can be said for systemic discrimination—it is a sociolegal reality that has been codified (albeit inadequately) by certain provinces in their human rights legislation. Given the definition's presence in legislation, it is essential to conceptualize it as such, and question the purpose of its inclusion by drafters. Bearing these lessons as well as the elements of systemic discrimination in mind, I now turn to their specific application in the Yukon.

IV. RE-DRAFTING SECTION 12 OF THE YUKON *HUMAN RIGHTS ACT*

Section 12 of the *Act* reads "any conduct that results in discrimination is discrimination."[82] How are claimants, staff at the Yukon Human Rights Commission ("Yukon Commission"), administrative decisionmakers, and reviewing courts meant to interpret this vague definition? As it stands, the Yukon Panel of Adjudicators (the "Panel") has interpreted the provision inconsistently. In *Hayes v Yukon College*, the Panel stated that "this section addresses circumstances where formal or informal administrative policies or procedures result in discrimination, causing such policies or procedures to be impugned."[83] However, this definition was never again cited by the Panel. In another case, the Panel stated that the *Act* "empowers the Panel to determine issues of discrimination based on a prohibited ground, systemic discrimination (by policy/practice), harassment, reasonable accommodation, remedy and costs."[84] Yet, the decisionmaker did not elaborate on how it would, or should, make a determination on the basis of systemic discrimination. In other decisions, the term "systemic discrimination" is evoked without definition.[85] Overall, since 1990, the term "systemic discrimination" has only appeared in four Panel decisions.

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81 For example, any consideration of Indigenous Homelessness is missing from the National Strategy for Housing. See Melanie Redman, "Defining and measuring an end to homelessness: Considerations for the National Housing Strategy", online: *Homeless Hub* <homelesshub.ca> [perma.cc/X8K9-UGY5].

82 *YHRA, supra* note 5.

83 *Hayes v Yukon College*, 2008 CanLII 93215 at para 49 (YK HRC).

84 *Malcolm v Yukon College,* 2011 CanLII 152503 at Appendix B (YK HRC).

85 See e.g. *Campbell v Yukon Housing Corp*, 2005 CanLII 94014 (YK HRC); *Nukon-Blake v Yukon (Justice)*, 2016 CanLII 154164 (YK HRC) at para 6.

The *Act* first came into force in 1986 and has since been amended eight times.[86] Section 12 remains unchanged since the original version of the *Act* was assented to in 1987.[87] In 2008, the Yukon legislature struck a special committee, the Select Committee on Human Rights, which was charged with reviewing and reporting to the Assembly its findings and recommendations regarding public opinion on legislative options for amending the *Human Rights Act*.[88] Upon conducting in-person hearings across the territory and soliciting written submissions, the committee released a report in which it unanimously recommended that "language in the Act be revised to reflect clarity on the issue of systemic discrimination."[89] Despite this recommendation and numerous suggestions in the form of written submissions, section 12 of the *Act* was not re-formulated in 2008 nor in any of the subsequent amending processes.

In considering how to re-formulate section 12, I wish to highlight some of the submissions the Committee received in 2008. Informed and influential groups such as the Yukon Public Service Commission, the Yukon Anti-Poverty Coalition, the Public Service Alliance Equity Seeking Committee, and the Yukon Human Rights Commission (which operates independently of the Panel) confirmed the lack of clarity and utility in section 12. They proposed alternative formulations that drew on the common elements from Part III. For example, the Yukon Commission proposed a change that was consistent with the Abella Report's definition in *CN*.[90] The Yukon Public Service Commission provided a formulation which outlined certain facets of systemic discrimination (impact, perpetuation of disadvantage) and subsumed it under the general definition of "discrimination" set out in sections 7, 8, 9, and 15 so that it could apply under the general area-ground-nexus test.[91]

Following the logic of standpoint theory, these submissions illustrate the value that public consultation and participation bring to legislative drafting. In the Yukon, groups with rich experiential knowledge about the population are willing to engage in the process to help produce legislation that will, in turn, be intelligible and accessible to Yukoners, especially those who may face systemic discrimination.[92] Unfortunately, the government did not adopt the Committee's recommendation, which was informed by these submissions. If successful, the Yukon may be able to derive the benefits of a complete definition from the submissions and avoid the pitfalls that the definition on Indigenous Homelessness faces.

In assessing the potential for a new formulation of section 12 through the expanded capabilities framework, two realizations come to bear. First, if the legislature were to adopt the Yukon Public Service Commission's proposal to include systemic discrimination under general discrimination as set out in sections 7, 8, 9, and 15 of the *Act*, claimants would be able to more easily identify whether their situation of systemic discrimination falls within the

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86 Select Committee on Human Rights, *supra* note 25.

87 *Ibid*. Note that the systemic discrimination provision used to be s. 11 but in 1998 it was shifted to s. 12.

88 *Ibid*.

89 Yukon Legislative Assembly, "Report of the Select Committee on Human Rights" (November 2008) at 17, online (pdf): *Yukon Legislative Assembly* <yukonassembly.ca> [perma.cc/426W-6HE3].

90 *CN*, *supra* note 63.

91 Select Committee on Human Rights, *supra* note 26 at 16-17 ("PSC Report").

92 Sheppard, *supra* note 47.

ambit of the *Act*. Given that the area-ground-nexus test is entrenched in Canadian human rights jurisprudence and in the Yukon Commission's activities, its application to systemic discrimination should not be onerous.[93]Accessing it will not be overly complicated because its logic falls in line with the complaints process that is familiar to claimants and administrative actors. Moreover, a reformed section 12 will also curtail the vastly inconsistent interpretations of the provision currently in the jurisprudence. This clarity, bolstered by the existing test, implies that the Panel and reviewing courts will likely cite the same definition consistently, and claimants will thus be able to rely, even unconsciously, on more predictable jurisprudence. The facility of associating systemic discrimination with the existing test for discrimination and the consistency that will come out of a concrete definition both lend themselves to claimants' capability and meaningful choice. A familiar test and foreseeable definition would not only allow for complainants to engage with a more informed option when deciding whether or not to submit a human rights complaint, but also better guide decision-makers at the Panel stage. As a result, we may observe legal empowerment in action as well as an increase in access to a justice system in which one can put a legislative name to an experience and seek recourse, even if success is not guaranteed. The predictability and agency imbued in this sequence lends itself to knowledge of and confidence in the administrative legal system and a resultant strengthening—or at least preservation—of the rule of law.

V. THE PLACE OF LEGISLATIVE DEFINITIONS IN THE ACCESS TO JUSTICE MATRIX

A. Reprisal: What kind of access? And what kind of justice?

In Part II, I explored the particular "kind" of access and justice that legislative drafting can bring about. Recalling Sen's capabilities approach and its relationship to the idea of meaningful access to justice, I now ask what *kind* of access and what *kind* of justice a re-drafting of section 12 would afford to Yukoners. In terms of access, I re-emphasize that it is a narrow variety of access. A reformed section 12—one that contains clearer descriptive elements of what exactly systemic discrimination looks and feels like in intelligible language—could provide a meaningful "chance" at making use of the Yukon Commission and the Panel.

When considering access to an administrative process like the human rights complaint mechanism as it stands, Sen's condition that "capabilities and the opportunity aspect of freedom […] have to be supplemented by considerations of fair processes and the lack of violation of people's right to invoke and utilise them" remains unfulfilled.[94] While an improved legislative definition may bring the process closer to realizing this condition, it is no panacea. Although a clearer definition may address poor drafting and inoperability , other access to justice issues in the administrative space (such as delay, lack of resources, understaffing and

93 YHRC has produced educational materials about it, all employees are familiar with it and can explain it to potential complainants. See "About Human Rights", online: *Yukon Human Rights Commission* <yukonhumanrights.ca> [perma.cc/KQQ5-WAXJ].

94 Sen, *supra* note 33 at 157.

backlog) still figure in the analysis.[95] By making the definition of systemic discrimination practicable, the possibility arises that more complaints will be accepted into the administrative process than is presently the case. It is unlikely that the system, in its current form, would be able to support them in a timely and thorough manner.[96] Thus, even if an improved definition becomes a real option for potential claimants, other structural improvements need to occur in order for the definition reform to be meaningful. If a more systemic overhaul does not accompany this change in definition, the drafting reform could, in a sense, cause more harm than good.

The methods I propose relate to "accessing" a state-created system that functions based on a limited statute. This access requires engaging with the narrow confines of the territorial human rights adjudicative system. The justice that it serves is of a specific kind: the result of the Yukon human rights complaint process is either a settlement or Panel-ordered damages which can take the form of financial compensation, specific performance (such as an apology or reinstatement), or some combination of the two.[97] Although the proposal at hand deals with a very particular kind of access to a narrow conception of justice, it does stand the test of Sen's public scrutiny because it is but one of many options, and wielding the power of choice is fundamental to the capability approach.

When put together, the nature of the access to justice available to claimants as a result of a reformed section 12 draws on principles of legal empowerment. Although the argument for re-drafting section 12 does not pertain solely to legal empowerment of the poor, it draws on Banik's reference to "civic agency" and ensuring that those who may be subject to systemic discrimination can access mechanisms for seeking recourse, being heard, or pursuing justice in this forum. Banik frames legal empowerment as the poor having protection against exploitation (among other harms) and equal opportunity to access economic opportunity. We can apply the same logic of "access" to administrative justice instead of to markets.[98] In fact, Banik himself writes that access to justice and the rule of law are considered the "fundamental and enabling framework" for the realizing other pillars of legal empowerment, namely property, labour, and business rights. This "core bundle" of rights cannot be fully effective unless there is a realistic option of enforcing them, which brings us back to the notion of "meaningful" access to justice.[99] Only through an intelligible and knowable system can we

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95 See e.g. David Stratas, "Decision-Makers under New Scrutiny: Sufficiency of Reasons and Timely Decision-Making" (Paper delivered at the CIAJ Roundtable, Toronto, 3 May 2010), [published on CIAJ website]; Terence Ison, "Administrative Law – The Operational Realities" (2009) 22 Can J Admin L & Prac 315; Paola Loriggio, "Experts Say Staffing Shortage Compounds COVID-19 Delays at Human Rights Tribunal", *Global News* (27 August 2020), online: <globalnews.ca> [perma.cc/BZ49-N7CB].

96 For further discussion on the pervasiveness of delay in administrative proceedings across Canada, see e.g. *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29; Frank Nasca, "Jurisdiction and Access to Justice: An Analysis of Human Rights Tribunal of Ontario-issued Notices of Intent to Dismiss" (2022) 35:3 Can J Admin L & Prac 253.

97 *YHRA*, *supra* note 5; "About Human Rights", *supra* note 93.

98 Dan Banik, "Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication" (2009) 1 Hague J Rule of Law 117 at 124.

99 *Ibid*.

realize legal empowerment—through agency and capability. Putting this theory into practice, a clearer and more operational definition of systemic discrimination, necessarily crafted by Yukon-based stakeholders who are part of the community, draws on the interrelationship between human capability and empowering those who may not currently be able to access the human rights adjudicative system.

To support this argument, I point to a parallel area where a clear legislative definition has helped increase access to justice (within the limited context outlined above). One example is the codification of the definition of strategic lawsuits against public participation ("SLAPP") in Ontario and Québec. SLAPPs refer to judicial practices of an enterprise or institution going to tribunals and courts in an attempt to neutralise or censure individuals, social groups, or collectives engaged in publicly denouncing their activities.[100] When corporate actors began to use SLAPPs to intimidate smaller parties who wanted to draw attention to their practices, the two provincial governments codified comprehensive definitions of the practice and how to identify it in their respective civil procedure statutes.[101] As a result, both the courts and parties can now easily identify the constitutive elements of a SLAPP in each province, and ambiguity on the matter is essentially eliminated. However, much like with the definition of systemic discrimination, codification is the first step. Upon entrenching a practical and comprehensive definition, the next challenge is educating the public on its existence and use. This next step warrants in-depth research of its own, and I do not wish to skim over it in this paper, whose sole focus is the codification and accessibility of legislative definitions.

The codification of SLAPPs illustrates how codification increases knowability and use by claimants and courts. Once legal actors are aware of a concrete legislative definition, they may use it to label an act or experience and may choose to act on it by means of an administrative or legal proceeding. As such, the process and result of "defining" finds its place in the access to justice matrix by imbuing meaningful choice, derived from lived experience and knowledge, into the statutes which govern us.

CONCLUDING THOUGHTS: LESSONS CANADA CAN LEARN FROM THE YUKON

In exploring legislative defining in the Yukon, I believe that the rest of Canada can learn from the Yukon, a territory arguably ahead of its time in enshrining a provision on systemic discrimination in its human rights legislation as early as 1987. Although I have spent many words arguing that the Yukon's definition of systemic discrimination requires re-drafting, I must acknowledge that the territorial government has taken steps towards more inclusive human rights legislation that other provinces and territories in our country. Ontario, British Columbia, and Québec, namely, have not. The law has a reputation for being slow to adapt, but the Yukon illustrates that it does not have to be this way. While section 12 of the *Act*

100 See e.g. Gouvernement du Québec, "Les poursuites stratégiques contre la mobilisation publique: les poursuites-bâillons (SLAPP)" (2007); Pamela Shapiro: "SLAPPs: Intent or Content? Anti-SLAPP Legislation goes International" (2010) 19:1 RECIEL 14.

101 *Courts of Justice Act*, RSO 1990, c C-43, s. 137.1; *Code of Civil Procedure*, C-25 arts 51, 54.

no doubt has a long way to go before it can qualify as a practicable, comprehensive, and accessible provision for combatting systemic discrimination, there is something to be said for its mere presence in the *Act*, as well as the community's awareness of and desire to repair its flaws. While Canadians often look to the populous provinces as a "model" for governance, this case study illustrates that the nation can learn something from its Northern territories.

The story of systemic discrimination in the Yukon *Human Rights Act* is one of promise and potential. Its existence is the prerequisite for a lesson to be learned about the importance of legislative drafting and definitions. Defining in a comprehensive and practical manner that is guided by community consultation allows us to draft human rights legislation that gives potential claimants the chance at a meaningful and well-informed choice to engage in human rights adjudication. This choice is a powerful one. It is representative of accessibility, agency, and trust in the administrative system, without which the rule of law would falter.

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