



APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

ARTICLES

The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate

Rachel Gutman

The *Water Sustainability Act*, Groundwater Regulation, and Indigenous Rights to Water: Missed Opportunities and Future Challenges

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No Matter How Small: Child Witnesses in Canadian Criminal Trials

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Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada

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Regulatory Competition and the Growth of International Arbitration in Singapore

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PREFACE

Kean Silverthorn and Christopher VanBerkum

Earlier this year, at a get-together similar to those that many lawyers will recall fondly—and those outside of law school would look at and wonder how some students get anything done—the discussion shifted to *Appeal*'s most recent Call for Submissions.

Students started discussing papers they recently read and case commentaries they thought were interesting. They also talked about the articles they read in *Appeal*. And then they talked about their own research. Recalling those discussions, one student talked about a paper she had in progress on environmental law and taxation; another discussed his work on public policy and remedies. Those students—and others—described their work with passion and precision and as advocates; they cut through the noise all around us, commanding attention and advancing debate and discussion.

Those are the sorts of authors (and articles) the Editorial Board seeks out when publishing *Appeal*; and after blinding the submissions sent to *Appeal*, the Editorial Board found seven authors who were able to command our attention—and eight articles we wanted to share with you.

This volume includes a paper on the Site-C hydroelectric project by Rachel Gutman, who asserts Treaty 8 must be understood with respect to the perspective of the signatory First Nations, which would put the decision allowing that hydroelectric project to proceed on “shaky ground.”¹ This volume also presents a paper on British Columbia's recently enacted *Water Sustainability Act*, and Kathryn Gullason argues that this legislation misses an opportunity for British Columbia to retire its colonial-era water regime and to recognize First Nations' water rights.²

Although this volume's articles on children appear completely dissimilar, reading them together, they reveal a common conclusion: legal practitioners must listen to children. Jeffrey Nels Westman acknowledges that the law has had difficulty listening to minors, though they can be accommodated, and they can be accepted as truth-tellers at trial. And addressing *Carter v Canada (Attorney General)* (“*Carter*”), Jessica Bond's article acknowledges recent amendments to the *Criminal Code* are not necessarily constitutional, as the regulatory regime adopted as a response to *Carter* could conflict with children's already accepted rights to life, liberty, and security of the person.³

This volume includes two articles by Sarah Chaster. In the first, she addresses recent developments on mandatory minimum sentencing in Canada, and she suggests Parliament should amend the *Criminal Code*, adopting a “legislative exemption clause” as a response

1 Treaty No 8 (21 June 1899), online; <www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853> archived at <<https://perma.cc/38TS-NMZL>>; Rachel Gutman, “The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate” (2018) 23 *Appeal* 3 at 19, 27.

2 *Water Sustainability Act*, [SBC 2014] c 15.

3 *Carter v Canada (Attorney General)*, 2015 SCC 5.

to that sentencing scheme's problems.⁴ In the second, she addresses the Charbonneau Commission and organized crime and corruption. In that article, she suggests that public inquiry provides an opportunity to analyze and assess the public procurement process in Quebec's construction industry—and that there is potential for real reform to those public procurement processes.

Naomi J. Krueger argues that British Columbia must modify the *Freedom of Information and Protection of Privacy Act* to permit actions against the provincial government.⁵ Surveying privacy breaches at the Ministry of Health and Ministry of Education, she suggests that there must be remedies available for public sector privacy breaches as there are for private sector privacy breaches.

And this volume concludes with a globally-minded article by Elizabeth MacArthur, who reflects on how Singapore has become a leader in international arbitration.

The Editorial Board thanks those authors for sharing their articles. Authoring a paper for publication is not an easy task. When those get-togethers end, the frustrating work of editing, updating, cutting, and clarifying takes place. But these authors were professional and proactive, and the Editorial Board appreciates all their efforts.

The Editorial Board also thanks *Appeal's* sponsors. It is only through their contributions that *Appeal* is able to promote the work of those authors—and the student scholarship that makes *Appeal* an interesting and informative read.

The Editorial Board thanks its committed volunteers.

And the Editorial Board thanks its Faculty Advisors—Professor Ted McDorman and Assistant Professor Supriya Routh. Their assistance and advice allowed the Editorial Board to publish those authors' articles appropriately.

4 *Criminal Code*, RSC 1985, c C-46; Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 *Appeal* 89 at 105.

5 *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165.

ARTICLE

THE STORIES WE TELL: SITE-C, TREATY 8, AND THE DUTY TO CONSULT AND ACCOMMODATE

Rachel Gutman *

CITED: (2018) 23 *Appeal* 3

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* Rachel Gutman recently completed her JD at the University of Victoria. She thanks Professor John Borrows (University of Victoria, Faculty of Law) for his advice and assistance with an initial draft of this paper—and the Editorial Board of *Appeal* for their revisions to that draft. The opinions expressed in this paper are those of the author alone.

“The truth about stories is that’s all we are.”

Thomas King, *The Truth About Stories*¹

INTRODUCTION

The Dane-zaa have lived on their traditional territories, the Dane-zaa-nané (“the people’s land”), since time immemorial.² The territory extends from the lands east of the Rocky Mountains in what is now Alberta to the Peace River Valley in what is now northeastern British Columbia and northwestern Alberta.³ The Dane-zaa creation story describes the unfolding of time and space and begins with an enormous body of water covering the world. The creator, Sky Keeper, draws a cross on the water as a way of establishing the four directions, and then sends each of the animals beneath the water’s surface to bring back earth. From the earth brought back under the nails of Muskrat, Sky Keeper tells the land to grow, until it eventually becomes so large that it can support both humans and animals.⁴ The stories of archeologists and geologists also tell a parallel story of creation that place the Dane-zaa on the Dane-zaa-nané territory at a time beyond memory, when ice sheets covering most of what is now called Canada began to melt and recede into lakes and rivers, roughly 10,500 years ago.⁵

The connection of the Dane-zaa to the land extends beyond magnitude of time. The Dane-zaa creation story, and other stories passed down over history represent legal orders governing the relationship between the Dane-zaa and other living and non-living beings within their territory. While these legal traditions may have ancient roots, the laws of the Dane-zaa and other Indigenous peoples⁶ are not relegated to the past.⁷ Indigenous legal orders pre-exist and survive the arrival of Europeans and declarations of Crown sovereignty; and today, Canada is a legally pluralistic state, encompassing civil law, common law, and Indigenous legal traditions.⁸ As such, the laws of Indigenous peoples remain relevant to all Canadians.⁹

Despite the pre-existence and continuation of Indigenous legal orders, the Crown in right of Canada and the Canadian common law courts tell a very different story of the relationship between the Dane-zaa and the Dane-zaa-nané territory than conveyed by the creation story described above. The predominance of the Crown’s perspective in common law jurisprudence has brought drastic changes to the land and way of life of the Dane-zaa people.

1 Thomas King, *The Truth About Stories: A Native Narrative*, 1st ed (Toronto: House of Anansi Press, 2003) at 1.

2 Robin Ridington & Jillian Ridington, *Where Happiness Dwells: A History of the Dane-Zaa First Nations* (Vancouver: University of British Columbia Press, 2013) at 3.

3 *Ibid.*

4 *Ibid* at 11.

5 *Ibid* at 68.

6 This paper will shift between “Aboriginal,” “Indigenous,” and “First Nation” depending on context. “Aboriginal peoples” is a colonial legal term referring to the “Indian, Inuit and Métis peoples of Canada,” see section 35(2) of the *Constitution Act, 1982*, *infra* note 15. This paper will use the term “Aboriginal” when referring to constitutional rights or colonial laws or when quoting from jurisprudence. “Indigenous,” on the other hand, is a term used by many communities to define themselves. “Indigenous law” refers to the legal orders and traditions of Indigenous peoples. This paper will use the term “Indigenous” where it is inappropriate to refer to Indigenous peoples or law through the lens of Canadian colonial law; see Gordon Christie, “‘Obligations’, Decolonization and Indigenous Rights to Governance” (2014) 27 Can JL & Jur 259 at note 1. Finally, this paper will use the term “First Nation” when referring to the Treaty 8 Nations who refer themselves as First Nations.

7 John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10.

8 *Mitchell v MNR*, 2001 SCC 33 at para 10.

9 Borrows, *supra* note 7 at 10.

In 1910 and 1914, Prophet River First Nation and Moberly Lake First Nations, descendants of the Dane-zaa, entered into Treaty 8, one of the eleven post-confederation numbered treaties signed between the Crown and Indigenous Nations between 1871 and 1923.¹⁰ For the Federal Government, the purpose of Treaty 8 was “to secure the relinquishment of the Indian title,” in order to facilitate the influx of settlement and mining in the western territories.¹¹ Like all numbered treaties, the written text of Treaty 8 contains an “extinguishment clause,” that purports to “CEDE, RELEASE, SURRENDER AND YIELD UP” all “rights and titles and privileges” of First Nation signatories to the lands described in the treaty.¹² In exchange, the document writes:

[T]he said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government [...] and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.¹³

While this paper does not purport to present the content of the laws of the Dane-zaa, it is difficult to imagine that, with a stroke of a pen, a single document written in a foreign language, containing laws unknown to the Dane-zaa, could end a multi-millennia relationship between the Dane-zaa and the Dane-zaa-nané. Nonetheless, Canada’s highest courts have relied on the written terms of Treaty 8 to interpret the following story of the treaty agreement: in exchange for surrender, First Nations signatories were given treaty rights to hunt, fish, and trap throughout the territory, which can be exercised until the Crown uses its treaty right to take up lands and put them to “an incompatible use” with the expression of treaty rights.¹⁴ Although the Crown has a right to take up lands, the treaty rights of signatory nations are constitutionally enshrined in section 35(1) of the *Constitution Act, 1982*.¹⁵ As such, they cannot be infringed without Crown justification.¹⁶

In the 2015 decision of *Prophet River v British Columbia* (“*Prophet River*”),¹⁷ the British Columbia Supreme Court (“BCSC”) expanded the Crown’s story of Treaty 8, writing that: in taking up lands for the purpose of the construction of the Site-C Hydroelectric Dam (“Site-C”), the Crown is not obligated under section 35(1) of the *Constitution Act, 1982* to determine whether a taking will infringe treaty rights; though if it was, it was not obligated to justify its actions before proceeding with the proposed taking. Rather, the BCSC suggests that the written text of Treaty 8 provides the Crown with an unfettered right to take up lands, limited only by a process of consultation.¹⁸ Any substantive limitation on the Crown’s right to take up lands appears to lie with the affected nation in bringing an action for infringement.¹⁹ The British Columbia Court of Appeal (“BCCA”) affirmed this ruling in 2017.²⁰ This paper will focus its analysis on the reasoning of the earlier BCSC decision.

10 *Prophet River First Nation v British Columbia (Environment)*, 2015 BCSC 1682 at paras 7-10 [*Prophet River*].

11 René Fumoleau, *As Long As This Land Shall Last*, 2nd ed (Calgary: University of Calgary Press, 2004) at 64.

12 Treaty No 8 (21 June 1899), online; <www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853> archived at <<https://perma.cc/38TS-NMZL>> [emphasis in original].

13 *Ibid.*

14 *R v Badger*, [1996] 1 SCR 771 at para 56 [*Badger*].

15 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

16 *Badger*, *supra* note 14 at para 85.

17 *Prophet River*, *supra* note 10.

18 *Ibid* at paras 146-153.

19 *Ibid* at para 133.

20 *Prophet River v British Columbia (Minister of the Environment)*, 2017 BCCA 58.

The holding in *Prophet River* has allowed the province of British Columbia to commence with the construction of Site-C, which will flood thousands of hectares of the traditional territory of the Dane-zaa in the Peace River Valley. Significant construction is already underway. While preparing this paper for publication, Premier John Horgan announced his government's intention to continue with the construction of Site-C, citing the CAD3.9 billion dollars already committed to the project by the previous Liberal government.²¹ The Crown has thus been permitted to cause irreversible impacts to the way of life of the Dana-zaa and, arguably, infringe Treaty 8 without justification, a result prohibited by section 35(1) of the *Constitution Act, 1982*.²²

The decision in *Prophet River* relies on a story of Treaty 8 as extinguishing a 10,500-year legal relationship between the Dane-zaa and Dane-zaa-nané territory for “rights” devoid of their former connection to the land and other living beings. Although the written terms of the treaty are clear, they represent only one side of the story of Treaty 8. This paper will show that the Dane-zaa signatories who entered Treaty 8 did not view treaty rights as general guarantees of the ability to hunt, fish, and trap subject to abrogation at the whim of the Crown. Rather, Treaty 8 was entered in order to ensure the continuity and way of life of the Dane-zaa.

Treaties represent mutual promises and obligations and are to be interpreted with regard to the perspective of both parties.²³ An interpretation of Treaty 8 that considers the perspective of both parties suggests that the Crown does not have an unlimited right to take up lands under Treaty 8. The right to take up lands cannot be exercised when doing so will impact the continuity of Dane-zaa way of life and culture, as reflected in the treaty rights to hunt, fish, and trap. To give effect to this perspective, this paper will argue that in taking up lands that risk infringement of Treaty 8 First Nations' treaty rights, section 35(1) of the *Constitution Act, 1982* requires the Crown to determine whether the taking will result in an infringement of Treaty 8.²⁴ If infringement will occur, the Crown is then required to obtain the consent of the respective nation, and if absent, justify its action using a two-part test articulated by the Supreme Court of Canada (“SCC”) in *R v Sparrow* (“*Sparrow*”)²⁵ prior to the taking.²⁶ These obligations are best achieved by expanding the duty to consult to include a determination of infringement.

This paper will proceed in three parts. Part I will provide an introduction to the jurisprudence on section 35(1), the *Sparrow* test for infringement, and the duty to consult and accommodate. Next, Part II will describe how the court in *Prophet River* applied this case law to the context of the Site-C project. It will delve into the reasoning behind the decision and the court's interpretation of Treaty 8. Finally, Part III, will contrast the court's interpretation of Treaty 8 with the First Nation signatories' own understanding of the meaning and scope of the rights enshrined in the treaty. This paper will then argue that, in order to better reflect the perspective of signatory nations and protect treaty rights in the context of a taking up of land, the duty to consult ought to be expanded to include a determination of infringement.

21 Office of the Premier, “Government will complete Site-C construction, will not burden taxpayers or BC Hydro customers with previous government's debt,” (11 December 2017) online: <<https://news.gov.bc.ca/releases/2017prem0135-002039>> archived at <<https://perma.cc/8L6A-EKUL>>.

22 *Badger*, *supra* note 14 at para 56.

23 *R v Marshall*, [1999] 3 SCR 456 at para 14 [*Marshall*].

24 Although this paper discusses Aboriginal rights as limitations on Crown sovereignty, it acknowledges that this rests on a problematic assumption of the legitimacy of Crown sovereignty.

25 *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

26 *Ibid* at 1113-1114.

I. SECTION 35(1) INFRINGEMENT AND THE DUTY TO CONSULT

This paper will begin by first providing an introduction to the sources of Aboriginal and treaty rights and the common law jurisprudence dealing with section 35(1) infringement and the duty to consult.

A. Aboriginal and Treaty Rights and Establishing Proof

On April 17, 1982, Canada became the first country in the world to enshrine the rights of Indigenous peoples in its constitution.²⁷ Section 35(1) of the *Constitution Act, 1982* states:

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.²⁸

There are two rights protected by section 35(1): Aboriginal rights and treaty rights. The source of Aboriginal rights is the historic and continued Indigenous occupation of the lands that make up what is today called Canada.²⁹ In contrast, treaty rights derive from legally binding and solemn agreements entered into between the Crown and Indigenous Nations.³⁰ In order to benefit from a section 35(1) right, claimants must *prove* the existence of an Aboriginal or treaty right. As will be described in more detail below, whether a right is proven or asserted has significant effects on the Crown's ability to exercise its purported sovereignty.

Aboriginal and treaty rights are not general rights, but specific to the particular group claiming the right.³¹ It is insufficient for a claimant Indigenous Nation to simply assert their existence; the Canadian common law requires that they be recognized either by court declaration or through the process of treaty negotiation. In a legal claim concerning the existence of an Aboriginal right, the burden falls on the claimant to demonstrate that the "activity" is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."³² As the courts have held that the Crown could extinguish Aboriginal rights prior to the constitutionalization of section 35(1) in 1982, the court must then determine whether the right in question has been extinguished.³³ The burden to prove extinguishment falls on the Crown.³⁴

Treaties represent the exchange of mutual rights and obligations between Indigenous Nations and the Crown. Thus, the rights enshrined in treaties are contextual and specific to the terms of the respective treaty agreement. However, the courts have held that like Aboriginal rights, the Crown was capable of unilaterally abridging treaty rights prior to 1982.³⁵ Thus, proof of treaty rights entails the consideration of the existence and content of a treaty agreement and a determination of whether the rights have been extinguished.

The scope and content of the rights enshrined in treaties are delineated using special interpretive principles articulated by the courts. Although these principles of interpretation will be discussed in more detail in Part III, a few introductory points are necessary. In the

27 Jack Woodward, *Native Law* (Toronto: Carswell, 1982) (loose-leaf), at 5-5.

28 *Constitution Act, 1982*, *supra* note 15.

29 *R v Van der Peet*, [1996] 2 SCR 507 at para 30 [*Van der Peet*].

30 *R v Sioui*, [1990] 1 SCR 1025.

31 *Van der Peet*, *supra* note 29 at para 69.

32 *Ibid* at para 46.

33 *Ibid* at para 2.

34 *Sparrow*, *supra* note 25 at 1099.

35 *Badger*, *supra* note 14 at para 41.

context of the historical treaties, such as the numbered treaties, written treaty documents do not necessarily represent the full content of the agreements. Treaty terms were often negotiated and agreed to orally, before Indigenous signatories assented to the written agreement.³⁶ The written agreements were drafted by officials in the Canadian government and were not translated into the languages of signatory nations.³⁷ Thus, the written text of Treaty 8, described in the Introduction, does not record the full extent of the treaty agreement and must be understood in relation to the oral promises made by the Crown and First Nations.

For the purposes of this paper, it is important to note that the treaty rights of the Prophet River First Nation and Moberly Lake First Nations under Treaty 8 are *proven* rights. In 1910 and 1914, both nations exchanged mutual and binding promises and obligations with Canada. The written treaty agreement and oral promises made by the parties are evidence of these promises. The Treaty 8 rights to hunt, fish, and trap have been affirmed by numerous courts and have been held to be unextinguished.³⁸ Although this paper will challenge the court's interpretation of the scope of those Treaty 8 rights, and in particular, the meaning of the "extinguishment clause," this does not suggest that the rights themselves are asserted or unproven.

B. Sparrow Justification Test and the Duty to Consult and Accommodate

In the seminal *Sparrow* decision, the SCC held that any action, which *prima facie* infringes an Aboriginal right needs to be justified by the Crown.³⁹ That is, Aboriginal rights serve as limitations on the sovereignty of the Crown. Before moving into the test for justification, the first question to be answered in an action claiming infringement is whether the proposal constitutes a *prima facie* infringement of an Aboriginal right. As will be discussed in more detail later, the court held that this necessarily involves an analysis of the characteristics of the rights at stake, with deference given to the Aboriginal perspective on their meaning.⁴⁰

In determining whether the right has been interfered with to such an extent as to constitute a *prima facie* infringement, the court identified three questions to be asked: "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?"⁴¹

If a *prima facie* infringement is found, the Crown is barred from proceeding with the proposed action unless it can meet the two-part justification test articulated in *Sparrow*. First, the infringement of the Aboriginal right must be in furtherance of a compelling and substantial legislative objective.⁴² Second, the infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.⁴³ The government has a special relationship of trust and responsibility in respect to Aboriginal peoples. A proposed action must be in line with this responsibility.⁴⁴ Furthermore, at the second stage of the justification analysis, the court must ask itself additional questions, which depend on the circumstances of the inquiry, including:

36 *Ibid* at para 52.

37 *Ibid*.

38 See *Badger*, *supra* note 14; *Prophet River*, *supra* note 10; *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 [*West Moberly*].

39 *Sparrow*, *supra* note 25 at 1078.

40 *Ibid*.

41 *Ibid* at 1112.

42 *Ibid* at 1113.

43 *Ibid* at 1113-1114.

44 *Ibid* at 1114.

whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.⁴⁵

In *R v Badger* (“*Badger*”),⁴⁶ a case involving three members of Treaty 8 First Nations charged with illegal hunting, the SCC held that infringements of rights guaranteed under Treaty 8 require justification by the two-part *Sparrow* test.⁴⁷ Thus, like Aboriginal rights, treaty rights also serve as a limitation on the sovereignty of the Crown. Although the court noted the different origins of Aboriginal and treaty rights, it held that their *sui generis* nature and explicit recognition in section 35(1) of the *Constitution Act, 1982* supported a common approach to infringement.⁴⁸

Notably, the court held that, while Treaty 8 guaranteed the rights to trap, hunt, and fish, Treaty 8 also imposed two limitations on these rights. First, there was a geographic limitation expressed explicitly in the treaty terms: “saving and excepting such tracts as may be required or taken up from time to time.”⁴⁹ The court wrote that signatories would have understood the expression of their rights as being limited to those geographic areas that had not been put to a visible and incompatible use with the ability to hunt, trap, or fish.⁵⁰ Second, the court noted that under the written text of the treaty, the rights to hunt, fish, and trap were subject to “such regulations as may from time to time be made by the Government of the country.”⁵¹ The court held that signatories would have understood the treaty as enabling the Crown to limit their treaty rights with regulations passed for the purpose of conserving game.⁵²

While Treaty 8 enabled the Crown to pass regulations in respect to the conservation of game, the court in *Badger* held that the Alberta licensing scheme imposed on all First Nations hunters infringed Treaty 8 by going beyond the regulatory power contemplated by the parties at the time the Treaty was entered and thus required justification.⁵³ However, the court did not discuss whether geographic limitations on the exercise of treaty rights might under certain circumstances also constitute an infringement of treaty rights. That is, might a taking by the Crown that puts land to an incompatible use with the expression of a treaty right infringe section 35(1) of the *Constitution Act, 1982* and require justification under *Sparrow*?

In 2005, the SCC held in *Mikisew Cree First Nation v Canada* (“*Mikisew Cree*”)⁵⁴ that a Crown taking of land under Treaty 8 does not constitute a *prima facie* infringement of treaty rights requiring justification.⁵⁵ Rather, the court held the Aboriginal rights of Treaty 8 First Nations were “surrendered and extinguished, and the Treaty 8 rights [...] expressly limited to lands not ‘required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.’”⁵⁶ Although not every taking will amount to an infringement of Treaty 8, the court in *Mikisew Cree* held that the Crown must

45 *Ibid* at 1119.

46 *Badger*, *supra* note 14.

47 *Ibid* at para 73.

48 *Ibid* at para 79.

49 *Ibid* at para 40.

50 *Ibid* at para 58.

51 *Ibid* at para 70.

52 *Ibid*.

53 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 43 [*Haida Nation*].

54 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree*].

55 *Ibid* at para 31.

56 *Ibid* [emphasis removed].

consult, and where necessary, accommodate an affected Treaty 8 First Nation prior to proceeding with the taking. That is, the court held that the duty to consult framework articulated in *Haida Nation v British Columbia* (“*Haida Nation*”)⁵⁷ applied to a taking up of land under the treaty.

In the context of unproven but asserted Aboriginal rights, the SCC held in *Haida Nation* that the Crown has a duty to consult and, in some circumstances, accommodate Aboriginal peoples when “the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”⁵⁸ The duty to consult is grounded in the concept of the honour of the Crown. The honour of the Crown requires that, “in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.”⁵⁹ Central to the duty to consult is the goal of reconciliation between Canada and Indigenous Nations.⁶⁰

In *Haida Nation*, the SCC found that the content of the duty to consult exists on a spectrum. That is, the precise requirements will vary depending on the strength of the case supporting the existence of an Aboriginal right and the seriousness of the potential adverse consequences to the right claimed. Where the claim to an Aboriginal right or title is weak and the potential for infringement unlikely, the Crown may only be required to give notice to the impacted group. When a strong *prima facie* claim to a right exists and the potential risk of infringement high, the Crown will be required to undergo “deep” consultation. This may include opportunities for the respective group to participate in the decision-making process.⁶¹

The court was clear in *Haida Nation*: although the Crown may have a duty to consult in the pre-proof context, “[t]he Crown is not rendered impotent.”⁶² That is, unlike proven Aboriginal rights, whose infringement must be justified, the duty to consult is a procedural safeguard that does not limit the sovereignty of the Crown. Even at the deep end of the spectrum, the duty to consult does not give an Aboriginal group a right to “a veto over what can be done with land pending final proof of the claim.”⁶³ This is true irrespective of the harm to the asserted right or the strength of the rights claim. Where a strong *prima facie* case exists for a claim to an Aboriginal right and the potential to affect the right significant, the Crown may accommodate “Aboriginal concerns” by, “taking steps to avoid irreparable harm or to minimize the effects of infringement.”⁶⁴ However, the court was clear that the term “accommodation” in the pre-proof context does not require a duty to agree but is “an attempt to harmonize conflicting interests.”⁶⁵

Citing the 1997 decision of the court in *Delgamuukw v British Columbia* (“*Delgamuukw*”),⁶⁶ the court acknowledged the only circumstance in which the Crown might be required to obtain consent in the consultation process was in the context of established rights, “and then by no means every case.”⁶⁷ However, as will be discussed in greater in detail

57 *Haida Nation*, *supra* note 53.

58 *Ibid* at para 35.

59 *Ibid* at para 17.

60 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 1.

61 *Haida Nation*, *supra* note 53 at para 44.

62 *Ibid* at para 27.

63 *Ibid* at para 48.

64 *Ibid* at para 47.

65 *Ibid* at para 49.

66 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

67 *Haida Nation*, *supra* note 53 at para 48.

in Part III, in the 2014 seminal *Tsilhqot'in v British Columbia* ("*Tsilhqot'in*")⁶⁸ decision, the SCC affirmed that the Crown is *always* required to obtain Indigenous consent prior to an incursion of Aboriginal title.

In *Mikisew Cree*, the SCC extended the *Haida Nation* consultation framework to the taking of lands under Treaty 8. The court held that Treaty 8 required a "process" by which lands could be taken up by the Crown and put to an "incompatible use" with the exercise of treaty rights.⁶⁹ The court held, as in *Haida Nation*, that the duty to consult exists on a spectrum. However, as the Crown always has knowledge of the existence of a treaty right, the content of the duty will depend on the adverse impact to the protected treaty rights.⁷⁰

This is significant, as the decision effectively applied the pre-proof consultation framework to the context of Treaty 8 rights, which as described above, ought to be understood as proven or established rights. As in *Haida Nation*, the duty to consult and accommodate under the *Mikisew Cree* framework provides no guarantee that treaty rights will not be infringed. It is a procedural rather than substantive right, and offers First Nations no guarantee a particular outcome will be pursued, irrespective of the potential harm of the taking. The duty only requires the Crown to consider and weigh First Nations concerns in its decision-making, and when necessary, accommodate these concerns to the best extent possible.⁷¹

Although the court found that individual takings of land do not amount to a *prima facie* infringement of Treaty 8, the court did indicate that the *Sparrow* framework was still relevant to the context of a taking of land. However, the court was vague as to when the test would be triggered, writing:

If the time comes that in the case of a particular Treaty 8 First Nation 'no meaningful right to hunt' remains over *its* traditional territories, the significance of the oral promise that 'the same means of earning a livelihood would continue after the treaty as existed before it' would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.⁷²

Before *Prophet River*, the courts had never described how the *Sparrow* and *Haida Nation* frameworks relate to one another in the context of a taking of lands under a numbered treaty. That is, when consultation under the *Haida Nation* framework is underway or complete, and it is evident that a taking is so great as to risk infringement of treaty rights, does the Crown proceed to the *Sparrow* framework prior to commencing with the taking?

As will be described in Part II below, in discharging the duty to consult and accommodate in the context of Site-C, the Crown was faced with this problem. However, it appears to have decided that meeting its duties did not require a determination of infringement, and if triggered, justification under *Sparrow*.⁷³ The court in *Prophet River* upheld this decision.

68 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [*Tsilhqot'in*].

69 *Mikisew Cree*, *supra* note 54 at para 33.

70 *Ibid* at para 55.

71 *Prophet River*, *supra* note 10 at para 162.

72 *Mikisew Cree*, *supra* note 54 at para 48 [emphasis in original].

73 Environmental Assessment Office and Canadian Environmental Assessment Agency, "Federal/ Provincial Consultation and Accommodation Report Site-C Clean Energy Project" (2014), online: <<https://sitecstatement.files.wordpress.com/2016/02/canadian-environmental-assessment-agency-e28093-british-columbia-environmental-assessment-office-september-7-2014-federalprovincial-consultation-and-accommodation-report-site-c-clean-en1.pdf>> archived at <<https://perma.cc/7SHC-V3QQ>> ["Consultation Report"].

II. PROPHET RIVER AND ITS INTERPRETATION OF TREATY 8

In the summer of 2015, the British Columbia Hydro and Power Authority (“BC Hydro”) commenced construction of the Site-C Hydroelectric Dam, the largest dam of its kind to be built in decades and the third on the Peace River.⁷⁴ The reservoir the dam creates will span 83 kilometers in length, flooding a total of 5,550 hectares of land.⁷⁵ The take up of lands by the Crown for the purposes of construction of Site-C is enormous, and the effect of the project on impacted Treaty 8 First Nations will be extraordinary. Both Prophet River First Nation and West Moberly First Nations contend that the project will infringe their treaty rights; yet to date, neither the Crown nor the courts have made a determination of infringement.⁷⁶ Rather, the Crown has only discharged the procedural duty to consult.

In this part, the paper will proceed by discussing how the Crown and court applied the jurisprudence described in Part I to the context of Site-C in *Prophet River*. It will contend that the court’s decision to exclude a determination of infringement was based on an interpretation of the written text of Treaty 8 as extinguishing Aboriginal rights for lesser treaty rights devoid of their former connection to culture and land. This interpretation, and decision to exclude a determination of infringement from the consultation framework, has allowed the Crown to proceed with what may be an unjustified infringement of Treaty 8.

A. Site-C and the Scope of the Crown’s Duty to Consult

In the case of Site-C, the duty to consult and accommodate was triggered and conducted pursuant to the environmental assessment (“EA”) process, a necessary condition for the project to proceed to construction.⁷⁷ Due to the scale of the project, the EA was carried out by a combined federal and provincial review process, which included the formation of a Joint Review Panel (“JRP”). The JRP was responsible for reviewing the effects of the project, providing recommendations for mitigation strategies and providing a written report of their findings to federal and provincial Ministers of the Environment, who were to then decide whether to approve the project under the respective EA legislation.⁷⁸

Due to the high probability that Site-C would impact the ability of “some First Nations to meaningfully exercise specific Treaty 8 rights in the area,” the Crown concluded that consultation would proceed at the “deep level” of the spectrum discussed in *Mikisew Cree* and *Haida Nation*.⁷⁹ However, the Crown appears to have found that the terms of Treaty 8 did not necessitate a determination of infringement of treaty rights as part of the EA process. Rather, according to the Crown’s Consultation Report (“Consultation Report”), which contains a summary of the consultation processes carried out by the Crown, the goal of consultation with British Columbia First Nations was:

74 BC Hydro, “Information Sheet Site-C Reservoir,” online: <<https://www.sitecproject.com/sites/default/files/Site%20C%20Reservoir%20-%20January%202016.pdf>> archived at <<https://perma.cc/HL9D-J6E8>>.

75 *Ibid.*

76 *Prophet River*, *supra* note 10 at paras 75-78.

77 Minister of the Environment (Canada) & Minister of the Environment (British Columbia), “Report of the Site-C Clean Energy Project BC Hydro Joint Review Panel Report” (2014) at 2, online: <<https://www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf>> archived at <<https://perma.cc/W9Z7-QAW9>> [“JRP Report”].

78 Although both Ministers of the Environment provided approval to the project, this paper will focus on British Columbia’s Minister of the Environment’s decision to issue an Environmental Certificate to the Site-C project and subsequent judicial review in *Prophet River*.

79 “Consultation Report”, *supra* note 73 at 23.

to discuss the potential for adverse impacts on their treaty rights should the proposed Project proceed, and to develop measures to avoid, mitigate or otherwise accommodate for potential impacts to those rights.⁸⁰

Indeed, in its Terms of Reference, the JRP was not permitted to make recommendations or findings on the nature and scope of Aboriginal or treaty rights or determine whether the project infringed Treaty 8.⁸¹ Instead, the JRP received information from First Nations regarding the location, extent, and exercise of their rights. The panel also accepted information on the manner in which the project would impact these rights, and from this, set out avoidance and mitigation strategies.⁸²

On May 1, 2014, the JRP released its near 500-page report to the public. As per its Terms of Reference, it did not make a determination on the issue of treaty infringement.⁸³ Nonetheless, the panel concluded that the project would “significantly affect the current use of land and resources for traditional purposes by Aboriginal peoples.”⁸⁴ The JRP wrote that the effects to fish and fish habitat would be “probable, negative, large, irreversible and permanent” and include the probable extirpation of three species of fish and a reduction in fish density.⁸⁵ This was found to be likely to cause a significant adverse and irreversible effect on Aboriginal fishing opportunities and practices. Even if Aboriginal groups would still be able to fish in the reservoir, the JRP wrote that “knowledge of fishing sites, preferred species, and cultural attachment to specific sites would be lost.”⁸⁶

The JRP further concluded that the Project was likely to cause significant adverse effects on hunting and trapping practices, which could not be mitigated.⁸⁷ The panel also wrote that the project would likely cause significant adverse cumulative effects on current uses of lands and resources, such as habitation sites, feather-gathering sites, firewood harvesting sites, drinking water, trails and water routes, and berry and plant gathering sites.⁸⁸

Turning to the costs, demand alternatives, and need for the project, the JRP concluded that while British Columbia will require more energy, BC Hydro had not fully demonstrated the need for the project on the timetable set forth.⁸⁹ As to an analysis of alternatives to the project, the Panel noted the availability of a number of supply alternatives immediately capable of adding a large load capacity at economical costs.⁹⁰

In September 2014, the British Columbia Environmental Assessment Office (“EAO”) submitted a referral package to the Minister of the Environment to use in making a final decision on whether to issue (or not issue) the Environmental Certificate.⁹¹ Included in this package was the JRP report and the Consultation Report.⁹² Additionally, the referral package also contained a letter from Prophet River First Nation outlining their outstanding concerns and issues with the project.⁹³ Prophet River First Nation pressed

80 *Ibid* at 29.

81 *Prophet River*, *supra* note 10 at paras 32-33.

82 “JRP Report”, *supra* note 77 at 123.

83 *Ibid* at 338.

84 *Ibid* at iv.

85 *Ibid* at 52.

86 *Ibid* at 102.

87 *Ibid* at 108-109.

88 *Prophet River*, *supra* note 10 at para 62.

89 “JRP Report”, *supra* note 77 at 306.

90 *Ibid* at 298.

91 *Prophet River*, *supra* note 10 at para 69.

92 *Ibid* at para 70.

93 *Ibid* at para 76.

for a determination of infringement, and it rejected the adequacy of the accommodation and compensation measures put forward by the Crown and BC Hydro:

The loss of the Peace River Valley would be an *infringement* on the exercise of our Treaty Rights [...] It is simply not possible to adequately compensate our community for the permanent destruction of the Peace River Valley.⁹⁴

Nonetheless, on October 14, 2014, the (British Columbia) Minister of the Environment issued the Environmental Certificate to BC Hydro to construct a dam, powerhouse, and related infrastructure on the Peace River for the purposes of the Site-C project.⁹⁵ No reasons for the decision were provided.⁹⁶

In the fall of 2015, West Moberly First Nations and Prophet River First Nation brought a petition for judicial review of the Minister's decision to issue the Environmental Certificate. Specifically, the petitioners held that the Minister was constitutionally obligated under section 35(1) of the *Constitution Act, 1982* to determine whether their rights under Treaty 8 would be infringed by the project, and if so, whether the project was justified in accordance with the test set out in *Sparrow*.⁹⁷

B. The *Prophet River* Ruling and Its Interpretation of Treaty 8

The court in *Prophet River* rejected all of the plaintiff's submissions, holding that the Minister of the Environment had no obligation to determine, in issuing the Environmental Certificate, whether the proposed project would infringe Treaty 8.⁹⁸ The court held the Minister of the Environment's decision to issue an Environmental Certificate under the *Environmental Assessment Act* ("EAA") was broad, discretionary, and based on policy rather than rights.⁹⁹ Moreover, the court further reasoned that the *EAA* did not provide the Minister the powers necessary to make a determination on the rights of the parties. That is, they did not have the power to compel testimony, hear legal submissions, or require production of documents.¹⁰⁰

The only constitutional obligation required of the Minister of the Environment in making their decision appears to have been to ensure that the duty to consult and accommodate had been correctly discharged. Despite the exclusion of a determination of infringement, the court held that the duty to consult at the "deep level of consultation" had been made out.¹⁰¹ As to whether the taking up of lands amounted to treaty infringement, the court held that the issue was best left to the courts in a separate action.¹⁰² This suggests that the burden lies with the impacted Treaty Nation to ensure that the Crown does not infringe constitutionally enshrined rights.

Although the court cited ministerial discretion and lack of expertise as a basis for its findings, this reasoning is unsatisfactory. In the decision of the BCCA in *West Moberly First Nations v British Columbia* ("*West Moberly*"),¹⁰³ the court held that neither discretion nor capacity operate as means of escaping constitutional obligations.¹⁰⁴ Rather, constitutional

94 *Ibid* at paras 76-77 [emphasis in original].

95 *Ibid* at para 1.

96 *Ibid* at para 118.

97 *Ibid* at para 94.

98 *Ibid* at para 134.

99 *Ibid* at paras 127, 132.

100 *Ibid* at para 130.

101 *Prophet River*, *supra* note 10 at paras 154-157.

102 *Ibid* at para 133.

103 *West Moberly*, *supra* note 38.

104 *Ibid* at paras 106-107.

duties lie upstream of administrative decisions, and therefore, when lacking the necessary powers and competencies to meet its obligations to First Nations, “[a] statutory decision maker may well require the assistance or advice of others with relevant expertise, whether from other government ministries or outside consultants.”¹⁰⁵ In the case of Site-C, it is unclear why the Minister of the Environment could not have delegated the question of infringement to the JRP, EAO, or another expert body. This paper questions whether the reasoning of *Prophet River* is more likely grounded in the court’s interpretation of Treaty 8, and the minimal constitutional limitations that treaty rights place on Crown sovereignty.

Before commencing its assessment of the issues at hand, the court in *Prophet River* provided excerpts from a number of cases dealing with the interpretation of numbered treaties and the Crown’s right to take up land under Treaty 8. The court appears to principally have relied on the rulings in *Mikisew Cree, Grassy Narrows v Ontario* (“*Grassy Narrows*”)¹⁰⁶ and *Keewatin v Ontario* (“*Keewatin*”)¹⁰⁷ for its interpretation of Treaty 8 and the process required for the Crown to take up land. Later in his judgment, in discussing whether the Ministers correctly understood the government’s duties with respect to treaty rights, the court wrote:

I have however compared the approach of government to the taking up power as described in the Consultation Report with the approach mandated in *Mikisew* and *Grassy Narrows*.

I conclude that the Ministers accepted the position of the EAO and the agency with respect to taking up as set out in the Consultation Report in preference to that expressed in the petitioners’ letters to them.

I am of the view that the government has correctly stated its obligation with respect to the exercise of power to take up land [...].¹⁰⁸

Because the court accepted the Consultation Report as a correct interpretation of the Crown’s obligations in taking up land under Treaty 8, the Consultation Report is an appropriate place to begin to understand why the court did not require the Crown to make a determination of infringement prior to issuing an Environmental Certificate for the Site-C project. Indeed, reading the Consultation Report along with the cases of *Mikisew Cree*, *Keewatin*, and *Grassy Narrows*, suggests that the court found that the treaty agreement limited the Crown’s obligation with respect to taking up land to a procedural duty to consult and accommodate. This obligation appears to be derived from an understanding of the written text of Treaty 8 as surrendering Aboriginal rights and title for weaker treaty rights devoid of connection to place or culture. In turn, that imposes no substantive limitation on the exercise of Crown sovereignty prior to the taking of land.

As with *Mikisew Cree* and *Grassy Narrows*, the Consultation Report writes that Treaty 8 had the effect of legally surrendering and extinguishing Aboriginal rights and title.¹⁰⁹ As to the impact of extinguishment, the Consultation Report writes that “Treaty 8 had the effect of exchanging all undefined Aboriginal rights in or to the lands described, both

105 *Ibid.* The court in *Prophet River* distinguished *West Moberly* from the facts before it, finding that *West Moberly* concerned the extent of the duty to consult and accommodate required in respect to a mining project. However, the position of this paper is that the court in *Prophet River* was also concerned with the content of the duty to consult, albeit, whether or not it ought to have included a finding of infringement. Thus, the findings from *West Moberly* are relevant.

106 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*].

107 *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 [*Keewatin*].

108 *Prophet River*, *supra* note 10 at paras 149-151.

109 See *Mikisew Cree*, *supra* note 54 at para 31; *Grassy Narrows*, *supra* note 106 at para 2.

surface and subsurface, for the defined rights in the treaty.”¹¹⁰ That is, the Consultation Report suggests Aboriginal and treaty rights are distinct, and by entering Treaty 8, the rights of signatory First Nations changed in nature from their prior “Aboriginal” context.

The Consultation Report’s discussion of oral representations made during treaty negotiation further suggests the Crown, and by extension, the court in *Prophet River*, interpreted treaty rights as being different from their former pre-treaty context. As described in Part I, oral representations made during treaty negotiations are critical to understanding the final terms of a treaty agreement. The Consultation Report cites the assurance made by the Superintendent General of Indian affairs in 1899 that the treaty would not lead to any “forced interference with mode of life” and that “the same means of earning a livelihood would continue after the treaty as existed before it.”¹¹¹ However, the Consultation Report writes that it views these oral promises as consonant with the treaty terms insofar as “mode of life and livelihood” are “hunting, fishing and trapping activities protected by the treaty.”¹¹² Additionally, the Consultation Report notes that, “harvesting activities undertaken for spiritual or cultural purposes” may be protected by Treaty 8.¹¹³ That is, the Crown appears to interpret Treaty 8 as providing general rights to hunt, trap, and fish. Connection of the right to cultural or spiritual practices appears to be an incidental effect rather than defining element of the treaty right.

As described in Part I, Aboriginal rights are not abstract or general, but must necessarily be understood with regard to an Indigenous Nation’s perspective on the meaning of the right at stake.¹¹⁴ However, the Consultation Report suggests a very different interpretation of the meaning of treaty rights. By reason of the extinguishment clause, it appears to interpret treaty rights as being limited to discrete and defined activities, devoid of their prior “Aboriginal” context.

As the rights are no longer “Aboriginal,” but limited to hunting, fishing, and trapping, the courts and the Consultation Report suggest that treaty rights import a much higher threshold of harm in order to trigger infringement than would Aboriginal rights. In *Sparrow*, the SCC held that the determination of whether a right has been infringed necessarily begins with an analysis of the characteristics or “incidents of the right at stake.”¹¹⁵ Due to the connection of the right to the culture of an Indigenous Nation, the SCC in *Sparrow* suggests that Aboriginal rights will be infringed at a relatively low level of harm to the right.¹¹⁶ In contrast, the Consultation Report and cases cited by *Prophet River* write that a taking up of land will *prima facie* infringe a Treaty 8 First Nation’s rights when the nation “no longer has a meaningful right to hunt, trap or fish in relation to the territory over which it traditionally hunted, trapped or fished.”¹¹⁷ That is, irrespective of the deleterious impact to the expression of a right in a particular location or cultural context, provided signatories are able to express their rights *somewhere* on their traditional territory, the promises of Treaty 8 remain intact.

110 “Consultation Report”, *supra* note 73 at 28.

111 *Ibid.*

112 *Ibid.*

113 *Ibid.*

114 *Van der Peet*, *supra* note 29 at para 49.

115 *Sparrow*, *supra* note 25 at 1078.

116 In *Sparrow*, the court wrote that the test for *prima facie* infringement involves, “asking whether either the purpose or the effect of the restriction [...] unnecessarily infringes the interests protected by the fishing right” (*Ibid* at 1112).

117 *Grassy Narrows*, *supra* note 106 at para 52; “Consultation Report”, *supra* note 73 at 29.

This is an enormous threshold of harm that arguably, if met, amounts to an extinguishment of treaty rights, a result prohibited by section 35(1) of the *Constitution Act, 1982*. If the take up of land eventually causes a particular nation to no longer have the ability to “meaningfully” express their treaty rights in their traditional territory, then what rights are they left with?

Prophet River suggests that this interpretation leaves Treaty 8 First Nations the “right” to fish, hunt, and trap on “surrendered” territory until the Crown so chooses to take up the land. Although *Mikisew Cree* held that the Crown must act honourably in the process of taking up land and must consult and accommodate affected First Nations, the ruling of *Prophet River* takes this one step further to find that acting honourably does not necessitate a finding of infringement. Rather, because infringement is triggered at such a high threshold of harm, the ruling arguably suggests that this necessarily circumscribes the scope of the Crown’s duties to Treaty Nations. Indeed, before beginning its analysis of the issues at hand, *Prophet River* cites the following paragraph from the *Keewatin* decision as authority for the government’s obligations in taking up land under numbered treaties:

It is important to distinguish between a provincial taking up that would leave no meaningful harvesting right in a First Nation’s traditional territories from a taking up that would have a lesser impact than that. The former would infringe the First Nation’s treaty rights, whereas the latter would not.¹¹⁸

Thus, *Prophet River* appears to rely on the assumption that any taking less than what arguably is an extinguishment of the ability to hunt, trap and fish, is within the Crown’s right to take up lands under treaty. Indeed, as to why the Minister did not have the jurisdiction to determine infringement the court wrote:

[*Mikisew Cree*] and *Grassy Narrows* [...] suggest questions of infringement should be determined in an action. At a minimum, these cases make it clear that deciding whether an infringement has occurred requires a consideration of matters beyond the impact of the Project [...] infringement requires a consideration of the residual position of the aboriginal group as a result of the loss of all land taken up.¹¹⁹

The court appears to rely on the assumption that infringement will only occur as a result of cumulative effects resulting in “no meaningful” expression of treaty rights throughout the territory. Thus, the court suggests that any singular taking of land is *prima facie* within the Crown’s treaty rights and therefore will not result in an infringement of the treaty.

As discussed in Part I, *Haida Nation* held that Aboriginal groups do not have the ability or right to “veto” a project in the consultation process.¹²⁰ In excluding a determination of infringement from the duty to consult, the court in *Prophet River* appears to suggest that like the non-proof context, Crown sovereignty will not be limited in a taking of land. That is, the process of consultation and accommodation appears to preclude substantive limits on Crown sovereignty that would be imported by a finding of infringement as per *Sparrow*. Rather, as it appears that treaty rights are presumed to remain intact provided they can be expressed somewhere on the traditional territory of a Treaty Nation, the relative harm to a treaty right will only impact the level of consultation in the decision-making process, but not force a particular outcome.

118 *Prophet River*, *supra* note 10 at para 112.

119 *Ibid* at para 133.

120 *Ibid* at para 48.

C. Implications of the Ruling in *Prophet River*

The case of Site-C is a perfect demonstration of the shortcomings of the duty to consult and accommodate absent a determination of infringement. As the findings of the JRP report detail, Site-C will have substantial and irreversible consequences for West Moberly First Nations and Prophet River First Nation. There is no doubt that in discharging the duty to consult and accommodate, the Crown compiled considerable information on the impacts of the project on the rights of affected Treaty 8 First Nations and attempted to address these effects in the design of the project. However, due to the nature of the project, which involves flooding an entire river valley, the accommodation measures put forward simply cannot prevent the risk of infringement of treaty rights. Indeed, because the duty to consult requires no consensus or agreement of the parties, the Minister was able to approve the project, despite the very real possibility of infringement.

At no point prior to the issuance of the Environmental Certificate, or since commencing construction, has the Crown or a court determined whether the taking of land for the purpose of Site-C will result in an infringement of Treaty 8. The decision in *Prophet River* has thus allowed the Crown to proceed with what may be an unjustified infringement of Treaty 8, a result prohibited by section 35(1) of the *Constitution Act, 1982*. In contrast, had the Crown been required to determine infringement (and to justify the encroachment pursuant to the test in *Sparrow*, if it was determined there was an infringement), there exists a possibility that it would not have been able to do so, given the findings of the JRP on the costs, need, and availability of alternatives to Site-C.

Although West Moberly First Nations, Prophet River First Nation, and other Treaty Nations can attempt to uphold their rights by bringing an action for infringement, this is an enormous and challenging burden for litigants to overcome. No court has ruled on a case where a treaty beneficiary alleges the taking up of land has infringed or is about to infringe a treaty right.¹²¹ Moreover, given the lengthy nature of a court action, it is possible that the project will be even farther into construction by the time a court makes a determination of infringement, causing irrevocable damage to the exercise of treaty rights. While West Moberly First Nations and Prophet River First Nation could apply for interim injunctive relief pending the outcome of their claim, the legal test for such a remedy is considerably weighted against them, and often tips in favour of protecting jobs and government interests.¹²²

III. EXPANDING THE DUTY TO CONSULT AND ACCOMMODATE: MOVING FROM A *HAIDA* TO *SPARROW* CONSULTATION FRAMEWORK

The critical problem with the ruling in *Prophet River* is that Treaty 8 did not provide the Crown an unlimited right to take up lands. The story of Treaty 8 relied on by the court rests on a literal interpretation of the text of Treaty 8 that fails to consider the perspective of signatory nations. As such, the interpretation offered by the court in *Prophet River* arguably violates the canons of treaty interpretation and the promises of Treaty 8.

Previous jurisprudence and historical and modern testimony from Treaty 8 signatories indicate that irrespective of the language of the extinguishment clause, Treaty 8 signatories did not view their rights as general guarantees of their ability to hunt, fish, and trap subject to abrogation at the whim of the Crown. Rather, Treaty 8 was entered into to ensure the continuity and way of life of signatory nations in exchange for granting the Crown rights

121 Woodward, *supra* note 27.

122 *Haida Nation*, *supra* note 53 at para 14.

to use their traditional territories. Accordingly, the Crown cannot take up lands in such a way as would unduly impact the exercise of the treaty rights to hunt, fish, and trap as they exist in relation to the perspective and culture of the respective Treaty 8 First Nation.

To give life to this perspective, this section will demonstrate that when a land taking presents significant risk to Treaty 8 rights, section 35(1) of the *Constitution Act, 1982* requires the Crown to determine whether in fact the taking will result in an infringement of Treaty 8. If infringement will occur, the Crown is then required to obtain consent, and if absent, justify its action using the two-part *Sparrow* test prior to the taking. The logical place for a determination of infringement to occur is during the consultation process.

A. “As Long as the Sun Shall Rise and the River Shall Flow”: Treaty Promises and Searching for Common Intent

Mikisew Cree and the Consultation Report, unequivocally state that the written text of Treaty 8 had the effect of surrendering all Aboriginal rights and title. As described earlier, this assumption of surrender appears to ground the court’s understanding of treaty rights, and in turn, their role in limiting Crown sovereignty in *Prophet River*.

However, the SCC has rejected a literal interpretation of the texts of historical treaties in determining the meaning of treaty terms.¹²³ Instead, courts are to choose an interpretation that represents the common intention of both parties, and in doing so, be sensitive to the unique cultural and linguistic differences of the parties. Any ambiguities are to be resolved in favor of Indigenous Nations.¹²⁴ Applying the principles of treaty interpretation to the terms of Treaty 8, there is considerable doubt that the extinguishment clause had the legal effect of surrendering rights and title.

Many Treaty 8 First Nations reject the argument that entering Treaty 8 surrendered their Aboriginal rights and title. They argue that their ancestors would not have understood Western notions of land ownership, and even if they did, their own laws would not have permitted the alienation of their traditional land.¹²⁵ In *Paulette, Re (“Paulette”)*,¹²⁶ after canvassing the oral promises made by the Crown and Indigenous signatories as well as affidavits from elders who remembered the treaty negotiations, Justice Morrow affirmed this challenge to the legal effect of the surrender clause:

Treaty 8 and Treaty 11 could not legally terminate Indian land rights. The Indian people did not understand or agree to the terms appearing in the written version of the treaties; only mutually understood promises relating to wild life, annuities, relief and friendship became legally effective commitments.¹²⁷

This discussion of the Aboriginal perspective on the meaning of the extinguishment clause is absent in *Mikisew Cree*, *Keewatin*, *Grassy Narrows*, the Consultation Report, and in turn, the *Prophet River* judgment. However, as demonstrated by the ruling in *Paulette*, there is doubt that there ever existed a common intention to cede rights and title.

123 *Marshall*, *supra* note 23 at paras 11-14.

124 *Ibid* at para 78.

125 *Ridington & Ridington*, *supra* note 2 at 226-229.

126 *Re Paulette et al and Registrar of Titles (No 2)*, 1973 CanLII 1298 (NWTSC) at 30 [*Paulette*]. Justice Morrow’s judgment was reversed by the Court of Appeal for the Northwest Territories (“NWTC”) in *Paulette (Re)*, 1975 CanLII 945 (NWTCA). The NWTC did not address Justice Morrow’s reasons respecting the legal validity of the extinguishment clause in Treaty 8 and Treaty 11.

127 *Paulette*, *supra* note 126 at 30.

Rather, *Paulette* suggests that it is possible that the effect of Treaty 8 was to, “confirm [the Crown’s] paramount title and, by assuring the Indians that ‘their liberty to hunt, trap and fish’ was not to be taken away or curtailed, was in effect a form of declaration by the Government of continuing aboriginal rights in the Indians.”¹²⁸ Thus, Treaty 8 may have simply affirmed the continuation of the existing Aboriginal rights of First Nations signatories in light of assertions of Crown sovereignty. If this is true, then the ruling of *Prophet River*, which rests on assumptions of extinguishment for grounding the scope of the Crown’s right to take up lands, sits on shaky ground.

If Aboriginal rights and title continue in the same manner after signing the treaty as before, then the rights of Treaty 8 First Nations and what amounts to infringement of these rights, must necessarily be understood in respect to the perspective of First Nations rights holders. That is, rather than general rights only infringed when they can longer be expressed over a territory, any taking of land that has the impact of unduly limiting the exercise of the rights to hunt, fish, and trap, as understood in regards to the perspective of the First Nation, constitutes a *prima facie* infringement requiring justification.

Even if Treaty 8 did have the legal effect of ceding Aboriginal rights and title, the court in *Prophet River* is still incorrect to suggest that the Crown has an unlimited right to take up lands so long as the treaty rights can be expressed somewhere on the nation’s territory. Although the rights to hunt, fish, and trap are explicit terms of Treaty 8, this does not mean that they can be interpreted in a vacuum that ignores the history and culture of a First Nation. As held by the SCC in *R v Marshall* (“*Marshall*”),¹²⁹ “even in the context of a treaty document that purports to contain all of the terms [...] extrinsic evidence of the historical and cultural context of a treaty may be received [...]”¹³⁰ Indigenous Nations relied on the authority of their own legal orders to enter treaty agreements. As such, the respective laws and culture of signatory nations are relevant to understand the meaning of treaty terms.¹³¹

The legal relationship between Dane-zaa hunters and animals makes it difficult to imagine that the rights guaranteed in Treaty 8 were abstract rights to hunt, fish, and trap devoid of connection to culture. In the Dane-zaa creation story (described in brief in the Introduction), Sky Keeper does not give humans dominion over animals; instead, humans and animals exist in mutually beneficial relationships, governed by reciprocal promises and obligations.¹³² Before a hunt, a hunter dreams to make contact with the spirit of the animal whose life he wishes to take, by visualizing the point where their trails connect.¹³³ The meeting of the trails represents an image of creation and the cross, made at the beginning of time by Sky Keeper. When the trail connects, the hunter shares an image of creation with the animal, and the animal and hunter enter into a mutual agreement. The hunter promises to respect the animal’s body and share the meat generously. If the animal fulfills its promise and shows up at the place their trails converge in the dream, its spirit will ascend to heaven and return in another body.¹³⁴

Oral accounts of witnesses and participants of Treaty 8 negotiations also suggest that the rights enshrined in Treaty 8 were more than just abstract rights, but a promise of the continuation of the signatory’s way of life and culture. In discussing the content of the

128 *Ibid.*

129 *Marshall*, *supra* note 23.

130 *Ibid* at para 11.

131 *Borrows*, *supra* note 7 at 133-134.

132 *Ridington & Ridington*, *supra* note 2 at 10.

133 *Ibid* at 45-46.

134 *Ibid.*

promises made in treaty negotiation, the court in *Badger* cited the following note made by the Commissioner of Treaty 8:

the same means of earning a livelihood would continue after the treaty as existed before it [...] we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and furbearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.¹³⁵

Indeed, in *West Moberly*, the BCCA rejected British Columbia's argument that Treaty 8 provided a general right to "hunt for food"—and therefore could not be understood in relation to the specific cultural practice of hunting caribou.¹³⁶ The court wrote that "while specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a 'continuity in traditional patterns of economic activity' and respect for 'traditional patterns of activity and occupation.'"¹³⁷

Moreover, as to the scope of the Crown's right to take up lands, the court in *West Moberly* challenges the notion that the language of the Treaty 8 contemplates the take up of land for a broad litany of uses:

Just as the right to hunt must be understood as the treaty makers would have understood it, so too must 'taking up' and 'mining' [...] 'some white prospectors [who] might stake claims', to the understanding of those making the Treaty, would have been prospectors using pack animals [...] That understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures.¹³⁸

Indeed, this observation applies equally to the case of Site-C. It is dubious that First Nation signatories in 1914 contemplated the possibility of a hydroelectric project capable of flooding over 5,000 hectares of their traditional territory.

Given these accounts, it is also difficult to imagine that the ancestors of West Moberly First Nations, Prophet River First Nation and other Treaty 8 First Nations perceived their entering the treaty as providing the Crown with an unfettered right to take up their lands, provided they could still hunt, fish, and trap somewhere on their territory. Instead, in entering Treaty 8, First Nations signatories gave the Crown rights to use their traditional territories. This appears to have been agreed to explicitly upon the condition that the lives of the signatory nations would be unchanged after entering the treaty. As such, Treaty 8 does not provide the Crown an unlimited right to take up lands for any purpose it chooses. Rather, the exercise of its rights is necessarily constrained by the promise of continuity of the way of life of Treaty 8 First Nations. Therefore, the Crown cannot take up lands in such a way as would unduly impact the exercise of the treaty rights to hunt, fish, and trap as they exist in relation to the perspective and culture of the respective Treaty 8 Nation.

¹³⁵ *Badger*, *supra* note 14 at para 39 [emphasis removed].

¹³⁶ *West Moberly*, *supra* note 38 at para 130.

¹³⁷ *Ibid* at para 137.

¹³⁸ *Ibid* at paras 134-135.

While it is possible that the nature of the rights held by signatory First Nations may have changed after the signing of Treaty 8, the treaty rights of both the Crown and First Nations under Treaty 8 are relational and limited by each party's obligations and responsibilities to the other. Indeed, as articulated by the Treaty 8 Tribal Association:

The Crown's right to take up land is not absolute. Like the right to hunt, the scope of the Crown's right to take up land is interpreted in light of the mutual understanding of treaty signatories and the oral promises made by the Crown. It was understood by both the Crown and aboriginal signatories that *from time to time*, lands 'would be taken up' [...] However, neither party expected the taking up of so much land as to jeopardize the exercise of traditional practices.¹³⁹

The promises of continuity of culture and way of life are legally binding and enshrined in section 35(1) of the *Constitution Act, 1982*. As such, the obligations of the Crown to Treaty 8 First Nations are not analogous to the non-proof context; rather, as will be described below, the rights of Treaty 8 First Nations serve as limitations on Crown sovereignty (as would proven Aboriginal rights). In turn, this imparts a duty on the Crown to determine whether the taking will result in a *prima facie* infringement of Treaty 8.

B. Understanding Treaty Rights as Limitations on Crown Sovereignty

As described above, contrary to the ruling of *Prophet River*, Treaty 8 does not provide the Crown an unfettered right to take up lands. The Crown's treaty right to take up land is constrained by treaty promises to First Nations signatories guaranteeing the continuity of their culture and way of life. The Crown cannot take up lands if doing so will undermine the ability of a Treaty Nation to hunt, fish, and trap, as understood in respect to the significance of those activities to the particular culture of the Treaty 8 Nation.

As the rights of Treaty 8 First Nations are proven rights, enshrined in section 35(1) of the *Constitution Act, 1982*, like Aboriginal rights and title, they represent a limitation on the sovereignty of the Crown. The 2014 decision of the SCC in *Tsilhqot'in* suggests that this limitation imports a requirement of prior consent and, if absent, justification according to the *Sparrow* test. This appears to be the case irrespective of whether the right is Aboriginal or treaty. Although not every taking of land will amount to a *prima facie* infringement of Treaty 8, the requirements articulated in *Tsilhqot'in* constitutionally oblige the Crown to determine whether a taking of land will result in an infringement prior to its approval.

While the justification test articulated in *Sparrow* often becomes relevant in legal proceedings when an Indigenous Nation challenges a Crown action, the courts have also held that section 35(1) rights import constitutional limitations upstream of the exercise of Crown sovereignty. That is, section 35(1) also represents substantive and procedural obligations on the part of the Crown *prior* to an action that may infringe an Aboriginal right.

As described in Part I, in *Haida Nation*, citing the *Delgamuukw* decision, the SCC noted that in the context of established title claims, the Crown may be required to obtain the consent of an Indigenous Nation in discharging the duty to consult on "very serious issues."¹⁴⁰ In this context, the duty to consult appears to import a substantive limitation on Crown sovereignty. That is, the Crown may be required to obtain First Nations consent prior to the incursion of the right.

139 *Prophet River*, *supra* note 10 at para 37 [emphasis in original].

140 *Haida Nation*, *supra* note 53 at para 24.

In the watershed *Tsilhqot'in* decision, the court applied this finding further, writing that in the case of an established title claim, consent is *always* required prior to incursion of title.¹⁴¹ When title is established and consent is absent:

the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of [section] 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.¹⁴²

While *Tsilhqot'in* was decided in the context of an Aboriginal title claim, there exists a strong logical basis to assume that the substantive requirements it spoke of apply equally to treaty rights. Indeed, in the passage cited above, the court's reasoning is grounded in the distinction between the requirements flowing from Aboriginal title from those required "[where] Aboriginal title is unproven."¹⁴³ That is, the procedural and substantive obligations required prior to Crown action appear to derive from the nature of the right as being established, and therefore constitutionalized under section 35(1) of the *Constitution Act, 1982*, rather than as a requirement specific to title rights.

In *Badger*, the court held that by nature of their constitutionalization, treaty and Aboriginal rights import the same limitation on Crown sovereignty. Furthermore, the court wrote that "it is equally if not more important to justify *prima facie* infringements of treaty rights."¹⁴⁴ If consent is understood to flow from a constitutional limitation on Crown sovereignty, as articulated in *Badger*, then it is difficult to imagine why section 35(1) would not import the same requirement on the Crown in the context of treaty rights, including in the take up of land.

In *West Moberly*, a case concerning whether the Crown adequately discharged its duty to consult prior to a taking of land under Treaty 8, the BCCA wrote that "[i]t is a well-established principle that statutory decision makers are required to respect legal and constitutional limits."¹⁴⁵ Although the Crown may have the right to take up land, this right is not unlimited. If a taking of land will *prima facie* infringe Treaty 8, it is reasonable to conclude that, like *Tsilhqot'in*, section 35(1) requires the Crown to obtain First Nations consent prior to the taking. If consent is not obtained, then the Crown is required to meet both the procedural duty to consult and accommodate and the substantive obligation to justify the encroachment according to the *Sparrow* framework. If these requirements are not met, the Crown is then constitutionally barred from continuing with the taking.¹⁴⁶

All the steps articulated by the court in *Tsilhqot'in* are required to be carried out prior to the proposed Crown action.¹⁴⁷ In order to fulfill the above requirements, the Crown must also be constitutionally obliged to determine whether a taking will result in an infringement of section 35(1). It is an absurd result, incongruent with the ruling in *Tsilhqot'in*, if the Crown could, as suggested by the court in *Prophet River*, escape the requirements of consent and justification imposed by section 35(1) by evading a determination of whether its action will result in a *prima facie* infringement of proven Aboriginal and treaty rights. Indeed, excluding a determination of infringement prior to the taking of land prevents

141 *Tsilhqot'in*, *supra* note 68 at para 76.

142 *Ibid* at para 103.

143 *Ibid* at para 80.

144 *Badger*, *supra* note 14 at paras 79-82.

145 *West Moberly*, *supra* note 38 at para 106.

146 *Tsilhqot'in*, *supra* note 68 at para 90.

147 *Ibid*.

Aboriginal groups from benefiting from the higher protections that flow from their proven rights (prior consent, and if absent, justification per the *Sparrow* framework) until their rights may already have been infringed. The case of Site-C is a perfect demonstration of this risk. In excluding a determination of infringement prior to the taking of land, the Crown has proceeded with construction of a project that very well may culminate in the extinguishment of treaty rights in the Peace River Valley without justification.

C. From *Haida* to *Sparrow*: Expanding the Duty to Consult and Accommodate

In *Tsilhqot'in* we are told of the requirements placed on the Crown prior to pursuing an infringement of title. However, we do not know the *process* by which the Crown evaluates whether a proposed project necessitates discharging the requirements of consent and justification. Indeed, this is likely because the court indicates that infringement is triggered at the low threshold of any non-title holder use of the land, and thus, the Crown will always have notice of infringement.¹⁴⁸ However, in the case of a treaty, where mutual rights and obligations have been exchanged, *prima facie* infringement is arguably less obvious. Meeting the procedural and substantive obligations articulated in *Tsilhqot'in* requires the Crown to first engage in an evaluation of the impact of a proposed action and determine whether it triggers the requirement of consent, and if absent, justification. The logical locus for this to occur is during the consultation process.

Although the duty to consult, as articulated in *Haida Nation*, and the justification framework in *Sparrow*, are often treated as separate legal concepts, they do not need to exist in watertight compartments. Indeed, in *Haida Nation*, the court wrote that the duty to consult is best understood as a spectrum, with each case being approached individually:

Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation [...]¹⁴⁹

When it becomes apparent to the Crown that infringement is likely to occur in gathering information during the consultation process, the framework ought to shift from mere mitigation of potential impacts of the action to obtaining the consent of the affected nation. When consent is withheld, the *Sparrow* justification test then would become the operative framework.

Not every taking up of land will push the duty into the realm of consultation requiring consent. In entering Treaty 8, First Nations provided the Crown the right to use their traditional lands under certain circumstances. It follows however, that in taking land under treaty, the Crown needs to include as part of the consultation process a determination of whether a proposed taking is in line with the promises of Treaty 8, that is, whether the taking is likely to result in a *prima facie* infringement.

A determination of *prima facie* infringement is not, as suggested in *Prophet River*, impossible in the context of Treaty 8. As discussed in Part II, the Crown's right to take up land is not unlimited. A singular taking of land will be beyond the Crown's right when doing so impacts the continuity of the life and culture of the Treaty 8 Nation, as reflected by the rights to hunt, fish, and trap.

¹⁴⁸ *Ibid* at para 103.

¹⁴⁹ *Haida Nation*, *supra* note 53 at para 45.

Even if the thesis of this paper is incorrect, and treaty rights exist as general rights, only infringed once they can no longer be “meaningfully expressed” over a territory, this does not preclude a determination of infringement in discharging the Crown’s duty to consult and accommodate. Rather, as demonstrated by the findings of the JRP report, the impact of the Site-C project is so large that it is possible that the taking will result in Prophet River and Moberly Lake First Nations not being able to “meaningfully” exercise their treaty rights. As such, the effects of the project on Treaty Nations is sufficiently well established to allow the Crown, in discharging its duty to consult and accommodate, to reach a determination as to whether the project will result in a *prima facie* infringement of Treaty 8.

A reasonable concern with the thesis of this paper is the result of having Crown actors perform infringement analyses. That is, can Treaty First Nations rely on the Crown to impartially adjudicate their rights? Indeed, in *Tsilhqot’in*, quoting from *Delgamuukw*, Chief Justice McLachlin noted a broad array of legislative objectives capable of meeting the first step of the Sparrow test for infringement:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.¹⁵⁰

In the case of Site-C, had the JRP or another Crown body determined infringement, the Minister of Environment arguably could have simply justified the taking as being in the public interest.

Firstly, this paper does not contend that the determination of the rights at stake ought to be conducted unilaterally by the Crown. Treaties represent the exchange of mutual rights. Giving effect to these rights necessarily involves the participation of both the Crown and signatory nations. Even the duty to consult as it stands today involves the participation of affected First Nations in understanding the impact of the rights at stake. This paper sees no reason why the Crown would necessarily determine infringement one-sidedly as part of an expanded consultation framework.

As to the troubling breadth of legislative objectives capable of justifying infringement of section 35(1) rights, it is important to highlight that it is insufficient for the Crown to simply assert a project is in the public interest. The Crown must also meet the second stage of the *Sparrow* analysis and demonstrate that the infringement is consistent with the fiduciary duty owed to First Nations.

That being said, it would be naïve and misleading for this paper to suggest that an expansion of the duty to consult to include a determination of infringement (and where necessary, prior consent) will perfectly protect Treaty 8 rights. The *Sparrow* justification test necessarily provides a framework for the Crown to unilaterally abridge the rights enshrined in section 35(1). This test rests on a problematic assumption of the sovereignty of the Crown and many Indigenous communities may reject the suggestion that the Crown has the inherent power to infringe their rights.

This paper does not wish to dismiss these objections or ignore the problematic assumptions and defects imbued in the common law doctrine of Aboriginal rights. However, in the context of Treaty 8, the consultation framework as it stands today provides little, if any,

150 *Tsilhqot’in*, *supra* note 68 at para 83 [emphasis removed].

assurance to Treaty 8 Nations that their rights will be protected from Crown infringement. As described in Part II, this weak framework has allowed the Crown to pursue Site-C, which may very well infringe Treaty 8.

Introducing the requirement of a determination of infringement to the duty to consult, and when triggered, consent, provides at least some substantive protection to the rights enshrined in Treaty 8. Moreover, an expanded duty to consult better reflects the promises and nature of Treaty 8 as a binding and solemn agreement between nations.

CONCLUSION

This paper discussed two creation stories. Both depict how people came to inhabit the lands over which they live. Both contain legal obligations and responsibilities governing the way in which people live on the land. Both bring two nations into existence. In the first, Sky Walker creates the land from the earth under the nails of Muskrat from which the Dane-zaa come into being. Amongst other sources of Dane-zaa law, the story contains rules and norms that give guidance to the Dane-zaa on how to live within the world and interact with both living and non-living beings. In the second story, Canada and its citizens come to have rights to live within the Dane-za-nané as a result of the consent given by the Dane-zaa in entering Treaty 8. Like the creation story of the Dane-zaa, the Treaty agreement is a source of law, prescribing legally binding obligations and responsibilities governing the relationship between the Crown and First Nations signatories.¹⁵¹

The ruling in *Prophet River* and other Canadian jurisprudence discussed in this paper suggests that these two stories are mutually exclusive, and that the existence of the second story makes the first story irrelevant to the present. That is, in entering of Treaty 8, First Nations signatories ceded all their former rights and title in exchange for limited and defined treaty rights to hunt, fish, and trap. As these rights are general and defined without regard to the respective nation's relationship with the land or culture, in exercising its treaty rights to take up land, the Crown need only discharge a procedural duty to consult and accommodate the affected Treaty 8 Nation, irrespective of the potential harm to the right.

As the current construction of the Site-C project exemplifies, the dichotomous treatment of the two creation stories enables the Crown to use and occupy the Dane-za-nané in an unencumbered manner. As one story is true and the other is fiction, there exists no need to embrace oppositions, complexities or other worldviews in understanding the relationship between the Crown and Treaty 8 First Nations. Indeed, the goal of "reconciliation," underpinning section 35(1) is easily achieved when the Crown's sovereignty is perceived as unlimited and treaty rights are defined and understood in the context of one normative system.¹⁵² Within this framework, "the [duty] to consult and accommodate [does] not operate to merge or reconcile Aboriginal visions of land use (rooted in Aboriginal self-understandings) with Crown visions of land use. Rather, the Crown is imagined as working within and through nothing but its own vision [...]."¹⁵³

However, in the words of author Thomas King, "[do] the stories we tell reflect the world as it truly is, or did we simply start off with the wrong story?"¹⁵⁴ Does the creation story of the Crown in the Peace River Valley end the 10,500-year relationship between the

151 Borrows, *supra* note 7 at 24-29.

152 *Mikisew Cree*, *supra* note 54 at para 1: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."

153 Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39:1 UBC L Rev 139 at 181.

154 King, *supra* note 1 at 26.

Dane-zaa and Dane-za-nané? In Part III, this paper answered this question in the negative. Irrespective of whether or not Treaty 8 had the effect of ceding Aboriginal rights and title, the legal relationship between the Dane-zaa and their territory, depicted by their creation story did not end upon entering Treaty 8. The legal relationship between the Dane-zaa and Dane-zaa-nané is not independent of Treaty 8, but is foundational to both its existence and the meaning of its terms.

Treaty 8 represents inter-societal law. It is an agreement between nations containing mutual obligations and promises made pursuant to distinct legal orders and norms.¹⁵⁵ As such, the meaning of its terms must necessarily be understood in respect to the perspective and laws of its parties. In entering Treaty 8, the Dane-zaa relied on their laws to *consent* to and provide the Crown the right of use of the Dane-za-nané, including what is now referred to as the Peace River Valley of British Columbia. Previous jurisprudence and historical and modern testimony from First Nation signatories and their descendants demonstrate that in exchange for these rights, the Crown guaranteed the Dane-zaa continuity of their way of life and culture, rather than general rights to hunt, fish, and trap, capable of abrogation at the whim of the Crown.

Given these promises, the ruling of *Prophet River* sits on shaky ground. The Crown does not have an unfettered right to take up land circumscribed only by a procedural duty to consult and accommodate. Rather, the Crown can only take up lands when doing so does not infringe the promises made to First Nations signatories, that is, the rights to hunt, fish, and trap, as understood in respect to the significance of those activities to the particular culture and perspective of the Treaty 8 First Nation.

While this paper does not deny that the Crown may have the right to take up lands under Treaty 8, the nature of the promises enshrined in the treaty agreement and the constitutionalization of treaty rights necessitates substantive limitations and obligations on the part of the Crown in taking up land. This paper is to be published in 2018, over 100 years since Prophet River First Nation and Moberly Lake First Nations entered into Treaty 8, 36 years since treaty rights were given constitutional protection, and three years since the Truth and Reconciliation Commission called on the federal and provincial governments to respect and honour treaty promises and “commit to the informed consent of Indigenous peoples before proceeding with economic development projects.”¹⁵⁶ Just as consent of the Dane-zaa and other First Nations signatories created Treaty 8 and gave the Crown and Canadians rights to the use of their territory, the infringement of treaty terms for the construction of the Site-C hydroelectric project requires a framework grounded in consent.

155 Borrows, *supra* note 7 at 28-29.

156 Truth and Reconciliation Commission of Canada, “Truth and Reconciliation Commission of Canada Calls to Action” (2015) at 10, online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> archived at <<https://perma.cc/3ECN-CACM>>.

ARTICLE

THE WATER SUSTAINABILITY ACT, GROUNDWATER REGULATION, AND INDIGENOUS RIGHTS TO WATER: MISSED OPPORTUNITIES AND FUTURE CHALLENGES

Kathryn Gullason *

CITED: (2018) 23 *Appeal* 29

INTRODUCTION

On February 29, 2016, British Columbia (alternatively, the “Province”) updated its *Water Sustainability Act* (“WSA”) and the first phase of the WSA’s regulations came into force.¹ The WSA introduces licensing requirements for groundwater, which was previously unregulated. While many celebrate the end of a system dubbed the “Wild West for groundwater,” the new regulations also pose challenges, particularly for Indigenous Peoples.²

Although all Canadian water law is limited by pre-existing Indigenous water rights,³ in British Columbia, the WSA largely maintains the status quo colonial water regime. On May 10, 2016, Canada officially adopted the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”); and article 32(1) of UNDRIP states “Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”⁴ But British Columbia continues to assume jurisdiction over water and ignore the “prior, superior and unextinguished water rights of Indigenous Nations of British Columbia.”⁵ The WSA represents a missed opportunity to right a historic wrong perpetrated against Indigenous Peoples and develop an equitable and sustainable nation-to-nation water governance model.

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1 *Water Sustainability Act*, SBC 2014, c 15 [WSA].

2 West Coast Environmental Law, “Underground and Under Pressure: Groundwater in BC’s Northeast” (16 April 2015), online: <<https://www.wcel.org/blog/underground-and-under-pressure-groundwater-bcs-northeast>> archived at <<https://perma.cc/Y9D9-75R7>>.

3 Merrell-Ann S Phare, *Denying the Source: The Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009) at 62.

4 *United Nations Declaration on the Rights on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2007) at 15.

5 Union of British Columbia Indian Chiefs, “UBCIC Submission BC Water Act Modernization Initiative” (30 April 2010), online: <<https://engage.gov.bc.ca/app/uploads/sites/71/2013/10/Union-of-BC-Indian-Chiefs.pdf>> archived at <<https://perma.cc/GY7P-J92L>> [UBCIC].

This paper will consider how the *WSA*'s groundwater regulations impact Indigenous water rights, specifically: (i) does British Columbia have jurisdiction to regulate groundwater on reserves and unceded title lands, (ii) how will prior allocation of groundwater licences impact Indigenous water rights, and (iii) what challenges will the regulations pose to meaningful consultation between the Province and Indigenous Peoples?⁶

Part I will begin with a brief history of the Province's colonial water regime and a description of the *WSA*'s groundwater regulations. Part II will review the foundations of Indigenous water rights, and Part III will consider how the groundwater regulations will affect those rights. Finally, this paper concludes by arguing that the *WSA* is inconsistent with UNDRIP and the Crown's "unique contemporary relationship" with Indigenous Peoples.⁶

I. BRITISH COLUMBIA'S COLONIAL WATER REGIME AND THE WATER SUSTAINABILITY ACT

A. A Brief History of Water Governance in British Columbia

Indigenous Peoples have used and occupied the lands we now know as Canada since time immemorial. Despite this fact, Europeans justified the imposition of settler state sovereignty based on the notion of *terra nullius*, which rejected the legitimacy of Indigenous land use and declared their territories to be "unused, empty, and put to waste."⁷ In 1865, the newly created Crown Colony of British Columbia asserted jurisdiction over surface water and began to issue water licences under the *Crown Colony Land Ordinance*; and in 1909, British Columbia introduced the *Water Act*, a water allocation regime based upon the principles of prior allocation.⁸ The principles of prior allocation include: (i) assertion of Crown ownership over water and prohibition of diverting water without a licence; (ii) appurtenance, the requirement that licences must be attached to land or "works"; (iii) beneficial use, which enabled a licence to be canceled if the water under the licence was not used or used for an improper purpose; (iv) prior allocation or "first in time, first in right" ("FITFIR"), which gives older licences precedence over newer ones; and (v) pay for use, which introduced fees for water use.⁹ Indigenous Peoples could not apply for a water licence until 1888.¹⁰ Though the *Water Act* provided for a Board of Investigations to resolve issues of priority and access, numerous Indigenous licences were improperly recorded and were often altered or cancelled by the Province.¹¹ When "Indian" lands were transferred from provincial to federal jurisdiction in 1930 and 1938, British Columbia continued to claim jurisdiction over the water in those lands.¹² In 2016, the former *Water Act* was replaced by the *WSA*, which introduced licensing and regulation of groundwater in British Columbia, among other changes.

6 *R v Sparrow*, [1990] 1 SCR 1075 at para 1114 [*Sparrow*].

7 Beatrice Rose Simms, "All of the water that is in our reserves and that is in our territory is ours': Colonial and Indigenous water governance in unceded Indigenous territories in British Columbia" (MA Thesis, University of British Columbia (Resource Management and Environmental Studies), 2014) at 24 [unpublished].

8 Jody Wilson-Raybould & Tim Raybould, "Section 3.31—Water" in *British Columbia Assembly of First Nations Governance Toolkit: A Guide to Nation Building*, 2nd ed (West Vancouver: British Columbia Assembly of First Nations, 2014), 5, online: <www.bcafn.ca/wp-content/uploads/2016/06/Governance-Toolkit.pdf> archived at <<https://perma.cc/Y8TN-GK8E>>.

9 Deborah Curran, "British Columbia's New *Water Sustainability Act*—Waiting for the Details" (13 May 2014), online: <<https://poliswaterproject.org/files/2017/06/Bill-18-2014-Summary-May-13-2014.pdf>> archived at <<https://perma.cc/D6M8-UQXQ>>.

10 Wilson-Raybould & Raybould, *supra* note 8 at 5.

11 *Ibid* at 6.

12 *Ibid*.

B. Groundwater Regulation under British Columbia's *Water Sustainability Act*

The *WSA* came into force on February 29, 2016.¹³ The *WSA* introduces some innovative measures for environmental protection, but largely maintains the principles of prior allocation and neglects to acknowledge Indigenous rights to water.¹⁴ Section 5(2) of the *WSA* vests property in and right to the use, percolation, and flow of British Columbia groundwater in the Crown. Groundwater is defined in the *WSA* as “water naturally occurring below the surface of the ground.”¹⁵ Under the *WSA*, all irrigators, industries, waterworks, and others who divert and use groundwater for non-domestic purposes must apply for a water licence.¹⁶ Groundwater users who were using groundwater on or before February 29, 2016 will receive licences based on prior allocation.¹⁷ The *WSA* sets out a three-year transition period for existing groundwater users to apply for a licence with an earlier precedence date based on evidence of when the groundwater was first used.¹⁸ Groundwater licensing on “First Nations reserve or treaty lands” is required for non-domestic use; however, First Nations individuals are generally exempt from water fees and rentals.¹⁹

The *WSA* maintains the status quo of the former *Water Act*, which was enacted during a period of imperialism, colonialism, and natural resource exploitation based on the oppression of Indigenous Peoples.²⁰ The Crown's relationship with Indigenous Peoples has since changed; however, the *WSA* continues to assume provincial ownership of water and ignore Indigenous water rights. Part II will review the foundations of Indigenous rights to water, and Part III will follow with a discussion of how the *WSA*'s groundwater regulations infringe those rights.

II. FOUNDATIONS OF INDIGENOUS RIGHTS AND TITLE TO WATER

According to the Union of British Columbia Indian Chiefs (“UBCIC”),

[a]s an incidence of our Aboriginal title to our territories, Indigenous Peoples have jurisdiction over the waters in our territories. Aboriginal title rights and treaty rights carry significant legal implications, and are priority interests.²¹

This section will explore the foundations of Indigenous rights to water including Aboriginal rights and title, treaty rights, and inherent Indigenous rights.

13 *WSA*, *supra* note 1.

14 Curran, *supra* note 9.

15 *WSA*, *supra* note 1, s 1(1).

16 British Columbia, Ministry of Environment and Climate Change Strategy, “Licensing Groundwater Users” (Victoria: Ministry of Environment and Climate Change Strategy, 2016), online: <www2.gov.bc.ca/assets/gov/environment/air-land-water/water/laws-rules/gw_licensing_brochure.pdf> archived at <<https://perma.cc/U789-QWET>> [Ministry of Environment and Climate Change Strategy].

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 UBCIC, *supra* note 5.

21 Council of Canadians, “Water Rush: Why BC's Water Sustainability Act fails to protect water” (January 2016) at 10, online: <<https://canadians.org/water-rush>> archived at <<https://perma.cc/5GRG-FAXR>>.

A. Aboriginal Rights and Title in Canadian Law

Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples in Canada based on the fact that “when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”²² Section 35(1) is to be given a “generous, liberal interpretation” that recognizes the “trust-like” relationship between the Crown and Indigenous Peoples.²³ Aboriginal rights are those that are “integral to the distinctive culture” of the claimant group.²⁴ They are not “frozen rights” but “must be interpreted flexibly so as to permit their evolution over time.”²⁵ Once an Aboriginal right is established, that right “generally encompasses other rights necessary to its meaningful exercise.”²⁶

Aboriginal title is a communal right to occupy a particular area of land exclusively and use it for various purposes.²⁷ The test for Aboriginal title is proof of exclusive occupation of the territory at the time the Crown asserted sovereignty.²⁸ In *Tsilhqot’in Nation v British Columbia* (“*Tsilhqot’in*”), the Supreme Court of Canada (“SCC”) made the first ever declaration of Aboriginal title and stated that “the right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders.”²⁹

Any infringement of unextinguished Aboriginal or treaty rights must be justified by the Crown. The Crown must prove that: (i) a valid legislative objective exists, and (ii) the chosen method of achieving that objective upholds the honour of the Crown.³⁰ The honour of the Crown includes a constitutional duty to consult and potentially accommodate Indigenous Peoples.³¹ The duty to consult arises “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”³² The content of the duty is contextual and proportionate to the strength of the claim and the seriousness of the potential adverse effect upon the Aboriginal right or title in question.³³

Aboriginal rights to water flow from the use and occupation of territories since time immemorial.³⁴ An Aboriginal right to water can be recognized either as a general, stand-alone right or as incidental to another Aboriginal right such as the right to fish. No Canadian court has explicitly established or denied an Aboriginal right to water; however, Canadian case law confirms that uses of water vital to the existence of an Aboriginal community can receive constitutional protection.³⁵ These rights can include “travel and navigation, rights to use water for domestic purposes such as drinking, washing, tanning

22 *R v Van der Peet*, [1996] 2 SCR 507 at para 30 [*Van der Peet*]; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1).

23 *Sparrow*, *supra* note 6.

24 *Van der Peet*, *supra* note 22 at para 46.

25 *Ibid* at para 64.

26 *Mitchell v Minister of National Revenue*, 2001 SCC 33, at para 22.

27 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

28 *Ibid*.

29 *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at para 76 [*Tsilhqot’in*].

30 *Sparrow*, *supra* note 6 at para 1114.

31 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24.

32 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35.

33 *Ibid* at para 39.

34 David Laidlaw, “Water Rights and Water Stewardship: What About Aboriginal Peoples?” (2010) at 2, online: <ablawg.ca/wp-content/uploads/2010/07/blog_dl_mpr_waterrights_july2010.pdf> archived at <<https://perma.cc/CFS3-FCM7>>.

35 *Ibid* at 3.

hides and watering stock, as well as rights to use water for spiritual, ceremonial, cultural or recreational purposes.”³⁶ Water may also be incidental to harvesting activities such as fishing, gathering, hunting, trapping, and lumbering, which the SCC has recognized are all “land and water based.”³⁷

In *Tsilhqot’in*, the SCC found that Aboriginal title includes “the right to decide how the land will be used; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”³⁸ However, submerged lands were excluded from the *Tsilhqot’in* title claim.³⁹ While the *Tsilhqot’in* decision does not explicitly mention possession and ownership of water as incidental to Aboriginal title, previous cases have suggested that Aboriginal interests in land include “adjacent waters.”⁴⁰ According to some commentators, *Tsilhqot’in* lays the foundation for Aboriginal title claims to water in the future.⁴¹

B. Treaty Rights to Water

Indigenous rights to water can also be recognized by treaty. Treaties are solemn agreements that define the respective rights of Indigenous Nations and the Crown to use and enjoy lands that Aboriginal people traditionally occupied.⁴² The “historic treaties” were concluded between 1701 and 1923, and the modern treaties, or comprehensive land claims, are those concluded since 1975.⁴³ The only historic treaties in British Columbia are the Douglas Treaties on Vancouver Island and Treaty 8 in northeastern British Columbia.⁴⁴ The historic treaties do not mention water; however, the modern treaties often include specific water allocations that are subject to provincial water law.⁴⁵

One frequently cited case regarding treaty-based water rights is *Winters v United States* (“*Winters*”).⁴⁶ In *Winters*, the United States Supreme Court held that when an Indian reservation is created, a quantity of water sufficient to fulfill the purposes of the reservation is impliedly reserved as well.⁴⁷ Water rights under *Winters* cannot be extinguished by non-use as their priority date is the date the reservation was created, and the right includes a quantity of water necessary to satisfy the object of the reservation.⁴⁸

36 *Ibid.*

37 *R v Sappier*, 2006 SCC 54 at para 51.

38 Mandell Pinder LLP, “*Tsilhqot’in Nation v British Columbia 2014 SCC 44*” (June 2014), Case Comment, online: <www.mandellpinder.com/tsilhqotin-nation-v-british-columbia-2014-scc-44-case-summary/> archived at <<https://perma.cc/H5AY-RVKQ>>.

39 *Tsilhqot’in*, *supra* note 29 at para 9.

40 *Van der Peet*, *supra* note 22 at 518.

41 Raluca Hlevca, Megan Spencer & Savannah Carr-Wilson, “*Tsilhqot’in Nation v BC: Summary of Panel Discussions on the Supreme Court of Canada Decision*” (October 2014), online: <https://poliswaterproject.org/files/2015/07/TsilhqotinPanelBrief_FINAL.pdf> archived at <<https://perma.cc/S7NX-H7ZA>>.

42 Indigenous and Northern Affairs Canada, “Treaties with Aboriginal people in Canada”, online: <<https://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>> archived at <<https://perma.cc/NF9E-NA5P>>.

43 *Ibid.*

44 Simms, *supra* note 7 at 23.

45 *Ibid* at 60.

46 *Winters v United States*, 207 US 564 (1908).

47 Kristy Pozniak, “Indian Reserved Water Rights: Should Canadian Courts ‘Nod Approval’ to the *Winters* Doctrine and What are the Implications for Saskatchewan if they Do?” (2006) 69 Sask L Rev 251; see also Jennele Morris O’Hair, “The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future” (1996) 10 BYUJ Pub L 263.

48 O’Hair, *supra* note 47 at 278.

Although *Winters* is American jurisprudence, some argue it should apply in Canada as well.⁴⁹ According to Kate Kempton, author of *Bridge over Troubled Waters: Canadian Law on Aboriginal and Treaty “Water” Rights, and the Great Lakes Annex*, Canadian courts often adopt principles from American jurisprudence in Aboriginal and treaty rights cases.⁵⁰ Kempton argues reserves in Canada and the United States were created to serve similar purposes, including residence and cultivation, both of which require assured access to water.⁵¹ She cites *Burrard Power Co v The King* (“*Burrard Power*”), a 1911 decision of the Privy Council, as authority for the argument that the principles enumerated in *Winters* are applicable in Canada. In *Burrard Power*, the Privy Council considered whether the conveyance of “public lands” by the Province of British Columbia to the Dominion Government included water rights.⁵² The Court refused to sever water rights from the land, stating that this would “defeat the whole object of the agreement.”⁵³ There is also evidence the Canadian government understood the creation of reserves to include an implied reservation of paramount water rights.⁵⁴ In 1920 (a decade after the *Winters* decision), the Canadian Department of Indian Affairs released a policy document which stated:

I am satisfied that the courts in construing the treaties between the Crown and the Indians under which reserves were set apart would follow the view already taken by the American Courts that there must be implied in such treaties an implied undertaking by the Crown to conserve for the use of the Indians the rights to take for domestic, agricultural purposes *all such water as may be necessary, both now and in the future development of the reserve from the waters which either traverse or are the boundaries of reserves.*⁵⁵

Finally, in *Saanichton Marina Ltd v Claxton*, the British Columbia Supreme Court (“BCSC”) issued an injunction against the construction of a marina in waters adjacent to a reserve. The Court found an implied right to water in relation to the treaty right to “carry on their fisheries as formerly.”⁵⁶

There is also scholarship suggesting the *Winters* doctrine is inapplicable in Canada.⁵⁷ While Canadian jurisprudence confirms that treaties should be given a generous and liberal interpretation to realize the intention of the reservation, Hopley and Ross, authors of “Aboriginal Claims to Water Rights Grounded in the Principle *Ad Medium Filum Aquae*, Riparian Rights and the *Winters* Doctrine,” argue *Winters* is inapplicable in Canada because of differences in the development of water law between the two jurisdictions. In the western United States, rights to water were governed by the doctrine of “prior appropriation,” whereby the first person to make beneficial use of a water source *appropriated* the rights to that water.⁵⁸ In western Canada, the law of riparian rights applied in the North-West Territories until 1894. Under a system of riparian rights, water is a public resource that

49 See Kate Kempton, *Bridge over Troubled Waters: Canadian Law on Aboriginal and Treaty “Water” Rights, and the Great Lakes Annex* (Toronto: Walter and Duncan Gordon Foundation, 2005) at 59-61.

50 *Ibid* at 59.

51 *Ibid*.

52 Richard H Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, 1986) at 21.

53 *Ibid*; *Burrard Power Co v The King*, [1911] AC 87 [*Burrard Power*].

54 Kempton, *supra* note 49 at 60.

55 As *Williams to Scott*, Black (Western) Series (July 27 1920), Ottawa, Library and Archives Canada (RG 10, vol 3660, file 9755-4), cited in Bartlett, *supra* note 52 at 36.

56 *Saanichton Marina Ltd v Claxton* (1987), [1988] 43 DLR (4th) 481 [*Saanichton Marina*]; Bartlett, *supra* note 52 at 36.

57 Scott Hopley & Susan Ross, “Aboriginal Claims to Water Rights Grounded in the Principle *Ad Medium Filum Aquae*, Riparian Rights and the *Winters* Doctrine” (August 2009) 19:3 JELP at 225.

58 *Ibid* at 263.

cannot be reserved, owned, or sold.⁵⁹ Instead, riparian rights to water are usufructuary; granting the legal right to use property that belongs to another with an obligation to preserve it.⁶⁰ Thus, the concept of “reserving” rights to water in Canada was, according to Hopley and Ross, not legally possible prior to 1894.⁶¹

Turning to the issue of treaty rights in relation to groundwater, under the *WSA*, non-domestic groundwater users on reserves now require a licence, which is subject to the principles of prior allocation. There has been minimal Canadian jurisprudence considering rights to groundwater on reserve lands. In *Halalt First Nation v British Columbia (Environment)*, the Halalt First Nation (“Halalt”) challenged the environmental assessment certificates for three groundwater wells along the Chemainus River within its reserve lands. Halalt argued it was not adequately consulted and the wells would infringe their Aboriginal rights and title. The BCSC held that Halalt was not adequately consulted and that Halalt had “an arguable case that the groundwater in the Aquifer was conveyed to the federal Crown in order to fulfill the objects for which the reserve lands were set aside” and “the Province cannot purport by legislative act to expropriate the groundwater.”⁶² The British Columbia Court of Appeal (“BCCA”) overturned the BCSC decision and held that Halalt was adequately consulted; however, the comments of the BCSC regarding groundwater on reserve may still be relevant.⁶³

While the existence of a general treaty right to water is unclear, there has been jurisprudence recognizing water as “necessarily incidental” to the exercise of a treaty right.⁶⁴ In *R v Simon*, the appellant, a registered Micmac Indian, was convicted under Nova Scotia’s *Lands and Forests Act* for possession of a rifle and shotgun cartridges. The appellant argued that he was protected by a treaty right to hunt under the Treaty of 1752. The SCC held in favour of the appellant and stated, “the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself.”⁶⁵ In *R v Sundown*, a member of a Cree First Nation party to Treaty 6 cut down trees and built a cabin within a provincial park to use for hunting and smoking fish. The SCC found that certain activities necessary for the exercise of a treaty or Aboriginal right, such as shelter for hunting, are constitutionally protected.⁶⁶ According to the SCC, “[i]ncidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.”⁶⁷ In British Columbia, the Tsawout First Nation successfully prevented the construction of a marina by arguing it threatened their treaty right to fish.⁶⁸ The Fort Nelson First Nation succeeded in cancelling a water licence due *inter alia* to inadequate consultation regarding the impact on their treaty rights to fish, hunt, trap, etc.⁶⁹ Thus, according to the jurisprudence (and applying the jurisprudence), water necessary for the exercise of a treaty right may be constitutionally protected.

59 *Ibid.*

60 *Ibid* at 233.

61 *Ibid* at 264.

62 *Halalt First Nation v British Columbia (Environment)*, 2011 BCSC 945 at para 553.

63 *Halalt First Nation v British Columbia (Environment)*, 2012 BCCA 472.

64 Phare, *supra* note 3 at 52-53.

65 *R v Simon*, [1985] 2 SCR 387 at para 31.

66 *R v Sundown*, [1999] 1 SCR 393 at para 29.

67 *Ibid* at para 30.

68 *Saanichton Marina*, *supra* note 56.

69 *Sharleen Gale and Fort Nelson First Nation v Assistant Regional Water Manager*, 2012-WAT0013(c) (BC EAB) at para 7 [Sharleen Gale].

C. Inherent Indigenous Rights

Aboriginal and treaty rights are not the only source of Indigenous rights to water. According to Indigenous Peoples, rights that “originate from the fact of their own existence as Nations, residing and governing throughout these territories” are their “inherent rights.”⁷⁰ Inherent rights may also be referred to as “reserved rights,” which Indigenous Peoples never relinquished to European settlers through treaties or any other means.⁷¹ Inherent Indigenous rights are distinguishable from Aboriginal and treaty rights because their validity does not stem from Canadian courts or governments. Inherent Indigenous rights are “given and limited by the Creator’s laws and responsibilities, including the laws of stewardship and reciprocity with nature [...] they] cannot be altered or narrowed by other humans, their governments or their laws [...] [n]either can Indigenous Peoples themselves shed the responsibilities placed upon them by the Creator.”⁷² While a fulsome discussion of the nature of inherent Indigenous rights to water is beyond the scope of this paper, it is important to recognize that Indigenous rights are not restricted to those recognized by colonial governments and legal systems.

III. IMPACT OF GROUNDWATER REGULATION ON INDIGENOUS RIGHTS TO WATER

This section will explore how the *WSA*’s groundwater regulations will impact Indigenous rights to water. Three interrelated issues will be considered: (i) whether the province has jurisdiction to regulate groundwater on reserves or unceded title lands, (ii) the impact of prior allocation of groundwater licensing on Indigenous rights to water, and (iii) the challenges the regulations pose to meaningful consultation between the Province and Indigenous Peoples.

A. Jurisdiction over Groundwater

The first issue this paper will consider in relation to British Columbia’s new groundwater regulations is whether the Province has the jurisdiction to regulate groundwater on reserve or unceded title lands. The Province argues that Indigenous Peoples gave up their rights to water when they negotiated treaties with the Crown.⁷³ The position of the UBCIC is that where Aboriginal title and rights have not been expressly ceded, the Province has no jurisdiction to assert ownership over water.⁷⁴ Thus, unless water rights have been negotiated explicitly, the Province does not have ownership or control over water. The *WSA* expressly violates this principle by purporting to regulate all groundwater, including on reserve and unceded title lands.

By purporting to regulate all groundwater in the province, British Columbia is assuming Indigenous rights to water (including Aboriginal, treaty, and inherent rights) have been extinguished. However, because inherent Indigenous rights flow from the occupation and use of land since time immemorial, and not from Canadian courts or governments, it is not possible for those same courts and governments to extinguish inherent Indigenous rights. Further, the Province likely does not have the constitutional authority to extinguish Aboriginal rights since they fall under the federal authority over “Indians, and Lands reserved for the Indians.”⁷⁵ Before 1982, the Crown was required to demonstrate a “clear

70 Phare, *supra* note 3 at 36.

71 *Ibid.*

72 *Ibid* at 37.

73 *Ibid* at 49.

74 UBCIC, *supra* note 5.

75 *Delgamuukw*, *supra* note 27; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24).

and plain intention” to extinguish an Aboriginal or treaty right.⁷⁶ After the ratification of the *Constitution Act, 1982*, Aboriginal rights and title have constitutional protection and cannot be extinguished.⁷⁷ Failure to recognize or grant protection to Aboriginal or treaty rights to water does not constitute a clear and plain intention to extinguish those rights.⁷⁸ Additionally, an Aboriginal or treaty right cannot be extinguished through government regulation.⁷⁹ The historic treaties make no mention of water, and have generally been interpreted as including water sufficient to meet the purposes of the reservation (such as, for the purposes of agriculture).

In a review of the water rights of Treaty 7 Indigenous Peoples in Alberta, Vivienne Beisel, author of *“Do not take them from myself and my children forever”: Aboriginal Water Rights in Treaty 7 Territories and the Duty to Consult*, concludes that no government action, including entering into Treaty 7, the transfer of natural resources from the federal to provincial government, or any other legislation, extinguished those rights.⁸⁰ Although the federal government did transfer authority over natural resources to British Columbia in 1930, this transfer was “subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same.”⁸¹ In *Denying the Source: The Crisis of First Nations Water Rights*, Merrell-Ann Phare argues this provision appears to guarantee Indigenous water rights in British Columbia and the other Western Provinces.⁸² Thus, it is unlikely that the Province has jurisdiction to regulate groundwater on lands that are subject to historic treaties, reserves or unceded title lands. The situation is different for the modern treaties, which are generally subject to provincial water law. For example, section 8.1.1. of the Maa-Nulth First Nation Final Agreement states “storage, diversion, extraction or use of water and groundwater will be in accordance with Federal Law and Provincial Law.”⁸³ The Agreement provides for five water reservations that have priority over all third party licences except those granted prior to October 2003.⁸⁴

Aboriginal title may or may not include rights to water. In *Tsilhqot’in*, the only case where a court has made a declaration of Aboriginal title, submerged lands were expressly excluded from the title claim.⁸⁵ However, there are ongoing title claims that do include submerged lands. For example, in 2002, the Haida Nation brought a claim for Aboriginal title to Haida Gwaii, including the land, inland waters, seabed, archipelagic waters, and air space.⁸⁶ The Haida claim is currently in abeyance; thus, it remains to be seen how a claim to Aboriginal title to waters and submerged lands will fare in court.

Based on the above, British Columbia may have overstepped its jurisdiction by purporting to regulate all groundwater on reserve and unceded title lands. In the next section, this paper will explore how these regulations may lead to the infringement of Indigenous water rights.

76 *Sparrow*, *supra* note 6 at 1099.

77 *Van der Peet*, *supra* note 22.

78 *R v Gladstone*, [1996] 2 SCR 723 at para 36.

79 *Sparrow*, *supra* note 5.

80 Phare, *supra* note 3 at 50; Vivienne Beisel, *“Do not take them from myself and my children forever”: Aboriginal Water Rights in Treaty 7 Territories and the Duty to Consult* (Saarbrücken: VDM Verlag Dr. Müller Aktiengesellschaft & Co KG, 2008).

81 Phare, *supra* note 3 at 52.

82 *Ibid.*

83 Indigenous and Northern Affairs Canada, “Maa-Nulth First Nations Final Agreement”, online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/mna_fa_mnafa_1335899212893_eng.pdf> archived at <<https://perma.cc/5764-A7PN>>.

84 *Ibid.*

85 *Tsilhqot’in*, *supra* note 29.

86 *Haida Nation v British Columbia*, 2004 SCC 73 (Statement of Claim), online: <www.haidanation.ca/wp-content/uploads/2017/03/Statement_of_Claim.pdf> archived at <http://www.haidanation.ca/wp-content/uploads/2017/03/Statement_of_Claim.pdf>.

B. Indigenous Water Rights and Prior Allocation of Groundwater

Under the *WSA*, Indigenous Peoples using groundwater for non-domestic purposes are required to apply for groundwater licences subject to the principles of prior allocation.⁸⁷ Therefore, groundwater licences obtained by Indigenous Peoples may be subject to third party licences with earlier precedence dates. In British Columbia, water scarcity is becoming an ever-increasing threat. Much of the Province experienced drought conditions in 2015, and many water sources are already fully or over-allocated.⁸⁸ Further, there are approximately 20,000 existing non-domestic groundwater users who will be brought under the *WSA* groundwater licensing regime over the next few years.⁸⁹ The confluence of increasing water scarcity and competing groundwater licences sets the scene for infringement of Indigenous water rights.

FITFIR grants priority water rights to users who are “first in time.” Interpreted literally, Indigenous Peoples are clearly the first users of water in British Columbia. As discussed, Indigenous Peoples have inherent rights, including rights to water, which have never been extinguished. Thus, the groundwater licences of Indigenous Peoples should have priority over all other third party licences. However, British Columbia has chosen to interpret FITFIR narrowly, only recognizing water rights once a provincial water licence has been issued (and again, Indigenous Peoples were barred from applying for water licences until 1888, 23 years after British Columbia began issuing licences). A “generous and liberal” interpretation of FITFIR would give precedence to Indigenous groundwater licences in recognition of their inherent rights to water.

Prior allocation of groundwater licences also has the potential to infringe constitutionally protected Aboriginal and treaty rights, or water uses which are necessarily incidental to the exercise of those rights. In times of water scarcity, Indigenous Peoples may be unable to exercise their Aboriginal and treaty rights to water. In *Sharleen Gale and Fort Nelson First Nation v Assistant Regional Water Manager* (“*Sharleen Gale*”), the Fort Nelson First Nation (“FNFN”) sought judicial review of a decision to issue a conditional water licence to Nexen Inc. within Treaty 8 territory. The licence authorized Nexen Inc. to divert water for storage and industrial use in oilfield injection.⁹⁰ Treaty 8 guarantees FNFN the right to “pursue their usual vocations of hunting, trapping and fishing.”⁹¹ The Environmental Assessment Board cancelled the water licence based on failure to adequately consult with FNFN regarding the potential impact on their treaty rights.⁹² *Sharleen Gale* is an example of the issuance of a water licence by a province that threatened to infringe constitutionally protected treaty rights.

Large gaps exist in understanding groundwater use and aquifer sustainability in British Columbia.⁹³ Given the lack of data and increasing scarcity of water in the Province, Aboriginal and treaty rights are at risk of being infringed. This is inconsistent with the

87 Ministry of Environment and Climate Change Strategy, *supra* note 16.

88 R Simms & OM Brandes, “Top 5 Water Challenges that will Define British Columbia’s Future” (September 2016) at 2, online: <<https://poliswaterproject.org/files/2016/09/POLIS-Top5-final-web.pdf>> archived at <<https://perma.cc/S7GL-567G>>; see also O Brandes & D Curran, *Water licences and conservation future directions for land trusts in British Columbia* (Victoria: POLIS Project on Ecological Governance, 2008).

89 British Columbia, Ministry of Environment and Climate Change Strategy, “New Requirements for Groundwater Users”, online: <www2.gov.bc.ca/gov/content/environment/air-land-water/water/water-licensing-rights/water-licences-approvals/new-requirements-for-groundwater-users> archived at <<https://perma.cc/3SQ3-B6UF>>.

90 *Sharleen Gale*, *supra* note 69 at para 1.

91 *Ibid* at para 10.

92 *Ibid*.

93 Simms & Brandes, *supra* note 88 at 11.

honour of the Crown. The Crown must justify any infringement of Aboriginal and treaty rights by demonstrating that a valid legislative objective exists and is in keeping with its “unique contemporary relationship” with Indigenous Peoples.⁹⁴ The next section will discuss how consultation with Indigenous Peoples on *Water Act* modernization was flawed from the beginning, and it will argue that current consultation procedures are insufficient to meet the Crown’s duty to consult.

C. Groundwater Regulation and the Duty to Consult

Groundwater licences granted without proper consultation with Indigenous Peoples may lead to infringement of Aboriginal and treaty rights. Indigenous Peoples state that British Columbia failed to adequately consult with them prior to enacting the *WSA*. During the public engagement process, Indigenous organizations and communities emphasized the need to recognize Indigenous rights to water, to negotiate on a nation-to-nation basis, and to acknowledge the priority of Indigenous water rights.⁹⁵ According to the UBCIC “the proposed *Water Act* amendments continue with the province’s history of denial, which is damaging both to Indigenous Peoples and Cultures, and also to the waters and all life that depends upon the water.”⁹⁶ The consultation process neither recognized Indigenous jurisdiction nor constitutionally protected Aboriginal and treaty rights.⁹⁷ According to the First Nations Summit, the Province’s engagement process on *Water Act* modernization “failed to engage First Nations in a distinct and direct process” and “cannot be deemed to constitute meaningful consultation with First Nations.”⁹⁸

Consultation between the Province and Indigenous Peoples prior to enacting the *WSA* was inadequate. The result is legislation that grants priority groundwater licences to third parties over Indigenous Peoples, potentially infringing Aboriginal and treaty rights. The Province now proposes to consult with Indigenous Peoples on a case-by-case basis when considering groundwater licences that impact Indigenous communities. There are two problems with this approach. First, the Province’s “on the ground” consultation procedures have proven ineffective.⁹⁹ In a review of British Columbia’s policies on consultation and accommodation, the First Nations Leadership Council (“FNLC”) outlined certain deficiencies in British Columbia’s approach.¹⁰⁰ The FNLC found British Columbia’s policies were developed in reaction to court decisions and have been legally narrow and reductionist, ignoring and in some cases setting back the spirit of reconciliation that underpins section 35 of the *Constitution Act, 1982*.¹⁰¹ Other deficiencies include the fact that provincial policy is aimed at preserving the legislative and operational status quo and is primarily procedural, not substantive.¹⁰²

94 *Sparrow*, *supra* note 6 at para 1110.

95 Council of Canadians, *supra* note 21 at 10.

96 UBCIC, *supra* note 5.

97 *Ibid.*

98 The First Nations Summit, “A Water Sustainability Act for BC: Legislative Proposal” (December 2013) at para 19, online: <<https://engage.gov.bc.ca/app/uploads/sites/71/2013/12/First-Nations-Summit.pdf>> archived at <<https://perma.cc/YXB3-TWRC>>.

99 *Ibid* at para 14.

100 First Nations Leadership Council, “Advancing an Indigenous Framework for Consultation and Accommodation in BC” (2013) at 87-101, online: <fns.bc.ca/wp-content/uploads/2016/10/319_UBCIC_IndigActionBook-Text_loresSpreads.pdf> archived at <<https://perma.cc/5N7N-74ZJ>>; see British Columbia, “Updated Procedures for Meeting Legal Obligations when Consulting First Nations—Interim” (7 May 2010), online: <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations>> archived at <<https://perma.cc/3B2Z-EPFJ>>.

101 First Nations Leadership Council, *supra* note 100 at 93-94.

102 *Ibid* at 96-97.

The second problem with a case-by-case approach to consultation is a capacity issue: the capacity of Indigenous Peoples to respond to these types of consultation requests is already over-burdened. The Crown referral process has been characterized as “[o]ne of the greatest logistical difficulties facing Aboriginal communities today” and a “death of a thousand cuts.”¹⁰³ Upholding the honour of the Crown requires meaningful consultation from the beginning of the law reform process, not as an afterthought to avoid liability once unjust colonial water governance principles are already in place.

CONCLUSION

In conclusion, the *WSA* represents a missed opportunity for British Columbia to retire its colonial water regime and recognize the “prior, superior, and unextinguished water rights” of Indigenous Peoples in British Columbia.¹⁰⁴ The former *Water Act* was developed in the context of colonialism, imperialism, and natural resource exploitation based on the oppression of Indigenous Peoples.¹⁰⁵ In enacting the *WSA*, the Province chose to maintain the status quo. This is not in keeping with Canada’s recent adoption of UNDRIP, section 35 of the *Constitution Act, 1982*, or Canada’s “unique contemporary relationship” with Indigenous Peoples.

The *WSA*’s groundwater regulations pose numerous challenges to Indigenous water rights. Where water rights have not been explicitly negotiated through treaty or Aboriginal title declarations, British Columbia has no jurisdiction to assert ownership or control over water.¹⁰⁶ Further, granting groundwater licences based on the principles of prior allocation will result in the infringement of both inherent Indigenous rights and constitutionally protected Aboriginal and treaty rights. Finally, Indigenous Peoples were not meaningfully consulted during the *Water Act* modernization process. Current consultation procedures have proven ineffective and are insufficient to further reconciliation. By ignoring Indigenous water rights and allocating water based on the colonial system of prior allocation, British Columbia risks conflict over water resources and the infringement of Indigenous, Aboriginal, and treaty rights.

103 Maria Morellato, *The Crown’s Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights* (West Vancouver: National Centre for First Nations Governance, 2008).

104 UBCIC, *supra* note 5.

105 *Ibid.*

106 *Ibid.*

ARTICLE

A MINOR ISSUE? THE SHORTCOMINGS OF THE ELIGIBILITY REQUIREMENTS FOR MEDICALLY ASSISTED DEATH IN CANADA

Jessica Bond *

CITED: (2018) 23 *Appeal* 41

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INTRODUCTION

In Canada, it is illegal to assist a person under 18 years of age in ending their own life,¹ meaning minors are prohibited from receiving medical assistance in dying (“MAID”). This prohibition is based on already accepted (and applied) arguments related to the protection of children, “who are particularly vulnerable both by virtue of their age and their disability, disease or illness”; and arguments that children cannot make MAID decisions because of their inexperience and immaturity.²

However, while minors are prohibited from making MAID decisions, this does not mean they are also immune from the disabilities and diseases that lead to intense, intolerable pain, or that they are against obtaining MAID.³ The Canadian Paediatric Surveillance Program recently reported minors are already approaching doctors about MAID.⁴ Though these conversations with minors about assistance in dying are still “relatively rare,”⁵ the possibility of such scenarios (and the prospect of paediatric illness) requires a reconsideration of those accepted arguments; they also require a review of arguments regarding bodily autonomy and mature minors.⁶

Responding to the Supreme Court of Canada’s (“SCC”) decision in *Carter v Canada (Attorney General)* (“*Carter*”),⁷ Parliament was required to balance Canadians’ interests in protecting children, vulnerable because of their inexperience and immaturity, and their interests in respecting mature minors’ right to request or refuse medical treatment. However, Parliament did not balance those interests in its minimally more permissive MAID regulatory regime, because that MAID regulatory regime restricts MAID to adults “at least 18 years of age and capable of making decisions with respect to their health.”⁸

Again, the prospect of paediatric disease and disability is disheartening—and the prospect of children with a “persistent and rational wish to end their own lives” is deeply distressing. As the External Panel on Options for a Legislative Response to *Carter v Canada* (“External Panel”) concluded: “[a]ccess for mature minors [to MAID] was perhaps one of the most emotionally charged questions the Panel encountered in its investigations of assisted dying.”⁹ The External Panel continued: “[n]o one who appeared before the Panel in Canada

1 *Criminal Code*, RSC 1985, c C-46, ss 14, 241 – 241.3 [*Criminal Code*].

2 “Legislative Background: Medical Assistance in Dying (Bill C-14, as Assented to on June 17, 2016) Part 4 – Statement of Legislative Impacts” (23 January 2017), online: Government of Canada <<http://www.justice.gc.ca/eng/rp-pr/other-autre/adra-amr/p4.html#p4>> archived at <<https://perma.cc/UNR2-UB2F>> [Canada, “Legislative Background”]; *AC v Manitoba (Child and Family Services)*, 2009 SCC 30 at para 108 [AC].

3 Maija Kappler, “Canadian pediatricians ‘increasingly’ being asked about assisted death for children,” *Global News* (26 October 2017) online: <globalnews.ca/news/3826108/assisted-death-canada-children/> archived at <<https://perma.cc/X724-ZPQ3>>. Canada, Public Health Agency of Canada & Canadian Pediatric Society, *Canadian Paediatric Surveillance Program, 2016 Results* (Ottawa: Canadian Paediatric Surveillance Program, 2017) at 34-35, online: <<https://www.cpsp.ca/uploads/publications/CPSP-2016-Results.pdf>> archived at <<https://perma.cc/KS8S-QZMQ>> [Canadian Paediatric Surveillance Program].

4 Canadian Paediatric Surveillance Program, *supra* note 3 at 35.

5 *Ibid.*

6 *AC, supra* note 2; *Van Mol v Ashmore*, 1999 BCCA 6 [Van Mol].

7 *Carter v Canada (Attorney General)* 2015 SCC 5 [Carter SCC].

8 *Criminal Code, supra* note 1, s 241.2(1)(b).

9 Canada, Department of Justice, *Consultations on Physician-Assisted Dying—Summary of Results and Key Findings*, External Panel on Options for a Legislative Response to *Carter v Canada*, (Ottawa: MediaMiser, 2015) at 55-56, online: <<http://www.justice.gc.ca/eng/rp-pr/other-autre/pad-amm/pad.pdf>> archived at <<https://perma.cc/JQ2E-23NV>> at 55 [External Panel].

openly advocated children’s access.”¹⁰ This paper is also not advocating for children’s access to MAID.

But there have been constitutional challenges from mature minors seeking the rights to make medical decisions for themselves and refuse the medical treatments that might save their lives; and it is possible a mature minor could challenge the constitutionality of section 241.2(1)(b) of the *Criminal Code*. If a mature minor were to argue that the MAID prohibition for persons under the age of 18 infringed their rights to life, liberty, or security of the person—and that the MAID prohibition was overbroad or disproportionate to the objective of the MAID regulatory regime, it is probable that the courts would consider section 241.2(1)(b) of the *Criminal Code* unconstitutional.

In Part I, the paper reviews the SCC’s decision in *Carter*, including the SCC’s “section 7 analysis,” its approach to determining whether laws do or do not contravene Canadians’ rights to life, liberty, and security of the person (and whether laws are or are not contrary to the principles of fundamental justice) under section 7 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).¹¹

In Part II and Part III, the paper reviews Parliament’s response to the SCC’s decision in *Carter*. The paper analyzes Canada’s MAID regulatory regime: the paper argues that this regulatory regime is incompatible with the rules, regulations, and laws related to mature minors (and their rights to their autonomy and ability to make medical decisions)—and, after applying the SCC’s “section 7 analysis,” acknowledges it is inconsistent with the principles of fundamental justice and mature minors’ rights to life, liberty, and security of the person.

I. CARTER AND CANADIANS’ RIGHTS TO LIFE, LIBERTY, AND SECURITY OF THE PERSON

Before *Carter*, Canada’s MAID regulatory regime was straightforward: MAID was wholly illegal. The *Criminal Code* prohibited MAID through two provisions: sections 14 and 241(b). Section 14 of the *Criminal Code* read:

No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent.¹²

Section 241(b) of the *Criminal Code* made aiding or abetting a person to commit suicide an indictable offence punishable with imprisonment for a term of not more than 14 years.¹³ And at the Supreme Court of British Columbia,¹⁴ then the British Columbia Court of Appeal,¹⁵ and finally the SCC, Gloria Taylor argued that this MAID prohibition contravened her rights under section 7 of the *Charter*.

In Part I, this paper reviews the SCC’s “section 7 analysis” in *Carter*, as the approach applied to Taylor’s argument that a complete prohibition on MAID for adults is unconstitutional also applies to arguments that a complete prohibition on MAID for minors is unconstitutional.

10 *Ibid* at 55.

11 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

12 *Criminal Code*, *supra* note 1, s 14.

13 *Ibid*, s 241(b).

14 *Carter v Canada* (*Attorney General*), 2012 BCSC 886 [*Carter BCSC*].

15 *Carter v Canada* (*Attorney General*), 2013 BCCA 435 [*Carter BCCA*].

A. Decision of the Supreme Court of British Columbia

In 2012, Taylor—joined by Lee Carter, Hollis Johnson, William Shoichet, and the British Columbia Civil Liberties Association (“BCCLA”)¹⁶—brought an action against the Attorney General of Canada for a declaration that Canada’s MAID prohibition in sections 14 and 241 of the *Criminal Code* was unconstitutional.¹⁷

Taylor had amyotrophic lateral sclerosis (“ALS”).¹⁸ By the time she testified to the Supreme Court of British Columbia, she was experiencing muscular atrophy in her hands, wrists, and feet.¹⁹ She said she required a wheelchair, but because her ALS made fine motor tasks difficult, she was unable to control one on her own.²⁰ Taylor said she required assistance from strangers for daily personal tasks; and she said that this assistance was an “assault on her privacy, dignity and self-esteem.”²¹ She stressed:

I, myself, will be greatly distressed by living in a state where I have no function or functionality that requires others to attend to all of my needs and thereby effectively oblige my family to bear witness to the final steps of the process of my dying with the indignity a slow death from ALS will entail.²²

Taylor wanted to avoid (what she anticipated as) a slow and painful death, and she wanted to ensure that her death was not undignified; as she told the trial judge: “I live in apprehension that my death will be slow, difficult, unpleasant, painful, undignified and inconsistent with the values and principles I have tried to live by.”²³

Taylor told the Supreme Court of British Columbia that palliative care and suicide were not necessarily acceptable alternatives to MAID.²⁴ She said palliative care could not prevent the slow and painful death she feared—and suicide left her with a “cruel choice between killing herself while she was still physically capable to do so or giving up the ability to exercise any control of the manner and timing of her death.”²⁵ The plaintiffs also argued, because the *Criminal Code*’s sections 14 and 241 subjected them to this choice, it had the effect

16 Carter and Johnson were the daughter and son-in-law, respectively, of Kay Carter (who, at age 89, attained MAID in Switzerland after a diagnosis of spinal stenosis); Carter and Johnson assisted Kay Carter to arrange that MAID, though their planning assistance and actions were illegal in Canada and opened them to prosecution (*Carter BCSC, supra* note 14 at paras 57-71). Shoichet, a physician practicing in Canada, was “willing to assist a patient who requested such end-of-life care where he was satisfied that it constituted appropriate medical care in the circumstances” (*ibid* at para 76). The BCCLA “has had a longstanding interest in matters of patients’ rights and health policy, and has conducted advocacy and education with respect to end-of-life choices, including assisted suicide and voluntary euthanasia” (*ibid* at para 45). This paper concentrates on the testimony of Taylor, as it is possible to most effectively and efficiently compare the experiences of that plaintiff to the experiences of the weighted hypothetical of “Adolescent” introduced in Part III.

17 The original claim brought forth by the plaintiffs was that sections 14, 21, 22, 222 and 241 of the *Criminal Code* were unconstitutional (*Carter BCSC, supra* note 14 at para 100). However, the SCC determined that sections 241(b) and 14 were the most relevant provisions for the purpose of the constitutional challenge (*Carter SCC, supra* note 7 at para 20).

18 ALS is alternatively known as motor-neuron disease; those diagnosed with ALS live through gradual paralysis and gradual muscular deterioration, and they “lose the ability to walk, talk, eat, swallow, and eventually breathe” (Amyotrophic Lateral Sclerosis Society of Canada, “What is ALS?” online: <<https://www.als.ca/about-als/what-is-als/>> archived at <<https://perma.cc/6NYG-AH78>>).

19 *Carter BCSC, supra* note 14 at para 49.

20 *Ibid* at para 50.

21 *Ibid*.

22 *Ibid* at para 52.

23 *Ibid* at para 54.

24 *Ibid* at para 55.

25 *Carter SCC, supra* note 7 at para 13.

of “forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable.”²⁶ These choices, Taylor concluded, infringed her rights under section 7 of the *Charter*.²⁷

Section 7 of the *Charter* states that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”²⁸ Taylor argued sections 14 and 241(b) of the *Criminal Code* constituted a “state interference with the right of grievously and irremediably ill individuals to a protected sphere of autonomy over decisions of fundamental personal importance.”²⁹ Additionally, she argued this interference by the state was not in accordance with the principles of fundamental justice since the MAID prohibition was overbroad and disproportionate to the objectives of the prohibition (the protection of the vulnerable).³⁰

The Supreme Court of British Columbia also addressed arguments under section 1 of the *Charter*, and concluded that the “benefits of the impugned laws are not worth the costs of the rights limitation they create.”³¹

The Supreme Court of British Columbia concluded that the *Criminal Code* provisions prohibiting physician-assisted dying infringed section 7 (and section 15) of the *Charter*, making them of no force and effect.³² Though those declarations were suspended for six months, Taylor was granted a constitutional exemption to permit physician assistance to die (under certain conditions).³³

B. Decision of the Supreme Court of Canada

The British Columbia Court of Appeal reversed the Supreme Court of British Columbia’s conclusion, so the case was appealed to the SCC.³⁴

The SCC held the voided sections of the *Criminal Code* violated Taylor’s rights to life, liberty, and security of the person by subjecting competent adults to premature death (by forcing them to take their own lives while still physically capable out of fear they would be

26 *Ibid* at para 57. This “cruel choice” was also addressed by another woman: “One woman noted that the conventional methods of suicide, such as carbon monoxide asphyxiation, slitting of the wrists or overdosing on street drugs, would require that she end her life ‘while I am still able bodied and capable of taking my life, well ahead of when I actually need to leave this life’ (*Ibid* at para 15).

27 *Ibid* at para 40.

28 *Charter*, *supra* note 11, s 7.

29 *Carter BCSC*, *supra* note 14 at para 1295.

30 *Ibid* at para 25.

31 *Ibid* at para 1285. Though these section 1 (of the *Charter*) arguments were actually addressed as a justification to the MAID prohibition’s section 15 (of the *Charter*) infringement, the Supreme Court of British Columbia concluded it would reach “the identical conclusion” if instead, those arguments were addressed as a justification to the section 7 infringement (*Ibid* at para 1385; *Charter*, *supra* note 11, ss 1, 15). The plaintiffs also argued that this “section 1 analysis” was not required, referencing *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, after a determination that the MAID prohibition infringed section 7. Though a section 1 justification of a section 7 infringement “may not be impossible,” the Supreme Court of British Columbia declined to reassess section 1 in the context of “a deprivation of life, liberty, or security of the person” (*Carter BCSC*, *supra* note 14 at paras 1379-1383).

32 *Carter BCSC*, *supra* note 14 at para 1393.

33 *Ibid* at para 1414.

34 The British Columbia Court of Appeal concluded “neither the change in legislation and social facts nor the new legal issues relied on by the trial judge permitted a departure from *Rodriguez v British Columbia (Attorney General)*, 1993 3 SCR 519” (*Carter SCC*, *supra* note 7 at para 34).

unable to do so when pain and suffering became intolerable),³⁵ reducing their autonomy over their bodies, and instilling a fear of prolonged pain and suffering.³⁶

i. Application of Section 7 of the *Charter*

The rights set out in section 7 of the *Charter* are not absolute. Rather, section 7 states that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof *except in accordance with the principles of fundamental justice*.”³⁷ Any legislation (or rules or regulations) limiting section 7 rights must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to the (impugned) law’s objective.³⁸ In instances where limiting legislation is overbroad, arbitrary, or grossly disproportionate, that law will be found to infringe section 7 rights not in accordance with the principles of fundamental justice, and therefore, they can only be upheld as constitutional through an application of section 1 of the *Charter* (see below).³⁹

In *Carter*, the SCC found that the prohibitions contained in sections 14 and 241(b) of the *Criminal Code* infringed Taylor’s right to *life*.⁴⁰ The SCC accepted that the impugned laws had the potential effect of forcing persons with such illnesses to “take their own lives prematurely for fear that they would be incapable of doing so when they reached the point where suffering was intolerable.”⁴¹ The SCC also adopted the trial judge’s reasoning that the complete prohibition on MAID had the effect of shortening the lives of individuals with grievous and irremediable illnesses (in cases where individuals took their lives prematurely).⁴² So—a regulatory regime that prohibited MAID shortened the lifespan of certain people while a regime that allowed MAID enabled people to choose to die only when they reached the point of intolerable suffering.⁴³

The SCC also held that the prohibition engaged the plaintiff’s rights to *liberty and security of the person*.⁴⁴ The SCC accepted the trial judge’s conclusion that the MAID prohibition engaged security of the person interests by subjecting those persons who were unable to obtain MAID to “suffer physical or psychological pain and imposed stress due to the unavailability of physician-assisted dying.”⁴⁵ Additionally, the SCC acknowledged that the

35 *Carter* SCC, *supra* note 7 at para 57.

36 *Ibid* at paras 57, 58, 65, 66, 126.

37 *Charter*, *supra* note 11, s 7 [emphasis added].

38 *Carter* SCC, *supra* note 7 at para 72.

39 *Ibid*.

40 *Ibid* at para 58.

41 *Ibid* at para 57.

42 *Ibid* at paras 57-58.

43 *Carter* BCSC, *supra* note 14 at para 1325.

44 The SCC references *Blencoe v British Columbia (Human Rights Commission)* to define liberty: “the right to make fundamental personal choices free from state interference” (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 54 [Blencoe], as cited in *Carter* SCC, *supra* note 7 at para 64). And the SCC references *Rodriguez v British Columbia (Attorney General)* to define security of the person: “a notion of personal autonomy involving [...] control over one’s bodily integrity free from state interference” (*Rodriguez v British Columbia (Attorney General)*, 1993 3 SCR 519 at 587-588, referring to *R v Morgentaler*, [1988] 1 SCR 30, as cited in *Carter* SCC, *supra* note at 7 para 64). Security of the person rights are assailed “by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering” (*Carter* SCC, *supra* note 7 at para 64, referring to *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 58 [G(J)]; *Blencoe*, *supra* note 44 at paras 55-57; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 43, 119, 191, 200).

45 *Carter* SCC, *supra* note 7 at 65.

MAID prohibition engaged liberty interests by interfering with a person's bodily integrity, personal autonomy, and right to make decisions about their medical care.⁴⁶

The SCC's reasoning reapplies the established principles underlying an individual's right to refuse life-saving treatment, and it analogizes the right to refuse life-saving treatment with the right to request MAID.⁴⁷ The SCC referred to *AC v Manitoba (Director of Child and Family Services)* ("AC"):

where the claimant sought to refuse a potentially lifesaving blood transfusion on religious grounds, [Justice Binnie] noted that we may 'instinctively recoil' from the decision to seek death because of our belief in the sanctity of human life [...]. *But his response is equally relevant here:* it is clear that anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition 'does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live' [...].⁴⁸

The SCC also referred to *Fleming v Reid*⁴⁹ and acknowledged that the right to make personal and fundamental life choices "is not vitiated by the fact that serious consequences, including death, may flow from the patient's decision."⁵⁰ Then the SCC concluded that the principles underlying the cases concerning the "right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued" also support the right to choose MAID.⁵¹

The SCC held that all three interests protected by section 7 of the *Charter* were engaged by the prohibition on MAID.⁵² This compelled the SCC to then determine whether the impugned provisions did so in accordance with the principles of fundamental justice. The SCC determined that the prohibition was not arbitrary,⁵³ but did find that it was overbroad.⁵⁴ (This paper concentrates on the overbreadth analysis, as the MAID prohibition for persons under 18 years of age is also overbroad; and if a mature minor makes a constitutional challenge to the MAID prohibition for persons under 18 years of age, it is probable that the court would approach that case the way the SCC approached this case.)

46 *Ibid* at para 68. In deciding that the prohibition of MAID infringed individuals right to liberty and security of the person, the SCC cited the trial judge's reasons:

The trial judge, too, described this as a decision that, for some people, is 'very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience'. This is a decision that is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person [citations omitted] (*Ibid*).

47 *Carter SCC, supra* note 7 at para 66.

48 *AC, supra* note 2, as cited in *Carter SCC, supra* note 7 at para 68 [citations omitted] [emphasis added].

49 *Fleming v Reid* (1991), 1991 CanLII 2728 (ONCA) [*Fleming*].

50 *Carter SCC, supra* note 7 at para 56.

51 *Ibid* at paras 66-67. The SCC reached that conclusion citing *Ciarlariello v Schacter*, [1993] 2 SCR 119; *Malette v Schulman*, 1990 CanLII 6868 (ONCA); and *Nancy B v Hôtel-Dieu de Québec*, 1992 CanLII 8511 (QCCS).

52 *Carter SCC, supra* note 7 at para 56.

53 *Ibid* at paras 83-84.

54 *Ibid* at para 90. Upon finding the prohibition overbroad, the SCC determined it was unnecessary to consider whether it was also grossly disproportionate to its purpose.

a. Overbreadth

In *Bedford v Canada (Attorney General)*, the SCC stated overbroad laws “may violate our basic values”—where overbreadth means “the law goes too far and interferes with some conduct that bears no connection to its objective.”⁵⁵ In determining whether a law is overbroad, the court is not obligated to contend “with competing social interests or ancillary benefits to the general population.”⁵⁶

The overbreadth inquiry has two steps. First, the court must determine the objective of the impugned law; second, the court must determine whether the law deprives individuals of life, liberty, or security of the person in cases that do not further that objective.⁵⁷ Where the second step is answered affirmatively, the law deprives persons of section 7 rights under the *Charter* in a manner that is not in accordance with the principles of fundamental justice.⁵⁸

In *Carter*, the SCC determined that the *Criminal Code* prohibition on MAID was overbroad.⁵⁹ The Attorney General of Canada argued sections 14 and 241 were aimed at preventing “vulnerable persons from being induced to commit suicide at a moment of weakness,” and the SCC accepted that this was the objective of those provisions.⁶⁰ However, the SCC also accepted “that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives.”⁶¹ Accordingly, the SCC concluded an absolute prohibition on MAID was overbroad: sections 14 and 241 protected the vulnerable, but also barred persons with a “rational and persistent wish to end their own lives” from MAID.⁶²

ii. Application of Section 1 of the Charter

Section 1 of the *Charter* both guarantees the rights and freedoms set out within the *Charter* and permits limitations on those rights, so long as they are prescribed by law and demonstrably justified in a free and democratic society.⁶³

The SCC has repeatedly noted that a law that infringes section 7 *Charter* rights can only be saved by section 1 in extraordinary circumstances.⁶⁴ There is yet to be a case where the

55 *Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 101 [*Bedford*].

56 *Carter* SCC, *supra* note 7 at para 85. Instead, the court’s focus is on the law’s effect on the individual who is challenging the impugned law. Furthermore, the determination as to whether a law is overbroad must be based on whether there is a rational connection between its effect on that specific individual and the object of the law.

57 *R v Appulonappa*, 2015 SCC 59 at 27. Even if a law is drawn broadly to make enforcement more practical, such practicality does not remedy the absence of connection between the purpose of the law and its effect on the individual. See *Carter* SCC, *supra* note 7 at paras 85–86; see *Bedford*, *supra* note 55 at paras 101, 112–113.

58 *Ibid.*

59 *Carter* SCC, *supra* note 7 at para 86.

60 *Ibid* at para 29.

61 *Carter* BCSC, *supra* note 14 at para 1136, as cited in *Carter* SCC, *supra* note 7 at para 86.

62 *Carter* SCC, *supra* note 7 at para 86. It was the barring of this larger class of individuals which was “not connected to the objective of protecting vulnerable persons” (*Ibid*).

63 *Charter*, *supra* note 11, s 1.

64 *Carter* SCC, *supra* note 7 at para 95; *Reference re s 94(2) of Motor Vehicle Act (BC)*, [1985] 2 SCR 486 at para 111; *G(J)*, *supra* note 44 at para 99. The government may only be able to do so where it is able to demonstrate that the public good justifies the deprivation of an individual person’s right to life, liberty or security of the person; the SCC’s approach to section 1 of the *Charter* is able to address that public good in ways the SCC’s approach to section 7 of the *Charter* cannot, as the ‘section 7 analysis’ addresses the individual’s rights (*Carter* SCC, *supra* note 7 at para 95).

government has been able to demonstrate such a public good (or proven section 7 rights have been justifiably infringed under section 1 of the *Charter*).⁶⁵

To justify an infringement of section 7, the law must have a pressing and substantial objective and the means chosen to obtain that objective must be rationally connected to that objective.⁶⁶ In *Carter*, the SCC accepted the British Columbia Court of Appeal's conclusion on the pressing and substantial objective behind the MAID prohibition: "where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks."⁶⁷ But the courts will also assess whether any infringement to those section 7 rights is minimally impairing. The minimal impairment analysis ensures deprivations of *Charter* rights are confined to what is reasonably necessary to achieve the state's objective; and in *Carter*, despite the reasonableness of the MAID prohibition as a means of achieving the state's objective, section 14 and 241 of the *Criminal Code* infringed the claimants' section 7 rights more than was necessary.⁶⁸

iii. Demonstrating (or Not Demonstrating) Deference to Parliament

The SCC accepted the trial judge's conclusion: "a regime less restrictive of life, liberty and security of the person could address the risks associated with physician-assisted dying."⁶⁹ The SCC also adopted the trial judge's conclusion that there are ways to accurately appraise the competency and capacity of persons requesting MAID to ensure that those persons were not being compelled or coerced into suicide.⁷⁰ Though the SCC (referring to *Alberta v Hutterian Brethren of Wilson Colony*)⁷¹ had held a "complex regulatory response" to some social issues should be accorded "a high degree of deference,"⁷² the SCC found that there was a limited amount of deference owed to the prohibition on MAID, as the *Criminal Code*'s MAID provisions were not necessarily complex.⁷³

In *Carter*, the SCC found section 1 of the *Charter*⁷⁴ did not justify the complete prohibition on MAID. Accordingly, the law was not upheld as constitutional—or "saved."⁷⁵ The Attorney General of Canada failed to meet the burden of proving there were no alternative,

65 Constance MacIntosh, "Carter, Medical Aid in Dying, and Mature Minors" (2016) 10 McGill JL & Health (QL).

66 *R v Oakes*, [1986] 1 SCR 103 at paras 73-75 [*Oakes*]. A law is proportionate when: (i) there is a rational connection between the law's objective and the means adopted to achieve that objective; (ii) the chosen means minimally impair the *Charter* right in question; and (iii) the deleterious and salutary effects of the law are proportionate to one another (*Ibid*).

67 *Carter* SCC, *supra* note 7 at para 100. The SCC is referring to the decision of Finch CJBC (*Carter* BCCA, *supra* note 15 at para 175).

68 *Carter* SCC, *supra* note 7 at para 102.

69 *Ibid* at para 103.

70 *Ibid* at para 107.

71 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

72 *Ibid* at para 37; *Carter* SCC, *supra* note 7 at paras 97-98.

73 *Carter* SCC, *supra* note 7 at para 98.

74 *Charter*, *supra* note 11.

75 Despite the SCC's ruling that the prohibition was prescribed by law and had a pressing and substantial objective, it held that it was disproportionate and not minimally impairing (*Carter* SCC, *supra* note 7 at paras 119, 121, 123).

less drastic means to achieve the objective of protecting the vulnerable.⁷⁶ Instead, the SCC held vulnerability could be assessed on an individual basis using the procedure physicians apply in their assessment of informed consent and capacity in the context of the medical decision-making generally.⁷⁷

In *Carter*, the SCC decided that the MAID prohibition (in sections 14 and 241(b) of the *Criminal Code*) infringed Taylor's "[section] 7 rights to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under [section] 1 of the *Charter*."⁷⁸ The SCC ruled that the *Criminal Code*'s MAID prohibitions were void:⁷⁹

insofar as they prohibit physician-assisted death for a competent adult person who [i] clearly consents to the termination of life; and [ii] has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.⁸⁰

The SCC turned the MAID regulatory regime issue back to Parliament.

II. PARLIAMENT'S RESPONSE TO *CARTER V CANADA* (ATTORNEY GENERAL)

Parliament's response to the SCC's decision in *Carter*, Bill C-14, came into force on June 17, 2016.⁸¹ Bill C-14 added sections 241.1, 241.2, 241.3, 241.31, 241.4 and 227—and amended sections 14, 241, and 245—of the *Criminal Code*.⁸²

76 *Ibid* at paras 107, 109, 121. This conclusion was informed by evidence from ethicists, scientists, medical experts, and others who were familiar with end of life practices as well as the impact of other jurisdictions' permissive regimes on vulnerable persons (*Ibid* at paras 104, 107); this included evidence by 12 medical practitioners who stated that "based on their clinical experience and their understanding of medical ethics, they would consider it ethical in some circumstances to assist a patient who wishes to hasten death" (*Carter BCSC, supra* note 14 at para 254). Additionally, Professor Sumner (Department of Philosophy, University of Toronto) told the Supreme Court of British Columbia that "there is simply no way to show that, of the four treatment options (treatment cessation, pain management, terminal sedation and assisted death), assisted death is uniquely ethically impermissible" (*Ibid* at para 235); Professor Sumner's belief that allowing MAID would not be unethical was supported by other ethicists (*Ibid* at paras 238-243). Additionally, it was found that there was no evidence from permissive jurisdictions that vulnerable populations (such as elderly and disabled persons) were at a heightened risk for accessing MAID (*Carter SCC, supra* note 7 at para 107).

77 *Ibid* at para 106.

78 *Ibid* at para 126.

79 *Ibid* at para 126-127. Parliament was granted one year to devise an acceptably constitutional legislative scheme for MAID before the existing *Criminal Code* provisions ruled invalid in *Carter* became of no force and effect, but the SCC granted a motion for a four-month extension in 2016 (Canada, Parliamentary Information and Research Service, *Legislative Summary of Bill C-14*, (Ottawa: Library of Parliament, 2016) [Canada, *Legislative Summary of Bill C-14*]; *Carter v Canada (Attorney General)*, 2016 SCC 4.

80 *Carter SCC, supra* note 7 at para 127.

81 Canada, *Legislative Summary of Bill C-14, supra* note 79.

82 *Ibid*.

Parliament developed a *marginally more permissive* MAID regulatory regime, closely connected to the SCC’s “minimalist decision” in *Carter*, as demonstrated through that regulatory regime’s relatively restrictive eligibility requirements and significant safeguards.⁸³

Section 241.2(1) establishes eligibility requirements for MAID, with the provision reading:

241.2(1) A person may receive medical assistance in dying *only if they meet all of the following criteria*:

- (a) they are eligible—or, but for any applicable minimum period of residence or waiting period, would be eligible—for health services funding by a government in Canada;
- (b) *they are at least 18 years of age* and capable of making decisions with respect to their health;
- (c) they have a grievous and irremediable medical condition [⁸⁴];
- (d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and
- (e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.⁸⁵

There are also significant safeguards to protect persons requesting MAID. Those safeguards are aimed at protecting vulnerable persons from compulsion, coercion, error, and abuse, and they are set out in section 241.2(3) of the *Criminal Code*. Among those safeguards, there are requirements that the medical or nurse practitioner ensure that the request for MAID was made in writing—and that the request for MAID be signed by two independent witnesses; the person requesting MAID must be able to withdraw their request, and they must wait at least ten days between the day of their request and the day of their MAID.⁸⁶ Section 241.3 of the *Criminal Code* applies a deterrent to coercion, compulsion, and abuse: medical practitioners and nurse practitioners who fail to comply with all the relevant requirements in section 241.2(3) are liable to a term of imprisonment of not more than five years (on conviction of an indictable offence) or a term of imprisonment of not more than 18 months (on summary conviction).⁸⁷

83 Doug Surtees suggests that *Carter* is a “minimalist decision”: “the SCC decided no more than it had to (and some will say less than it ought to have) in order to resolve the matter before it” (Doug Surtees, “The Authorizing of Physician Assisted Death in *Carter v Canada* (Attorney General)”, (2015) 78 Sask L Rev 225).

84 A “grievous and irremediable medical condition” is defined in section 241.2(2) of the *Criminal Code*:

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

- (a) they have a serious and incurable illness, disease or disability;
- (b) they are in an advanced state of irreversible decline in capability;
- (c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
- (d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining (*Criminal Code, supra* note 1).

85 *Ibid*, s 241.2(1) [emphasis added].

86 *Ibid*, s 241.2(3).

87 *Ibid*, s 241.2(3)(a)-(b).

III. SECTION 241.2(1)(B) OF THE *CRIMINAL CODE* IS UNCONSTITUTIONAL AND UNRESPONSIVE TO THE JURISPRUDENCE ON MATURE MINORS

Instead of asking *how* section 241.2(1)(b) balances mature minors' rights to life, liberty, and bodily autonomy against Parliament's interests in protecting children (vulnerable to compulsion and coercion by virtue of their illness or inexperience), it could be asked *whether* section 241.2(1)(b) balance those things at all.

In Part III, the paper surveys the substantial jurisprudence on mature minors' rights to bodily autonomy, including their rights to request and refuse life-saving medical treatment. The paper reviews those rights because they are not incorporated into Parliament's MAID regulatory regime, and could constitute a more complex alternative to a complete prohibition. The SCC holds that those rights must be incorporated into legislation respecting the medical decision-making rights of mature minors.⁸⁸ Mature minors are able to request and refuse life-saving medical treatment, those courts have held, because those actions align with their rights under section 7 of the *Charter*.⁸⁹ The paper suggests that these criteria could also be applied to MAID decisions for minors and would be sufficiently rigorous to screen out minors who are incapable of making these decisions. This paper argues that the existing "mature minor principle" and the "best interests standard" are less restricting than an age-based criterion; they could protect vulnerable minors while upholding autonomy of minors in rare situations of paediatric irremediable and grievous disease. This argument is supported by the recommendations and findings of independent groups, who studied eligibility requirements for MAID before the new *Criminal Code* provisions were implemented.

This paper then analyzes the constitutionality of section 241.2(1)(b) of the *Criminal Code*. After analyzing Parliament's MAID regulatory regime through the same structure the SCC used to assess Parliament's prohibition on MAID in *Carter*, the paper concludes section 241.2(1)(b) of the *Criminal Code* contravenes mature minors' rights to life, liberty, and security of the person. Additionally, this paper concludes that this infringement cannot be justified under section 1 of the *Charter*. This paper suggests that the total prohibition on MAID for persons under the age of 18 is likely unconstitutional; but Parliament could, conceivably, still save that regulatory regime by removing the arbitrary age restriction—and by implementing standards similar to the criteria currently used to measure minors' capacity to make medical decisions.

A. Parliament's Response to *Carter* Ignores Jurisprudence on Mature Minors' Bodily Autonomy

The SCC and provincial and territorial trial and appellate courts have held age restrictions are an arbitrary way to determine minors' capacity to request or refuse medical treatment; instead, those courts maintain minors must be assessed individually (through the "mature minor rule" and "best interests standard").⁹⁰ These individual assessments are accepted as an effective, efficient, and accurate way to assess those minors' capacities, and Parliament's response to *Carter* ignored jurisprudence on mature minors' right to bodily autonomy.

88 *AC*, *supra* note 2 at paras 3-4, 21.

89 *Ibid* at para 101.

90 See *AC*, *supra* note 2 at paras 107-108.

i. The “Mature Minor Rule”

The “mature minor rule” was first articulated in 1985 in the United Kingdom in *Gillick v West Norfolk and Wisbech AHA* (“*Gillick*”).⁹¹ The issue in this case was whether doctors could provide contraceptive advice and prescriptions to a girl under the age of 16 without parental consent.⁹² The House of Lords recognized that, although parental rights and duties of custody did not completely disappear until the age of majority, the line between childhood and adulthood was not rigid but gradual.⁹³ The “mature minor rule” was affirmed by the Supreme Court of British Columbia in *Ney v Canada (Attorney General)* (“*Ney*”), in 1993, and the SCC in *AC*, in 2009.⁹⁴

As detailed below, both the SCC and Legislative Assembly of British Columbia have stated that it is arbitrary to use age as a definitive restriction on minors’ ability to consent. *AC* sets out the common law “mature minor rule” in Canada.⁹⁵ In this case, the SCC upheld impugned provisions of Manitoba’s *Child and Family Services Act* (“*CFSA*”),⁹⁶ which allowed the court to intervene in minors’ medical decisions, despite those minors’ right to autonomy over their bodies. The SCC found that, when interpreted appropriately, the scheme achieved the requisite balance between the public’s interests in protecting vulnerable children and respecting the autonomy of minors⁹⁷—and that it did not violate section 7 of the *Charter*.⁹⁸ In *AC*,⁹⁹ Justice Abella insisted it would be “inherently arbitrary to deprive an adolescent under the age of 16 of the opportunity to demonstrate sufficient maturity when he or she is under the care of the state,”¹⁰⁰ and she generally accepted that there is no constitutional justification to deprive a minor of that opportunity.¹⁰¹

Further, the SCC found that, with proper interpretation, the *CFSA*¹⁰² did not arbitrarily restrict minors under 16 years of age from proving they were capable medical decision-makers.¹⁰³ Rather, the *CFSA* only precluded them from a rebuttable presumption of

91 *Gillick v West Norfolk and Wisbech AHA*, 1986 AC 112, as cited in *AC*, *supra* note 2 at para 48.

92 *AC*, *supra* note 2 at para 48.

93 *Ibid* at paras 48-51.

94 *Ney v Canada (Attorney General)*, 1993 CanLII 1301 (BCSC) [*Ney*]. It is important to note that the Manitoba Law Reform Commission concluded the ‘mature minor rule’ is “a well-known, well-accepted and workable principle which [...] raise[s] few difficulties on a day-to-day basis” (*Minors’ Consent to Health Care* (1995), Report 91, at 33), as cited in *AC*, *supra* note 2 at para 46.

95 *AC*, *supra* note 2.

96 *The Child and Family Services Act*, CCSM 1985 c C80 [*CFSA*].

97 *AC*, *supra* note 2 at para 108.

98 *Charter*, *supra* note 11.

99 In *AC*, *supra* note 2, a 14-year-old-girl received a blood transfusion despite her refusal on religious grounds. The transfusion was ordered by the trial court because it was determined to be in the child’s best interest. The authority to do so came from Manitoba’s *CFSA*. Although the plaintiff had been found to have capacity to consent to treatment, the trial court found it was in her best interests to order the blood transfusion, despite her refusal of it. The plaintiff challenged the constitutionality of the legislative scheme on the grounds that it violated her section 7 rights. However, the SCC held that because the scheme provided a thorough assessment of maturity of the minor to determine whether the treatment was in their best interest, the scheme achieved the requisite balance between the protection of the vulnerable and autonomy of minors and that it did not violate section 7 of the *Charter*.

100 *Ibid* at para 114.

101 *Ibid* at para 29.

102 *CFSA*, *supra* note 96, ss 25(8), 25(9).

103 *AC*, *supra* note 2 at para 108.

capacity—a presumption that persons 16 years of age and older were afforded.¹⁰⁴ The *CFS* required courts to consider the maturity (and corresponding self-determination) of a minor under 16 years of age when deciding whether a self-elected medical decision was or was not in their “best interests” (see below).¹⁰⁵ Therefore, their ability to make treatment decisions was “ultimately calibrated in accordance with *maturity, not age*.”¹⁰⁶ This finding by Justice Abella is important when deciding whether the current age restriction for MAID is constitutional, as the current provisions do not provide an opportunity for anyone under the age of 18 to prove their capacity to request MAID.

The Legislative Assembly of British Columbia has also acknowledged that age is an arbitrary measurement of a minor’s capability to consent to medical procedures. In 1992, British Columbia’s *Infants Act*¹⁰⁷ was amended. The previous version required persons between 16 and 18 years of age to satisfy a test before being deemed to have the capacity to consent.¹⁰⁸ Colin Gabelmann, then the Attorney General of British Columbia, acknowledged that this previous provision was vulnerable to a constitutional challenge, and he held “[t]he amendment removes arbitrary distinctions between minors of different ages, and makes the requirements for consent to health care uniform for all minors.”¹⁰⁹ The current version of the *Infants Act*¹¹⁰ does not include an age requirement and instead provides a uniform test to determine the medical decision-making capacity of minors.¹¹¹

This paper contends that, in certain circumstances, medical decision-making by minors is analogous to their ability to request MAID, and a complete prohibition on MAID based solely on age is arguably arbitrary.

ii. The “Best Interests Standard”

Canadian jurisprudence has considered how the “mature minor rule” applies in cases where minors *refuse* life-saving treatment. In certain cases, a minor’s decision to refuse life-saving treatment can be overridden if a court determines it to be in the child’s best interests. When it comes to a minor’s refusal of treatment (including life-saving treatment), the mature judgement and capacity of a minor to make medical decisions are important considerations when deciding whether the courts can override the wishes of a minor.¹¹² As Justice Abella accepted:

It is a sliding scale of scrutiny, with the adolescent’s views becoming increasingly determinative depending on his or her ability to exercise mature,

104 *Ibid* at para 24. This is consistent with the arguments advanced in *Informed Consent: Legal Theory and Clinical Practice*, referenced in AC:

Authors in this area agree that age cut-offs should not be used as automatic determinants of de facto capacity for any type of decision but may function as an indicator to shift presumptions. Thus, individuals below the age of consent are presumed to lack capacity unless shown otherwise, and those above the age of consent are presumed to have capacity until shown otherwise (Jessica W Berg, et al, *Informed Consent: Legal Theory and Critical Practice*, 2nd ed (Oxford, Oxford University Press, 2001), as cited in AC, *supra* note 2 at para 111).

105 AC, *supra* note 2 at para 116.

106 *Ibid* at para 111 [emphasis added].

107 *Infants Act*, RSBC 1979 c 196 s 16.

108 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 35th Parl, 1st Sess, Vol 5, No 4 (24 June 1992) at 3056 (Hon C Gablemann). [BC *Hansard*].

109 *Ibid*.

110 *Infants Act*, RSBC 1996 c.223 s.17 [*Infants Act*].

111 BC *Hansard*, *supra* note 108 at 3056.

112 AC, *supra* note 2 at para 96. Considerations made in this determination of decisional capacity include: the influence of parents on the child’s wishes; the likelihood that the treatment would be successful; and the child’s developmental experience, intelligence, and understanding of the nature of their condition (*Ibid*).

independent judgment. The more serious the nature of the decision, and the more severe its potential impact on the life or health of the child, the greater the degree of scrutiny that will be required.¹¹³

Applying such scrutiny, a court can interfere with a minor's right to autonomy, and this interference does not violate section 7 of the *Charter*.¹¹⁴

The "best interests standard"¹¹⁵ comes from the provincial statutory schemes that govern mature minors' ability to consent to treatment.¹¹⁶ The SCC has held that such a standard does not violate section 7 when its application balances a minor's right to medical decision-making autonomy with the state's interest in protecting vulnerable minors, which was the case in *AC*.¹¹⁷ To achieve this balance, "a thorough assessment of maturity, however difficult, is required in determining their best interests."¹¹⁸

That statutory scheme refers to the considerations applied when determining whether a minor's medical decisions are or are not in their best interests. This includes factors like "the mental, emotional and physical needs of the child; his or her mental, emotional and physical stage of development; the child's views and preferences; and the child's religious heritage."¹¹⁹ The court considers the complete circumstances of the minor making the medical decision when assessing best interest.

However, as minors move from childhood to adolescence, the "distinction between promoting autonomy and protecting welfare" starts to collapse. In *W(A Minor), Re* (which was referenced with approval in *AC*), Lord Balcombe addressed that collapse:

[A]s children approach the age of majority, they are increasingly able to make their own decisions concerning their medical treatment. [...] Accordingly the older the child concerned the greater the weight the court should give to its wishes, certainly in the field of medical treatment. In a sense this is merely one aspect of the application of the test that the welfare of the child is the paramount consideration. It will normally be in the best interests of a child of sufficient age and understanding to make an informed decision that the court should respect its integrity as a human being and not lightly override its decision on such a personal matter as medical treatment, all the more so if that treatment is invasive.¹²⁰

113 *Ibid* at para 20.

114 See *AC*, *supra* note 2.

115 The "best interests standard" is used in provincial legislation that governs medical decision-making by minors and the courts' ability to override a minor's autonomy and order a treatment believed to be in the minor's best interest despite the minor's refusal of such treatment. The SCC has held that the best interests standard must consider the minor's treatment wishes and relevant capacity to make medical decisions, as well as the courts overarching responsibility to protect children from harm (*AC*, *supra* note 2 at paras 21-23, 32). The SCC stated that the level of the minor's maturity becomes more determinative of their ability to make such a decision without interference from the court when the impact of the decision on the life of the minor is less severe. Additionally, the court should consider all relevant factors such as the mental, emotional, physical and educational needs of the child and the child's mental, emotional and physical stage of development.

116 *Infants Act*, *supra* note 110, s 17; *CPSA*, *supra* note 93; *Child, Family and Community Service Act*, RSBC 1996 c 46 s 29; *Child and Family Services Act*, SS 1989-90, c C-7.2, ss 4(b), 11.

117 *AC*, *supra* note 2 at para 115.

118 *Ibid* at para 4; *Charter*, *supra* note 11.

119 *AC*, *supra* note 2 at para 89.

120 *W(A Minor) (Medical Treatment: Court's Jurisdiction), Re*, [1992] 4 All ER 627 at 643-644, as cited in *AC*, *supra* note 2 at para 55 [emphasis removed].

Returning to the “best interests standard,” Lord Balcombe also accepted that the courts should demonstrate some deference—and “give effect to the child’s wishes on the basis that prima facie that will be in his or her best interests.”¹²¹

In *AC*, the SCC referenced several cases where minors’ decisions to refuse treatment have been upheld. As an example, in *Re LDK (An Infant)*, a 12-year old (who was also a Jehovah’s Witness) refused the blood transfusions required as a consequence of chemotherapy; the Ontario Provincial Court considered the improbability of success (the prospect of success was estimated at 10 to 30 percent), the sincerity of her religious beliefs, and the emotional trauma involved, accepting her decision.¹²² In *Re AY*, as another example, the trial judge accepted a decision made by a 15-year old (who was also a Jehovah’s Witness) to refuse a blood transfusion and chemotherapy; recognizing the improbability of successful treatment (the prospect of success was estimated at 10 to 40 percent) and the minor’s maturity, and the trial judge accepted the minor’s decision.¹²³ In these instances, the minors refusing treatment had terminal illnesses, the treatment had a low chance of saving their lives, and they were found to be capable of making their own medical decisions.¹²⁴ These decisions were based on the requirement that the courts consider the mental state and emotional impact of ordering medical treatment against a minor’s wishes.¹²⁵

The SCC (in *AC*) also referenced several cases where the courts intervened in minors’ medical decisions. In *Dueck (Re)*, the Saskatchewan Court of Queen’s Bench overruled the decision of a 13-year old boy to refuse surgery and continued chemotherapy was overturned, as the boy “was deeply influenced by his father”—and “[t]he father controlled the information the boy was getting about treatment, and misled him with respect to the nature of his condition.”¹²⁶ In *H(T) v Children’s Aid Society of Metropolitan Toronto*, a 13-year old girl (who was also a Jehovah’s Witness) was overruled after she refused a blood transfusion, as the girl “lacked the maturity to judge the foreseeable consequences of her decision.”¹²⁷

This paper argues that these cases illustrate similar circumstances to a mature minor who requests MAID. Rather than an arbitrary age requirement, the courts considered the complete circumstances of the minor making the medical decision. The “best interests standard” acted as a safeguard in these cases, as it could be a safeguard in cases of mature minors requesting MAID: it may permit some mature minors to access MAID, while preventing those that lack the necessary intelligence, independence, or maturity from receiving MAID.

121 *Ibid.*

122 *Re LDK (An Infant)*, 1985 CanLII 2907 [*Re LDK*].

123 *Re AY*, 1993 CanLII 8385 [*Re AY*].

124 *Ibid* at paras 14, 18, 23, 28, 34, 37. In *Re AY*, the Newfoundland Supreme Court denied a request by the state to administer blood products to a 15-year-old who was suffering from terminal cancer and who had refused such treatment. The likelihood that the treatment would arrest the progress of the child’s disease was somewhere between 10 to 40 percent (*Ibid* at para 14). In *Re LDK*, the Ontario Provincial Court, found that a 12-year-old minor, who was suffering from acute myeloid leukemia, was of sufficient intelligence to refuse a blood transfusion; the chances of successful treatment were between 10 to 30 percent (*Re LDK*, *supra* note 122 at paras 3-4, 14).

125 *Re AY*, *supra* note 123 at para 14; *Re LDK*, *supra* note 122 at paras 17, 19, 21, and 34. Specifically, courts focused on whether the treatment would violate the mature minor’s right to freedom of religion, produce side effects that cause pain and anguish, and the impact the treatment would have on the minor’s dignity and peace of mind when that treatment was forced upon them, among other issues.

126 *AC*, *supra* note 2 at para 60; *Dueck (Re)*, 1999 CanLII 20568 (SKQB).

127 *AC*, *supra* note 2 at para 59; *H(T) v Children’s Aid Society of Metropolitan Toronto*, 1996 CANLII 8153 (ONSC).

In light of the decision in *AC*, this paper argues that in order to meet the constitutional balance of a minor's autonomy with society's interest to protect vulnerable minors, the MAID provisions must at least consider a minor's maturity and capacity to consent to and refuse medical treatment before precluding them. This could be achieved through a more restrictive and controlled "best interests standard," as seen in the refusal of life-saving treatment cases.

B. Parliament Rejected Recommendations for a More Permissive Regulatory Regime

This paper accepts that the existing "mature minor rule" and the "best interests standard" are less restrictive than an aged-based criterion and that they could protect vulnerable minors while upholding the autonomy of minors in rare situations of irremediable and grievous pediatric disease. This argument is supported by recommendations and findings of independent groups who studied eligibility for MAID before the new provisions were implemented.

One of those independent groups is the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying ("Advisory Group").¹²⁸ The Advisory Group was created by Parliament to consult with several stakeholders¹²⁹ to make recommendations for an amendment to the *Criminal Code* as a response to *Carter*. One of the recommendations made by the Advisory Group was that eligibility for MAID be based on competence (rather than age).¹³⁰ Their Final Report states:

[...] in assessing whether someone is an adult person, an arbitrary age limit such as 18 years old provides no valid safeguard. Instead, it is important that willing physicians carefully consider the context of each request to determine whether the person has the information needed, is not under coercion or undue pressure, and is competent to make such a decision.¹³¹

Additionally, the Special Joint Committee on Physician-Assisted Dying ("Joint Committee"), another group created by Parliament, studied submissions from Benoît Pelletier (External Panel; Faculty of Law, University of Ottawa) and Derryck Smith (Physicians Advisory Council, Dying with Dignity Canada). Pelletier stated that "suffering is suffering, regardless of age and that there is a risk that the provisions may be challenged on the basis of section 15 of the *Charter* (equality rights) if minors are excluded."¹³²

The Joint Committee also recommended that "the capacity of a person requesting medical assistance in dying to provide informed consent should be assessed using existing medical practices, emphasizing the need to pay particular attention to vulnerabilities in end-of-life

128 Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, Final Report (30 November 2015), online: <http://www.health.gov.on.ca/en/news/bulletin/2015/docs/eagreport_20151214_en.pdf> archived at <<https://perma.cc/B3VR-DDAV>> at Appendix 1 [Canada, *PT Expert Group*]. Members of the Advisory Group included experts in bioethics, human rights, and medical and mental health (*ibid*).

129 *Ibid* at Appendix 2. These stakeholders included the British Columbia and Canadian Civil Liberties Associations, Canadian Hospice Palliative Care Association, and College of Family Physicians Canada (*ibid*).

130 Canada, *Legislative Summary of Bill C-14*, *supra* note 79 at ss 1.4, 1.5, 1.6.

131 Canada, *PT Expert Group*, *supra* note 128 at page 34.

132 Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (26 January 2016), 1810 (Benoît Pelletier), as cited in Parliament of Canada, Special Joint Committee on Physician-Assisted Dying, *Medical Assistance in Dying: A Patient-Centred Approach*, February 2016) (Chairs: Hon Kelvin Kenneth Ogilvie & Robert Oliphant), online: <<https://www.parl.ca/Content/Committee/421/PDAM/Reports/RP8120006/pdamrp01/pdamrp01-e.pdf>> archived at <<https://perma.cc/439W-2LGZ>> [Canada, *Special Joint Committee*].

circumstances.”¹³³ After a review of many arguments for and against allowing minors to access MAID, the Joint Committee stated:

Allowing competent minors access to MAID would not be eliminating the requirement for competence. Given existing practices with respect to mature minors in health care [...] and the obvious fact that minors can suffer as much as any adult, the Committee feels that it is difficult to justify an outright ban on access to MAID for minors. As with issues of mental health, by instituting appropriate safeguards, health care practitioners can be relied upon to identify appropriate cases for MAID and to refuse MAID to minors that do not satisfy the criteria.¹³⁴

The Joint Committee acknowledged that there were differences of opinion among witnesses (and the reports and recommendations the Joint Committee received)—and that those opinions reflected the range of public perspectives.¹³⁵ As an example, the Canadian Paediatric Society maintained minors should not necessarily be brought into Parliament’s revised MAID regulatory regime; its reasons included “the lack of evidence before the court in *Carter* regarding minors; the fact that an age limit is not arbitrary; and the lack of social consensus with respect to MAID for minors [sic].”¹³⁶ Instead, the Canadian Paediatric Society advised addressing minors’ access to MAID at a later date, when more data was available to address the issue.¹³⁷ Also—Margaret Birrell (Alliance of People with Disabilities Who Are Supportive of Legal Assisted Dying Society) and John Soles (Society of Rural Physicians of Canada) “were open to minors possibly having access, but felt this should not be allowed at the present time.”¹³⁸

The External Panel reported some witnesses were skeptical of an age-based criterion. Specifically, the College of Physicians and Surgeons of British Columbia told the External Panel that excluding minors would be inconsistent with legislation (of several provinces) that allows minors to make their own medical decisions.¹³⁹ Additionally, three medical ethicists¹⁴⁰ recommended an approach to MAID eligibility restrictions that did not

133 Canada, *Special Joint Committee*, *supra* note 132 at 18.

134 *Ibid* at 20-21 [citations omitted]. Peter Hogg (Osgoode Hall Law School) also asserted (to the Joint Committee) that the SCC spoke only of ‘competent adults’—meaning the Joint Committee could set the age of “adulthood” though adulthood is accepted as between the ages of 18 and 21 (Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (25 January 2016), 1240 (Peter Hogg), as cited in Canada, *Special Joint Committee*, *supra* note 132 at 18-19).

135 Canada, *Special Joint Committee*, *supra* note 132 at 21.

136 *Ibid* at 19.

137 *Ibid*.

138 *Ibid* at 20; Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (4 February 2016), 1730 (Margaret Birrell), online: <www.parl.ca/DocumentViewer/en/42-1/PDAM/meeting-12/evidence> archived at <<https://perma.cc/K62E-W56V>>; Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (4 February 2016), 1900 (John Soles), online: <www.parl.ca/DocumentViewer/en/42-1/PDAM/meeting-12/evidence> archived at <<https://perma.cc/K62E-W56V>>. It should be noted that, at this same session, Michael Bach (Canadian Association for Community Living) also asserted: “We strongly urge that mature minors not be eligible. We don’t deny the suffering of children and adolescents, but we believe that palliative care is the answer for those situations” (Parliament 1st Sess, 42nd Parl, Special Joint Committee on Physician-Assisted Dying, *Evidence* (4 February 2016), 1925 (Michael Bach), online: <www.parl.ca/DocumentViewer/en/42-1/PDAM/meeting-12/evidence> archived at <<https://perma.cc/K62E-W56V>>.

139 *External Panel*, *supra* note 9 at 54.

140 Those medical ethicists are Dr. Thomas Foreman, Joshua Landry, and Michael Kekewich of the Champlain Centre for Health Care Ethics, Ottawa Hospital.

reference age. Instead, they argued that an age-based criterion would be arbitrary, and they advocated for an approach to MAID eligibility requirements based on actual capacity.¹⁴¹

Wayne Sumner (Department of Philosophy, University of Toronto) suggested that the revised regulatory regime allow MAID for minors between the ages of 12 and 18. Sumner stated:

The Court did not restrict eligibility for [physician-assisted dying] to competent adults only and there is no justification for doing so. Some provision must also be made for decision-making by ‘mature minors’ (between the ages of twelve and eighteen). In this case, however, it may be best to reverse the presumption of capacity, so that adolescents will need to demonstrate that they have the maturity to handle a decision of this magnitude. If so, then the decision should be left in their hands, though (especially in the case of younger adolescents) consultation with parents or legal guardians may be mandated; the rule of thumb should be that if a minor is deemed to be competent to refuse life-sustaining treatment then he or she is also competent to request life-shortening treatment.¹⁴²

Though the recommendations and reports from these groups (and the testimony of their witnesses) reveals a range of opinions regarding minors and the MAID regulatory regime, most maintain age-based restrictions are problematic and probably unconstitutional (as those restrictions disrespect mature minors’ rights to bodily autonomy). The testimony of many witnesses (and groups) reflected those witnesses’ (and groups’) professional, political, and ethical interests in protecting populations vulnerable to coercion and compulsion; competence appeared as an acceptable alternative to an age-based restriction.

This paper reviewed the recommendations and findings of independent groups who studied eligibility requirements for MAID in anticipation of a “section 7 analysis” and “section 1 analysis” under the *Charter*. As the paper reviews below, these groups’ arguments that the *Criminal Code*’s age-based eligibility requirement is probably arbitrary or disproportionate to the objective of the MAID regulatory regime are relevant to the constitutionality of section 241.2(1)(b)—as is their contention that there are alternatives to that age-based eligibility requirement that are less likely to infringe a mature minor’s bodily autonomy.

C. Section 241.2(1)(b) of the *Criminal Code* Probably Infringes Mature Minors’ Rights to Life, Liberty, and Security of the Person

In *Carter*, the SCC determined “that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives”¹⁴³—and the SCC decided “not every person who wishes to commit suicide is vulnerable.”¹⁴⁴

So—is it possible that there are also mature minors “who have a considered, rational and persistent” wish to die? In its attempt to protect vulnerable children from compulsion and coercion into suicide, is it possible that Parliament drafted an amendment to the *Criminal Code* that went beyond that objective, capturing mature minors that are not necessarily vulnerable?

As a weighted hypothetical, consider a constitutional challenge to section 241.2(1)(b) of the *Criminal Code* by “Adolescent.” Adolescent is a competent, capable, and strong-

141 *External Panel*, *supra* note 9 at 54.

142 *Ibid.*

143 *Carter BCSC*, *supra* note 14 at para 1136, as cited in *Carter SCC*, *supra* note 7 at para 86.

144 *Ibid.*

willed 17-year-old who was diagnosed with a degenerative disease when he was 14. He has been told by multiple physicians that he will not live to see his next birthday, and before he succumbs to the condition, he will endure more and more severe suffering and pain, eventually becoming immobile. His physicians have also told him he will need significant personal care. He fears he will have to have assistance from strangers; and he fears, similar to Taylor, that this will result in interference with his “privacy, dignity, and self-esteem.”¹⁴⁵ Adolescent knows that there are palliative care options available to him, though he also acknowledges palliative care cannot completely prevent his severe suffering; he has considered suicide as an alternative.

To determine whether section 241.2(1)(b) of the *Criminal Code*, which prohibits Adolescent from accessing MAID because of his age, infringes his section 7 rights to life, liberty, and security of the person, the court would consider the reasons in *Carter*. Specifically, the court would determine if the reasons for the finding that Taylor’s section 7 interests were engaged by a prohibition on MAID would extend to someone in Adolescent’s position. The court would then determine if section 241.2(1)(b) of the *Criminal Code* was overbroad in achieving its purpose to protect vulnerable minors from taking their own lives in a moment of weakness, including coercion and a lack of understanding of their choice.

i. Application of Section 7 of the *Charter*

Admittedly, Adolescent may have difficulty claiming he has the same life experience that Taylor had had, and he may have difficulty claiming he has firmly established life principles that he lives by; and those factors were important issues in *Carter*.

However, he may wish to access MAID for reasons fundamental to him, and again, he may fear the loss of privacy or self-esteem that could come from dependence on strangers for care and a lack of independence generally. As a 17-year-old, he has an understanding of his own body (and he is entitled to a realm of personal privacy). Adolescent also faces the same fear of intolerable suffering that Taylor faced. As a result of these fears, despite his age, Adolescent could still have a “fundamental belief” about how he wishes to live his life (or cease to live his life). He may have to face the same sort of “cruel choice” that Taylor faced.

The finding, in *Carter*, that a total prohibition on MAID infringes the right to life (of those seeking MAID) by potentially forcing them to prematurely take their own life could logically extend to mature minors. Certain mature minors who experience the intolerable suffering of irremediable and grievous ailments could be faced with the same choices that Taylor was forced to face. For example, in the instance of Adolescent, he fears the imminent and intolerable suffering that will be caused by his irremediable disease as well as loss of privacy and dignity. As a result of these fears, Adolescent could have a “deeply personal and fundamental belief” about how he wishes to cease living. However, section 241.2(1)(b) of the *Criminal Code* does not allow him to pursue MAID, and instead, he must choose to face the intolerable suffering and dependence on strangers for personal care (in this clearly weighted hypothetical) or be forced to take his own life while he is still physically capable. Although cases as serious as Adolescent’s are rare, they are possible, and this paper argues that based on the reasons in *Carter*, the existing provisions potentially infringe a mature minor’s right to life.

Section 241.2(1)(b) infringes minors’ (evolving) right to autonomy over their own body, and they may face intolerable physical and psychological pain because they were denied access to MAID. Therefore, the state interference with minors’ access to MAID engages both *liberty* and *security of the person* interests (see above and below).

145 *Carter* SCC, *supra* note 7 at para 12.

a. Overbreadth

Applying the “section 7 analysis” used by the SCC in *Carter*, this paper asserted that the current regulatory regime restricting access to MAID to persons aged 18 and older infringed the liberty and security of the person interests of mature minors, turning to the weighted hypothetical of “Adolescent.” This paper acknowledges that the current scheme restricting access to MAID is probably overbroad, and therefore, it infringes a mature minor’s rights to life, liberty, and security of the person. In order to be saved, the law must be justified by section 1 of the *Charter*.

In order to determine overbreadth, the court must focus on the effect of the law on the individual mature minor. First, the court must consider the object of the prohibition on access to MAID for persons under 18 years old. Second, the consideration turns to whether depriving the mature minor of their section 7 rights furthers the objective of protecting minors who are particularly vulnerable by virtue of their age; or disability, disease, or illness; or compulsion or coercion by others who may induce them to take their own lives.

If the court establishes that the mature minor is not vulnerable by virtue of those factors, it must conclude that the government’s infringement of their rights applies to a larger group than the lawmakers intended. This means that the age-based MAID safeguard is catching more persons than it is required to catch, including those who would not be considered especially vulnerable. In effect, the court must find that the new provisions are overbroad and take away the life, liberty, or security of the person in a way that runs afoul of basic societal values.¹⁴⁶

The current *Criminal Code* provisions restrict minors from proving they are not vulnerable based on age. At common law, the “mature minor rule” requires that an individual assessment of maturity determine an adolescent’s (or child’s) capacity to consent to medical treatment, rather than any pre-determined age limit.¹⁴⁷ A minor’s developing intelligence and relative capacity to understand what is involved in making informed choices about proposed medical treatments determines their entitlement to decision-making autonomy.¹⁴⁸ As mature minors have been found capable of consenting and refusing consent to medical treatment, it must follow that they are capable of being competent, fully informed, and free from coercion and duress in similar circumstances. Thus, a mature minor who meets all other eligibility requirements for MAID would not be vulnerable if a permissive regulatory regime was available to them. This paper acknowledges that, by limiting access to MAID based on age and not an individual’s maturity, the law effectively captures minors who are not necessarily vulnerable. Minors who are competent, fully informed, and free from coercion and duress are not at risk of being induced into taking their own lives in a moment of weakness.

Returning to that weighted hypothetical, assume that Adolescent meets all other eligibility requirements to access MAID, including giving his informed consent as approved by two independent medical or nurse practitioners. Additionally, in the opinion of a psychiatrist, he is of sufficient intelligence and relative capacity to understand the implications of a request for MAID. It could be argued that Adolescent is not vulnerable to be induced into taking his own life in a moment of weakness, but rather entitled to make that choice by virtue of his section 7 rights under the *Charter*. However, because Adolescent does not meet the age requirement (by a matter of months, in this hypothetical) he is not eligible for MAID and is subject to intolerable pain and suffering. It was likely not Parliament’s intention to deny this person the right to decide to end their life when such pain and

146 *Bedford*, *supra* note 55 at paras 94-96.

147 *Van Mol*, *supra* note 6 at paras 76-77; *Ney*, *supra* note 94 at 142.

148 *Van Mol*, *supra* note 6 at para 75.

suffering ensued. However, the effect of their chosen criteria for MAID is denying this choice to a person who is not vulnerable.

The Department of Justice (“DOJ”), however, argues that establishing a clear age cut-off for accessing MAID rather than an individualized assessment “is justified in light of the unique interests at stake.”¹⁴⁹ It has been recognized that in some cases, determining the capacity and maturity of a minor is not a precise measure and they could be subject to coercion and influence from others.¹⁵⁰ As such, to protect from mistakes in judgment regarding a minor’s capacity, it is argued a clear-cut off age is justified. However, this practicality justification does not change the absence of connection between the purpose of the law and its effect on an individual mature minor who is capable of making such decisions. Accordingly, such an argument is better dealt with under the section 1 analysis (see below).

In response, this paper argues that the MAID regulatory regime can be bettered by the addition of the “mature minor rule” and “best interests standard.” In addition to ensuring that they have the capacity for informed consent, the “mature minor rule” and “best interests standard” can protect minors from compulsion, coercion, and abuse.

ii. Application of Section 1 of the *Charter*

If the new provisions under the *Criminal Code* infringe a mature minor’s section 7 *Charter* rights contrary to the principles of fundamental justice, they will not automatically be struck down. Instead, the provisions would need to be examined under section 1 of the *Charter*, which would justify the infringement in circumstances “of sufficient importance,” such as where the countervailing public good requires infringement to the rights of the individual guaranteed under section 7.¹⁵¹

Recalling the “section 1 analysis” addressed in Part I: as established in *Carter*, the protection of vulnerable persons (including minors) is a pressing and substantial objective.

The primary consideration under the section 1 analysis, in this case, would likely be whether the law is proportionate to its objective.¹⁵² Section 241.2(1)(b) would likely satisfy the first part of the proportionality test. The current prohibition on access to MAID for persons under 18 is rationally connected to the goal of protecting minors, who are vulnerable because of their age; or disability, disease, or illness; or compulsion or coercion by others; and a prohibition on access to MAID would prevent any possibility that they could be induced into taking their own lives.

149 Canada, “Legislative Background”, *supra* note 2. The DOJ asserted “[r]especting a mature minor’s refusal of further unwanted medical treatment is not the same as acquiescing to a request for active measures to cause death” (*Ibid*). However, the DOJ acknowledged that the issue required additional study, specifically saying that there needed to be “additional safeguards to protect mature minors if they were to have access to such assistance” (*Ibid*).

150 *AC*, *supra* note 2 at paras 4, 143.

151 *Oakes*, *supra* note 66 at paras 69-70; *R v Big M Drug Mart Ltd.* [1985] 1 SCR 295 at 352.

152 *Oakes*, *supra* note 66 at para 73.

However, there is a strong argument to be made that it is not minimally impairing—and it is probable that the current prohibition on mature minors’ access to MAID would be subject to criticisms that there are less drastic alternatives available.¹⁵³ The provisions are considered minimally impairing if the government meets its burden of proving the absence of less drastic means of achieving the objective in a real and substantive manner. Thus, courts must determine whether an age restriction is the least drastic means of ensuring the protection of vulnerable minors (in response to the unique vulnerability of children—and the gravity of the intervention at issue).

It would be difficult for the state to demonstrate that there are not more minimally impairing alternatives to the MAID prohibition for persons under the age of 18 in section 241.2(1)(b) of the *Criminal Code*. This paper reviewed the “mature minor rule” and “best interests standard” to demonstrate that age restrictions in medical decision-making are acknowledged as overbroad to similar stated objectives; an assessment of individual maturity levels is the appropriate test.¹⁵⁴ Additionally, this paper reviewed the recommendations made by experts (through the independent groups established as a response to the SCC’s decision in *Carter*), and those experts reported that there are more minimally impairing alternatives than the current MAID prohibition for persons under 18 years of age.

As a result, it is unlikely section 241.2(1)(b) would withstand the scrutiny of a “section 1 analysis”—and the impugned provision would likely be considered unconstitutional.

iii. Deference Owed to Parliament

The current *Criminal Code* MAID provisions may require the court to exercise deference. The complete prohibition on MAID did not receive deference because it was not a complex response by the legislature to the underlying issues of a permissive MAID regime.

The new scheme is more complex in that it sets out eligibility requirements and restrictions, safeguards, and processes for accessing MAID, but it can be argued that the current eligibility restriction based solely on age is not sufficiently complex for minors. Interference with mature minors’ rights to bodily autonomy must address the complexity of the interests at stake.¹⁵⁵ The common law entitles minors to a degree of decision-making autonomy commensurate to their maturity.¹⁵⁶

153 The provisions are minimally impairing if the government meets its burden of proving the absence of less drastic means of achieving the objective in a real and substantive manner; that is, is there a way to protect vulnerable minors in ways that are neither overbroad nor arbitrary while still permitting the free exercise of their section 7 rights under the *Charter*? For an example of a more minimally impairing legislative scheme, it is important to consider the MAID regimes of other jurisdictions. In both Belgium and the Netherlands, people under the age of 18 are able to request MAID. The regime for MAID in Belgium originally excluded those who had not reached the age of majority (18 years old), but in 2014 the law surrounding MAID removed the age requirement and instead recognized that the decision-making capacity varied depending on the child (MacIntosh, *supra* note 65 at S28). A minor who requests MAID in Belgium must have a “serious and incurable disorder,” be in a hopeless situation and be experiencing unbearable suffering (*ibid* at S27-28); additionally, the parents of the minor must consent (*ibid* at S28). In the Netherlands, children over the age of 12 may request MAID (*ibid* at S30). The Dutch MAID regulatory regime requires that a physician can only grant a request for MAID when the physician is convinced that the patient is voluntarily seeking MAID and is well informed of their options (*ibid*); additionally, the patient must be experiencing lasting and intolerable suffering and be convinced that MAID is the only solution for them after two assessments of eligibility by independent physicians (*ibid*). Depending on the age of the minor, the parents must either be consulted or consent (*ibid*).

154 *Van Mol*, *supra* note 6 at paras 76-77; *Ney*, *supra* note 94 at 142.

155 *AC*, *supra* note 2 at para 84.

156 *Ibid* at para 108.

A counter-argument is that the requirement by Bill C-14 to further study mature minors' access to MAID creates a sufficient balance between the countervailing public and individual interests. With further study, Parliament can determine if further safeguards should be put in place for the protection of vulnerable minors, and a constitutional challenge commenced before the completion of that study may lead the court to defer to that process.

CONCLUSION

After applying a section 7 and a section 1 (*Charter*) analysis, this paper argued the amended MAID regulatory regime remains unconstitutional, as it infringes the rights to life, liberty, and security of the person of mature minors.

The paper reviewed the jurisprudence on mature minors in Canada, as mature minors' rights to request and refuse (potentially life-saving) medical treatment was a reasonable, relevant point of comparison to the MAID regulatory regime. The "mature minor rule" provides a means for children who have decisional capacity to refuse potential life-saving treatment when it is determined to be in their best interests; and the "best interests standard" provides a means for the court to intervene in the medical decisions made by mature minors to prevent them from acting contrary to their best interests. Through those rules, there are ways to protect vulnerable children while also promoting mature minors' rights to life, liberty, and security of the person; and they add to the stringent eligibility criteria and safeguards already in place to protect adults from taking their own lives in moments of vulnerability.¹⁵⁷

The paper also addressed the recommendations made by independent expert groups that those rules are applicable to the issue of MAID and mature minors. Those independent expert groups reported that the "mature minor rule" and "best interests standard" are a more sophisticated, subjective approach to determinations of decisional capacity.

The paper then applied that section 7 and section 1 (*Charter*) analysis to the weighted hypothetical of "Adolescent." Adopting as many of the transferable facts from Taylor's case as possible, that weighted hypothetical demonstrated it is possible the MAID prohibition in section 241.2(1)(b) of the *Criminal Code* infringes the section 7 *Charter* rights of mature minors in ways contrary to the principles of fundamental justice.

157 *Criminal Code*, *supra* note 1, ss 241.2(2), 241.2(3).

ARTICLE

NO MATTER HOW SMALL: CHILD WITNESSES IN CANADIAN CRIMINAL TRIALS

Jeffrey Nels Westman *

CITED: (2018) 23 Appeal 65

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INTRODUCTION

After her conviction for witchcraft in the notorious Salem Witch Trials, but before her execution, Martha Carrier bemoaned that “[i]t is a shameful thing, that you should mind these folks that are out of their wits.”¹ Whether she was or was not impugning the testimony of her adolescent accusers, Carrier’s “out of their wits” remark accurately describes the way the Court would consider children and their testimony for centuries: that children were imaginative, and that the testimony of children was “often inaccurate because of their limited memory capacity” and “especially vulnerable to suggestive or ‘leading’ questions.”²

Parliament and the Supreme Court of Canada (“SCC”)—and Canada’s criminal jurists—endorsed those socio-legal attitudes until the judicial landscape began changing in the 1980s. Since then, Parliament and the SCC have provided substantial assistance to the children providing testimony in Canada’s courts. This assistance includes allowing video-recorded interviews to be admitted as testimonial evidence, child witnesses to testify behind witness protection screens or through closed-circuit television (“CCTV”), and child witnesses to be accompanied by trusted persons or support animals. Provisions like these in the *Criminal Code* and *Canada Evidence Act*, along with robust developments in case law, which emerged as a result of developments in the judicial and political landscape, made it easier for the court to consider evidence from child witnesses.³

With experience working in criminal investigations relating to child protection, I believe that the changes to the *Criminal Code* and *Canada Evidence Act* are consistent with the truth-seeking functions of the courts and a more realistic, responsive, and conscientious approach to the capacities of child witnesses. I also acknowledge, though, that there are some special vulnerabilities that can come with the accommodations that are made for child witnesses in Canada’s criminal trials. Criminal counsel must remain vigilant to some special vulnerabilities affecting the criminal process that may accompany these accommodations because of the significance of this evidence to criminal trials.

In this article, I address, analyze, and contextualize some of the statutory provisions aimed at accommodating child witnesses, and I critically assess the challenges confronting criminal counsel with child witnesses, particularly criminal counsel confronting video-recorded interviews of children.

In Part I, I review four fundamental statutory provisions pertaining to child witnesses in criminal trials. The aim of this part of the paper is two-fold: first, to put those statutory provisions in historical context, tracking the development of the law as a reflection of changing socio-legal attitudes towards the testimony of children; and second, to set out the current state of the law related to that child evidence in Canada. That historical context aids an understanding of those statutory provisions and the SCC and Parliament’s rationale in revising rules of evidence; and that allows for an in-depth assessment of the practices and procedures involved in the taking of video-recorded interviews of children (for their use at a trial).

In Part II, I focus on the use of video-recorded interviews as admissible hearsay evidence under section 715.1 of the *Criminal Code*.⁴ What best practices should be followed when

1 Charles W Upham, *Salem Witchcraft: With an Account of Salem Village, and a History of Opinions on Witchcraft and Kindred Subjects*, vol 2 (Boston: Wiggin and Lunt, 1867) at 236.

2 Stephen J Ceci, David F Ross & Michael P Toglia, “Suggestibility of Children’s Memory: Psycholegal Implications” (1987) 116:1 J Experimental Psych: Genl 38 at 39.

3 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]; *Canada Evidence Act*, RSC 1985, c C-5 [*Canada Evidence Act*].

4 *Criminal Code*, *supra* note 3, s 715.1.

interviewing children, and how do those best practices change counsel’s approach to those video-recorded interviews at trial? What methods and protocols are used by the specially-trained police officers and social workers that conduct those video-recorded interviews? In this part of the paper, I analyze and assess those best practices and methodologies. Canada’s criminal law practitioners must understand the best practices and methodologies applied to the video-recorded interviews advanced at trial for the truth of their contents; and that understanding can contribute to the deft defence—or prosecution—of an accused.

I. THE STATUS AND DEVELOPMENT OF RELEVANT STATUTORY PROVISIONS

Sociologist Eugen Ehrlich, among other legal scholars and sociologists, has attributed the development of laws to social norms and beliefs.⁵ To examine the historical development of statutory provisions that relate to child witnesses, therefore, is to also examine the development of social attitudes towards child witnesses. The two are inextricably linked. A historical examination of provisions in the *Criminal Code* and *Canada Evidence Act* relating to child witnesses demonstrates how criminal law, as a reflection of our social values, has changed from regarding children to be unbelievable, to focusing on obtaining the best evidence from children in court, without unduly harming the interests of the child.

Each of the changes I describe in Part I were introduced as part of a larger movement for victim rights. In an adversarial criminal justice system, the rights of a victim and the rights of an accused are often at odds with one another. The overarching goal of these legislative reforms has been to advance the rights of victims of crime, while the overarching consideration of the courts in view of these legislative reforms has been to balance the rights of victims with the traditional rights of accused persons, as part of the truth-seeking function of the criminal justice process.

A. Repealing Section 659 of the *Criminal Code* and Abrogating the Doctrine of Corroboration

Perhaps no other provision of the *Criminal Code* is as telling of Canada’s treatment of child witnesses as section 659, which required that “[n]o person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.”⁶

Section 659 is the basis of the “doctrine of corroboration.” Constance Backhouse, an academic expert in sexual assault law, has explored the history and origins of the doctrine of corroboration in Canada.⁷ She has identified several respected jurists—including John Henry Wigmore, Sidney Phipson, and William Tremear—whose commentary on children as witnesses, while presently distasteful, reveals the pervasive socio-legal beliefs that viewed

5 Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (London: Routledge, 2001). Of law created by the state, Ehrlich said that “[t]he center of gravity of legal development [...] from time immemorial has not lain in the activity of the state but in society itself, and must be sought there at the present time. This may be said not only of the legal institutions but also of the norms for decision” (*Ibid* at 390).

6 *Criminal Code*, RSC 1970, c C-34, s 586 expresses the original wording of the section. Note that this section was briefly revised to *Criminal Code*, *supra* note 3, s 659 until it was repealed. The statutory revisions were taking place parallel to the law being reviewed. The current form of this section, which abrogates the need for corroboration, eventually replaced the earlier form of the same section that required corroboration (see *Criminal Code*, *infra* note 18 and accompanying text).

7 Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975* (Toronto: Irwin Law for the Osgoode Society for Canadian Legal History, 2008) at 171-173 [Backhouse, *Carnal Crimes*]; Constance Backhouse, “The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth Century Canada and Australia” (2001) 26:2 *Queen’s LJ* 297 at 302 [Backhouse, “Doctrine of Corroboration”].

child witnesses as uncontrollably creative creatures that simply could not harness their imaginative natures, even when in a courtroom.⁸

The need to corroborate child testimony was also confirmed by the SCC in 1962 in *Kendall v the Queen*, which held that evidence given by “children of immature years” must be handled cautiously and corroborated out of concern for the “frailty” of a child’s evidence.⁹

The law in this area began to change when Bill C-15, *An Act to Amend the Criminal Code and Canada Evidence Act*, came into force on January 1, 1988.¹⁰ Bill C-15 was the government’s response to several reported recommendations made by the Committee on Sexual Offences Against Children and Youths, chaired by Robin Badgley (and commonly referred as the “Badgley Report”).¹¹ In addition to criminalizing many offences against children that still exist, Bill C-15 updated Canada’s antiquated laws with respect to the evidence of children and repealed section 659 of the *Criminal Code*.¹²

The Canadian Bar Association (“CBA”), however, opposed the legislative action to repeal section 659, clinging to the belief that “children of younger ages have a tendency to fabricate.”¹³ The CBA representative, Joel Pink, cited “studies” that confirm these beliefs. When Svend Robinson requested copies of those studies, none were submitted to the Legislative Committee on Bill C-15. Subsequent witnesses disagreed strongly with these characterizations of children and child witnesses, and the CBA’s testimony was not well-received by either members or other witnesses to the Legislative Committee on Bill C-15, who characterized it as disappointing and poorly documented.¹⁴ Despite these objections, however, Bill C-15 was passed in to law with relative ease and little controversy in the House of Commons¹⁵ (though several amendments to the law were recommended by the committee, and accepted at the third reading).¹⁶

8 *Ibid.* These jurists are identified only to emphasize the ubiquity of these beliefs before the 1980s.

9 *Kendall v R*, [1962] SCR 469 [*Kendall*] emphasizes mental immaturity as an element of testimonial reliability. While this is consistent with Wigmore’s arguments, Backhouse characterizes Wigmore as a proponent of the doctrine of corroboration “without discernible justification” (Backhouse, *Carnal Crimes*, *supra* note 7 at 172). Without discrediting Wigmore or his rules of evidence, his views on women and children as witnesses are, at the very least, flagged for caution in this historical examination.

10 *An Act to Amend the Criminal Code and Canada Evidence Act*, SC 1987, c 24 [*Act to Amend the Criminal Code and Canada Evidence Act*].

11 House of Commons, Legislative Committee on Bill C-15 *An Act to Amend the Criminal Code and the Canada Evidence Act*, *Minutes of Proceedings and Evidence* (27 November 1986) (Chair: Marcel Danis) at 1:21-1:22 [Legislative Committee on Bill C-15]; see also Canada, Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children in Canada: Summary of the Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa: Supply and Services Canada, 1984) at 27-34 [Badgley Report].

12 *Act to Amend the Criminal Code and Canada Evidence Act*, *supra* note 10, s 15; see also Legislative Committee on Bill C-15, *supra* note 11; see also Badgley Report, *supra* note 11.

13 Legislative Committee on Bill C-15, *supra* note 11 at 2:17.

14 See *ibid* at 3:14 (for comments by the Canadian Institute of Child Health and members of the Legislative Committee).

15 See “Bill C-15, An Act to amend the Criminal Code and the Canada Evidence Act”, 2nd reading, *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol I (4 November 1986) at 1073 (Sheila Copps) [Bill C-15, 2nd Reading, *House Debates*]; see also “Bill C-15, An Act to amend the Criminal Code and the Canada Evidence Act”, 3rd reading, *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol VI (23 June 1987) at 7504-7509. All speakers from all parties supported the final bill. The most lukewarm support was from Hon. Bob Kaplan, who said “[w]hile the recommendations do not go as far as the Badgley Commission recommended, they are a tremendous improvement over the present law. Bill C-15 will result in more prosecutions than has been the case to date. Many of the obstacles to bringing cases forward have been disposed of as a result of the work of the committee” (*Ibid* at 7506).

16 House of Commons, *Journals*, 33rd Parl, 2nd Sess, vol 129 (28-29 April 1987) at 788-791. No rationale for the amendments are provided in *Hansard* or in the Committee Proceedings, but the amendments were not substantial and did not alter the original meaning of the provisions.

In 1993, Parliament acted again to amend section 659 in Bill C-126, *An Act to Amend the Criminal Code and Young Offenders Act*. With Bill C-126, section 659, which had sat empty since January 1, 1988, was made to read: “Any requirement whereby it is mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child is abrogated.”¹⁷ The provisions in Bill C-126 were more commonly known at the time as “anti-stalking legislation” and, although there were no reasons put forward for amending section 659 in this way,¹⁸ section 659 was the least contentious of Bill C-126’s provisions.¹⁹ Even the CBA, which had recently opposed changes to the doctrine of corroboration’s statutory relic,²⁰ did not oppose this newest addition to the *Criminal Code* in Bill C-126.²¹ Section 659 has remained unchanged since that time.

The doctrine of corroboration has been put to rest and the focus instead has been shifted to evaluate the reliability of a child’s testimony.²² The importance of this evaluation will be discussed in detail in Part II.

B. Amending Section 16 of the *Canada Evidence Act* to Accommodate the Testimony of Children

The oath or solemn affirmation made in court, aside from being symbolic, is viewed by some as imbuing testimonial evidence with a greater veracity than if no oath or solemn affirmation were made.²³ Prior to Bill C-15, section 16 of the *Canada Evidence Act* required that

16(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence.

17 *Criminal Code*, *supra* note 3, s 659.

18 A review of Parliamentary records reveals little useful information that would suggest this amendment was necessary or strongly desired. See House of Commons, Legislative Committee on Bill C-126, *An Act to Amend the Criminal Code and the Young Offenders Act*, *Minutes of Proceedings and Evidence* (2 June 1993) (Chair: Gilbert Parent) at 5:28-29 [Legislative Committee on Bill C-126]. An exchange between Professor Nicholas Bala and Hon. Rob Nicholson at the Committee indicates that section 659 of the *Criminal Code* may have been updated because of some residual concern in the legal community that corroboration was being misunderstood by the courts, as *Kendall* had not been specifically addressed in the SCC decision of *R v W(R)*, [1992] 2 SCR 129 [RW]. Despite this, however, a complete reading of the exchange makes it clear that there was no urgent need to amend this section. See *R v K(V)*, [1991] BCJ No 3913 at paras 19-22 (The British Columbia Court of Appeal (“BCCA”) repeatedly refers to the use of the caution from *Kendall* as being a matter of “discretion” for the trial judge and “not a rule of practice”); see *R v Meddoui*, [1990] AWLD 827 at paras 51-54 [Meddoui] (regarding lower court commentary on the application of *Kendall* after the passage of Bill C-15).

19 “Bill C-126, An Act to Amend the Criminal Code and the Young Offenders Act”, 2nd reading, *Debates of the Senate*, 34th Parl, 3rd Sess, Vol 5 (17 June 1993) at 3576 (Hon Richard J Stanbury); see also generally *supra* note 15 and accompanying text.

20 See Legislative Committee on Bill C-15, *supra* note 11 and accompanying text.

21 Legislative Committee on Bill C-126, *supra* note 18 at 3:20.

22 While the doctrine of corroboration, as described by Backhouse, “Doctrine of Corroboration”, *supra* note 7, has been laid to rest, caution may still be necessary in evaluating the statements of children. As discussed in Part II, suggestibility in children is much better understood today.

23 See *R v B(KG)*, [1993] 1 SCR 740 [B(KG)]. “Originally the oath was grounded in a belief that divine retribution would visit those who lied under oath. Accordingly, witnesses were required to believe in this retribution if they were to be properly sworn and their evidence admissible” (*Ibid* at 788). *B(KG)* includes general commentary on the relaxation of the oath, especially in relation to children (*Ibid* at 789).

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.²⁴

In 1988, Bill C-15 amended this section to read:

16(1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promise to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.²⁵

Comparing the two sections, this was a significant shift in the law. Together with the repeal of section 659 of the *Criminal Code*, the evidence of a child could be now taken on a promise to tell the truth if the child understood what telling the truth meant, even when they did not understand the nature of an oath or solemn affirmation.²⁶

Although a minor change to that procedure was made in 1994,²⁷ the next major change came in 2005, when section 16(1) of the *Canada Evidence Act* was amended to apply only to witnesses that were “fourteen years of age or older whose mental capacity is challenged.”²⁸ Children would now be included in section 16.1, which would eliminate entirely the requirement for witnesses under fourteen years to take an oath at all, and create the presumption of testimonial competence for all witnesses under fourteen years of age, shifting the burden in the criminal court to the defence to prove that a child lacks the capacity to testify.

24 *Canada Evidence Act*, RSC 1970, c 307, s 16.

25 *Canada Evidence Act*, *supra* note 3, s 16 (as it appeared 1 January 1989).

26 See *B(KG)*, *supra* note 23.

27 *An Act to Amend the Criminal Code and other Acts (miscellaneous matters)*, SC 1994, c 44, s 89.

28 *An Act to Amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32, s 26 [*Act to amend the Criminal Code and Canada Evidence Act, 2005*].

Section 16.1, in force today, reads:

16.1(1) A person under fourteen years of age is presumed to have the capacity to testify.

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.²⁹

In 2010, the SCC endorsed a decision of the BCCA, which held section 16.1 of the *Canada Evidence Act* to be constitutional.³⁰ In *R v JZS* (“JZS”), at the BCCA, Justice Smith held that “a child’s presumed testimonial incompetence” is neither a fundamental principle of justice, nor a violation or diminishment of an accused’s right to a fair trial.³¹ This development in Canada’s criminal justice system was consistent with the truth-seeking goal of justice, and it respected the essential elements of an accused’s right to a fair trial.³²

This presumption of testimonial competence, now firmly entrenched in our rules of evidence, firmly establishes that child witnesses are more welcome than ever in the criminal courtroom.³³

29 *Ibid*, s 27.

30 *R v JZS*, 2010 SCC 1; *R v JZS*, 2008 BCCA 401 at para 54 [*JZS BCCA*].

31 *Ibid*. JZS was convicted of sexually assaulting his seven-year old son and ten-year old daughter (though they were, respectively, eight-years old and eleven-years old at the time of the trial); Crown Counsel applied for permission to have the children testify behind a screen, and that application was accepted (*JZS BCCA*, *supra* note 30 at para 1). JZS challenged the constitutionality of section 486.2 of the *Criminal Code* and section 16.1 of the *Canada Evidence Act* (*Criminal Code*, *supra* note 3, s 486.2; *Canada Evidence Act*, *supra* note 3, s 486.2; *JZS BCCA*, *supra* note 30 at para 2).

32 *JZS BCCA*, *supra* note 30 at para 55.

33 See *R v (D)*, 2012 SCC 5 (for a general discussion of testimonial competence and the SCC’s opinions on preventing vulnerable persons from testifying). Although this case addressed the testimonial competence of adult witnesses with mental disabilities, many of the court’s sentiments can be transposed for analysis when discussing the presumed testimonial competence of children.

C. Sections 486.1 and 486.2 of the *Criminal Code* and Testimonial Aids and Support Persons

In most criminal trials, the accused will have full view of the witness as they testify by themselves. However, sections 486.1 and 486.2 of the *Criminal Code* allow for testimonial aids and support persons for children. Section 486.1(1) indicates a judge or justice:

shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who has a mental or physical disability, or on application of such a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.³⁴

Section 486.2 requires that a judge or justice, on the application of the prosecutor or the witness, make an order that witnesses who meet certain criteria testify outside the court room or “behind a screen or other device that would allow the witness not to see the accused.”³⁵ Section 486.2, in practice, generally allows for the use of witness privacy screens or allows a witness to testify through CCTV. As acknowledged by Justice Smith in *JZS* at the BCCA: “[t]he provision [...] mandates the court to grant such an application unless to do so would interfere with the proper administration of justice.”³⁶

The first iteration of the provision that permits the presence of a support person became law in 1993, through Bill C-126, as section 486(1.2) of the *Criminal Code*.³⁷ That provision differed from today's version in two important ways: (i) it made the order to allow a support person discretionary to the judge, whereas the current law creates a presumption for allowing a support person; and (ii) it limited the proceedings in which the order could be granted, whereas the current law permits support persons “in any proceedings.”³⁸

Despite these internal limitations, the provision to allow a support person was opposed by both the Criminal Lawyers Association (“CLA”) and the Criminal Justice Section of the Canadian Bar Association (“CJSCBA”) when it was first proposed in 1993. The CLA and CJSCBA opposed the provision for two reasons. The first was that having a support person “necessarily in very close proximity to a child who is testifying” would create the perception “that the child needs protection from the accused adult in the prisoner's dock,” thereby unfairly prejudicing the accused.³⁹ The second concern was that the child was not “best placed” to select an appropriate support person.⁴⁰ Both the CLA and CJSCBA argued that it should be the judge, and not the child witness, that selects the support person. Michelle Fuerst, representing the CJSCBA, said

[w]e also suggest that it shouldn't be a support person of that person's choosing. Obviously it has to be a support person, but there may well be support persons who are not appropriate. We should not control the discretion of the court to say no, that may not be an appropriate support

34 *Criminal Code*, *supra* note 3, s 486.1(1).

35 *Ibid*, s 486.2.

36 *JZS BCCA*, *supra* note 30.

37 *Criminal Code*, *supra* note 3, s 486(1.2) (as it appeared January 1995).

38 *Ibid*. Section 486(1.2) limited support persons for children to proceedings under sections 271 (sexual assault), 272 (sexual assault with a weapon or causing bodily harm) and 273 (aggravated sexual assault) or “in which violence against the person is alleged to have been used, threatened or attempted” (*ibid*); section 486.1 as it is today allows support persons in “any proceedings” (*Criminal Code*, *supra* note 3, s 486.1).

39 Legislative Committee on Bill C-126, *supra* note 18 at 3:20.

40 *Ibid*.

person. The bill does that when it says we don't want a support person particularly to be a witness in the same case, but it seems to us important to establish not that the young person has the right to absolutely choose, but rather that the court should have the right to let there be a support person and that support person should have sufficient independence so the court is comfortable that they will not interfere with the witness.⁴¹

The concerns of the CJSCBA regarding section 486(1.2) of the *Criminal Code* appear to have been dismissed by the courts. The Nova Scotia Court of Appeal dealt with the appropriateness of the support person in *R v DC*.⁴² In that case, the mother of the child-complainant could be a support person because she had already testified and had been cross-examined.⁴³

The use of privacy screens and CCTV has also been held to be constitutional. In *R v Levogiannis* (“*Levogiannis*”), the SCC held that section 486(2.1) of the *Criminal Code* (dealing with testimony delivered by CCTV while the witness remains outside of the courtroom) did not violate the accused's rights either under section 7 or section 11(d) of the *Canadian Charter of Rights and Freedoms*, as it maintained the accused's right to cross-examine, his presumption of innocence, and his ability to observe the complainant as he testified.⁴⁴ Further, Justice L'Heureux-Dubé stressed “that the circumstances under which a judge may resort to an order under [section] 486(2.1) of the *Criminal Code* do not require that exceptional and inordinate stress be caused to the child complainant.”⁴⁵ When section 486(2.1) was both broadened and made presumptive in its wording, the appellant in *JZS* sought to have *Levogiannis* distinguished.⁴⁶ The SCC, in affirming the decision of the BCCA, dismissed this argument.⁴⁷

Children are, understandably, nervous and afraid of the courtroom experience that is central to a criminal prosecution.⁴⁸ Put simply, and maybe too obviously, testimonial aids and support persons are meant to make the courtroom experience easier for a child. Perhaps not as obvious, however, is that investigators and police officers can use these tools to comfort and calm a child complainant that is nervous or afraid of appearing in court in *anticipation* of court. This can make the investigative stages of an interview, particularly with older children who have preconceived notions of what court might look like, easier for children and for investigators.

D. Section 715.1 of the *Criminal Code* and Video-Recorded Interviews

Video-recorded interviews are conducted according to section 715.1 of the *Criminal Code*. They serve two primary purposes. First, they often provide investigators with the reasonable grounds required to contemplate and lay a criminal charge. Second, and more importantly for the purposes of this paper, these interviews are generally admissible later in court if the person giving the interview adopts the contents of the video-recording as part of their testimony.

41 *Ibid.*

42 *R v DC*, 2008 NSCA 105 [DC].

43 *Ibid.*

44 *R v Levogiannis*, [1993] 4 SCR 475 [*Levogiannis*].

45 *Ibid* at 492.

46 *JZS BCCA*, *supra* note 30.

47 *Ibid.*

48 See Larry C Wilson, “Child Victims of Sexual Assault—Re-Examining the Adversarial Process” (2017) 64 *Crim L Quarterly* 53.

i. Historical Development of the Statute

Section 715.1 of the *Criminal Code* currently reads:

In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.⁴⁹

But, when it was introduced to the *Criminal Code* in 1988, section 715.1 was limited in its application to proceedings related to the prosecution of only listed offences, and videotapes could only be made for complainants.⁵⁰ Still, section 715.1 represented a radical development in Canadian criminal law because of its statutory exception to the rules against hearsay.⁵¹

In 1997, the section was broadened to add additional offences to the list and allow videotapes to be made where witnesses, who were not the complainants, were under 18 years of age.⁵² In 2005, section 715.1 was amended again to its current form: this removed the restrictions on video-recorded evidence for non-listed offences, and this changed the term “complainant” to “victim.”⁵³

49 *Criminal Code*, *supra* note 3, s 715.1.

50 *Criminal Code*, *supra* note 3, s 715.1 (as it appeared in 1988). In 1988, section 715.1 of the *Criminal Code* read:

715.1 In any proceeding relating to an offence under section 151 [sexual interference], 152 [invitation to sexual touching], 153 [sexual exploitation], 155 [incest] or 159 [anal intercourse], subsection 160(2) [compelling another person to commit bestiality] or (3) [committing bestiality in the presence of a person under the age of 16 years], or section 170 [parent or guardian procuring sexual activity], 171 [householder permitting sexual activity], 172 [corrupting children], 173 [indecent acts], 271 [sexual assault], 272 [sexual assault with a weapon, threats to a third party or causing bodily harm], or 273 [aggravated sexual assault], in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.

51 Legislative Committee on Bill C-15, *supra* note 11 at 1:25-1:27.

52 *Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, SC 1997, c 16, s 7. With this amendment, *Criminal Code*, sections 210 (keeping common bawdy-house), 211 (transporting person to bawdy-house), 212 (procuring), 213 (offence in relation to prostitution), 266 (assault), 267 (assault with a weapon or causing bodily harm), and 268 (aggravated assault) were added to the list of applicable criminal charges. The section was also re-titled from “Evidence of complainant” to “Evidence of complainant or witness,” and references to “complainant” were replaced with “complainant or witness”.

53 *Act to amend the Criminal Code and Canada Evidence Act, 2005*, *supra* note 28, s 23. The section was re-titled from “Evidence of complainant or witness” to “Evidence of victim or witness under 18” and references to “complainant” were replaced with “victim.” The *Criminal Code* defines complainant as “the victim of an alleged offence,” while victim is defined as:

a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence and includes, for the purposes of sections 672.5, 722 and 745.63, a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person (*Criminal Code*, *supra* note 3, s 2).

A review of Parliamentary records does not show an obvious reason for this change, except that the change occurred in the context of a bill intended to advance victim's rights.

ii. Case Law Developments and the Elements of the Provision

Several SCC cases concluded section 715.1 of the *Criminal Code* is constitutional, making it virtually unassailable in substance by the defence at a criminal prosecution. These cases have expanded judicial discretion when it comes to considering hearsay evidence, such as video-recorded evidence, and shifted the focus from admissibility of video-recorded evidence to issues of reliability and weight.

Hearsay evidence is “an out-of-court statement that is offered to prove the truth of its contents” that is made without the opportunity for a contemporaneous cross-examination.⁵⁴ Hearsay evidence has always been, and continues to be, presumptively inadmissible.⁵⁵ However, Canadian criminal courts have evolved to take a principled approach to exceptions to the hearsay rule, through a lens that evaluates the necessity and reliability of that evidence to the proceeding before them.⁵⁶ Video-recorded interviews, meeting the definition of hearsay evidence, are admitted to trial on a statutory exception to the hearsay rule and are generally consistent with the principled approach to hearsay evidence now followed by the courts.

R v Khan (“*Khan*”) was the first ruling by the SCC to expand the admissibility of a child’s hearsay evidence, when it is both necessary and reliable. Justice McLachlin, as she then was, said:

I conclude that hearsay evidence of a child’s statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.⁵⁷

But the next ruling by the SCC remains its most authoritative (and direct) ruling on video-recorded evidence and statements from witnesses other than the accused: *R v B(KG)* (“*B(KG)*”).⁵⁸ This case involved a statement provided to police by a witness that later recanted.⁵⁹ In *B(KG)*, Chief Justice Lamer (for the majority) accepted the principled approach to hearsay evidence first alluded to in *Khan*, holding that the prior inconsistent video-recorded statements could be admitted as evidence to trial as proof of the truth of their contents if they satisfied the test laid out in *Khan* (that is, the statement must be both necessary and reliable).⁶⁰

Only a few months after *B(KG)* was decided by the SCC, it was asked to decide on the fate of section 715.1 of the *Criminal Code*. Given its reasoning in *Khan*, and then later in *B(KG)*, it is hardly surprising that the SCC unanimously found the provision to be

54 David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law) at 113-115.

55 *R v Khelawon*, 2006 SCC 57 at para 42; see especially paras 42-45, 61-100 (for an overview of the development of the principled approach to hearsay evidence by Justice Charron) [*Khelawon*]. See Glen Crisp, “*Khelawon*” (2008) 39:2 *Ottawa L Rev* 213.

56 *B(KG)*, *supra* note 23; *R v Khan*, [1990] 2 SCR 531 [*Khan*].

57 *Khan*, *supra* note 56 at 548. In that instance, the statement made by the child to their mother was necessary and reliable:

[i]t was necessary, the child’s viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence (*ibid*).

58 *B(KG)*, *supra* note 23.

59 *Ibid*.

60 *Ibid*.

both constitutional and consistent with the rules of evidence articulated in *R v L(DO)* (“*L(DO)*”).⁶¹ In finding that section 715.1 was constitutional, Chief Justice Lamer, again writing for the majority, held that section 715.1 “not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.”⁶² The approach taken in *Khan, B(KG)*, and *L(DO)* indicates that courts should consider the most reliable testimonial evidence which, for children, the SCC has held, is a video-recorded statement made within a reasonable time of the event.

What does section 715.1 of the *Criminal Code* mean when it says that the statement must be made “within a reasonable time” after the alleged offence?⁶³ At the time it was enacted, Parliament likely intended this to mean “shortly after the offence.”⁶⁴ The majority in *L(DO)* did not treat the question of “reasonable time” with any great depth, but Justice L’Heureux-Dubé in her concurring opinion said that a “reasonable time” must be determined on a case-by-case basis, based on the circumstances of the case, and account for “social science data which makes clear that recollection decreases in accuracy with time.”⁶⁵

In *L(DO)*, five months had elapsed, and this was held to be a reasonable time in the circumstances of the case.⁶⁶ In *R v LRS* (“*LRS*”), the Court of Appeal for Saskatchewan held that ten months was a reasonable time in the circumstances of that case.⁶⁷ In *R v SM* (“*SM*”), the Court of Appeal of Alberta (“*ABCA*”) unanimously held that 17 months was a reasonable time in which to make the video recording in the circumstances of that case.⁶⁸ In both *LRS* and *SM*, the delay in making the video recording was due to a delay in reporting the allegations to authorities which, in *SM*, the *ABCA* recognized is “not unusual in the case of intrafamilial assault.”⁶⁹ In *R v Lucas*, the *BCCA* excluded a video-recorded interview taken 45 months after the alleged offence because it was, in the circumstances of that case, “outside of the time frame selected by Parliament when it enacted [section] 715.1 of the *Criminal Code*” as a result of the child passing through a number of developmental stages in the 45 months it took to take his statement.⁷⁰ Taken together, these cases demonstrate that while there are limits, there is considerable leeway given with respect to a “reasonable time” to make the video recording.

The test for adoption was laid out by the SCC in *R v F(CC)* (“*F(CC)*”), where Justice Cory required that, for a video-recorded interview to be admitted under section 715.1 of the *Criminal Code*, the person must view the video in court, recall the interview, affirm that they were attempting to be honest during the interview, and then adopt the contents of that video as their testimony.⁷¹ In adopting the testimony, it is not necessary that the person have an independent memory of the events that they describe on the video-recording, but it is recommended that the trier of fact be given a “special warning [...] of the dangers of convicting based on videotape alone” where there is no such independent memory.⁷² It

61 *R v L(DO)*, [1993] 4 SCR 419 [*L(DO)*].

62 *Ibid* at 429.

63 *Criminal Code*, *supra* note 3, s 715.1.

64 Bill C-15, 2nd Reading, *House Debates*, *supra* note 15 at 1077.

65 *L(DO)*, *supra* note 61 at 468.

66 *L(DO)*, *supra* note 61.

67 *R v LRS*, 2008 SKCA 138 [*LRS*].

68 *R v SM*, 1995 ABCA 198 at para 2 [*SM*].

69 *Ibid* at para 4; *LRS*, *supra* note 67.

70 *R v Lucas*, 2001 BCCA 361 at para 18 [*Lucas*].

71 *R v F(CC)*, [1997] 3 SCR 1183 at paras 30-44 [*F(CC)*].

72 *Ibid* at para 44. Justice Cory endorsed the approach to warning the trier of fact that was recommended in *R v Meddoui*, 1990 CanLII 2593 (ABCA), which was “similar to the one given in *R v Vetrovec*, [1982] 1 SCR 811 [at para 44].” Note that, traditionally, adoption requires that there be an independent memory.

is important in considering the adoption of the video-recorded interview, that there be a distinction made between the threshold for adoption in court, and the qualities that speak to the reliability or truthfulness of the statement. Given *F(CC)*, the reliability of a statement is an issue for the trier of fact to wrestle with after the statement has been adopted. *L(DO)* and *F(CC)*, however, do endorse the use of a *voir dire* “to review the contents of the tape to ensure that the statements within it conform to the rules of evidence.”⁷³ The failure to hold a *voir dire*, however, was not fatal to the prosecution in *F(CC)* because “no substantial wrong resulted” from it, and the SCC held that where a *voir dire* is held, the statement should generally be admitted “unless the trial judge is satisfied that it could interfere with the truth-finding process.”⁷⁴

Surprisingly, the courts have not thoroughly addressed what would qualify as interfering with “the proper administration of justice” in the context of section 715.1 of the *Criminal Code*. In *R v Ferreira*, only the first 30 minutes of the video-recording was recorded and presented to the court; the video thereafter inexplicably cut out.⁷⁵ The Ontario Superior Court of Justice held that admitting only the first 30 minutes of the interview and depriving the trier of fact of being able to evaluate the “personality and intelligence of the witness” throughout the interview interfered with the proper administration of justice.⁷⁶ Justice L’Heureux-Dubé, in *L(DO)*, identified ten factors that the trial judge “could take into account in exercising his or her discretion to exclude a videotaped statement,”⁷⁷ which have been regularly cited by trial judges in exercising said discretion. Those criteria can also be related broadly to the administration of justice, and include:

- (a) The form of questions used by any other person appearing in the videotaped statement;
- (b) any interest of anyone participating in the making of the statement;
- (c) the quality of the video and audio reproduction;
- (d) the presence or absence of inadmissible evidence in the statement;
- (e) the ability to eliminate inappropriate material by editing the tape;
- (f) whether other out-of-court statements by the complainant have been entered;
- (g) whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);
- (h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;
- (i) whether the trial is one by judge alone or by a jury; and
- (j) the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.⁷⁸

73 *F(CC)*, *supra* note 71 at para 51.

74 *Ibid* at paras 52-54.

75 *R v Ferreira*, 2010 ONSC 6733 at para 7 [*Ferreira*].

76 *Ibid* at paras 32-36.

77 *L(DO)*, *supra* note 61 at 463.

78 *Ibid*.

Finding a video-recorded statement made under section 715.1 to be inadmissible is the exception to the general rule of *L(DO)*. The court is more likely to admit these video-recorded statements, and the arguments that occur thereafter are going to be focused on the weight and reliability of that statement because those are the criteria that must be evaluated by the trier of fact. By focusing on evaluating the testimonial evidence of children, rather than determining whether or not it should be admitted, courts become focused on considering the best evidence possible and subject that evidence to the same rigorous scrutiny and questions of reliability that other evidence faces.

II. STRUCTURED INVESTIGATIVE INTERVIEWS

Children can be capable witnesses, and they can provide highly accurate testimony regarding their autobiographical experiences if they are properly interviewed.⁷⁹ In other words, a good interview, conducted by a skilled interviewer, can result in high-quality testimonial narratives, while a bad interview will compromise the reliability of the child's interview, potentially casting whatever disclosure or details have been obtained into doubt.⁸⁰

As I discussed in Section D of Part I, it is highly likely that video-recorded interviews will be admitted, and there are few opportunities for defence counsel to prevent a trier of fact from viewing the video-recorded interview, especially in trials by judge alone. Once admitted, the questions for the trier of fact are focused on the reliability and weight of the statement. Whether before a judge alone or a judge and jury, the focus of an effective defence should be on the video-recorded interview that is presented in court; but defence counsel should not necessarily focus on impeaching a sympathetic child, who may or may not be lying. Defence counsel would fare better scrutinizing the “methods and expectations of the adults extracting, recording, and interpreting information.”⁸¹ Likewise, Crown counsel should focus on those elements of the interview that would promote reliability, reduce perceptions of suggestibility, and enhance the overall quality of the statement that is ultimately adopted by the witness.

Tomes of research have been published on the memories of children generally—and the memories of child witnesses specifically.⁸² Part II of this article cannot possibly review, in any comprehensive or meaningful way, the extensive body of knowledge that relates to child memories and testimony. Section A will provide an overview of the setting in which the video-recorded interview will take place and broadly survey the various interview protocols and methods used by interviewers. Section B will examine the phenomenon of suggestibility as it relates to the reliability and accuracy of a child witness' testimony and strategies for the counsel assessing those interviews. Section C will examine the reasonable time requirement that is imposed by section 715.1 of the *Criminal Code*. Altogether, Part II will probe the overall context in which a forensic interview is conducted and identify some key considerations for criminal practitioners as they assess or review these interviews in light of the fact that an interview is more likely than not to be admitted as evidence.

79 Deirdre A Brown & Michael E Lamb, “Can Children Be Useful Witnesses? It Depends How They Are Questioned” (2015) 9:4 *Child Dev Persp* 250; Michael E Lamb et al, “Use of a structured investigative protocol enhances the quality of investigative interviews with alleged victims of child sexual abuse in Britain” (2008) 23:4 *Appl Cognitive Psych* 449.

80 Maggie Bruck, “A Summary of an Affidavit Prepared for *Commonwealth of Massachusetts v Cheryl Amirault LeFave*” (1999) 3:2 *Appl Developmental Sci* 110 at 12.

81 Wendy van Tongeren Harvey & Paulah Edwards Dauns, *Sexual Offences Against Children and the Criminal Process*, 2nd ed (Markham: Butterworths, 2001) at 14.

82 *Ibid*; see also Michael E Lamb et al, *Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses* (London: John Wiley & Sons, 2008).

Balancing the rights of an accused person with the rights of a victim or witness of crime (and the truth-seeking function of the courts) requires that the evidence ultimately considered by courts be relevant, material, and trustworthy. The best way to do this is to be focused on evidence gathering practices—or interview practices—that are based in a scientific understanding of child memories.

A. The Setting and Structure of an Interview

i. Child Advocacy Centres

Where they are available, it is likely the forensic interview will be conducted at a Child Advocacy Centre (“CAC”). In Canada, CACs have developed from a model of the same name developed in the United States in the 1980s as “a response to the failure of traditional law enforcement and child protection practices in working with victims of child sexual abuse.”⁸³ Although they vary slightly in form, a CAC is usually a child-friendly facility with police, child protective services, prosecutors, medical staff, victim advocates, and trauma referral services accessible through a single point of intake.⁸⁴ These multi-disciplinary teams collaborate to refer children alleging physical or sexual abuse to additional community support and resources, such as counselling and medical treatment. There are as many as 25 CACs in Canada, across seven provinces and three territories.⁸⁵ These CACs are located in urban centres and, because they are operated as charities with deep roots in the community, are often well-known by the community at large. Rural communities often rely on the expertise of distant CACs in conducting major child abuse investigations.

The “non-intimidating and child-appropriate” environment of the interview rooms at the CAC is “critically important” for investigative quality and child-victim experience.⁸⁶ This child-friendly environment may vary, but will often include unobtrusive audio-video equipment and child-friendly furniture, lighting, and décor that conveys the impression that “other children have been in the room before.”⁸⁷ These interview rooms are sometimes called “soft rooms” and are intended to set a child at ease. Medical examinations are unlikely to take place in the CAC itself, but the CAC model allows for easy collaboration between medical staff, investigators, and other involved agencies. Because of the collaborative nature of a CAC, it is possible that the interviewer will be somebody other than a police officer.⁸⁸ This collaborative model makes it possible for the interviewer to conduct the interview on behalf of the primary police investigator with no other or prior involvement in the investigation, though this might not always be the case and is by no means required. This model allows for more highly skilled interviewers to conduct more challenging or

83 James Leslie Herbert & Leah Bromfield, “Evidence for the Efficacy of the Child Advocacy Center Model: A Systematic Review” (2016) 17:3 *Trauma Violence & Abuse* 341 at 341.

84 See Zebra Child Protection Centre, “About” (2016) online: <www.zebracentre.ca/about/> archived at <<https://perma.cc/VRQ5-QW7T>>; see also Sheldon Kennedy Child Advocacy Centre, “The Centre” (2018) online: <<http://sheldonkennedycac.ca/thecentre/>> archived at <<https://perma.cc/JEQ5-2YPK>>.

85 See Child Advocacy Centre Canada, “Organizations” (2014) online: <<http://cac-cae.ca/organizations/>> archived at <<https://perma.cc/TLB8-ZRZ9>>. This may not be an exhaustive list, and there may be other less formal CACs not identified by (or registered with) Child Advocacy Centre Canada.

86 Bernie Sue Newman, Paul L Dannenfels & Derek Pendleton, “Child Abuse Investigations: Reasons for Using Child Advocacy Centers and Suggestions for Improvement” (2005) 22:2 *Child & Adolescent Social Work J* 165 at 177.

87 Wendy Bourg et al, *A Child Interviewer's Guidebook* (Thousand Oaks: Sage Publications, 1999) [Bourg et al]. *A Child Interviewer's Guidebook* describes the “physical components of a neutral environment” that are still followed by CACs (*ibid* at 26-28).

88 See van Tongeren Harvey & Dauns, *supra* note 81 at 4-5; see also Herbert & Bromfield, *supra* note 83.

difficult interviews with especially young children, for example, and for a wider variety of perspectives and interview styles to be brought to bear on complex investigations.

Children are highly sensitive to the status and power of interviewers and observers, so it is a best practice for a police officer to wear something other than a police uniform.⁸⁹ Canadian police interviewers generally do not, with some exceptions, wear their uniform during the interview of a child for this reason. This sensitivity also makes it important that the child be interviewed separately from their parents or adult accompaniment.⁹⁰ To ensure high-quality forensic interviews, it is best practice that the child and interviewer be alone in the room.

ii. Interview Protocols and Methods

The interviewer is likely to be trained in a protocol or method specifically calibrated for conducting forensic interviews with children. Two protocols that may be used in Canada include the Step Wise Interview protocol⁹¹ and the National Institute of Child Health and Human Development (“NICHD”) protocol.⁹² There are numerous other protocols and methods for interviewing children, ranging from the simple and straightforward to the complex and highly prescriptive. Although they differ generally in form, they remain relatively similar in substance, mirroring the broader body of knowledge in the related sciences. Kathleen Faller has surveyed several protocols, finding that most structured interviews, the NICHD and Step Wise Interviews among them, follow a series of phases.⁹³ Faller has identified 13 phases that may be included in interview structures.⁹⁴ This article does not go into depth analyzing these phases or interview models, but discusses the best practices for application by criminal law practitioners in an assessment of statement reliability. For the purposes of this paper, the structure of an interview will be considered in three broad steps: the introduction, the interview, and the closure. Each stage has numerous phases that may or may not be present, but the overall structure of the interview is likely to follow these three general steps with different discrete phases involved.

It is important to note that a single mistake by an interviewer (or a failure to rigorously adhere to the chosen interview protocol) is unlikely to corrupt the entire interview.⁹⁵ A critical failure would likely occur where an error or compilation of errors by the interviewer compromises or is likely to have compromised the reliability of the statement. The structure of the interview protocol is reviewed here to provide counsel with a framework for reviewing child interviews for that reliability.

89 Maggie Bruck & Stephen J Ceci, “Amicus Brief for the Case of *State of New Jersey v Michaels* Presented by Committee of Concerned Social Scientists” (1995) 1:2 Psych Pub Pol & L 272 at 285-286; Kamala London, “Investigative Interviews of Children: A Review of Psychological Research and Implications for Police Practices” (2001) 4:1 Police Q 123 at 134 (for the characterization of the uniform as a distraction); Bourg et al, *supra* note 87 at 28.

90 *Ibid.*

91 John Yuille, “The Step Wise Interview—A Protocol for Interviewing Children” (2001), online: Law Society of Saskatchewan <<https://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/ac2062.pdf>> archived at <<https://perma.cc/E649-B3W9>>.

92 National Institute for Child Health and Human Development, “Revised Investigative Interview Protocol” (2014) online: <nichdprotocol.com/wp-content/uploads/2013/03/RevisedProtocolTMWH2final-1.pdf> archived at <<https://perma.cc/3YJL-WB7Q>> [NICHD].

93 See Kathleen Coulborn Faller, “Interview Structure, Protocol, and Guidelines” in Kathleen Coulborn Faller, ed, *Interviewing Children About Sexual Abuse* (New York: Oxford University Press, 2007) at 69.

94 *Ibid* at 66-68. See also van Tongeren Harvey & Dauns, *supra* note 81 at 15.

95 Bruck, *supra* note 80 at 110.

a. The Introductory Phases of an Interview

The introductory step of the interview can have several discrete phases. In her broad cross-protocol analysis, Faller fully identifies nine phases that may be included in the interview, depending on the protocol used by the interviewer. These include: (i) documenting people, time, and place for the video; (ii) informing the child about the interview; (iii) completing a competency assessment; (iv) building rapport; (v) doing a developmental assessment; (vi) assessing overall functioning; (vii) explaining the rules; (viii) conducting a practice interview; and (ix) introducing the topic of concern.⁹⁶ Every phase may not be included in the introduction.

The interview may begin with varying degrees of formality, as the interviewer documents the people, time and place for the video. As a practice, the video camera and microphone will be addressed, and the interviewer may even introduce the interview monitor (the person taking interview notes and watching the interview in real time from a different room). Following this, it is appropriate to introduce the child to the interview process. As the interviewer introduces him or herself, it is important that he or she not introduce an assumption of abuse. A skilled interviewer will introduce him or herself by saying something like: "I'm a police officer (or a social worker, or so on) and I talk to kids all the time about things that happen to them. Do you want to talk to me about anything that's happened to you?"⁹⁷ or "My name is _____ and my job is to talk to children about things that have happened to them."⁹⁸ An assumption of abuse in an introductory statement might sound like "I'm a police officer and I arrest bad guys that hurt kids like you. Is there anything you'd like to tell me about?" or "I'm a social worker and I help kids who have been hurt by their parents."

Rapport-building is, arguably, the most critical phase of the introductory step. It has two purposes: to put the child at ease, and to allow the interviewer to assess the oral and body language of the child. Studies have shown that a strong rapport, built through effective rapport building, can improve both the accuracy and completeness of the interview content, and build a resistance to misleading questions by the interviewer.⁹⁹ Good rapport-building may take the form of asking about the hobbies or interests of the child interviewee. For this process to be effective, however, the interviewer must show genuine interest in, and enthusiasm for, what is being said, being careful to avoid mechanical or lukewarm reactions.¹⁰⁰ A skilled interviewer may have already spoken with the parent or adult accompaniment to identify ice-breakers, and foreknowledge of an activity or interest is not necessarily evidence of having spoken with the child in advance.

96 Faller, *supra* note 93 at 69. These steps generally correspond with both the NICHD protocol and the Step Wise Interview.

97 Yuille, *supra* note 91 at 11.

98 NICHD, *supra* note 92 at 1.

99 Eleanor A Price, Elizabeth C Ahern & Michael E Lamb, "Rapport-Building in Investigative Interviews of Alleged Child Sexual Abuse Victims" (2016) 30:5 *Appl Cognitive Psych* 743 at 743 summarizing findings in Irit Hershkowitz, "Rapport Building in Investigative Interviews of Children" in Michael E Lamb et al, eds, *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, 2nd ed, (Malden: J. Wiley, 2011); James M Wood, Kimberley A McClure & Rebecca A Birch, "Suggestions for Improving Interviews in Child Protection Agencies" (1996) 1:3 *Child Maltreatment* 223. See Robert A Nash et al, "Does rapport-building boost the eyewitness eye closure effect in closed questioning?" (2015) 21:2 *Leg & Criminological Psych* 305.

100 Wood, McClure & Birch, *supra* note 99 at 223.

Best practice suggests that the interviewer should avoid questions or prompts that encourage children to use their imagination throughout the interview, including during rapport-building.¹⁰¹ This means avoiding imaginative topics, such as television, books, or comics, and ensures that the witness is not in a creative or imaginative state during the interview. Children should be focused on recalling and relating autobiographical information instead of fantasy. The rapport-building phase is also an excellent time in which to make active observations of the child and his or her language. In the Step Wise Interview protocol, John Yuille encourages the interviewer to “[n]ote the length of sentences the child uses, the type of words, and so on. Also, note the body language of the child, the nature of the child’s eye contact and [their] affect.”¹⁰² These observations can be invaluable tools for reading and accurately responding to the child witness later in the interview.¹⁰³

Rapport-building may blend in to (or be part of) the practice narrative¹⁰⁴ or episodic memory training.¹⁰⁵ At this stage, the interviewer will ask the child to narrate an event that is unrelated to the abuse being investigated. As with the child’s interests, the interviewer may discuss a possible event to be narrated with the caregiver or adult accompaniment. A birthday party or holiday might be appropriate,¹⁰⁶ but events that might encourage the child to be imaginative, such as a trip to the movie theatre or an amusement park, should not be explored.¹⁰⁷

b. The Informational and Conclusory Phases of an Interview

Practitioners reviewing the informational phase of an interview should survey whether the interviewer has or has not asked open-ended questions. In interviews of children, open ended question prompts will elicit the best and most accurate information.¹⁰⁸ Open-ended questions and prompts should use language that the child is comfortable with, and be focused on allowing the child to drive the conversation.

Best practices in the information-gathering phases of an interview will universally follow a single rule: ask open-ended questions. Of the many rules that an investigator can follow, the rule in favour of open-ended questions and prompts is the most important because it minimizes the risk that suggestibility will influence the interview.

B. Suggestibility

Stephen Ceci and Maggie Bruck provide the broadest definition of suggestibility, which “concerns the degree to which children’s encoding, storage, retrieval, and reporting of events can be influenced by a range of social and psychological factors.”¹⁰⁹ Suggestibility presents a danger that information received after the autobiographical event is interpreted

101 Lamb et al, *supra* note 82 at 96. There were no studies found that examine the use of imagination in the rapport-building phase specifically, but this is a general best practice to be exercised throughout the interview.

102 Yuille, *supra* note 91 at 8.

103 The interviewer can, for example, more accurately mirror the child’s vocabulary and affect from those things observed during rapport-building.

104 *Ibid.*

105 NICHD, *supra* note 92 at 5.

106 *Ibid.* See also Faller, *supra* note 93 at 70.

107 Lamb et al, *supra* note 82.

108 Brown & Lamb, *supra* note 79 at 251; Kirk Luther et al, “Child Interviewing Practices in Canada: A Box Score from Field Observations” (2015) 30:3 J Police & Crim Psych 204; Michael E Lamb et al, “Differences between accounts provided by witnesses and alleged victims of child sexual abuse” (2003) 27:9 Child Abuse & Neglect 1019.

109 Stephen J Ceci & Maggie Bruck, “The Suggestibility of the Child Witness: A Historical Review and Synthesis” (1993) 113:3 Psychol Bul 403 at 404.

by the child's memory, and consequently incorporated to become a part of that memory.¹¹⁰ Suggestibility can affect adults,¹¹¹ but receives special attention in the way that it affects children because of their enhanced vulnerability due to their developmental status¹¹² and the fact that the single biggest risk factor for eyewitness suggestibility is age, with younger children being more susceptible than older children.¹¹³ Although memory may be commonly thought of as permanent once formed, memory is in fact subject to subsequent modification by outside influences and suggestion, commonly referred to in literature as post-event suggestibility. This post-event suggestibility can affect the memory of children for a long time after the misinformation is first introduced.¹¹⁴

Children are susceptible to two forms of suggestibility: "demand characteristics" and "genuine memory confusions."¹¹⁵ Demand characteristics refer to those social influences that might cause the responses of interviewees to conform with the perceived expectations or wishes of the interviewer.¹¹⁶ "Genuine memory confusions" occur where a person has received post-event information, possibly related to the event itself, and then synthesized that post-event information with their own memory of the event.¹¹⁷ Poole and Lindsay have conducted several studies that have found misleading suggestions from a parent before an interview can cause the child-interviewee to describe fictitious events in response to open-ended questions by an interviewer.¹¹⁸ Determining whether any misleading suggestions might have affected a disclosure is important, and an investigator can skillfully do this on a background investigation. Having a clear understanding of the words and vocabulary that a trusted adult might have used in receiving the disclosure, for example, can help the investigator to explain and understand why a young child might be using advanced vocabulary to describe the incident. In these cases, it may be important to more thoroughly determine the precise nature of the disclosure made to that trusted adult in order to determine the accuracy of the video-recorded statement. It is preferable for all parties involved—prosecution, defence, victims, and families—that this be ascertained before trial.

Ensuring that an interview is free of any possible suggestibility is a priority for the skilled investigator. An investigator can avoid a perception of suggestibility by entering an interview of a child witness with an open mind (and adhering to a structured interview protocol, as asserted above), rather than preconceived opinions about what the child may discuss or disclose. These practices and the basis for them should, therefore, be of concern

110 *Ibid* at 404-405.

111 See Stefanie J Sharman & Martine B Powell, "A Comparison of Adult Witnesses' Suggestibility Across Various Types of Leading Questions" (2012) 26:1 *Appl Cognitive Psych* 48 at 48-53; see also, generally, Anne M Ridley, Fiona Gabbert & David J La Rooy, eds, *Suggestibility in Legal Contexts: Psychological Research and Forensic Implications* (London: John Wiley & Sons, 2013).

112 Jennifer A Ackil & Maria S Zaragoza, "Developmental Differences in Eyewitness Suggestibility and Memory for Source" (1995) 60:1 *J of Experimental Child Psych* 57. See also Robyn E Holliday, Karen M Douglas & Brett K Hayes, "Children's Eyewitness Suggestibility: Memory Trace Strength Revisited" (1999) 14:3 *Cognitive Development* 443.

113 Lamb et al, *supra* note 82 at 38-49. See also Henry Otgaar et al, "Abducted by a UFO: Prevalence Information Affects Young Children's False Memories for an Implausible Event" (2009) 23:1 *Appl Cognitive Psych* 115.

114 Kamala London, Maggie Bruck & Laura Melnyk, "Post-Event Information Affects Children's Autobiographical Memory after One Year" (2009) 33:4 *L & Hum Behav* 344 at 353.

115 Debra A Poole & D Stephen Lindsay, "Interviewing Preschoolers: Effects of Nonsuggestive Techniques, Parental Coaching, and Leading Questions on Reports of Nonexperienced Events" (1995) 60 *J Experimental Child Psych* 129 at 132 [Poole & Lindsay, "Interviewing Preschoolers"].

116 *Ibid*.

117 *Ibid* at 133.

118 See Debra Ann Poole & D Stephen Lindsay, "Children's Eyewitness Reports After Exposure to Misinformation from Parents" (2001) 7:1 *J Experimental Psych Appl* 27 [Poole & Lindsay, "Exposure to Misinformation from Parents"].

to criminal law practitioners as well because of the threat that suggestibility poses to the accuracy and reliability of the video-recorded interview.

i. Identifying Suggestibility

Suggestibility, with its corrupting influence on the truth, has no place in criminal proceedings, and members of the bar and bench alike should be alert to its signs and symptoms. While some manifestations of suggestibility might be observable to counsel through an assessment of the forensic interview, other instances may have occurred before the interview.

During the interview, practitioners should be alert to questions that either explicitly or implicitly introduce facts, assumptions, or beliefs that have not been disclosed or articulated by the child interviewee. These questions, at best, are suggestive and leading; at worst, they are indicative of interviewer bias. Interviewer bias “refers to interviewers who hold a priori beliefs about the occurrence of certain events and, as a result, shape the interview to produce allegations that are consistent with these beliefs.”¹¹⁹ To avoid real or perceived interviewer bias, one best practice for forensic interviewers is to mirror the language used by children and probe the use of that language to determine its meaning. As a result, probing the narrative of a child with language or assumptions that have not been introduced as part of that narrative should be avoided as they can encourage the child to provide testimonial evidence that supports the interviewer’s own presumptions and hypotheses about the crime.

An example of this might be where a child refers to the “water from his pee-pee.” A skilled and trained interviewer, knowing that more must be known about the “water from his pee-pee,” might ask the child: “Describe the water from his pee-pee.” This open-ended prompt mirrors the language used by the child (“water from his pee-pee”), encourages the child to continue using his or her own language, and introduces no subtle or implied assumptions aside from a curiosity about what the child has said, which may in turn emphasize a special interest by the interviewer. If the initial open-ended prompt fails to elicit any additional information from the child, the interviewer may pose a narrower, but still open-ended prompt, such as: “Describe what the water from his pee-pee looks like.”

An unskilled or inexperienced interviewer that has hypothesized—either before or during the interview with the child—how the crime occurred may assume that the “water from his pee-pee” is urine. Questions that might be asked by an unskilled or inexperienced interviewer would be closed or leading in supporting these assumptions. Questions like “Where did he pee?” or “What colour was his pee?” might create an implied expectation for the child that the “water from his pee-pee” is urine. The child may, in fact, be trying to describe semen or blood—things that, in the child’s short life to date, have gone unexperienced and are not, therefore, part of the child’s vocabulary or inventory of understood experiences.

Practitioners should also be alert to the responses of the interviewer when viewing these video-recorded interviews, as the interviewer’s reactions may reveal signs of bias. Even providing affirmative responses (such as saying “yes” repeatedly) can be suggestive to a child interviewee. Practitioners should watch those responses, and they should monitor the footage for the interviewer’s facial expressions (even though this may be counter-intuitive, as

119 Stephen Ceci, Amelia Hritz & Caisa Royer, “Chapter 8: Understanding Suggestibility” in William T O’Donohue & Matthew Fanetti, eds, *Forensic Interviews Regarding Child Sexual Abuse* (New York: Springer, 2016) 141 at 144.

the interviewer is not the focus of the interview). This video footage of the interviewer will usually be a “picture-in-picture” (though it may be a separate video-recording altogether), and it should be produced as part of standard disclosure practices.

The same principles of mirroring verbal language apply to the body language of a child during the interview—and practitioners should watch for that too, again, to ensure that there are no indications of suggestibility (or interviewer bias).¹²⁰ An interviewer that nods frequently, appears disinterested or overly interested at different times, or makes gestures and signs that have not been made by the child is communicating with the child. Practitioners should also watch for “minimal encouragers” when watching interviewers’ body language. Minimal encouragers, such as a head-nod, are commonly taught as components of active listening,¹²¹ which is taught as an occupational skill to the police officers and social workers who perform most forensic interviews.¹²² Police officers use these active listening skills, including minimal encouragers, as a tool for de-escalating conflict and avoiding the use of force except where necessary.¹²³ It may, therefore, be challenging for an experienced police officer who is unskilled in child forensic interviews to not use this skill in the interview room with a child as a means of encouraging additional information. Nevertheless, excessive head-nodding is a form of suggestibility that can change the form and substance of a witness’ interview.

For practitioners trying to determine the possibility of suggestion prior to the forensic interview, it is necessary to probe the initial disclosure (and the circumstances surrounding that initial disclosure). They should try to review the way the person who received that initial disclosure reacted. This is important because children’s memories can be, directly or indirectly, with or without deliberation, affected by interactions with other people between the time at which an event occurred and the time the forensic interview is conducted. The memory of children can be affected by post-event discussions with their peers¹²⁴ and parents or other adults.¹²⁵ Post-event interactions should, therefore, be probed as part of an interview protocol during the video-recorded interview.¹²⁶ As I discussed, these questions will help the investigator and practitioners determine whether additional witnesses should be interviewed, such as the person trusted by the child with the initial disclosure, to ensure that the court receives the most accurate information possible. This will also help to explain discrepancies between the initial disclosure and subsequent statements made by the child witness.

120 *Ibid* at 147.

121 See Michael J McMains “Active Listening: The Aspirin of Negotiations” (2002) 2:2 *J Police Crisis Negotiations* 69 at 69-70; see also Justice Institute of British Columbia Centre for Conflict Resolution, *Conflict Resolution*, 14th ed (New Westminster: Justice Institute of British Columbia, 2007) at 67-82.

122 See generally Janet R Oliva, Rhiannon Morgan & Michael T Compton, “A Practical Overview of De-Escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury” (2010) 10:1 *J Police Crisis Negotiations* 15; see also Justice Institute of British Columbia Centre for Conflict Resolution, *Dealing with Anger*, 9th ed (New Westminster: Justice Institute of British Columbia, 2010) at 73.

123 Oliva, Morgan & Compton, *supra* note 122.

124 Ingrid Candel, Amina Memon & Fatma Al-Harazi, “Peer discussion affects children’s memory reports” (2007) 21:9 *Appl Cognitive Psych* 1191; see also Gabrielle F Principe & Stephen J Ceci, “‘I saw it with my own ears’: The effect of peer conversation on preschoolers’ report of nonexperienced events” (2002) 83:1 *J Experimental Child Psych* 1.

125 Poole & Lindsay, “Interviewing Preschoolers”, *supra* note 115; Poole & Lindsay, “Exposure to Misinformation from Parents”, *supra* note 118.

126 NICH, *supra* note 92 at 12 (the interviewer should “explore the disclosure process, addressing the disclosure time, circumstances, recipients, potential discussions of the event, and reactions to disclosure by both the child and recipients. Use open-ended questions whenever possible”).

C. The “Reasonable Time” Requirement

Balancing feasibility with accuracy is a primary difficulty inherent to the “reasonable time” requirement. While its parameters have been shown to be flexible and contingent upon the circumstances of each case, its exclusions can still be problematic. However, a significant relaxation of the “reasonable time” requirement may corrode the testimonial trustworthiness of the video-recorded interview where it is not taken reasonably soon after the alleged crime.

Developments in the law regarding the reasonable time requirement must be informed by evidence-based best practices. Recalling Justice L’Heureux-Dubé’s concurring opinion in *L(DO)* (see above), the inference is that where recollection has decreased in accuracy with time, the reasonable time requirement would necessitate that the evidence be examined by the court and trier of fact on a first-hand basis, rather than by a video-recorded statement. It is also arguable that Parliament, in first enacting section 715.1 of the *Criminal Code*, intended, at least in part, for “reasonable time” to mean “shortly after the offence.”¹²⁷ Despite this, however, the courts have given great latitude to the prosecution which, it seems, can justify several years as being a “reasonable time” in the circumstances of the case.¹²⁸

The courts appear to be focused on examining the circumstances and timeline of the initial disclosure, and the reasons for a delay of that disclosure.¹²⁹ In the context of *L(DO)*, the question that the courts appear to be asking is whether a delay to be interviewed is justified or not. The key question should instead be whether the delay has compromised the testimonial trustworthiness of the video-recorded interview and statement. In other words: will a video-recorded statement, delayed as it is, provide the court with the best evidence possible? Or is it more appropriate for the witness to appear in court in person, where the witness can be contemporaneously cross-examined?

Justice L’Heureux-Dubé addresses this concern in the concurring decision of *L(DO)*. Justice L’Heureux-Dubé identifies several benefits to children providing most of their testimony on video-recording. Among these benefits are mitigating the trauma of courtroom testimony, and being able to “answer delicate questions about the abuse in a more controlled, less stressful and less hostile environment, a factor which, according to social science research, may drastically increase the likelihood of eliciting the truth about the events at hand.”¹³⁰ There might also be an argument that the statement obtained by skilled child forensic interviewers is generally of higher quality than cold, hard courtroom testimony would be, though this assertion is somewhat contentious.¹³¹ And in my experience, children are generally more comfortable where their interviews can be facilitated in the child-friendly facilities of a CAC than they are later in the harsh environment of a courtroom, softened as it might be by accompaniment (including a person or animal), witness screens or CCTV, and other *Criminal Code* accommodations. In being more comfortable, video-recorded statements might provide courts with better evidence than requiring children to testify without a video-recorded statement.

127 Bill C-15, 2nd Reading *House Debates*, *supra* note 15 at 1077.

128 *SM*, *supra* note 68 with accompanying text; see also *R v WEB*, 2012 MBCA 23.

129 See *SM*, *supra* note 68; *LRS*, *supra* note 67.

130 *L(DO)*, *supra* note 61 at 446-447, 449.

131 Emma Davies, Emily Henderson & Kirsten Hanna, “Facilitating children to give best evidence: Are there better ways to challenge children’s testimony?” (2010) 34 *Crim LJ* 347; *contra* Kimberlee S Burrows & Martine B Powell, “Prosecutors’ perspectives on using recorded child witness interviews about abuse as evidence-in-chief” (2014) 47:3 *Aust & NZ J Crim* 374.

On the whole, however, these more minor considerations do not negate the statutory requirement that the statement be taken within a “reasonable time.” The approach to interpreting section 715.1 of the *Criminal Code*, consistent with the principled approach to hearsay evidence, must be that it is an exception to the general preference that evidence from a witness be taken in the court room, under oath or affirmation, or after a promise to tell the truth. This commentary acknowledges the possibility that a video-recorded interview may make it easier for a child witness to testify in court; but does science really conclude that a video-recorded statement, taken years after the offence, will “drastically increase the likelihood of eliciting the truth about the events at hand”?¹³² Or does a video-recorded statement, taken potentially years after the fact, erode the testimonial trustworthiness of the evidence being provided for the consideration of the court because “recollection decreases in accuracy with time”?¹³³

Considering video-recorded statements as a tool to mitigate the stress or potential trauma of testifying in court should not be done in isolation, as it was in *L(DO)*, but instead be done in contemplation of all the *Criminal Code* provisions accommodating child witnesses. The use of screens or CCTV and support persons was not discussed in *L(DO)*, but they should be viewed as tools to accomplish these same ends while allowing contemporaneous cross-examination of the witness. With the help of testimonial aids and support persons, a child’s courtroom testimony will still be difficult, but need not be traumatic. Coupling a support person with CCTV testimony can create an environment comparable to the child-friendly environments in which video-recorded interviews are conducted, particularly because a support person is permitted to be present for court but would not be in a video-recorded interviews. Challenges in this approach still exist, and the state of the law is clear: the prosecution is given latitude as to what constitutes a “reasonable time.”¹³⁴

In light of these considerations, the reasonable time requirement should be viewed as having a dual purpose: first, as a safeguard to ensure that the fleeting autobiographical memories of a child are captured and recorded for evidentiary purposes before they are changed by time, experience, and mental development; second, as a tool allowing the judicial process to minimize any potential re-traumatization of the child witness. Neither should be considered entirely in isolation from the other.

CONCLUSION

After decades of progress, children are able to have their voices heard: a steady flow of legislative reforms, beginning in 1988 (and regularly affirmed by the SCC thereafter), have resulted in adaptations intended to blunt the pain of children participating in an adversarial criminal justice system.

The integrity of the criminal trial, however, is dependent on the capacity of the court to critically assess the accuracy and reliability of the evidence before it, and the testimony of children should be no different. In fact, those statutory adaptations, and the way the courts have interpreted them, have created important considerations for those prosecuting and defending an accused. Closely evaluating the video-recorded statement of a child witness and ensuring that the video-recorded statement has been made within a reasonable, though liberal, timeframe are unenviable tasks for practitioners.

Children’s suggestibility, and the suggestibility of young children especially, demand that investigative techniques and video-recorded interviews be closely scrutinized. Accused persons have an uphill battle in this regard with video-recorded interviews that are almost

132 *L(DO)*, *supra* note 61.

133 *Ibid.*

134 *Ibid.*

certain to be admitted as evidence, thereafter to be evaluated by the trier of fact for weight. It is up to criminal law practitioners to ensure that the trier of fact is presented with the most accurate and reliable evidence possible, and this can sometimes include challenging the forensic interviewer or even the child. Future developments in this area of law must ensure that courts continue to receive the best evidence possible. Extraordinary delays in making video-recorded statements may compromise the testimonial trustworthiness of the evidence itself and undermine the rationale for this rule.

Testifying in court is difficult enough for a professional, to say nothing of how difficult it likely is for a child. Justice L'Heureux-Dubé described the protection of children as one of the goals of video-recorded statements in *L(DO)*, but cautioned in that protection is an assertion that the more controlled, less stressful, and less hostile environment of a video-recorded statement will improve the likelihood of eliciting a truthful autobiographical narrative.¹³⁵ Future developments in this area of law should be set around this stage: informed by social science, the courts stand to receive the best evidence where a child is interviewed at a CAC or other child-friendly environment, by trained professionals, in a transparent way consistent with the principles of fundamental justice.

This does not relieve the child witness of a duty to be cross-examined at trial, and the entirety of statutory child witness provisions must be considered together when contemplating ways of eliciting the best evidence from a child witness. The use of CCTV, witness screens, and support persons should be considered as tools to be used along with the video-recorded statement to provide courts with the best evidence possible.

135 *Ibid.*

ARTICLE

CRUEL, UNUSUAL, AND CONSTITUTIONALLY INFIRM: MANDATORY MINIMUM SENTENCES IN CANADA

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INTRODUCTION

Mandatory minimum sentences (“MMS”) are a quandary in Canadian criminal law. Lawyers, social scientists, and academics constantly criticize the *Criminal Code*’s increasingly comprehensive mandatory minimum sentencing schemes. These critics question the constitutional infirmities and policy justifications of MMS. At the same time, MMS have long attracted judicial deference.

However, in April 2015, for the first time in nearly 30 years, the Supreme Court of Canada (“the Court”) struck down a mandatory minimum sentence in *R v Nur* (“*Nur*”). The Court then struck down another mandatory minimum sentence in April 2016 in *R v Lloyd* (“*Lloyd*”).

These rapid changes in judicial treatment of MMS from Canada’s highest court raise many questions. In particular, what will be the future of mandatory minimum sentencing in Canada? That future is, for now, unclear: do the decisions in *Nur* and *Lloyd* augur a threat to the continued use of mandatory minimum sentencing in Canada, or will they reinforce the *status quo*? Is the Court responding to the criticisms of those lawyers, social scientists, and academics, or will these decisions justify judicial deference to mandatory minimum sentencing schemes?

In this analysis and assessment of the state of MMS in Canada,¹ I briefly engage with the evolution of MMS and academic commentary on their evolution and use. I then examine how the Court’s approach to MMS in *Nur* and *Lloyd* altered—or upheld—section 12 (*Canadian Charter of Rights and Freedoms* (“*Charter*”)) principles, which commonly feature in challenges to minimum sentences. Finally, I evaluate the possibilities for *Charter* challenges to MMS beyond section 12, as well as avenues for future reform.

Ultimately, this article aims to demonstrate that, though they are politically appealing, MMS can be crude, cruel, and undesirable devices in the sentencing process. The majority in *Lloyd* addressed the underlying infirmities in mandatory minimum sentencing, and it directed Parliament to develop “legislative exemption clauses” to render MMS constitutionally compliant. I applaud this judicial direction, and argue that the most reasonable response to these underlying constitutional infirmities is a legislative exemption clause, inserted into the *Criminal Code*, which would permit sentencing judges to depart from MMS in “substantial and compelling circumstances.” In the alternative, if Parliament is unable or unwilling to adopt legislative exemption clauses, I argue that Canadian courts should be less deferential, and more openly activist in assessing the underlying justifications and undesirable consequences of MMS.

I. AN OVERVIEW OF MANDATORY MINIMUM SENTENCING

MMS have been described by the Court as a “forceful expression of government policy in the area of criminal law” and a “clear statement of legislative intent.”² They are not in themselves unconstitutional and have historically been upheld by the Court as an acceptable, albeit harsh, sentencing device. More recently, however, MMS have also been denounced by the Court as provisions which “by their very nature have the potential

1 A brief introductory comment on the scope of this paper is warranted. I address MMS of imprisonment only and do not consider other mandatory penalties such as fines, prohibitions, or periods of parole ineligibility. I also do not address arguably less controversial mandatory penalties for such offences as murder and high treason and instead limit the scope of this paper to the rapid increase in MMS attaching to offences which historically did not entail minimum penalties.

2 *R v Nasogaluak*, 2010 SCC 6 at para 45 [*Nasogaluak*]; *R v Nur*, 2015 SCC 15 at para 132 [*Nur*].

to depart from the principle of proportionality in sentencing” and function as a “blunt instrument [...] which may, in extreme cases, impose unjust sentences.”³ Because this article explores the perplexing tension between these positions, I must begin by situating MMS in their historical and theoretical context.

A. An Overview of Sentencing in Canada

Sentencing in Canada is governed by Part XXIII of the *Criminal Code*. The fundamental purpose of sentencing, as set out in section 718, is “to protect society and to contribute, along with crime initiatives, to respect for the law and the maintenance of a just, peaceful and safe society [...]”⁴ Criminal sanctions respond to a number of different objectives, including denunciation, deterrence, separating offenders from society where necessary, rehabilitation, providing reparations for harm done, and promoting a sense of responsibility in offenders.⁵

Judges prioritize these sentencing objectives in different ways, depending on the offender, the nature of the offence, and societal pressures of the day. Parliament specifically declined to establish any internal hierarchy between the sentencing objectives when this provision was codified; it is generally accepted that for some offenders, the sentencing objective of denunciation will be prioritized over rehabilitation, as an example, and for some offences, restitution will be prioritized over separation of the offender from society. Sentencing judges determine the priority to be placed on the various sentencing objectives, depending on the specific factors raised before them. However, in the context of MMS, the priority is almost always denunciation, deterrence, and separation of offenders from society, at the expense of rehabilitation.

Regardless of which sentencing objectives are prioritized, judges are bound by the fundamental principle of sentencing in section 718.1, to the effect that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.⁶ By virtue of this codification, proportionality is paramount in the sentencing process. As the Court held in *R v Ipeelee*, “proportionality is the *sine qua non* of a just sanction.”⁷ Proportionality embodies the “just deserts” philosophy of sentencing in that a given sentence must reflect the gravity of the offence, responding to the objective of denunciation, while remaining appropriate relative to the moral blameworthiness of the offender, thereby responding to the need for restraint.⁸

Within the constraints of proportionality and minimum legislated punishments, sentencing judges enjoy broad discretion and considerable deference on appellate review.⁹ Canadian jurisprudence reflects an acceptance, both tacit and explicit, that such broad discretion is fundamental to the very nature of sentencing. Offenders and their particular circumstances are rarely identical. Sentencing judges must be armed with a broad grant of discretion to craft appropriate sentences for the myriad circumstances of offenders before them. Therefore, as the Court has acknowledged, between the “distant statutory poles” of maximum and minimum punishments, “the *Code* delegates to trial judges considerable latitude in ordering an appropriate period of incarceration which advances the goals of sentencing and properly reflects the overall culpability of the offender.”¹⁰

3 *Nur*, *supra* note 2 at para 44.

4 *Criminal Code*, RSC 1985, c C-46, s 718 [*Criminal Code*].

5 *Ibid.*

6 *Criminal Code*, *supra* note 4, s 718.1.

7 *R v Ipeelee*, 2012 SCC 13 at para 37 [*Ipeelee*].

8 *Ibid.*

9 *R v M (CA)*, [1996] 1 SCR 500 at para 90.

10 *Ibid* at para 37.

Despite the increasing use of mandatory punishments such as fines, prohibitions, and periods of incarceration, sentencing in Canada continues to be a highly and necessarily individualized process.¹¹

B. The History of MMS

When the *Criminal Code* was enacted in 1892, few offences carried a minimum penalty.¹² Rather, *maximum* penalties were used to set the upper limit, leaving broad judicial discretion as to the severity of the sanction within that limit. Thus, the Canadian Sentencing Commission noted that, in 1892, “mandatory minimum penalties were the exception to [the] rule.”¹³

The proliferation of MMS in Canada is a relatively recent phenomenon. Though the increase in MMS is regularly attributed to the “tough on crime” stance of Canada’s most recent Conservative federal government (under Prime Minister Stephen Harper), that proliferation of MMS actually began with the Liberal federal government in the 1990s, under Prime Minister Jean Chrétien, as part of a stricter approach to gun control.¹⁴ There were only nine MMS legislated in Canada in 1987.¹⁵ In 1995, the *Firearms Act* introduced more mandatory penalties to the *Criminal Code*,¹⁶ though there was a further flourishing of MMS in the 2000s and 2010s. By the end of 2012, between the *Criminal Code* and *Controlled Drugs and Substances Act* (“CDSA”), there were nearly one hundred MMS.¹⁷ While MMS are still the exception to the rule, their growing use in Canadian criminal policy has made them increasingly controversial.

C. Academic Reaction to MMS: Social Science and Political Perceptions

I must begin by acknowledging that MMS are not necessarily unconstitutional.¹⁸ “Standard” penalties are “the exclusive prerogative of Parliament”¹⁹ and sentencing judges are bound to follow them. Although MMS are increasingly challenged, the debate is by no means one-sided. Some academics accept that, though the increasing trend towards MMS is undeniably tough on crime, it is difficult to argue that the penalties imposed are unfit since they apply only to very serious conduct.²⁰ On this view, MMS are justified as a legislative prerogative: “[s]ociety and Parliament alike regard such conduct as being particularly dangerous and thus deserving of a clear measure of their denunciation and deterrence.”²¹ MMS are perceived as a forceful expression of Parliamentary opinion, and a harsh but valid sentencing device.

11 CED 4th (online), *Sentencing* at § 1.

12 In 1892, only the most serious offences such as murder and high treason carried a mandatory minimum sentence. See generally Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, (Ottawa: Minister of Supply and Services Canada, 1986) at 176 [CSC].

13 *Ibid* at 176.

14 *R v Morrisey*, [2000] 2 SCR 90 at para 70 [*Morrisey*].

15 Debra Parkes, “From Smith to Smickle: The Charter’s Minimal Impact on Mandatory Minimum Sentences,” (2012), 57 SCLR (2d) 149 at 149 [Parkes, “From Smith to Smickle”].

16 *Morrisey*, *supra* note 14 at para 70.

17 Parkes, “From Smith to Smickle”, *supra* note 15 at 149.

18 For further discussion on this point, see *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045 at para 97 [*Smith*].

19 CED, *supra* note 11 at § 7.

20 Gary Clewley, Paul McDermott & Rachel Young, *Sentencing: A Practitioner’s Guide* (Toronto: Thomson Reuters, 1995) at 1-13.

21 *Ibid*.

Supporters of MMS argue that judicial discretion has *never* been unfettered, and that legislators have long relied on MMS to achieve uniformity in sentencing.²² In this sense, MMS operate as a bastion against the idiosyncrasies of the sentencing judge. As the Court has held, “a key objective of mandatory minimum sentences is the removal of judicial discretion in pursuit of greater certainty and consistency in sentencing.”²³ MMS ensure rather than inhibit the rule of law by contributing to certainty and predictability in our discretionary sentencing regime.²⁴ In legislating a minimum sentence, Parliament has presumably asked, “what sentence would be appropriate for the least morally culpable person whose behaviour still constitutes the elements of the offence?”²⁵ In answering this question, Parliament must perform a “nuanced, multi-faceted policy analysis of the moral status of the behaviour in question.”²⁶ Essentially, a defence of MMS asks, why ought the courts hold the figurative reins in the sentencing process? Is the passage of MMS not an iterative, vital, and fundamental part of our democratic process? Distrust of seemingly unfettered judicial discretion permeates this rhetoric.

While these arguments have long contributed to curial deference to Parliament in the context of MMS, much of the academic community denounces their increased use. In 1987, the Canadian Sentencing Commission issued a comprehensive Report on Sentencing which recommended the outright abolition of mandatory minimum penalties for all offences, with the exception of murder and high treason.²⁷ The Commission’s most salient concerns turned on unfettered prosecutorial discretion, the minimal deterrent effect of mandatory penalties, and the lack of regard for the wide range of circumstances in which offences are committed.²⁸ The Commission’s message was clear: “mandatory minimum penalties create at least as many difficulties as they attempt to solve.”²⁹

Though more and more frequent, the criticisms of MMS remain fundamentally unaltered. Not only are MMS constitutionally vulnerable, they are seen as a flawed policy device which insidiously create problems rather than responding to real concerns. A light unspooling of the “massive body of evidence”³⁰ accumulated on MMS exposes common threads of complaint:

(i) MMS increase costs on an overburdened justice system.

(ii) MMS result in higher rates of incarceration.

(iii) MMS increase trial frequency and *Charter* challenges. This is likely to occur because more accused persons will go to trial now that guilty plea negotiations for a sentence below the mandatory minimum are no longer possible. Further, the dramatic spike in MMS, particularly for drug-related offences, will likely result in increasing *Charter* challenges to the arguably unconstitutional nature of these provisions.

22 Lincoln Caylor & Gannon Beaulne, *Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences*, (2014) Macdonald-Laurier Institute at 2.

23 *R v Ferguson*, 2008 SCC 6 at para 54 [*Ferguson*].

24 Caylor et al, *supra* note 22 at 16.

25 *Ibid.*

26 *Ibid.*

27 *CSC*, *supra* note 12 at 189.

28 *Ibid* at 65. Notably, over half of the sentencing judges surveyed by the Commission felt that minimum penalties constrained their ability to impose a just sentence. Over half also believed that such sentences contributed to inappropriate agreements between Crown and defence counsel (*Ibid* at 180). Given that this judicial disapproval occurred at a time when there were only nine mandatory minimum sentences in Canadian criminal law, one can only imagine the level of concern such a survey would show today.

29 *Ibid* at 66.

30 Parkes, “From Smith to Smickle”, *supra* note 15 at 151.

(iv) MMS reduce transparency and accountability in the sentencing process by shifting discretion from judges to prosecutors.³¹

(v) MMS spawn the possibility of wrongful convictions by exerting pressure on the accused to plead to a lesser offence in order to avoid a conviction which carries a minimum sentence.

(vi) MMS distort the sentencing process by creating an “inflationary floor.” The minimum sentence becomes reserved for the best offender in the best circumstances, driving up the entire range of sentences for all but the very “best” or least morally blameworthy offenders.

(vii) MMS have been assailed as a cause of substantive inequality by disproportionately affecting marginalized populations.³²

If the various criticisms can be distilled into a single comment, it is this: MMS are based on a seductive but spurious philosophy that mandatory minimum sentencing imposes a fit and fair penalty in all instances for given offences.

In addition to these consequences, MMS reportedly fail to achieve their fundamental justification: *deterrence*.³³ Commentators Anthony Doob and Cheryl Webster have dubbed the tenuous link between severity of sentence and deterrent effect a “null hypothesis.”³⁴ After an exhaustive review of social science evidence and literature, Doob and Webster conclude that sentence severity does not affect levels of crime.³⁵ Given the dearth of evidence to the contrary, it is difficult to ignore the assertion that severe sentences simply do not deter crime to any greater extent than more moderate sentences. I suggest we must grapple with this evidence to understand the real utility of MMS, rather than defending their continued use with the cracked shield of deterrence.

The state of MMS in Canadian criminal policy is deeply ruptured. On the one hand, they may be viewed as a severe but inherently constitutional tool that has properly received decades of curial deference. On the other, they may be seen as crude instruments which threaten the fundamental principle of proportionality and fail to live up to their central promise of deterrence. Academic commentary amounts to a clarion call for deeper consideration, at a judicial and legislative level, of the continued use of MMS in Canadian criminal justice. With this understanding of MMS in the theoretical context, I turn to their treatment by the Court, the nature of judicial and legislative dialogue on the subject, and possibilities for future reform.

31 Prosecutorial discretion is increased by the prosecutor’s option to serve notice of intention to seek greater punishment in some cases. It is also increased by the decision as to whether to proceed summarily or by indictment in hybrid offences; this decision may compel the court to impose a mandatory minimum sentence for certain offences in the event of a conviction.

32 For a more detailed examination of these arguments around MMS and substantive equality, see Parkes, “From Smith to Smickle”, *supra* note 15; Rosemary Cairns Way, “A Disappointing Silence: Mandatory Minimums and Substantive Equality” (2015) 18 CR-ART 297(WL Can) [Cairns Way, “A Disappointing Silence”]; Legal Society, “Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences”, report by Darcie Bennett and Scott Bernstein (2013) [Pivot Report]; and Tim Quigley, “Reducing Expectations While Maintaining the Function of Canadian Criminal Law” (2015) 62 CLQ 274.

33 For further examination of this point, see *CSC*, *supra* note 12 at 182 and *Smith*, *supra* note 18 at para 20.

34 Anthony Doob & Cheryl Webster, “Sentencing Severity and Crime: Accepting the Null Hypothesis” (2003) 30 *Crime & Just.* 143.

35 *Ibid.*

II. FROM SMITH TO LLOYD—CRUEL AND UNUSUAL PUNISHMENT

Section 12 is the most commonly invoked *Charter* provision in challenging the constitutionality of MMS. It reads: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”³⁶

In 1987, the Court first struck down a mandatory minimum sentence in the seminal case of *R v Smith*.³⁷ At the time, the *Narcotics Control Act* imposed a seven-year minimum sentence for the importation of narcotics, regardless of the type, the quantity imported, and whether the purpose was for trafficking or personal consumption.³⁸ Writing for the Court, Justice Lamer, as he then was, set out the analytical framework to assess whether a punishment is “cruel and unusual” in contravention of section 12. He set a high threshold. Beyond being unfit or “merely excessive,”³⁹ the punishment must be *grossly disproportionate* to what would have been otherwise appropriate. To be grossly disproportionate, the prescribed punishment must be “so excessive as to outrage the standards of decency.”⁴⁰ Courts “should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation.”⁴¹

The test enunciated in *Smith* consists of two parts. First, a court examines the particular offence and offender to determine whether the sentence is grossly disproportionate.⁴² If the sentence is not grossly disproportionate in the case at bar, the court then engages in a generalized inquiry to determine whether the sentence would be grossly disproportionate in a “reasonably hypothetical” scenario. This second step in the inquiry resulted in the provision being struck down in *Smith*. While the seven-year minimum was not grossly disproportionate for the specific offender before the Court, it would have been grossly disproportionate for a hypothetical young offender who drove into Canada with his or her “first joint of grass.”⁴³ In short, the ambit of the provision was simply too broad, capturing conduct that should not be subject to the mandatory minimum, and the provision was therefore struck down.⁴⁴

The Court’s use of the reasonable hypothetical in *Smith* could have foreshadowed increasing judicial activism in the assessment of MMS. Indeed, Justice Lamer commented on the courts’ “lingering reluctance”⁴⁵ in testing penal sanctions for compliance with section 12, and reminded them of their constitutional obligation to do so. However, the decades following *Smith* did not result in rigorous curial examination of MMS. Rather, the intervening years saw judicial minimalism in the face of the increasingly aggressive use of mandatory minimums. Debra Parkes writes that, since *Smith*, “the Supreme Court’s approach has been decidedly deferential to Parliament” and has given section 12 “little substantive content or application.”⁴⁶ Twenty-eight years elapsed before another MMS was struck down by the Court.

36 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

37 *Smith*, *supra* note 18.

38 *Ibid* at para 66.

39 *Ibid* at para 55.

40 *Ibid* at para 54.

41 *Ibid* at para 55.

42 *Ibid* at para 88.

43 *Ibid* at para 2.

44 *Ibid* at para 75.

45 *Ibid* at para 47.

46 Debra Parkes, “The Punishment Agenda in the Courts” (2014), 67 SCLR (2d) 489 at 598 [Parkes, “The Punishment Agenda”].

In the 2015 decision of *Nur*, the Court considered MMS for the possession of loaded prohibited firearms, contrary to section 95(1) of the *Criminal Code*. Writing for the majority, Chief Justice McLachlin struck down these provisions as violating section 12 of the *Charter* based on their application to reasonably foreseeable cases.⁴⁷ Since section 95 encompassed a wide range of conduct stretching from serious firearms infractions to mere licensing transgressions, the minimum sentences inevitably led to grossly disproportionate sentences for those at the lower end of the spectrum. In dissent, Justice Moldaver disputed the propriety of the reasonable hypotheticals raised by the majority. He argued that the hybrid nature of the scheme operated as a “safety valve,” preventing the imposition of MMS in less serious cases where the Crown could proceed summarily.⁴⁸

A year later, in *Lloyd*, the Court again considered the constitutionality of MMS, this time in the context of a trafficking offence under the *CDSA*. The Court again struck down the minimum sentence, relying on *Nur* to illustrate constitutional vulnerabilities of MMS⁴⁹ and offering explicit guidance to Parliament in regards to addressing them.

The interplay between the majority and dissenting judgments in *Nur* encompasses the constellation of issues raised by MMS. Accordingly, I use *Nur* as a lens through which to examine the evolution of section 12 since *Smith*, buttressed by the subsequent application of the *Nur* analysis in *Lloyd*. In the next section, I address the central issues in the section 12 analysis, broken down as: (1) the section 12 test and the scope of a “reasonable hypothetical”; (2) the maintenance of gross disproportionality as the threshold for a section 12 violation; (3) prosecutorial discretion and hybrid schemes; and (4) available remedies when a section 12 violation has been made out. Finally, I consider the strengths and weaknesses of the changes to section 12. While the Court in *Nur* demonstrated only a limited engagement with the social science evidence and the adverse consequences of MMS, I argue that *Nur* has nevertheless breathed new life into the section 12 analysis. I suggest this assertion is reflected in the Court’s application of its revived section 12 analysis in *Lloyd* and explicit comments on the steps that must be taken to cure the constitutional infirmities of MMS. Taken together, I suggest these decisions mark what will very likely become a turning point for future judicial assessments of the constitutional validity of MMS.

A. Section 12 and the Scope of the Reasonable Hypothetical

Arguably, the most dramatic change from *Nur* in the section 12 analysis is its reformulation of the reasonable hypothetical. Determining the availability and scope of the reasonable hypothetical has been of signal importance in the jurisprudence since *Smith*. Indeed, in *Nur*, Chief Justice McLachlin identified this issue as “the heart of this case.”⁵⁰ She firmly rooted the reasonable hypothetical at the protected core of the section 12 analysis and rebuffed arguments for the abandonment of this analytical tool.⁵¹ Writing for the majority in both *Nur* and *Lloyd*, Chief Justice McLachlin applied several reasonable hypotheticals to illustrate the unconstitutional applications of the MMS in each case. I suggest that by rephrasing and expanding the scope of “reasonably foreseeable” situations against which the validity of legislation may be tested, the Court has loosened the stranglehold of what had become increasingly restrictive reasonable hypothetical analyses.

The Court in *Smith* did not provide much guidance for the assessment of the scope of reasonable hypotheticals. Lower courts were left with little direction as to how common, reasonable, or detailed the hypothetical must be. The Court explored these issues further

47 *Nur*, *supra* note 2 at para 4.

48 *Nur*, *supra* note 2 at paras 146-156.

49 *R v Lloyd*, 2016 SCC 13 at para 3 [*Lloyd*].

50 *Nur*, *supra* note 2 at para 47.

51 *Nur*, *supra* note 2 at paras 49-52.

in the 1991 decision of *R v Goltz*⁵² and severely tightened the availability of the reasonable hypothetical in the section 12 analysis. Writing for the majority, Justice Gonthier grudgingly accepted the utility of reasonable hypotheticals but emphasized throughout that courts cannot consider “remote or extreme examples”⁵³ and must instead focus on “imaginable circumstances that would commonly arise in day-to-day life.”⁵⁴ He refused to consider *other* offences which triggered the impugned mandatory minimum sentence.⁵⁵ Had those other offences also been considered in the analysis, Justice Gonthier conceded that the provision “would admittedly cast a wider and potentially more suspect net.”⁵⁶ If the full scope of the provision casts a perilously broad net, there is arguably no principled basis on which to exclude the provision in all of its potential applications from *Charter* scrutiny.⁵⁷ Ultimately, the decision in *Goltz* constrained the reasonable hypothetical analysis to the extent that some concluded that it essentially became a “faint hope clause.”⁵⁸

In the 2001 decision of *Morrisey*, the Court revisited the scope of the reasonable hypothetical analysis. Again, for the majority, Justice Gonthier upheld the restrictions on the use of reasonable hypotheticals earlier imposed in *Goltz*.⁵⁹ *Morrisey* is particularly noteworthy for the *dicta* respecting the use of reported cases when crafting a reasonable hypothetical. One might think that the consideration of reported cases would lend itself well to the analysis. Something which not only might reasonably occur in a hypothetical context, but has in fact actually occurred, arguably provides a useful benchmark for potentially unconstitutional instances of a sentencing provision. However, the Court did not follow this reasoning. Justice Gonthier held that reported cases were to be “used with caution” and as a starting point only.⁶⁰ In his view, “a reported case could be one of the ‘marginal’ cases, not contemplated by the approach set out in *Goltz*.”⁶¹ Again, this restrictive approach exhibits a logical conundrum, in that events which have in fact transpired are not seen as common enough to reasonably ground the analysis. Such an approach seems likely to result in constitutional violations.⁶² Finally, Justice Gonthier restricted the analysis by considering reasonable hypotheticals at a broad, general level of abstraction, rather than at the level of

52 *R v Goltz*, [1991] 3 SCR 485 [*Goltz*].

53 *Ibid* at para 45.

54 *Ibid* at para 73.

55 *Ibid* at para 18. In this case, the accused had been found guilty of driving while prohibited under section 86(1)(a)(ii) of the *BC Motor Vehicle Act*, contrary to section 88(1)(a). Section 88(1)(c) mandated a minimum sentence of 7 days’ imprisonment and a CAD300 fine for driving while prohibited under sections 84, 85, 86, or 214. The majority refused to consider reasonable hypotheticals based on *other* offences giving rise to the same prohibition and triggering the mandatory minimum. This “severing” of the other relevant offences narrowly circumscribed the availability of the reasonable hypothetical as an analytical tool. The provision was not considered in all of its applications, and the reasonable hypothetical analysis was consequently tailored to only one application of the MMS. It is logically problematic to constrain the reasonable hypothetical analysis to the extent that other offences which give rise to the *same* mandatory minimum at issue cannot feature into the *Charter* analysis.

56 *Ibid* at para 76.

57 For deeper consideration of these arguments, see the dissenting reasons of Justice McLachlin (as she then was) in *Goltz*, *supra* note 52 at paras 91-112.

58 Palma Paciocco, “Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing” (2014) 18 *Can Crim L Rev* 241 at 243.

59 *Morrisey*, *supra* note 14 at paras 30-31.

60 *Ibid* at para 33.

61 *Ibid* at para 32.

62 For further consideration of these arguments, see the reasons of Justice Arbour in *Morrisey*, *supra* note 14 at para 65.

specificity which he maintained was “never contemplated by *Smith*.”⁶³ However, details are required in the analysis to demonstrate cases which may be marginal or unusual, but would nonetheless result in unconstitutional applications of MMS.⁶⁴ Yet the analysis in *Morrisey* precludes the consideration of details in the reasonable hypothetical analysis, rendering section 12 challenges more difficult.

The subsequent decision in *Nur* injected some much-needed flexibility into the section 12 analysis. After dissenting in both *Goltz* and *Morrisey*, Chief Justice McLachlin wrote for the majority in *Nur* and made four important alterations (or clarifications) to the reasonable hypothetical analysis:

(i) The requirement of common or day-to-day generality from *Goltz* is displaced by a broader test based on “reasonable foreseeability”;⁶⁵

(ii) A ruling that a particular provision is not in violation of section 12 does *not* preclude future challenges to that provision;⁶⁶

(iii) Reported cases *should* be considered in the reasonable hypothetical analysis;⁶⁷ and

(iv) Personal characteristics *may* be considered when constructing a reasonable hypothetical, as long as they are not tailored to create remote or far-fetched examples.⁶⁸

63 *Ibid* at paras 50-53. In this case, the impugned provision was a four-year minimum sentence for the offence of criminal negligence causing death with a firearm. Rather than looking at the specifics of actual instances of this offence, Justice Gonthier concluded that there were two general types of reasonable hypothetical scenario—an individual playing with a gun, or a hunting trip gone awry—and concluded that in neither hypothetical would a four-year term of imprisonment constitute cruel and unusual punishment. This restrictive approach, which considers reasonable hypotheticals only at a very generalized level, is problematic because it eliminates details from the analysis which could demonstrate an unconstitutional application of the provision.

64 Consider, for example, the unusual facts of *R v Smickle*, 2012 ONSC 602 [*Smickle*] which demonstrate the necessity of incorporating details into the reasonable hypothetical analysis. Here, a young first offender was caught in his cousin’s apartment, posing with a loaded handgun to take pictures for his online Facebook profile. The police had entered with a search warrant for the offender’s cousin; the offender himself simply happened, very much, to be in the wrong place at the wrong time. He was charged with possessing a loaded firearm contrary to section 95 of the *Code*, an offence which carried a three-year mandatory minimum sentence. The facts of this case were clearly marginal but nevertheless arguably foreseeable, and the approach taken in *Morrisey* would have prevented a reasonable hypothetical analysis which demonstrated the unconstitutionality of the mandatory minimum by depicting this potential scenario.

65 *Nur*, *supra* note 2 at paras 67-68.

66 *Ibid* at para 71. The Court held that if a provision survives a section 12 *Charter* challenge, an offender can always argue in a future case that the provision violates section 12 in his or her specific circumstances. Further, an offender can argue a violation based on a reasonable hypothetical if there are different circumstances or new evidence. Although *stare decisis* requires a “significant change in the reasonably foreseeable applications of the law” for courts to revisit the question, this still allows for a greater degree of flexibility in the section 12 analysis.

67 *Ibid* at para 72. The Court rejected the exclusion of reported cases which might seem “marginal” and held that there is “no principled reason to exclude them on the basis that they represent an uncommon application of the offence.”

68 *Ibid* at paras 73-76. The Court departs from the degree of generality in *Morrisey* and permits the consideration of personal characteristics in a more detailed reasonable hypothetical analysis. It is still problematic, however, because courts are instructed to “[exclude] using personal features to construct the most innocent and sympathetic case imaginable” (*Ibid* at 75). There are many foreseeable situations which are sympathetic, innocent, or strange (particularly in the context of drug offences, where selling drugs to fuel an addiction might result in diminished moral blameworthiness).

Ultimately, the changes in *Nur*, I suggest, are likely to mark a turning point in the section 12 analysis. The Court's approach is flexible, less restrictive, and ultimately could make it easier to demonstrate that MMS may lead to cruel and unusual punishment in reasonably foreseeable circumstances.⁶⁹ The seeds of analytical change planted in *Nur* begin to take form in *Lloyd*. There, section 5 of the *CDSA* required a 1-year minimum sentence for certain trafficking offences where the accused had previously been convicted of a similar drug offence. The majority accepted several reasonable hypothetical scenarios as illustrating unconstitutional applications of the provision.⁷⁰ The hypotheticals relied on represent the new analytical approach set out in *Nur*. Rather than considering scenarios at a high level of generality, the Court entertained detailed hypotheticals including qualities such as drug addiction, efforts to rehabilitate, degree of social connectivity, and specific time periods between current and prior offending.⁷¹ These hypotheticals illustrate a departure from the pre-*Nur* approach, which would have restricted hypotheticals to those of common generality and devoid of significant reliance on detail and personal characteristics.

Scholars do not agree as to what effect *Nur* will have in the context of MMS. Some suggest that by rephrasing the test as reasonable foreseeability, the Court is merely playing with words while making no substantive changes.⁷² While I agree that there are underlying problems in MMS, I suggest that the language in *Nur* is important and will resonate in the analysis. Uncommon scenarios may still be reasonably foreseeable. I suggest that one of the reasonable hypotheticals relied on by the majority in *Lloyd* illustrates this very proposition: an addict who is charged with trafficking under the *CDSA* for sharing a small amount of a drug with a spouse, yet had been convicted nine years before for sharing marijuana on a social occasion.⁷³ This hypothetical demonstrates the clear difference, as the Court stated in *Nur*, between "what is foreseeable although 'unlikely to arise' and what is 'remote [and] far-fetched.'"⁷⁴ Such a hypothetical, though perhaps uncommon, is nevertheless reasonably foreseeable. Parkes has argued that extreme cases, like *R v Smickle*,⁷⁵ are the "canaries in the coal mine that should prompt a reassessment of our reliance on counter-productive, blunt instruments such as mandatory minimum sentences."⁷⁶ However, she was writing before *Nur*, which seems to have broadened the availability and applicability of the reasonable hypothetical analysis. Courts may no longer need to rely on extreme cases to ground a section 12 violation. Rather, they can use an expanded test based on reasonable foreseeability, which incorporates reported cases and personal characteristics, to demonstrate scenarios where a given minimum sentence will be grossly disproportionate and, consequently, unconstitutional.

69 For example, in *Lloyd*, *supra* note 49, a reasonable hypothetical analysis was employed to include characteristics like poverty, marginalization, and drug addiction into the analysis. The dissent rejected the use of such hypotheticals, construing them as the judicial manufacture of "the most innocent or sympathetic case imaginable", which had been rejected in *Nur* (see *Lloyd* at para 91). The dissent construed the use of such hypotheticals as allowing personal circumstances to "overwhelm" the analysis while losing sight of the seriousness of the underlying conduct (*Lloyd* at para 102). I suggest the dissenting opinion reflects the earlier, restrictive approach which dominated section 12 jurisprudence following *Smith*, while the new path for a more easily established section 12 breach is demonstrated in the majority's reliance on such hypotheticals.

70 *Lloyd*, *supra* note 49 at paras 32-33.

71 *Ibid.*

72 Cairns Way, "A Disappointing Silence", *supra* note 32 at 2. Professor Cairns Way writes that, "while thirty paragraphs are devoted to this semantic clarification, I am not convinced that the problem is semantic. It is a problem about the nature of mandatory minimums." In other words, Professor Cairns Way suggests the problem with MMS is not the linguistic framing of the section 12 analysis, but rather their inherently unconstitutional applications.

73 *Lloyd*, *supra* note 49 at para 32.

74 *Nur*, *supra* note 2 at para 68.

75 *Smickle*, *supra* note 64.

76 Parkes, "From Smith to Smickle", *supra* note 15 at 165.

B. Gross Disproportionality: A Workable Threshold?

The high threshold of disproportionality is maintained in *Nur* as the standard against which violations of section 12 must be assessed. Given that proportionality is the central axis on which sentencing objectives turn, such a high standard for the section 12 analysis is surprising. In *Morrisey*, Justice Arbour wrote that the section 12 analysis requires sentences to be upheld even if demonstrably unfit, as long as they are not grossly disproportionate.⁷⁷ In *Nur* and *Lloyd*, Chief Justice McLachlin—writing for the majority in both decisions—reached the same conclusion.⁷⁸ It seems illogical at best, verging on simply wrong, that our highest court is willing to uphold sentences which are demonstrably unfit, provided that they do not violate the threshold of gross disproportionality.

Some scholars have maligned this threshold as being too draconian. For example, Palma Paciocco has argued for a reconfiguration of the section 12 analysis wherein the threshold would be relaxed to require proof of mere, rather than gross, disproportionality. Given the fundamental role of proportionality in our sentencing process, she asserts that “if mandatory minimum sentencing schemes cannot survive the honest application of [basic constitutional principles like proportionality], they should not survive at all.”⁷⁹ While these arguments are persuasive, they seem unlikely to sway the Court, in particular given the recent endorsement of the gross disproportionality standard in *Nur* and *Lloyd*. It bears mention, however, that while this threshold was maintained in *Lloyd*, the Court did make particular note of the fact that the wider the range of conduct and circumstances captured by the minimum sentence, the more likely it is to constitute cruel and unusual punishment and therefore be grossly disproportionate.⁸⁰ This comment attenuates the high bar of gross disproportionality to a certain degree. Nevertheless, the Court has long upheld the necessity of a stringent section 12 standard, maintaining that anything less would “trivialize the *Charter*.”⁸¹ Whether the Court will now depart from this standard is doubtful.

C. Prosecutorial Discretion and Hybrid Offences

One significant point of debate involves the application of MMS in the context of hybrid offences. In some hybrid schemes, the Crown may elect to proceed indictably, thus triggering the mandatory minimum, or may proceed summarily, where the minimum may not apply. This shifts what is arguably proper judicial discretion into the control of prosecutorial discretion.

Nur marked the Court’s first consideration of the constitutional validity of a mandatory minimum sentencing provision in the context of a hybrid scheme.⁸² In his dissent in *Nur*, Justice Moldaver set much store in the hybrid nature of the impugned provision and the Crown’s consequent ability to proceed summarily where the MMS would be grossly disproportionate. He would see a different analytical framework, where prosecutorial discretion could be challenged for abuse of process with a remedy under section 24(1),

77 *Morrisey*, *supra* note 14 at para 69.

78 *Nur*, *supra* note 2 at para 39 and paras 44-46; *Lloyd*, *supra* note 49 at paras 23-24.

79 P Paciocco, *supra* note 58 at 267.

80 *Lloyd*, *supra* note 49 at para 24.

81 *R v Latimer*, 2001 SCC 1 at para 76.

82 *Nur*, *supra* note 2 at para 147. As Justice Moldaver noted in his dissent, “to date, our section 12 jurisprudence from *Smith* to *Morrisey* has only considered the constitutionality of MMS in the context of straight indictable offences.”

rather than striking down the entire provision under section 52.⁸³ Since *Smith*, the Court has rejected the reliance on prosecutorial discretion as a means of curing constitutional frailties in MMS.⁸⁴ In *Nur*, the majority similarly rejected the possibility that prosecutorial discretion could resolve constitutional defects in MMS. The majority reasoned that sentencing is an inherently judicial and not a prosecutorial function,⁸⁵ and trial fairness could be endangered by giving prosecutors a significant advantage over the defence.⁸⁶ Further, a review of prosecutorial discretion might be illusory, given the “notoriously high bar” required to establish abuse of discretion.⁸⁷ Thus, the majority in *Nur* refused to rely on prosecutorial discretion in hybrid regimes as a way to preclude grossly disproportionate sentences. *Nur* therefore represents another possibility for expanding the section 12 analysis, by rejecting the use of Crown election in hybrid schemes as a way to immunize a mandatory minimum provision from *Charter* scrutiny. I suggest that this is prescient, given that in recent years, MMS have often been introduced in the context of hybrid schemes.⁸⁸ The particular provision engaged on the facts in *Lloyd* was not a hybrid scheme, and so a consideration of that case does not offer anything specific to the context of prosecutorial discretion. However, numerous other drug offences under the *CDSA* have hybrid schemes. Increasing challenges to MMS are likely to occur in the drug context, and *Nur* properly forecloses arguments that prosecutorial discretion in hybrid schemes can shield a provision from *Charter* scrutiny.

Nevertheless, while *Nur* dictates that the prosecutorial discretion in a hybrid scheme does not itself preclude section 12 challenges to MMS, the transfer of discretion from the judiciary to the prosecution as a result of MMS in general is troubling.⁸⁹ Parkes has identified this transfer as a central problem: “[a] very significant result of the move to mandatory minimum sentences is the wholesale transfer of discretion from judges to prosecutors.”⁹⁰ It signals a lack of trust in the judiciary and a concomitant increase of trust in prosecutors, whose decisions are “virtually unassailable” due to the high threshold for an abuse of process

83 *Ibid* at paras 148-150. Justice Moldaver suggested that Parliament’s decision to enact a hybrid scheme meant that the Crown could proceed summarily in less serious cases, where the mandatory minimum would not be appropriate. He set out an alternative scheme, consisting of two stages. First, a court must determine whether the hybrid scheme adequately protects against grossly disproportionate sentences in general. Second, a court must determine whether the Crown has exercised its discretion in a way that results in a grossly disproportionate sentence in the particular circumstances before the court. If so, a remedy would lie under section 24(1) of the *Charter*. Such a remedy would not violate the rejection of constitutional exemptions in *Ferguson* (as discussed later in this paper), since the state action (that is, the Crown’s discretion on how to proceed), and not the law itself, is at issue. Justice Moldaver noted that the remedy under section 24(1) would most likely come in the form of a sentence reduction below the mandatory minimum. The challenge to prosecutorial discretion in this circumstance would be for abuse of process, with the burden of proof on the offender. There would be no need to prove bad faith or malicious intent on the part of the Crown to establish an abuse of process but simply that the Crown’s decision to proceed by indictment undermined society’s expectations of fairness in the administration of justice.

84 *Smith*, *supra* note 18 at para 101.

85 *Nur*, *supra* note 2 at para 87.

86 *Ibid* at paras 95-96.

87 *Ibid* at para 94.

88 See, for example, *Safe Streets and Communities Act*, SC 2012 c 1 [SSCA].

89 In some cases, the prosecution has the discretion as to whether to give notice and seek a mandatory minimum sentence. See, for example, the impaired driving charges at issue in *R v Anderson* 2014 SCC 41 [*Anderson*]. Otherwise, the prosecution may also choose to lay inappropriate charges which do not have a mandatory minimum sentence, simply to avoid laying charges which, while appropriate, may carry a mandatory minimum which is not fit in the circumstances. Either way, the prosecution clearly holds a great deal of power in these cases.

90 Parkes, “From *Smith* to *Smickle*”, *supra* note 15 at 166.

challenge.⁹¹ The recent decision in *R v Anderson* is pertinent.⁹² Here, the Court refused to attach constitutional obligations to prosecutorial discretion in the sentencing context. Specifically, the Court rejected these arguments as inappropriately conflating the role of a prosecutor with that of a sentencing judge; courts cannot both supervise the exercise of prosecutorial discretion and at the same time act as impartial arbitrators.⁹³

Palma Paciocco's criticisms of *Anderson* bear mentioning. She writes that the Court has failed to effectively enforce the principle of proportionality⁹⁴ and that given the key role played by prosecutors in deciding whether mandatory minimums will be invoked, the increasing number of MMS results in a huge increase in prosecutorial power.⁹⁵ Paciocco concludes that, given the division of powers in our adversarial system, it was defensible for the Court in *Anderson* to foreclose "a [section] 7 requirement that prosecutors consider proportionality when making discretionary decisions that limit the range of available sentences."⁹⁶ However, she suggests that prosecutors have an *ethical* obligation to consider proportionality when seeking MMS, even if this duty does not rise to the level of a constitutional obligation. Paciocco acknowledges that ethical obligations are difficult to enforce and that Crown charging decisions often lack transparency.⁹⁷ She recognizes that her argument, while theoretically palatable, seems in practice largely unworkable. Therefore, while the Court has properly foreclosed reliance on prosecutorial discretion as a way to cure constitutional defects in MMS, their use as a sentencing device in general demonstrates a problematic transfer of discretion in general from the judiciary to the prosecution. This concern must be borne in any consideration of Parliament's increasing legislative reliance on MMS.

D. What Remedy?

Nur raises questions about what meaningful remedy ought to be imposed when a violation of section 12 is made out. Holding that the impugned mandatory minimum sentence violated section 12 and could not be saved under section 1, the majority in *Nur* declared them to be of no force and effect under section 52 of the *Constitution Act, 1982*.⁹⁸ Similarly, in *Lloyd*, the majority determined the impugned provision to be inconsistent with section 12 of the *Charter* and declared it to be of no force and effect, despite the appellant having sought a remedy under section 24(1) of the *Charter*. This follows the ruling in *Ferguson*,⁹⁹ where the Court rejected the use of a constitutional exemption to cure an unconstitutional application of a mandatory minimum sentence. Prior to this decision, there had been extensive debate in the lower courts about the availability of constitutional exemptions as a remedy for section 12 violations.¹⁰⁰ The defendant in *Ferguson* argued that rather

91 *Ibid.*

92 *Anderson, supra* note 89. In this case, an Aboriginal offender argued that Crown counsel ought to be subject to certain constitutional obligations. Specifically, when using their discretion as to whether to seek a mandatory minimum sentence, prosecutors should be under a constitutional obligation to consider Aboriginal status, as directed in section 718.2(e) of the *Criminal Code*. The accused in this case suggested that since mandatory minimums prevent sentencing judges from taking these factors into consideration, the obligation should be shifted to the prosecution when deciding whether to seek a mandatory minimum sentence. However, the Court rejected these arguments and held that prosecutorial discretion is reviewable for abuse of process only; the duty to ensure sentences are proportionate rests with judges only, not Crown prosecutors.

93 *Ibid* at paras 25 and 32.

94 P Paciocco, *supra* note 58 at 248.

95 *Ibid* at 251.

96 *Ibid* at 252.

97 *Ibid* at 255.

98 *Nur, supra* note 2 at para 119.

99 *Ferguson, supra* note 23.

100 *Ibid* at para 33.

than invoking the usual remedy of striking down the impugned statutory provision in its entirety, a constitutional exemption should be granted under section 24(1).¹⁰¹ However, the Court rejected this remedy for a number of reasons, including the need to prevent inappropriate intrusions on Parliament's role, since granting a constitutional exemption would directly undermine the legislative intent reflected in the passage of mandatory minimum sentencing legislation.¹⁰² In the result, *Ferguson* precludes judges from effectively "[reading] in a discretion to a provision where Parliament clearly intended to exclude discretion."¹⁰³ Where a mandatory minimum violates section 12, the appropriate remedy is to invoke section 52 to strike it down.¹⁰⁴

I argue that inserting legislative exemption clauses into MMS provisions would achieve the same results as constitutional exemptions, while avoiding the attendant problems regarding intrusions into Parliament's role. No matter what, a remedy—including the ability to depart from an unconstitutional application of a mandatory minimum sentence—must be meaningful.¹⁰⁵ A well-crafted legislative exemption clause would be a more meaningful and accessible remedy than requiring a challenge to the full provision in every case. I expand in detail on this argument below.

E. *Nur* and *Lloyd*: Success and Failure

Nur made the following changes to the landscape on section 12 and MMS. First, it expanded the reach of the reasonable hypothetical, while maintaining the high threshold of gross disproportionality to establish a section 12 violation. Second, it rejected prosecutorial discretion as a way to cure potentially unconstitutional applications of MMS in hybrid schemes. Third, it followed *Ferguson* in striking down the provision based on the section 12 violation, rather than using a constitutional exemption for individual circumstances.

The decision in *Lloyd* cemented the analytical changes established in *Nur* with regards to the section 12 analysis. Specifically, the Court relied on an expanded approach to reasonably foreseeable applications of the impugned MMS. The Court maintained the high bar of gross disproportionality to establish a section 12 violation. However, the Court did attenuate this high threshold somewhat by suggesting that gross disproportionality would more easily be established in mandatory minimum sentencing provisions which

101 *Ibid* at para 37.

102 *Ibid* at para 52.

103 *Ibid* at para 56.

104 It is worth mentioning that in *Nasogaluak*, *supra* note 2 at para 64, the Court also considered the availability of section 24(1) as a remedy to reduce a sentence in the context of a *Charter* breach. While the Court held that generally, section 24(1) cannot be used to reduce a sentence below a mandatory minimum, the Court then equivocated: "However, the remedial power of the court under [section] 24(1) is broad. I therefore do not foreclose the possibility that, in some exceptional cases, a sentence reduction outside statutory limits may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and the offender" (*ibid* at para 6). Nevertheless, this would likely arise in the context of state misconduct rather than a challenge to the validity of a particular sentencing provision. Whatever is made of this *dictum*, it is unlikely to apply in the context of a challenge to a mandatory minimum sentencing scheme.

105 For example, in *R v Lloyd* 2014 BCPC 8 at para 55 [*Lloyd* BCPC], the trial judge held that a grossly disproportionate application of the mandatory minimum could not be saved by section 10(5) of the *CDSA*. This provision allows a sentencing judge to depart from the mandatory minimum if an offender successfully completes an approved drug treatment program. However, on further consideration, there were serious constraints to the availability of this option. The trial judge noted that there is only one such court in the entire province of British Columbia, the defendant must have pleaded guilty and given up the right to a fair trial in order to qualify, and the Crown can use its discretion to disqualify an applicant. This reasoning was endorsed by the majority in *Lloyd*, *supra* note 49 at para 34. Clearly, this is neither an equitable nor a meaningful alternative to the imposition of an otherwise unconstitutional mandatory minimum sentence.

capture a broad range of possible conduct. And the Court similarly followed the approach established in *Ferguson* by striking the provision down under section 52, rather than granting the sought-after remedy under section 24(1) of the *Charter*.

Certain comments between the majority and dissenting reasons in *Lloyd* are particularly thought-provoking in the context of determining whether there has been a decisive shift in the section 12 analysis. In dissent, Justices Gascon, Brown, and Wagner (as he then was) suggested a far more restrictive approach to the section 12 test. The dissent emphasized that the Court has only struck down mandatory minimums *twice* in the decades since the *Charter's* enactment: in the cases of *Smith* and *Nur*.¹⁰⁶ On this view, the dissent construed the decades of curial deference towards MMS as part and parcel of the rigorous approach which must be applied to any section 12 challenge. Indeed, the dissenting justices emphasized at length the cases, including *Goltz*, *Ferguson*, and *Morrissey*, where challenges to MMS repeatedly failed.¹⁰⁷ They asserted that this continued endorsement of the constitutionality of MMS underscores the necessarily restrictive approach taken to challenges under section 12, and that the new direction set by the majority in *Nur* and in *Lloyd* is in tension with the Court's earlier jurisprudence on section 12.¹⁰⁸

First, as a matter of logic, this view ignores the fact that there were relatively few MMS in the *Criminal Code* at one point in time, meaning that it was less likely for them to be struck down for a period of time prior to their proliferation. However, I would also suggest that the dissenting interpretation is wrong in principle. On this view, *Nur* stands as an aberration in established section 12 jurisprudence. Conversely, I would argue that *Nur* sets a new direction for striking down MMS, rather than operating as an outlier case. I would agree that the Court's approach represents a departure from the established section 12 jurisprudence. However, I suggest that *Nur* represents a conscious and decisively new approach to section 12, in light of emerging understandings of the constitutional frailties of MMS, rather than a misinterpretation of earlier section 12 jurisprudence. *Nur* and *Lloyd* represent a more flexible analytical approach to account for the reality that MMS, unmitigated by legislative exemption clauses, are very likely to be unconstitutional in their applications.

For those advocating *against* the use of MMS, the analytical shift represented in these cases is a mixed victory. The loosening of the reasonable hypothetical analysis is likely to make it easier to demonstrate where imposing mandatory minimums would constitute cruel and unusual punishment. However, unmitigated by legislative exemption clauses, many of the problems inherent in MMS, such as shifts from judicial to prosecutorial discretion, endure.

Perhaps one of the greatest shortcomings in *Nur* is the limited attention given by the Court to the use of mandatory minimums as a sentencing device in general. Notwithstanding the limited deterrent effect of MMS and their disparate applications to marginalized groups, the Court engaged only marginally with the relevant social science,¹⁰⁹ despite the fact that such evidence was before the Court.¹¹⁰ Professor Cairns Way commented on *Nur* that, despite the well-documented harms occasioned by MMS, the Court expended much of

106 *Lloyd*, *supra* note 49 at para 62.

107 *Ibid* at paras 63-68.

108 *Ibid* at para 106.

109 See *Nur*, *supra* note 2 at paras 113-114.

110 The Court did not respond meaningfully to many of the suggestions of interveners in *Nur*, such as the insertion of legislative exemption clauses. Nor did the Court engage with the evidence that MMS may perpetuate systemic disadvantage on certain racialized or marginalized groups. For example, see generally *Nur*, *supra* note 2 (Factum of the Intervener Canadian Bar Association) [CBA Factum].

its analytical energy looking at abstractions in the context of reasonable hypotheticals rather than seriously discussing the real impact of mandatory minimums.¹¹¹ Although the application of the reasonable hypothetical is somewhat expanded in *Nur*, Professor Cairns Way criticized the reasons for judgment as being restricted to a classical fault analysis rather than incorporating systemic and foreseeable characteristics “which relate to vulnerability, marginality, racialization, disability, and inequality.”¹¹² She condemned mandatory minimums as being “inconsistent with a commitment to substantive equality” and argued that they should be presumptively unconstitutional.¹¹³

Regardless of whether arguments on the presumptive unconstitutionality of MMS will ever take hold, the Court responded more explicitly to the criticisms calling for a reassessment of the increased use of MMS. Specifically, the majority emphasized throughout *Lloyd* that MMS are constitutionally vulnerable. The majority went on to make specific suggestions as to how Parliament might cure the constitutional defects of MMS—most notably, through the insertion of legislative exemption clauses to give sentencing judges a “safety valve” against unconstitutional applications of MMS. As I will explore below, I agree that legislative exemption clauses would be the most viable solution in this context. I will also canvass avenues beyond section 12 wherein parties can challenge the constitutionality of MMS. In particular, I note that section 15 challenges, though difficult in practice, would respond best to the as yet limited engagement with the underlying inequality and discriminatory impact of MMS.

III. LEGISLATIVE EXEMPTION CLAUSES AND RESIDUAL CONSTITUTIONAL FRAILTIES

A. Legislative Exemption Clauses

A review of mandatory minimum sentencing in Canada reveals a tumultuous, controversial, and rapidly evolving state of affairs. Challenges to MMS are on the rise and, absent legislative change, are liable to continue. The widespread reaction against the use of MMS is indisputable. The path forward, though, is less clear. Some argue for the partial repeal of mandatory minimum sentencing provisions.¹¹⁴ Others advocate for their outright abolition.¹¹⁵ Still others acknowledge the infirmities of MMS but conclude that the *status quo* is nevertheless satisfactory and suggest various ways our judicial system can flex to absorb their negative impact.¹¹⁶ With an unprecedented level of MMS provisions on the books, two recent strike-downs of MMS provisions from the Court, and whispers of legislative change regarding such provisions from the federal government,¹¹⁷ the future of mandatory minimum sentencing is simply impossible to predict. Rather than speculating,

111 Cairns Way, “A Disappointing Silence”, *supra* note 32 at 2.

112 *Ibid.*

113 *Ibid* at 3.

114 Quigley, *supra* note 32 at 275.

115 *CSC*, *supra* note 12.

116 David Paciocco, “The Law of Minimum Sentences: Judicial Responses and Responsibility” (2015) 19 *Can Crim L Rev* 173 at 198. Here, Paciocco posits that judges appropriately use tools at their disposal—such as creative statutory interpretation and sentence reduction remedies—to constrain the impact of MMS. He argues that the existing state of affairs is satisfactory and focuses on legitimate means for judges to temper the harsh impact of MMS, rather than overhauling the system or challenging these provisions through the *Charter*.

117 See, for example, “Justin Trudeau Might Repeal Some Mandatory Minimums if Elected”, *Global News* (25 September 2015), online: < <http://globalnews.ca/news/2242259/justin-trudeau-might-repeal-mandatory-minimums-if-elected/> archived at <<https://perma.cc/VA9S-GHD3>>. See also “Liberals eye changes to mandatory minimum sentences”, *The Canadian Press* (7 May 2017), online: <<http://www.cbc.ca/news/politics/mandatory-minimum-sentences-liberal-trudeau-harper-government-1.4103855>> archived at <<https://perma.cc/VZT6-5VG8>>.

I will again assert that attaching legislative exemption clauses to mandatory minimum sentencing provisions would be a meaningful and politically viable remedy.

Legislative exemption clauses are not new. They have been endorsed in many different contexts¹¹⁸ and frequently attach to MMS in other jurisdictions.¹¹⁹ Canada would do well to follow suit. Legislative exemption clauses would cure many of the constitutional deficiencies plaguing MMS by maintaining generally constitutional sentencing schemes while allowing for departures from mandatory minimums where their imposition would be unconstitutional. In this sense, legislative exemption clauses would address the same concerns as constitutional exemptions without raising the issues addressed by the Court when rejecting this remedy in *Ferguson*. Specifically, in *Ferguson*, the Court rejected constitutional exemptions because they directly contradict legislative intent by injecting judicial discretion where Parliament clearly intended for there to be none.¹²⁰ The Court adverted to the possibility of legislative exemption clauses but concluded that because Parliament did not provide for any exceptions to the mandatory minimum, it would be wrong for courts to use a constitutional exemption to effect the same result. Therefore, the legislative insertion of exemption clauses would best respect the division of powers between Parliament and the Court.

In *Ferguson*, the Court also rejected constitutional exemptions due to rule of law concerns over certainty and predictability. However, such principles become illusory with unprecedented *Charter* challenges levied against MMS, which are only liable to increase. The lifetime of any mandatory minimum sentence becomes precarious and uncertain. Thus, in this sense legislative exemption clauses would arguably create, rather than undermine, certainty in mandatory minimum sentencing. Legislative exemption clauses would ensure that a mandatory minimum sentence applied in the majority of circumstances, while simultaneously ensuring that a sentencing judge could depart from the minimum in appropriate cases.

As a final comment on this point, *Ferguson* has been met with mixed reactions. Some scholars, such as Ben Berger, applaud the decision, calling it a “constitutional push-back on the politics of minimum sentences.”¹²¹ Others see it as having a chilling effect on challenges to MMS, removing a more easily attainable remedy, given how historically difficult it has been to challenge an MMS provision in its entirety under section 12.¹²² Legislative exemption clauses, on the other hand, would make a remedy for unconstitutional applications of MMS readily available to sentencing judges, rather than constitutional exemption clauses—which are precluded by the decision in *Ferguson*—or challenging the entire provision under section 12.

118 See, for example, the comments of the trial judge in *Smickle*, *supra* note 64 at paras 112 to 117; CBA Factum, *supra* note 110; Peter Sankoff, “The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case” (2013) 22:1 Constitutional Forum 3 at 11; the dissenting reasons of Justice Arbour in *Morrisey*, *supra* note 14 at para 94; and *Lloyd*, *supra* note 49 at paras 3, 36.

119 Indeed, in surveying the use of MMS of imprisonment in common law jurisdictions, Canada’s Department of Justice concluded that when MMS are imposed, courts in other countries are generally provided with the discretion to sentence below the legislated minimum, when extraordinary mitigating circumstances exist. See Canada, Department of Justice, Research and Statistics Division, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*, report by Julian V. Roberts with the assistance of Rafal Morek and Michael Cole, November 2005 (online: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/rr05_10.pdf) archived at <<https://perma.cc/J78Q-3BYL>>. See also G Ferguson and B Berger, “Recent Developments in Canadian Criminal Law”, (2013), 37 *Crim LJ* 315-317.

120 *Ferguson*, *supra* note 23 at para 54.

121 Parkes, “From Smith to Smickle”, *supra* note 15 at 157.

122 *Ibid* at 162.

Legislative exemption clauses would also strike an effective balance between Parliament communicating a strong denunciatory message for certain offences while ensuring that the regime is constitutional in its all of its applications. Suggestions that legislative exemption clauses would cure the constitutional defects of MMS trace back through the section 12 jurisprudence. For example, dissenting in the 2000 decision of *Morrissey*, Justice Arbour suggested that MMS should be read by judges as applicable in all cases *except* for those in which their application would be unconstitutional, based on the particular circumstances of the case. She justified her suggestion as being “more consistent with Parliament’s desire to see an increase in the rate and length of imprisonment for this type of offence, while giving effect to Parliament’s obligation to operate within the framework set out by the Constitution.”¹²³

Despite jurisprudential and academic suggestions that Parliament legislate exemption clauses to accompany MMS, such clauses still do not feature in Canadian criminal legislation. Recently, in *Lloyd*, the Court offered its most forceful comment to date on the necessity of legislative exemption clauses. Writing for the majority, Chief Justice McLachlin set the tone in the very first paragraph of the reasons: while Parliament has the power to determine punishment for criminal conduct, individuals are constitutionally entitled to receive—and judges are constitutionally mandated to impose—sentences which reflect the particular circumstances of the case.¹²⁴ Chief Justice McLachlin drew on *Nur* to emphasize the reality that where offences can be committed in a wide variety of circumstances by a wide range of people, any mandatory punishment is constitutionally vulnerable.¹²⁵ As a side note, I suggest that even the more narrowly circumscribed offences in the *Criminal Code* could conceivably be committed in a wide variety of circumstances and by a wide variety of offenders. Her comment exposes the majority of MMS to the “reality” of constitutional infirmity.

As a remedy, Chief Justice McLachlin suggested either narrowing the reach of offences so that they only catch conduct deserving of the attendant mandatory minimum. Her other suggestion, and the area where she devoted the majority of the analysis, is the legislative permission of residual judicial discretion to “impose a fit and constitutional sentence in exceptional cases”: in other words, legislative exemption clauses.¹²⁶ First, she rejected the availability of a drug treatment program to cure the constitutional infirmity of the provision. In particular, the law provided that the mandatory sentence need not apply where the offender successfully completes an approved drug treatment program. Although this option is a “step in the right direction,” Chief Justice McLachlin considered it to provide illusory protection only against grossly disproportionate punishment.¹²⁷

Chief Justice McLachlin then turned to her central suggestion, that is, “for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment.”¹²⁸ She noted that many countries use legislative exemptions to avoid injustice in MMS. She referenced other jurisdictions for the various approaches available, noting that judicial discretion would usually be confined

123 *Morrissey*, *supra* note 14 at para 94.

124 *Lloyd*, *supra* note 49 at para 1.

125 *Ibid* at para 3.

126 *Ibid* at para 3.

127 *Ibid* at para 34. Specifically, Chief Justice McLachlin noted the following problems with the drug treatment option as an exemption from the mandatory minimum sentence: first, it was confined to certain programs to which the particular offender may not have access; second, the offender must have pled guilty and forfeited his right to trial to attend; third, the requirement that the offender successfully complete the program prior to sentencing might be illusory for heavily addicted offenders; and finally, the Crown typically maintained discretion to disqualify an applicant to the program.

128 *Ibid* at para 36.

to exceptional cases and might require a judge to provide reasons justifying departure from a given MMS. However, she concluded that the parameters of any judicial discretion must be for Parliament to determine. To properly respect the division of powers, the sole direction given by the judiciary to Parliament is that residual discretion must provide for a lesser sentence where the legislated MMS would be unconstitutional.¹²⁹

Considering Chief Justice McLachlin's two suggestions—either narrowing the scope of offences to which MMS attach, or legislating residual judicial discretion via exemption clauses—I suggest the latter is the preferable approach. In my view, as mentioned above, even more narrowly circumscribed offences can conceivably be committed in a variety of circumstances and by a broad range of offenders. This is particularly true in light of recent changes to the section 12 analysis, where the approach to the use of reasonable hypotheticals has relaxed. Such scenarios may now incorporate increasingly personal detail into the analysis, which will more easily illustrate unconstitutional applications of even more narrowly defined offences. It is more viable, in consideration of both principle and predictability, to insert legislative exemption clauses, rather than narrowly define offences and leave them open to continued constitutional attack.

Of course, the form and scope of these exemption clauses would need to be determined. Ultimately, as I have sought to demonstrate in this paper, the necessity of exemptions is tethered to constitutionality. A sentencing judge must be empowered to consider the offender, determine whether the MMS would impose cruel and unusual punishment—in other words, whether it would be grossly disproportionate—and, if so, depart from the mandatory sentence.¹³⁰ However, a general exemption clause would obviate the need for an offender to prove unconstitutionality every time an exemption is sought. Even with an arguably relaxed section 12 analysis following *Nur* and *Lloyd*, launching a constitutional challenge to a provision is an onerous task. Many offenders may have neither the resilience nor the resources to attempt to strike down a purportedly unconstitutional provision. And from the perspective of the criminal justice system as a whole, repeated constitutional challenges occupy vast amounts of court resources as such issues are litigated. Therefore, from the perspective of basic access to justice issues, as well as procedural and judicial autonomy, general exemption clauses are a far preferable avenue to depart from unconstitutional applications of MMS rather than seeking to strike down such provisions in their entirety. The language of the clause would need to reflect the necessary threshold and scope of the exemption, short of establishing a constitutional infringement.

i. General Exemption Clause

I turn now to several central suggestions regarding the legislation of exemption clauses in the context of MMS.

First, in my view, it would be preferable to have a single and general exemption clause to attach to every mandatory sentence in the *Criminal Code*, rather than separately defining exemption clauses depending on the category of offence.¹³¹ Beyond being attractive for the obvious reasons of clarity and simplicity, both in legislative drafting and practical application, I suggest this approach is justified in principle. Specifically, I would argue that the constitutional necessity of building judicial discretion into mandatory sentencing is not premised on the seriousness of a given offence, but rather on whether the application

129 *Ibid.*

130 I note this central consideration follows suggestions in the jurisprudence: see *Morrissey*, *supra* note 14 at para 94 and *Lloyd*, *supra* note 49 at para 36.

131 This view is reflected in the academic commentary: see Levi Vandersteen, "Building a Safety Valve for Mandatory Minimums: How to Construct a Statutory Exemption Scheme", 27 CR (7th) 249 (2016) at 259-260.

of the punishment *attached* to that offence would be unconstitutional in the context of a particular offender. In other words, I would argue that a general exemption clause which directs judges to consider the particular offender and depart from mandatory sentences where necessary best reflects the principled reason for justifying legislative exemptions in the first place. In my view, this general approach is preferable to nuancing each exemption clause to the particular category of offence. And in any event, it would be harder to justify departure from a mandatory sentence in a more narrowly circumscribed offence or an offence which targets extremely serious conduct. This reality is implicit and need not be specifically set out in different exemption clauses in their applications to categories of offences based on degree of severity.

ii. Threshold of “Substantial and Compelling Circumstances”

Second, the most central determination to be made regarding a constitutional exemption is the threshold at which such an exemption could be triggered. In my view, sentencing judges should be entitled to depart from a mandatory minimum sentence in “substantial and compelling” circumstances. In *Lloyd*, Chief Justice McLachlin suggested residual judicial discretion should typically be allowed in “exceptional” cases.¹³² The threshold of “exceptional circumstances” has similarly been suggested in the academic commentary as well as being reflected in international settings,¹³³ and was recently endorsed by a working group of the Canadian Bar Association examining constitutional exemptions to MMS.¹³⁴

However, while the language is quite similar, I would suggest a threshold triggered by “substantial and compelling” circumstances, rather than “exceptional” circumstances, or a lower standard based on an “unjust” sentence. In my view, such a threshold would require that a mandatory minimum sentence apply in the majority of cases, but would allow a sentencing judge to depart from the minimum penalty where substantial circumstances—in other words, strong reasons, drawn from all of the factors as a whole—compelled the sentencing judge to do so. The language suggests that the minimum penalty cannot be ignored in marginal cases. I suggest that “substantial and compelling circumstances” is the proper threshold, for the following reasons. First, a lower threshold—such as a varied sentence where the court considers it to be “just and reasonable,”¹³⁵ or an exemption to avoid an “unjust” sentence¹³⁶—might simply be too vague or nebulous a threshold against which to measure a legislative exemption. One would hope that all sentences tend towards justice. Language of compelling and substantial circumstances is stronger because it is not loosely premised on the justice of the sentence, but rather focuses specifically on the *circumstances* that might require departure from a mandatory sentence, which is itself in the interests of justice. This would offer a more precise direction where courts can depart from MMS where there are substantial and compelling reasons to do so. I recommend defining “substantial and compelling circumstances”—since for the non-lawyer, it is more

132 *Lloyd*, *supra* note 49 at para 36.

133 See Vandersteen, *supra* note 131 at 262; Yvon Dandurand, Ruben Timmerman and Tracee Mathison-Midgley, *Exemptions from Mandatory Minimum Penalties: Recent Developments in Selected Countries* (Ottawa: Department of Justice Canada, 2016) at 22-30, online: <http://www.justice.gc.ca/eng/tp-pr/jjr/rr16_ex/rr16_ex.pdf> archived at <<https://perma.cc/D8TA-YEWV>> [Dandurand Report]; Canadian Bar Association Working Group, *Statutory Exemptions to Mandatory Minimum Penalties: Final Report* (Victoria: Uniform Law Conference of Canada Criminal Section, 2013), paras 14-21, online: <https://www.ulcc.ca/images/stories/2013_pdfs_en/2013ulcc0003.pdf> archived at <<https://perma.cc/Y22C-LVC6>> [CBA Working Group].

134 CBA Working Group, *supra* note 133 at para 17.

135 Language suggested in Bill C-669, An Act to amend the Criminal Code (independence of the judiciary), 2nd Sess, 41st Parl, 2015, online: <<http://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=C669&Language=E&Mode=1&Parl=41&Ses=2>> archived at <<https://perma.cc/J26A-UATE>>.

136 Dandurand Report, *supra* note 133 at 30-36.

difficult to understand how circumstances can be substantial—and for the lawyer in other jurisdictions, it may have a slightly different meaning.

Additionally, as noted by the Canadian Bar Association, too low a threshold would eclipse the constitutional protection offered by section 12; the constitutional question would never arise where an exemption could be triggered at a much lower threshold than the “gross disproportionality” contemplated by section 12.¹³⁷ Accordingly, too low a threshold would impermissibly undermine the constitutional role of the courts. A threshold premised on “substantial and compelling circumstances” would hover below the high threshold for a constitutional remedy under section 12, but still above the lower threshold of “demonstrably unfit” required for ordinary sentence appeals.¹³⁸

As a final note on the threshold, while the language of “substantial and compelling circumstances” and “exceptional circumstances” has been used interchangeably, I would suggest the former over the latter. In my view, “substantial and compelling circumstances” might be slightly less exacting a standard than “exceptional circumstances”. An exceptional circumstance will typically be substantial and compelling, but a substantial and compelling circumstance need not *necessarily* be exceptional. A threshold of “substantial and compelling” would thus impose a high standard while still keeping legislative exemptions in the available arsenal of sentencing judges. In my view, this would be more in line with the new approach taken to reasonable hypotheticals, in *Nur*, which contemplates that uncommon scenarios can still be reasonably foreseeable. Such uncommon but reasonably foreseeable scenarios may justify departure from a mandatory sentence based on substantial and compelling reasons, without necessarily being exceptional.

iii. Written Reasons Requirement

I also suggest a requirement that a sentencing judge departing from a given mandatory minimum justify the departure with written reasons. This requirement would mitigate concerns about this kind of judicial discretion trenching inappropriately on Parliament’s decision to legislate standard penalties for serious offences. I would refrain from imposing any specific requirements on such reasons (in terms of length or factors to be considered, for example) but would simply direct trial judges to draw on established sentencing principles and the circumstances of the case before them to explain the substantial and compelling circumstances which require departure from the mandatory sentence.¹³⁹

There are numerous residual concerns regarding the framing and implementation of legislative exemption clauses. I flag them for context only, as their full consideration is beyond the scope of this paper. However, if Parliament chooses to craft constitutional exemptions for MMS, policy experts will have to consider further questions, including:

137 CBA Working Group, *supra* note 133 at para 16.

138 *Ibid* at para 17.

139 I note the suggestion of written reasons is not a novel one: see private member’s bill, CBA Working Group, *supra* note 133 at para 27.

whether judges should be directed to consider certain factors in particular,¹⁴⁰ the interactions between legislative exemptions and the plea bargaining process,¹⁴¹ the role of appellate review in this context,¹⁴² and whether MMS for any particular offences—such as murder—should be left unmitigated by legislative exemption clauses.¹⁴³ I suggest as a starting point that a single general exemption clause be crafted to apply to all MMS, justified where there are substantial and compelling circumstances, and buttressed by written reasons from the sentencing judge explaining the departure.

B. Constitutional Challenges: Section 15

In this paper, I have examined MMS in their historical and theoretical context as well as their treatment in the courts under the section 12 analysis. I have further suggested that the most constitutionally viable response to MMS would be the insertion, by Parliament, of legislative exemption clauses. However, even if Parliament addresses legislative exemption clauses—and particularly if they do not—certain problems remain. MMS are riddled with constitutional frailties. They particularly raise real concerns over substantive inequality, and their applications on already-marginalized populations. There must still be an avenue for constitutional challenges to MMS, particularly if these sentencing provisions continue to be unmitigated by legislative exemption clauses. I argue that protections offered by section 15 might best respond to the constitutional frailties of MMS and particularly their applications on already-marginalized populations. These concerns over substantive equality could either be addressed in a proper section 15 challenge, or might be seen to begin to infuse the section 12 analysis itself with the new life that has been breathed into the analysis by *Nur* and *Lloyd*.

We are in what has been called a “perfect storm,” where the proliferation of MMS and the rejection of individual constitutional exemptions will result in an unprecedented degree of *Charter* attacks to these sentencing provisions.¹⁴⁴ In British Columbia, MMS have frequently been challenged in the courts and they have on numerous occasions have been held to violate section 12, largely on the basis of the reasonable hypothetical analysis.¹⁴⁵

140 It has been suggested that judges should be directed to consider certain particular factors when deciding whether to depart from the mandatory minimum sentence: see, for example, Vandersteen, *supra* note 131 at 262-263; see also CBA Working Group, *supra* note 133 at paras 22-24. In my view, existing sentencing principles which are set out in detail in section 718 of the *Criminal Code* are sufficient to guide a sentencing judge’s discretion in deciding whether circumstances are sufficiently compelling and substantial to depart from an established mandatory sentence. It might be helpful for Parliament to establish a set of factors—relating particularly to the degree of moral blameworthiness and the severity of the offence, since those will typically be the primary factors militating in favour of a sentence below the established minimum—but I would not argue that such a requirement is *necessary*. I note, also, that the utility of a set list of factors may be diminished by virtue of the fact that whatever circumstances are so compelling and substantial to justify departure from a mandatory sentence will typically be very specific to the circumstances of that particular case. In light of this, the utility of an established laundry list of factors diminishes.

141 In some jurisdictions, the prosecution offers legislative exemptions from mandatory minimums in exchange for a guilty plea. I echo concerns raised in the commentary on legislative exemption clauses that it would be highly problematic, particularly in the context of marginalized offenders, to offer legislative exemptions to mandatory minimums in exchange for guilty pleas. For further discussion of this point, see Vandersteen, *supra* note 131 at 262-263; Dandurand Report, *supra* note 133 at 13-17; CBA Working Group, *supra* note 133 at para 19.

142 For further discussion, see Vandersteen, *supra* note 131 at 263; CBA Working Group, *supra* note 133 at para 27.

143 For further discussion, see CBA Working Group, *supra* note 133 at paras 32-33.

144 Sankoff, *supra* note 118.

145 See generally *R v Dickey*, 2015 BCSC 191, where the court struck down a mandatory minimum based on section 12 and declined to rule on the section 7 issue; *Lloyd*, *supra* note 49; *R v Jackson-Bullshields* 2015 BCPC 411; *R v Oud* 2015 BCSC 1040; *R v Elliott* 2016 BCSC 393; *R v Holt*, 2014 BCSC 2170 [*Holt*].

Given the reinvigoration of the analysis in *Nur*, section 12 remains the most viable avenue for the testing of the constitutionality of MMS provisions.¹⁴⁶ Nevertheless, I briefly canvass section 15 of the *Charter* as an alternative avenue to challenge MMS, with its particular focus on equality concerns.¹⁴⁷ I also comment on the section 1 analysis and the proper role of deference and dialogue between the courts and Parliament.

i. Section 15: Substantive Inequality in MMS

Section 15 of the *Charter* governs equality rights in Canada,¹⁴⁸ with substantive equality as its animating norm.¹⁴⁹ It reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in

146 There is some argument that section 7 of the *Charter* might operate as a means to challenge MMS. Section 7 of the *Charter* provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Liberty interests are clearly engaged when a term of imprisonment due to a mandatory minimum is at stake. The section 7 violation will depend on whether this deprivation accords with the principles of fundamental justice, which operate mainly against arbitrariness, overbreadth, and gross disproportionality. These principles were explored by the Court exhaustively in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 93 to 123 [*Bedford*] and again, shortly afterwards, in *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 83 to 92 [*Carter*]. Arguments based on arbitrariness and overbreadth would likely be the most effective way to challenge MMS. If the empirical social science evidence establishes that MMS do not achieve deterrence to a greater extent than non-mandatory sentences, then there is a very real argument that such sentencing provisions are overbroad, arbitrary to their deterrent purpose, or both.

However, the section 12 analysis itself already captures concerns over arbitrariness and overbreadth. It is axiomatic that a mandatory sentence which is grossly disproportionate to the particular circumstances of a given offender is arbitrary in that there is an insufficient connection between the effect and objective the law, since it captures offending which is insufficiently blameworthy to mandate the minimum sentence. A mandatory sentence found to violate section 12 is also clearly overbroad, in that the law clearly goes too far and captures conduct which is unrelated to the law's purpose.

Similarly, the principle against gross disproportionality is unlikely to gain much traction in the courts through section 7 arguments. Because gross disproportionality features specifically in section 12, claimants will likely be required to rely on that provision, rather than advancing gross disproportionality under the umbrella of section 7. Therefore, while the door is not closed to the possibility of a successful section 7 challenge in the context of MMS—and was explicitly referred to as a possible way to challenge the constitutionality of MMS in *Nur*, *supra* note 2 at para 109, I would argue that this possibility is highly unlikely. In my view, the expanded section 12 analysis responds to many of the same concerns and will likely be the most viable mechanism through which to strike down MMS.

147 Section 9 of the *Charter* might also be relevant in the context of MMS. This provision reads: "Everyone has the right not to be arbitrarily detained or imprisoned," *Charter*, *supra* note 36, s 9. However, this provision is not raised as frequently as sections 7 or 12 in the context of MMS. Section 9 was recently raised in *Holt*, *supra* note 145 at para 150. The defendant had advanced an arbitrariness argument under both sections 7 and 9 but did not make any submissions as to whether a different standard should apply as between the two *Charter* rights. The trial judge held that it made no difference, since the Court had established in earlier jurisprudence that if a law authorizing detention is not arbitrary contrary to section 7, then it cannot offend section 9. The section 9 argument was also rejected in *Lloyd*, *supra* note 49 at para 61, where the trial judge held that "a mandatory minimum sentence authorized by a law that is only engaged upon the conviction of particular offenders for particular offences cannot be said to constitute arbitrary detention or imprisonment." In light of this, I focus instead in this section on more promising *Charter* arguments under sections 12 and 15.

148 The jurisprudence in section 15 cases has established a two-part test for measuring a section 15 violation: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" See *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2.

149 *R v Kapp*, 2008 SCC 41 at para 16.

particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹⁵⁰

The Court has emphasized that legislation which appears neutral on its face may still have discriminatory effects.¹⁵¹ MMS, which apply uniformly to all offenders regardless of personal circumstances or moral blameworthiness, exemplify this possibility. Evidence that MMS disproportionately affect certain populations, such as women, youth, Aboriginal, or drug-addicted offenders, demand consideration as to whether these sentencing provisions violate substantive equality. Pivot Legal Society published a report in 2013 which presents evidence from Canada's Correctional Investigator that "nearly all of the population growth in Canada's jails over the last decade has been from Canada's marginalized populations," specifically Aboriginal peoples, visible minorities, people struggling with drug dependency and the mentally ill.¹⁵² In light of this sad reality, it is not difficult to imagine the discriminatory impacts that MMS are ever more likely to inflict, particularly in the context of drug-related offences.

The Pivot Legal Society Report elucidates potential channels for novel *Charter* arguments in the context of MMS.¹⁵³ Bill C-10, the *Safe Streets and Communities Act* ("SSCA"), received royal assent in March 2012 and, among other things, introduced numerous new mandatory minimum provisions for drug offences.¹⁵⁴ The Pivot Report summarizes findings from a study seeking to measure the effects of the SSCA on low-income drug users.¹⁵⁵ The Pivot Report demonstrates how section 15 of the *Charter* might found unprecedented challenges to the constitutional validity of mandatory minimum sentencing. The authors asserted that MMS are very likely to have unconstitutional applications, particularly when viewed "contextually through the lens of marginalized, drug-dependent offenders—often people with other characteristics that compound their marginalization, such as poverty or mental health issues [...]"¹⁵⁶

Although the SSCA was touted as a legislative initiative to target serious offenders and organized crime, Pivot's research predicted that the burden of these MMS would be borne primarily by the most marginalized, and least serious, offenders.¹⁵⁷ A law that purports to target "drug kingpins"¹⁵⁸ and yet predominantly catches low-income, drug dependent offenders is seemingly arbitrary. Such a law also arguably furthers substantive inequality: while appearing non-discriminatory in its application, it in effect indirectly impacts marginalized populations to a higher degree and thus inherently furthers systemic discrimination. Particularly, the study highlighted the way in which higher level drug traffickers often use severely addicted individuals to engage in street-based drug dealing. These individuals, who sell to support their own drug dependencies, are the most likely to be caught by the legislation and sentenced to mandatory minimums, while the more serious drug traffickers are not caught. Such a scheme has constitutional frailties.

The academic commentary reveals concerns over substantive equality in the context of MMS. Parkes raises equality concerns about race-based discrimination against Canada's Aboriginal peoples. She points specifically to the over-policing of Aboriginal communities

150 *Charter*, *supra* note 36, s 15.

151 *Quebec (Attorney General) v A*, 2013 SCC 5 at para 198.

152 Pivot Report, *supra* note 32 at 33.

153 *Ibid.*

154 SSCA, *supra* note 88.

155 Pivot Report, *supra* note 32 at v.

156 *Ibid* at vi.

157 *Ibid* at 38.

158 *Ibid.*

and the limitations on judges' abilities to consider unique Aboriginal circumstances.¹⁵⁹ Such consequences flow directly from the steady bleed of discretion from the judiciary to the prosecution. David Paciocco, now a judge of the Court of Appeal for Ontario, has similarly offered comments on the potential of MMS to be a source of substantive inequality, particularly in the context of Aboriginal offenders.¹⁶⁰ Professor Cairns Way has also written extensively on this issue. In her view, "mandatory minimum sentences are in and of themselves inconsistent with a commitment to substantive equality."¹⁶¹ She emphasizes the need to engage with evidence demonstrating the disproportionate effect of MMS on marginalized populations. She calls for decisions which heed empirical bases and vehemently denounces continued reliance on a neo-liberal ideology, which simplifies the complicated criminal landscape into a free market view of free actors, rational choices, and personal responsibility.¹⁶²

In light of these concerns, arguments have been made to prefer using section 15 rather than sections 7 and 12 in challenging discriminatory criminal legislation, particularly in the context of disproportionality in sentencing, due to its particular impact on vulnerable minorities.¹⁶³ Making this argument in a recent article, Jonathan Rudin writes that the *Charter's* equality provision has typically been invoked in response to under-inclusive equality legislation, rather than over-inclusive criminal legislation. Centrally, Rudin asserts that "the problem with relying on section 7 and section 12 to address the constitutional infirmities of criminal laws is that it masks the reality of the disparate impact of criminal law on vulnerable groups."¹⁶⁴ He posits that while section 15 would be a better approach to challenge discriminatory criminal law, recourse is typically made instead to sections 7 and 12, for structural as well as practical reasons.¹⁶⁵ Rudin concludes that section 15 is the preferred approach as it would force Parliament, following the striking down of an unconstitutional law, to address the underlying unequal impact of the law in question, rather than re-writing the legislation to fit within the confines set by section 7. He also lauds section 15 as leading to a more honest public debate about criminal law reform and the systemic inequality effected by certain criminal laws, rather than obfuscating the issue through the complex categories and internal tests of section 7.¹⁶⁶

Section 15 arguments can emerge in various ways. The authors of the Pivot Report, for example, suggest the recognition of drug dependence as either a specific analogous ground of discrimination, or within the enumerated ground of physical disability.¹⁶⁷ They point to data demonstrating that drug-dependent individuals are jailed at a higher rate for *CDSA* offences than those who are not drug-dependent, particularly because these individuals often sell drugs to finance their dependence.¹⁶⁸ This fact establishes a framework for equality arguments to the effect that MMS adversely affect drug-dependent populations and perpetuate disadvantage through increased incarceration. The authors also propose section 15 arguments in the context of Aboriginal people. It is widely acknowledged that Aboriginal offenders are over-represented in Canadian prisons. MMS can limit the discretion of sentencing judges in varying a sentence based on the unique circumstances

159 Parkes, "From Smith to Smickle", *supra* note 15 at 168.

160 D Paciocco, *supra* note 116 at 9-10.

161 Cairns Way, "A Disappointing Silence", *supra* note 32 at 3.

162 Rosemary Cairns Way, "An Opportunity for Equality: *Kokopenace* and *Nur* at the Supreme Court of Canada" (2015), University of Ottawa – Working Paper Series, WP 2015 – 19 at 465.

163 See generally Jonathan Rudin, "Tell It Like It Is – An Argument for the Use of Section 15 over Section 7 to Challenge Discriminatory Criminal Legislation", 64 *Crim LQ* (3-4th) 317 (2017).

164 *Ibid* at 3.

165 *Ibid* at 5.

166 *Ibid* at 7.

167 *Ibid*.

168 *Ibid*.

of Aboriginal offenders. This is contrary to the statutory direction in section 718.2(e).¹⁶⁹ Rather than furthering the objectives of rehabilitation and reconciliation, the increased number of MMS in the *SSCA* are likely to perpetuate the over-incarceration of Aboriginal people in Canada and potentially violate their equality rights.¹⁷⁰

The case of *R v Adamo*¹⁷¹ illustrates how MMS can violate section 15 rights on the basis of mental disorder. Justice Suche found a violation under section 15 in the context of a severely brain injured person whose mental disorder was directly connected to his offending behaviour.¹⁷² Justice Suche concluded that the impugned mandatory minimum sentence violated section 15 because it entirely foreclosed a sentence which would account for the offender's mental disorder and his diminished moral blameworthiness. To this extent the impugned mandatory minimum sentence perpetuated systemic disadvantage of the mentally ill.¹⁷³ The suggestions made in the Pivot Report and the conclusions in *Adamo* illustrate how section 15 arguments potentially or actually play out in the context of MMS. Such equality arguments demand reconsideration of deeply-held presumptions about free will, individual responsibility and rational actors which underpin our criminal justice system.

Although substantive equality is assuming a central focus in academic commentary on the use of MMS, section 15 has yet to be argued before the Court in this context. It is a complex test and will likely prove difficult to establish. Section 15 arguments have seen little success in parties' attempts in lower courts to challenge MMS.¹⁷⁴ The lower court decisions in *Nur* illustrate the difficulties in establishing a section 15 violation. There, the accused relied on expert evidence, and was supported by an intervener, to argue that the impugned MMS disproportionately affected black males and thus breached the section 15 equality guarantee. Specifically, the accused pointed to the various intersecting factors such as poverty, unemployment, and biased policing and justice system practices which all perpetuated the disadvantage of the black community. However, the trial judge summarily rejected all of the equality arguments put forward by the accused.¹⁷⁵ The trial judge accepted that anti-black discrimination contributed to many of the underlying societal causes emphasized by the accused, but he rejected that the impugned *law itself* had a

169 *Criminal Code*, *supra* note 4, s 718.2(e).

170 Pivot Report, *supra* note 32 at 35.

171 *R v Adamo*, 2013 MBQB 225 [*Adamo*]. In addition to a section 7 violation, the court also held that the impugned mandatory minimum sentence violated section 15 of the *Charter* based on the accused's mental disability. As Justice Suche held: "I conclude that the mandatory minimum sentence [...] has a much greater impact on mentally disabled persons because it does not take into account their reduced moral blameworthiness" (*Ibid* at para 139). In reaching this conclusion, Justice Suche demonstrated curial receptivity to equality arguments in the context of MMS, while also moving away from the premise of the Canadian justice system that all offenders are autonomous, free actors. Judgments like *Adamo* signal an increased acceptance of equality arguments and a shifting understanding about the role of free choice and rationality in criminal conduct.

172 *Ibid* at para 133.

173 *Ibid* at para 135.

174 Section 15 arguments seem either to be rejected outright, or are not considered in light of a parallel section 12 argument succeeding. See, for example, *R v JED*, 2017 MBPC 33 at para 77, where the trial judge rejected the section 15 arguments of an offender on the autism spectrum facing a mandatory sentence. The judge emphasized that not all offenders on the autism spectrum would be disproportionately affected by the mandatory minimum sentence, and thus the section 15 argument had to fail. See also *R v O'Neil Harriott*, 2017 ONSC 3393 at para 46, where the trial judge accepted that the mandatory sentence breached section 12 and thus deemed it unnecessary to consider the section 15 argument advanced by the accused. Similarly, see *R v SJP*, 2016 NSPC 50, where the trial judge found the impugned mandatory minimum sentence violated section 12 but refused to consider the accused's section 15 arguments, holding they were lacking in proper support (see para 17).

175 *R v Nur*, 2011 ONSC 4874 at paras 74-82, 275 CCC (3d) 330.

discriminatory effect.¹⁷⁶ The trial judge's acceptance of the systemic discrimination faced by black offenders, coupled with his refusal to attribute any of that discrimination to the impacts of the impugned MMS in particular, demonstrate the difficulty of establishing a section 15 breach in this context.¹⁷⁷

I argue that section 15 is a preferred method to strike down over-inclusive criminal laws, the precise problem which inheres in MMS. In my view, section 15 targets the core harm caused by such mandatory penalties: substantive inequality. Section 15 challenges would mandate a focus on the inequality wrought by MMS and provide a better avenue for meaningful change. Nevertheless, in light of the general lack of success in section 15 challenges to MMS and a judicial reticence to engage with section 15 in this context, I would argue that section 12 is likely to remain the most fruitful avenue to challenge MMS. However, this does not mean that equality considerations have no place in the analysis. Instead, I would argue that concerns around substantive equality may increasingly infuse the section 12 analysis post-*Nur*. With the loosening of the reasonable hypothetical analysis, we may yet see the increased incorporation of characteristics which are “systemic and foreseeable”¹⁷⁸ based on such factors as race, mental disorder, drug dependency, and the like. In this way, even if section 15 challenges are not taken up in the context of discriminatory criminal legislation, an expanded section 12 analysis may accommodate equality concerns by demonstrating how MMS disproportionately impact certain minorities.¹⁷⁹

The decision in *Lloyd* is telling on this point. As Parkes noted, *Lloyd* constitutes the first time since *Smith* that the Court has considered a mandatory minimum provision in the context of a drug offence.¹⁸⁰ On the appeal, numerous interveners highlighted the extent to which MMS for drug possession disproportionately impact low-level, drug-dependent offenders who sell drugs to fuel their habits. Since section 15 was not raised in *Lloyd*, substantive equality was instead addressed in the ambit of section 12, and interveners crafted reasonable hypotheticals to reflect the disproportionate effects of the impugned provisions on poor and drug dependent offenders.¹⁸¹

Notably, in the trial decision in *Lloyd*, the sentencing judge accepted the proposed hypothetical of an addict who possesses a small amount of a Schedule 1 substance and shares it with a friend. The trial judge recognized that “this happens daily in the downtown east side of Vancouver and is in no way a far-fetched or extreme example.”¹⁸² The majority of the Court in *Lloyd* accepted the trial judge's articulation of the hypothetical and was receptive to the substantive equality arguments made by the interveners and the appellant in the section 12 analysis. The majority explicitly endorsed the hypothetical of an addict charged with sharing a small amount of a drug with a friend, as well as an offender who trafficked in order to support an addiction and was making efforts to rehabilitate.¹⁸³

176 *Ibid* at para 79.

177 I note that the Court of Appeal for Ontario accepted the trial judge's reasoning in *Nur*: see *R v Nur*, 2013 ONCA 677 at paras 3, 182.

178 Cairns Way, “A Disappointing Silence”, *supra* note 32 at 2.

179 Professor Cairns Way is not optimistic in this regard (see her concerns generally at *supra* note 32). However, there is room for optimism; while mandatory minimums by their nature raise serious concerns over systemic discrimination, *Nur* at least sets us on a path that is more sensitive to substantive equality concerns than was previously the case.

180 Parkes, “The Punishment Agenda”, *supra* note 46 at 603.

181 See, for example, *Lloyd BCPC*, *supra* note 105 (Factum of Pivot Legal Society).

182 *Lloyd BCPC*, *supra* note 105 at paras 48-49.

183 *Lloyd*, *supra* note 49 at paras 32-33.

Therefore, I argue that despite the difficulty in establishing a section 15 breach on its own, the Court seems willing to consider equality considerations through the use of reasonable hypotheticals in section 12. An expanded section 12 analysis following *Nur* and *Lloyd* provides more scope for section 15 concerns to infuse the section 12 analysis in the context of MMS. The Court has been receptive to the understanding of drug addiction as an illness¹⁸⁴ and is willing to consider the differential and disproportionately harsh effect of MMS on marginalized minorities. This presents a way to address how MMS disproportionately impact these populations without recourse to the more complex and challenging analysis under section 15.

ii. Section 1: Deference and Dialogue

If a *Charter* violation were made out under sections 7, 12, or 15, it would fall to the government to justify the intrusion under section 1.¹⁸⁵ A full examination of the justificatory analysis in the *Oakes* test is beyond the scope of this paper.¹⁸⁶ However, a few comments are warranted on both the level of deference owed to Parliament in this area and the nature of the dialogue between the Court and Parliament. As we have seen, it has been argued that courts should generally defer to Parliament's decision to legislate MMS. Until *Nur*, the Court was exceedingly deferential to Parliament in the context of MMS. However, deference is not a uniform concept and can manifest in varying degrees. Accordingly, before embarking on an examination of section 1, we must identify the level of deference which animates the analysis. Parkes has distinguished *naked* deference from *principled* deference, arguing that curial deference to Parliament in the legislative context must be principled and evidence-based, particularly if fundamental rights are at stake.¹⁸⁷ This includes deference to Parliament in the context of MMS. The Court ought to take heed of the significant body of evidence challenging both the efficacy and constitutionality of MMS.¹⁸⁸ Rather than nakedly deferring to legislative intent here, the Court should adopt a principled position and send a clear message to Parliament that the constitutional infirmities in mandatory minimum sentencing must be addressed. The Court would not be overstepping its role. Rather, such a message would properly consist of what has been called a "robust and democratic dialogue" between the courts and the legislature.¹⁸⁹

184 See generally *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

185 *Charter*, *supra* note 36, s 1.

186 It should be noted that any violation of sections 7 or 12 will be hard to justify. In *Bedford*, *supra* note 146 at para 129, the Court commented that a section 7 violation has never been justified under section 1, and that while such an outcome is possible, it is unlikely. Similarly, in *Nur*, *supra* note 2 at para 111, Chief Justice McLachlin said the following concerning section 1: "It will be difficult to show that a mandatory minimum sentence that has been found to be grossly disproportionate under [section] 12 is proportionate as between the deleterious and salutary effects of the law under [section] 1." It is difficult to conceive of a scenario where a provision which breaches the terrifically high threshold of gross disproportionality can be demonstrably justified as a reasonable limitation on *Charter* rights.

187 Email from Debra Parkes to Sarah Chaster (March 11, 2016). Parkes referred to the work of Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40:4 3-4 Osgoode Hall LJ 337. In this article, Moon discusses three different ways that a court might defer, with the third being a general lowering of the standard of deference (as opposed to deferring to findings of fact by legislators, or deferring to the accommodation of competing interests). Parkes has termed this third approach to be *naked*, rather than *principled* deference.

188 Doob et al, *supra* note 34 at 28: "Deterrence-based sentencing makes false promises to the community. As long as the public believes that crime can be reduced by legislatures or judges through harsh sentences, there is no need to consider other approaches to crime reduction." Therefore, only by seriously questioning the foundation of MMS and relaxing our reliance on these devices do we create space for more nuanced, sophisticated initiatives in criminal justice policy.

189 Parkes, "From Smith to Smickle", *supra* note 15 at 161.

Further, as the Court held in *Carter v Canada*, the type of legislation at issue can impact the appropriate level of deference. For example, a “complex regulatory response to a social ill will garner a higher degree of deference” than an absolute prohibition.¹⁹⁰ A mandatory minimum sentencing provision can hardly be called a complex regulatory response to the social ill of criminal conduct. I suggest that, as was the case in *Carter*, the level of deference owed to Parliament here should be accordingly reduced. While the level of judicial activism in *Nur* was a welcome change from the previous decades of minimalism on the part of the Court, the decision fell markedly short in terms of fully engaging with the evidence on MMS. Nevertheless, the Court took a further step in the right direction on this front in *Lloyd*. After finding a section 12 violation, the majority concluded that the breach could not be saved under section 1 of the *Charter*. Specifically, the majority held that the law was not minimally impairing, and that the Crown had not established that less harmful means would achieve Parliament’s objectives, either by narrowing the scope of the offence or establishing legislative exemption clauses.¹⁹¹ These comments in the context of section 1 demonstrate that the Court is taking a stance of more principled deference to Parliament, explicitly directing that legislative changes are necessary to attenuate the constitutional frailties of MMS, rather than nakedly deferring to Parliament’s decisions in this regard. This is a clear message sent in the Court’s dialogue with Parliament: mandatory minimums will continue to violate the *Charter* unless there is judicial discretion to depart from these sentencing provisions in certain circumstances.

CONCLUSION

In this paper, I have situated MMS in their historical context and sought to demonstrate their constitutional infirmities. I have argued that the Court’s decisions in *Nur* and *Lloyd* have breathed new life into section 12, particularly in expanding the availability of the reasonable hypothetical analysis. Nevertheless, given that gross disproportionality will likely remain the high standard in the section 12 analysis, and that MMS severely constrain a sentencing judge’s ability to ensure proportionality, which is the fulcrum of the sentencing process, the state of affairs is deeply problematic. I echo the suggestion urged on Parliament by the majority in *Lloyd*: MMS must be accompanied by a codified legislative exemption clause to cure their inherent constitutional infirmities. I suggest that a single exemption clause could be legislated to apply to any mandatory minimum in the *Criminal Code*, allowing judges to depart from a given mandatory minimum sentence in substantial and compelling circumstances, and requiring written reasons to justify the departure.

Since mandatory minimums inherently result in a transfer of discretion to prosecutors, who carry no collateral constitutional obligation to uphold proportionality as a principle of sentencing, a legislative exemption clause would effectively transfer some discretion *back* to the judiciary. It would allow a sentencing judge to depart from the mandatory minimum when to impose it would seriously compromise proportionality. Such an outcome would also respect the different roles of the prosecutor and the sentencing judge. Legislative exemption clauses would thus address some of the deep issues concerning MMS in the context of untrammelled prosecutorial discretion.

Legislative exemption clauses would clearly be more politically viable than a full repeal of all MMS. This legislative change would steer us away from the punishment-based narrative which has dominated Canadian criminal justice for too long and would perhaps abate the distrust of judicial discretion in Canada. Whether Parliament is open to this suggestion remains to be seen. Either way, this paper has attempted to show that there is a new sense

190 *Carter*, *supra* note 146 at paras 83-92.

191 *Lloyd*, *supra* note 49 at para 49.

of optimism for future *Charter* challenges to mandatory minimum sentencing provisions, either in a revived section 12 analysis or through novel section 15 arguments. Hopefully, the rapid proliferation of MMS in our criminal justice system has come to an end, and *Nur* and *Lloyd* have definitively set us on a path towards a time where MMS cease to feature prominently—or perhaps one day, at all—in the Canadian criminal justice landscape.

ARTICLE

PUBLIC PROCUREMENT AND THE CHARBONNEAU COMMISSION: CHALLENGES IN PREVENTING AND CONTROLLING CORRUPTION

Sarah Chaster *

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INTRODUCTION

Corruption is an insidious problem which has long plagued our society. Its frequently unseen mechanisms and destructive consequences ripple from small, local stages to a vast, global scale. Its costs range from fractured faith in public administration, deep inefficiencies in our use of time and resources, and most notably a vast financial drain on society.¹ Fighting corruption is one of the primary challenges of modern times. In particular, public procurement and the construction industry are notoriously vulnerable to corruption.² The public procurement sector has often been described as exceptionally prone to corruption due to the substantial amounts of money changing hands and an all too common lack of proper oversight or concomitant expertise. Professor Gerry Ferguson, in his work examining global corruption, notes that one, if not the, most prevalent area of public procurement corruption is the construction industry.³ A key political and legal focus in contemporary Canadian society is the attempt to address and curb corruption in these specific contexts.

The province of Quebec is a jurisdiction that has publicly struggled with a public procurement regime and construction industry riddled with corruption. Quebec is often known for its history of corruption crises, emanating from deep social and economic changes stemming from the Quiet Revolution.⁴ The scandals have spanned a breadth of areas including political financing regimes, the appointment of judges, and the federal “Sponsorship Scandal.”⁵ However, in recent years, corruption in public procurement and organized crime in the construction industry have come particularly to the fore. In October 2011, amidst the furor of political scandal and increasingly ruptured public confidence in the government, then-Premier of Quebec Jean Charest announced a public inquiry to investigate the awarding and management of public contracts in the construction industry: the Charbonneau Commission (alternatively, the “Commission”). The Charbonneau Commission, and the report it published four years later, will be the primary focus of this paper.⁶

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- 1 Susanne Kuhn & Laura B Sherman, *Curbing Corruption in Public Procurement: A Practical Guide* (2014) at 9-10, online: Transparency International <www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf> archived at <<https://perma.cc/G2GE-H37E>>.
 - 2 See AO Arewa & P Farrell, “The Culture of Construction Organisations: the Epitome of Institutionalised Corruption”, *Construction Economics and Building*, 2015, 15(3), 59-71, online: <epress.lib.uts.edu.au/journals/index.php/AJCEB/index> archived at <<https://perma.cc/4JDK-2VWS>>. This study examined the culture of corruption in the United Kingdom construction sector and suggests that the nature of the construction industry itself promotes fraud and corruption.
 - 3 Gerry Ferguson, *Global Corruption: Law, Theory and Practice*, 2nd ed, Coursebook (Creative Commons License, 2017), ch 11 at 3, online: <icclr.law.ubc.ca/wp-content/uploads/2017/06/Global-Corruption-Law-Theory-and-Practice-2017.pdf> archived at <<https://perma.cc/TJ6X-YWUM>>.
 - 4 For an in-depth commentary on the history and causes of Quebec corruption, see Martin Patriquin, “Quebec: The most corrupt province”, *Maclean’s* (24 September 2010), online: <www.macleans.ca/news/canada/the-most-corrupt-province/> archived at <<https://perma.cc/SUFK-HEAL>>.
 - 5 These issues will be explored in further detail in Part II of this paper.
 - 6 Quebec, *Rapport final de la Commission d’enquête sur l’octroi et la gestion des contrats publics dans l’industrie de la construction* (November 2015) (France Charbonneau) online: <https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Integral_c.pdf> archived at <<https://perma.cc/K5QW-6RPL>> [Charbonneau Report]. Note that the Charbonneau Commission’s full report is currently available only in French.

The Charbonneau Commission and consequent report are important moments in the Canadian legal landscape and in the global fight against corruption. Following the release of the report in November 2015, there is merit in now reflecting on what led to the report, what it accomplished, and whether its numerous recommendations might be effective in curbing corruption in public procurement. In seeking to answer these questions, this paper will first sketch out a broad overview of public procurement generally, the nature of public commissions, and their context in the province of Quebec. It will then discuss the Charbonneau report and describe and critically assess its recommendations, particularly as they relate to public procurement. Finally, this paper will canvas the implementation of and reaction to the Charbonneau recommendations, examining several legislative responses and elucidating their strengths and weaknesses through a comparative analysis with certain international standards, as well as aspects of the Canadian federal public procurement regime. Ultimately, this paper seeks to demonstrate that the Charbonneau Commission has been a unique opportunity for a detailed and sophisticated examination of corruption in an industry sector that has long been accepted as one of the most prone to corruption—and that the Charbonneau Commission’s recommendations have the potential for major structural reform of public procurement in Quebec.

I. AN OVERVIEW OF PUBLIC PROCUREMENT

Before embarking on an examination of the Charbonneau Commission and report, we must arm ourselves with an understanding of public procurement, both in terms of its general nature and its particular susceptibilities to corruption.⁷ The Quebec Treasury Board Secretariat, a government department tasked in part with overseeing the management of contracts and resources in Quebec’s public administration, defines public procurement as the act of public and municipal bodies and government corporations procuring goods and services in order to fulfil their respective mandates.⁸ Essentially, public procurement occurs anytime a governmental or public body acquires goods or services. Public procurement is a broad term encompassing all the stages of the often-complicated procurement process, from the initial needs assessment to the implementation of the final contract. The governmental acquisition of goods and services ranges from something as simple as obtaining materials for schools to massive construction projects.⁹ It has been described as a complicated and opaque process which consumes vast amounts of global gross domestic product, meaning rampant corruption in public procurement wastes these public funds to a tremendous degree.¹⁰ The costs of corruption in public procurement extend beyond the financial: corruption distorts competition, drives down the quality of public works and the likelihood that a given project will actually meet the public’s needs, and ultimately undermines the public’s trust in government.¹¹

Corruption arises in the public procurement context in a variety of ways. To begin, we must determine exactly what is meant by corruption. In its guide to curbing public procurement corruption, Transparency International defines corruption as “the abuse of entrusted

7 In the interests of brevity, this will be a cursory overview of public procurement and related corruption problems. For a much more in-depth exploration of these issues, see Ferguson, *supra* note 3.

8 Quebec, Secretariat du Conseil du trésor, “Government Procurement: Role of the Secretariat du conseil de trésor” (2009), online: <<https://www.tresor.gouv.qc.ca/en/public-procurement/government-procurement/>> archived at <<https://perma.cc/G5JM-ZKJN>>.

9 Kuhn & Sherman, *supra* note 1 at 6.

10 *Ibid* at 4.

11 *Ibid*.

power for private gain.”¹² This broad definition allows for many iterations of corruption, which can occur at any stage of the procurement process, and can be initiated on either side of the procurement relationship (that is, the private sector on the supply side, or the government on the demand side).¹³ Corruption spans from small-scale, everyday abuse by low-level public officials to large-scale corrupt acts committed by public officials in massive projects. It includes such techniques as bribes—through the form of donations to political parties, for example—being offered to obtain a contract, rather than the award being based on merit or efficiency.¹⁴ Transparency International also references the prevalence of collusion in public procurement, which it defines as “secret agreements between parties [...] to conspire to commit actions aimed to deceive or commit fraud with the objective of illicit financial gain.”¹⁵ Collusion in the context of procurement might arise where government officials and bidders collude to pre-arrange bids and deceive the competition, or where bidders collude amongst themselves to manipulate the contract award decision.¹⁶

With a basic understanding of the public procurement process and how corruption might operate within it, we can now ask: what makes public procurement and the construction industry particularly susceptible to corruption, to the extent that Transparency International has ranked construction and public works as the industry sector most prone to corruption?¹⁷ To begin with, public procurement procedures are often complex and play out with limited transparency, rendering corruption extremely hard to detect. Further, those who do uncover corruption—be it intentionally or by chance—rarely report it, for a variety of reasons, including a lack of engagement with the money at stake, a sense of futility in the reporting process, and a fear of retaliation.¹⁸ One study suggests that the very culture of construction organizations may promote institutionalized corrupt practices.¹⁹ This vulnerability to corruption stems from the character of construction projects, which are often massive in size and disjointed in nature. As Professor Denis Saint-Martin notes in his work examining the Charbonneau Commission and corruption in Quebec, the scale and complexity of such projects, particularly since they are often one-of-a-kind enterprises, render it difficult to effectively monitor payment and ensure proper standards and guidelines are followed.²⁰ Finally, the nature of these projects is such that private actors are frequently and repeatedly asking for public approval, which increases the opportunity for bribes and inappropriate influence in public decision-making processes.²¹ Ultimately, while numerous factors operate here, the overarching principle to be drawn from this

12 Transparency International, *The Anti-Corruption Plain Language Guide* (2009) at 14, online: <www.transparency.org/whatwedo/pub/the_anti_corruption_plain_language_guide> archived at <https://perma.cc/F6YR-LR8E>.

13 Kuhn & Sherman, *supra* note 1 at 6.

14 *Ibid.*

15 Transparency International, *supra* note 12 at 9.

16 Kuhn & Sherman, *supra* note 1 at 7.

17 Deborah Haroon & Finn Heinrich, *Bribe Players Index 2011* (2011) at 3, online: Transparency International <www.transparency.org/whatwedo/publication/bpi_2011> archived at <<https://perma.cc/UR7C-P2BP>>.

18 Kuhn & Sherman, *supra* note 1 at 7.

19 Arewa & Farrell, *supra* note 2. This study was conducted in the United Kingdom construction industry in particular, but I suggest its lessons may reveal institutionalized traits around the nature of the construction industry in general.

20 Denis Saint-Martin, “Systemic Corruption in an Advanced Welfare State: Lessons from the Quebec Charbonneau Inquiry” (2015) 53:1 *Osgoode Hall LJ* 66 at 72 <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss1/4/>> archived at <<https://perma.cc/JA2B-649J>>.

21 Ferguson, *supra* note 3, ch 11 at 8-9.

analysis is that public procurement inherently tends to involve the massive exchange of money and resources, with continued regulatory approvals from public actors; this in itself leads to huge incentives for abusive practices and corruption.²²

II. PUBLIC INQUIRIES AND THE QUEBEC CONTEXT

A. Public Inquiries Generally

To properly situate an examination of the Charbonneau Commission, we must first consider the nature and purpose of commissions of inquiry generally, with due regard to their strengths and weaknesses. In his work critiquing commissions of inquiry, Professor Ed Ratushny describes them as a unique form of administrative tribunal whose function is to investigate and report on a certain issue. After this task is completed, the commission ceases to exist.²³ Public inquiry commissions are created under and governed by both provincial and federal legislation. Quebec's *Act Respecting Public Inquiry Commissions* sets out the power to establish a public inquiry and its fundamental purposes:

1. Whenever the Government deems it expedient to cause inquiry to be made into and concerning any matter connected with the good government of Quebec, the conduct of any part of the public business, the administration of justice or any matter of importance relating to public health, or to the welfare of the population, it may, by a commission issued to that effect, appoint one or more commissioners by whom such inquiry shall be conducted.²⁴

The language of this provision, which mirrors a similar provision in the federal *Inquiries Act*,²⁵ is noticeably broad. The inclusive wording allows the government to call an inquiry for any matter connected with good government and public interest generally. Commissioners are given expansive powers to incur expenses, to summon witnesses, and to compel the production of documents. Commissioners have considerable autonomy once appointed, as long as the investigation is restricted to the authorized mandate.²⁶

Justice Gomery, who chaired a public inquiry commission following the federal “Sponsorship Scandal” (which will be briefly considered later in this paper), has since opined on the benefits of public inquiries. He suggests the core function of an inquiry is to investigate, to educate, and to inform—all of which, in his opinion, operate to the benefit of Canadian society.²⁷ Common complaints levied against commissions include criticisms

22 Note that much of what Transparency International says about corruption (at Kuhn & Sherman, *supra* note 1) dovetails with the costs and consequences of corruption as identified by the Charbonneau report. The causes of corruption in the report are broken down between those related to the construction industry, the public procurement process generally, those linked to government actors and public institutions, the infiltration of organized crime into the construction industry, and a lack of adequate oversight or control (Charbonneau Report, *supra* note 6, Volume 3, ch 2 at 20-33). The consequences of corruption include economic costs (both direct and indirect), an increase in organized crime, the diversion of public interest objectives, a threat to democracy and the rule of law, and an erosion of confidence in public institutions (Charbonneau Report, *supra* note 6, Volume 3, ch 3 at 33-49). The Charbonneau Commission specifically set out to address these harms in its report and recommendations.

23 Ed Ratushny, “The Commission of Inquiry: A Residual Institution of Government” (2010) 4 J Parliamentary & Pol L 275 at 275.

24 *Act Respecting Public Inquiry Commissions*, CQLR 2006, c C-37, s 1.

25 *Inquiries Act*, RSC 1985, c I-11, s 2.

26 Justice John H Gomery, “The Pros and Cons of Commissions of Inquiry” (2006) 51:4 McGill LJ 783 at 786.

27 *Ibid* at 792.

that they take too long and cost too much.²⁸ Justice Gomery acknowledges these concerns but counters that the Supreme Court of Canada has generally rejected these viewpoints and upheld the legitimacy and necessity of public inquiries.²⁹ He concludes by extolling the benefits of inquiries: they are independent and impartial, their open nature allows the public to be apprised of the circumstances that led to the critical issue in question, and they typically offer recommendations to the government (which not only assist in remedying whatever situation necessitated the inquiry, but further tend to restore public confidence in the process overall).³⁰

Public inquiries have some strategic political value, but I suggest this does not necessarily undermine their ability to investigate difficult issues, offer recommendations, or reinforce faith in public institutions. Ratushney notes the political aspect of public inquiries, describing them as both a “check on politics” and a “political tool.”³¹ Inquiries are created in exceptional circumstances: where there has typically been a total failure to properly address the issue at hand. In this sense they are inherently political in nature. This political purpose might be to engage stakeholders and the public, or to obtain policy advice on thorny issues.³² It has also been suggested, in a more cynical light, that they serve an important tactical purpose:

The primary political advantage in appointing a commission of inquiry is to take the heat off the government in relation to a problem with a high public profile. The government can say it has ‘done something’ without having to admit wrongdoing, at least temporarily.³³

On the one hand, then, the Charbonneau Commission could be seen primarily as a political instrument and an expensive mechanism to deflect negative attention from the government, the true value of which is limited. On the other hand, however, it is precisely the willingness of the government to call an inquiry and investigate allegations of misconduct which lends it inherent worth in our democratic society. Indeed, Justice Gomery lauds this aspect of public inquiries for their ability to restore public confidence in the government itself: “[i]n Canada we tend to take this for granted, but very few nations subject their governments to this kind of independent and public scrutiny.”³⁴

B. Corruption in the Quebec Context

The context of scandal and corruption in which the Charbonneau Commission was struck is not a new phenomenon. Quebec has been called Canada’s “most corrupt province,” and journalists and political commentators have long speculated on the source and accuracy

28 *Ibid* at 794.

29 *Ibid* at 789.

30 *Ibid* at 792.

31 Ratushney, *supra* note 23 at 280.

32 *Ibid* at 276.

33 *Ibid* at 280.

34 Gomery, *supra* note 26 at 787. While the government’s willingness to appoint a public inquiry to investigate allegations of public wrongdoing is laudable, it should be noted that when Charest initially announced the creation of the Commission, he did so by cabinet decree rather than under Quebec’s *Act Respecting Public Inquiry Commissions*. This meant the power of the Commission was substantially fettered. It was only after a period of sustained public criticism that the Charest government granted the Commission full powers under the *Act* and thus ensured the full independence of the Commission. This fact must be borne in mind when commending the Quebec government’s willingness to investigate allegations of public procurement corruption. See Linda Gyulai, “Charbonneau Commission timeline”, *Montreal Gazette* (24 November 2015), online: <montrealgazette.com/news/local-news/the-5-ws-of-the-charbonneau-commission> archived at <<https://perma.cc/SL2X-35XJ?type=image>>.

of such a statement.³⁵ Without supporting the assertion that Quebec is the *most* corrupt province as compared to the rest of Canada, I would at minimum argue that Quebec has struggled for decades with high levels of ongoing corruption in many of its institutions.³⁶ Quebec's climate of corruption can perhaps be traced back to the rapid modernization in the 1960s known as the Quiet Revolution. This period led to massive projects with poor oversight that were fertile ground for corrupt practices; projects were also plagued by ongoing strife and union violence.³⁷ Today, the constant scandals are easy to name: allegations of inappropriate influences in the appointment of judges and in political financing, corruption in the construction industry, and the federal sponsorship scandal.³⁸ A stark representation of the purported extent of corruption is captured in the following figure: according to Transport Canada figures, "it costs Quebec taxpayers roughly 30 per cent more to build a stretch of road than anywhere else in the country."³⁹

This history of public scandals indicating high levels of corruption in Quebec is an important context to properly situate the social and political milieu from which the Charbonneau Commission emerged. For example, the federal "Sponsorship Scandal," which came to light through the late 1990s and early 2000s, revealed rampant corruption and cast a dim view not only of the federal Liberal Party but of politics in Quebec.⁴⁰ A sponsorship fund had been established as an advertising campaign to promote federalism in Quebec, following the failed referendum on sovereignty in 1995. However, it was alleged that the Liberal government abused the system and flagrantly broke rules in awarding public contracts by misappropriating public funds into the pockets of supporters of the Liberal Party in Quebec.⁴¹ This scandal resulted in the Auditor General of Canada launching a full investigation, a finding that CAD100 million had been paid to advertising companies operating in Quebec for work that was never even done,⁴² a public inquiry headed by Justice Gomery,⁴³ and a crisis of confidence in the Liberal government which set the stage for the Conservative Party to take federal power.⁴⁴ More recently, allegations emerged in

35 Patriquin, *supra* note 4.

36 For a deeper analysis of the systemic corruption in Quebec and a consideration of Quebec's historical trajectory since the Quiet Revolution, see Saint-Martin, *supra* note 20 at 81-91. Saint-Martin accepts the high levels of corruption in Quebec, although he argues that the very idea of "systemic corruption" is not a sound conceptual basis for creating change in anti-corruption research.

37 Patriquin, *supra* note 4.

38 *Ibid.*

39 *Ibid.*

40 "Federal sponsorship scandal", *CBC News Online* (26 October 2006), online: <www.cbc.ca/news2/background/groupaction/> archived at <<https://perma.cc/T8VE-WN3P>> ["Federal sponsorship scandal"].

41 For an in-depth description of the Sponsorship Scandal, see Jay Makarenko, "Gomery Commission of Inquiry & Sponsorship Scandal" (1 January 2006), *Mapleleafweb*, online: <www.mapleleafweb.com/features/gomery-commission-inquiry-sponsorship-scandal.html> archived at <<https://perma.cc/6H5D-V7R8>>.

42 For the full report, see Office of the Auditor General of Canada, *2003 November Report of the Auditor General of Canada*, online: <www.oag-bvg.gc.ca/internet/English/parl_oag_200311_e_1126.html> archived at <<https://perma.cc/7BHY-5SBP>>.

43 For the full report, see Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Phase 1 Report* (1 November 2005) and *Restoring Accountability, Phase 2 Report* (1 February 2006), online: <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm> archived at <<https://perma.cc/CF9L-8XBL>>.

44 "Federal sponsorship scandal", *supra* note 40.

2010 that third parties had inappropriately influenced the appointment of three judges to the Court of Quebec, which resulted in the establishment of a public inquiry to investigate those issues.⁴⁵

Finally, a consideration of corruption in Quebec must also examine the establishment of the Permanent Anticorruption Unit (Unité permanente anticorruption) (“UPAC”). UPAC was created by the provincial government in February 2011 in order to combat corruption in Quebec.⁴⁶ UPAC emerged out of public calls for action and accountability following the same revelations of corruption in Quebec’s construction industry which led to the Charbonneau Commission.⁴⁷ UPAC consists of over 350 members with an annual budget of CAD30 million, and UPAC coordinates law enforcement forces and expertise on behalf of the government in the fight against corruption.⁴⁸ UPAC operates on three distinct fronts related to corruption: prevention, verification, and investigation. The UPAC Commissioner, who is considered a peace officer throughout the province of Quebec, has broad powers to investigate possible corruption, coordinate responses, and formulate recommendations to individuals, governmental bodies, and public sector entities on the management of their contracts with a view to preventing corruption.⁴⁹ UPAC also has a strong educational component, which includes such techniques as offering various public information sessions on integrity in public contracts and challenges regarding corruption generally.⁵⁰ UPAC has been active in high profile investigations and arrests in recent years, which suggests it is establishing itself as a centre of expertise and a crucial and independent force in the fight against corruption in Quebec.⁵¹

The characterization of Quebec as Canada’s “most corrupt” province is itself highly controversial, and a comparative analysis to reject or substantiate that assertion is beyond

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- 45 Marc Bellemare, Quebec’s Minister of Justice from 2003 to 2004, made public allegations in 2010 that third parties who were involved in fundraising for the Quebec Liberal Party had inappropriately influenced the appointment of three judges to the Court of Quebec. These allegations resulted in Charest calling an Inquiry Commission on the Process for Appointing Judges. While the Commission found insufficient evidence to establish an inappropriate influence in the appointment of these three judges, it nevertheless noted that certain stages of the appointment process are vulnerable to all manner of intervention and influence, and made several recommendations to respond to public expectations and restore public confidence in the administration of justice in Quebec. See the Inquiry Commission on the Process for Appointing Judges of the Court of Quebec and Municipal Courts and Members of the Tribunal administratif du Québec (Les Publications du Québec, 2011), online: <www.cepnj.gouv.qc.ca/> archived at <<https://perma.cc/9ACN-PUTW>>.
- 46 For a more detailed examination of UPAC, see Maxime Reeves-Latour & Carlo Morselli, “Fighting Corruption in a Time of Crisis: Lessons from a Radical Regulatory Shift Experience” (2017) *Crime L Soc Change* at 5.
- 47 For details on UPAC’s purpose, powers, and creation, see Quebec’s *Anti-Corruption Act*, SQ 2011, c 17 [*Anti-Corruption Act*].
- 48 Quebec, Commissaire a la lutte contre la corruption, “Lutter contre la corruption pour un système public intègre”, online: <<https://www.upac.gouv.qc.ca/upac/mandat.html>> archived at <<https://perma.cc/9LXM-96KL>> [author’s translation].
- 49 Quebec, Commissaire a la lutte contre la corruption, “Le Commissaire”, online: <www.upac.gouv.qc.ca/upac/le-commissaire.html> archived at <<https://perma.cc/8VDS-JREF>> [author’s translation].
- 50 Quebec, Commissaire a la lutte contre la corruption, “Formation en ligne”, online: <<https://www.upac.gouv.qc.ca/prevenir/formation-en-ligne.html>> archived at <<https://perma.cc/HFZ5-Q6VK>> [author’s translation].
- 51 For example, UPAC arrested several high-ranking Quebec Liberals on such charges as fraud on government, corruption, and abuse of trust for allegedly criminal behavior related to political financing and abuse of public contracts, amid calls for the Charbonneau Recommendations to be implemented: see Jason Magder, “High-ranking Liberals, including Nathalie Normandeau, arrested by UPAC on fraud charges”, *Montreal Gazette* (17 March 2016), online: <montrealgazette.com/news/local-news/high-ranking-liberals-including-nathalie-normandeau-arrested-by-upac-on-fraud-charges> archived at <<https://perma.cc/3ABX-8MBZ?type=image>>.

the scope of this paper.⁵² However, I suggest that the above consideration of Quebec's history demonstrates high levels of corruption, and it sets the stage for an understanding of the significance of the Charbonneau Commission and its recommendations. A plausible explanation for the high levels of corruption in Quebec is simply that Quebec is more vigilant in its policing of corruption.⁵³ This suggestion draws on the idea that wherever there is government, there is corruption, and perhaps corruption is the most visible in Quebec because this is where it has been the most visibly exposed and tackled, with the establishment of forces such as UPAC.⁵⁴ Indeed, most anti-corruption researchers today start from the premise that all human societies are corrupt, and that some nations are simply better than others at detecting and eradicating corruption.⁵⁵ I accept this suggestion, and argue that we would be well served to scrutinize the experience in Quebec for lessons in the fight against corruption, as I strive to do in this paper. Quebec faces high levels of corruption, but the lessons learned from the Charbonneau Commission and report have the potential to lead to major structural reform, which might render Quebec more adept and sophisticated in its ability to deter corruption and reduce its associated costs.

Saint-Martin argues that corruption is deeply adaptable. To this end, he suggests the Charbonneau Commission as a “moment” in the fight against corruption might have beneficial short-term effects but fewer long-term impacts, as corrupt officials learn to manipulate new institutional changes resulting from the Charbonneau recommendations.⁵⁶ He writes that “[t]he shift in societies from a systemically corrupt social order to a less corrupt one is never achieved once and for all as ‘big bang’ models of change lead us to believe.”⁵⁷ I agree. And I do not suggest that the Charbonneau Commission will operate as the “big bang” moment which will conclusively set Quebec on a path away from systemic corruption. However, I would argue that the depth of the Charbonneau inquiry and the light it sheds on institutionalized corruption nevertheless offers an important vehicle for significant structural reform in Quebec and sophisticated mechanisms in the ongoing fight against corruption in that province.

III. THE CHARBONNEAU COMMISSION, REPORT, AND RECOMMENDATIONS

A. The Charbonneau Commission

Having assessed public procurement and corruption generally, the nature of commissions of inquiry, and the Quebec context, we turn now to the central focus of this paper: the Charbonneau Commission. The Commission was established in 2011 by then-Premier Jean Charest amid sustained pressure following allegations of widespread corruption

52 It has been argued, for example, that Quebec is unique in being truly more corrupt than any other province in Canada: see Patriquin, *supra* note 4. Several explanations for this phenomenon include the high levels of provincial spending on projects in Quebec, which increase the scope for corruption, as well as Quebec's quest for independence where the public focuses on the haunting question of separation rather than on demanding an accountable and transparent government.

53 Globe Editorial, “Is Quebec corrupt, or just more vigilant?”, *Globe and Mail* (23 March 2016), online: <www.theglobeandmail.com/opinion/editorials/is-quebec-corrupt-or-just-more-vigilant/article29365096/> archived at <<https://perma.cc/7TMY-9B3Q>>.

54 *Ibid.* See also Saint-Martin, *supra* note 20 at 72, where the author accepts that Quebec faces high levels of endemic corruption but asserts that Quebec is not alone in this regard, and lists numerous other developed countries that similarly face systemic corruption in particular industries.

55 Saint-Martin, *supra* note 20 at 77.

56 *Ibid.* at 105.

57 *Ibid.*

in Quebec's public procurement processes and construction industry.⁵⁸ Charest named Quebec Superior Court Justice France Charbonneau to head the inquiry. Formally titled the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, its primary focus—as the name suggests—was to examine and improve practices related to public procurement in the construction industry. I argue that the Charbonneau Commission is a robust show of democracy, rather than operating primarily as a political strategy to deflect sustained criticism of the Quebec government. The Commission's lengthy investigation and recommendations respond to central concerns in the fight against public procurement corruption. Integrity in public procurement requires not only good governance, but also a sustained political effort to review and update sound procurement rules.⁵⁹ The Commission and report are a part of that necessary political effort.

According to the Commission's final report, concerns around corrupt schemes relating to public contracts in the construction industry began circulating in 2007.⁶⁰ There were questions regarding conflicts of interest in the awarding of public contracts, inappropriate ties between union executives and construction contractors, and allegations of bid-rigging which sparked media attention and public controversy.⁶¹ The Quebec legislature reacted by passing a bill to tighten up regulations around public contracts, add certain restrictions on building licences, and amend penal provisions relating to the construction industry.⁶² Further legislative changes were made regarding ethics in municipal affairs and election funding.⁶³ However, new schemes continued to be unearthed, and after the release of yet another damning report in the fall of 2011, the Government of Quebec announced the creation of the Charbonneau Commission.⁶⁴

The Commission's mandate was trifold: first, to examine activities of collusion and corruption in public contracts within the construction industry; second, to investigate the possible infiltration of organized crime in the construction industry; and third, to suggest recommendations to better identify, reduce, and prevent corruption and organized crime in these industries.⁶⁵ The scope of the investigation covered the period from 1996 to 2011.⁶⁶ The Commission directed a monumental investigation into these issues, which is demonstrated by the degree of evidence that came before it. Notably, the Commission conducted 263 days of hearings, heard from approximately 300 witnesses, filed 3,600 documents and produced 70,000 pages of transcripts.⁶⁷ The Commission defined public contracts as those with any agency or person in the public sector, meaning that hundreds of bodies were covered in its ambit, including government ministries and agencies, universities, municipalities, school boards, and certain companies with a degree of government ownership.⁶⁸ The Commission heard explosive testimony from such witnesses as engineers, contractors, former mayors, members of the National Assembly of Quebec,

58 Sidhartha Banerjee & Peter Rakobowchuk, "Quebec corruption inquiry ends after 30 months of public hearings", *Toronto Star* (14 November 2014), online: <https://www.thestar.com/news/canada/2014/11/14/quebec_corruption_inquiry_ends_after_30_months_of_public_hearings.html> archived at <<https://perma.cc/X4DF-PEW4>>.

59 Ferguson, *supra* note 3, ch 11 at 24.

60 Charbonneau Report, *supra* note 6, Part 1, ch 1 at 4.

61 *Ibid.*

62 *An Act to provide measures to fight crime in the construction industry*, SQ 2009, c 57.

63 Charbonneau Report, *supra* note 6, Part 1, ch 1 at 6.

64 *Ibid.* at 8.

65 *Ibid.*, Part 1, ch 2 at 12.

66 *Ibid.*

67 *Ibid.*, "Mot de la Presidente" (no page number: PDF at 16).

68 *Ibid.*, Part 1, ch 2 at 12.

and union organizers which demonstrated shocking degrees of alleged corruption.⁶⁹ Overall themes in the evidence demonstrated the depth of corruption in engineering firms and construction contractors in Quebec, issues around conflicts of interest, collusion and kickbacks, the infiltration of the Mafia in the construction industry, and the hidden face of political financing.⁷⁰ The “relentless testimony of kickbacks and greased palms,” which resulted in the resignation of three Quebec mayors, constituted what legal commentators have called a clear signal that the entire Quebec construction industry is in need of a regulatory overhaul.⁷¹ This overhaul is precisely what the Charbonneau recommendations set out to accomplish.

B. The Charbonneau Report

In November 2015, four years following its creation, the Commission tabled its final report. The report, nearing 2,000 pages in length, offers a unique and comprehensive analysis of public procurement, the construction industry, and political financing. The report focuses on the Quebec context buttressed by a lengthy analysis of foreign experience. The report has much to offer in the fight against corruption generally, but unfortunately is still only available in French.⁷² An official English translation would go far to bring the lessons of the Commission’s work to the rest of the world. The report itself is divided into five parts. Part 1 sets out the context of the creation of the Commission, including its mandate and evolution. Part 2 provides extensive summary information regarding public contracts, the construction industry, political financing, and organized crime, while also canvassing foreign experiences with regard to these issues. Part 3 summarizes the facts uncovered and evidence as a whole, broken down into several chapters simply due to the sheer amount of testimony collected. Part 4 analyzes the nature of the schemes and their causes as uncovered by the evidence. Part 5 contains 60 recommendations proposed by the Commission to the government. In light of the shocking depth of corruption unearthed by the Commission, the report opens with a *cri de coeur*⁷³ appealing citizens to become more actively involved in the fight against corruption, recommending that journalists keep watch, and encouraging regulatory bodies and UPAC to continue their important work. Collaboration from all levels of society is essential, in the Commission’s opinion, to address corruption in Quebec.⁷⁴

C. The Charbonneau Recommendations

In Part 5 of its report, the Commission turns to the third and final aspect of its mandate: examining potential solutions and making recommendations to prevent public procurement corruption in the construction industry. The Commission strove to incorporate a broad and comprehensive range of perspectives in its recommendations. To this end, the Commission heard suggestions from a variety of experts, interest groups, professional associations, international organizations, and public institutions. The Commission also identified and incorporated academic literature on the relevant subjects raised by its mandate. Finally, the Commission took heed of public debates, comments from citizens, and general discussions from observers.⁷⁵ The extensive consideration of a diversity of expert opinions and foreign

69 “10 witnesses whose testimony rocked the Commission”, *CBC News* (14 November 2014), online: <www.cbc.ca/news/canada/montreal/10-witnesses-whose-testimony-rocked-the-charbonneau-commission-1.2834413> archived at <<https://perma.cc/7LKB-FFRK>>.

70 Charbonneau Report, *supra* note 6, “Mot de la Presidente” (no page number: PDF at 17-18).

71 Douglas Oles, “Anti-Corruption Legislation in the United States (An Introduction)” [2014] *J Can C Construction Law* 67 at 67.

72 This author speaks French and worked from the French report as well as several English summaries.

73 This is a French phrase meaning “a passionate outcry or appeal.”

74 Charbonneau Report, *supra* note 6, “Mot de la Presidente” (no page number: PDF at 17).

75 *Ibid*, Part 5 at 1.

experience is one of the great strengths underpinning the Charbonneau recommendations. Legislation, for example, is sometimes criticized for being speedily enacted without proper debate or sufficient academic background.⁷⁶ In this sense, commissions of inquiry have a certain advantage over legislative change as a better avenue through which to effect long-term, well-informed solutions to systemic problems.

i. Action Strategies

The Commission first gave an account of various principles and strategies that guided its recommendations. It identified two overarching parameters: the recommendations must underscore basic principles of democracy and the rule of law, and they must be curative in nature.⁷⁷ The Commission then set out eight action strategies to underpin the recommendations.⁷⁸ The strategies focused on effectively regulating intervention with measures of increasing intensity; by starting with awareness and education and working gradually to coercive measures, the recommendations sought to maximize resources and avoid disengaging actors willing to comply with standards.⁷⁹ The strategies also included targeting structural reform rather than punishing individual action, and improving the quality of state intervention by acting proactively rather than reactively.⁸⁰ The final strategies targeted public procurement specifically: to depoliticize the process of granting public contracts, to use a nuanced and informed transparency, to engage citizens by better protecting whistleblowers, and to strengthen the integrity of actors in the public sector overall.⁸¹ In these strategies, the Commission reinforced the notion that citizens are agents of change in an attempt to reinvigorate public trust in a fractured system. These strategies also combat apathetic attitudes about inevitable corruption in Quebec by bolstering the idea that individual action can lead to positive, structural reform.

ii. Recommendations Regarding Public Procurement

The Commission established five main areas of intervention: (i) to review the public procurement framework; (ii) to improve detection and sanctions; (iii) to target inappropriate political financing; (iv) to promote citizen participation; and (v) to renew trust in elected officials and civil servants. A consideration of all 60 recommendations is beyond the scope of this paper, which will focus primarily on the first block of recommendations regarding public procurement. The first central recommendation made by the Commission is the establishment of a provincial public procurement authority (“PPA”) for Quebec.⁸² The report suggests that due to the unique, complex, and sometimes urgent nature of public construction projects, public contracting authorities (“PCAs”) are rarely able to ensure the integrity of such contracts on their own.⁸³ Oversight from such a public body would purportedly respond to central vulnerabilities in the existing procurement system, including excessive discretion afforded to PCAs in applying rules for awarding contracts and a lack of sufficient internal expertise when evaluating contracts.

76 See Graham Steele, *Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Schulich School of Law, 2015) at 86-88, online: Faculty of Graduate Studies Online Theses <dalspace.library.dal.ca/bitstream/handle/10222/56272/Steele-Graham-LLM-LAWS-March-2015.pdf?sequence=1&isAllowed=y> archived at <<https://perma.cc/Y6L6-6LG5>>. These considerations will be addressed in greater detail in Part IV of this paper.

77 Charbonneau Report, *supra* note 6, Part 5 at 1.

78 *Ibid*, Part 5, ch1 at 83.

79 *Ibid* at 84.

80 *Ibid* at 85.

81 *Ibid* at 86-87.

82 *Ibid*, Part 5, ch 2 at 91-92.

83 *Ibid*.

The Commission suggested several ancillary recommendations to provide the PPA with information and enforcement measures necessary to ensure the integrity of public procurement. The PPA would require access to information from all parties involved in public procurement, and it should share that information with control bodies such as UPAC and the Competition Bureau of Canada.⁸⁴ It was also recommended that the PPA produce an annual report and offer training courses for PCAs relating to public procurement. In this sense, the report envisions a strong educational function for the PPA, on top of its ongoing monitoring powers. In terms of regulating the work of PCAs, the report suggested a number of steps which would integrate the PPA within all stages of public procurement (including the tendering system and appointment of selection committees), require the presence of inspectors to ensure integrity, ensure clear complaint responses free of political influence, and generally allow the PPA to act as a buffer between public and private actors.⁸⁵ Finally, the report recommended that the PPA take over the power to licence businesses wishing to enter into public contracts, a responsibility which currently rests with the *Autorité des marchés financiers* (“AMF”).⁸⁶ While there were no current issues found with the AMF regulating business licences, transferring this power to the PPA would maximize its use of expertise and resources.⁸⁷

The report then recommended altering the tendering rules in the construction industry to depart from the “lowest compliant bidder” approach. While professional services contracts are decided based typically on a combination of both quality and price, construction contracts consider price alone, meaning the bid with the lowest price is selected.⁸⁸ This approach has numerous setbacks, including a disproportionate focus on price which incentivizes companies to minimize costs at the expense of quality and innovation.⁸⁹ This approach also increases the possibility of collusion; results are predictable, since the lowest price tender will win, which allows bidders to collude to divide contracts.⁹⁰ Therefore, the Commission recommended that the tendering rules be changed to provide the PCA with the best intersection of price and quality, based on the nature of the work. However, the report did not set out proposed rules. Rather, it suggested that the PCAs have the authority, under the supervision of the PPA, to craft rules which reflect an appropriate weighing of price and quality criteria depending on the construction contract in question.⁹¹

This recommendation responds to one of the central forms of public procurement corruption identified by Transparency International, as set out in Part I of this paper: collusion. However, departure from the lowest compliant bidder approach imports more discretion into the process, particularly since this recommendation does not itself suggest rules to achieve the best intersection of price and quality. Increasing space for discretion also increases the possibility of corruption.⁹² Thus, while departure from the lowest common bidder approach is justified to import quality into the tendering process, its implementation could have counterintuitive results by increasing the scope for corruption. I suggest that any response to this recommendation would be well-served not to leave discretion of the PCAs entirely unfettered, and that the supervision of the PPA should establish certain overarching guidelines to reduce the risk of corruption stemming from

84 *Ibid.* As with many of its recommendations, the Commission envisioned that the PPA would work in conjunction with UPAC in its investigation and analytical activities.

85 *Ibid.* at 94-96.

86 *Ibid.* at 97.

87 *Ibid.*

88 *Ibid.*

89 *Ibid.* at 99.

90 *Ibid.* at 98.

91 *Ibid.* at 99.

92 Ferguson, *supra* note 3, ch 11 at 49-50.

increased discretion. PCAs could maintain some, but not total, discretion to determine the appropriate intersection of price and quality when it comes to selecting a bidder.

The latter proposals in the first block of recommendations address discrete sub-issues relating to public procurement. First, the Commission identified political influence in the approval of road infrastructure projects by the Ministry of Transportation of Quebec, and suggested measures to depoliticize this process.⁹³ The Commission then referenced rampant collusion in the field of asphaltting and the acquisition of materials and licensed products. The recommendations suggested measures to increase healthy competition in these regards, since it was deemed the current system limits competition and drives prices disproportionately high.⁹⁴ Next, the Commission recommended tightening rules for awarding contracts to para-municipal companies and non-profit organizations. Currently, these bodies are not entirely subject to legislation governing public procurement, such as the *Act respecting contracting by public bodies* (“*ACPB*”).⁹⁵ During the Commission’s work, UPAC raised concerns that corrupt individuals could use non-profit organizations as a tool for fraud and tax evasion, thereby wasting public funds. The Commission thus recommended that such bodies be subject to the same legislative rules as the public bodies with which they are associated.

Finally, the Commission recommended changing the deadline for the receipt of tenders. Currently the deadline is set at a minimum of 15 days. However, many companies do not have adequate time to prepare a bid and are eliminated from the competition.⁹⁶ On the other hand, 15 days can be too long of a deadline in situations of urgency. The report thus suggested greater flexibility by allowing PCAs to establish a reasonable deadline for receipt of bids, depending on the financial importance and complexity of the project at hand. While flexibility is arguably required in this process, the same concerns highlighted above regarding discretion resulting in an increased potential for corruption apply in this context. However, as I suggest above, an established PPA could create guidelines and monitor deadlines to ensure that any increased flexibility is properly used and does not in itself increase the scope for corruption in this particular context.

iii. Recommendations Regarding Sanctions, Political Financing, Citizen Participation, and Confidence in Public Officials

After addressing public procurement, the Commission offered further recommendations in four blocks: improving prevention and strengthening sanctions, addressing political party financing, promoting citizen participation, and renewing confidence in public officials. This paper will now canvass the second block of recommendations as it focuses specifically on preventing collusion, corruption, and the infiltration of organized crime in the construction industry.

The Commission recommended improved whistleblower protection legislation of general application.⁹⁷ Currently, whistleblowers are protected by sector-specific legislation such

93 Charbonneau Report, *supra* note 6 at 99.

94 *Ibid* at 101.

95 *Act respecting contracting by public bodies*, CQLR c C-65.1 [*ACPB*]. See also Charbonneau Report, *supra* note 6 at 105. The Commission noted that government agencies often subsidize construction projects which are carried out by para-municipal or non-profit organizations. However, such organizations are not subject to the *ACPB*, which means they may enter contracts with companies who have been deemed ineligible for public contracts, using public subsidies in the process. The Commission noted particularly that the recent *Recovery Act* extends to para-municipal and non-profit organizations, and suggests that other pieces of legislation should be similarly extended (*Recovery Act*, *infra* note 155). The *ACPB* and the *Recovery Act* will be addressed in greater detail in Part IV of this paper.

96 *Ibid* at 107.

97 *Ibid* at 109.

as Quebec's *Anti-Corruption Act*.⁹⁸ However, this legislation is limited in that it targets only the public procurement sector and is only available for a person who reports directly to UPAC (rather than to a colleague or manager, for example). On a related note, the Commission also recommended improved witness immunity for those cooperating in investigations.⁹⁹ The recommendation of a general system of protection for whistleblowers and improved witness immunity responds directly to one of the central challenges to corruption identified by Transparency International in Part I above, being that those who do uncover public procurement corruption rarely tend to report it.

The Commission then set out a series of interrelated recommendations to prevent the infiltration of organized crime into the construction industry. These include expanding the list of offences that can result in the cancellation of a construction contractor's licence by the Régie du bâtiment du Québec ("RBQ"),¹⁰⁰ tightening the rules on the waiting period imposed by the RBQ for license holders that have committed an offence,¹⁰¹ and expanding the scope of criminal record checks for shareholders in construction companies.¹⁰² Further recommendations targeted issues such as reducing payment delays to construction contractors,¹⁰³ cracking down on violence and intimidation in construction sites,¹⁰⁴ targeting false billing,¹⁰⁵ reviewing the appointment process for the UPAC Commissioner to ensure proper independence from political influence,¹⁰⁶ and improving the reliability of the data gathered by the Quebec register of enterprises on companies authorized to do business in Quebec.¹⁰⁷ The Commission also suggested changes for improved monitoring of Quebec's professional system.¹⁰⁸ These numerous recommendations reflect increasing criminalization tactics rather than ensuring compliance through cooperation and self-regulation, and they operate in conjunction with a view to drive down the possible infiltration of organized crime in the construction industry and to improve the monitoring and reporting of possible corruption. They reflect a more punitive approach to anti-corruption which is analyzed in more detail in Part IV(B)(i) below.

98 *Anti-Corruption Act*, *supra* note 47.

99 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 111-113. This recommendation is made on the basis that evidence from repentant witnesses is crucial in cases of corruption and collusion, where it is typically difficult to acquire the necessary evidence.

100 *Ibid* at 114. The RBQ is tasked with ensuring the quality of work and safety of buildings and facilities, and the professional qualifications and integrity of contractors. It enacts and enforces construction, safety, and professional qualification standards. Currently, if officers of a business with a construction contractors' license have been convicted in the last five years of a tax offence, an indictable offence connected with the construction industry, or gangsterism, their license is cancelled by the RBQ. The Commission recommended that the RBQ licensing requirements be tightened so that this list is expanded to include the offences of trafficking, production or importation of drugs, laundering the proceeds of crime, and offences related to collusion and corruption. This aims to address particular vulnerabilities of companies in the construction industry to the infiltration of organized crime.

101 *Ibid* at 115.

102 *Ibid* at 117.

103 *Ibid* at 118.

104 *Ibid* at 119-120.

105 *Ibid* at 131.

106 *Ibid* at 127.

107 *Ibid* at 130.

108 *Ibid* at 136-141. The testimony during the Commission revealed concerns around a lack of ethics in Quebec's professional system and insufficient monitoring of the professional system due to a lack of data and professional inspections. These recommendations targeted engineering firms in particular; the Commission noted that many engineering firms had cultures which allowed corrupt practices regarding political financing and collusion, and suggested changes to ensure that engineering firms be made subject to proper oversight, rather than the professionals themselves. As it currently stands, oversight bodies can only discipline professionals rather than the firms themselves, which the Commission highlighted as a fundamental challenge in curbing corrupt practices in professional systems.

The report also addressed the protection of sensitive information and advocated for a form of “nuanced transparency.”¹⁰⁹ The Commission concluded, based on expert testimony, that transparency *alone* cannot necessarily guarantee effectiveness and fairness in the public procurement process.¹¹⁰ Interestingly, this suggestion is somewhat at odds with the premise that transparency is the hallmark to any good public procurement system.¹¹¹ Transparency in public procurement has been described as reducing the risk of corruption by ensuring the accountability of decision-makers and the engagement of stakeholders.¹¹² Somewhat conversely, the Commission found that disseminating information may in fact facilitate collusion and exert undue pressure on key players in the public procurement process, particularly information relating to the composition of selection committees and the identity of parties accepting tender documents.¹¹³ The Commission thus recommended that laws be standardized to ensure the confidentiality of such information in the hopes of decreasing opportunities for collusion and corruption. I suggest that the Commission’s advocacy for the concept of nuanced transparency demonstrates the depth of its examination into the nature and sources of procurement corruption. By refusing to rely on transparency as a panacea for all corruption, the Commission presented a more sophisticated and nuanced strategy in the fight against corruption in Quebec.

The final three blocks of recommendations will now be briefly addressed, but their full consideration is beyond the scope of this paper. Part Three addresses political financing. The Commission distinguished legitimate influence in a democratic society from inappropriate interference, and made recommendations regarding political financing as a way to depoliticize public procurement processes.¹¹⁴ Part Four is intended to promote citizen participation and to encourage Quebec citizens to take on an active monitoring role in the fight on corruption.¹¹⁵ This would be primarily achieved through a central recommendation that Quebec adopt a law allowing citizens to prosecute fraudsters on behalf of the government, mirroring the existing American *False Claims Act*.¹¹⁶ The final block of recommendations focuses on renewing confidence in elected officials and civil servants, notably by reviewing existing ethical and professional conduct frameworks, tightening rules on gifts, and tightening post-employment rules for employees transitioning from the public to private sector.¹¹⁷ While the primary focus of the Commission’s work targeted public procurement and crime in the construction industry, a brief review of the major organizational themes in the recommendations demonstrates a focus on major structural change touching on many aspects of Quebec industries and public systems, as well as an effort to change attitudes and basic societal engagement with issues around corruption.

109 *Ibid* at 129-130.

110 *Ibid*.

111 Ferguson, *supra* note 3, ch 11 at 22-23.

112 Kuhn & Sherman, *supra* note 1 at 12.

113 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 130.

114 *Ibid* at 151.

115 *Ibid* at 166.

116 *Ibid* at 166-172. This recommendation discusses the United States’ *False Claims Act* in great detail and suggests ways it could be transposed into the Quebec context. Legal commentators have considered this possibility and concluded that there are no obvious legal barriers to the adoption of a civil remedy for fraud in Quebec, although such legislation would almost certainly be challenged in the courts if it were passed: see Paul Daly, “Final Report of Quebec’s Corruption Inquiry: Recommendation of a False Claims Act” (24 November 2015), *Paul Daly, Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2015/11/24/final-report-of-quebecs-corruption-inquiry-recommendation-of-a-false-claims-act/> archived at <<https://perma.cc/E4NB-EEMP>>.

117 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 177-192.

IV. RESPONSES TO THE CHARBONNEAU REPORT

A. Reaction, Criticisms, and Implementation

After an extensive review of the Charbonneau Commission's recommendations, this paper will now turn to a critical assessment of their goals, implementation, and utility. The recommendations' inherent value lies in their broad application, their vision for systemic change, and their responsiveness to central challenges in curbing corruption. As identified in Part III of this paper, many of the recommendations respond directly to the paramount obstacles of corruption as identified by bodies like Transparency International. Examples include changing tendering rules to curb collusive practices and expanding the scope of whistleblower protection legislation to encourage reporting. The guidance offered by the eight action strategies also offers a framework for cohesive and structural change, rather than a haphazard approach. In this sense, the Charbonneau Commission offers a sophisticated examination of corruption in public procurement, and has the potential for major structural reform in this industry in Quebec.

Reaction to the effectiveness of the Charbonneau Commission has been varied. One commentator made the following comment regarding its reception: “[w]hile the commission had the makings of a potential political bombshell, the final report was met with little acclaim, and commentators have been quick to dismiss the inquiry as a [...] failed mission.”¹¹⁸ There were suggestions of political influence and infighting among the members of the Commission, and the report has been called an “expensive disappointment” with its cost of approximately CAD45 million, which failed to yield high profile political arrests.¹¹⁹ However, the report has also been defended as a valuable contribution to good governance, notably by exposing the true scale of corruption in Quebec and generating recommendations which will lead to, and perhaps have already resulted in, meaningful change. On this basis, the Charbonneau Commission cannot simply be written off as an expensive failed venture. As this paper has sought to demonstrate, it represents an unprecedented examination of corruption in public procurement and an opportunity to generate systemic reform.

In terms of implementation, Quebec's Liberal government moved quickly to begin implementing certain recommendations. Justice Minister Stéphanie Vallée publicly avowed the government's commitment to enact the recommendations, an estimated 80 percent of which require legislative or regulatory amendments.¹²⁰ And Quebec's Liberal Party recently announced that “[o]ver 80 [percent] of the recommendations have been realized or are in the process of being implemented.”¹²¹ This is reflected in the specific legislative changes addressed in the next section of this paper, as well as several bills which have recently been introduced in Quebec to respond to specific recommendations made by

118 Daniel Binette, “The Charbonneau Commission's Underappreciated Contributions to Fighting Corruption in Quebec”, (15 January 2016), *The Global Anticorruption Blog: Law, Social Science, and Policy* (blog), online: <<https://globalanticorruptionblog.com/2016/01/15/the-Charbonneau-commissions-underappreciated-contributions-to-fighting-corruption-in-quebec/>> archived at <<https://perma.cc/G3U4-MZ9D>>.

119 *Ibid.*

120 Sarah Leavitt, “Charbonneau commission: Quebec to create public works authority”, *CBC News* (24 March 2016), online: <www.cbc.ca/news/canada/montreal/Charbonneau-commission-liberal-government-recommendations-1.3505437> archived at <<https://perma.cc/9YTB-5TZ9>>.

121 Parti Libéral du Québec, Annonce Gouvernementale, “Creating the base for a new Quebec” (8 December 2017), online: <<https://plq.org/en/press-release/creating-the-base-for-a-new-quebec/>> archived at <<https://perma.cc/5J3H-RM69>>.

the Charbonneau Commission, although they have not yet been enacted.¹²² Despite the government's professed commitment to enact the Charbonneau recommendations, some of the proposed legislation has been criticized as failing to get to the heart of corruption problems, or even as being counterproductive.¹²³ Additionally, there are questions as to whether the Commission has made any difference regarding general opinions about the fight against corruption; allegations of corruption continue to emerge, and the media has asserted that "Quebecers don't seem to think much has changed on the corruption front."¹²⁴ Nevertheless, I suggest the recommendations have at the very least a strong potential for major structural reform in public procurement in Quebec. Time will tell whether that potential is borne out.

B. Legislative Responses to the Charbonneau Report

This paper will now address specific legislative responses to public procurement which have been enacted as a result of the Charbonneau Commission. However, we must first acknowledge that law reform comes about in a variety of ways that extend beyond concrete legislative change. While the Charbonneau Commission has value in acting as a catalyst for new legislation, it also achieves indirect law reform in more subtle ways. Systemic corruption itself is reflected in both formal institutions as well as social norms and cultural beliefs.¹²⁵ This mirrors the formal and informal manifestations of law reform. The Charbonneau Commission has wrought change in generating formal and informal discussions around corruption in public procurement, bringing critical issues to the fore in Quebec society, and perhaps positively affecting general public opinion in these regards. Such subtle changes are particularly important at a time where there has been a crisis of public confidence in governance in Quebec. While legislative change is thus worth consideration, we must be careful to not place undue emphasis on these formal changes without being aware of the deeper ripple effects that may spread in more informal ways as a result of the Commission's work. An increased awareness of corruption in public procurement, through informal discussions, media publicity,¹²⁶ and academic

122 As of November 2016, six Charbonneau-related bills had been introduced by the Quebec government on such topics as political financing, whistleblowing, professional orders, the establishment of a central procurement authority, and UPAC: for a brief description, see Andy Riga, "Charbonneau Commission report: One year later, has anything changed in Quebec?", *Montreal Gazette* (23 November 2016), online: <montrealgazette.com/news/local-news/Charbonneau-commission-report-one-year-later-has-anything-changed-in-quebec> archived at <<https://perma.cc/6ZYV-DJHH?type=image>>. More recently, several bills have been introduced to respond to recommendations around decreasing violence and intimidation in Quebec's construction industry, and to increase the power of the Regie du batiment du Quebec around issuing licences under the *Building Act*. See Bill 152, *An Act to amend various labour-related legislative provisions mainly to give effect to certain Charbonneau Commission recommendations*, 1st Sess, 41st Leg, Quebec, 2017. See also Bill 162, *An Act to amend the Building Act and other legislative provisions mainly to give effect to certain Charbonneau Commission recommendations*, 1st Sess, 41st Leg, Quebec, 2017.

123 Riga, *supra* note 122.

124 *Ibid.*

125 For further discussion on systemic corruption reflected in both formal and informal institutions, and the differences between them, see Saint-Martin, *supra* note 20 at 78-81. I note for completeness that in his discussion of formal and informal institutions, Saint-Martin cautions against an overreliance on the conceptual use of "systemic corruption" generally as a way to understand and respond to cycles of corruption, a term which may not provide sufficient allowance for human agency and may not be the best concept to explain the persistence of systemic corruption in increasingly advanced welfare states.

126 I suggest that media publicity is an important driver of structural change, by focusing social attention on issues such as rampant corruption. However, it should be noted that there can be adverse effects of sustained media scrutiny on such topics. See, for example, Reeves-Latour & Morselli, *supra* note 46 at 15, where the authors consider the role of the media in Quebec's anti-corruption efforts, and note that while increased media scrutiny has raised societal awareness about corruption on an unprecedented scale, it can also arbitrarily affect strategic prosecution choices and may threaten whistleblowers if investigative strategies become too invasive.

commentary—often stemming from direct reactions to the Charbonneau Commission—is also an important driver of law reform and structural change.

i. *The Integrity in Public Contracts Act*

Bill 1, or the *Integrity in Public Contracts Act*,¹²⁷ was the first bill passed by the new Parti Québécois government after the defeat of the Liberal government in 2012.¹²⁸ The Charbonneau Commission was already underway at this point. The new government acted preemptively in passing this anti-corruption measure to curb the various practices that were coming to light as a result of the Commission's work. Public procurement was at that time regulated through the *ACPB*, which was significantly amended in the *Integrity in Public Contracts Act*. The existing regulatory framework was deemed insufficient, and the new government—in response to the Commission and in an attempt to distance itself from the scandals that beset the Liberal government—made dramatic changes in the *Integrity in Public Contracts Act*. The heart of these changes was a pre-authorization requirement obligating *any* enterprise (not only those within the construction industry) that wished to contract with a public body to first apply to the AMF for authorization.¹²⁹ It was envisioned that the AMF would work closely with UPAC to exercise its new powers.¹³⁰ Authorization would be based on an assessment of the enterprise's integrity, and the AMF would have a broad discretion to refuse an enterprise that failed to meet a requisite standard of integrity.

The system of pre-authorization established by the *Integrity in Public Contracts Act* has attracted criticism. Legal commentators, on review of the bill, have asserted that “the application of the new law is likely to be fraught with difficulties and challenged by stakeholders.”¹³¹ While that legislation aims to ensure that any enterprises wishing to contract with public bodies in Quebec demonstrate a high threshold of “unassailable integrity,” it is maligned as allowing a broad discretion leading to unpredictable results.¹³² Professor Graham Steele, in his analysis of the bill, noted the significant differences between automatic and discretionary refusals for pre-authorization.¹³³ The AMF has the discretion to refuse an authorization “if the enterprise concerned fails to meet the high standards of integrity that the public is entitled to expect.”¹³⁴ Steele denounced the problematically subjective nature of this provision and the lack of clarity as to what might result in a refusal, particularly since none of the language used in the provision is a legal term of art.¹³⁵

Steele considered some of the bill's frailties with regards to its objectives. While the bill had a clear objective to restore integrity in public procurement, it also had a political objective to restore public confidence in procurement processes. Steele assigned this political objective as responsible for some of the bill's problems, particularly the speed with which it was

127 *Integrity in Public Contracts Act*, SQ 2012, c 25.

128 Steele, *supra* note 76 at 72.

129 Ian Gosselin & Antoine Pellerin, “Public Contracts in Quebec: A Question of Integrity” [2013] J Can C Construction L 1 at 2.

130 *Ibid* at 12.

131 *Ibid* at 2.

132 *Ibid* at 13.

133 Steele, *supra* note 76 at 77. See also Ferguson, *supra* note 3.

134 *Integrity in Public Contracts Act*, *supra* note 127, s 21.27. This discretionary criterion has broadly attracted criticism, although it was assessed and upheld by the Quebec Superior Court less than a year after its enactment. For a discussion of these considerations, see Clementine Sallee & Liviu Klauferman, “Public Procurement in Quebec: New Authorization Regime under Judicial Scrutiny”, (12 June 2013), online: Blake, Cassels & Graydon LLP <www.mondaq.com/canada/x/320228/Government+Contracts+Procurement+PPP/Public+Procurement+In+Quebec+New+Authorization+Regime+Under+Judicial+Scrutiny> archived at <<https://perma.cc/W9JX-6XZL>>.

135 Steele, *supra* note 76 at 79.

passed and the lack of evidence based decision-making.¹³⁶ He noted with surprise that there was “not a single mention of any of the international and national anti-corruption instruments” in the debates around Bill 1, nor was there a reference to anti-corruption literature or expert advice.¹³⁷ He commented that the Charbonneau Commission heard from two witnesses from New York City, who testified that pre-authorization is only a small part of a much larger anti-corruption system, and that it could actually do more harm than good if not properly integrated within a larger system.¹³⁸ Steele concluded with the following assertion: “there has to be a serious doubt whether Bill 1 represents a sustainable anti-corruption agenda.”¹³⁹

Steele’s criticisms of Bill 1 illuminate the value of the Charbonneau recommendations. Steele noted that legislative change alone, particularly when it does not capitalize on expert advice or proper research on the issue, is insufficient. He pointed to jurisdictions such as the European Union or New York City, which do not rely on legislative change alone but rather “enforcement, measurement, reporting, and correction” as the most effective anti-corruption agendas.¹⁴⁰ The Commission’s true potential lies in these kinds of nuanced changes, rather than calling only for legislative change. While the Commission commented on public procurement legislation, it also affirmed systemic, high-level reform which focused on enforcement, measurement, and reporting. This is demonstrated in the recommendations around whistleblower protection, establishing a central procurement authority, and focusing on monitoring procurement processes and building expertise around best practices. The Commission capitalized on expert testimony and foreign experience to suggest a broad spectrum of change, extending beyond legislation, and in so doing set Quebec on a path to achieving a similarly nuanced anti-corruption agenda.

Indeed, Quebec’s approach to anti-corruption in light of the Charbonneau inquiry has been described as a radical regulatory shift which represents a more punitive model.¹⁴¹ This relates to Steele’s comment above, in that enforcement and correction measures are the most effective anti-corruption agendas, beyond simply legislative change. Quebec’s anti-corruption measures have historically been lacking in enforcement measures, penalties, and collaboration. Between the establishment of UPAC and the many recommendations of the Commission, the new anti-corruption agenda has been characterized as more punitive in nature.¹⁴² A more punitive model carries some unforeseen challenges—for example, collaboration between agencies working with UPAC can be difficult, and increased criminalization brings the likelihood of complex offences and contested litigation.¹⁴³ However, the more punitive model has been seen by some as necessary to promote respect for laws by actors in public procurement.¹⁴⁴ In this sense, the nuanced suggestions made by the Commission include potential for better monitoring and enforcement of anti-corruption measures, in an effort to root out some of the rampant corruption in Quebec’s public procurement industry.

136 *Ibid* at 82-83.

137 *Ibid* at 102-103.

138 *Ibid* at 107-108.

139 *Ibid* at 117.

140 *Ibid*.

141 See Reeves-Latour & Morselli, *supra* note 46, at 5.

142 *Ibid* at 7-9.

143 *Ibid* at 19-20.

144 *Ibid*.

ii. Quebec's Bill 108

On June 8, 2016, the Quebec government introduced Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*.¹⁴⁵ This bill proposes establishing the Autorité des marchés publics (“AMP”) as a central authority to take over responsibility from the AMF with regards to overseeing public contracts. This bill is a direct response to the Commission’s suggestion that Quebec enact a public procurement authority to ensure the integrity of public procurement in Quebec. The bill envisions the AMP taking on all existing responsibilities currently held by the AMF (namely, the pre-authorization of public contracting bodies in Quebec), as well as overseeing all other contracting processes determined by the government.¹⁴⁶ This bill also amends the *ACPB* in a number of ways. These amendments relate primarily to when the government might require an enterprise to obtain authorization and when authorizations might be cancelled by the AMP, and they establish a one year waiting period for an enterprise that has withdrawn or had its application cancelled before it can re-apply.¹⁴⁷ The actual process to obtain prior authorization for public contracts, however, remains unaltered.¹⁴⁸ The bill also tasks the AMP with maintaining the register of enterprises ineligible for public contracts.¹⁴⁹

Bill 108 helps to better situate Quebec’s pre-authorization scheme within a more nuanced public procurement framework. Section 21.27 of the *ACPB*, which contains the provision allowing discretion to refuse authorization if an enterprise “fails to meet the high standards of integrity” expected by the public,¹⁵⁰ is not amended by the bill.¹⁵¹ This means the same “startling subjectivity” raised by Steele would still be present in the legislation.¹⁵² However, the broad discretion might be tempered somewhat since pre-authorization would now be established within the concentrated expertise of the AMP, whose mission would include not only pre-authorization but also generally overseeing all public contracts and ensuring integrity and ongoing compliance with public procurement processes. Bill 108 has been lauded as a significant change that would bring positive developments and greater uniformity to Quebec’s public procurement processes.¹⁵³ It responds directly to one of the most central recommendations made by the Commission with regards to public procurement. Bill 108 was assented to on December 1, 2017 and came into force on that same day, so its actual implementation and practical impacts remain to be seen.¹⁵⁴

145 Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorite des marches publics*, 1st Sess, 41st Leg, Quebec, 2016 [Bill 108].

146 Natalie Beauregard & Marjolaine Verdon-Akzam, “Public contracts: Quebec introduces the Autorite des marches publics”, (17 June 2016), online: Osler, Hoskin & Harcourt LLP <<https://www.osler.com/en/resources/regulations/2016/public-contracts-quebec-introduces-the-autorite-d>> archived at <<https://perma.cc/8CPT-Y2TD>>.

147 See Bill 108, *supra* note 145, at the explanatory notes for a list of the central changes proposed in the bill.

148 Beauregard & Verdon-Akzam, *supra* note 146.

149 Bill 108, *supra* note 145 at cl 20(4).

150 *Integrity in Public Contracts Act*, *supra* note 128.

151 At the time of writing, the bill had very recently been assented to and the finalized version is not yet available. However, while it has been subject to numerous amendments since it was introduced, none of them appear to relate to the discretion established in section 21.27 of the *Act respecting contracting by public bodies*, nor to any of the central aspects of the bill which have been considered in this part of the analysis.

152 Steele, *supra* note 76 at 79.

153 Marc-Alexandre Hudon, Madeleine Renaud & Dominic Therien, “Important Proposed Modification to Quebec Public Procurement Rules” (20 June 2016), online: McCarthy Tetrault LLP <www.mccarthy.ca/article_detail.aspx?id=7273> archived at <<https://perma.cc/4NK6-878V>>.

154 *An Act to facilitate oversight of public bodies' contracts and to establish the Autorite des marches publics*, SQ 2017, c 27.

iii. Quebec's Voluntary Reimbursement Program

A final legislative change which merits consideration in the wake of the Charbonneau Commission is the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* (“*Recovery Act*”).¹⁵⁵ This legislation provides exceptional measures for the recovery of amounts improperly paid due to fraud in connection with *all* public contracts, not only those within the construction industry.¹⁵⁶ It was enacted in April 2015, meaning the Quebec government again acted preemptively, passing legislation to respond to the concerns raised by the Commission before the final report was released. The *Recovery Act* has been called a “unique and innovative regime” to recoup amounts lost in public contracts due to fraud.¹⁵⁷ The *Recovery Act* applies to para-municipal and non-profit organizations as well as public bodies. The *Recovery Act* envisions a voluntary reimbursement program, wherein an individual or corporation which has improperly received funds during the course of a public project can repay those amounts in exchange for a release from the affected public body.¹⁵⁸ The legislation creates numerous incentives to encourage participation, including an express provision that anything disclosed within the framework of the program is confidential.¹⁵⁹ While the program is designated as being “voluntary,” parties that fail to avail themselves of this reimbursement option may expose themselves to civil litigation for the recovery of those amounts.¹⁶⁰ It should be noted, however, that in the event civil recourse is initiated, constitutional challenges to the statutory regime are likely.¹⁶¹ Specifically, the *Recovery Act* establishes a presumption that any body which has participated in fraudulent tactics in the public procurement process is presumed to have caused *injury* to the public body concerned, and this statutory presumption may well be the target of a constitutional challenge in the event that civil recourse is initiated through the *Recovery Act*.¹⁶² Ultimately, it is a unique piece of legislation which is backwards looking, targeting the drain on public funds wrought by corruption and an attempted recovery of those amounts.

V. A COMPARATIVE ANALYSIS WITH FEDERAL AND INTERNATIONAL PROCUREMENT

A. Federal Public Procurement Regime

This paper will close with a consideration of the Charbonneau Commission's recommendations as compared to both the Canadian federal public procurement regime and international standards under the Organisation for Economic Cooperation and Development (“OECD”).

Canadian federal procurement laws and policies tend to be more sophisticated than provincial procurement schemes.¹⁶³ Accordingly, while the different level of detail in federal

155 *An Act to ensure mainly the recovery of amounts improperly paid as a result of fraudulent tactics in connection with public contracts*, SQ 2015, c 6 [*Recovery Act*].

156 Pierre-Jerome Bouchard et al, “Public contracts and Bill 26: recovery of amounts improperly paid and changes to the AMF authorization regime” (28 April 2016), online: McCarthy Tetrault LLP <https://www.mccarthy.ca/article_detail.aspx?id=7091> archived at <<https://perma.cc/8VLE-Q5AV>>.

157 Yvan Houle, “Quebec's Voluntary Reimbursement Program: Looking for a Few Volunteers” (2016) J Can Construction Law 1 at 2.

158 *Recovery Act*, *supra* note 155 at ss 3 and 22.

159 *Ibid* at s 7.

160 Houle, *supra* note 157 at 8-10.

161 *Ibid* at 10. See also Bouchard et al, *supra* note 156, where the authors assert that the constitutional validity of these rules could be challenged.

162 Houle, *supra* note 157 at 8-9.

163 Ferguson, *supra* note 3, ch 11 at 40.

and provincial regimes should be borne in mind, it is useful to assess the Commission's recommendations by comparing them to a more detailed and comprehensive procurement scheme. Public Works and Government Services Canada ("PWGSC") is the main procurement arm of the Canadian federal government, and it is responsible for procuring goods and services for the majority of federal departments.¹⁶⁴ Federal public procurement is based on the following common law principles: the two-contract framework set out in Canadian jurisprudence, that only compliant tenders may be accepted, and that bids must be evaluated fairly and equally.¹⁶⁵ Federal procurement is also subject to Canada's obligations under trade agreements, such as the North American Free Trade Agreement and the Agreement on Internal Trade (an intergovernmental trade agreement replaced by the Canadian Free Trade Agreement in 2017), which further differentiate federal and provincial procurement processes.¹⁶⁶ PWGSC, as the principal purchasing agent for the government, must act in accordance with various legislative and regulatory precepts, as well as directives issued by the Treasury Board of Canada; however, PWGSC nevertheless retains considerable discretion to establish procedures around public procurement.¹⁶⁷

Canadian public procurement is subject to the federal Integrity Regime, which is established and directed by PWGSC. This federal framework operates to ensure integrity in procurement processes through debarment, a process wherein suppliers are rendered ineligible to do business with the government. Certain offences lead to automatic ineligibility, while others are determined on a discretionary, case-by-case approach.¹⁶⁸ The most recent Integrity Regime, implemented in July 2015 (and amended in April 2016) is the latest in a series of iterations dating back to 2007. Legal commentators welcomed the changes in the latest Integrity Regime, as the earlier regime on debarment was considered to be so "inflexible, punitive and far-reaching" that it was actually counterproductive to its objective of furthering integrity.¹⁶⁹ Under the old regime, suppliers deemed to be ineligible faced a mandatory 10 year period of ineligibility with no scope for reduction, and no concomitant incentive for companies to acknowledge and mitigate the conduct resulting in ineligibility.¹⁷⁰ The new regime has been applauded for reducing the length of debarment from 10 to 5 years through remediation in certain circumstances and adding a degree of transparency to the manner in which ineligibility decisions will be made. However, Canadian federal procurement is still an incredibly strict regime as compared to foreign jurisdictions.¹⁷¹

164 Gerry Stobo & Derek Leschinsky, *Pocketbook on the Canadian Public Procurement Regime* (Borden Ladner Gervais, 2009), online: <blg.com/en/News-And-Publications/documents/publication_1799.pdf> archived at <<https://perma.cc/XSQ4-BWRT>> [BLG Pocketbook]. See also Public Services and Procurement Canada, "PSPC Services: Buying and Selling", online: <<https://www.tpsgc-pwgsc.gc.ca/app-acq/index-eng.html>> archived at <<https://perma.cc/5YCD-Q6Y6>>.

165 For more on these common law principles, see BLG Pocketbook, *supra* note 164 at 6-8.

166 *Ibid* at 10.

167 *Ibid*.

168 See Public Works and Government Services Canada, "About the Integrity Regime", online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>> archived at <<https://perma.cc/MJV6-WPNR>>. The regime applies across government to agreements with a transaction value over CAD10,000 and is made up of three parts: the *Ineligibility and Suspension Policy*, the integrity directives, and the integrity provisions. Ineligibility may result if suppliers have been convicted of certain offences (under the *Criminal Code*, *Competition Act*, or *Financial Administration Act*, for example), if suppliers have entered into subcontracts with an ineligible supplier, or if suppliers have provided false or misleading information to Public Services and Procurement Canada.

169 Milos Barutciski & Matthew Kronby, "Canadian Government Overhauls the Integrity Regime for Suppliers" (6 July 2015), online: Bennett Jones LLP <<https://www.bennettjones.com/en/Publications-Section/Updates/Canadian-Government-Overhauls-the-Integrity-Regime-for-Suppliers>> archived at <<https://perma.cc/P3LH-PNK4>>.

170 *Ibid*.

171 *Ibid*.

There is value in comparing debarment under the federal Integrity Regime with the system of pre-authorization that emerged in Quebec in tandem with, and perhaps as a result of, the Charbonneau Commission. As set out above, entities wishing to enter public contracts in Quebec must first apply for prior authorization to the AMF, a responsibility which the Commission recommended be reassigned to a central procurement authority. This central procurement authority would be responsible for the integrity of procurement in Quebec, much like the PWGSC on a federal level. Conversely, PWGSC makes ineligibility determinations “on its own initiative, upon receiving a request from a supplier to conduct a review to determine its ineligibility, or upon receiving a request from a department, agency or other federal entity to which the policy applies.”¹⁷² Thus the timing and triggering of the two processes are different, with the onus on entities in Quebec to seek prior authorization while PWGSC typically makes determinations on its own initiative (although under the federal regime suppliers can request an advanced determination of eligibility).¹⁷³ Debarment has also been decried as being inflexible and for focusing too heavily on punishment and deterrence, the domain of criminal law, rather than protecting the integrity of federal procurement.¹⁷⁴ In this sense, pre-authorization imports more discretion than the mandatory debarment period, with the licensing authority having a broad discretion as to when to declare an entity ineligible. However, as discussed in Part IV above, this discretion has been condemned as being *too* broad and leading to problematic and unpredictable results. Discretion is clearly an important element in either regime, with too little arguably afforded under the federal regime and too much under the current Quebec regime. Discretion must be subject to clear guidance and established parameters, and a middle ground is arguably necessary between these approaches.

Critics of the federal Integrity Regime have also noted that it fails to properly distinguish between criminal law aims versus good governance in public procurement, and have called for an integrity regime that is *remedial*, rather than *punitive*.¹⁷⁵ As compared to the federal debarment regime, which arguably prioritizes punishment at the expense of remediation, the public procurement framework suggested by the Commission (which includes the pre-authorization scheme) focuses extensively on educational and remedial components. While some commentators have deemed Quebec’s recent regulatory shift in the field of anti-corruption as being punitive in nature, this characterization is tethered closely to the expansive powers of the UPAC rather than the Charbonneau Commission’s recommendations specifically.¹⁷⁶ While some of the Commission’s recommendations are more punitive in nature in attempts to minimize the infiltration of organized crime into the construction industry, I suggest they also demonstrate strong educational and remedial mechanisms which counterbalance the punitive nature of other aspects of Quebec’s anticorruption regime. Such components include recommendations to educate procurement stakeholders, coach contracting authorities, and act quickly to respond to complaints.¹⁷⁷ In this sense, the Charbonneau recommendations and existing pre-authorization scheme have the potential to better encourage integrity in present and future conduct, rather than punishing past conduct and debarring entities for periods of 5 to 10 years on that basis. However, it should be noted that there is an office of the Procurement Ombudsman at the federal level, whose mandate is to review practices of

172 Public Works and Government Services Canada, “Ineligibility and Suspension Policy” at s 9(a), online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>> archived at <<https://perma.cc/Q35K-V25Z>>.

173 Public Works and Government Services Canada, “About the Integrity Regime: Frequently Asked Questions”, online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/faq-eng.html#a1>> archived at <<https://perma.cc/HBP8-7YYZ>>.

174 Barutciski & Kronby, *supra* note 169.

175 *Ibid.*

176 See Reeves-Latour & Morselli, *supra* note 46.

177 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 96.

departments (including PWGSC) for fairness and transparency, review complaints, and issue reports on the results.¹⁷⁸ In this sense, the work of the Ombudsman might import an important monitoring and reporting function which has been decried as lacking in the federal Integrity Regime.

Beyond debarment and pre-authorization, there are other useful comparisons to be drawn between the Charbonneau recommendations and federal procurement. The first of these is rules around tendering processes. The Commission recommended that procurement in Quebec depart from the lowest compliant bidder approach, a recommendation which accords with federal procurement policies. For example, the treaties mentioned above which impose obligations on the federal government generally require that contracts be awarded to the most qualified bidder, considering price *and* non-related price factors.¹⁷⁹ Similarly, the Treasury Board of Canada's federal Contracting Policy, which governs aspects of public procurement, states that government procurement should strive for an optimal balance of overall benefits, which requires consideration of all relevant costs and factors, rather than the basic contractual costs alone.¹⁸⁰ These aspects of federal procurement policies demonstrate that Quebec would likely be well-suited to follow the recommendation that the lowest compliant bidder approach be abandoned, so that public contracts are not only awarded to the cheapest project. As discussed in Part III, this approach comes at the expense of quality in public works and leads to greater opportunities for collusion. However, as I suggested in Part III(C)(ii) above, such a recommendation would best be implemented under the supervision of a central procurement contracting authority, to reduce any risks of corruption from the unfettered discretion of procuring agencies to select the best intersection of price and quality. Further, the Commission recommended that the government import more flexibility into the deadline for tenders, which is currently set at 15 days. This recommendation accords with discretion around tendering deadlines at the federal level. The Agreement on Internal Trade, which applies at a federal level, stipulates that each party shall be afforded a reasonable period to submit a bid, depending on the nature and complexity of the project at hand.¹⁸¹ Thus, the Charbonneau recommendations pertaining to tendering rules and deadlines accord with the more detailed regime existing at the federal level.

Further comparisons between federal procurement and the Charbonneau recommendations involve ethics around employment in public and private sectors, whistleblower protection, and increased citizen involvement. First, the Commission recommended tightening rules around employees transitioning from the public to private sector.¹⁸² This recommendation mirrors the federal government's Policy on Conflict of Interest and Post-Employment, which imposes similar restrictions on employees transitioning from the public sector to work for a private entity with which they had significant official dealings.¹⁸³ Second, the Charbonneau recommendations regarding whistleblower protection actually seem to exceed protections at the federal level. For example, Transparency International Canada has asserted that Canada's current legal framework for whistleblowing is outdated, noting

178 Canada, Office of the Procurement Ombudsman, "The Office: Our Mandate" (3 March 2017), online: <opo-boa.gc.ca/bureau-office-eng.html> archived at <<https://perma.cc/ZSZ6-G6UG>>.

179 Barutciski & Kronby, *supra* note 169.

180 Treasury Board of Canada, "Contracting Policy, 9: Best Value", online: <www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494> archived at <<https://perma.cc/2H7Y-Y35X>>.

181 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 107.

182 *Ibid* at 183. Specifically, recommendation 55 requires that any employees involved with the contract management of a public entity wait until one year after termination of their employment to accept a position with a private sector entity with which they had significant dealings.

183 Treasury Board of Canada, "Policy on Conflict of Interest and Post-Employment", online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25178>> archived at <<https://perma.cc/W9F6-S744>>.

that there is a lack of federal *or* provincial protection for public sector whistleblowers.¹⁸⁴ Therefore, the Charbonneau recommendations to improve whistleblower protection and witness immunity, if enacted, may in fact surpass parallel protections at the federal level.¹⁸⁵ Finally, the central recommendation made by the Commission around citizen engagement was the suggestion of enacting legislation to mirror the United States' *False Claims Act*.¹⁸⁶ There is no similar legislation that exists at the federal level, although some commentators have advocated for such a change.¹⁸⁷ Accordingly, if a *False Claims Act* were enacted in Quebec, it might pave the way for a similar change at the federal level, to increase citizen involvement in the fight against corruption.

B. International Public Procurement Standards

Finally, the recommendations can also be critically assessed with reference to the work of the OECD, an organization whose members form the bulk of the world's advanced economies, including Canada. The OECD operates as a forum in which governments share work, collect expertise, and set international standards in a variety of areas.¹⁸⁸ In light of this, it is particularly helpful to assess the Charbonneau recommendations and their potential for reform in Quebec against the expertise of the OECD. In 2009, the OECD produced a set of principles to achieve integrity in public procurement.¹⁸⁹ The Charbonneau recommendations accord in large part with the suggested reforms set out by the OECD. First, the OECD criticized the fact that public procurement reforms have focused predominantly on the formation of contracts stage only, which is construed as the "tip of the iceberg."¹⁹⁰ The OECD identified a need for governments to prevent corruption in the entire procurement cycle, rather than focusing almost exclusively on the contract formation stage. This broad change affecting every aspect of procurement is precisely what the Charbonneau recommendations seek to trigger. While some recommendations focus on the rules around tendering and contract formation, the majority extends beyond formal contract management to touch on every aspect of public procurement, as well as consolidating expertise and improving knowledge around best public procurement practices generally.

Beyond the basic premise that reform must focus on every stage of public procurement, numerous other Charbonneau recommendations accord with principles enunciated by the OECD. First, the OECD concluded that the needs assessment stage is particularly

184 Government of Canada, *Open Government*, "Idea details: Enhancing Whistleblower Protection", online: <open.canada.ca/en/idea/enhancing-whistleblower-protection> archived at <<https://perma.cc/LQ53-SBMF>>.

185 For calls to improve whistleblower protection in Quebec, see Syndicat de professionnelles et professionnels du gouvernement de Québec, *Whistleblower Protection: For a Québec with integrity* (2014: Service de recherche), online: <www.spgq.qc.ca/utilisateur/documents/Protection-divulgateurs_Vanglais.pdf> archived at <<https://perma.cc/ERH6-3KUK>>.

186 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 166.

187 See Kaitlyn Mason, "Incentivizing Integrity: Adopting a Canadian False Claims Act" (30 June 2016), *Calgary Chamber Blog* (blog), online: <www.calgarychamber.com/sites/default/files/user/files/Incentivizing%20Integrity%20-%20Adoption%20of%20a%20Canadian%20False%20Claims%20Act.pdf> archived at <<https://perma.cc/8NHD-SHPM>>. Mason notes that current federal laws to protect public procurement are deficient and should be reformed, particularly in light of the ambitious infrastructure spending plan tabled by the federal government in the 2016 Federal Budget. Mason thus recommends a *False Claims Act* as an efficient enforcement mechanism, particularly based on its success in the United States.

188 For more information on the OECD, see The Organisation for Economic Cooperation and Development, "About", online: <www.oecd.org/about/> archived at <<https://perma.cc/5JWF-VHXV>>.

189 OECD, *OECD Principles for Integrity in Public Procurement* (2009), online: <www.oecd.org/gov/ethics/48994520.pdf> archived at <<https://perma.cc/PS9M-J7RN>>.

190 *Ibid* at 9.

vulnerable to corruption and political interference.¹⁹¹ The Commission's recommendation to establish a central authority on procurement, particularly to assist public contracting authorities that have insufficient expertise at the needs assessment stage, responds directly to this concern. The OECD integrity principles focus on the better management of public funds and the need to ensure that procurement officials meet "high professional standards of knowledge, skills and integrity."¹⁹² Again, the Commission paid particular attention to these principles by enacting a raft of recommendations focused specifically on reviewing and enhancing existing ethics and professional conduct frameworks, as set out in Part III(C)(iii) above. The OECD also construed, as a central principle, close cooperation and high standards of integrity as between government and the private sector.¹⁹³ The Commission's recommendations mirror this principle with a specific focus on depoliticizing procurement processes, as well as ensuring a "cooling-off" period for employees transitioning from the public to private sector.

Finally, the OECD stressed the importance of establishing a clear chain of responsibility, effective control mechanisms, and empowering individual involvement where "[d]irect control by citizens can complement these traditional accountability mechanisms."¹⁹⁴ The Charbonneau recommendations (set out in Part III(C)(ii) and (iii) above) accord thoroughly with these principles, focusing in part on proper enforcement and complaint management, and clearly designating chains of authority as between control bodies such as the PPA and UPAC. The recommendations are also buttressed throughout by suggestions to empower individual action and citizen involvement, through general educational endeavors as well as the establishment of legislation to allow citizens to pursue allegations of fraud on behalf of the state. Empowering individuals as agents of change is reflected both in the recommendations and in the action strategies, set out in Part III(C)(i) above, as well as the recommendation that Quebec adopt a law mirroring the American *False Claims Act*.¹⁹⁵ This brief review of the Charbonneau recommendations as compared to principles enunciated by a sophisticated body such as the OECD demonstrates that the Commission's work aligns broadly with key concerns and suggestions for reform from expert international communities in the fight against corruption, and lends credence to the assertion that the Charbonneau report offers much by way of structural reform to target corruption in public procurement in Quebec.

CONCLUSION

In conclusion, the Charbonneau Commission has been a unique opportunity for a detailed and sophisticated examination of corruption in an industry sector which has long been accepted as one of the most prone to corruption. The Commission's recommendations have the potential for major structural reform in public procurement, and I suggest that the nature of the Commission as a public inquiry does not undermine the validity of the recommendations. While public inquiries have some strategic value, the Commission represented more than mere political grandstanding. The recommendations were based on an extensive assessment of expert testimony, a consideration of domestic and foreign experience, and a sound understanding of corruption generally. They extended beyond the "tip of the iceberg" of tendering rules and touched on extensive aspects of Quebec industries and public systems. The recommendations accord with and even surpass parallel federal legislation in certain respects, and respond to what sophisticated international entities such as the OECD have identified as central challenges in the fight against corruption.

191 *Ibid* at 10.

192 *Ibid* at 11-12.

193 *Ibid* at 12.

194 *Ibid* at 13.

195 For more detail, see the discussion at note 116.

While it remains to be seen whether the Commission's work will repair public confidence in government in Quebec, the recommendations have already led to legislative change, provide a sound basis for reform, and are a valuable contribution to an examination and understanding of public procurement corruption in Quebec.

ARTICLE

PUBLIC SECTOR PRIVACY BREACHES: SHOULD BRITISH COLUMBIANS HAVE A CAUSE OF ACTION FOR DAMAGES UNDER THE *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*?

Naomi J. Krueger

CITED: (2018) 23 *Appeal* 149

INTRODUCTION

The provincial government (“Province”) is obligated to protect the personal information it collects from British Columbians, though sometimes it fails to fulfill that obligation. Recent failures include privacy breaches at the Ministry of Health and Ministry of Education. In June 2013, there were three unauthorized data disclosures at the Ministry of Health. Following those breaches Elizabeth Denham, then the Information and Privacy Commissioner for British Columbia (“Commissioner”), released an investigation report highlighting significant deficiencies in the Ministry of Health’s privacy and security safeguards for personal information.¹ In September 2015, the Ministry of Education reported the loss of an unencrypted hard drive containing the personal information of millions of students and teachers from British Columbia and Yukon.² After investigating the loss, the Commissioner determined that several Ministry of Education employees had violated the privacy and security safeguards aimed at preventing the unauthorized use, access, and disclosure of private records.³ Through those failures, the Province exposed millions of British Columbians (and Yukoners) to risk, including the risks of identity theft and loss of reputation—and the mental distress and economic losses that can accompany those risks.

In this paper, I argue that the Province’s obligation to make reasonable security arrangements against unauthorized access, collection, use, and disclosure of personal information

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- 1 British Columbia, Office of the Information and Privacy Commissioner, *Investigation Report F13-02: Ministry of Health*, 2013 BCIPC No 14 [*Investigation Report: Ministry of Health*]. The Office of the Information and Privacy Commissioner for British Columbia was established in 1993 to oversee and enforce British Columbia’s privacy laws. The Commissioner is tasked with, among other things, investigating reported privacy breaches. After investigating a privacy breach, the Commissioner may choose to publish an investigation report setting out any findings of law or recommendations for remedying a breach or complaint or to prevent future breaches: for more about the OIPC, see Office of the Information and Privacy Commissioner, “Home”, online: <www.oipc.bc.ca> archived at <<https://perma.cc/YF9X-3W9E>>.
 - 2 Office of the Information and Privacy Commissioner, News Release, “Statement from BC Information and Privacy Commissioner regarding a Ministry of Education Privacy breach” (22 September 2015).
 - 3 British Columbia, Office of the Information and Privacy Commissioner, *Investigation Report F16-01: Ministry of Education*, 2016 BCIPC No 5 at 4 [*Investigation Report: Ministry of Education*].

pursuant to the *Freedom of Information and Protection of Privacy Act* (“*FIPPA*”)⁴ is of limited value to British Columbians as the statute prohibits actions against the Province for good faith disclosures. In particular, I suggest that British Columbians should have access to a cause of action in damages to recover losses arising from privacy breaches by the Province.⁵

In Part I of this paper, I look at the scope of the Province’s obligation to protect the personal information of British Columbians. Then, to illustrate the lack of remedies available under *FIPPA*, I compare its provisions with the cause of action for damages under the *Personal Information Protection Act* (“*PIPA*”).⁶ I then consider the Commissioner’s findings as to the nature of the breaches at the Ministry of Health and Ministry of Education and her findings about the manner in which the breaches occurred.

I also consider whether the *Privacy Act* would provide a cause of action against the Province for British Columbians harmed by the unauthorized disclosures in those circumstances,⁷ though I conclude that because the *Privacy Act* only gives rise to damages for intentional conduct, the Province would likely not be liable for the privacy breaches in the absence of evidence they were intentional (within the meaning of the *Privacy Act*).

In Part II, I argue *FIPPA* should be amended to include a cause of action for damages, even if only to provide access to nominal damages for British Columbians harmed by privacy breaches. Such an amendment is necessary to recognize the scope of risk British Columbians take when they provide personal information to the Province. To illustrate the risk taken, I give an overview of the type of damages claimed in private law cases where privacy breaches similar to those at the Ministry of Health and Ministry of Education have occurred. While some Courts have maintained that emotional distress is more than an inconvenience in certain circumstances, others have applied *Mustapha v Culligan of Canada Ltd*⁸ to narrow the scope of compensable losses for breach of privacy. Accordingly, I argue that unauthorized access and disclosure under *FIPPA* should be actionable *per se* to allow plaintiffs to recover nominal damages.

Lastly, in Part III, I argue British Columbians should be able to seek damages in negligence from the Province when they suffer actual harm because of the Province’s negligent protection of personal information. I rely on the Commissioner’s findings with respect to the Ministry of Health and Ministry of Education breaches to argue that the Province breached a private law duty of care owed to British Columbians when it failed to supervise and enforce the protection of personal information at those Ministries.

4 *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 [*FIPPA*].

5 In this paper, I focus exclusively on whether British Columbians should be able to claim damages from the Province for what I argue is negligent conduct in relation to personal information. I do not address any possible claims for breach of contract or breach of fiduciary duty.

6 *Personal Information Protection Act*, SBC 2003, c 63 [*PIPA*]. Among other things, *PIPA* regulates the collection and use of personal information in the private sector.

7 *Privacy Act*, RSBC 1996, c 373 [*Privacy Act*]. My analysis is limited in the sense that it is based solely on the facts available in the investigation reports; however, the Commissioner’s findings would likely be persuasive in the context of litigation given her authority to determine all questions of fact and law pursuant to section 56 of *FIPPA*.

8 *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 [*Mustapha*]. In *Mustapha*, the plaintiff claimed damages for a psychiatric injury, which he said was the result of having found a fly in a water bottle delivered to him by the defendant. Chief Justice McLachlin, for the Court, held that the plaintiff’s psychiatric injury was not compensable under the negligence analysis because a reasonable person would not have suffered the type of injury he suffered as a result of the alleged breach of the duty of care. In cases where a person’s psychiatric injuries do not flow from a physical injury, the alleged injury must be a reasonably foreseeable result of the conduct or negligence at issue.

I. OVERVIEW OF BRITISH COLUMBIA'S PRIVACY LEGISLATION

The Province routinely gathers and stores a significant amount of personal information from British Columbians. The information gathered is generally necessary for policy development and service delivery in British Columbia.⁹ The types of information British Columbians entrust to the Province include contact information and addresses, personal health numbers, driver's license numbers, and social insurance numbers. This information may include details about a person's occupation, income, or family structure. In medical circumstances, it may include information about a diagnosis or treatment of an illness.

Recognizing the sensitive nature of this type of information, the Legislative Assembly of British Columbia unanimously passed *FIPPA* in June 1992. When it was enacted, *FIPPA* only applied to provincial public bodies, including government ministries, provincial government corporations, boards, commissions, and agencies.¹⁰ Soon after, *FIPPA* was amended to apply to "local public bodies" including local and regional governments, hospitals, police forces and boards, schools, school boards, universities, colleges, and self-governing professional bodies.¹¹ The overarching purpose of *FIPPA* is to "provide greater protection for privacy with respect to personal information held by the government," to limit the government's right to collect information, and to limit the way it can use the information it collects.¹²

A. Personal information is broadly defined

FIPPA defines personal information as "any recorded information about an identifiable individual other than contact information."¹³ The Office of the Information and Privacy Commissioner for British Columbia ("OIPC") has interpreted that definition broadly to include any recorded information that uniquely identifies a person, such as the person's name, address and telephone number (when stored with other identifying information), age, sex, race, religion, sexual orientation, disability, fingerprints, or blood type.¹⁴ Third-party opinions about British Columbians and the opinions of British Columbians about themselves are generally protected under *FIPPA* as well.¹⁵ To be considered "personal information," the information must be reasonably capable of identifying a particular individual either alone or with other sources available to those seeking it, and it must be collected, used, or disclosed for a purpose related to the individual.¹⁶

9 Barbara Mclsaac, Rick Shields & Kris Klein, *The Law of Privacy in Canada* (Toronto: Carswell, 2016), 3.31-3.3.3.

10 *Freedom of Information and Protection of Privacy Act, 1992*, SBC 1992, c 61; Mclsaac, Shields & Klein, *supra* note 9, s 3.3.1.

11 *Freedom of Information and Protection of Privacy Amendment Act, 1993*, SBC 1993, c 46; Mclsaac, Shields & Klein, *supra* note 9. Although *FIPPA* applies broadly to public bodies, I refer specifically to the Province throughout this paper because I draw from the Ministry of Health and Ministry of Education breaches to frame my analysis.

12 British Columbia, Legislative Assembly, *Debates of the Legislative Assembly of British Columbia (Hansard)*, 35th Parl, 1st Sess, Vol 3, No 12 (22 May 1992) at 173 (Hon C Gabelmann).

13 *FIPPA*, *supra* note 4, schedule 1.

14 British Columbia, Office of the Information and Privacy Commissioner, "Guide to Access and Privacy Protection under *FIPPA*" (October 2015) at 4 ["Guide to *FIPPA*"].

15 *Ibid.* See also *Harrison v British Columbia (Information and Privacy Commissioner)*, 2008 BCSC 411 at para 42 where the Court held that a Ministry of Child and Family Development resource worker's opinion about the level of risk Robert Glen Harrison posed to children and youth was protected by legislation as personal information.

16 Mclsaac, Shields & Klein, *supra* note 9.

B. *FIPPA* imposes privacy protection obligations on the Province

One of *FIPPA*'s primary purposes is to create accountability for public bodies that collect personal information from British Columbians and the greater public.¹⁷ *FIPPA* regulates how public bodies collect, use, and disclose personal information and ensures that personal information is handled fairly.¹⁸ *FIPPA* recognizes the inherent right of British Columbians to retain some control over information disclosed in exchange for services.¹⁹ In essence, *FIPPA* attempts to balance that right with the need to collect personal information in the course of providing services to British Columbians.

Under section 30 of *FIPPA*, the Province is required to protect personal information in its custody or under its control by making reasonable security arrangements against risks such as unauthorized access, collection, use, disclosure, or disposal.²⁰ The Commissioner has held that reasonable security arrangements are measured on an objective basis, and while perfection is not required, the type of information gathered determines the level of protection that is necessary.²¹ In the investigation report on the Ministry of Health disclosures, the Commissioner said:

To meet the reasonableness standard for security arrangements, public bodies must ensure that they have appropriate administrative, physical and technical safeguards. The measure of adequacy for these safeguards varies depending on the sensitivity of the personal information, the medium and format of the records, the estimated costs of security, the relationship between the public body and the affected individuals and how valuable the information might be for someone intending to misuse it.²²

Additionally, *FIPPA* prohibits the Province from disclosing personal information except in accordance with the legislation, and it requires the Province to report any unauthorized disclosures immediately upon discovery of the disclosure.²³ Unauthorized disclosures are punishable offenses and subject to a fine of up to CAD2,000 for individuals and CAD500,000 for corporations.²⁴

The OIPC is responsible for monitoring the Province's compliance with its *FIPPA* obligations.²⁵ Sections 42(2) and 44 of *FIPPA* set out the broad powers of the Commissioner to investigate and resolve any complaints from the public, including complaints about unperformed duties or personal information that has been improperly collected, used, or disclosed by the Province.²⁶ The Commissioner has jurisdiction to decide all questions of

17 *FIPPA*, *supra* note 4, s 2. *FIPPA* also contains provisions that regulate when and how the public will be permitted to access government records.

18 *FIPPA*, *supra* note 4.

19 Mclsaac, Shields & Klein, *supra* note 9.

20 *FIPPA*, *supra* note 4, s 30.

21 *Investigation Report: Ministry of Health*, *supra* note 1 at 9; *Investigation Report: Ministry of Education*, *supra* note 3 at 11.

22 *Investigation Report: Ministry of Health*, *supra* note 1. For more on how to manage personal information, see Michael Power, "Annex: Managing Personal Information" in *The Law of Privacy* (Markham: LexisNexis Canada Ltd, 2013) at 265.

23 *FIPPA*, *supra* note 4 at ss 30.4 and 30.5. Sections 33.1, 33.2, and 33.3 describe circumstances where authorized disclosures of personal information may be permitted.

24 *Ibid*, ss 30.4, 30.5, and 74.1.

25 *Ibid*, ss 42 and 44.

26 *Ibid*.

fact and law, and can make an order under section 58 to dispose of any compliance issues that arise.²⁷ The Commissioner may, by order, do one or more of the following:

58(3)(a) confirm that a duty imposed under this Act has been performed or require that a duty imposed under this Act be performed;

[...]

(e) require a public body or service provider to stop collecting, using or disclosing personal information in contravention of this Act, or confirm a decision of a public body or service provider to collect, use or disclose personal information;

(f) require the head of a public body to destroy personal information collected in contravention of this Act.²⁸

Section 74 of *FIPPA* makes it an offence to not comply with an order issued by the Commissioner; but the Commissioner has no jurisdiction to make an order for damages in circumstances where a breach has caused harm.²⁹ Instead, the Province is protected by section 73 of *FIPPA*, which bars any and all claims for “good faith” disclosures, meaning that absent evidence of bad faith, the Province is immune from liability for harm or loss flowing from a privacy breach.³⁰

C. The *Personal Information Protection Act* governs the private sector

PIPA, which came into force on January 1, 2004, similarly governs the collection, use, and disclosure of personal information—but in the private sector.³¹ When *PIPA* was introduced in the Legislative Assembly of British Columbia on April 30, 2003, it was said to reflect the Province’s commitment to ensuring that private sector businesses in British Columbia were well positioned to take full advantage of commercial opportunities, especially in electronic commerce, while also reassuring British Columbians that their personal information is protected when they participate in electronic transactions.³² *PIPA*’s purpose mirrors that of *FIPPA* in that it aims to balance the right of individuals to protect their personal information and the need of organizations to collect, use, and disclose information in the normal course of business.³³

Unlike *FIPPA*, *PIPA* provides a statutory cause of action for damages, which permits British Columbians to recover damages for privacy breaches that occur as a result of a private sector organization’s failure to adhere to the obligations set out in that legislation.³⁴

In British Columbia’s private sector, organizations cannot collect, use, or disclose personal information without the consent of the relevant individual, and even then, they can only use collected information for “reasonable purposes.”³⁵ What is reasonable will depend on a

27 *Ibid*, s 56.

28 *Ibid*, s 58.

29 *Ibid*, s 74. Whether the Commissioner should be authorized to award damages for public sector breaches is not discussed to any significant length in this paper; however, such a power may be sufficient to enable British Columbians to recover damages up to a certain amount.

30 *Ibid*, s 73. I explore the operational effect of this provision in Part II, below.

31 McIsaac, Shields & Klein, *supra* note 9, s 4.3.1; *PIPA*, *supra* note 6.

32 British Columbia, Legislative Assembly, *Debates of the Legislative Assembly of British Columbia (Hansard)*, 37th Parl, 4th Sess, Vol 14 No 12 (30 April 2003) at 1419 (Hon S Santoni).

33 *PIPA*, *supra* note 6, s. 2; McIsaac, Shields & Klein, *supra* note 9, s 4.3.2; British Columbia, Office of the Information and Privacy Commissioner, Order P05-01 (May 25, 2005) at paras 38-43 and 55.

34 McIsaac, Shields & Klein, *supra* note 9; *PIPA*, *supra* note 6, s 57. See also *FIPPA*, *supra* note 4, s 73.

35 *PIPA*, *supra* note 6, ss 6, 11, 14, 17 and 26.

range of factors, including the kind or amount of personal information collected, how the information is going to be used, and where and how the information will be disclosed.³⁶ An organization must develop and follow the policies and practices necessary to meet its obligation to protect the personal information it chooses to collect.³⁷

As with public sector privacy breaches, the Commissioner has broad powers to investigate complaints about private sector privacy breaches. After an investigation, however, the Commissioner is required to make a binding order that disposes of the issues of the investigation.³⁸

After the Commissioner makes an order, section 57 of *PIPA* creates a cause of action for damages:

57(1) If the commissioner has made an order under this Act against an organization and the order has become final as a result of there being no further right of appeal, *an individual affected by the order has a cause of action against the organization for damages for actual harm that the individual has suffered as a result of the breach by the organization of obligations under this Act.*

(2) If an organization has been convicted of an offence under this Act and the conviction has become final as a result of there being no further right of appeal, *a person affected by the conduct that gave rise to the offence has a cause of action against the organization convicted of the offence for damages for actual harm that the person has suffered as a result of the conduct.*³⁹

By permitting an action for damages, this section provides a meaningful remedy to British Columbians whose privacy has been breached by a private sector organization.⁴⁰

D. The *Privacy Act* grants a limited private right of action in British Columbia

If an individual in British Columbia suffered a harm or loss because of the Ministry of Health or Ministry of Education privacy breaches, it is unlikely that a claim for damages would arise pursuant to the *Privacy Act*. Currently, absent a finding of bad faith, British Columbians can only recover damages from the Province for an unauthorized disclosure of personal information under the vicarious liability doctrine and pursuant to the *Privacy Act*.

The *Privacy Act* provides that “it is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another.”⁴¹ The Commissioner’s investigation reports indicate that both the Ministry of Health and

36 “Guide to *FIPPA*”, *supra* note 14.

37 *PIPA*, *supra* note 6, s 4(1), and ss 11, 14 and 17; see also *Mclsaac, Shields & Klein*, *supra* note 9.

38 *PIPA*, *supra* note 6, ss 50 and 52. If, for example, after investigating a complaint about a privacy breach under *PIPA*, the Commissioner finds that an organization has not adequately performed the duties set out in the act, she can make an order requiring the organization to perform those duties. Conversely, if the Commissioner finds that the organization has adequately performed the duties under the act, she can make an order to that effect. Either way, she must make an order that resolves the issues giving rise to the investigation.

39 *Ibid*, s 57 [emphasis added].

40 A right is only as meaningful as the remedy provided for its breach: *R v 974649 Ontario Inc*, 2001 SCC 81 at para 20. A discussion of whether *PIPA* should provide a cause of action for damages without proof of “actual harm” is beyond the scope of this paper; however, a provision similar to section 57 in *FIPPA* may be all that is needed to recognize the impact that similar public sector privacy breaches can have on British Columbians.

41 *Privacy Act*, *supra* note 7, s 1. See for example *Ari v Insurance Corporation of British Columbia*, 2013 BCSC 1308 [Ari BCSC], *aff’d Ari v Insurance Corporation of British Columbia*, 2015 BCCA 468 at paras 51-61 [Ari BCCA]; *Albayate v Bank of Montreal*, 2015 BCSC 695 [Albayate].

Ministry of Education breaches were caused by the Province's carelessness rather than a single employee or group of employees intentionally harmful conduct.⁴² If the Commissioner had found the privacy breaches were intentionally caused by employees at either of those Ministries, the Province might face liability under the doctrine of vicarious liability.⁴³ British Columbians claiming damages against the Province in those circumstances would need to show that an employee or a group of employees of the Ministry of Health or Ministry of Education willfully and without a claim of right violated their privacy—and that those violations arose in the course and scope of employment—before the Courts would apply the doctrine of vicarious liability to award damages, payable by the Province, for the conduct of an employee or group of employees.

As I set out in greater detail below, the Commissioner found that the Ministry of Health and Ministry of Education privacy breaches were caused by the Province's carelessness, rather than the intentionally injurious conduct of an employee or group of employees. It is, therefore, unlikely that British Columbians could claim for damages under the *Privacy Act* and the vicarious liability doctrine.

i. The Ministry of Health Disclosures

In May 2012, the Ministry of Health reported three unauthorized disclosures of personal health information at its Pharmaceutical Services Division.⁴⁴ On those three separate occasions, Ministry of Health employees transferred personal information about British Columbians to portable storage devices and gave the information to researchers employed (or contracted) by the Province.⁴⁵ The disclosures did not include names of health care recipients, but they did include Personal Health Numbers and other demographic information that could be used to identify individuals and their sensitive health information.⁴⁶ One of the disclosures included information about the alcohol and drug use, mental health, self-esteem, and sexual health of some British Columbians. The Ministry of Health admitted that the disclosures were unauthorized under *FIPPA*.⁴⁷

The Commissioner investigated the disclosures and found that they each occurred because of deficiencies in the Ministry of Health's privacy and security safeguards for personal information.⁴⁸ She found specifically that the Ministry of Health lacked effective governance, management, and controls over access to personal health information, deficiencies that were exacerbated by a lack of clear responsibility for privacy and security.⁴⁹ Most notably, employees were able to copy large quantities of personal health data onto unencrypted flash drives and share the data with unauthorized persons without being detected by the Ministry of Health's privacy or security controls, in place to prevent such disclosures.⁵⁰ The Commissioner found that Ministry of Health employees had excessive access to personal information.⁵¹ At the same time, there was a complete lack of monitoring, enforcement, or evaluation of unauthorized access, use, and disclosure of personal information. There were

42 *Investigation Report: Ministry of Health, supra* note 1.

43 *Ari BCSC, supra* note 41; *Ari BCCA, supra* note 41. Under the doctrine of vicarious liability, an employer can be held liable for an employee's tortious conduct or omission if the employee's conduct or omission arises in the course and scope of his or her employment. The doctrine of vicarious liability provides an exception to the general proposition that liability for tortious conduct or omissions will lie exclusively with the tortfeasor.

44 *Investigation Report: Ministry of Health, supra* note 1 at 5.

45 *Ibid.*

46 *Ibid.*

47 *Ibid* at 10.

48 *Ibid* at 3.

49 *Ibid* at 5.

50 *Ibid* at 5 and 12.

51 *Ibid* at 14.

absolutely no audits of employee or researcher compliance with the privacy provisions in the agreements that authorized information sharing.⁵² Although the Ministry of Health had privacy and security policies in place, the Commissioner found that it had failed to translate those policies into meaningful business practices.⁵³

ii. The Ministry of Education Disclosures

The Province reported a similar breach to the OIPC on September 18, 2015 after it learned that the Ministry of Education was unable to locate an unencrypted portable hard drive containing the personal information of about 3.4 million British Columbian and Yukoner students and teachers.⁵⁴ The missing information included names, genders, birthdates, addresses, and other identifying details collected over a period of more than 10 years.⁵⁵ The hard drive was last seen in May 2011, in a locked cage, at an offsite warehouse leased by the Ministry of Education.⁵⁶

When the Commissioner investigated the breach, she learned that a team of Ministry of Education employees had been analyzing education data to produce reports related to student performance and the overall performance of the education system.⁵⁷ After the reports were complete, the analysts transferred their project files on to two mobile hard drives to decrease electronic storage costs.⁵⁸ One hard drive was used by the employees for follow up questions and reports, and the other was created as a backup and was taken to an offsite warehouse for storage.⁵⁹ The Ministry of Education discovered the backup hard drive was missing in July 2015 when an employee went to the warehouse to retrieve it.⁶⁰

Again, the Commissioner found that though the Province had adequate policies in place to protect personal information, it had failed to properly enforce those policies at the Ministry of Education.⁶¹ The employees who transferred the unencrypted data to the hard drives were aware of the privacy and security policies in place, and they were aware that transferring the data was a clear violation of at least three of those policies.⁶² First, the employees failed to encrypt the information; second, they failed to properly record the existence of the hard drives in an inventory of information assets; and finally, they failed to store the backup hard drive in a government approved records facility.⁶³ The Commissioner was of the view that the training received by staff and managers was not effective in ensuring compliance with the policies in place to protect personal information at the Ministry of Education.⁶⁴

Although the Commissioner's findings highlight the Province's failure to follow the policies it put in place to protect the personal information of British Columbians, there is insufficient information to conclude that any one employee accessed, used, or disclosed that information in bad faith. Rather, the reports suggest that the various systemic failures within the two Ministries, including the Province's failure to monitor the authorized

52 *Ibid* at 15.

53 *Ibid* at 3.

54 *Investigation Report: Ministry of Education, supra* note 3 at 4.

55 *Ibid* at 6.

56 *Ibid*.

57 *Ibid* at 8.

58 *Ibid* at 10.

59 *Ibid*.

60 *Ibid*.

61 *Ibid* at 20.

62 *Ibid*.

63 *Ibid* at 15.

64 *Ibid*.

conduct of employees were operational in nature. In the absence of a clearly intentional breach of privacy, the *Privacy Act* would not offer a right of action to British Columbians harmed by either one of the breaches.

II. NOMINAL DAMAGES FOR PUBLIC SECTOR PRIVACY BREACHES

Without an action for damages, the Province's obligation to make reasonable security arrangements to protect personal information is of limited value to British Columbians when measured against the risks they take entrusting their personal information to the Province. To fairly reflect the scope of that risk, *FIPPA* should be amended to include a cause of action for damages, even in the absence of bad faith.

Currently, section 73 bars any and all claims against the Province for “good faith” disclosures.⁶⁵ It grants near-immunity to the Province by providing that:

73 No action lies and no proceeding may be brought against the government, a public body, the head of a public body, an elected official of a public body or any person acting on behalf of or under the direction of the head of a public body for damages resulting from

(a) the disclosure, or failure to disclose, in good faith of all or part of a record under this Act or any consequences of that disclosure or failure to disclose, or

(b) the failure to give any notice required under this Act if reasonable care is taken to give the required notice.⁶⁶

While it is open to the legislature to limit the Province's liability in circumstances it deems appropriate, *FIPPA*'s purpose is to create accountability for public bodies that collect personal information from British Columbians. In light of that purpose, an immunity clause is difficult to reconcile with the reality that British Columbians often have no choice but to provide the Province with their personal information in order to receive services such as health care and educational programming.⁶⁷

A. The harms associated with unauthorized disclosures are generally psychological in nature

In *Condon v Canada*, Justice Gagné certified a class action against Canada's Ministry of Human Resources and Skills Development after it lost an external hard drive with the personal information of approximately 583,000 Canadians, including the names, dates of birth, addresses, student loan balances, and social insurance numbers of those individuals.⁶⁸ In their motion to certify, the plaintiffs acknowledged that their claims for damages were “for very small sums.”⁶⁹ They sought compensation for “wasted-time, inconvenience, frustration and anxiety” resulting from the lost hard drive and damages for “increased risk of identity theft in the future.”⁷⁰ Other plaintiffs have claimed damages for the same or similar injuries, including “anxiety, inconvenience, pain, suffering and/or fear due to

65 *FIPPA*, *supra* note 4, s 73.

66 *Ibid.*

67 British Columbia, Office of the Information and Privacy Commissioner, “An Examination of British Columbia's Privacy Breach Management” (28 January 2015) at 3 [“Privacy Breach Management”].

68 *Condon v Canada*, 2014 FC 250 at paras 2, 117 [*Condon*], *aff'd Condon v Canada*, 2015 FCA 159.

69 *Condon*, *supra* note 68 at para 49.

70 *Ibid* at para 66.

the loss of their personal information” and for exposure to fraud and/or identity theft.⁷¹ More specifically, plaintiffs have alleged that, even in the absence of actual economic loss or other consequences of identity theft, “fear, stress, inconvenience and loss of time due to the necessity of monitoring monthly statements of accounts” are compensable injuries.⁷²

Despite the seriousness of the injuries alleged, Courts have consistently relied on *Mustapha*, where the Supreme Court of Canada (“SCC”) drew a distinction between minor and transient upsets and compensable injuries, to restrict the circumstances where damages for breach of privacy will be awarded.⁷³ Generally, harms associated with privacy breaches are considered to be “ordinary annoyances, anxieties, and fears that people living in society routinely, if sometimes reluctantly, accept,” so actual harm seems to be a difficult threshold to cross.⁷⁴

B. Nominal damages are an appropriate remedy in the circumstances

In British Columbia, nominal damages may be available to a plaintiff who cannot meet the threshold of actual harm following a privacy breach. Nominal damages are defined as “a trivial sum of money awarded to a litigant who has established a cause of action but has not established entitlement to compensatory damages.”⁷⁵ The purpose of nominal damages is to establish individual rights and to recognize a defendant’s liability when those rights have been violated in an unacceptable way.⁷⁶ Given the costs associated with litigation of this nature, it may not be cost effective for an individual British Columbian to bring an action against the Province for nominal damages alone; however, class proceedings may permit British Columbians to have their privacy rights recognized when they have been violated by the Province.⁷⁷ As set out above, in privacy breach cases, the Courts have awarded nominal damages to recognize psychological harms associated with privacy breaches.

In *Nammo v TransUnion of Canada Inc* (“*Nammo*”), the Federal Court awarded Mirza Nammo CAD5,000 to recognize the humiliation he suffered after the Royal Bank of Canada denied him a business loan because the defendant, TransUnion, provided the bank with credit information that was incorrect.⁷⁸ Nammo sought damages under section 16 of the *Personal Information Protection and Electronic Documents Act* (“*PIPEDA*”), which provides that “[t]he Court may, in addition to any other remedies it may give [...] award damages to the complainant, including damages for any humiliation that the complainant has suffered.”⁷⁹

71 *Mazzonna c DaimlerChrysler Financial Services Canada Inc/Services financiers DaimlerChrysler inc*, 2012 QCCS 958 at para 10 [*Mazzonna*].

72 *Ibid*; *Zuckerman c Target Corporation*, 2015 QCCS 1285 at para 12 [*Zuckerman*]; *Larose c Banque Nationale du Canada*, 2010 QCCS 5385.

73 *Mazzonna*, *supra* note 71; *Zuckerman*, *supra* note 72.

74 *Mustapha*, *supra* note 8 at para 9.

75 Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (Toronto: Carswell, 1996) at 99.

76 *Ibid* at 100, 101.

77 See for example *Tucci v Peoples Trust Company*, 2017 BCSC 1525 [*Tucci*]. In *Tucci*, the British Columbia Supreme Court (“BCSC”) certified, as a class proceeding, an action against the defendant by representative plaintiffs who may be at risk of identity theft because an online database containing personal information they provided to the defendant had been accessed by unauthorized individuals located in another country. The representative plaintiffs claimed, among other things, a nominal award to recognize time wasted, inconvenience, frustration, anger, or stress flowing from the breach of their privacy.

78 *Nammo v TransUnion of Canada Inc*, 2010 FC 1284 at para 7 [*Nammo*].

79 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*]; *ibid* at paras 66 and 75. *PIPEDA* governs private sector organizations in provinces without similar legislation, and it governs all private organizations that engage in interprovincial or international commercial transactions. For more about the significance of *PIPEDA* in Canada, see *Eastmond v Canadian Pacific Railway*, 2004 FC 852.

Notably, *PIPEDA*'s purpose is similar to those of *PIPA* and *FIPPA*. *PIPEDA*'s purpose is set out in section 3, which reads:

3 The purpose of this Part [Protection of Personal Information in the Private Sector] is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.⁸⁰

In *Nammo*, the Federal Court said that disseminating false credit information lays a person bare to those receiving the information: “having wrong information shared about you can be equally intrusive, embarrassing and humiliating as a brief and respectful strip search.”⁸¹ Although the effects of humiliation are difficult to prove, *Nammo* recognizes that in some circumstances, they are much more than ordinary annoyances, anxieties and fears that people should generally be able to cope with in society.

Applying *Nammo*, the BCSC awarded CAD2,000 in nominal damages in *Albayate v Bank of Montreal*, to recognize the banking inconveniences suffered by Loretta Albayate after her bank provided two credit bureaus with inaccurate information about her address.⁸² Albayate claimed damages under the *Privacy Act* but did not succeed in establishing that she suffered actual psychological harm because of the privacy breach.⁸³ To recover damages for emotional or psychological harm under the *Privacy Act* there must be actual damage, meaning the psychological harm must rise to the level of a recognizable psychiatric illness.⁸⁴ Nevertheless, the BCSC recognized that her right to privacy had been violated in a manner that warranted an award of nominal damages.⁸⁵

The scope of damages claimed in these cases illustrates the potential consequences of the Ministry of Health and Ministry of Education privacy breaches for individuals whose information has been accessed or disclosed without authorization. Even if only in the context of a class proceeding, nominal damages under *FIPPA* would provide a meaningful remedy for British Columbians because such a claim would permit recovery of modest losses and would have the effect of enforcing privacy rights against the Province.

III. NEGLIGENCE LAW OFFERS IMPORTANT REMEDIES AND ENFORCEMENT OPTIONS TO BRITISH COLUMBIANS

Without a statutory cause of action for damages, British Columbians should be able to rely on the law of negligence to enforce their privacy rights against the Province. When the *Crown Proceedings Act* was enacted,⁸⁶ the law of negligence became an important vehicle for British Columbians to voice their complaints and to secure remedies for the Province's carelessness.⁸⁷ In the investigation reports, the Commissioner was clear that the Ministry of Health and Ministry of Education breaches occurred because the Province failed to

80 *PIPEDA*, *supra* note 78, s 3; see also McIsaac, Shields & Klein, *supra* note 9.

81 *Nammo*, *supra* note 78 at para 78.

82 *Albayate*, *supra* note 41.

83 *Ibid* at paras 138, 144.

84 *Kotai v The Queen of the North (Ship)*, 2009 BCSC 1405 at para 69, applied in *Albayate*, *supra* note 41. However, see *Saadati v Moorhead*, 2017 SCC 28 for a recent consideration of the proof required for psychiatric injuries.

85 *Albayate*, *supra* note 41.

86 *Crown Proceedings Act*, SBC 1974, c 24.

87 Phillip H Osbourne, *The Law of Torts* (Toronto: Irwin Law, 2015) at 224-225.

supervise and enforce the privacy protection obligations imposed under *FIPPA*. If British Columbians suffer actual harm as a result of the Province's carelessness, they should be able to recover their losses in negligence.

A. The Courts addressed negligence in *Ari v Insurance Corporation of British Columbia* ("Ari")

In November 2015, the British Columbia Court of Appeal ("BCCA") held that section 30 of *FIPPA* does not give rise to a private law duty of care to make reasonable arrangements to protect against unauthorized access, collection, use, disclosure, or disposal of personal information.⁸⁸ *Ari* was proposed as a class action against the Insurance Corporation of British Columbia ("ICBC") after an ICBC employee accessed the personal information of Ufuk Ari and 65 other ICBC clients without an apparent business purpose.⁸⁹ In chambers, Justice Russell allowed Ari's claim for vicarious liability under the *Privacy Act*, but struck his claims for common law breach of privacy and for negligent protection of private information.⁹⁰ On appeal, the BCCA affirmed that there is no common law tort of breach of privacy in British Columbia. It also reiterated the rule in *R v Saskatchewan Wheat Pool*⁹¹ that protects public bodies from liability in negligence for merely breaching a statutory duty.⁹²

On the question of whether a new private law duty of care could require ICBC to make reasonable arrangements to protect personal information, the Court found that notwithstanding foreseeability of harm and proximity, four policy considerations negated such a duty.⁹³ First, the Court found that recognizing a duty of care would raise the specter of indeterminate liability because of *FIPPA*'s broad application to all public bodies.⁹⁴ Second, it recognized that because *FIPPA* does not legislate a specific standard of care, a range of acceptable conduct is permitted by that legislation; any security arrangements implemented would understandably vary depending on the nature of the public body.⁹⁵ Third, the Court held that Ari's claim was related specifically to the reasonableness of ICBC's security measures, not the actual manner or extent to which the measures were carried out by ICBC and its employees.⁹⁶ Finally, after reviewing the comprehensive complaint and remedy scheme under *FIPPA*, the Court held that the legislature had no intention of allowing a common law remedy to exist alongside the remedies available in the statute.⁹⁷

B. *Ari* is distinguishable on the facts

FIPPA, without section 73, would likely give rise to a private law duty of care for British Columbians who suffered loss as a result of the Ministry of Health and Ministry of Education breaches because *Ari* can be distinguished in two critical ways on the facts available. First, based on the Commissioner's investigation reports, any claims against the Province would stem from its failure to supervise and enforce the operational aspects of protecting the personal information of British Columbians. In *Ari*, Justice Russell rejected

88 *Ari BCCA*, *supra* note 41 at para 53..

89 *Ari BCSC*, *supra* note 41 at para 3.

90 *Ibid* at paras 65, 79.

91 *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 ["*Saskatchewan Wheat Pool*"].

92 *Ari BCCA*, *supra* note 41 at paras 19, 20. See also *Holland v Saskatchewan*, 2008 SCC 42; *Saskatchewan Wheat Pool*, *supra* note 91 at 225. In *Saskatchewan Wheat Pool*, the SCC held that statutory breaches will be considered in the context of the general law of negligence. Statutory breach is not a tort in and of itself.

93 *Ari BCCA*, *supra* note 41 at para 48.

94 *Ibid* at para 50.

95 *Ibid* at para 51.

96 *Ibid* at para 52.

97 *Ibid* at paras 53-62.

the argument that Ari's claim was analogous to *KLB v British Columbia* ("KLB") insofar as it involved liability for breach of a statutory duty, because *KLB* "dealt with negligence arising out of the operational acts of government."⁹⁸

In *KLB*,⁹⁹ the SCC held that the Province had a duty under the *Protection of Children Act* to "place children in adequate foster homes and to supervise their stay" in those homes.¹⁰⁰ At the time, the *Protection of Children Act* required the Superintendent of Child Welfare to make arrangements for the placement of a child in a foster home "as will best meet the needs of the child."¹⁰¹ The SCC recognized that the Province could not be a "guarantor against all harm" but it held that the Province would be responsible for harm sustained by children if the Province failed to adequately monitor and respond to any abuse detected in foster homes.¹⁰² Similarly, British Columbians should be able to expect that the Province will monitor its employees to ensure that the personal information it collects is being adequately protected under *FIPPA* and that it will respond to any detected access or unauthorized disclosure.

Second, while the core duty of care would flow from section 30 of *FIPPA*, other provisions are fundamentally relevant. For example, sections 26(d)(i) and 27(2) require the individual subject of the information to give informed consent to its collection, section 30.4 prohibits unauthorized disclosures, and section 32 limits the way personal information can be used by the public body who collected the information. Each of these provisions may inform whether a proximate relationship can be established between the Province and British Columbians. If an individual has been assured by the Province that the information it is collecting will be used only for a particular purpose and will not be disclosed without authorization, the Province should be expected to adequately supervise and enforce the policies and mechanisms put in place to meet expectations of privacy established by those assurances.¹⁰³

C. In the circumstances, *FIPPA* gives rise to a *prima facie* duty of care

I argue that *FIPPA*'s privacy protection provisions give rise to at least two different duties of care.

First, the Ministry of Health and Ministry of Education breaches may give rise to a claim for negligent misrepresentation. In *R v Imperial Tobacco Canada Ltd*, the SCC stated that:

a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case [...] Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff as a result of a negligent misstatement.¹⁰⁴

General statements by the Province to the public about privacy mechanisms implemented under *FIPPA* are not sufficient to establish a proximate relationship. However, if the Province, in an authorization form, or otherwise, made representations about the

98 *Ibid* at para 20.

99 *KLB v British Columbia*, 2003 SCC 51 [*KLB*].

100 *Ibid* at para 12.

101 *Ibid* at para 13.

102 *Ibid* at para 14.

103 See for example, *Tucci*, *supra* note 77 at para 131, where the BCSC held that, in the private sector, a duty of care may arise from an organization's own privacy policies and security measures rather than from a legislated standard applicable to public authorities.

104 *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 42 [citations omitted].

mechanisms in place to protect that person's information it should be liable in negligence in circumstances where an individual relied on those statements. If, for example, health care providers or school administrators employed by the Province, in their interactions with a specific individual, led that individual to believe there were adequate safeguards in place to prevent the types of breaches that occurred, the Province and that individual are in a sufficiently proximate relationship to justify a *prima facie* duty of care.

Second, as I have argued throughout, the Province should be liable for negligently supervising and enforcing the arrangements it makes to protect the personal information of British Columbians. The Commissioner's findings clearly indicate the Province had policies in place at both the Ministry of Health and Ministry of Education to govern the conduct of its employees and to protect the personal information of British Columbians. But merely having policies in place is not enough. It is entirely foreseeable that a systemic lack of effective training about policies, monitoring, enforcement, or evaluation of unauthorized access, use, and disclosure of information would expose British Columbians to a significant risk of harm. The law generally accepts that government actors may attract liability in tort if they are negligent in carrying out prescribed duties.¹⁰⁵ Unless a more robust evidentiary record reveals the Province's decisions with respect to supervising and enforcing its duty to protect personal information were made for economic, social, or political reasons, it is reasonable and just to impose a *prima facie* duty of care in the circumstances.

D. Overcoming the policy rationales discussed in *Ari* is difficult but not impossible

Once a *prima facie* duty of care is established, policy reasons for negating a duty of care in the circumstances would have to be considered.¹⁰⁶ In *Ari*, ICBC first argued that recognizing a duty of care would create indeterminate liability because of *FIPPA*'s broad application to all public bodies; the Court agreed.¹⁰⁷ Although indeterminate liability is relevant to the Ministry of Health and Ministry of Education breaches, it is not fatal to either set of circumstances.

In *Hercules Management Ltd v Ernst & Young*, the SCC explained that the prospect of limitless liability checks the imposition of a private law duty of care.¹⁰⁸ The problem of indeterminate liability can be circumscribed by the facts of the Ministry of Health and Ministry of Education breaches. British Columbians seeking damages for negligent misrepresentation would have to establish that their relationship with the Province goes beyond the duty set out in section 30 of *FIPPA*. Only those individuals who can point to an interaction, written or in person, with an employee of the Province who, for the purpose of obtaining consent to collect, use, or disclose personal information, made representations about the Province's privacy protection practices, will be able to recover damages in negligence. Similarly, the Province's liability for negligently supervising and enforcing the operational aspects of privacy protection are constrained by the unique policies of each provincial ministry, agency, board, commission, and Crown corporation. Although, the Province could be liable to a significant number of British Columbians, as described above in Part II, the high threshold for psychological harm set out in *Mustapha*, would naturally limit the scope of compensable damages.

105 *Ibid* at para 71.

106 Osbourne, *supra* note 87 at 77.

107 *Ari* BCCA, *supra* note 41.

108 *Hercules Management Ltd v Ernst & Young*, [1997] 2 SCR 165 at 41.

Second, ICBC argued in *Ari* that the legislature intended to allow a broad range of acceptable privacy protection measures under *FIPPA*.¹⁰⁹ As discussed above, the operational nature of the proposed duty of care limits the relevance of this policy concern in the context of the Ministry of Health and Ministry of Education breaches because the proposed duties are primarily concerned with the Province's failure to monitor and enforce the arrangements it chose to put in place. Furthermore, the Commissioner has set out minimum standards for "reasonable security arrangements" in the course of her investigations into various breaches, and additional interpretation of those standards falls squarely within the role of the Courts in Canada.¹¹⁰

In January 2015, the Commissioner released an audit report that examined the degree to which the government was fulfilling its duty to respond to (and properly manage) its privacy breaches.¹¹¹ The report made several recommendations to help public bodies reach a minimum standard to enhance the efficacy of breach management programming and to build trust between British Columbians and the government.¹¹² Arguably, the January 2015 report and the one that followed in September 2015, established a minimum standard of acceptable practices under *FIPPA* and established recommendations to ensure that thorough precautions will be taken to safeguard the personal information of British Columbians.¹¹³

Lastly, ICBC argued that the British Columbia legislature had no intention of allowing a common law remedy to exist alongside the administrative remedies available under *FIPPA*.¹¹⁴ On the facts available in the Commissioner's reports, a claim in negligence against the Province, absent a finding of bad faith, could only be filed if section 73 was repealed. As I have argued above, such an amendment would signal to the Courts that the legislature understands the risk British Columbians take when they entrust the Province with their personal information and it would signal to the Courts that individuals harmed by the Province's negligence are entitled to a meaningful remedy for recovering their losses.

CONCLUSION

As long as British Columbians are left without an action in damages for losses suffered because of the Province's failure to protect personal information, *FIPPA* fails to meet its purpose of creating accountability for public bodies that collect personal information from British Columbians. Although the *Privacy Act* provides a cause of action in circumstances where information is deliberately and unlawfully accessed or disclosed, it does not provide a remedy for British Columbians harmed by systemic failures and clear negligence by the Province.¹¹⁵ Based on the information available about the Ministry of Health and Ministry of Education privacy breaches, it is unlikely that the *Privacy Act* would offer an adequate remedy to British Columbians harmed by those particular breaches.

In privacy breach cases, the significance of the harm to individuals is often considered trivial because it is primarily psychological in nature. The federal government, and the Federal Court, have recognized under *PIPEDA* that some privacy breaches cause humiliation serious enough to warrant a remedy of damages. *FIPPA* needs to be amended to recognize that British Columbians take an incredible risk of experiencing harm, including wasted-time, inconvenience, frustration, anxiety, and increased risk of identity theft when they provide their information to the Province in exchange for services like health care and

109 *Ari BCCA*, *supra* note 41.

110 For more about reasonable security arrangements, see *Power*, *supra* note 22.

111 "Privacy Breach Management", *supra* note 67 at 3.

112 *Ibid.*

113 *Ibid.*

114 *Ari BCCA*, *supra* note 41.

115 *Ibid*; *Privacy Act*, *supra* note 7.

educational programming. By repealing section 73, and by making unauthorized access and disclosure of that information actionable *per se*, plaintiffs could at least recover nominal damages from the Province.

Lastly, the Commissioner's findings on the Ministry of Health and Ministry of Education breaches weigh heavily in favor of finding that the Province breached a private law duty of care to individuals who suffered loss when it failed to supervise and enforce the protection of personal information at those Ministries. Negligence law is an important legal mechanism for holding the Province accountable to individuals; it should be available to British Columbians when the Province fails to meet its obligations under *FIPPA*.

ARTICLE

REGULATORY COMPETITION AND THE GROWTH OF INTERNATIONAL ARBITRATION IN SINGAPORE

Elizabeth MacArthur *

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INTRODUCTION

In September 2016, Singapore’s Court of Appeal overturned the decision of a lower court and upheld an international arbitration tribunal’s finding that a bilateral investment treaty signed with China extends to Macao.¹ This closely watched decision confirmed the commitment of Singapore’s national courts to a tradition of minimal intervention in, and support for, international arbitration. Singapore’s reputation as an arbitration-friendly jurisdiction was, by extension, reaffirmed.

In the last decade, Singapore has become a leading global hub for international arbitration.² The Singapore International Arbitration Centre (“SIAC”) is one of the foremost arbitral institutions in the world.³ SIAC’s caseload has increased rapidly over the past decade, and in March 2017 it reached an active caseload of approximately 650 cases.⁴

This paper will argue that Singapore’s success can be attributed to the state’s engagement in “regulatory competition.” Recognizing the revenue potential created by the phenomenon of forum shopping within international arbitration, the government has made every effort to provide arbitration-friendly legislation and infrastructure in an effort to attract arbitration to its jurisdiction. In addition to joining the 1958 New York Convention and adopting the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law, the government has attracted arbitration largely by ensuring its courts have a strong tradition of the rule of law and a policy of non-intervention in arbitral decisions, supporting the continuing growth of SIAC, and offering Asia’s largest fully-integrated dispute resolution complex at Maxwell Chambers.

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1 *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic*, [2016] SGCA 57 [Sanum].

2 Jawad Ahmad & Andre Yeap, “Arbitration in Asia” (3 September 2013), *Global Arbitration Review*, online: <<https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2014/1036763/arbitration-in-asia>> archived at <<https://perma.cc/9YZG-VJ3G>>.

3 Gary Born, *International Arbitration: Law and Practice*, 2nd ed (London: Kluwer Law International, 2015) at §1.06 [Born, *International Arbitration*].

4 Singapore International Arbitration Centre, “Statistics” (3 January 2018), online: <www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics> archived at <<https://perma.cc/9D9H-5NJP>> [SIAC, “Statistics”].

This paper proceeds in four major parts. Part I discusses the market aspect of international arbitration, in particular the practice of forum shopping. Part II explains how the phenomenon of forum shopping leads states to engage in regulatory competition as they compete with one another for business. Part III argues that Singapore recognizes international arbitration as an opportunity for economic development—and consequently engages in regulatory competition through efforts to make itself arbitration friendly. Part IV explores these efforts in detail, with references to the *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* (“*Sanum*”) decision.

I. ARBITRATION AGREEMENTS AND FORUM SHOPPING

One of the distinguishing features of international arbitration is that it is largely consensual in nature: arbitration generally occurs pursuant to an arbitration agreement between the parties.⁵ Recognizing that international commercial transactions and investments sometimes give rise to costly and time-consuming disputes, parties take pains to minimize, or at least manage, the uncertainty associated with the resolution of potential disputes by including an arbitration agreement in their contracts.⁶ This agreement can be drafted in whatever terms the parties wish and, as international arbitration scholar Gary Born explains, are largely a “product of the parties’ interests, negotiations, and drafting skills.”⁷ Article 7(1) of the UNCITRAL Model Law provides that “[a]n arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”⁸ Arbitration clauses are the most popular, with one estimate suggesting that as many as 90 percent of all international commercial contracts contain an arbitration clause.⁹ Despite the fact that arbitration agreements can come in all shapes and sizes, they generally include several common elements, the most crucial being:

- (a) the agreement to arbitrate; (b) the scope of disputes submitted to arbitration;
- (c) the use of an arbitral institution and its rules; (d) the seat of the arbitration;
- (e) the method of appointment, number and qualifications of the arbitrators;
- (f) the language of the arbitration; and (g) a choice of law clause.¹⁰

Drafting parties are incentivized to pick and choose the institution, seat, rules, laws, and arbitrators that will provide the best likelihood of reaching the desired outcome at the lowest cost.¹¹ Because the parties have so many options to choose from, the possibilities are presented as a kind of market:

5 Born, *International Arbitration*, *supra* note 3 at §1.07.

6 Ali Assareh, “Forum Shopping and the Cost of Access to Justice: Cost and Certainty in International Commercial Litigation and Arbitration” (2012) 31 *JL & Com* 1 at 5.

7 Born, *International Arbitration*, *supra* note 3 at §1.07.

8 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*, No E.08.V.4 (2008), online: <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> archived at <<https://perma.cc/43GJ-NPH7>>.

9 KP Berger, *International Economic Arbitration* (Denver: Kluwer, 1993). However, despite the fact that this figure is widely circulated in international arbitration scholarship (the author came across this statistic in four scholarly sources), it is likely inflated. As Born observes, the 90 percent figure “lacks empirical support and is almost certainly substantially inflated: in reality, significant numbers of international commercial transactions—certainly much more than 10 percent of all contracts—contain either forum selection clauses or no dispute resolution provision at all” (Gary Born, *International Commercial Arbitration: Commentary and Materials*, 2nd ed (The Hague: Kluwer, 2009) at 71). However, he accepts that in cross-border commercial transactions, the parties are “more likely than not” to include an arbitration clause in their contracts (*Ibid*).

10 Born, *International Arbitration*, *supra* note 3 at §1.07.

11 Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford: Oxford University Press, 2013) at 63.

Arbitration is often presented quite overtly as a kind of market where the clients are able to choose from a palette of potential arbitrators according to the nature of their problems, their affinities, and above all their strategies. The parties—and their advisors—thus choose their terrain, their arms, and the rules of the game that will govern their confrontation.¹²

One of the most important choices a party must make is the location of the seat, as the seat indicates the law governing the arbitration (the “*lex arbitri*”). As there is almost complete freedom to designate any state as the seat of arbitration (depending on the interests of the parties), there is a plethora of options available, and the process of choosing one is referred to as “forum shopping.”¹³ The seat is where an award has its “formal legal or judicial jurisdiction, and where the arbitral award will be formally made.”¹⁴

This has important consequences because the seat usually determines, among other things, the procedural law of the arbitration, the national courts responsible for issues relating to the constitution of the tribunal, and the national courts responsible for the annulment of arbitral awards.¹⁵ As arbitration scholar Christopher Drahozal notes, a number of key considerations go into forum shopping, including: “The accessibility of the site to the parties, the availability of necessary infrastructure, and the applicability of a treaty (for example, the New York Convention) providing for the enforceability of arbitral awards.”¹⁶ However, the most important consideration is legal, “because the law governing the arbitration [...] is typically considered to be the law of the country where the proceedings are held and the award enforced.”¹⁷ According to a study conducted by arbitration scholar Joshua Karton, the formal legal infrastructure of a state (including such factors as “the ‘arbitration-friendliness’ of the state’s arbitration laws, its courts’ track record of enforcing arbitration agreements and awards, and the neutrality and professionalism of its judiciary”) was cited by corporate counsel as the most important influence on parties’ choice of a seat of arbitration.¹⁸ Because of the importance of these considerations to the parties’ choice of seat, there is evidence to suggest that states engage in “regulatory competition” as they compete amongst themselves to accommodate these needs and make themselves an attractive arbitration destination.¹⁹

II. REGULATORY COMPETITION AND THE MARKET OF INTERNATIONAL ARBITRATION

Owing to the consensual nature of international arbitration, as Drahozal explains, parties are likely to choose the state “that best serves their interests, subject to the informational costs of evaluating alternative arrangements,” as their seat of arbitration.²⁰ If parties *ex ante* were better off with another seat of arbitration, they would, all else being equal, name that other seat in their arbitration agreement.²¹

12 *Ibid* at 57.

13 *Ibid*.

14 Born, *International Arbitration*, *supra* note 3 at §1.07.

15 *Ibid*.

16 Christopher Drahozal, “Regulatory Competition and the Location of International Arbitration Proceedings” (2004) 24:1 *Intl Rev of L & Economics* 371 at 373 [Drahozal, “Regulatory Competition”].

17 *Ibid*.

18 Karton, *supra* note 11 at 70.

19 Christopher Drahozal, “Commercial Norms, Commercial Codes, and International Commercial Arbitration” (2000) 33:1 *Vanderbilt J of Transnational L* [Drahozal, “Commercial Norms”].

20 *Ibid* at 101.

21 *Ibid*.

Because of this freedom of choice, national governments wishing to win the business of arbitration proceedings must compete amongst each other to provide the most attractive jurisdiction. The idea that states engage in competition to gain business from arbitration proceedings can be accounted for by economics expert Albert Breton's theory of "competitive governments":

In contrast to a view of government as a monolith or monopoly, whose policies are typically viewed [...] as the product of rent-seeking behaviour by special interest groups that have captured Leviathan, [this theory] argues that governments [...] are intensely competitive in a wide variety of dimensions.²²

In this theory, regulatory competition engenders "lively competition" among national regulators as to which country or countries' regulatory approach "will become the model for international standards or regulatory norms."²³ In the context of international arbitration, states compete to provide the regulations that are most likely to attract international arbitration to their jurisdictions.²⁴ Generally, this means that they have established or amended their national arbitration laws in order to make them more "friendly" to international arbitration, "in particular by removing restrictions on arbitration procedures or by narrowing the grounds on which awards may be challenged."²⁵ As one commentator puts it, "[c]ountries have, without shame, exhibited their desire to attract the business of arbitration" by "climb[ing] on the 'hospitable-jurisdiction-to-arbitration' bandwagon."²⁶ Although regulatory competition scholarship is generally concerned with the provision of competitive laws and policies,²⁷ this paper broadens this understanding somewhat. For example, this paper understands regulatory competition to also include the government's provision of institutions and infrastructure, as will be discussed below.

One of the most common features of arbitration-friendly states, as Karton explains in *The Culture of International Arbitration and the Evolution of Contract Law*, is that their arbitration laws permit an expanded scope of party autonomy (in matters such as choosing the governing substantive and procedural rules of law) and arbitral powers (in matters such as the tribunal having the power to make determinations as to its own jurisdiction), while restricting the role of national courts.²⁸ For example, the SIAC website advertises that the Singapore courts offer "maximum judicial support of arbitration and minimum intervention."²⁹ As mentioned above, Karton's survey revealed that corporate counsel cited these features as being the most important influence on parties' choice of a seat of arbitration.³⁰ Due to the importance of these considerations, 78 states and 109 jurisdictions have enacted legislation based on the Model Law on International Commercial Arbitration.³¹ These changes act as low-cost "marketing strategies," intended to signal to

22 Michael Trebilcock, "Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics" (1998) 6:1 *European J of L & Economics* 5 at 8, discussing Albert Breton, *Competitive Governments* (New York: Cambridge University Press, 1996).

23 *Ibid* at 29.

24 Karton, *supra* note 11 at 68.

25 *Ibid*.

26 Drahozal, "Regulatory Competition", *supra* note 16.

27 For example: Drahozal, "Regulatory Competition", *supra* note 16.

28 Karton, *supra* note 11 at 68.

29 Singapore International Arbitration Centre, "What Singapore Has to Offer" (4 January 2018), online: <www.siac.org.sg/64-why-siac> archived at <<https://perma.cc/9ZES-6VJZ>> [SIAC, "What Singapore Has to Offer"].

30 See Karton, *supra* note 11 at 70.

31 United Nations Commission on International Trade Law, "Status—UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (3 Jan 2018), online: <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> archived at <<https://perma.cc/ZK48-CDC2>>.

the international arbitration community “the user friendliness of their legal environment and of the quality of services offered in these jurisdictions.”³²

According to a study by Drahozal, this regulatory strategy is effective. Using a panel of countries that enacted new arbitration laws from 1994 to 1999, the study revealed a statistically significant increase in the number of International Chamber of Commerce (“ICC”) arbitrations held in countries after enactment.³³ The estimated increase in the number of ICC arbitrations held within a country is 26.95 percent for major arbitration countries and 18.39 percent for the full sample.³⁴ Because the study had to rely only on published data from ICC arbitrations and not arbitrations administered by other institutions (or ad hoc arbitration proceedings), Drahozal suggests that the study’s estimates likely reflect the minimum increase that results from the new arbitration legislation.³⁵

In light of the legislative effort of drafting and approving a new arbitration law designed to make the state a more attractive seat, it seems reasonable to question why governments go through the trouble of engaging in regulatory competition. In short, becoming a venue for arbitration, particularly international arbitration, can be a highly lucrative business.³⁶ A variety of interest groups have an incentive to support the enactment of arbitration-friendly legislation.³⁷ For example, arbitration institutions earn fees from administering arbitration proceedings, and hotels charge for conference rooms and accommodations.³⁸ Arguably the major beneficiaries, however, are local lawyers and arbitrators.³⁹ In addition to earning fees from additional arbitrations, lawyers trained in that country will be better able to compete for business overseas and to negotiate arbitration agreements with foreign investors.⁴⁰ This has led scholars to suggest that regulatory competition to supply arbitration-friendly legislation may in fact be driven by lawyers rather than legislators.⁴¹

Proponents of the enactment of new or revised arbitration laws frequently cite the substantial economic benefits that are anticipated.⁴² For example, during the Parliamentary debates on the *Arbitration Act* of 1979, Lord Cullen of Ashborne famously ventured an estimate that “a new arbitration law might attract to England as much as [GBP]500 million per year of ‘invisible exports,’ in the form of fees for arbitrators, barristers, solicitors, and expert witnesses.”⁴³ However, critics have been quick to suggest that the economic benefits of regulatory competition may be overstated. For example, international arbitration scholars Yves Dezalay and Bryant Garth note:

In England, the partisans of reform of arbitration estimated that millions of pounds were being lost to London and its legal profession from the fact of legislation perceived by their foreign counterparts as too restrictive and

32 Drahozal, “Regulatory Competition”, *supra* note 16 at 373.

33 *Ibid* at 373.

34 *Ibid* at 383.

35 *Ibid* at 382.

36 Drahozal, “Commercial Norms”, *supra* note 19 at 102.

37 *Ibid*.

38 Drahozal, “Regulatory Competition”, *supra* note 16 at 373.

39 Luke Nottage, “The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View From the Periphery” (2000) 16:1 *Arbitration International* 53.

40 Tom Ginsburg, “The Culture of International Arbitration” (2003) 39:1 *Vanderbilt J Transnat’l L* 1335.

41 Christopher Drahozal, “Arbitrator Selection and Regulatory Competition in International Arbitration Law” in Christopher Drahozal & Richard Naimark, eds, *Towards a Science of International Arbitration: Collected Empirical Research* (The Hague: Kluwer Law International, 2005).

42 Drahozal, “Regulatory Competition”, *supra* note 16 at 374.

43 W Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 2nd ed (Dobbs Ferry: Oceana Publications, 1990) at 467.

costly. The same individuals today admit that the estimates, widely reported by the press, were complete inventions.⁴⁴

The results of Drahozal's aforementioned study, however, reported an (approximately) 18 to 27 percent estimated increase in the number of ICC arbitrations held within a country after that country had promulgated new or revised arbitration laws.⁴⁵ This suggests that these changes actually do attract arbitration. As a result, many countries, including Singapore, appear set on continuing to court international arbitration proceedings for the foreseeable future.

III. SINGAPORE'S DEVELOPMENT AS A HUB FOR INTERNATIONAL ARBITRATION

Twenty-five years ago, international arbitration in Singapore was almost non-existent.⁴⁶ Today it is recognized as a leader in international arbitration in Asia, and as a growing hub for international arbitration globally.⁴⁷ This is demonstrated, not only by the fact that SIAC has been recognized as one of the fastest growing arbitral institutions in the world (in 2016 it had 343 new cases),⁴⁸ but also by the fact that over 80 percent of these cases are international.⁴⁹

Singapore has achieved this by fully engaging in regulatory competition. Remarks by Minister of Law K. Shanmugam at an Arbitration Dialogue organized by the Ministry of Law in 2011 support this assertion. He stated that Singapore intends to be at the "leading edge of thinking in international arbitration,"⁵⁰ and he went on to explain the government's unequivocal approach to arbitration:

As I tell the arbitration practitioners we meet, our approach in Singapore is: we see a problem, and where it can be solved legislatively, we are in a position to do that within three to six months. For example, in almost every jurisdiction, you might get cases which sometimes are not consistent with how we want arbitration to be supported. We came across such a case from the High Court and the situation was sorted out legislatively within four months. That is the approach we take when we have a court system and judicial philosophy now which is extremely supportive of arbitration as well. They intervene in appropriate cases; they do not take a completely hands-off approach, but totally supportive and in line with international thinking.⁵¹

44 Yves Dezalay & Brian Garth, *Dealing in Virtue* (Chicago: The University of Chicago Press, 1996) at 299.

45 Drahozal, "Regulatory Competition", *supra* note 16 at 383.

46 Ahmad & Yeap, *supra* note 2.

47 *Ibid.*

48 SIAC, "Statistics", *supra* note 4.

49 Alvin Yeo & Chou Sean Yu, "Singapore", *Global Arbitration Review 2016* (18 May 2015) at 92, online: <www.globalarbitrationreview.com/benchmarking/the-asia-pacific-arbitration-review-2016/1036915/Singapore> archived at <<https://perma.cc/2K2M-TPDJ>>.

50 Shaun Lee, "News Update: SIAC Opens its First Overseas Office in Mumbai" (30 April 2013), *Singapore International Arbitration Blog* (blog), online: <<https://singaporeinternationalarbitration.com/2013/04/30/news-update-siac-opens-its-first-overseas-office-in-mumbai/>> archived at <<https://perma.cc/AC3U-D6NS>> [Lee]; Ahmad & Yeap, *supra* note 2.

51 Singapore, Ministry of Law, *Opening Speech by Minister of Foreign and Law, Mr K Shanmugam, at the Ministry of Law Arbitration Dialogue*, (1 November 2011), online: <<https://www.mlaw.gov.sg/news/speeches/opening-speech-by-minister-for-foreign-affairs-and-law-mr-k-shanmugam-at-the-ministry-of-law.html>> archived at <<https://perma.cc/JD32-93YD>>; Ahmad & Yeap, *supra* note 2.

Singapore's strong commitment to being at the "leading edge" of international arbitration provides insight into how states can successfully engage in regulatory competition and market themselves as attractive arbitration destinations.⁵²

Shortly after attaining internal self-governance in 1960, Singapore had a gross domestic product ("GDP") per capita of USD428 and faced an uncertain future.⁵³ Today Singapore has an estimated GDP per capita of USD55,252.40, making it one of the richest countries in the world.⁵⁴ With few natural resources, much of the city-state's development has been credited to effective and firm governance.⁵⁵ Singapore's government practices a form of state-capitalism, which essentially ties the ruling People's Action Party's legitimacy to remain in power with competent economic management and the ability to deliver sustained economic growth.⁵⁶ As Singapore scholars have observed, "the link between economic legitimacy and political power in Singapore cannot be understated."⁵⁷ Consequently, the government has worked hard to ensure that Singapore maintains a regulatory climate hospitable to business. It has been rewarded for its efforts:

For the past eight years, the World Bank has recognized Singapore as having the best regulatory and economic environment in the world for doing business [in June 2016, however, it slipped to second place, behind New Zealand]. Transparency International consistently ranks Singapore in the top five countries in the world for having the lowest level of corruption. The *Wall Street Journal* and The Heritage Foundation consistently rank Singapore in the top few countries in the world with respect to economic freedom. The Asian Corporate Governance Association has repeatedly ranked Singapore as having the best corporate governance in Asia.⁵⁸

In light of Singapore's commitment to economic growth, it is unsurprising that it would seek to market itself as an arbitration-friendly jurisdiction. In addition to generating revenue from the fees associated with arbitration, it has been argued that non-Western and developing states must "opt in" to the Western system of arbitration "in order to maintain and grow business relationships with Western partners."⁵⁹ In other words, the benefits of adopting arbitration-friendly laws go beyond attracting arbitrations, and include attracting business in general. Developing a robust system of private international dispute resolution may even be a precondition for economic growth in the modern era of globalized commerce.⁶⁰ For example, Robert Briner, a former President of the Iran-United States Claims Tribunal, has observed:

[A]rbitration accompanied the growth of international commerce. It saw its role as offering the tools best suited to international business to resolve disputes whenever they arose. The major institutions especially see their role

52 Lee, *supra* note 50.

53 Tan Cheng-Han, Dan W Puchniak, & Umakanth Varottil, "State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform" (2015) 28:2 Colum J Asian Law 61 at 65.

54 Global Finance, "Singapore GDP and Economic Data", *Global Finance* (28 December 2017), online: <www.gfmag.com/global-data/country-data/singapore-gdp-country-report> archived at <<https://perma.cc/22NJ-2FNE>>.

55 Cheung-Han, Puchniak, & Varottil, *supra* note 53 at 65.

56 *Ibid* at 86.

57 *Ibid*.

58 *Ibid* at 65-66.

59 Edward Leahy & Carlos Bianchi, "The Changing Face of International Arbitration" (2000) 17:4 J Int'l Arb 19 at 58.

60 Karton, *supra* note 11 at 109.

in facilitating the growth of international business by offering the necessary tools to resolve the disputes arising in international business.⁶¹

In other words, arbitration is essential to business because it offers tools that local courts often cannot. Arbitration is generally considered to be more impartial, expedient, flexible, cost-effective, and confidential than many national court systems.⁶² Because of the efficient services they provide, international arbitration lawyers have been referred to as “transaction cost engineers”⁶³ and arbitrators have famously been called “men of affairs, not apart from the marketplace.”⁶⁴ It has been posited that, since commerce requires an effective, predictable, and legitimate dispute resolution system, arbitration is *itself* a commercial institution:

The workings of international commercial arbitration have a considerable impact on the security of business investments and on the transaction costs of resolving transnational disputes. International commercial arbitration, therefore, should be seen as a key institution in the structuring of international markets.⁶⁵

Given Singapore’s commitment to economic development it is unsurprising then that it would strive to be at the “leading edge” of international arbitration.⁶⁶

IV. REGULATORY COMPETITION IN ARBITRATION-FRIENDLY SINGAPORE

The greatest factor underpinning the success of Singapore’s arbitration model is the government’s commitment to promoting Singapore as a global international arbitration hub through regulatory competition.⁶⁷ First and foremost, it has developed an arbitration-friendly formal legal structure—a key factor considered by corporate counsel when drafting arbitration agreements.⁶⁸ Singapore is a signatory to the New York Convention, and the UNCITRAL Model Law is a “cornerstone” of its *International Arbitration Act*.⁶⁹ When that legislation was amended in 2009, in response to industry feedback canvassed by the Ministry of Law, it was tellingly done with the express intent of keeping “[Singapore’s] *International Arbitration Act* modern, effective and arbitration-friendly”; and as acknowledged at the second reading of that amendment, by Minister of Law K. Shanmugam, “[t]his will in turn help to keep Singapore at the forefront as a top international arbitration centre.”⁷⁰

Furthermore, the government has ensured that Singapore’s courts maintain a tradition of minimal curial intervention in international arbitrations—a feature which SIAC

61 Robert Briner, “Globalization and the Future of Courts of Arbitration” (2000) 2:1 Eur J L Reform 439 at 444.

62 Born, *International Arbitration*, *supra* note 3 at §102.

63 Drahozal, “Commercial Norms”, *supra* note 19 at 107.

64 *Commonwealth Coatings Corp v Cont’l Casualty Corp*, 393 US 145 at 150 (1968).

65 Dezalay & Garth, *supra* note 44 at 7.

66 Lee, *supra* note 50.

67 Ahmad & Yeap, *supra* note 2.

68 Karton, *supra* note 11 at 70.

69 SIAC, “What Singapore Has to Offer”, *supra* note 29; *International Arbitration Act* (Cap 143A, 2002 Rev Ed Sing).

70 Singapore, Parliament of the Republic of Singapore, *Official Reports—Parliamentary Debates (Hansard)*, 11th Parl, 2nd Sess, Vol 86, No 86 (19 October 2009) at (columns) 1631-1632 (K Shanmugam), online: <https://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00003591-WA¤tPubID=00004793-WA&topicKey=00004793-WA.00003591-WA_1%2B%2B> archived at <<https://perma.cc/F4C7-QA78>>; Ahmad & Yeap, *supra* note 2.

advertises on its webpage.⁷¹ The Singapore judiciary's approach towards arbitration is succinctly captured in the following quotes from a Court of Appeal judgment: “[a] unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore”⁷² and “[i]n short, the role of the court is now to support, and not to displace, the arbitral process.”⁷³

This position was reaffirmed by the highly anticipated *Sanum* decision in September 2016. The Court of Appeal overturned the decisions of the Singapore High Court and upheld an UNCITRAL tribunal's finding that a bilateral investment treaty signed with China extended to Macao.⁷⁴ Furthermore, the decision demonstrated the high degree of professionalism and competence of Singapore's courts: “The court's willingness to engage and tackle complex questions of customary international law and treaty interpretation is evident throughout the judgment—where relevant, the court applied commentary by international jurists and decisions by investment tribunals.”⁷⁵ Arbitrating parties can, therefore, feel confident in the knowledge that Singapore's judges are well versed in the rule of law and capable of grappling with complex legal issues.⁷⁶ Additionally, in January 2015 the government also established the new Singapore International Commercial Court (“SICC”). This court involves an adjudicative court process managed by the Singapore High Court, and has been designed to complement mediation at the Singapore International Mediation Centre (“SIMC”) and arbitration at SIAC.⁷⁷ The SICC offers foreign parties access to a neutral international court as well as 11 renowned international jurists who have been appointed as “international judges.”⁷⁸

Another key feature that makes Singapore an arbitration-friendly jurisdiction is the government's provision of excellent infrastructure. The government's decision to establish the not-for-profit SIAC in 1991 has been called the nation's “first step” towards establishing “a world-class arbitration hub.”⁷⁹ Since then, the government has made a concerted effort to raise SIAC's profile. The institution's rise to prominence likely would not have been possible without significant government support. As one Singapore-based observer notes:

The support given is very important [...], the encouragement of the government officials, making available their time, making available support systems, and facilitating legislative changes such as allowing foreign lawyers and foreign arbitrators to be involved [...]. More and more liberties were granted by them.⁸⁰

In addition to generating revenue from fees, SIAC is also providing revenue for Singapore's national courts, as roughly 50 percent of cases filed at SIAC have included Singapore as the seat of arbitration.⁸¹ Should any arbitral issues come before the court, they will profit.

71 SIAC, “What Singapore Has to Offer”, *supra* note 29.

72 *Tjong Very Sumito and Others v Antig Investments Pte Ltd*, [2009] 4 SLR 732 at para 28 [*Tjong Very Sumito*]; Ahmad & Yeap, *supra* note 2.

73 *Tjong Very Sumito*, *supra* note 72 at para 29; Ahmad & Yeap, *supra* note 2.

74 *Sanum*, *supra* note 1.

75 Jonathan Lim, Gary Born, & Dharshini Prasad, “Sanum v. Laos (Part 1): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC-Laos BIT”, *Kluwer Arbitration Blog* (10 November 2016), online: <www.kluwerarbitrationblog.com/2016/11/10/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit/> archived at <<https://perma.cc/DWV5-DPA4>>.

76 Karton, *supra* note 11 at 69.

77 Yeo & Yu, *supra* note 49 at 92.

78 *Ibid.*

79 Ahmad & Yeap, *supra* note 2.

80 Karton, *supra* note 11 at 70.

81 *Ibid.*

SIAC is conveniently located inside the Maxwell Chambers facility, which opened in 2010. Maxwell Chambers is Asia's largest fully-integrated dispute resolution complex, and also houses the SICC and the SIMC.⁸² As the Minister of Law, K. Shanmugam, explained at the inaugural SIAC Congress in 2014, the three institutions present a "complete suite of dispute resolution offerings to parties, especially those with cross-border disputes."⁸³ The presence of such facilities and the services they provide is a huge draw for arbitrating parties.⁸⁴

Singapore has also employed direct incentives to attract arbitrations to its jurisdiction.⁸⁵ For example, in 2008, legislators promulgated a five-year tax break for international arbitration practitioners whose work involves arbitration hearings held in Singapore.⁸⁶ As Karton explains, this effectively reduced the cost of arbitration because practitioners are able to offer reduced fees.⁸⁷ Singapore has also reduced barriers to entry by conveniently not requiring foreign professionals to obtain temporary work visas when participating in local arbitrations and mediations.⁸⁸

However, not all of Singapore's success as an arbitration hub can be attributed to these regulatory competition efforts. First and foremost, English is the working language of Singapore. It is taught as an official language in schools, and English is used in Singapore's judiciary and legislature. As the global language of business, the prevalence of English is certainly a draw for international arbitration. The high number of SIAC clients from English-speaking countries supports this assertion.⁸⁹

Second, political neutrality has undoubtedly played a role in boosting the country's popularity.⁹⁰ Singapore has the good fortune of being situated "at the crossroads of South East Asia, and in between sea lanes of communication that sit astride China and India."⁹¹ Singapore's geography and trade links, therefore, "put it in a unique position to market itself as the premier arbitration hub for Asia."⁹² One commentator attributes Singapore's increasing popularity as an arbitral seat to the fact that Singapore is a "truly neutral venue in Asia."⁹³ Statistics on the nationality of the parties who frequent SIAC reflect the institution's convenient geography. As discussed by leading arbitration practitioners Alvin Yeo and Chou Sean Yu in their *Global Arbitration Review* profile on Singapore, of the 81 percent of international cases filed with SIAC in 2014:

The highest number of filings in 2014 was generated by parties from China, closely followed by parties from the United States and India. 2014 saw a significant increase in the number of cases involving parties from the United States, which rose in the ranking to become the largest foreign user of SIAC arbitration. Cases involving parties from Australia, Malaysia and the UK also increased in 2014, with Malaysia and the UK sharing a joint

82 SIAC, "What Singapore Has to Offer", *supra* note 29.

83 Yeo & Yu, *supra* note 49 at 92.

84 Karton, *supra* note 11 at 70.

85 *Ibid* at 69.

86 *Ibid*.

87 *Ibid*.

88 *Ibid*.

89 Singapore International Arbitration Centre, "Profile of Cases" (5 January 2018), online: <www.siac.org.sg/2014-11-03-13-33-43/facts-figures/profile-of-cases> archived at <<https://perma.cc/VPZ8-R9GW>>.

90 Ahmad & Yeap, *supra* note 2.

91 *Ibid*.

92 *Ibid*.

93 Karton, *supra* note 11 at 71.

fifth ranking. The other parties in the top 10 list of foreign users were Hong Kong, South Korea, Indonesia and Thailand. SIAC received cases from parties from 58 jurisdictions in 2014. SIAC users came from a wider range of jurisdictions in 2014 than in 2013, and included parties from Mongolia and Papua New Guinea.⁹⁴

While Singapore is an established regional hub for international arbitration the government nevertheless has ambitions further afield. For example, in an effort to raise its international profile, Born (again, a leading international arbitration scholar) was appointed as the new president of the SIAC Court of Arbitration in 2015, replacing the founding president Michael Pryles.⁹⁵ In a letter written on the commencement of his term in April 2015, Born is said to have noted that a primary goal going forward would be to bolster SIAC's position as one of the most global international arbitration institutions in the world.⁹⁶ Finally, notwithstanding its dominant regional position in Asian international arbitration, SIAC would seek to strengthen its global position by ensuring that it be the preferred choice for users worldwide vis-à-vis international dispute resolution.⁹⁷

CONCLUSION

Twenty-five years ago, international arbitration in Singapore was almost non-existent. Today the country is recognized as the leader in international arbitration in Asia, and as a growing hub for international arbitration globally.

Singapore's success can be attributed to the state's engagement in regulatory competition. Recognizing the revenue potential created by the phenomenon of forum shopping within international arbitration, the government has made every effort to provide arbitration-friendly legislation and infrastructure with the goal of attracting arbitrations to its jurisdiction. In addition to joining the New York Convention and adopting the UNCITRAL Model Law, the government has attracted arbitration largely by ensuring its courts have a strong tradition of the rule of law and a policy of non-intervention in arbitral decisions, supporting the continuing development of SIAC, and offering Asia's largest fully-integrated dispute resolution complex at Maxwell Chambers. However, Singapore's success can also be attributed to factors unrelated to regulatory competition. These include the use of English as the language of business as well as having a central geographic location in Asia and a policy of political neutrality. Nevertheless, the government's strategic engagement in regulatory competition has undoubtedly contributed to Singapore's developing role as a leader in international arbitration.

94 Yeo & Yu, *supra* note 49 at 92-93.

95 *Ibid* at 93.

96 *Ibid*.

97 *Ibid*.

