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PREFACE

Kevin Menz and Lauren Sutherland

We take pride at Appeal Publishing Society in describing our journal as "student run," but the term does not truly convey the work students put into all aspects of the journal. *Appeal: Review of Current Law and Law Reform* is student *driven.* Our board members, including ourselves, are students. Our podcast, *Stare Indecisis*, is produced by students. A majority of our authors, year after year, are students. The volunteers listed in the introduction pages of our journal are students. Student efforts are behind our journal's 25 years of success.

Volume 25 marks a milestone for *Appeal*. Our journal, now a staple within the University of Victoria Faculty of Law, started in 1995. The first issue, its editorial address reads, was borne when several students saw the possibility of producing a first-rate law journal run by students. The goal: "to provide a forum for discussing the state of Canadian law and possibilities for its reform in a manner that was accessible, challenging, and representative of the views of tomorrow's law-makers." The first board sought to be, in the members' own words, "alternative." The editors committed to publishing student work, to providing an outlet for students to express their observations and ideas.

Twenty-five years later, the vision still holds strong.

The journal this year is, once again, driven by top student work.

Volume 25 features pieces from seven authors, including three current University of Victoria students—JD candidates Leila Gaind and Katie Dakus and JD/MPA student Suzy Flader—and two authors—Sydney McIvor and Chase Blair—with undergraduate degrees from the university.

Gaind challenges the rhetoric surrounding the police practice of "well-being checks" in her work, "A Rose by Any Other Name: Well-Being Checks, a New Manifestation of Discriminatory Policing?" While police frame well-being checks as a necessary tool for promoting the social welfare of vulnerable community members, Gaind argues that the practice is simply another form of discriminatory policing.

Dakus's article, "From Ringing to Impinging: The Intrusion of Technology into the Employment Relationship," calls out the need for Canada's labour laws to protect employees in an age of technology in which pressures to respond to often constant after-hours emails, text messages, and phone calls lead to the performance of unpaid labour.

Flader, whose review of *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* was published in last year's *Appeal* journal, is again featured in Volume 25. Her piece, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice under Section 7 of the *Charter*," contends that expanding the principles of fundamental justice to include equality will allow courts to assess claimants' unique and intersectional societal positions when ruling on section 7 *Charter* claims of marginalized claimants.

Flader's work is complemented by another piece, "Social Science Evidence in Poverty-Related *Charter* Claims: An Example in *Bedford v Canada*," authored by McIvor, now a JD student at Osgoode Hall Law School. McIvor's article looks at the key role social science evidence played in the Supreme Court of Canada's *Bedford v Canada (Attorney General)* ruling to argue for such evidence to be embraced in poverty-related *Charter* claims.

The article from Blair, titled "Indigenous Sacred Sites & Lands: Pursuing Preservation Through Colonial Constitutional Frameworks," argues legal frameworks available to Indigenous peoples in Canada to preserve their sacred sites and lands—the section 35 title option, the section 35 rights option, and the section 2(a) *Charter* option—perpetuate colonial values and, specifically, oppress Indigenous spiritualities. Blair, in 2019, completed his JD at Thompson Rivers University.

Emma Compeau, a JD student at Western University, outlines how Canadian courts may handle the religious thin skull principle with her piece, "The Price of God: Understanding Reason and Religion in the Duty to Mitigate." The paper tackles the legal issues—specifically within a Canadian context—arising from situations in which a victim of tort refuses medical treatment following injury on the basis of religious conviction.

The final piece in the journal, "Misspent Youth: The (Mis)application of the *Youth Criminal Justice Act* by the *Criminal Code* Review Boards of British Columbia and Ontario," by Kyle McCleery, starts filling the gap in research into youth who commit criminal acts while suffering from mental disorders. McCleery, who recently completed an LLM from the University of British Columbia, contends that section 141(6) of the *Youth Criminal Justice Act*—which requires provincial review boards to consider an accused's "age and special needs"—prevents the review boards from adequately recognizing the unique circumstances of young people.

Deciding on the seven pieces was no easy task. We received dozens of strong student works from across Canada, and to conclude that any piece submitted but not chosen for publication was not of high quality would be a great underappreciation of the impressive works we received. We hope, though, the seven pieces we chose push law forward just as Volume 1's editorial board envisioned.

We would be remiss, of course, while praising the contributions of students to the journal, not to acknowledge the help and support we received from many others in the legal and academic communities. Bringing the seven chosen pieces together into one journal would not be possible without the guidance we received from our external reviewers. Publication would not be possible without our sponsors and sponsoring members. The journal's design—now iconic, in our opinion—is thanks to the wonderful work of graphic designer Paul Maher. The Faculty of Law, the staff at the school's Diana M. Priestly Law Library, and the University of Victoria Law Students' Society provided support throughout the year. Professor Ted McDorman, our faculty advisor, and Volume 24's editor-in-chief, Rachael Gardner, went above and beyond whenever we reached out for guidance. We thank each of the above-mentioned people and groups, and we thank the many others not mentioned whose support and encouragement we received throughout the year. Volume 25 is a reality thanks to them.

Here's to another 25 years of *Appeal.*

ARTICLE

A ROSE BY ANY OTHER NAME: WELL-BEING CHECKS, A NEW MANIFESTATION OF DISCRIMINATORY POLICING?

Leila Gaind *

CITED: (2020) 25 *Appeal* 3

ABSTRACT

Citizens and advocacy groups across Canada have called for an end to street checks, a practice that involves the police stopping and questioning people on the street, absent grounds for arrest or detention, to collect identifying information. Across jurisdictions, the data reveals that street checks disproportionately target Black, Indigenous, and other racialized and marginalized persons. Police departments have historically justified these racial disparities by framing street checks as a proactive policing tool, but in recent years, the rhetoric around street checks has shifted. Now, street checks are a way for officers to check in on the "well-being" of marginalized community members. In Vancouver, the VPD has framed this practice as promoting a social good, but this article contends that well-being checks are another manifestation of arbitrary street checks. This article first examines how street checks and the discourse surrounding them have evolved in Toronto, leading to the current moment, where departments face mounting pressure to justify racial disparities in their data. Next, this article shifts its focus to the Downtown East Side (DTES) of Vancouver, where police are facing a similar public reckoning, and have responded with one specific, novel justification: street checks are justifiable as a proactive policing tool that protects the interests of society's most vulnerable. This article concludes by arguing that well-being checks may function as a new manifestation of discriminatory policing, one that responds to a specific history and context but duplicates the experience of an arbitrary street check.

* Leila Gaind holds an Honours B. Arts Sc. and MA from McMaster University, and is currently in her third year of the JD program at the University of Victoria. She will complete her articles as a clerk for the Ontario Superior Court. Leila sincerely thanks Professor Asad Kiyani for his supervision and assistance with this paper, and Sarah Pringle for her thoughtful and meticulous edits.

I. INTRODUCTION

In recent years, police departments across Canada have faced scrutiny because racialized,[1] Indigenous,[2] and marginalized[3] persons are disproportionately subject to the police practice of "carding" or "street checks." These checks typically involve police stopping and questioning people on the street, absent grounds for arrest or detention, to collect identifying information, which is then entered and stored in a centralized database for intelligence gathering purposes.[4]

Advocates defend the practice as a necessary tool for solving and preventing crime, but the resulting harm to those inordinately targeted, who find themselves subject to pervasive and ongoing harassment and surveillance, is undeniable.[5] Paired with mounting evidence regarding the inefficacy of street checks,[6] the practice is becoming increasingly difficult for police departments to justify.

The most recent, high-profile indictment comes from the Ontario Court of Appeal's Honourable Michael Tulloch. In January 2019, Justice Tulloch released his long-awaited *Report of the Independent Street Checks Review*,[7] which confirmed what critics of carding have been saying for years: it is an ineffective policing tool that comes at a tremendous social cost, and as such, should be banned.[8] While Justice Tulloch's condemnation of carding marks an important turn in public discourse, it is unclear how his findings will

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1 "Racialization" refers to the processes that produce and sustain race as a real and unequal category.

2 As the Ontario Human Rights Commission explains, while Indigenous people are also racialized, this designation "fails to recognize that many members of First Nations, Metis and Inuit communities object to being referred to as a racial group," and thus I will be using the term Indigenous separately to give recognition to the unique historical experience of Indigenous communities in Canada. See Ontario Human Rights Commission, "Under Suspicion: Research and consultation report on racial profiling in Ontario" *Ontario Human Rights Commission* (April 2017), online: <http://ohrc.on.ca/sites/default/files/Under%20suspicion_research%20and%20consultation%20report%20on%20racial%20profiling%20in%20Ontario_2017.pdf> at 15 archived at [https://perma.cc/9WND-VU3P].

3 While street check data clearly indicates that racialized and Indigenous persons are subject to disproportionate police attention, the way in which poverty and social marginalization also determine who is unfairly targeted has been more difficult to track. However, policing poverty is a pervasive, inextricable problem that often affects those who experience intersecting forms of oppression.

4 Law Union of Ontario, "Submissions to Toronto Police Services Board Re: Community Contacts Policy" *Law Union of Ontario* (25 May 2014), online: <http://www.lawunion.ca/tag/carding/> archived at [https://perma.cc/YA6Z-Q4UB].

5 The harmful effects of racial profiling are well-documented. As Desmond Cole stated, "because of that unwanted scrutiny, that discriminatory surveillance, I'm a prisoner in my own city." See Desmond Cole, "The Skin I'm In" *Toronto Life* (21 April 2015), online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/> archived at [https://perma.cc/7R9V-ESSY].

6 CBC News, "An Ontario judge says carding doesn't work. But will politicians listen?" *CBC News* (4 January 2019), online: <https://www.cbc.ca/news/canada/toronto/ontario-carding-review-michael-tulloch-1.4964768> archived at [https://perma.cc/S576-SR2A].

7 The Honourable Michael T. Tulloch, *Report of the Independent Street Checks Review* (Queen's Printer for Ontario: 2018), online: <http://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/StreetChecks.pdf> archived at [https://perma.cc/ZA24-CKBP]. ("The Tulloch Report")

8 On April 17, 2019, Nova Scotia's Justice Minister directed police across the province to immediately yet *temporarily* suspend the practice of street checks. This decision came shortly after a landmark report indicated that Black people in Halifax were being disproportionately targeted. See Taryn Grant, "Nova Scotia suspends police street checks" *The Star Halifax* (17 April 2019), online: <https://www.thestar.com/halifax/2019/04/17/nova-scotia-announces-immediate-suspension-of-police-street-checks.html> archived at [https://perma.cc/K6D6-SWZ6?type=image].

affect police policies within and beyond Ontario, in part because the practice manifests differently across jurisdictional lines.[9]

Most police departments now publicly condemn what has been conventionally understood to be carding.[10] Yet, there are disparities between policy and practice, and it is within this liminal space that racialized, Indigenous, and marginalized people continue to get caught. These communities are still carded at disproportionate rates. However, these interactions are not recognized as discriminatory because police departments can point to other reasons for the stops: namely, the individual in question may (1) exhibit suspicious behaviour, (2) be present in high-crime areas, or (3) appear to need assistance.[11] These reasons are repeatedly used to legitimize police interactions and circumvent allegations of racial profiling, even though the data continues to reveal racial discrepancies.[12] The discriminatory history of the first two reasons for stops—what behavior looks suspicious and what neighbourhoods are labelled high crime—have been thoroughly explored.[13] However, how racialized, Indigenous, and marginalized people may be deemed "in need of assistance" for the purpose of a street check has not, as of yet, been examined in great depth.

Recent data revealing the overrepresentation of Indigenous women in Vancouver's street check data suggests that well-being checks may not be benign, nor fundamentally different than their controversial counterparts. In May 2018, following two freedom of information requests, the Vancouver Police Department ("VPD") released data on street checks for the 2007–2018 period.[14] The data indicated that Black and Indigenous persons were disproportionately subject to street checks, leading the British Columbia Civil Liberties Association and the Union of British Columbia Indian Chiefs to file a complaint with the Office of the Police Complaint Commissioner, calling for an investigation into the practice.[15] In response to this complaint, the VPD conducted an internal review[16] of their

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9 Kristy Hoffman, Patrick White and Danielle Webb "Carding across Canada: Data show practice of 'street checks' lacks mandated set of procedures" *The Globe and Mail* (19 June 2017), online: <https://www.theglobeandmail.com/news/national/does-carding-occur-across-canada/article25832607/> archived at [https://perma.cc/5B6U-UNNX.]

10 Tulloch, s*upra* note 7, at 36.

11 Chelsea Laskowski, "Saskatoon police board to discuss proposed carding policy" *CBC News* (21 February 2019), online: <https://www.cbc.ca/news/canada/saskatoon/saskatoon-police-carding-new-policy-1.5027662> archived at [https://perma.cc/DXJ7-WDCL].

12 Anjuli Patil, "Halifax residents call for stop to street checks after racial profiling report" *CBC News* (30 March 2019), online: <https://www.cbc.ca/news/canada/nova-scotia/halifax-street-checks-racial-profiling-rally-1.5078428> archived at [https://perma.cc/R6GZ-28J9].

13 See, for example, David M. Tanovich's book, *The Colour of Justice*, for a thorough exploration of how race, ethnicity, and religion have been used as markers of suspicion by police and security officials; David M. Tanovich, *The Colour of Justice,* (Toronto: Irwin Law, 2006). For a discussion of how the racial composition of a neighbourhood may lead to perceptions that the area is "high crime," see, for example, Lincoln Quillian and Devah Pager, "Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime" (2001) 107: 3 American Journal of Sociology 717 and Brian Jordan Jefferson, "Predictable Policing: Predicting Crime Mapping and Geographies of Policing and Race" (2018) 108:1 Annals of the American Association of Geographers 1.

14 An excel spreadsheet of the data can be accessed here: <https://vancouver.ca/police/assets/pdf/foi/.../vpd-street-check-data-2008-2017.xlsx> archived at [https://perma.cc/4QQ9-4336].

15 Dylan Mazur, "Unpacking the public dialogue on discriminatory street checks in British Columbia" *British Columbia Civil Liberties Association* (30 August 2018), online: <https://bccla.org/2018/08/unpacking-the-public-dialogue-on-discriminatory-street-checks-in-british-columbia/> archived at [https://perma.cc/G524-4UGZ].

16 An independent review of the department's policies and practices was underway, as of the time of this article's writing. See Mike Howell, "Police board orders independent study of VPD 'street checks'" *Vancouver Courier* (4 October 2018), online: <https://www.vancourier.com/news/vancouverpolice-board-orders-independent-study-of-vpd-s-street-check-practice-1.23443814> archived at [https://perma.cc/LD83-6TJC].

data and policies, finding that there is "no statistical basis"[17] to establish that street checks are carried out in an arbitrary, discriminatory manner. This conclusion is at odds with the lived experiences of many Black and Indigenous community members, a number of whom have spoken publicly about how their interactions with the VPD appear to be targeted.[18]

The VPD internal review justifies the practice of street checks as proactive policing, a necessary and effective strategy for not only curbing criminal activity but also ensuring the well-being and safety of vulnerable community members. The VPD asserts that "well-being" checks are a practice that encourages officers to interact with and check-in on those with drug dependency issues, those experiencing homelessness, and other at-risk populations, interactions that are typically documented and "[followed] up on… to ensure the person's condition has not deteriorated."[19] Anecdotal accounts indicate that these types of checks occur at much higher frequencies than the data indicates,[20] and officers appear to be afforded considerable discretion to act in the interests of well-being.[21]

While carding has faced a public reckoning,[22] well-being checks have evaded scrutiny, framed as a practice that promotes a social good. Yet, as this article hopes to show, well-being checks are simply another manifestation of street checks, and, in the same way, continue to disproportionately harm racialized, Indigenous, and marginalized communities. They are necessarily targeted interactions, supposedly undertaken to fulfil the broad policing duty of ensuring the safety and security of society's most vulnerable. Importantly, however, under the pretence of a well-being check, the police may be able to evade and justify allegations of racial profiling. While the VPD has publicly condemned the use of race as a proxy for criminality,[23] "wellness," or specifically, lack thereof, may be operationalized as a proxy for race and socioeconomic status, thus justifying the well-being check as non-arbitrary while having the same detrimental impact on the affected party.

This article begins by examining how street checks and the discourse surrounding them have evolved in Toronto, culminating in the current moment, where police departments face mounting pressure to justify racial discrepancies in their data. Then, this article moves to the Downtown East Side ("DTES") of Vancouver, where police have faced a

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17 Vancouver Police Department, *Understanding Police Checks: An Examination of a Proactive Policing Strategy*. (September 2018), online: <https://vancouver.ca/police/assets/pdf/understanding-street-checks.pdf> at 4 archived at [https://perma.cc/LD83-6TJC].

18 Cherise Seucharan "Police carding data may not show full extent of police interactions on the street" *The Star Vancouver* (16 June 2018), online: <https://www.thestar.com/vancouver/2018/06/16/police-carding-data-may-not-show-full-extent-of-police-interactions-on-the-street.html> archived at [https://perma.cc/AR45-5Z6K].

19 Vancouver Police Department, *supra* note 17 at 14.

20 Seucharan, *supra* note 18.

21 The report also does not indicate the processes that officers follow when dealing with persons they deem as vulnerable, and little evidence is offered to corroborate the narrative that such interactions have a positive effect on those checked.

22 As of January 23, 2020, the VPD released a new policy governing street checks. This policy was developed pursuant to the province's new Provincial Policing Standards. While the policy does not permit arbitrary street checks, it fails to mention the circumstances in which well-being may be conducted. In essence, it reiterates the law and *Charter* protections surrounding police-civilian interactions; information that police should already know. Moreover, given that police are already expected to know the law that governs their actions, this policy does not add anything substantive to the conversation, and will likely not be effective in restraining discriminatory conduct. See Vancouver Police Department, *Addition to the Regulations and Procedures Manual Section 1.6.53 Conducting and Documenting Street Checks (and Police Stops)* (January 2020), online: <https://vancouver.ca/police/policeboard/agenda/2020/0123/2001P01-Street-Checks-Policy.pdf?utm_source=vancouver%20is%20awesome&utm_campaign=vancouver%20is%20awesome&utm_medium=referral> archived at [https://perma.cc/U3VX-46L7].

23 Vancouver Police Department, *supra* note 17 at 11.

similar public reckoning but have responded with one explanation in particular: racial discrepancies in street checks are justified as proactive policing that promotes the well-being of marginalized community members. This article concludes by arguing that well-being checks function as a new manifestation of discriminatory policing, one that responds to a specific history and context, but nonetheless duplicates the harms of arbitrary street checks. In light of the history of policing in Toronto and Vancouver, we must remain wary of how this shifting discourse around street checks may reify existing discriminatory police practices as not only an acceptable approach to socio-economic vulnerability but as a socially desirable one that comes at the expense of marginalized people.

Evidently, the overrepresentation of racialized, Indigenous, and marginalized people within all dimensions of the criminal justice system is not a natural occurrence and must be understood in reference to the violent histories and enduring sociopolitical and economic structures that dispossess and police people deemed deviant or threatening. While this article does not endeavour to un-map all of these entanglements, it accepts as a fundamental premise that context matters, and that the relationships that currently manifest between race, space, and the law[24] did not spring forth from a vacuum.

II. HISTORY OF STREET CHECKS

The street check, or the practice of law enforcement requesting identification more broadly, has a long lineage in Canada, "the purpose and effects [of which] vary, based on the historical perspective from which it is viewed."[25] Police have consistently maintained that street checks are simply a harmless form of proactive policing, but for racialized communities, the practice bears a striking resemblance to historically racist policies aimed at their disenfranchisement.[26] As Justice Tulloch explains, many members of Canada's Black community analogize carding to the enforcement of slave passes,[27] which took the form of written documents that served as proof that slave owners had permitted their slaves to move freely in a designated area for a specified period. Indigenous communities have similarly likened street checks to the off-reserve pass system,[28] which was designed to control their movement on and off reserves.[29] Those who breached the pass system faced punitive consequences, often in the form of incarceration.[30]

Both slave passes and the off-reserve pass system served as explicit mechanisms of oppression, segregation, and surveillance, aimed at ensuring that Black and Indigenous communities stayed within carefully demarcated spaces. These practices have not been forgotten by those affected, who have observed that "random carding in its current form [shares] certain public shaming and fear-inducing characteristics with these historic practices by showing Indigenous, Black and other racialized people that their presence in certain spaces [is] always in question."[31] While inter-generational trauma and memory persist within many

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24 *Race, Space and the Law* is the name of a book by Sherene Razack that draws upon critical geography, sociology, law, education, critical race and feminist studies to "unmap" specific spaces and the way in which they implicate racialized and Indigenous bodies. See Sherene Razack, *Race, Space, and the Law: Unmapping a White Settler State* (Between the Lines: Toronto, 2002).

25 Tulloch, *supra* note 7 at 36.

26 *Ibid*.

27 *Ibid* at 37. This observation arose in Justice Tulloch's consultations with Indigenous, Black and other racialized people.

28 This system was created by the Department of Indian Affairs in 1885.

29 Tulloch, *supra* note 7 at 37.

30 *Ibid*.

31 *Ibid*. This observation arose in Justice Tulloch's consultations with Indigenous, Black and other racialized people.

affected communities, a broader phenomenon of societal and institutional forgetting has repeatedly silenced those who dare remember Canada's violent past.[32]

To see how well-being checks may duplicate the problems inherent to arbitrary street checks, it is important to understand how both the practice and the rhetoric surrounding it have evolved. This section begins by mapping out a history of street checks in Toronto.[33] It then explores the incongruent discourses that have emerged as allegations of racial profiling have gained credence and entered the public consciousness and is followed by an overview of the Government of Ontario's response to these allegations.[34]

A. The Provenance of "Carding" in Toronto

What we now understand to be carding has been traced back to 1957, when the newly minted Metropolitan Toronto Police Force used street checks to gather information on persons of interest.[35] The relevant information was recorded on "Suspect Cards" or "R41 Cards," and then subsequently passed along to detectives to assist with their investigations.[36] For several decades, the targeted practice of street checks became increasingly indiscriminate as police were conferred with broader discretion to investigate people on the street, particularly if the person was known to police.[37]

The practice further intensified in 2006, when police instituted the Toronto Anti-Violence Intervention Strategy ("TAVIS"), a specialized division that arose in response to widespread anxieties related to the preceding "Year of the Gun."[38] Described as a "community mobilization strategy,"[39] TAVIS increased police presence in designated high-crime neighbourhoods, where officers would conspicuously patrol the area, engaging with community members for alleged intelligence gathering purposes. The majority of those stopped were not suspected of a crime, nor were they exhibiting suspicious behaviour,

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32 When the police, politicians, and the other institutions of power deny and/or justify racial profiling, they are in effect silencing and gaslighting racialized communities, whose lived experiences are invalidated and disbelieved.

33 While the history and evolution of street checks in Toronto is well documented, I had difficulty tracing the roots of the practice in Vancouver. Thus, this section will focus primarily on Toronto, as it has been the site of thorough reporting and conversation.

34 Despite the longstanding, biased treatment of racialized persons by law enforcement in Canada, history has repeatedly shown that anecdotal accounts of discrimination are typically not afforded belief by the general public unless the statistics are able to prove it. The African Canadian Legal Clinic—as cited by Charles C. Smith, *Conflict, Crisis, and Accountability: Racial Profiling and Law Enforcement in Canada* (Canadian Centre for Policy Alternatives, 2007: Ottawa) at 30—offers the following statement in their report entitled "Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination":

> Since the end of the 19th and beginning of the 20th century, there has been ample evidence identifying the disproportionate impact of the criminal justice system on peoples of African descent…. Despite the expression of concern by the African Canadian community regarding these facts, there has been little leadership from either government or the public to address these issues. The only time attention has been paid to these serious concerns is after a significant event, usually one in which police use of violence and/or force has resulted in serious injury or death.

35 Jim Rankin, "How the cards have played out since 1957" *Toronto Star* (26 May 2015), online: <https://www.thestar.com/news/gta/2015/05/26/how-the-cards-have-played-out-since-1957.html> archived at [https://perma.cc/5CN2-VDCD?type=image].

36 Tulloch, *supra* note 7 at 38.

37 Rankin, *supra* note 35.

38 2005 was named the "Year of the Gun" because it resulted in 52 gun-related deaths. See Tulloch, *supra* note 7 at 38.

39 Public Safety Canada, *Toronto Anti-Violence Intervention Strategy* (Synopsis) (2013), online: <https://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/cnmcs-plcng/ndx/snpss-en.aspx?n=72> archived at [https://perma.cc/3H9X-G95A].

revealing how arbitrary the practice had become over the years. While the stated intention of TAVIS was to reduce gun violence, it gained notoriety for producing the city's highest carding rates, affecting predominantly Black communities.[40]

In 2008, the practice underwent a further change when the information filled out for "any person or vehicle of interest during the course of [an officer's] duties," then referred to as "Field Information Reports ("FIR")," could be entered directly into a computer database.[41] By 2012, less than one in 10 cards were completed specifically for intelligence gathering purposes, and the practice had expanded beyond the boundaries of the designated crime hotspots.[42] Since this time, the practice has been subject to both rebranding and technological advancement, yet the essential characteristics have remained mostly unchanged.

While conversations surrounding street checks have been particularly pronounced in Toronto, the practice takes place nationwide, often under different labels. Vancouver,[43] Edmonton,[44] and Halifax,[45] amongst other jurisdictions, engage in "street checks"; Calgary has carried out "check-up slips"[46] and "info-posts"[47]; and Saskatoon has recently re-labelled the practice "contact interviews."[48]

B. The Emergence of Allegations of Racial Profiling

In 2002, the *Toronto Star* published the first of a series of articles focused on the prevalence of racial profiling of Black people. The series, entitled *Singled Out*, was based on the Toronto Police's arrest and charge data from 1996–2002, which revealed significant disparities between the way Blacks and whites were treated by law enforcement.[49] As Carol Tator and Frances Henry detail extensively in their book, the series sparked widespread conversation and controversy, generating hundreds of news stories, opinion pieces, and editorials, ultimately leading to what the authors describe as a "discursive crisis."[50] This crisis revealed ruptures between majority-minority relations in Canada; while the series

40 Wendy Gillis, "Experts warn against return to policing that targets 'communities and not individuals'" *Toronto Star* (6 July 2018) online: <https://www.thestar.com/news/gta/2018/07/06/experts-warn-against-return-to-policing-that-targets-communities-and-not-individuals.html> archived at [https://perma.cc/N9JG-F4Z3?type=image].

41 Rankin, *supra* note 35.

42 *Ibid*.

43 Vancouver Police Department, *supra* note 17.

44 Edmonton Police Service, "Understanding Street Checks" (29 June 2017), online: <https://www.edmontonpolice.ca/News/UnderstandingStreetChecks> archived at [https://perma.cc/NM56-5RWY].

45 Anjuli Patil, "Halifax residents call for stop to street checks after racial profiling report" *CBC News* (30 March 2019), online: <https://www.cbc.ca/news/canada/nova-scotia/halifax-street-checks-racial-profiling-rally-1.5078428> archived at [https://perma.cc/R6GZ-28J9].

46 CBC News, "Police carding a useful tool for Calgary police, says chief" *CBC News* (28 June 2016), online: <https://www.cbc.ca/news/canada/calgary/calgary-police-carding-meeting-1.3655719> archived at [https://perma.cc/5JX6-DGPK].

47 CBC News, "Calgary police 'carding' practice to be modernized, made more accountable" *CBC News* (5 October 2016), online: <https://www.cbc.ca/news/canada/calgary/calgary-police-carding-1.3791827> archived at [https://perma.cc/M28U-DFW8].

48 Guy Quenneville, "What Sask. civilians should know about new police street check rules" *CBC News* (6 June 2018), online: <https://www.cbc.ca/news/canada/saskatoon/sask-police-commission-contact-interview-1.4693987> archived at [https://perma.cc/7PYP-7NH5].

49 For example, the data showed that Black drivers were disproportionately ticketed for violations that surfaced only following a traffic stop, and were significantly more likely to be held for bail than white offenders for drug possession charges. See Carol Tator and Frances Henry, *Racial Profiling in Canada: Challenging the Myth of 'A Few Bad Apples'* (Toronto: University of Toronto Press Incorporated, 2006) at 4.

50 *Ibid* at 5.

validated the lived experiences of Black community members and confirmed what many targeted individuals had been claiming for years, it faced considerable critique from those in institutions of power. Police Chief Julian Fantino's indignant remarks demonstrate:

> We do not do racial profiling. We do not deal with people on the basis of their ethnicity, their race, or any other factor. We're not perfect people but you're barking up the wrong tree. There's not racism… it seems that, according to some people, no matter what honest efforts people make, there are always those who are intent on causing trouble.[51]

The rhetoric employed by many white elites[52] perpetuated both the "denial of racial profiling in policing; and the social construction of Blacks as the 'other.'"[53]

The discourse of denial relies on the fiction that Canadian society and its institutions are colour-blind and structured around the principles of equality and liberalism. To concede that law enforcement agencies practice racial profiling would be to reify racism and undermine the democratic values on which Canada prides itself. Instead, by dismissing racial profiling outright, those in power attempted to reduce the widespread discrimination experienced by the Black community to individualized instances of racial bias, carried out by "a few bad apples." This framing ignored the systemic nature of racism,[54] and deflected responsibility from the institution to the individual, in effect insulating the broader structure of policing from critique.[55]

Moreover, while denying the existence of racial profiling, white elites simultaneously suggested that criminality was inherent to the Black community, thus justifying the disproportionate police attention they received. This was particularly amplified in regard to the discourse surrounding the "war on drugs" and the moral panic it engendered. Beginning in the mid-1980s, Canada mimicked the American approach to drug enforcement, creating a racialized profile of a drug courier that led to the overrepresentation of Blacks arrested for drug offences. This unsurprisingly lead to racial discrepancies within the criminal justice system more broadly, confirming the legitimacy of the racialized profile itself, and circuitously legitimizing increased surveillance.[56] By racializing crime in this way, police and politicians alike essentially condoned the very thing they claimed did not occur: racial profiling. This rhetorical dance displaced blame one step further, from the institution, to the "bad apples," to their targets, who were characterized as unruly,

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51 Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (November 2018), online: <http://ohrc.on.ca/sites/default/files/TPS%20Inquiry_Interim%20Report%20EN%20FINAL%20DESIGNED%20for%20remed_3_0.pdf#overlay-context=en/news_centre/ohrc-interim-report-toronto-police-service-inquiry-shows-disturbing-results> at 43 archived at [https://perma.cc/HW4K-BMXW]

52 Included within this group of white elites were the chief of police, the police services board, the Ontario minister for public safety and security, the mayor of Toronto, and the president of the Toronto Police Association. See Smith, *supra* note 34 at 25.

53 Tator and Henry, *supra* note 49 at 123.

54 Racial profiling is more than individualized expressions of prejudice, and "occurs when law enforcement or security officials, consciously or *unconsciously,* subject individuals at any location to heightened security based solely or in part on race, ethnicity, Aboriginality, place of origin, ancestry, or religion, or on stereotypes associated with any of these factors rather than on objectively reasonable grounds to suspect that the individual is implicated in criminal activity." [emphasis added] See Tanovich, *supra* note 47 at 13.

55 This framing also gave credence to the perspective that "racial bias" could be corrected through simple changes such as increasing cultural sensitivity training and hiring more officers of colour. See Tator and Henry, *supra* note 49, at 17.

56 David M. Tanovich, *The Colour of Justice* (Toronto: Irwin Law, 2006), at 85–87.

disruptive, and dangerous.[57] Not only did this "othering" legitimize racist stereotypes, it also generated a narrative of victim-blaming whereby Toronto's Black community was chastised and derided for failing to take responsibility for its collective actions and alleged propensity for deviance. As Tator and Henry explain, "the voice of white public authority focused strongly and consistently on the Black community's failure to act like 'responsible citizens'"[58] and further reinforced and perpetuated the notion that race and crime are inextricably linked.

While responses to *Singled Out* were polarizing, the series incited a public conversation. The following year, the Kingston Police launched an experimental data collection project,[59] intended to gather information on the kinds of contacts being made between officers and the broader public. As stated by Chief William J. Closs, "this project grew out of our genuine interest in addressing the issue of racial profiling in policing" and "was an honest effort to move beyond denial and to cause change."[60] In 2005, the results were released, indicating that Black residents, specifically young males, were more likely to be stopped and questioned than any other demographic group.[61] That year, the Ontario Human Rights Commission also released a report entitled *Paying the Price*, featuring the stories and experiences of those subject to racial profiling.[62] These accounts not only demonstrated the toll that racial profiling has on its targets, but also indicated how the dismissal of concerns erodes public confidence and breeds mistrust and antagonism.

In 2010, the *Toronto Star* released a second series of articles, entitled *Race Matters,* that documented the continued prevalence of racial profiling in the city. While the 2002 reporting focused on the disproportionately harsh treatment of racialized persons in the criminal justice system, *Race Matters* focused on how racialized persons were subject to street checks in incommensurate rates. The series included both anecdotal accounts of carding and a detailed analysis of the city's contact card data for the 2003–2008 period.[63] Over those six years, the Toronto Police filled out 1.7 million contact cards, the majority pertaining to non-criminal encounters.[64]

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57 Tator and Henry, *supra* note 49 at 13.

58 *Ibid* at 139.

59 From 2003–2004, officers were required to make a report each time they conducted a traffic or pedestrian stop.

60 William J. Closs, *The Kingston Police Data Collection Project: A Preliminary Report to the Kingston Police Services Board* (17 March 2005), online: <https://qspace.library.queensu.ca/bitstream/handle/1974/8656/Bias-Free%20Policing%20-%20Kingston%20Police.pdf?sequence=1&isAllowed=y> at 1 archived at [https://perma.cc/7HJY-L2MY].

61 Scott Wortley and Lysandra Marshall, *Bias Free Policing: The Kingston Data Collection Project Final Results* (20 September 2005), online: <https://qspace.library.queensu.ca/bitstream/handle/1974/8655/Bias%20free%20policing%20-%202005%20-%20Wortley%20-%20Policy.pdf?sequence=1&isAllowed=y> archived at [https://perma.cc/G4LU-5DU8].

62 Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (2005), online: <http://www.ohrc.on.ca/sites/default/files/attachments/Paying_the_price%3A_The_human_cost_of_racial_profiling.pdf> archived at [https://perma.cc/2Z8U-ML53].

63 Andrew Bailey and Jim Rankin, "Toronto Star Analysis of Toronto Police Service Data – 2010: Advanced Findings" (2010), online: <https://www.thestar.com/content/dam/thestar/static_images/advancedfindings2010.pdf> archived at [https://perma.cc/R536-MH8R].

64 "General investigation" garnered the largest number of entries, with 158,685 of the 289,413 stops falling under this heading. Close behind were "traffic stop" (47,593), "vehicle related" (15,500), and "loitering" (10,885), with more serious offences accounting for comparatively few contacts. See *Ibid* at 9.

By this time, the prevalent discourse had shifted from denial to justification, as the influx of affirmative data made outright dismissal an untenable position.[65] However, despite the acknowledgement that racial profiling does occur, the police continued to defend the practice of carding as a critical crime-solving tool, intended to promote public safety.[66]

In 2013, the *Toronto Star* published a third series entitled *Known to Police*, analyzing data from the 2008–2012 period. Again, the analysis revealed stark racial discrepancies, exceeding the proportion of Black New Yorkers subject to the city's racist stop and frisk policy.[67] The chair of Toronto Police Services Board, Alok Mukherjee, called these statistics "devastating" and "unacceptable"[68] and challenged the long-repeated reprise that the prevalence of gun violence justified "the legitimacy of potentially carding every single young black man in the city."[69] Moreover, despite heightened awareness and widespread criticism of the stops, the analysis revealed that the frequency at which carding occurred had actually increased.

In the succeeding years, numerous reports continued to affirm both the prevalence of racial profiling in the practice of carding, and its destructive consequences. Perhaps the most seminal piece on racial profiling comes from Desmond Cole, a reporter and activist who shared his own experiences with carding in the award-winning editorial "The Skin I'm In: I've been interrogated by police more than 50 times—all because I'm black."[70] As Cole explains, Black people must always be "prepared to prove [they are not] criminals,"[71] and must carry the burden of being considered "suspect" or an "outsider" in predominantly white spaces.[72] The devastating effects of carding also circulated widely in the *Star* piece entitled, "The man police can't stop carding,"[73] which chronicled the ongoing surveillance, harassment, and trauma that Dale James experienced at the hands of the police. James was subject to 43 encounters with the police from April 2006 to

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65 However, as noted in the *Star,* the response to *Race Matters* was largely without teeth: "Instead of denying that racial profiling occurs, the chief and other senior officers admit it happens, imply it's normal, and go on to explain why the police practice of carding so many blacks is not something we should worry about." See John Sewell, "Racial profiling still has no place here" *Toronto Star* (11 February 2010), online: <https://www.thestar.com/opinion/2010/02/11/racial_profiling_still_has_no_place_here.html> archived at [https://perma.cc/R5WX-SGPR].

66 Chief Bill Blair indicated that officers were being deployed to neighbourhoods that experience high victimization, typically those areas where poverty and race intersect, and emphasized that being carded does not amount to a criminal record. While not explicitly attributing criminality with race, this justification nonetheless legitimized the over-policing of these communities. See Jim Rankin, "When good people are swept up with the bad" *Toronto Star* (6 February 2010), online: <https://www.thestar.com/news/gta/2010/02/06/when_good_people_are_swept_up_with_the_bad.html> archived at [https://perma.cc/E26U-T7U9].

67 Jim Rankin and Patty Winsa, "As criticism piles up, so do the police cards" *Toronto Star* (27 September 2013), online: <https://www.thestar.com/knowntopolice2013/carding.html> archived at [https://perma.cc/7ZYM-8QFU].

68 *Ibid*.

69 *Ibid*.

70 Cole, *supra* note 5.

71 *Ibid*.

72 Cole was recently stopped by Vancouver police for an alleged bylaw infraction while smoking a cigarette on a sidewalk near Stanley Park. While the officer threatened to arrest him, he eventually left without issuing a ticket. The sad irony of the situation is that Cole was in Vancouver that weekend to deliver a speech on racial inequality.

See Laura Kane, "Anti-carding activists Desmond Cole stopped by police in Vancouver" *The Canadian Press* (15 November 2018), online: <https://bc.ctvnews.ca/anti-carding-activist-desmond-cole-stopped-by-police-in-vancouver-1.4178555> archived at [https://perma.cc/8PS2-PNQF].

73 Jim Rankin, "The man police can't stop carding" *Toronto Star* (14 August 2016), online: <https://www.thestar.com/news/insight/2016/08/14/the-man-police-cant-stop-carding.html> archived at [https://perma.cc/B7K5-NULK].

November 2015, interactions that left him "feeling bullied, profiled and humiliated."[74] Sadly, these accounts are not unique, and countless other racialized folk have and continue to experience the dehumanizing effects of profiling.

Not only do the visceral effects of profiling bear down on racialized and Indigenous communities, making them feel unsafe and hyper-visible within public space, but this heightened surveillance also affects its targets in ways that extend beyond the immediacy of the interaction. Street check data has been recognized as impacting individuals' employment and educational opportunities and has led to the creation of profiles, stored in police databases, that are used to justify continued surveillance of innocent people.[75]

C. Ontario's Legislative Response

In 2016, the Ontario provincial government responded to the controversy surrounding carding by enacting Regulation 58/16 under the *Police Services Act*.[76] In doing so, Ontario became the first province to formally regulate street checks and provide police departments with "'clear and consistent rules' for so-called 'voluntary' police-public interactions.'"[77] The regulation now explicitly prohibits officers from eliciting identifying information if they are motivated by a perception that the individual is part of a racialized group.[78] The regulation also outlines several duties that must be fulfilled before attempting to collect information, including informing the individual of their right to walk away[79] and explaining the reason for the stop.[80]

Although the regulation imposes some constraints on the practice, its scope of protection is minimal, especially concerning well-being checks. The regulation only applies to circumstances where the attempt to gather information is "done for the purpose of: (1) inquiring into offences that have or might be committed; (2) inquiring into suspicious activities to detect offences; or (3) gathering information for intelligence purposes".[81] This implicit limitation excludes a wide range of interactions, including when an officer is assisting individuals through a well-being check.[82] As Justice Tulloch notes, "officers should not be discouraged from assisting members of the public because of concerns over having to fill out paperwork" and emphasizes that the regulation should not apply in circumstances where the officer intends to input identifying information in a "database in order to be able to follow-up on the well-being of the person who was checked."[83]

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74 *Ibid*.

75 Tulloch, *supra* note 7 at 43. Street-check data has also been linked to "counter-terrorism" initiatives in Ontario. A 2014 document that was posted by a local police department and then later removed indicated that street check data was being shared between the police, the Mounties, and CSIS, raising questions and concerns about how this data was being used. See Jim Rankin and Wendy Gillis, "Ontario police forces share carding data with Mounties, CSIS" *Toronto Star* (23 April 2017), online: <https://www.thestar.com/news/canada/2017/04/23/ontario-police-forces-share-carding-data-with-mounties-csis.html> archived at [https://perma.cc/CY7Y-TFUN].

76 O Reg 58/16.

77 The Canadian Press, "Ontario regulation bans random street checks by police" *Macleans* (22 Mar 2016), online: <https://www.macleans.ca/news/canada/ontario-regulation-bans-random-street-checks-by-police/> archived at [https://perma.cc/YNZ2-VUV6].

78 *Supra* note 76, ss 5(1)(a).

79 *Ibid*, ss 6(1)(a).

80 *Ibid,* ss 6(1)(b). Officers are also required to provide individuals with a formal receipt that includes the officer's name and badge number, along with information regarding how to contact the Independent Police Review Director and instructions on how to access the individual's record through the *Municipal Freedom of Information Protection of Privacy Act,* RSO 1990, c M.56 or *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F.31. See ss 7(4).

81 Tulloch, *supra* note 7 at 88. [emphasis in original]

82 *Ibid* at 89.

83 *Ibid*.

Critics have waged that the regulation is an insufficient response to the problem at hand. Anti-carding activists have expressed concerns that the new rules only serve to codify carding as a legitimate practice, and continue to allow the police to question those who appear suspicious, a highly discretionary assessment that has consistently led to racial profiling.[84] The Ontario Human Rights Commission has taken issue with the narrow scope of the regulation and the circumstances in which it applies, noting that interactions where police are investigating a specific offence can be interpreted broadly, and its exclusion "threatens to render [the regulation's] mandate meaningless."[85] Moreover, the regulations have left it up to individual police boards to decide what to do with the data that has been collected over the past decade,[86] and the Toronto Police has stated that it intends to keep the historic data, subject to limited access.[87]

D. The Current Moment

Because the discourse surrounding racial profiling has evolved significantly over the past two decades, widespread racial disparities in policing data can no longer be unequivocally dismissed. In a sense, the Ontario provincial government had no choice but to act given the extensive recognition that racial profiling is an ongoing phenomenon that is inconsistent with the liberal values on which Canada prides itself.

Yet, while police forces across the country concede that racial profiling does occur, they continue to rely on justifications that implicitly reinforce a connection between race and criminality, and often refer to the overrepresentation of racialized demographics within the criminal justice system to validate their own disparate data. These justifications function in a circular way, ignoring the critical contextual piece: over-policing begets over-representation. To claim that the police "[do] not control where crime falls along racial and gender lines"[88] is to engage in an insidious practice of institutional forgetting. It is due to the tireless work and advocacy of racialized, Indigenous, marginalized, and other allied communities that these long-standing refrains are repeatedly challenged.

III. VANCOUVER STREET CHECKS IN CONTEXT

The practice of street checks in Vancouver is rooted in a specific context, one that is unique to the city and its demographics, geography, and history. Street checks have functioned quite differently in Vancouver relative to Toronto, with the VPD relying more heavily on tropes of "well-being" to justify over-policing of marginalized communities. Ultimately, both jurisdictions exhibit patterns of over-surveillance, and use pervasive stereotypes of the city's Indigenous community to justify continued interactions with the criminal justice system.

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84 John Rieti and Chris Glover, "Toronto police board approves new rules for street checks, angering critics" (17 November 2016), online: <https://www.cbc.ca/news/canada/toronto/police-board-approves-policy-1.3855805> archived at [https://perma.cc/2PFF-XYSX].

85 Ontario Human Rights Commission, *Submission to the Independent Street Checks Review* (1 May 2018), online: <http://www.ohrc.on.ca/en/ohrc-submission-independent-street-checks-review> archived at [https://perma.cc/NS77-9GXX].

86 Alok Mukherjee, "Time for police to destroy carding data" *Now Toronto* (27 April 2017), online: <https://nowtoronto.com/news/time-for-police-to-destroy-carding-data/> archived at [https://perma.cc/AVQ6-VC3L].

87 *Ibid*.

88 Adam Palmer, "Statement on Street Checks from Constable Adam Palmer" *Vancouver Police Department* (14 June 2018), online: <https://mediareleases.vpd.ca/2018/06/14/statement-on-street-checks-from-chief-constable-adam-palmer/> archived at [https://perma.cc/9CA9-VK73].

As laid out in the introduction, the VPD intended the report to respond to allegations of racial profiling, as the city's street check data revealed significant racial discrepancies. Ultimately, the department's analysis revealed that:

> - The overwhelming majority of street checks are of persons previously involved in crime;
> - Street checks occur in areas where violent crime is most prevalent;
> - Street checks can be a result of a call for service from the public and street checks occur most in areas where we have high concentrations of calls for service from the public; and
> - Street checks are also used to check on the well-being of vulnerable individuals, such as those who are struggling with mental health, addiction issues, or homelessness.[89]

The VPD define street checks as a "type of interaction arising from *non-random* contact between members of the public and the police" and assert that they "are not necessarily negative in nature, as many street checks are done to ensure the well-being and safety of citizens."[90] The report is cognizant of the cross-national concerns that have arisen with regard to racial profiling, and it further acknowledges the psychological and physical impact of profiling, its broader impact on society, and the way in which perceived discrimination by law enforcement erodes public trust and confidence.[91] However, despite this awareness, the report does not concede that the VPD's street check policies and procedures do in fact lead to discriminatory outcomes.[92] In fact, it distances the VPD's targeted practice from the controversy surrounding arbitrary, random checks in both Ontario and Edmonton.[93]

The first three reasons that the VPD cites for conducting streets checks are not novel, but rather pertain to the police's general crime prevention duties. However, the report's reliance on well-being checks as the primary reason for stopping, and recording identifying information, of a disproportionate number of Indigenous women deviates from other oft-cited justifications. Unlike other forms of street checks, the VPD maintains that well-being checks are an extension of the police's affirmative duty to:

> [T]ake action that prevents harm to any individual. [A duty that] is even more vital to fulfill when it pertains to potentially vulnerable persons including those dealing with mental health challenges, addiction issues or homelessness.[94]

Despite the prevalence of well-being checks, they are not defined in the report and the VPD does not have any formal policy regarding how and when they are to be conducted.[95] However, the report offers the following circumstances as examples of when a well-being check may be warranted: "during the winter months, when temperatures drop below

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89 Vancouver Police Department, *supra* note 17 at 2.

90 *Ibid* at 12. [emphasis added]

91 *Ibid* at 24.

92 Josh Paterson, "Re: Service or Policy Complaint #2018-133 on Street Checks" *British Columbia Civil Liberties Association* (26 September 2018), <https://bccla.org/wp-content/uploads/2018/09/Microsoft-Word-Brief-response-to-VPD-report-street-checks-Sept-26-2018-UBCIC-BCCLA-1.pdf> archived at [https://perma.cc/93LE-QYJA].

93 Vancouver Police Department, *supra* note 17 at 21.

94 *Ibid* at 2.

95 The VPD's Director of Planning, Research and Audit confirmed the lack of a formal policy on well-being checks over email.

freezing and vulnerable members of the community are at risk for exposure to the elements,"[96] to "assist in locating missing persons,"[97] and to ensure that those with drug dependency issues are "able to care for themselves, and to make them aware of available overdose prevention and treatment services."[98]

It is important to note here that:

> The role of police officers in Canada has undergone significant reform in the past 20 years. [And] the duties performed by police have expanded beyond traditional crime prevention and law enforcement to include a role more akin to that of a social worker, mental health professional, and community outreach worker.[99]

This shift in the nature of police work is not unique to Vancouver. In other jurisdictions, such as Edmonton, officers have been required to address an increasing range of social issues that extend beyond typical law enforcement activities.[100] The expanded scope of police duties has been attributed in part to widespread disinvestment in social services, and the subsequent "downloading"[101] of duties that have historically been relegated to other public service agencies.

Evidently, neoliberal governance and the dismantling of crucial social services has changed the nature of police work, and it is not this article's intention to challenge the fact that police are, in essence, front line workers. Rather, while well-being checks may be useful in certain circumstances, they are also a highly discretionary mechanism that may not only duplicate the experience of an arbitrary street check, but may also be used in a disingenuous way to acquire an individual's identifying information.

A. Proactive Policing: Laying the Foundations for Racial Profiling

Reflective of the changing nature of police work, the VPD practice "problem oriented policing," which, as Sergeant Jason Robillard has publicly stated, is "a proactive, targeted approach to reduce crime or after an underlying problem has been identified."[102] This form of policing is preventative in nature, and requires officers to "[maintain] a high-visibility presence by walking the beat and conducting routine vehicle patrol" and "[identify]

96 Vancouver Police Department, *supra* note 17 at 10.

97 *Ibid* at 14.

98 *Ibid*.

99 *Ibid* at 12.

100 Edmonton's street check review states that officers have been required to do the following: "checking on the well-being of persons, finding persons who are reported as missing, and, increasingly, interacting with persons with mental illness and addiction issues and those who are marginalized and vulnerable." See Curt Taylor Griffiths, Ruth Montgomery, and Joshua J. Murphy, "City of Edmonton Street Checks Policy and Practice Review" (June 2018), online: <https://edmontonpolicecommission.com/wp-content/uploads/2019/02/EPS-Street-Check-Study-Final-REDACTED.pdf> at 36 archived at [https://perma.cc/E6M4-XDTC].

101 Public Safety Canada, *Contemporary Policing Responsibilities* (Research Summary) (2018), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2017-s006/index-en.aspx> archived at [https://perma.cc/3H9X-G95A].

102 Sunny Dhillon, "Vancouver Police Department's use of carding disproportionately targets Indigenous people" *The Globe and Mail* (15 June 2018), online: <https://www.theglobeandmail.com/canada/british-columbia/article-vancouver-police-departments-use-of-carding-disproportionately/> archived at [https://perma.cc/GX3Z-PYKS].

problems that damage the quality of life."[103] Proactive policing is also inherently predictive, drawing upon data to identify crime hot-spots, or areas where crime and disorder are likely to be concentrated. This is confirmed in the VPD report, which states that "the deployment of police to a particular neighbourhood is not random and arbitrary but rather, premised on addressing an emerging crime and disorder issue and the best use of police resources to ensure community safety."[104]

Proactive policing appears to be a veiled manifestation of the "broken windows" theory, which asserts a causal link between disorder and crime.[105] This form of policing was popularized during Rudy Giuliani's tenure as mayor of New York, when he waged a rapacious campaign against minor offences such as graffiti, loitering, and panhandling in part of his effort to "clean up the city."[106] According to Nancy Heitzeg, the broken windows theory "emerges from the tradition of criminology which searches vainly for individual and environmental causes of crime while ignoring the vast array of well-documented structural contributors such as poverty, unemployment, lack of quality education, and racism."[107]

Policies and bylaws aimed at addressing "disorder" are often "cloaked in the populist language of civic morality, family values and neighbourhood security."[108] Order is dichotomized with disorder, and likewise, the orderly law-abiding citizen with the disorderly criminal.[109] This duality assumes that individuals are defined by these fixed qualities, but as Bernard Harcourt asserts, "the category of disorderly is itself a reality produced by the method of policing."[110] Through the discursive creation of the "disorderly" citizen, defined by specific behaviours (such as public drunkenness, panhandling, prostitution, urinating in public, squeegeeing, etc.), the police are able to control and monitor certain populations.[111] Often, perceptions of who is disorderly or lawless falls along racial lines and becomes a coded category that "maintains the literal and figurative boundaries of whiteness."[112]

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103 Both maintaining a high-visibility presence and identifying "quality of life" issues are outlined as the functions of the police constable in the position profile. See Vancouver Police Department, "Vancouver Police Department Position Profile" (12 August 2003) online: <http://www.missingwomeninquiry.ca/wp-content/uploads/2011/10/EXHIBIT-50G-Document-entitled-Vancouver-Police-Department-Position-Profile-Police-Constable-Neighborhood-Policing-Team.pdf> archived at [https://perma.cc/HT2J-MSYU].

104 Vancouver Police Department, *supra* note 17 at 13.

105 The theory's central thesis is that: "if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken." See George L. Kelling and James Q. Wilson, "Broken Windows: The Police and Neighbourhood Safety" *The Atlantic* (March 1982), online: <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> archived at [https://perma.cc/7X8Y-B8LQ].

106 Neil Smith, *The New Urban Frontier: Gentrification and the Revanchist City* (New York: Routledge, 1996) at 224.

107 Nancy Heitzeg, "'Broken Windows,' Broken Lives and the Ruse of 'Public Order' Policing" *Truthout* (17 July 2015) online: <https://truthout.org/articles/broken-windows-broken-lives-and-the-ruse-of-public-order-policing/> archived at [https://perma.cc/257U-NK76].

108 Smith, *supra* note 106 at 207.

109 Bernard Harcourt, "Reflecting on the Subject: A Critique of the Social Influence Conception of Deterence, the Broken Windows Theory, and Order-Maintenance Policing in New York" 97 Mich LJ 291 at 297.

110 *Ibid* at 298.

111 Just as the discursive creation of the deviant Black body has justified over-policing Blackness, so too has the discursive creation of the disorderly citizen justified over-policing poverty, a practice that is compounded for those whose racialization intersects with their socioeconomic status.

112 Heitzeg, *supra* note 107.

B. Proactive Policing in the DTES

For years, the Downtown East Side, often referred to as "Canada's poorest postal code,"[113] has been the primary focus of the VPD's proactive policing strategy. The DTES is viewed as an area where "homelessness, poverty, affordable and quality housing, unemployment, mental health, drug use and crime"[114] are particularly concentrated. As a material space,[115] the DTES has a complicated history, marked by "successive rounds of capital investment and disinvestment in urban 'real estate,'"[116] that have culminated in stark socio-economic and racial stratification. The community has also long been characterized by "unrelenting images of deviance, disease, and broken bodies [that have been] increasingly framed by prevailing understandings of poverty, gender, and indigeneity"[117]; such images have become ingrained in the popular imaginary.

Like the majority of other poor urban spaces across North America, the DTES has been subject to a neoliberal, frontier ideology[118] and the gentrifying impulse to "clean up"[119] the neighbourhood and the bodies associated with its apparent decay. This process has manifested through both insidious mechanisms, such as increasing rent and dismantling and decentralizing crucial social services, and overt mechanisms, such as racial profiling and the criminalization of poverty through bylaw enforcement.[120]

Launched in the early 2000s,[121] the Beat Enforcement Team ("BET") is the primary team policing the DTES. This team is a division of the VPD with officers who patrol the neighbourhood by foot and maintain a high visibility presence.[122] While the VPD have stated that their intention is to foster trust by encouraging increased engagement with community members, many residents associate the BET with "routine street checks, detention, arrests, search and seizure, bylaw tickets, use of force, extortion of information,

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113 The Honourable Wally T. Oppal, *Missing Women Commission of Inquiry, Forsaken: The Report of the Missing Women Commission of Inquiry Executive Summary* (Vancouver: Missing Women Commission of Inquiry) <http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/Forsaken-ES-web-RGB.pdf> at 12 archived at [https://perma.cc/Z7ZC-RTBQ].

114 City of Vancouver, *Downtown Eastside: Local Area Profile 2013* (7 November 2013), online: <https://vancouver.ca/files/cov/profile-dtes-local-area-2013.pdf> archived at [https://perma.cc/E7NJ-9B2G].

115 It is also important to note that gentrifying processes are only an extension of colonial processes, and as Nicholas Blomley points out, "native peoples have occupied and used these lands since, they say, the beginning of time, establishing summer camps, villages, and fishing settlements." See Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2003) at 32.

116 *Ibid*.

117 *Ibid* at 33.

118 In *New Urban Frontier*, Neil Smith posits the inner city as the "new frontier" to be colonized by the gentry, who regenerate and cleanse otherwise hostile urban landscapes. See Smith, *supra* note 106.

119 Yasmin Jiwani and Mary Lynn Young, "Missing and Murdered Women: Reproducing Marginality in News Discourse" (2006) 31:4 Canadian Journal of Communication 895.

120 Darcie Bennet and DJ Larkin, *Project Inclusion*, (2018) Pivot Legal Society, online: <http://www.pivotlegal.org/full_report_project_inclusion_b> at 30 archived at [https://perma.cc/Y2D8-P5CX].

121 DH Vancouver Staff, "What should policing in the Downtown Eastside look like?" *Daily Hive Vancouver* (3 June 2015), online: <https://dailyhive.com/vancouver/policing-downtown-eastside-look-like/> archived at [https://perma.cc/7WB3-VAS8].

122 While the BET has been associated with the increased enforcement of poverty-related offences, their presence has been welcomed by some, such as the executive director of the business improve association, DTESHastings Crossing. See Jessica Kerr, "Vancouver police increase presence in the Downtown Eastside" *Vancouver Courier* (31 January 2018) online: <https://www.vancourier.com/news/vancouver-police-increase-presence-in-the-downtown-eastside-1.23160339> archived at [https://perma.cc/K2LC-75Z5].

use of police dogs, escalation during a mental health crisis, entry in homes, [and] catch-and release as a form of intimidation."[123] In the following section, I will explore how residents of the DTES, specifically Indigenous women, have been subject to both over-policing and under-protection. This context provides a framework for understanding why those targeted may nonetheless feel more unsafe, despite the benign stated objective of the police practice.

C. Bylaw Enforcement in the DTES: A Previous Manifestation of Well-Being Checks

Prior to the 2010 Olympic Games, the VPD increased bylaw enforcement in what is now referred to as "the ticketing blitz of 2008,"[124] during which residents of the DTES were disproportionately ticketed for a range of bylaw offences. The 2009 Strategic Plan's policy explicitly mandated the BET increase its time spent "curbing and deterring disorder on the street."[125] The BET's approaches included: increased discretion for arresting and charging individuals for simple drug possession, increased bylaw infractions for nuisance offences, increased enforcement of the *Safe Streets Act*[126] and the *Trespass Act*,[127] and a "minimum of 4 checks per BET member per block."[128] While the VPD spokesperson at the time, Constable Tim Fanning, cited "quality of life and safety for all residents and visitors in the area"[129] as the impetus for pursuing such aggressive policing strategies, the heightened criminalization[130] of street offences was widely criticized as a mechanism for sanitizing the "city's black eye"[131] in light of the impending games. In particular, the "4 check per block" requirement imposed on the BET was intended to discover and apprehend residents with outstanding warrants, and was ultimately challenged as unconstitutional.[132]

The increased issuance of bylaw tickets was coupled with the implementation of the *Assistance to Shelter Act*,[133] which empowered the police to force people who are street entrenched into shelters through the use of "non-forceful touching."[134] Posited as life-saving legislation intended to prevent extreme-weather related deaths, it was dubbed the "Olympic Kidnapping Act" by DTES residents and activists groups, who challenged the draconian way in which it permitted the police to deposit people who are street entrenched at shelters

123 Carol Muree Martin and Harsha Walia, *Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside,* (2019) Downtown Eastside Women's Centre, online: <http://dewc.ca/wp-content/uploads/2019/03/MMIW-Report-Final-March-10-WEB.pdf> archived at [https://perma.cc/FHN6-QEGF].

124 Pivot Legal Society and VANDU, "Backgrounder on By-Law Enforcement in Vancouver's Downtown Eastside" (2013), online: <http://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/mailings/82/attachments/original/Ticketing_Backgrounder.pdf?1362558098> archived at [https://perma.cc/N24Q-LLFV].

125 Carlito Pablo, "Vancouver police plan Downtown Eastside crackdown ahead of Olympics" *The Georgia Straight* (21 January 2009) online: <https://www.straight.com/article-197388/vancouver-police-plan-downtown-eastside-crackdown-ahead-olympics> archived at [https://perma.cc/C6LU-6JWG].

126 SBC 2004, c 75.

127 RSBC 2018, c 3.

128 Pivot Legal Society and VANDU, *supra* note 125.

129 Pablo, *supra* note 125.

130 As Don Mitchell states, "quality of life initiatives in the contemporary city rely on *fear* as a driving force and thus tend toward… the wholesale elimination of a class of people who have nowhere else to *be* but in public." See Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: The Guilford Press, 2003) at 9.

131 Lucy Hyslop, "Winter Olympics on slippery slope after Vancouver crackdown on homeless" *The Guardian* (3 February 2010), online: <https://www.theguardian.com/world/2010/feb/03/vancouver-winter-olympics-homeless-row> archived at [https://perma.cc/62YR-HCGY].

132 Pivot Legal Society and VANDU, *supra* note 124.

133 SBC 2009, c 32.

134 Hyslop, *supra* note 131.

without their consent and with no regard for their safety, belongings, or community.[135] As noted by the MLA for Vancouver-Hastings at the time, Shane Simpson, the legislation had the consequence of deeming those who refused to go to a shelter as "mentally ill," and thus making them vulnerable to apprehension under the *Mental Health Act,*[136] leading to a catch 22: "If you're opposed to coming to the shelter in extreme weather, then you must have a mental health issue so I'll use this other piece of legislation to take action."[137] Together, these two acts provided the police with expansive authority to control street-entrenched populations, all in the name of ensuring their well-being. While poverty and the lack of accessible housing was and continues to be a pervasive problem in the DTES, these legal mechanisms targeted the aesthetics of poverty and not its root causes, and were viewed by many as a desperate attempt remove undesirable persons from public spaces.[138]

Both the VPD and City of Vancouver eventually acknowledged that the "ticketing blitz" was ultimately ineffective. Consequently, city councillors partnered with community groups to address the same issues that the VPD had endeavoured to target through a range of grassroots initiatives, such as "the creation of a vendors market on Sundays, improved pedestrian safety initiatives, and the expansion of access to public toilets for residents who don't have a decent bathroom where they live."[139] Yet, despite the blitz's failure to invoke any changes in behaviour, the 2013 Strategic Plan illustrated a continued insistence on proactive policing initiatives aimed at controlling disorder through bylaw enforcement.[140]

That same year, Pivot Legal Society ("Pivot") and the Vancouver Area Network of Drug Users ("VANDU") obtained police data on city-wide bylaw enforcement through a freedom of information request. The statistics indicated that once again, enforcement was disproportionately concentrated in the DTES, with 76 percent of jaywalking and 31 percent of panhandling tickets being issued in the area. Earlier that year, Pivot and VANDU also acquired data that revealed that 95 percent of street-vending tickets were handed out in the DTES. The VPD maintained that the numbers correlate to the areas in which the offences predominantly take place. However, unlike the nuisance offences of panhandling and street vending, Pivot pointed out that jaywalking occurs uniformly across city intersections and bears no relation to socioeconomic status.[141]

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135 Andrew MacLeod, "New Law Lets Police Force Homeless to Visit Shelter" *The Tyee* (30 October 2009), online: <https://thetyee.ca/News/2009/10/30/PoliceForceHomeless/> archived at [https://perma.cc/KCR4-MS3T].

136 RSBC 1996, c 288.

137 *Ibid*.

138 Raina Delisle, "The Olympics' other legacy" *This Magazine* (March/April 2010), online: <https://search-proquest-com.ezproxy.library.uvic.ca/docview/1016221194/fulltextPDF/47163CD16FC5401EPQ/1?accountid=14846> archived at [https://perma.cc/QK7P-4ZTB].

139 Pivot Legal Society and VANDU, *supra* note 124.

140 *Ibid*.

141 Douglas King, "Pivot and VANDU slam VPD over city bylaw enforcement" *Pivot Legal Society* (6 June 2013), online: <http://www.pivotlegal.org/pivot_and_vandu_slam_vpd_over_city_bylaw_enforcement> archived at [https://perma.cc/9BHZ-7WYE].

The VPD responded to this assertion by claiming that the tickets were being enforced to promote public safety and "educate and deter individuals from committing the offence and possibility getting hit by a car and either injured or killed,"[142] although they had previously ignored the community's request for increased pedestrian safety measures.[143]

As stated by Douglas King, Pivot's police accountability lawyer at the time, "these statistics confirm our fears that city bylaws are not being enforced for reasons of public safety, but to circumvent the constitutional protections in this country against profiling and arbitrary detention."[144] In an interview with *The Georgia Straight*, King further noted his concern that the disproportionate ticketing of jaywalking offences in the DTES was "creating an industry of enforcement that has nothing to do with criminal behaviour and has everything to do with profiling people who are of a different social class."[145] Through the pretext of a bylaw infraction, the police were legally able to obtain an individual's identifying information, which was then used to track those with outstanding warrants.[146]

The continued issuance of bylaw tickets fostered an environment of fear and mistrust, compounding the existing antagonism between the VPD and DTES residents. As noted by Wally Oppal in the *Missing Women Commission of Inquiry* ("MWCI"),[147] the constant surveillance and fear of being targeted for outstanding fines and warrants is the primary reason why many Indigenous and marginalized women in the DTES do not feel comfortable going to the police, leading to another critical contextual point regarding the history of policing in the DTES.

D. Indigenous Women and Over-Policing in the DTES

While the DTES has been subject to rampant surveillance and over-policing through bylaw enforcement, street checks, and other discriminatory policies and practices, for years the police have simultaneously failed to take violence against Indigenous women seriously.[148] From 1997–2002, 69 women disappeared from the DTES, the majority of whom were Indigenous and poor.[149] Despite these staggering numbers, police showed a reluctance to investigate the disappearances, and consistently declined to acknowledge the possibility that they could be linked to a serial killer.[150] Instead of addressing the concerns of family members, both the police and the media characterized the missing women as drug dependent sex workers, "peripatetic wanderers forever in search of the

142 Tiffany Crawford, "Vancouver police asked to explain huge disparity in ticketing between wealthy, impoverished neighbourhoods" *Vancouver Sun* (6 July 2013), online: <http://www.vancouversun.com/vancouver+police+asked+explain+huge+disparity+ticketing+between+wealthy+impoverished+neighbourhoods/8487433/story.html> archived at [https://perma.cc/KBJ4-FMC8].

143 In fact, in 2010, VANDU members launched the Pedestrian Safety Project, an initiative intended to address the prevalence of pedestrian injuries along Hastings Street. The VPD however initially refused to implement the changes recommended by the project, which included reducing the driving speed to 30 km/h. See <http://pedestriansafety.vandu.org/> archived at [https://perma.cc/XXH2-YYXH].

144 King, *supra* note 141.

145 Marcel Chaves, "Advocacy groups accuse VPD of unfairly targeting Downtown Eastside residents for jaywalking tickets" *The Georgia Straight* (6 June 2013), online: <https://www.straight.com/news/389541/advocacy-groups-accuse-vpd-unfairly-targeting-downtown-eastside-residents-jaywalking-tickets> archived at [https://perma.cc/ZE7V-Z4ZN].

146 Pivot Legal Society and VANDU, *supra* note 124.

147 *Ibid*.

148 Martin and Walia, *supra* note 123 at 44.

149 Elaine Craig, "Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside" (2014) 60:1 McGill LJ 1.

150 Jiwani and Young, *supra* note 119 at 897.

latest fix and with no sense of responsibility."[151] Even when Robert Pickton was eventually charged and convicted for many of the murders in 2002, media reporting continued to identify the victims as "troubled, abused runaways,"[152] and associated their vulnerability with their apparent high-risk lifestyles. This narrative served to further stigmatize street-entrenched, marginally housed Indigenous women, implicitly blaming them for their own misfortune without attending to the fact that "colonial patriarchy is the highest risk factor in Indigenous women's lives."[153]

In 2012, the MWCI concluded that the investigations were a "blatant failure,"[154] caused by a range of intersecting factors, such as racist and dismissive attitudes on the part of the police, inadequate resource allocation, insensitive and offensive treatment of victims' families, and a lack of coordination between police forces.[155] As the report made clear, the missing women were forsaken not only by the police, but by society at large, marginalized by the "retrenchment of social assistance programs, the ongoing effects of colonialism, and the criminal regulation of prostitution and related law enforcement strategies."[156]

Despite this acknowledgement, community members have criticized the MWCI for failing to include the voices of those most affected by both the murders and subsequent investigations. Indigenous groups, women's groups, sex workers' groups, and other human rights organizations were denied funding to participate in the Inquiry.[157] Unfortunately, while the MWCI had the potential to repair fractured relationships between these communities and law enforcement, it has been denounced for reaffirming a toxic dynamic characterized by "colonialism, criminalization, discrimination, mutual distrust, and paternalism."[158]

E. Putting Well-Being Checks into Context

The practice of well-being checks must be understood within the particular context of how they affect Indigenous women living in the DTES. The VPD report justifies the overrepresentation of Indigenous women in the street check data as the response to the issue of missing and murdered Indigenous women and girls, stating that:

> The documented street check information—including locations where the at-risk female may frequent, friends or associates that she was with who may have means of contacting or later locating the female—provide valuable information that can be used by police if the woman goes missing.[159]

This statement implies that *any* Indigenous woman who appears to be "vulnerable" or "at-risk" may be subjected to a check, although no objective markers of "un-wellness" are offered to guide this assessment. In other words, despite being a targeted, proactive measure,

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151 *Ibid* at 898.

152 *Ibid* at 906.

153 Martin and Walia, *supra* note 123 at 43.

154 *CBC News*, "Pickton inquiry slams 'blatant failures' by police" *CBC News* (17 December 2012), online: <https://www.cbc.ca/news/canada/british-columbia/pickton-inquiry-slams-blatant-failures-by-police-1.1191108> archived at [https://perma.cc/85MH-DDHW].

155 Martin and Walia, *supra* note 123 at 45.

156 Oppal, *supra* note 113 at 111.

157 Darcie Bennett, David Eby, Kasari Govender, and Katrina Pacey, *Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry,* BC Civil Liberties Association, West Coast Women's Legal Education and Action Fund, Pivot Legal Society (2012), online: <https://d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/189/attachments/original/1353022676/Missing_Women_Inquiry_web_doc.pdf.pdf?1353022676> at 23 archived at [https://perma.cc/6EBE-C59X].

158 *Ibid* at 15.

159 Vancouver Police Department, *supra* note 17 at 2.

without a carefully delineated framework, a well-being check may be no less arbitrary than a random street check. This is especially the case if a well-being check is informed by pervasive stereotypes of Indigenous women (among other racialized and marginalized persons living in the DTES). Similar to the response by white elites in Toronto, the VPD appear to be claiming that they do not practice racial profiling, while simultaneously offering reasons why their attention is disproportionately, and justifiably, directed toward a specific population. While this practice may be read as an attempt to remedy past wrongs by keeping tabs on a vulnerable community that was so long overlooked, this has not been the perception, nor the experience, of those actually checked.

In April 2019, the Downtown Eastside Women's Centre released a comprehensive report featuring the voices and perspectives of Indigenous women survivors. Indigenous women have historically been construed incorrectly as passive victims, statistics and stereotypes. However, the report, *Red Women Rising*, demonstrates the resilience and strength of Indigenous women in the DTES, and provides them with a platform to articulate their experiences, dreams, and ideas for change. Despite the *stated* good intentions of the VPD, "only 15% of 157 women said they would go to the police if they felt unsafe."[160] Many women feel as though the police will not protect them, and in fact, some articulate a fear of the police themselves: "The police don't protect us; they harass us. There is too much police brutality down here.[161] People on the street are afraid of the police. At best, the police do nothing. At worst, the police brutalize us."[162] The long-standing history of colonialism, dispossession, and racism, intertwined with a recent-history of over-policing and under-protection, have culminated in an immensely asymmetric power dynamic between police and Indigenous women residents of the DTES. As a result, harmonious, let alone productive, police-civilian relations are forestalled.

Red Women Rising includes 35 key recommendations, including:

> End the policing practice of street checks; reduce the number of bylaw infraction tickets issued by police in the DTES; prohibit police from carrying and using all lethal weapons; develop guidelines to facilitate greater use of police discretion not to lay charges especially for minor poverty-related offences.[163]

This report and other anecdotal accounts[164] make clear that while the police frame well-being checks in benign terms, Indigenous women's experiences with the police may make them feel *more* vulnerable and unsafe.

Considering the history of over-policing in the DTES, it is reasonable for those being checked to view the interaction as simply another means of acquiring their identifying information for the more underhanded purpose of surveillance and criminalization. If those subject to well-being checks feel harassed and afraid, arguably compounding their marginalization, then we must ask whose well-being is really being protected.

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160 Martin and Walia, *supra* note 123 at 129.

161 *Ibid* at 12.

162 *Ibid* at 48.

163 Martin and Walia, *supra* note 123 at 156.

164 See *Project Inclusion* for further anecdotal accounts of the negative ramifications of over-policing for homeless people. See Bennett and Larkin, *supra* note 120.

IV. WELL-BEING CHECKS BEYOND VANCOUVER

While Vancouver appears to be the first jurisdiction to heavily cite well-being checks as a major reason for the racial disparities within their data, the supposed pursuit of the well-being of marginalized people has allowed police to nefariously collect data across the country. As recently reported, both Ontario and Saskatchewan maintain a "risk-driven tracking database," shared by police, social services, and health workers, that inputs highly personal, identifying information, such as a "whether a person uses drugs, has been the victim of assault, or lives in a 'negative neighbourhood.'"[165] Those who are seen as at risk of engaging in criminal activity may be subject to "rapid intervention" that could range from "a door knock and a chat to forced hospitalization or arrest."[166]

The issue of whether an officer was conducting an arbitrary street check or a well-being check garnered considerable attention in Hamilton, Ontario, when Mathew Green, the city's first Black councillor was approached by a police cruiser while waiting for a bus. As Green reported, the officer asked the following questions: "What are you doing there? Where are you going? Are you even from this city?" leading Green to conclude that the "conversation felt confrontational in nature… [causing] embarrassment, frustration and anger."[167] According to the officer, it was a cold and windy day, and Green appeared "mentally unstable," "hiding" near the bridge and standing in a puddle of mud, in an area with three lodging homes for people suffering from mental health issues.[168] While the officer was initially charged with discreditable conduct under the *Police Services Act*,[169] he was found not guilty of conducting "an arbitrary or unjustified street check."[170] This finding was based in part on the hearing officer's conclusion that Green's testimony was not credible, as he is "clearly an intelligent individual who feels relatively comfortable talking to frontline officers,"[171] and the fact that the officer was simply carrying out an innocuous well-being check.

In reaching this conclusion, the hearing officer relied on Green's prior positive interactions with the police in his role as city councillor as proof that he was not being sincere when he claimed that he felt intimidated and profiled during the unprovoked stop. This finding evidently fails to account for the different dynamics the two contexts engender: while Green may have formed good relationships with frontline officers during community events,[172] this fact should not be unfairly used to invalidate his experience of fear and intimidation

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165 See Nathan Munn, "Police in Canada are Tracking People's Negative Behaviour in a 'Risk' Database" *Motherboard* (27 February 2019), online: <https://www.vice.com/en_ca/article/kzdp5v/police-in-canada-are-tracking-peoples-negative-behavior-in-a-risk-database> archived at [https://perma.cc/WGP7-E2ZP].

166 *Ibid.*

167 Kelly Bennett, "What does a criminal look like?' Councillor files complaint over police stop" *CBC News* (16 April 2016), online: <https://www.cbc.ca/news/canada/hamilton/headlines/what-does-a-criminal-look-like-councillor-files-complaint-over-police-stop-1.3554921> archived at [https://perma.cc/KM7U-N4BW].

168 Molly Hayes, "Street Check' or 'Well-being Check?' Police carding case comes at key juncture in Ontario" (17 November 2017), online: <https://www.theglobeandmail.com/news/national/carding-ruling-to-come-at-critical-point-for-policing-regulations/article37013729/> archived at [https://perma.cc/D7W8-CE6K].

169 RSO 1990, c P.15.

170 Samantha Craggs, "Tribunal rejects black councillor's claim Hamilton police stop was racial profiling" *CBC News* (26 April 2018), online: <https://www.cbc.ca/news/canada/hamilton/matthew-green-andrew-pfeifer-1.4636773> archived at [https://perma.cc/PWX2-5QWM].

171 *Police Constable Andrew Pfeifer Badge #408 v Hamilton Police Service* (26 April 2018) [*Police Constable*], online: <https://www.hpa.on.ca/files/files/Pfeifer%20PSA%20Tribunal%20Decision%20April%202018.pdf> at 53 archived at [https://perma.cc/JP9C-9XAR].

172 *Ibid* at 52.

under completely different circumstances.[173] This inference belies the coercive nature of police power, and the complex relationships that exist between racialized community members and the Hamilton Police, who have previously been indicted by the Ontario Human Rights Commission for practicing "a textbook description of racial profiling."[174]

Under the premise of a well-being check,[175] an officer may be permitted to stop and question individuals arbitrarily with impunity, despite legislative safeguards. Green explained that "neither officer asked about his well-being or explained to him why he was stopped or were concerned about him because of the conditions."[176] When a witness was asked whether she was of the opinion that Green looked as though he required assistance, she stated "No, not at all. He was dressed similar, maybe to what he's wearing today, business casual."[177]

CONCLUSION

Ultimately, while well-being checks have been framed by the VPD as a benign exercise of discretion intended to protect vulnerable populations, in practice, they appear to perpetuate the same problems inherent to arbitrary street checks. Similar to the way in which Black people have been repeatedly represented as deviant and dangerous to justify their over-policing, so too have Indigenous people been constructed as inherently vulnerable, thus leading to a phenomenon whereby they are viewed both as the obvious, fated victim, and as a demographic to be closely monitored.[178]

What the crises in Toronto and Vancouver (and elsewhere) have taught us, is that it is crucial that we listen to the experiences of those targeted by these supposedly beneficial policing practices. If the communities subject to carding and well-being checks do not feel safe, then we must ask *who* these practices are intended to protect. For those who deviate from whiteness, and have endured its panoptic gaze, the answer to this question is clear.[179] It bears remembering that "racialized law enforcement has been an extraordinarily important tool in preserving social power, and over the last 150 years police forces have been a central resource to social control".[180]

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173 While the racial profiling correspondence test may not have been met in this case, the hearing officer's comments regarding Mr. Green's credibility are problematic, insofar as they undermine the lived experience of racism, and the way in which racialized people move through the world. It is also important to recognize that while the test for psychological detention relies on objective criteria, finding that an individual in similar circumstances would not have felt as though they were being detained is different than explicitly disbelieving an individual's subjective experience.

174 Bennett, *supra* note 167.

175 Constable Pfeifer stated that a well-being check had never been defined to him in any policy or procedure, and that "they all make their own observations and arrive at conclusions at their own pace and time, that it's the case where each officer is unique and that gets based on many things in their experience as officers." See *Police Constable*, *supra* note 171 at 28.

176 *Ibid* at 5.

177 *Ibid* at 13.

178 As Simone Browne states, "racializing surveillance is a technology of social control where surveillance practices, policies and performances concern the production of norms pertaining to race and exercise a "power to define what is in or out of place." See Simone Brown, *Dark Matters: On the Surveillance of Blackness* (Durham: Duke University Press, 2015) at 16.

179 Whether used to target those who appear "out of place," or to ensure that populations are exactly where they are supposed to be, discriminatory policing creates and maintains boundaries.

180 Charles C. Smith, "Racial Profiling in Canada, the United States, and the United Kingdom" in Carol Tator, Frances Henry, Charles Smith and Maureen Brown (eds), *Racial Profiling in Canada: Challenging the Myth of a "Few Bad Apples"* (Toronto: University of Toronto Press, 2006), at 56.

When faced with justifications for racial disparities in street check data (and the criminal justice system more broadly), we must remain vigilant and remember that these patterns are *not* natural, nor necessary, occurrences. Canada is a white settler society, one built on the dispossession and displacement of Indigenous people and the ongoing maintenance of rigid racial hierarchies.[181] The disproportionate policing of racialized persons cannot be neatly cleaved from this context, and we must collectively guard against attempts to cloak discriminatory practices in benign language.

181 Sherene Razack, *supra* note 24 at 1.

ARTICLE

FROM RINGING TO IMPINGING: THE INTRUSION OF TECHNOLOGY INTO THE EMPLOYMENT RELATIONSHIP

Katie Dakus *

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ABSTRACT

Technology has fundamentally altered how individuals contact and connect with each other. This has troubling ramifications for the employment sector, as employees may receive electronic communications from their employer outside of their scheduled work hours. Employees may feel various professional or societal pressures to answer these communications, resulting in the employee engaging in unpaid labour. This paper asks if Canada should seek to regulate after-hours communications between employers and employees by conducting an international analysis of approaches taken by other jurisdictions. Three potential methods of reform are examined, and a recommendation is made for Canada to implement a "right to disconnect." The right to disconnect means that employees cannot be penalized for ignoring communications received after-hours. The right to disconnect could be legislated through the *Employment Standards Act* and the *Canada Labour Code* to provide additional protections to employees.

INTRODUCTION

Technology has fundamentally altered how society functions by connecting individuals regardless of time or place. As new technologies, such as smartphones and social media, become more prevalent and essential for modern life, concerns arise that individuals are becoming increasingly incapable of disconnecting from them, and therefore from each other. This constant level of connectivity is especially troubling with regard to the employer-employee relationship, as it distorts the separation of professional work hours and personal time.[1] If an employer sends an e-mail or a text message to an employee after hours, is this time compensable? If not, should it be compensable? Canada has been slow to answer these questions, especially when compared to various other jurisdictions. For example, France has enacted legislation to limit an employer's ability to contact employees outside of working hours,[2] and American courts have witnessed a rise in lawsuits in which workers claim additional wages for time spent communicating outside of work hours.[3]

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* Katie Dakus is a third-year law student at the University of Victoria and will begin articling in July 2020 at Lidstone & Company in Vancouver. She thanks Julia Tikhonova and the *Appeal* Editorial Board for their contributions to this paper.

1 Openyemi Akanbi, "Policing Work Boundaries on the Cloud" (2018) 127 Yale LJ 637 at 638.

2 Tanya Marcum, Elizabeth A Cameron & Luke Versweyveld, "Never off the Clock: The Legal Implications of Employees' After Hours Work" (2018) 69 Lab LJ 73 at 78.

3 *Ibid* at 74.

While Canadians were recently asked to complete a national government survey[4] on this topic, there has been no indication to date as to whether the government intends to further pursue this avenue.

This paper begins by briefly examining the development of protective legislation in the British Columbia *Employment Standards Act ("ESA")*[5] and the *Canada Labour Code ("CLC")*,[6] with a specific focus on overtime and on-call provisions. Next, this paper examines the rising prevalence and pervasiveness of smart technology in Canadian society and how this technology erodes boundaries between an employee's work life and private life. This eroding boundary is discussed through the evaluation of international jurisprudence, including by examining how American court systems are handling the intrusion of technology into the employment sphere. This paper argues that Canada's response to the increasing use of technology to contact employees outside of working hours has been inadequate and that the existing legislative regime is insufficient to regulate the use of technology outside the workplace. This paper concludes with proposals for three methods of reform that would provide necessary protections to vulnerable employees who fall within the scope of the *ESA* or *CLC*.

I. THE *EMPLOYMENT STANDARDS ACT* AND THE *CANADA LABOUR CODE*

The inherent power imbalance between employers and employees raises the concern that employees may not be adequately compensated for their labour.[7] Therefore, legislation has been enacted in Canada over the past century to protect workers' rights. Specifically, these statutes have created minimum standards that employers must follow when scheduling employees for shifts. The *Canada Labour Code* governs federal workers, such as employees of banks and railroads, and stipulates that a federal employee's standard work week must not exceed eight hours in a day and 40 hours in a week.[8] If an employer requires an employee to work in excess of these standards, they must pay for each additional hour at a premium wage.[9] This premium wage, known as overtime, must be a minimum of one-and-a-half times the employee's normal wage.[10] Provincial legislation echoes these provisions, and British Columbia's *Employment Standards Act* adds that if an employee exceeds 12 consecutive hours of work, any subsequent hours must be paid at double the normal wage.[11] The *ESA* also outlines rest periods to which an employer must adhere. Each employee must receive 32 consecutive hours free of work each week, and any hours worked in contravention of this section must be paid at an overtime rate.[12] Barring very specific exceptions, these statutes prohibit overtime work from occurring without additional compensation.

The *Employment Standards Act* also dictates how remuneration will occur if an employee is on-call, and notes that this remuneration is subject to the overtime regulations specified

4 Canada, Employment and Social Development Canada, *What We Heard: Modernizing Federal Labour Standards* (30 August 2018) [*What We Heard*] at 10.

5 RSBC 1996, c 113 [*ESA*].

6 RSC 1985, c L-2 [*CLC*].

7 *What We Heard, supra* note 4.

8 *CLC, supra* note 6 at s 169(1)(a).

9 *Ibid*, s 174.

10 *Ibid*.

11 *ESA*, *supra* note 5 at s 35(1). There are many professions that fall outside the purview of the *ESA* and are therefore unentitled to its benefits (e.g., independent contractors) The scope of this paper is limited to those who qualify for the protections within the *ESA* or the *CLC*.

12 *Ibid*, s 36(1)(a)-(b).

above.[13] As per the *ESA*, an employee is deemed on-call if they are required to remain at or close to a specific location designated by the employer, as long as this location is not their personal residence.[14] On-call employees that fall within the Act are considered to be working and, therefore, must be compensated for any time spent on-call, even if they do not perform work during this period.[15] For example, firefighters who must remain at the firehall during their shift are on-call, as are maintenance workers who must remain within a specified radius of their facilities. The rationale, according to the *ESA*, is that on-call employees should be entitled to compensation because they are limited in their activities during the on-call period and are unable to "spend time effectively on their own pursuits."[16] This explains why being on-call at home disqualifies an employee from compensation: the employee is presumed capable of indulging in personal time.[17] As later discussed, some employees have argued that the degree of exertion needed to respond to after-hours texts, calls, and e-mails constitutes being on-call, and that they should be compensated accordingly.[18]

The provisions in the *CLC* and the *ESA* are aimed at protecting workers' rights and ensuring fair compensation for labour, including for overtime and on-call work. Despite the provisions, however, there has been a notable increase in the amount of unpaid overtime work engaged by Canadians since the 1990s.[19] One study suggests that, as of 2009, 1.6 million Canadians averaged 8.4 hours per week of unpaid overtime.[20] Suspected reasons for this unpaid overtime include advertent or inadvertent pressure from the employer and the employees' desire to stay connected.[21] Regardless, the law is clear: an employee must be compensated for any work in accordance with the relevant legislation, irrespective of the employer's intention.[22] If work occurs after an employee's standard eight-hour day or 40-hour week, that work must be treated as overtime work, even if the employer did not intend for this work to occur.[23] The knowledge that at least some employees perform unpaid overtime work raises the question of why an employee would voluntarily perform labour without compensation.

II. THE RISE OF TECHNOLOGY IN THE EMPLOYMENT SPHERE

Canadian literature on the field of technology in the employment sphere is limited, but a consensus exists that a substantial portion of unpaid overtime is due to the influence of modern technology.[24] Technology has fundamentally reshaped society and redefined how individuals interact with one another. Constant connectivity is the new norm, as demonstrated by a recent *Globe and Mail* article, which notes that Canadians self-reported being online for an average of 24.5 hours per week, with millennials exceeding five

13 *Ibid,* s 1(2).
14 *Ibid*.
15 *Ibid*.
16 Akanbi, *supra* note 1 at 643.
17 *Ibid*.
18 Jana M Luttenegger, "Smartphones: Increasing productivity, creating overtime liability" (2010) 36:1 J Corp L 260 at 274.
19 Richard Pereira, "The Costs of Unpaid Overtime Work in Canada" (2009) (Master's Thesis, Athabasca University, 2009) [unpublished].
20 *Ibid*.
21 Marcum et al, *supra* note 2 at 73–74.
22 Kenneth G Dau-Schmidt, "The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law" [2017] U Chicago Legal F 63 at 70.
23 *ESA, supra* note 5, s 35(1).
24 Akanbi, *supra* note 1 at 637–38.

hours per day.[25] Communication platforms, such as smartphones and social media, allow professional work to encroach into the private sphere, whether by after-hours e-mails or texts from employers.[26] Scholars have noted that "employees are constantly connected,"[27] and they suggest this creates "explicit… and implicit… expectations that employees remain constantly connected to their jobs."[28] Employees may feel an unspoken expectation to respond to an after-hours communication, especially if the sender knows it has been received.[29] Additionally, employees may prefer to answer an e-mail during their time off, instead of letting it compound an already busy workday, or they may worry that a lack of response will be viewed as lazy and indicative of their dedication to their work.[30] Regardless of the reason, the statistics regarding after-hours work are startling. For example, half of American employees check their work e-mail on the weekend, and one-third of employees check their work e-mail during their vacation.[31] Across the European Union, one in five employees communicates about work-specific topics with their employer after-hours, and 20 percent of employees are required to respond to work e-mails when they are not on shift.[32] Canadian workers are similar to their international counterparts, as just over half of all Canadians complete additional work from home.[33]

Proponents for the use of modern technology in this fashion argue that it offers unprecedented flexibility when allocating an employee's work hours. An often cited example is the growing percentage of the workforce that telecommutes to work. An employee is deemed to telecommute if they work a portion of their job remotely through technology.[34] For example, an employee who Skypes into a business meeting from their home has telecommuted. The number of employees who telecommute for work has increased fourfold over the past two decades, from nine percent in 1995 to 37 percent in 2016.[35] Purported benefits of telecommuting include the ability to "cut commuting time and costs, reduce energy consumption and traffic congestion, and contribute to work-life balance for those with caregiving responsibilities."[36] Despite these benefits, research suggests that employees who telecommute do not substantially reduce the time spent at their physical workspace. Instead, the majority of workers who telecommute work more than 40 hours per week, which suggests that at least some of the telecommuted hours are

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25 See Aly Thomson, "Concerns raised as report suggests Canadians spending more time online" (last modified 17 May 2018), online: *The Globe and Mail* < www.theglobeandmail.com/news/national/concerns-raised-as-report-suggests-canadians-spending-more-time-online/article34360751> archived at [https://perma.cc/TXB6-7QM3]. This article summarizes a survey conducted by the Media Technology Monitor.

26 Dau-Schmidt, *supra* note 22 at 70.

27 Marcum et al, *supra* note 2 at 74.

28 Justin A Walden, "Integrating Social Media Into the Workplace: A Study of Shifting Technology Use Repertoires" (2016) 60:2 J Broadcasting & Electronic Media 347 at 348.

29 Pereira, *supra* note 19 at 14.

30 Marcum et al, *supra* note 2 at 75–76.

31 *Ibid*.

32 Anna Arlinghaus & Friedhelm Nachreiner, "Health Effects of Supplemental Work from Home in the European Union" (2014) 31:10 Chronobiology Intl 1100 at 1101.

33 Linda Duxbury & Christopher Higgins, "Revisiting Work-Life Issues in Canada: The 2012 National Study on Balancing Work and Caregiving in Canada" (2012), online: <newsroom.carleton.ca/wp-content/files/2012-National-Work-Long-Summary.pdf> at 4 archived at [https://perma.cc/AG8W-E7GE].

34 Employment Standards Act Reform Project Committee, "Consultation Paper on the Employment Standards Act" (June 2018) at 72, online (pdf): *British Columbia Law Institute* < www.bcli.org/wordpress/wp-content/uploads/2018/06/Consultation-Paper_ESA.pdf> archived at [https://perma.cc/6B2Z-FRMJ].

35 Dau-Schmidt, *supra* note 22 at 69.

36 Mary C Noonan & Jennifer L Glass, "The Hard Truth About Telecommuting" (2012) 135 Monthly Lab Rev 38 at 38.

overtime.[37] The implication is that telecommuting does not relocate where an employee conducts their work, but instead increases the overall amount of work that must be completed.[38] The more sobering implication is that telecommuting not only increases an employee's overall workload, but also infiltrates an employee's private life and decreases their leisure time.[39]

Telecommuting serves as a useful illustration of how technology can increase the hours an employee spends working, but care must be taken not to conflate telecommuting with the use of technology after hours. Telecommuting workers are typically considered "on-shift" and, therefore, will be remunerated appropriately for any hours worked from home.[40] Even if these are overtime hours, additional overtime compensation should be granted in accordance with the *CLC* or the *ESA*. This contrasts with the earlier example of a worker who reads and responds to an e-mail after their shift has been completed. Using technology after hours in this manner does not guarantee that the employee's activities will be recompensed, because there is uncertainty as to whether the employee's activities constitute work. If it is considered work, the employee must be compensated as per the relevant legislation. If it is not work, the employee is owed no compensation. While there has been minimal litigation in Canada on this specific topic, American courts have attempted to clarify whether using technology in brief intervals fits within the definition of work.[41] In doing so, they have created both the *de minimis* rule and a two-part test to determine when an employee's activities should be deemed compensable.[42] The next section of this paper discusses the definition of work by reviewing the recently decided 7th Circuit decision of *Allen v City of Chicago* and the limits of the *de minimis* rule.

III. DEFINING WORK AND THE DE MINIMIS RULE

The modern definition of work in the American jurisprudence is articulated by the United States Supreme Court in *Anderson v Mt Clemens Pottery.*[43] Here, the Court held that work occurs if the employee is "required to give up a substantial measure of his time and effort."[44] "Substantial measure," as subsequent cases have dictated, can be determined by analyzing three factors: the degree of administrative difficulty in determining the amount of time worked, the total amount of alleged time worked, and the consistency in which the alleged work was performed.[45] This framework creates a consensus that a claim is most likely to succeed if it is consistent, chronicled work that expends more than a few minutes of effort. If the activity engaged in by the worker does not fit within this framework, it is deemed trivial, or *de minimis*, and not compensable.[46] Application of the *de minimis* rule in the employment context has traditionally focused on the compensability of actions immediately preceding or following an employee's shift while the employee is still at the job location.[47] The rule is designed to assist the judiciary in determining what qualifies as work and is not meant to be applied rigidly. As there is no specific threshold that must be

37 *Ibid*.
38 *Ibid* at 39.
39 Teresa Coelho Moreira, "The Impact of New Technologies in Balancing Private and Family Life with Working Time" (2017) 3:1 Labour & L Issues 2 at 3.
40 Noonan & Glass, *supra* note 36 at 38.
41 Pereira, *supra* note 19 at 6; Duxbury & Higgins, *supra* note 33.
42 Marcum et al, *supra* note 2 at 74.
43 328 US 680 (1946).
44 *Ibid*.
45 Jeffrey Brecher & Eric Magnus, "A Matter of Time: Managing Wage and Hour Risks in a Digitally Connected World" [2017] J Internet L 2 at 5.
46 *Ibid*.
47 *Ibid*.

met, the trier of fact is granted discretion in determining whether work was performed.[48] However, the use of this discretion has resulted in an arguably inconsistent application of what qualifies as trivial.

The inconsistent application of the *de minimis* rule is exemplified in several cases. In *Corbin v Time Warner,* the court held that an employee was not entitled to compensation for the one minute spent loading computer software prior to clocking in each day.[49] Similarly, the court in *Lindow v United States* concluded that arriving seven to eight minutes early to review prior shift logs was not compensable.[50] By contrast, in *Sandifer v United States Steel Corporation*, the United States Supreme Court held that the time spent by employees each day donning their work uniforms was not necessarily *de minimis* activity, even though it took less than three minutes.[51] Justice Scalia, in *Sandifer*, stated that "there is no reason to *disregard* the minute or so [it takes to get changed] than there is to regard the minute or so."[52] The activity was ultimately deemed non-compensable due to the terms of a collective bargaining agreement, but the Court's statement on the *de minimis* aspect highlights the inconsistencies in judicial determinations of whether an activity should be remunerated.[53] There is no "magic" amount of time that an activity must take before it is considered work, analysis of these cases reinforces.

The inconsistencies are concerning when applied to the situation of an employee using technology to work from home because there is no clear guideline for when this activity exceeds the *de minimis* threshold and becomes work. By these standards, how many e-mails must an employee answer before this *de minimis* threshold is exceeded? Is corresponding with an employer via text message over the course of an evening *de minimis*, since each message is quick to send, even though the total duration of the conversation is prolonged? It is concerning that technology may enable an employee to perform non-compensable *de minimis* work. Even though these actions may not take much physical time, they still have the effect of dissociating an employee from their leisure time.[54] The discretion exhibited by the courts could result in employees feeling uncertain as to whether they have a valid case against their employer, and it may reduce the number of allegations brought forward.

A. *Allen v City of Chicago*

The most current decision involving communication technology and after-hours work is *Allen v City of Chicago* ("*Allen*").[55] This United States Court of Appeals for the Seventh Circuit ruling regards the use of smartphone technology to work from home. Fifty-two current and former police officers from the Chicago Police Department alleged that they were not properly compensated for work completed on their department-issued smartphones after hours and that some of the hours were overtime hours.[56] The plaintiffs claimed that the defendants cultivated an environment that discouraged the reporting of overtime work and that the defendants chose not to compensate for hours worked on smartphones, despite having constructive knowledge of the work's occurrence. The defendants rebutted by arguing that they were unaware of any after-hours work completed by the officers and noted that the proper procedure for recording hours was to submit

48 Marcum et al, *supra* note 2 at 77.
49 821 F (3d) 1069 (9th Circ 2016).
50 738 F (2d) 1057 (9th Circ 1984).
51 134 S Ct 870 (7th Circ 2012).
52 *Ibid* at 13.
53 *Ibid*.
54 Luttenegger, *supra* note 18 at 1.
55 Jon Hyman, "About Those Off-the-Clock Emails", Case Comment on *Allen v City of Chicag*o 135 F (3d) 16-1029 (7th Circ 1998).
56 *Allen v City of Chicago*, 135 F (3d) 16-1029 (7th Circ 1998) [*Allen*].

a time sheet to the department. The officers failed to record their off-duty work in this manner, meaning that the department had no way of knowing the work was occurring. Compensation should therefore not be owed, the defendants argued.

The trial court applied a two-part test to determine that the officers' work should not be compensated even though some of it was above the *de minimis* threshold.[57] The first step assessed whether the activity in question was of a *de minimis* nature. If the activity was not *de minimis*, the second step asked whether the employer knew or ought to have known the work was occurring.[58] With regard to the first step, the trial court specifically noted that the legal distinction between *de minimis* and non-*de minimis* activity is murky and that clarification may be needed in the law.[59] Of note was that the trial court did not determine whether the activity was beyond *de minimis* by examining the amount of time spent per e-mail sent. Instead, it held that "off-duty activities… pursued necessarily and primarily as part of plaintiffs' jobs… constituted compensable work under the FLSA [Fair Labour Standards Act]." This ruling appears to add a new requirement to the definition of work, specifically that work must be essential to the employee's job to qualify as beyond *de minimis*. Based on this new articulation of *de minimis*, the first branch of the test was decided in favour of the plaintiffs, as the smartphone activity fell within the definition of work and had been performed without compensation.[60]

Having established that the smartphone activity was work, the court then applied the second step of the test to determine whether the employer had actual or constructive knowledge that this work was occurring.[61] Work is compensable if the employer knew or ought to have known that it was happening, and employees will be denied remuneration if they took steps to ensure their superiors were unaware of the additional hours worked.[62] This exception is narrow and will not protect employers if the employee volunteers to do the work or engages in overtime against company policies. This caveat exists solely to protect an employer who truly had no way of knowing about the work being performed, not just an employer who "turned a blind eye" or instituted hollow policies[63] to avoid liability.[64] The court held in favour of the defendants, noting that they had no constructive or actual knowledge of the work being performed by the plaintiffs. The court reasoned that the officers could log their overtime hours on their biweekly time sheet, and that officers who did so were paid for their additional hours.[65] There was no reason for the bureau to assume that the officers would fail to record and submit their hours in this fashion. Ultimately, their failure to do so meant that the bureau had no actual or constructive knowledge about the alleged work.[66] In other words, the failure of the officers to record their hours

57 *Ibid*.

58 *Allen v City of Chicago*, 226 (ND Ill) 3183 (2015) [*Allen, Trial*].

59 *Ibid* at 29.

60 *Ibid* at 28–29.

61 *Ibid*.

62 Hyman, *supra* note 55 at 26.

63 Lutteneger, *supra* note 18. An employer can fit within this exception by instituting strong policies prohibiting unauthorized overtime work and enforcing violations of this prohibition with meaningful penalties. It will not be enough for the employer to institute these policies and then ignore infractions.

64 Marcum et al, *supra* note 2 at 76.

65 Brecher & Magnus, *supra* note 45 at 10. American courts have emphasized that there is a distinction between an employer who *should have known* work was occurring versus an employer who *could have known* work was occurring. Being capable of discerning whether work was occurring is not sufficient to find an employer liable, as there must also be some sort of indication that the employer *ought* to have known about the work as well.

66 *Allen, supra* note 56 at 34–35; Hyman, *supra* note 55 at 26.

fell within the above exception to when overtime work is not compensable. Therefore, the officers' claim was dismissed, a finding upheld by the appellate court.[67]

Although *Allen* was decided in favour of the employer, the case has been interpreted as reinforcing the rights of workers to receive overtime pay for work done remotely.[68] The plaintiffs lost their case not because their after-hour activities were not considered work, but because they had not sufficiently notified the employer of the work they performed.[69] *Allen* successfully establishes that using a smartphone at home can constitute work, meaning that future lawsuits can rely on this precedent. Furthermore, this case is one of the first to deal with overtime allegations related to working on a smartphone from home.[70] It extends the caselaw toward acknowledging that technology can enable after-hours work, and that employees have the right to be compensated for this work. While this development is promising, there are some concerning inferences raised from the commentary of what constitutes *de minimis* work. The requirement that work performed at home via technology be "of necessary and of primary importance to the job itself," for example, could leave employees vulnerable to engaging in subsidiary or miscellaneous work from home without compensation.

When should the use of technology outside of work hours be considered compensable? Should the ways an employer can contact an employee after hours be regulated, considering the goals of the *ESA* and the *CLC* are to protect workers from abuses of power? Three potential methods of regulation, as well as areas for potential Canadian law reform, may be able to address these questions."

IV. POTENTIAL METHODS OF REFORM

The normalization of technology has resulted in its increasingly frequent use by employers to contact their employees. This is ostensibly beneficial to both the employer and employee, as it allows for the exchange of a simple and instantaneous message, as opposed to coordinating a phone conversation or an in-person meeting.[71] However, the ability of technology to constantly remind an employee of work, regardless of the time, place or location, has led to an "explicit and implicit expectation that employees remain constantly connected to their jobs."[72] Research suggests, in fact, that employees who work after hours increase their total amount of hours worked per week, suggesting any work performed from home is in excess of what the employee would otherwise accomplish.[73] Social scientists have termed this phenomenon "presence bleed"[74] to reflect how professional work can "bleed" into private time.[75] Labour organizations have protested the rise of "presence bleed," arguing that employees require time to disconnect from work to relax and refocus, and that work obligations should not extend into personal time off.[76]

The societal and psychological implications of constant connectivity and presence bleed have been investigated by social scientists, but the legalities of this phenomenon are only beginning to emerge. After-hours work is often informal and undocumented, meaning that

67 *Allen, supra* note 56.
68 Marcum et al, *supra* note 2 at 74.
69 *Ibid* at 74.
70 Brecher & Magnus, *supra* note 45.
71 Akanbi, *supra* note 1 at 638.
72 Walden, *supra* note 28 at 348.
73 Akanbi, *supra* note 1 at 638.
74 Walden, *supra* note 28 at 348.
75 *Ibid*.
76 *What We Heard, supra* note 4 at 11.

employees are not always adequately compensated for this labour.[77] Even if workers were to document and submit their hours, there is a possibility that the work would be deemed *de minimis* and therefore not worthy of pay. This legal ambiguity can leave workers uncertain about what work they are required to perform and whether it is compensable. Unions, advocacy groups and legal scholars have made calls to reform Canadian employment legislation so it is better equipped to handle the introduction of modern technology in the workplace.[78] However, little guidance has been offered within the Canadian legal sphere on how reform should be facilitated.[79]

The remainder of this paper proposes three potential methods of reform: assigning an automatic reimbursement for after-hours use of technology; modifying on-call laws; and implementing a right to disconnect. Each of these methods will aim to satisfy two entwined goals: preserving workers' free time and ensuring any work they perform is appropriately compensated in accordance with the *ESA* or the *CLC*. The discussion begins with the novel idea of predetermining remuneration for after-hours text messages, e-mails and other forms of technological communication. The paper then analyzes international regimes to demonstrate certain methods of reform—modifying on-call laws and implementing a right to disconnect— that have already been successfully implemented and to estimate the probability of their success in Canada. Commentary on whether any of these methods should be implemented in Canada concludes the paper.

A. Predetermined Remuneration for Technological Communication

The first proposed method of reform involves firmly establishing when the use of technology from home constitutes a valid and compensable work endeavour. Answering an e-mail or text message may be viewed as a brief affair, especially if it only requires a quick and perfunctory response and is not of fundamental importance to the employee's role.[80] However, if viewed through the lens of the "presence bleed" phenomenon, time spent on these activities may extend beyond the number of seconds or minutes needed to perform the action. Instead, time spent anticipating the message, receiving and replying to the message, and then having to disengage from work, should all be considered when determining the aggregate time consumed by the action.[81] It may be more accurate, then, to assign a weighted value to each activity, or to pay a premium for any technological communication that is performed after hours. This approach is already used successfully by professionals, such as lawyers, to calculate their billable hours. Such an initiative would have to be legislated within the *ESA* or the *CLC*, but this is not unlike the *ESA*'s mandate that any employee called in for a shift must be paid for a minimum of two hours regardless of how long they actually work.[82] The goal of this approach would be to reduce after-hours communication by deterring employers from contacting employees unless their assistance was truly required, while also ensuring that employees are adequately compensated when after-hours work occurs.

This approach would provide simple and clear guidelines as to what is considered work while also providing a predictable basis for compensation. It would also skirt the requirement raised in *Allen* that work should only be compensable if it is of necessary and primary importance to the employer.[83] Avoiding this requirement protects employees from completing miscellaneous work for their employer that would not be compensable as per

77 See e.g., Marcum et al, *supra* note 2 at 74–75.
78 Pereira, *supra* note 19 at 70; What We Heard, *supra* note 4.
79 Pereira, *supra* note 19 at 6.
80 Hyman, *supra* note 55 at 26.
81 Akanbi, *supra* note 1 at 642–45.
82 *ESA, supra* note 5 at s 4(1).
83 *Allen,* supra note 56 at 28.

Allen. Although this case is not binding in Canada, courts commonly evaluate international perspectives when litigating a new area of law.[84] It is possible that the Canadian judiciary could adopt similar restrictions to those imposed in *Allen*, considering Canadian courts are currently silent on the definition of work in relation to technology. Following *Allen*, though, could create a loophole where an employer is capable of obtaining free labour by sending subsidiary work to the employee.[85] The plaintiffs in *Allen* noted that many of the e-mails they received were of a trivial nature, such as a department-issued notice regarding happenings of the week. Although these communications were not essential to the officers' jobs, reading and archiving the messages still detracted from the employees' personal time. In addition, dealing with these messages would have clearly been a compensable activity had it occurred during work hours. This loophole is even more alarming when considering the pressure that employees may feel to respond to after-hours communications. Legislating when the use of technology is considered work would help avoid such problems.

Despite the benefits of such an approach, assigning a weighted value to each of these activities is accompanied by a unique set of difficulties. It could be difficult to determine the "true" amount of time each activity takes or how much an employee's response is worth. For this type of reform to succeed, research would be required to determine the average time used to perform these tasks. This would provide a logical basis for weighted values to be assigned, as opposed to an arbitrary number being chosen. However, the use of an average could still result in unpaid labour from employees who perform their tasks below the median speed. This type of solution also would only help the narrow subsection of employees who choose to report hours worked from home.[86]

B. Modifying On-Call Laws

The second proposed method for reform entails modifying existing on-call laws to more thoroughly protect employees who engage with technology to work from home. In a 2018 Canadian government survey, some employers argued that being "available and on-call"[87] through technology is now a condition for many jobs, and that employers should retain discretion to contact the employee whenever required.[88] In the United States, some employees consider after-hours communications similar to being on call and argue they should be compensated according to the same standard.[89] Specifically, they argue that they are being "engaged to wait"[90] as opposed to "waiting to be engaged".[91] This distinction comes from judicial interpretation of the United States' *Fair Labour Standards Act* ("*FLSA*"), which governs how on-call work is compensated.[92] In contrast to the *CLC* and the *ESA*, the *FLSA* holds that compensation is owed if time spent on-call chiefly benefits the employer and if the employee is not free to engage in their own personal undertakings.[93] These criteria distinguish an employee who is on-call, yet free to pursue their own endeavours, from an employee whose on-call status prevents them from pursuing any of their own activities. The former is referred to as "waiting to be engaged" and is not

84 See generally *NCC et al v Pugliese et al*, [1979] 2 SCR 104 (This case considers how international jurisdictions regulate percolating water, and serves as an example of how courts will evaluate international regimes when determining an unchartered area of law).

85 See e.g., *Allen supra* note 56.

86 It is difficult to gauge the potential success of such a regime, given that it is beyond the scope of this paper to consider whether any jurisdictions currently endorse such an approach.

87 *What We Heard, supra* note 4 at 11.

88 *Ibid*.

89 Luttenegger, *supra* note 18 at 274.

90 *Ibid*.

91 *Ibid*.

92 29 USC § 203 (1938) (*"FLSA"*).

93 Luttenegger, *supra* note 18 at 268.

compensable under the *FLSA*, while the latter is referred to as "engaged to wait" and is compensable under the *FLSA*.[94] Additional factors that can assist in distinguishing these two categories of on-call status include how often the employer contacts the employee, and how quickly an employee must respond to any such contact.[95]

As noted, some employees who use technology after-hours allege they are "engaged to wait" and that they should be granted the appropriate compensation outlined in the *FLSA*. Their argument is that not only must they respond to any work-related communications, but also that the terms of doing so infringe on their ability to effectively enjoy their personal time.[96] Some employers, for instance, require that their employees respond within minutes of receiving a message.[97] Analyzing this claim through the *FLSA*'s guidelines suggests that some employees could have a convincing argument that they are "engaged to wait." For example, if an employee must respond to a smartphone notification within 15 minutes, this could arguably restrict their ability to pursue their own initiatives during their off-time. The "presence bleed" phenomenon, as well, suggests that an employee's ability to relax for an evening will be impeded if technology constantly reminds them of their work obligations. These considerations could indicate that the employee is not truly free to engage in their own personal undertakings.

While this argument has merit, it has not yet been successfully litigated in the United States.[98] This paper suggests that this type of accusation requires deeper exploration of phenomena such as "presence bleed" before successful litigation or statutory amendment is likely to occur. Even if research was available to substantiate these workers' claims, compensating them as if they were "engaged to wait" would be quite complex, as this approach requires determining when an employee begins and completes their on-call shift. For example, should the employee be considered on-call from the moment they leave their work premises? Should they be compensated for being on-call even if the employer does not contact them for that entire evening? Answering these questions in a Canadian context is even more difficult due to the lack of distinction between "engaged to wait" and "waiting to engage" in Canadian overtime laws.[99] Despite these uncertainties, this approach can still assist in guiding conversation on potential reforms.

As previously mentioned, the *ESA* currently specifies that time spent waiting on-call is not compensable if the employee is at their personal residence.[100] However, once the employee receives a call-in, their work is remunerable regardless of where it occurs.[101] In regard to on-call laws, the British Columbia *ESA's* interpretation guidelines state that when an "employee responds to a page, or a cellular call, the employee has in effect, 'reported' to work and is entitled to minimum daily pay.… This has the effect of 'reporting to work' and is not limited to physically reporting to the workplace."[102] If after-hours communications were governed by on-call doctrines, then at bare minimum, employees who answer communications from home would be entitled to pay for the duration of their answer. Clarifying and enforcing this requirement could assist in shifting the mindset of employers who feel entitled to

94 *Ibid* at 273–274.
95 *Ibid*.
96 *Ibid*.
97 *Ibid*.
98 *Ibid*.
99 *ESA*, *supra* note 5 at s 1(2).
100 *Ibid*.
101 *Ibid*.
102 British Columbia, Employment, Business and Economic Development, *Interpretation Guidelines Manual British Columbia Employment Standards Act and Regulations*, (Guide), online: <www2.gov.bc.ca/gov/content/ employment-business/employment-standards-advice/employment-standards/igm/esa-definitions/esa-def-work> archived at [https://perma.cc/66GU-2CKZ].

contact employees after-hours without compensating them. Furthermore, it could also help reverse the trend of increasing unpaid overtime work in Canada[103] by providing clearer guidelines to employees on when their work is compensable. This would also have the effect of bolstering the *ESA*'s purpose of protecting vulnerable employees without requiring significant reform to current employment legislation. Clarification could be made by legislating that remuneration for contacting an employee after their shift is completed will be governed by current on-call legislation. More thorough reform could implement an on-call wage for these types of scenarios.[104] However, the same issues arise regarding difficulties in enforcing any violations of this legislation. For a claim to be successful, the employee would have to report these hours being worked from home. Modification and reform to on-call laws may help to inform employees of these rights, but only employees who are willing to bring forward a claim and potentially litigate their allegations would gain protection under these amendments.

C. The Right to Disconnect

The third potential method for reform would be to implement a ban on all employer-initiated after-hours communication, subject to limited exceptions. Prohibiting after-hours communication would aim to protect employees who are unable or unwilling to ignore after-hours communication, while also strengthening the eroding boundary between professional and personal life. This approach has gained international traction over the past few years, becoming a movement known as the "right to disconnect."[105] The right to disconnect advocates for increased regulations and policies that allow employees to "disconnect" from work after their shift is complete. It notes that the "current tendency is to request broader participation of workers in the life of the enterprise"[106] and argues that this overburdens the employee. This movement is relatively new to Canada but has been predominant in other countries for years. In fact, select countries have already codified this right. Recent legislation in Italy, for example, guarantees workers the right to disconnect after their shift, and the Philippines has legislated that an employee cannot be reprimanded at work for ignoring after-hours communications.[107] France recently joined these countries in enacting right to disconnect legislation during a wave of labour reforms, and the City of New York has brought forward a municipal proposal.[108]

Both France's judiciary and legislature have set strong precedents of protecting workers' rights and personal time through restricting after-hours contact. In 2001, the French Supreme Court acknowledged the right of workers to disconnect upon finishing their shift by holding that employees are under no obligation to conduct work from home.[109] In 2004, the French Supreme Court again tackled this issue, but in the explicit context of technological communication. The Court reinforced workers' rights by holding that "not being reachable on one's mobile telephone outside working hours is not a fault."[110] The sentiment behind this decision was echoed by the French government when it passed legislation enforcing the right to disconnect. These laws came into effect on January 1, 2017 and outline the ways in which an employer can and cannot contact an employee after-hours.[111] This legislation takes an interesting approach, as there is no outright prohibition of after-hours communication. Instead, any employer with more than 50 workers must

103 Pereira, *supra* note 19 at 4.
104 Luttenegger, *supra* note 18 at 277.
105 Marcum et al, *supra* note 2 at 78–80.
106 Moreira, *supra* note 39 at 2–3.
107 Marcum et al, *supra* note 2 at 78–79.
108 *Ibid*.
109 Supreme Court, Social Chamber, 2 October 2001, nº 99-42.727.
110 Supreme Court, Social Chamber, 17 February 2004, nº 01-45.889. (Note that this is a translation).
111 Moreira, *supra* note 39 at 2–3.

collaborate with their employees to outline acceptable modes and methods of contact for after-hours communication.[112] Once this collaboration is complete, the employer is required to "create a charter establishing and defining employees' right to disconnect"[113] that must be re-negotiated on a yearly basis.[114]

This approach forces employees and employers to agree upon situations in which technology can be used, and thereby affords greater flexibility than an outright ban. This process of negotiation may help educate employees about their rights under this new legislation and alleviate unspoken expectations that they should be available after hours.[115] Also, the implementation of a mandatory annual re-negotiation period allows charters to stay relevant despite the constant and rapid growth of technology. The benefits of this new legislation, however, are not solely restricted to the employee. Employers will be given an opportunity to clearly outline their expectations, which may potentially minimize lawsuits claiming uncompensated or overtime work. Employers are also able to create their own prohibitions, exemplified in one corporate charter where employees agreed to ignore their own personal e-mails for the duration of their shifts to increase productivity.[116] While this legislation provides benefits to both the employer and employee, a brief note must be made on its limitations. These regulations exclusively apply to corporations with more than 50 employees, resulting in coverage of only a portion of the French workforce.[117] There are no protections to ensure that the inherent power imbalance in employment relationships does not negatively impact the outcome of these negotiations. A mediator or negotiator may be required to ensure these proceedings are of fair and of equal benefit to the employee. Finally, there is no specified remedy if an employer violates the terms of a charter other than litigation.[118] These restrictions narrow the effectiveness of this regime by reducing the scope of included participants and limiting their potential remedies.

While France's approach provides a valuable starting point, New York City's recent proposal for a right to disconnect bylaw makes beneficial modifications to its French predecessor. The American approach underlines the French consensus that workers should have a say in the regulation of after-hours communications. However, New York's recently proposed bylaw would apply to any corporations with 10 or more employees. This widens the scope of the right and captures a far greater number of workers than France's regulations.[119] If passed, the bylaw would differ from its French counterpart in its application of the right to disconnect. Instead of negotiating a charter, the bylaw would dictate that employees cannot be penalized for ignoring communications received when off shift or during sick days and vacation days.[120] Finally, this proposal is unique in its suggested complaints process: an employee could claim directly to the City of New York, and the municipality would then be required to conduct an investigation.[121] If a breach of the bylaw were found, the employer would be required to pay a fine to both the City and to the wronged

112 Akanbi, *supra* note 1 at 648.

113 *Ibid*.

114 *Ibid*.

115 Pereira, *supra* note 19 at 73. Many Canadians are unaware of the protections granted to them by legislation such as the *ESA*, and this ignorance leaves them more vulnerable to working schemes that violate these existing legislations. He recommends education as a tool to help educate workers and to counteract the rising rate of unpaid overtime work in Canada.

116 Moreira, *supra* note 39 at 3.

117 *Ibid* at 2.

118 *Ibid*.

119 Marcum et al, *supra* note 2 at 79.

120 *Ibid*. This form of the right to disconnect is similar to the form enacted in the Philippines.

121 See Jonathan Wolfe, "*New York Today: The Right to Disconnect"* (23 March 2018), online: <www.nytimes.com/2018/03/23/nyregion/new-york-today-the-right-to-disconnect.html> archived at [https://perma.cc/UQY3-R7F4].

employee.[122] This process would be primarily handled by the City and, therefore, would be more accessible and affordable than litigation. The costs of litigation can hinder access to justice, and this proposed method could provide an accessible means for resolving complaints.[123] Considering both the French and American approaches can help shape and direct possible Canadian reform.

The right to disconnect is a relatively new concept in Canada, but it is not revolutionary. In August 2018, the Canadian federal government released a report outlining the findings of a nationwide survey regarding labour reform issues.[124] The survey canvassed public opinion on a number of topics surrounding the right to disconnect, and included responses from citizens, corporations, and labour organizations.[125] Ultimately, 93 percent of respondents agreed that off-shift employees should be entitled to ignore any after-hours communications including e-mails, text messages, and phone calls.[126] Labour organizations strongly advocated for the right to disconnect, noting that "responding to inquires [such as e-mails, phone calls, text messages] impacts quality of family time, acts as a source of stress, and reduces effectiveness of rest time."[127] However, support for the right to disconnect was not as widespread among employers and employment organizations. Employers argued that legalizing the right to disconnect would reduce an employee's flexibility by limiting how they are allowed to do work, with some employers stating it would be a "legislative overstep."[128] Out of these respondents, 27 percent justified their stance by noting that the business day does not always end with an employee's shift, and as such, employees should remain available to their employers.[129] The results of the survey suggest that implementing a right to disconnect would be viewed positively by the majority of Canadian workers. While employers appear to be less enthused about this possibility, it must be remembered that the goal of employment standards legislation such as the *ESA* and *CLC* is to protect employees from exploitation. Therefore, while employers' input should be considered, the priority must remain on protecting workers' rights. The right to disconnect, then, may be a viable option for protecting workers' personal time.

Although the aforementioned survey indicates that adopting some form of the right to disconnect would be viewed positively by Canadians, it provides little guidance on how this implementation should occur. If Canada were to adopt the right to disconnect, it should do so through incorporation into the *ESA* and the *CLC,* as opposed to simply trusting employers to incorporate such a mandate into their company policy, because employers may prioritize the success of their business over the protection of their employees. Legislating this right would be in accordance with the approach used by other international jurisdictions and would allow for legal enforcement. Concerns raised by employers that legislating this right will force an employee to disconnect when they would otherwise "choose to remain connected outside of work"[130] are tenuous, as these policies do not necessarily require an outright ban. In fact, the converse argument can be made that the right to disconnect actually increases an employee's flexibility and autonomy by allowing them to choose the manner in which they use technology for work.

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122 *Ibid*.

123 See generally Canada, Department of Justice, *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework* (online): Government of Canada <www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/p2.html> archived at [https://perma.cc/6STL-D5PQ].

124 *What We Heard, supra* note 4 at 1–3.

125 *Ibid*. This online survey garnered responses from 3,138 respondents over a one-year period.

126 *Ibid* at 10.

127 *Ibid*.

128 *Ibid*.

129 *Ibid* at 11.

130 *Ibid*.

While either standard could be adopted in Canada, combining France's charter-based approach with New York's complaints process would provide the most effective relief to employees. Using a clearly defined charter of acceptable and non-acceptable communications would allow for employees to identify any inappropriate employer requests. A clear outline of the employer's expectations may also reduce concerns that employees will perform unpaid overtime work because of unspoken employer pressure.[131] As well, having a definitive, written document would provide an evidentiary foundation for alleged violations, and could force a corporation to be held to these agreed-upon minimum standards.

If the *ESA* or *CLC* were to adopt this type of regime, the potential legislation could benefit from the incorporation of a streamlined complaints process. This regime would be similar to New York in that employers could be fined for violations, but I propose that a Canadian system adopt modifications that would provide additional meaningful remedies to employees. Employers could be ordered to amend their charters or to implement changes within their organization to adhere to the outlined minimum standards. These modifications would provide relief to the complainant, as well as other workers in the organization who are unwilling or unable to register a complaint. Implementing a complaint process could also help minimize litigation, which is ideal when considering Canada's overburdened courts and access to justice concerns.[132] A variation of this method would be to implement the right to disconnect in conjunction with modifying on-call laws. While the right to disconnect would dictate when and how an employee can be contacted, on-call laws would reinforce that any such contact must be compensable. Regardless of what approach Canada adopts, safeguards must be implemented to ensure that any work performed is given adequate compensation, including requisite overtime pay.

In summary, implementing a right to disconnect could benefit Canadian workers by regulating how technology can be used in the employment sphere. It would provide a clear, mandatory policy and offer financial and systemic remedies to wronged employees. However, the implementation of such a right would involve updating both the *ESA* and the *CLC* and would involve substantial labour reform.

CONCLUSION

Research suggests that the rising use of technology in Canadian society has resulted in increased connectivity between employers and employees. This connectivity is correlated to employees engaging in higher levels of unpaid, after-hours work, partially because they feel pressured to answer e-mails, text messages, and phone calls from home. Regardless of whether this is due to employer pressure, societal pressure, or another unknown factor, it is critical that Canada's labour statutes legislate protections from exploitation. There are multitudes of ways in which the *Canadian Labour Code* and the *Employment Standards Act* could be reformed to enhance employee protections. This paper has focused on three potential reforms: assigning a weighted value to after-hours activities; modifying existing on-call laws; and the right to disconnect. Each of these potential reforms aim to reduce the prevalence of unpaid work from home, and specifically target unpaid work that is facilitated through the use of modern technology. These reforms have the effect of educating employees about their rights to compensation and establishing firmer boundaries between employees' professional and private lives.

131 Pereira, *supra* note 19 at 73.

132 Employment Standards Act Reform Project Committee, *supra* note 34 at 35.

While each proposed reform offers unique benefits, the most effective approach may be to legislate a right to disconnect. Although this approach would require substantial amendments to the *CLC* and the *ESA*, it could be modified to suit Canada's unique employment background and provide thorough protection for workers. The right to disconnect would allow employees to increase their autonomy by choosing the circumstances in which they are willing to work from home, and would ensure that any work completed is properly compensated. If a right to disconnect were to be legislated, care would have to be taken to establish a clear definition of "work" to prevent ambiguities such as those created by the murky *de minimis* rule in the United States. Canadian jurisdictions could define "work" within their employment standards legislation and provide examples of when using technology fits within this definition. This would clarify employment standards for employees, assist them in recognizing when their rights have been compromised, and bolster their confidence to refuse unpaid work.

As technology continues to become more commonplace, employment standards legislation must continue to adapt in order to protect vulnerable workers. While these suggested reforms may involve substantial amendments to existing employment standards legislation, failure to make these amendments will result in protective legislation that is ill-equipped to handle the unique challenges of the modern workplace.

ARTICLE

FUNDAMENTAL RIGHTS FOR ALL: TOWARD EQUALITY AS A PRINCIPLE OF FUNDAMENTAL JUSTICE UNDER SECTION 7 OF THE *CHARTER*

Suzy Flader *

CITED: (2020) 25 *Appeal* 43

ABSTRACT

Section 7 of the *Canadian Charter of Rights and Freedoms* has led to some groundbreaking wins for Canadians. However, its life, liberty, and security of the person guarantees are not currently expansive enough to truly protect the interests of marginalized claimants. Furthermore, the equality protections guaranteed by section 15 of the *Charter* are often insufficient for marginalized claimants due to unsettled jurisprudence. In response to the need for novel claims to alleviate complex systemic problems, this paper advocates for the introduction of equality as a principle of fundamental justice underlying the section 7 test. The equality conceptualized at the heart of this argument is intersectional and therefore inclusive of the various barriers that individuals face when attempting to protect their *Charter* rights. With this definition in mind, the paper considers four Supreme Court of Canada decisions—*PHS*, *Boudreault*, *Gosselin*, and *Carter*—to examine recent equality trends beyond section 15 of the *Charter* and consider the pressing need for equality as a new principle of fundamental justice. Finally, the benefits of the proposed principle are weighed against potential judicial concerns in order to suggest that balance will be necessary to satisfy opposing interests. The overall message here is not that *Charter* litigation can fix every need, but rather that everyone should have fair opportunities to advocate for their protected rights.

* Suzy Flader holds an Honours B. Arts Sc. from McMaster University. In spring 2020, she will graduate from the joint JD/MPA program at the University of Victoria. Suzy is grateful to Professor Patricia Cochran as well as Emmett Rogers, Medina Abdelkader, and the rest of the *Appeal* team for their support throughout the writing and publication processes.

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> *The* BNA Act *planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.*
> —Lord Sankey, *Edwards v Canada*[1]

> *The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the* Constitution *responds to the realities and needs of all members of society.*
> —Justice L'Heureux-Dubé, *New Brunswick v G(J)*[2]

INTRODUCTION

Life, liberty, and security of person—these are the fundamental rights protected under section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3] Throughout the *Charter's* history, section 7 claims have resulted in groundbreaking wins for Canadians, including laws that protect matters such as fair trial procedures, abortion rights,[4] and the right to physician-assisted death.[5] At the same time, judges have resisted recognizing the section 7 rights of marginalized claimants in the context of their social positioning. In some instances, judges have upheld a section 7 claim brought by a marginalized claimant, but the impact of the win was too narrow to force true systemic change. Other times, a court's failure to recognize systemic or economic marginalization has resulted in an unjust finding of no section 7 violation. This reluctance to recognize equality rights in a section 7 claim is a pressing problem, given the number of claims brought by individuals who face heightened systemic disadvantage due to factors such as race, Indigeneity, gender, disability, sexual orientation, and socioeconomic status.[6]

The current section 7 test cannot consistently persuade judges to address the unique fundamental needs of marginalized claimants. In response to both academic and judicial calls for change, this paper suggests the court should move toward recognizing equality as a substantive principle of fundamental justice. While equality-based analysis is not necessarily limited to section 15 of the *Charter*, recent section 7 decisions highlight the need for such an explicitly holistic approach to the section 7 test. Drawing from legal scholar and professor Kerri Froc's argument that substantive equality as a principle of fundamental justice would grant women equal access to section 7 *Charter* rights,[7] this paper contends that such a principle could have positive effects for other minority groups who increasingly rely on section 7 claims. An equality-focused principle of fundamental justice could help protect the established *Charter* rights of marginalized individuals while also advancing necessary novel claims. Though judges are typically reluctant to establish new principles of fundamental justice, equality is an essential social concept worthy of the *Charter's* defence. Those who face barriers in relation to factors such as gender, race, and disability should have their section 7 rights assessed in the context of their unique and intersectional societal positions.

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1 1929 CanLII 438 (UK JCPC) at 107–108, 1929 CarswellNat 2.

2 From the concurring decision in *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [*G(J)*] at 115, 1999 CanLII 653 (SCC).

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

4 See *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90 (SCC). Note, the majority did not rule on whether there is a right to access abortion services. Rather, the Court struck down the criminal prohibitions relating to abortion at the time due to their specific violations to the security of person of women.

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

6 See *Gosselin v Quebec*, 2002 SCC 84 [*Gosselin*].

7 Kerri A Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42 Ottawa L Rev 411 [Froc, "Equality as a PFJ"].

Several key points help justify the need for an equality-focused approach to section 7. After a brief introduction to section 7 and the principles of fundamental justice in Part I of this paper, the focus of Part II will turn to conceptualizing "equality." The Supreme Court of Canada ("SCC") has affirmed that substantive equality is the correct approach under section 15 of the *Charter*. Two SCC decisions, *Canada (Attorney General) v PHS Community Service Society ("PHS")*[8] and *R v Boudreault ("Boudreault")*,[9] serve as examples of how equality has significantly contributed to *Charter* analysis outside the realm of section 15. Next, Part III will delve into two more SCC decisions, *Carter v Canada (Attorney General) ("Carter")*[10] and *Gosselin v Quebec ("Gosselin")*,[11] whose aftermaths emphasize the pressing and substantial need for equality to become recognized as a principle of fundamental justice. *Gosselin* has provided a particularly troubling legacy for the existence of positive section 7 rights, which many scholars contend are necessary in order for many Canadians to achieve true fundamental freedoms. With these cases in mind, Part V will weigh the potential benefits and concerns with recognizing equality under section 7.

The goal here is not to suggest that an equality-focused principle of fundamental justice will solve every problem that disadvantaged section 7 claimants face. *Charter* litigation is not a perfect solution to achieving the systemic changes necessary for more Canadians to enjoy equitable access to fundamental rights and freedoms. Rather, the assertion is that this option has the potential to increase the likelihood of success for marginalized claimants raising section 7 claims. If we are to live in a fair and democratic society,[12] then such a promotion of new and diverse voices must serve as a priority for the Canadian justice system.

I. SECTION 7 OF THE *CHARTER* AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[13] These protections under section 7 typically arise in connection with the state's conduct in administering justice,[14] including criminal law processes,[15] child protection hearings,[16] and immigration proceedings.[17] Section 7 has not yet been interpreted as imposing positive obligations on governments to ensure the enjoyment of life, liberty, and security of the person, but the SCC has not foreclosed this possibility.[18]

The two-step test for establishing a violation of section 7 is well recognized in the Canadian jurisprudence. First, claimants must prove that the impugned laws deprive them of the right to life, liberty, or security of the person. Second, claimants must show that any such infringements are not in accordance with the principles of fundamental justice.[19] There is

8 2011 SCC 44 [*PHS*].
9 2018 SCC 58 [*Boudreault*].
10 *Carter, supra* note 5.
11 *Gosselin, supra* note 6.
12 As prescribed by s 1 of the *Charter.*
13 *Charter*, *supra* note 3.
14 *Gosselin*, *supra* note 6 at para 77.
15 *Ibid* at paras 77–78.
16 See e.g. *G(J), supra* note 2.
17 See e.g. *Charkaoui v Canada*, 2007 SCC 9.
18 *Gosselin*, *supra* note 6 at paras 82–83.
19 *Boudreault, supra* note 9 at para 186.

no constitutional guarantee that the state will never interfere with a person's life, liberty, or security of person. Rather, the state cannot do so in a way that violates the principles of fundamental justice.[20]

In *Re BC Motor Vehicle Act* ("*Motor Vehicle Reference*"),[21] the SCC recognized that the principles of fundamental justice are concerned with the basic values underpinning the Canadian constitutional order.[22] The section 7 analysis is therefore concerned with capturing inherently bad laws that violate basic societal values. Given the fundamental nature of section 7 rights and the unique self-regulating role that the principles of fundamental justice play within section 7, the SCC has affirmed that it is very unlikely for a section 7 violation to be justified under section 1 of the *Charter*.[23] This grants the principles of fundamental justice great authority over which matters are upheld under section 7.

Three primary principles of fundamental justice have emerged from the jurisprudence: arbitrariness, overbreadth, and gross disproportionality.[24] While judges have relied on these principles to justify some groundbreaking section 7 decisions, the principles of fundamental justice do not inherently promote contextual analyses focused on discriminatory factors. This can lead to inconsistent decision-making, given that some judges will be more willing than others to make connections between the pre-existing principles of fundamental justice and the disadvantaged circumstances of some claimants.

Courts are typically unwilling to recognize new principles of fundamental justice. However, given the highly individualized nature of section 7, and both academic and judicial recognition that individuals have distinct needs, the section 7 analysis requires a more nuanced approach if it is to adequately represent Canada's diverse population. Froc has convincingly revealed how equality meets the requirements for establishing a new principle of fundamental justice under the *Malmo-Levine* test through a step-by-step analysis.[25] In 2019, equality must be considered a "basic tenet of the legal system"[26] with respect to judicial perspectives of individual matters. A contextual equality analysis under section 7 would help the justice system evolve to meet greater societal calls for change.

Section 7 also has a uniquely political role amongst the *Charter* rights, making its recognition of diverse interests especially pressing. Mark Carter has discussed the need to conceptualize fundamental justice under section 7 according to values that support and advance human rights theory.[27] This could allow for a more honest and doctrinally defined debate about any reasonable limits placed on section 7 by policy imperatives and alternative interpretations of justice posed under section 1 of the *Charter*.[28] Margot Young has more explicitly considered section 7's usefulness in advancing the rights of marginalized individuals, particularly given the difficulty claimants face when attempting

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20 *Carter*, *supra* note 5 at 71.

21 [1985] 2 SCR 486 at para 31 [*Motor Vehicle Reference*], 1985 CanLII 81 (SCC).

22 *Ibid*.

23 *G(J)*, *supra* note 2 at para 99.

24 *Carter*, *supra* note 5 at para 72.

25 Froc, "Equality as a PFJ", *supra* note 7 at 436–444; *R v Malmo-Levine*, 2003 SCC 74 at para 113. According to the *Malmo-Levine* test, a principle of fundamental justice must be (1) a legal principle; (2) that is by consensus fundamental to the fair operation of the legal system; and (3) that can be identified with sufficient precision to yield a manageable standard for measuring against section 7 rights.

26 *Motor Vehicle Reference*, *supra* note 21 at para 31.

27 Mark Carter, "Fundamental Justice in Section 7 of the *Charter*: A Human Rights Interpretation" (2003) 52 UNBLJ 243 at 244–245 [Carter, "Fundamental Justice in Section 7"].

28 *Ibid* at 260.

to assert section 15 rights.[29] Young argues that if the *Charter* is to effectively legitimize the rights of disadvantaged people, its protections must be informed by substantive and progressive understandings of social concepts such as democracy, citizenship, individual autonomy, equality, and justice.[30]

In a more recent paper, Young maintains that compared to section 15, section 7 is amenable to contextual and nuanced understanding of complex social justice claims.[31] Hence, section 7's important role for marginalized claimants has survived long enough to demonstrate its potential future power. Now, judges must refine this potential by consistently focusing on equality needs in relation to section 7.

II. CONCEPTUALIZING EQUALITY

Given the trend of marginalized claimants evoking section 7 to help protect their fundamental rights, it makes sense for the section 7 test to evolve in an equality-focused manner. To identify how this evolution should proceed, it is necessary to inclusively define the concept of equality for its ready application by the public, courts, and governments alike. Section 15 of the *Charter* protects equality rights on the basis of an adverse impacts approach. Since *Andrews v Law Society of British Columbia* ("*Andrews*"),[32] and most recently affirmed in *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux* ("*Alliance*"),[33] the legal definition of equality under section 15 has focused on substantive equality. This conception of equality focuses on ensuring that laws or policies do not subordinate groups who already face social, political, or economic disadvantages in Canada.[34]

The substantive equality approach recognizes that individuals may require different treatment in order to achieve equality.[35] For the sake of consistency, an equality-concerned principle of fundamental justice should also focus on substantive equality. However, given judicial reluctance to grant claimants section 15 rights, it is worth considering how marginalized claimants could benefit if judges relied on revamped substantive equality analyses. Not only could this rejuvenated equality analysis benefit claimants under section 7, but its reach could also extend to section 15 and beyond.

There is no perfect definition of equality—our society is far too diverse for that. In 2001, Chief Justice Beverley McLachlin, as she then was, labelled equality the most challenging right to establish under the *Charter*.[36] Given both the lack of clarity surrounding the term and individualized perceptions of equality, it is often difficult to recognize equality needs outside the scope of one's daily life and experiences. It is therefore difficult for judges to make contextual decisions about marginalized issues that they have not personally experienced. This seems to influence the struggles that claimants currently face in attempting to establish equality rights.

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29 Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 UBCL Rev 539 at 539–540 [Young, "Section 7 Politics"].

30 *Ibid* at 541.

31 Margot Young, "Social Justice and the Charter: Comparison and Choice" (2013) 30 Osgoode Hall LJ 669 at 673 [Young, "Social Justice and the Charter"].

32 [1989] 1 SCR 143 at 165, 1989 CanLII 2 (SCC).

33 2018 SCC 17 at para 25.

34 Jennifer Koshan & Jonnette W Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 at 24–25 [Koshan & Hamilton, "Continual Reinvention of Section 15"].

35 *Ibid*.

36 Beverly McLachlin, "Equality: The Most Difficult Right" (2001) 14 Sup Ct L Rev 17.

Claimants are rarely successful when it comes to making section 15 claims. If they are successful, their success does not necessarily promote substantive equality.[37] The trend of courts hesitating to uphold equality rights under section 15 implies judicial confusion surrounding the concept of equality that must be avoided in the context of section 7. The primary reason for this confusion, which has been consistently revealed throughout section 15's evolutions, is that courts focus too heavily on comparators and fail to undertake truly contextual analyses of equality rights.[38] The limited number of protected enumerated grounds under section 15 does not help matters. These grounds help ensure a further uphill battle for claimants who face discrimination due to analogous or intersecting grounds. It follows that the human dignity of section 15 claimants is not assessed equally under the current substantive equality approach.[39]

If substantive equality is recognized as a principle of fundamental justice under section 7, its conception must be more inclusive to avoid some of the current section 15 issues. This could be achieved through increased emphasis on intersectionality within the substantive equality framework. Intersectionality is a feminist theory introduced by Kimberlé Crenshaw that examines how intersecting social or economic barriers, often labelled "oppressions," can uniquely impact individuals.[40] For example, a Black woman is more likely to face heightened systemic discrimination than a Black man or a white woman. This discrimination can manifest in a number of ways, notably here with respect to how likely a person is to achieve justice within the Canadian legal system. Canadian judges are familiar with the concept of intersectionality in theory. The SCC has even recognized the intersection of enumerated equality grounds as analogous grounds.[41]

In practice, however, there appears to be gaps between the way that judges understand intersectionality and how they apply it to section 15 cases involving marginalized claimants. In response to inconsistent applications of intersectionality throughout society and its institutions, academics have demanded more contextual approaches to the theory. Leslie McCall prefers an "intercategorical complexity" approach to intersectionality that focuses on explicating the nature of inequality relationships rather than solely relying on the use of categories.[42] Colleen Sheppard focuses on what she calls "inclusive equality" and underscores the importance of examining both "inequitable substantive outcomes in various social contexts" and "unfairness and exclusions in the structures, processes, relationships, and norms that constitute the institutional contexts of our daily lives."[43] Sheppard's "multi-layered contextual analysis" focuses on micro, meso, and macro levels of context in order to emphasize the "need to develop mechanisms for amplifying the voices and power of those who experience discrimination and institutionalized inequalities."[44] Both McCall and Sheppard's approaches propose that equality, in its fairest sense, must go beyond labels and focus on the underlying contextual factors that influence a person's disadvantages.

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37 Koshan & Hamilton, "Continual Reinvention of Section 15", *supra* note 34 at 37.

38 *Ibid* at 50.

39 See generally Denise G Reaume, "Dignity, Equality, and Comparison" in Deborah Hellman and Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: OUP, 2013) 1.

40 See generally Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan L Rev 1241.

41 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 94, 1999 CanLII 675 (SCC).

42 Leslie McCall, "The Complexity of Intersectionality" (2005) 30 Signs 1771 at 1784–1785.

43 Colleen Sheppard, *Inclusive Equality* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 4 [Sheppard, "Inclusive Equality"].

44 Sheppard, "Inclusive Equality", *supra* note 42 at 9, 13.

In order for substantive equality to become a principle of fundamental justice, the term must address the unique systemic discriminations that marginalized individuals face in various social and institutional contexts. Dean Spade notes the "violence" that legal and administrative systems promote through processes including criminal punishment, immigration enforcement, child welfare, and public benefits[45]—all of which are inherently subject to section 7 criticism. Significant here is the understanding that equality claims can promote further damage to marginalized individuals if, instead of truly addressing social and economic barriers, such claims divide constituencies, participate in structures that uphold domination relationships that are opposed, or expand relations and structures of domination.[46] In other words, an equality approach to section 7 must not create additional barriers for marginalized claimants. It should only help judges recognize and prioritize fundamental needs and barriers that are often forgotten or ignored.

III. RECENT EQUALITY TRENDS BEYOND SECTION 15

Equality analyses have never been solely restricted to section 15 litigation. Peter Hogg notes the importance of equality as a *Charter* value throughout various sections, specifically mentioning its usefulness to section 7 and the principles of fundamental justice.[47] This section explores two recent cases, *PHS* and *Boudreault*, which highlight the types of equality analyses the SCC has been willing to consider outside the realm of section 15. The importance of these cases for marginalized claimants also portrays the need for equality to play a more consistent role in *Charter* litigation, particularly with respect to life, liberty, and security of person rights.

A. Equality and Section 7: *PHS*

PHS is a novel section 7 case that reveals the SCC's potential open-mindedness to a more contextual form of the section 7 test. A unanimous Court required the federal government to uphold its previous commitment to exempt Insite, a supervised injection facility located in Vancouver's Downtown East Side, from criminal prohibitions under the *Controlled Drugs and Substances Act* ("*CDSA*").[48] The SCC found that revoking this exemption would violate the liberty interests of Insite staff and the life and security of person rights of its clients.[49] Further, the Minister of Health's attempt to reverse the exemption was viewed as arbitrary and grossly disproportionate and, therefore, not in accordance with the principles of fundamental justice.[50]

PHS is a somewhat surprising decision, given the stigma surrounding safe injection sites. Jennifer Koshan argues that *PHS* serves as "an important example of how a compelling evidentiary record of harm that flows from state action can lead to the finding of a section 7 violation and a robust remedy."[51] The claimants' success in *PHS* allows us to imagine ways in which section 7 could grow and allow more marginalized people to assert their fundamental rights.

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45 Dean Spade, "Intersectional Resistance and Law Reform" (2013) 38 Signs 1031 at 1031–1032.

46 *Ibid* at 1037.

47 Peter W Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 Sup Ct L Rev 113.

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

49 *PHS, supra* note 8 at para 126.

50 *Ibid* at paras 129–133.

51 Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Charter Showdown" (2013) 22 Const F 31 at 37 [Koshan, "Section 7 vs 15"].

Among its reasons, the Court recognized that Insite staff provided potentially life-saving services to poor and vulnerable individuals. The Court also recognized the vulnerability of Insite's clients, and how they were influenced by factors such as "physical and sexual abuse as children, family histories of drug abuse, early exposure to serious drug use, and mental illness."[52] Lack of adequate housing and disability were also cited as reasons that a person was likely to become addicted to drugs.[53] The Court rejected the government's argument that addiction was a matter of personal choice,[54] accepting the claimants' argument that addiction is an "illness, characterized by a loss of control over the need to consume the substance to which the addiction relates."[55] State conduct was found to cause the claimants' deprivation—not choice.[56]

PHS indicates how equality can integrally function within the section 7 test. Equality issues seemed to ultimately persuade the Court to find for the claimants. However, *PHS* alone cannot ensure that marginalized claimants consistently have their section 7 rights analyzed in a contextual manner. The *PHS* remedy is somewhat narrow in terms of what it can offer a broader range of Canadians—even those similar to the plaintiffs in the case. While the government was not allowed to shut down Insite, given the essential role that it already played in the community, the case does not oblige governments to establish new safe injection facilities.[57] Again, this case serves as one step toward necessary structural change. Now, its legacy must expand.

B. Equality and Section 12: *Boudreault*

The SCC recently demonstrated another movement toward a more inclusive conception of equality rights in *Boudreault*. The case concerned the constitutionality of victim surcharges, which were mandatory for people who discharged, pleaded guilty, or were found guilty of an offence under the *Criminal Code*[58] or the *CDSA*. While section 7 was also pleaded, the Court quashed the surcharges on the sole basis that they were cruel and unusual punishment under section 12 of the *Charter*. This was Justice Martin's first decision for the Court, and she made a memorable mark by reading in a highly contextual equality approach without the claimants even pleading section 15. *Boudreault* may represent the SCC's willingness to think of equality as a flexible concept with an expansive role throughout the *Charter*.

Justice Martin recognized that the plaintiffs faced significant social and economic barriers, including serious poverty, precarious housing situations, addiction, growing up under child protection, Indigeneity, and physical disabilities.[59] She also noted that marginalized people were more likely to offend and be required to pay these surcharges more often.[60] Overall, Justice Martin found that mandatory victim surcharges caused undue hardship for "impecunious" offenders[61] and were grossly disproportionate to those individuals lacking "adequate financial capacity."[62]

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52 *PHS, supra* note 8 at para 7.
53 *Ibid* at para 8.
54 *Ibid* at paras 97–101.
55 *Ibid* at para 99.
56 *Ibid* at para 106.
57 Koshan, "Section 7 vs 15", *supra* note 51 at 37.
58 RSC 1985, c C-46.
59 *Boudreault, supra* note 9 at para 54.
60 *Ibid* at para 55.
61 *Ibid* at para 57.
62 *Ibid* at para 60.

To aid her conclusion, Justice Martin detailed the "four interrelated harms" the surcharge caused offenders:

> "(1) the disproportionate financial consequences suffered by the indigent, (2) the threat of detention and/or imprisonment, (3) the threat of provincial collections efforts, and (4) the enforcement of *de facto* indefinite criminal sanctions."[63]

While the surcharges were found to have a valid penal purpose—to raise funds for victim support services and to increase offenders' accountability to victims of crime and the community—Justice Martin recognized that "these objectives [were] not likely to be realized" in the case of marginalized offenders.[64]

In a follow-up blog article, legal scholars Jennifer Koshan and Jonnette Watson Hamilton persuasively examine how *Boudreault* has potentially paved the way for an inclusive understanding of equality under *Charter* rights beyond section 15—including both sections 12 and 7.[65] For example, despite the usual difficulty of proving an adverse impact under section 15, Justice Martin referred to this concept several times throughout the *Boudreault* decision.[66] Justice Martin's contextual analysis also focused on equality grounds not currently recognized under section 15, including poverty, addiction, and Indigeneity.[67] The tenuous status of these grounds under section 15 is likely why the plaintiffs only relied on sections 7 and 12 in this case.[68]

Koshan and Hamilton recognize that avoidance of section 15 will not be possible in every case involving marginalized claimants. However, before the Supreme Court of Canada ideally confirms a more inclusive approach to section 15, it is useful to know that disadvantaged claimants have access to alternative constitutional routes that may provide them with greater chances of success. *Boudreault* will hopefully ensure that equality continues to underlie section 12 judicial analyses. Given the overlap between the section 12 and 7 tests,[69] future section 7 claims deserve similar and consistent applications of an inclusive form of equality.

Substantive equality is not an inherently problematic concept and may ultimately help serve marginalized claimants as a permanent tool under section 7. However, current judicial applications of substantive equality under section 15 underscore the need for the reconceptualization of the term before it becomes a normalized standard under other *Charter* analyses. Justice Martin does not explicitly point to intersectionality or a reconceptualization of substantive equality in the *Boudreault* decision. Yet, her recognition of the unique social and economic barriers faced by the claimants that made it cruel and

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63 *Boudreault*, *supra* note 9 at para 65.

64 *Ibid* at para 63.

65 Jennifer Koshan & Jonnette Watson Hamilton, "The Impact of Mandatory Victim Surcharges and the Continuing Disappearance of Section 15 Equality Rights" (7 January 2019), online (blog): *ABlawg* <https://ablawg.ca/2019/01/07/the-adverse-impact-of-mandatory-victim-surcharges-and-the-continuing-disappearance-of-section-15-equality-rights/> at [Koshan & Hamilton, "Impact of Mandatory Victim Surcharges"] archived at [https://perma.cc/GN8J-N4A9].

66 *Ibid* at 4; See *Boudreault*, *supra* note 9 at paras 3, 28, 58, and 86.

67 Koshan & Hamilton, "Impact of Mandatory Victim Surcharges", *supra* note 65 at 5–6.

68 *Ibid* at 6.

69 The section 12 test comes from *R v Nur*, 2015 SCC 15. First, a court must determine what would constitute a proportionate sentence for the offence according to the principles of sentencing in the *Criminal Code*. Second, the court must ask whether the mandatory punishment is grossly disproportionate when compared to the fit sentence for either the claimant or for a reasonable hypothetical offender (at para 46). The second step's emphasis on gross disproportionality mirrors the principles of fundamental justice analysis under section 7.

unusual for them to pay mandatory victim surcharges under section 12 paves the way for an equality analysis under section 7.

IV. THE PRESSING NEED FOR EQUALITY AS A NEW PRINCIPLE OF FUNDAMENTAL JUSTICE

As confirmed in *PHS*, equality is not a new concept to section 7 of the *Charter*. Past decisions illuminate the importance of recognizing a claimant's marginalization in relation to a violation of their fundamental rights. However, both past and present section 7 trends exhibit the need for a more consistent contextual approach to the section 7 test. The next section of this paper highlights two SCC cases, *Gosselin* and *Carter*, in order to validate the pressing and substantial need for equality to become a principle of fundamental justice.

A. *Gosselin:* An Unfair Precedent for Positive Section 7 Rights

The *Gosselin* decision exemplifies the danger of judges not paying adequate attention to the systemic barriers that influence a claimant's access to section 7 rights. The case involved a challenge to the base amount of welfare benefits provided for adults under 30 years of age by a 1984 Quebec social assistance scheme. This base rate was set as approximately one-third the rate of benefits available to older welfare recipients.[70] When this legislation was in effect, young people could only increase their welfare payments if they participated in a designated training program. Designed to encourage individuals under the age of 30 to acquire training or basic education, this paternalistic scheme sought to prevent dependence on social assistance during these individuals' "formative years."[71]

The claimant, Louise Gosselin, retroactively challenged the scheme's presence from 1985 to 1989, when it was replaced by legislation that did not make age-based distinctions.[72] Ms. Gosselin, a welfare recipient who was under 30 when the legislation was in effect, brought the claim on behalf of all of the welfare recipients impacted by the scheme.[73] Ms. Gosselin pleaded sections 7 and 15 of the *Charter*, on the basis of security of person and age infringement.[74] In addition she brought her claim under section 45 of the Quebec *Charter of Human Rights and Freedoms*.[75] The remedy sought was a Court declaration that the lesser welfare rate was invalid from 1987 to 1989, and an order to compel the Quebec government to reimburse all welfare recipients for the difference between what they received and what they would have received if they had been over 30 years of age during that period of time. The SCC ultimately had to decide whether a government could be compelled to provide services on the basis of section 7 of the *Charter*. In other words, whether section 7 can provide positive rights was in dispute. The SCC was highly divided on this issue.[76] Given their importance to the section 7 jurisprudence, the majority decision and Justice Arbour's dissent will be the foci of this paper.

The majority rejected Gosselin's claim, finding that Quebec's social welfare scheme had not violated any of her constitutional rights. With respect to section 7, eight out of the nine judges either supported Ms. Gosselin's use of section 7 or left open the future possibility

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70 *Gosselin, supra* note 6 at para 6.

71 *Ibid* at paras 6–7.

72 *Ibid* at para 9.

73 *Ibid*.

74 Young, "Section 7 Politics", *supra* note 29 at 542.

75 CQLR c C-12, s 45. Provides a right to "measures provided for by law, susceptible of ensuring an adequate standard of living."

76 Justices McLachlin, Gonthier, Iacobucci, Major, and Binnie encompassed the majority (with Justice McLachlin writing the decision), and Justices Bastarache, LeBel, Arbour, and L'Heureux-Dubé each issued separate dissenting decisions.

of such a use.[77] The majority found that there was insufficient evidence in this case to justify a section 7 claim. However, Justice McLachlin specifically held that the "novel" use of section 7 to impose positive section 7 rights remained an option for the future.[78]

The majority decision is puzzling for several reasons. First, Justice McLachlin cited insufficient evidence as the primary reason for the rejection of Ms. Gosselin's claim. Yet, the plaintiff's evidentiary record included several qualified expert reports, including a social worker, psychologist, dietitian, and physician working in a community health practice. All of these experts had interacted closely with young welfare recipients. The expert evidence showed that young welfare recipients were malnourished, socially isolated, in poor physical and psychological health, and often homeless. A lack of stable housing, telephone, or presentable clothing made it very difficult for young welfare recipients to find work.[79] Ms. Gosselin also provided extensive testimony about her struggle to survive on the under-30 welfare benefits, and how her poverty-related experiences led to her failed attempts to participate in the government training programs and the greater workforce.[80] Overall, the evidentiary record seemed to confirm the roles that Ms. Gosselin's gender, disability, and economic status played in supporting the "acute material and psychological insecurity, deprivation, and indignity" she suffered.[81]

Despite being presented with extensive evidence relating to Ms. Gosselin's background, the majority failed to capture the "complexity of the oppression"[82] that was at stake for her in relation to the insufficient welfare scheme. Rather, the judges blamed Ms. Gosselin for failing to adhere to the structure of the welfare program. For example, Justice McLachlin stated that Ms. Gosselin "ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits."[83] Throughout the majority decision, it is implied that if Ms. Gosselin had just worked a little harder she would have survived better.

The majority's reasoning ignores the intersectional issues underlying this case, setting a dangerous precedent for future marginalized claimants. People who face multiple social and economic barriers are not always able to participate in mainstream activities, even those intended to "help" them. Ms. Gosselin may have exerted some autonomy when she dropped out of the government's programs, but her actions may also be seen as linked to the programming's lack of inclusivity. In this case, the primary issue seems to go beyond a lack of evidence. Rather, the evidence provided was not of the type that the majority was willing to integrate into the section 7 analysis. Equality had a key role to play here, but it was overlooked.

Another troublesome aspect of the majority decision is its treatment of positive section 7 rights. Rather than completely discounting the concept, Justice McLachlin stated that positive rights may have a role to play in future section 7 cases. *Gosselin* was simply not the right case. Justice McLachlin does not provide explicit criteria for what would be required to justify a positive section 7 right, but the surrounding circumstances would presumably need to differ from Ms. Gosselin's. Herein lies the issue. *Gosselin* is a case about a woman

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77 *Ibid.* Justice Bastarache alone took a limited approach to section 7, holding that it only applies to judicial or administrative contexts in which the state acts against an individual (*Gosselin, supra* note 6 at paras 205–223).

78 *Gosselin, supra* note 6 at 82.

79 Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 Sup Ct L Rev 297 at 312 [Jackman, "Constitutional Castaways"].

80 Young, "Social Justice and the Charter", *supra* note 31 at 683.

81 Jackman, "Constitutional Castaways", *supra* note 79 at 313.

82 Young, "Social Justice and the Charter," *supra* note 31 at 683.

83 *Gosselin, supra* note 6 at para 8.

who faced multiple social and economic barriers preventing her from achieving the adequate social assistance that she relied on to survive. Ms. Gosselin's circumstances were about as dire as they come. It is thus difficult, if not impossible, to imagine another case persuading a court to find a positive section 7 right using the current legal framework. A more equality-focused approach seems to be necessary if certain claimants are to achieve the fundamental rights they so desperately need. Overall, *Gosselin* had the potential to become the landmark case for the progressive evolution of the *Charter*.[84] Instead, the majority judgement has made things worse for marginalized claimants.

Though the majority ruled against Ms. Gosselin, Justice Arbour's dissent sheds light on the need for a more equality-focused approach to the section 7 test. She found that the welfare scheme violated Ms. Gosselin's section 7 rights, arguing that:

> a minimum level of welfare is closely connected to the issues relating to one's basic health (or security of person), and potentially even to one's survival (life interest), that it appears inevitable that a positive right to life, liberty and security of person must provide for it.[85]

Overall, Justice Arbour wrote a strong endorsement of the state having a positive obligation to provide full benefits under the Quebec income assistance scheme.[86] She relied on former Chief Justice Dickson's statement in *Irwin Toy* that courts must not rashly exclude from section 7 "such rights, included in various international covenants" including "rights to social security, equal pay for equal work, adequate food, clothing and shelter."[87]

Justice Arbour argued against narrow interpretations of section 7 that only provide protection for "legal rights"[88] or to guarantees of negative state action.[89] This "purposive and contextual interpretation" of section 7 revives an earlier notion that section 7 protects both negative and positive rights.[90] An adoption of Justice Arbour's perception of section 7 could go beyond helping marginalized claimants with similar circumstances to Gosselin. This equality-focused acceptance of positive section 7 rights could open the door to a diversity of claims from often-silenced groups and individuals.

B. *Carter:* A Groundbreaking Win with Unjust Results for Marginalized Claimants

In the more recent *Carter* decision, the SCC unanimously held that the federal criminal prohibition on assisted dying violated the right to life, liberty, and security of person under section 7. The Court found the prohibition void to the extent that it deprived a competent adult of receiving assistance in death where: (1) the person could "clearly consent"; and (2) they had a "grievous and irremediable medical condition (including an illness, disease, or disability)" that caused "enduring" and "intolerable" suffering in the circumstances of the person's condition.[91] The Court suspended the declaration of invalidity for 12 months,[92] and later granted the new Liberal government a four-month extension to allow them to craft appropriate response legislation.[93] *Carter* was groundbreaking, particularly because

84 Young, "Section 7 Politics", *supra* note 29 at 542.

85 *Gosselin, supra* note 6 at para 358.

86 *Ibid* at paras 307–400. Justice L'Heureux-Dubé generally concurred on this part of Justice Arbour's argument at para 141.

87 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1003, 1989 CanLII 87 (SCC).

88 *Gosselin, supra* note 6 at paras 314–318.

89 *Ibid* at paras 319–329.

90 Young, "Section 7 Politics", *supra* note 29 at 545.

91 *Carter, supra* note 5 at para 4.

92 *Ibid* at para 147.

93 *Carter v Canada (Attorney General)*, 2016 SCC 4.

the Court required the government to legislate medically assisted dying legislation. The foundation seemed to have been laid for real systemic improvements that could help those living with disabilities.

In June 2016, Parliament passed Bill C-14, which regulates access to medical assisted dying ("MAID") for individuals at least 18 years old who suffer from a "grievous and irremediable medical condition."[94] Of note is the requirement that a person with a grievous and irremediable medical condition must be in "an advanced state of irreversible decline in capacity" with a natural death that is "reasonably foreseeable."[95] This vague wording has limited the law's applicability to people with terminal conditions, including multiple sclerosis, spinal stenosis, Parkinson's disease, and Huntington's disease.[96] The Court's baseline threshold for access does not contemplate such a limit, making the legislation's narrow threshold for access more restrictive than required.[97]

Just 10 days after the passing of Bill C-14, Julia Lamb and the British Columbia Civil Liberties Association challenged the constitutionality of its eligibility criteria. Lamb suffers from Type 2 Spinal Muscular Atrophy, a hereditary and degenerative disease that causes weakness and wasting of the voluntary muscles. Restricted to a wheelchair, Lamb lives with significant pain and requires constant help from others in order to complete daily living activities. Eventually, she is likely to lose the use of her hands and require a long-term ventilator and a feeding tube.[98] At the time of enacting litigation, Ms. Lamb did not meet the criteria for medical assisted dying because her death was not reasonably foreseeable. Yet, she knew the progression of her disease would bring her intolerable and incurable suffering.[99] Ms. Lamb sought the right to access MAID when she is no longer able to tolerate her pain.[100] After losing a bid for speedy trial, the *Lamb* trial was set for fall 2019.[101]

On September 18, 2019, Ms. Lamb and the British Columbia Civil Liberties Association announced the adjournment of their case after the federal government's witness admitted that Ms. Lamb would qualify for an assisted death under the MAID eligibility criteria.[102] According to the expert report, medical practitioners who help patients with medical assisted death have reached a clear understanding that the law does not require a person to be near death. Rather, there is a medical consensus that a patient's natural death will become reasonably foreseeable if they refuse care that will lead to death, such as care that prevents infection.[103] Ultimately, the expert report admitted that the government's MAID law allows medical practitioners flexibility to interpret the law to help those like Ms. Lamb who are not technically dying, but who would be subjected to predictable and short deaths due to refusing preventative care. No other experts challenged this evidence.[104]

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94 Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3, s 3, amending *Criminal Code*, RSC 1985, c C-46, s 241.2(1)(b)-(c).

95 *Ibid*, s 3, amending RSC 1985, c C-46, 2 241.2(2)(b), (d).

96 *Lamb v Canada (Attorney General)*, 2017 BCSC 1802 (Notice of Civil Claim, Julia Lamb and the British Columbia Civil Liberties Association at 10–11) [*Lamb* NOCC].

97 Emmett Macfarlane, "Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*" (2017) 49 Ottawa L Rev 107 at 110 [Macfarlane, "Dialogue, Remedies, and Positive Rights"].

98 *Lamb* NOCC, *supra* note 96 at para 3–6.

99 *Ibid* at para 6.

100 *Ibid*.

101 *Lamb v Canada (Attorney General)*, 2018 BCCA 266, leave to appeal to SCC refused, 38256 (13 December 2018).

102 British Columbia Civil Liberties Association, "Release: B.C. Supreme Court adjourns B.C. Civil Liberties Association's assisted dying case" (2019) online: BCCLA <https://bccla.org/news/2019/09/release-b-c-supreme-court-adjourns-b-c-civil-liberties-associations-assisted-dying-case/> archived at [https://perma.cc/2SPD-Y332].

103 *Ibid*.

104 *Ibid*.

Despite this win for Ms. Lamb and those like her, there are still concerns surrounding the federal government's MAID criteria—particularly related to the remaining "reasonably foreseeable" requirement. On September 11, 2019, the Quebec Superior Court released its decision in *Truchon*, declaring the "reasonably foreseeable" requirement unconstitutional under both the federal and provincial MAID requirements. Justice Baudouin found the requirement violated both sections 7 and 15 of the *Charter* because it did not permit assistance in dying for Canadians who are suffering with no immediate or specifically predicable end in sight. The Court suspended the declaration of invalidity for six months.[105]

The fact that Lamb and other people living with degenerative disabilities were ever excluded from Bill C-14's scheme is perplexing. Nothing in the *Carter* decision explicitly excludes them from the Court's remedial decision. On the contrary, they always seem to have met the SCC's proposed criteria. Emmett Macfarlane says this unjust result for disabled individuals is a matter of the complex institutional relationships that governments and courts share.[106] It is possible to conclude that Parliament ignored the SCC's will, and drafted legislation that it thought was most suitable. This may in fact be consistent with previous governmental responses to court decisions, seeing as courts are typically more reluctant to enforce legislative action.

However, the Court's role in further marginalizing disabled Canadians should not be ignored. The Court was provided with the opportunity to base its decision on the systemic barriers faced by each of the plaintiffs. It also could have provided a more robust definition of "grievous and irremediable medical condition" that may have prevented Parliament's unjust exclusion. An equality analysis attached to the principles of fundamental justice could have better served the interests of a greater number of people than the overbreadth analysis that was ultimately relied upon.[107] While the federal government did not have to draft such narrow responsive legislation, the Court could have done more to demand inclusive justice.

As a result of the Court's failure to adequately address equality needs in its remedial decision, disabled Canadians were forced to fight for rights that they have arguably already won. The plaintiffs in *Lamb* and *Truchon* were required to go through the expensive litigation process that included much of the same evidence as *Carter*. It took years for them to achieve justice, which may still be taken away pending legislative re-drafting. What was meant to be a groundbreaking decision for individuals like Julia Lamb turned into somewhat of a nightmare. If the Supreme Court of Canada had truly recognized the marginalization of the *Carter* plaintiffs, the situation may have been different.

C. Summary

Carter and *Gosselin* are not the only cases that suggest the need for a more equality-focused approach to the section 7 analysis. Yet, both cases illuminate that judicial failure to contextualize fundamental needs is a current issue backed by heavily cited Supreme Court of Canada decisions. The aftermath of *Carter* illustrates that an apparent victory for marginalized individuals may be misleading without a remedy focused on the underlying equality issues at stake. Further, *Gosselin* highlights the danger of a court making progressive claims without enforcing progressive actions. The fate of positive section 7 rights is currently dangling by weak threads. It seems that without a change to the section 7 test, true access to such rights may not be possible.

105 *Ibid; Truchon c Procureur général du Canada,* 2019 QCCS 379.

106 Macfarlane, "Dialogue, Remedies, and Positive Rights", *supra* note 97 at 127.

107 *Carter*, *supra* note 5 at paras 85–88.

Though both *Carter* and *Gosselin* demonstrate how slow progress has been for marginalized claimants in the *Charter* litigation arena,[108] all hope is not lost. Cases such as *PHS* and *Boudreault* indicate that the SCC is willing to take equality-focused approaches outside the context of section 15. The goal now should be to ensure that such applications are consistent, particularly in relation to section 7.

V. WEIGHING EQUALITY AS A PRINCIPLE OF FUNDAMENTAL JUSTICE

The lack of consistency amongst judges to contextually consider the section 7 claims of marginalized claimants reveals the need for structural change to the section 7 analysis. This section explores some of the positive functions that an equality-focused principle of fundamental justice could have for a wider range of claimants, most notably through its potential to allow for novel claims. This section will also identify judicial concerns likely to arise regarding this proposed principle. While this analysis is underscored by an understanding that such a change to the section 7 analysis will likely have some inherent flaws, when judicial concerns are weighed against the benefits that disadvantaged individuals serve to gain from an equality-focused principle of fundamental justice, it is evident that change is still necessary.

A. The Ideal Benefits for Marginalized Claimants

A key benefit to the introduction of an equality-focused principle of fundamental justice is its potential to allow for marginalized claimants to make necessary and novel section 7 claims. Such claims could mirror those made in *PHS*, *Boudreault*, and *Carter*, in which a government has deprived a group of their fundamental rights—likely through some form of criminal prohibition or enforcement. These are the section 7 claims most likely to be successful in court today, given that they can adhere to the current test. However, an equality-concerned principle of fundamental justice could still benefit marginalized claimants making these claims by enforcing more consistent contextual analyses of the social and economic factors that have contributed to their deprivations.

Even more intriguing is the potential for the proposed equality principle to allow for positive section 7 obligations, such as those argued for in *Gosselin,* to succeed. Despite *PHS*, in which the Supreme Court of Canada had a much more progressive understanding of choice than in *Gosselin*, it still seems unlikely that Louise Gosselin would be successful if she brought her case today and was forced to rely on the same section 7 framework. The Court's understanding of equality issues may be progressing, but without an embedded equality analysis it seems unlikely that the move will be made toward recognizing positive section 7 rights.

The need for positive section 7 rights among marginalized individuals is sufficiently clear. All Canadians still lack positive rights to fundamental services such as social welfare, health care,[109] and housing[110] under the *Charter.* Some section 7 claims concerning these topics

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108 Cara Wilkie and Meryl Zisman Gary, "Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal Soc Issues 37 at 42 [Wilkie & Gary, "Positive and Negative Rights"].

109 See *Chaoulli v Quebec*, 2005 SCC 35 at para 104 [*Chaoulli*]; *Flora v Ontario Health Insurance* Plan, 2008 ONCA 538 at paras 105–111.

110 See generally Scott McAlpine, "More than Wishful Thinking: Recent Developments in Recognizing the Right to Housing Under S 7 of the *Charter*" (2017) 38 Windsor Rev Legal & Soc Issues 1, which addresses recent developments in case law surrounding the recognition of a right to housing under section 7.

have had some success, but only in the context of an explicit deprivation.[111] Governments do provide many fundamental social services, and sometimes they are sufficient to help marginalized individuals. However, if such a service is taken away, section 7's lack of protection over positive rights may deprive a claimant of legal recourse. The Supreme Court of Canada, in *PHS*, has recognized how a lack of resources or services can force individuals into precarious lifestyles. Without the Court going a step further to affirm positive rights under section 7, it seems unlikely that marginalized Canadians will receive consistent and equal *Charter*-protected access to the resources they need to survive with dignity.[112]

B. Potential Judicial Concerns

It would be unfair for this paper to ignore potential judicial concerns surrounding this proposed change to the section 7 test. A primary issue that relates to the discussion of positive rights is whether equality as a principle of fundamental justice would open the door to too many claims. In other words, whether this change would open the feared litigation "floodgates." The answer to this lies in judicial ability to both spot and balance valid equality issues. The ongoing *Cambie Surgeries*[113] litigation serves as a helpful example to explain this point. The plaintiffs argue that the current British Columbia health-care scheme violates their section 7 rights because it forces them to endure lengthy wait times in order to receive necessary medical procedures.[114] They claim that they should have access to reasonable alternatives, including services provided in independent medical facilities through use of private health insurance. Broad access to private medical services is currently limited by the *Medicare Protection Act*[115] and under the provincial Medical Services Plan. If the plaintiffs are successful in their bid for what is truly a positive right to health care, this case has the potential to undermine universal healthcare schemes throughout the country.

There is no denying that the individual plaintiffs in *Cambie Surgeries* have suffered.[116] If equality were a factor under the principles of fundamental justice, each could contend that the British Columbia healthcare scheme violates their section 7 rights on at least the ground of disability. Yet, equality's function under section 7 is intended to be holistic. While the plaintiffs in this case could potentially have better health-care access with private insurance, other Canadians would suffer as a result of not being able to access such insurance. The British Columbia government contends that the recognition of positive health-care rights in the context of this case would unreasonably harm marginalized individuals.[117] The judge in this case is forced to balance diverse equality interests. An equality-focused principle of fundamental justice would allow for this balancing, but should ultimately favour the party who faces the greater social and economic barriers. This proposed change to the section 7 test would help regulate the types of cases brought under its guise.

Another concern that may arise with equality as a principle of fundamental justice is whether there would be too much overlap between sections 7 and 15 of the *Charter*. Some will argue that a broadening of section 7 to include equality rights would take away the need for section 15. While some overlap between section 7 and 15 is already impossible

111 Wilkie & Gary, "Positive and Negative Rights", *supra* note 108 at 45. See also *Chaoulli, supra* note 109; *Victoria (City) v Adams*, 2008 BCSC 1363, aff'd 2009 BCCA 563.

112 Wilkie & Gary, "Positive and Negative Rights", *supra* note 108 at 39.

113 See especially *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2018 BCSC 2084 [*Cambie Surgeries*].

114 *Ibid* at paras 58–72.

115 RSBC 1996, c 286.

116 See *Cambie Surgeries*, *supra* note 113 (Notice of Civil Claim, Cambie Surgeries Corporation, Chris Chiavatti, Mandy Martens, Krystiana Corrado, Walid Khalfallah, and Specialist Referral Clinic (Vancouver) Inc at 6–15).

117 *Ibid* (Response to Notice of Civil Claim, Medical Services Commission of British Columbia, Minister of Health of British Columbia, and Attorney General of British Columbia at 15–16).

to avoid, an equality-focused change to section 7 would still allow for section 15 to serve a unique *Charter* role. Sections 7 and 15 protect against constitutionally-recognized harms that are "qualitatively different in nature"[118] and the Supreme Court of Canada has implicitly recognized this distinction.[119] Section 7 would still require a claimant to prove an infringement of a life, liberty, or security of interest right. In equality-focused cases where this is not possible, claimants will still need to rely on section 15.

Equality as a principle of fundamental justice may also alleviate the need for claimants to plead both sections 7 and 15. Currently, many claimants rely on both because an infringement of their life, liberty, or security of person interest involves underlying equality issues. This is what happened in *PHS, Carter,* and *Gosselin*. If the claimants had instead been able to rely on just section 7, knowing that they could make equality arguments within their section 7 claim, the trial and appeal processes may have gone faster. Not only would this help promote access to justice generally, but section 7 claimants could also obtain speedier access to their fundamental rights.

The argument here is not that section 7 should replace section 15 entirely. However, there is no denying that achieving section 15 rights is typically more difficult for claimants who could instead rely on section 7. Insofar as courts continue to struggle to apply section 15 to meet the equality needs of marginalized claimants, it is vital that these claimants have alternate strategies that they can reasonably rely upon to achieve their *Charter* rights. Thus, this overlap between sections 15 and 7 can benefit claimants in a way that section 15 alone has so far failed.

CONCLUSION

Charter litigation alone cannot solve the systemic problems faced by marginalized Canadians. The process is timely, expensive, and typically offers limited remedies. However, when a disadvantaged individual or group does choose to bring a *Charter* challenge, it is crucial that they receive an equitable chance of success. The section 15 jurisprudence emphasizes judicial failure to account for marginalized voices and experiences, with many questioning the ability of section 15 to uphold inclusive equality rights. At present, section 7 shows more promise for marginalized claimants protecting their *Charter* rights, so long as they have a life, liberty, or security of person interest to rely upon.

An equality-focused principle of fundamental justice could help ensure that more consistent judicial attention is focused on diverse perspectives throughout the litigation process. This proposition is not a perfect solution, but it does serve as a necessary start. An embedded equality analysis could open the minds of judges who would not ordinarily consider the intersectional systemic barriers that certain claimants face when attempting to acquire their *Charter*-protected rights. Comparing the *PHS* and *Gosselin* decisions, for example, stresses the difference that a contextual analysis can make in the determination of a claimant-friendly outcome.

In order for *Charter* litigation to move forward in an equality-focused manner, it is important to dwell on past judicial misinterpretations of systemic disadvantages. An equality-focused principle of fundamental justice must not follow the same unjust path as the section 15 analysis. As Canada's population continues to diversify, and as new people gain more opportunities to speak their truths publicly, it is necessary for the law to change accordingly. This is how the living branches of the Canadian constitution must grow.

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118 Koshan, "Section 7 vs 15", *supra* note 51 at 41.

119 *Ibid.*

ARTICLE

SOCIAL SCIENCE EVIDENCE IN POVERTY-RELATED *CHARTER* CLAIMS: AN EXAMPLE IN *BEDFORD V CANADA*

Sydney McIvor *

CITED: (2020) 25 *Appeal* 61

ABSTRACT

Social science can be a useful tool for courts when deciding upon issues relating to poverty, as it can provide information about the societal realities of the matter in question. This paper explores the use of social science evidence in poverty law-related *Charter* claims, looking at the specific example of *Bedford v Canada (Attorney General). Bedford* was a *Charter* application that ultimately struck down three provisions in the *Criminal Code* as unconstitutional because they interfered with sex workers' abilities to protect themselves against violence. Social science evidence played a vital role in the decision, demonstrating its effectiveness in these types of claims. The Supreme Court of Canada also made two important rulings in *Bedford* that increased the Court's recognition of the legitimacy of social science facts. This paper concludes that social science evidence is an essential aspect of many poverty-related *Charter* claims and that a solution should be found for ensuring that there is funding available for impoverished persons bringing these claims.

INTRODUCTION

Social science evidence can be highly valuable for tracking trends, gathering information, and measuring the impacts of public policy with respect to poverty. While society views courts as conservative institutions, there can be little doubt that social science evidence is a useful tool for courts to understand the implications of their decisions, particularly in cases involving the constitutionality of legislation. As social science develops sophistication and public acceptance, it becomes increasingly important that the courts embrace this form of evidence and develop consistent processes for its evaluation. For the purpose of this paper, social science evidence refers to evidence, regarding a particular aspect of a case, that is data-driven and seeks to understand some aspect of society and social interactions.

This paper will explore the use of social science evidence in the case of *Bedford v Canada (Attorney General)*.[1] Part I of this paper addresses the societal context that gave rise to the *Bedford* claim, including the intersection of sex work and poverty in Canada. Part II discusses the factors that make poverty law challenges unique, and explains why *Bedford* was selected for the discussion in this paper. Part III discusses the social science admitted

* Sydney McIvor is a second-year JD student at Osgoode Hall Law School with an undergraduate degree in economics from the University of Victoria. Sydney conducted empirical research for her undergraduate thesis and is interested in the intersections between statistics and law. Special thanks to Professor Shelley Gavigan and Karen Andrews for their guidance in the writing process and to Miscia Sullivan for her feedback on early drafts.

1 2010 ONSC 4264 [*Bedford SC*]; 2013 SCC 72 [*Bedford SCC*].

at trial through expert testimony, namely how the trial judge assessed the evidence. I will also address some criticisms of this analysis. Part IV notes significant changes to the way courts utilize such evidence following *Bedford*. Finally, Part V addresses ongoing problems with admitting social science evidence, particularly in poverty law cases. The purpose of this paper is to highlight the ways in which social science can be successfully used to support challenges under the *Canadian Charter of Rights and Freedoms* ("*Charter*"),[2] in a poverty law context. The conclusion will grapple with access to justice by examining available funding for such claims and recommends an expansion of government programs.

I. BACKGROUND ON *BEDFORD*

Bedford was a case brought to the Ontario Superior Court of Justice by three applicants who were, or previously had been, sex workers in Canada.[3] The applicants claimed that three provisions in the *Criminal Code* concerning prostitution infringed on their section 7 rights under the *Charter* 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."[4] Although sex work in itself was not criminalized in Canada, the *Criminal Code* provisions in question criminalized keeping a common bawdy-house, living off the avails of prostitution, and communicating for the purposes of prostitution.[5] The applicants submitted that these provisions infringed on their section 7 rights because they effectively prevented sex workers from taking measures for their own security and therefore forced a decision between protecting themselves and risking criminal prosecution.[6]

The applicants in *Bedford* were Teri Jean Bedford, Amy Lebovitch, and Valarie Scott. Between them, they had sex work experience in major Canadian cities, with experience ranging from engaging in sex work on the streets to running an escort agency.[7] As can be gleaned from further investigation into the stories of the applicants, one must be cautious in characterizing *Bedford* as a poverty law case. Sex workers are not necessarily intrinsically impoverished or exploited. As Lebovitch wrote: "[n]o matter what those who speak for us want you to believe, there are not 'representative' sex workers. We are not just one type of being who share all the same experiences."[8] It is critical to note, however, that the applicants in *Bedford* had privileges that many street-involved sex workers do not have. All three applicants were no longer working on the streets and, at the time of bringing the claim, were in roles where they had autonomy over their work. In contrast, many sex workers do live in poverty, particularly those who work on the streets, where many face insurmountable barriers to changing professions, which may include: drug dependency, exploitative relationships, and monetary limitations.[9] Many academics note

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

3 RSC 1985, c C-46 [*Criminal Code*]; Note: In this paper, when writing in my own voice I will use the term "sex work" to refer to providing sexual services in exchange for payment. However, when I am paraphrasing or quoting, particularly in relation to the *Criminal Code* I may use the word "prostitution," as this is how sex work is characterized in the *Criminal Code.*

4 *Charter*, *supra* note 2 at s 7. Note: The applicants also made claims under section 2(b), the freedom of expression provision of the *Charter,* but this paper will focus on the section 7 claims as they are more pertinent to the discussion of poverty law, and bringing the section 2(b) analysis is beyond the scope of this paper.

5 *Bedford SC*, *supra* note 1 at para 1; *Criminal Code*, *supra* note 3, at ss 210(1), 212(1), 213(1) as appeared on June 13, 2013.

6 *Bedford SC*, *supra* note 1 at para 3.

7 *Bedford SC*, *supra* note 1.

8 Amy Lebovitch, "Foreword" in Shawna Ferris, *Street Sex Work and Canadian Cities: Resisting a Dangerous Order* (Edmonton: University of Alberta Press, 2015) at IX.

9 Lauren Sampson, "The Obscenities of This Country: Canada v. Bedford and the Reform of Canadian Prostitution" (2014) 22:1 Duke J. Gender L. & Pol'y 137 at 159 (HeinOnline) [Sampson].

that sex work is often associated with the economic conditions of "particularly young, poorly educated, young women who are unable to find employment."[10] Thus, it can be inferred that even though the sex trade is not inherently associated with poverty, there are significant connections between the two.

Although not all sex workers are impoverished or victimized, it remains true that those who are in highly precarious situations have increased vulnerability. In the *Bedford* trial, police officers from across the country testified that those sex workers they encountered were "commonly poverty-stricken, abused and drug-addicted."[11] In addition, vulnerable and racialized women work in street-involved sex work at higher rates.[12] As Sherene Raznak explains, a street sex worker is likely to be marginalized simply by virtue of their trade. However, it is often many other factors, such as race and poverty, that "over-determine" whether the person might find themselves working on the streets.[13] Thus, poverty and marginalization are not only factors that are experienced by women in the sex trade, but are also factors that contribute to their entrance and entrenchment in the industry.

II. SOCIAL SCIENCE EVIDENCE AND POVERTY LAW *CHARTER* CHALLENGES

A. Background

The use of social science evidence as a tool for disadvantaged groups in advancing *Charter* claims has had a rapid turnaround in recent Canadian jurisprudential history. As Benjamin Perryman writes: "In less than two decades, we have moved from a constitutional jurisprudence that could find serious psychological harm on the basis of a brief affidavit of the applicant, to a jurisprudence that frequently relies on, if not requires, massive records."[14] Evidence heard in court can be defined as either case-specific, coined "adjudicative facts," or it can be more generalized facts about society and the effects of legislation, which Kenneth Davis coined as "legislative" facts.[15] While turnaround in the treatment of social science can likely be credited to advances in the fields of social science and a modernization of courts, another strong component was the introduction of the *Charter* in 1982, and the jurisprudential treatment of *Charter* rights and freedoms since. Perryman points out that some of the earliest *Charter* claims adduced or attempted to adduce social science evidence.[16] Although this paper does not seek to track a case-by-case treatment of social science throughout history, prior to the *Charter* there would have been only a few cases in which legislative facts—evidence as to the effects of legislation and policy—would have been utilized.[17] The introduction of the *Charter* gave courts unprecedented scrutiny over legislation and legislative schemes. In order to thoroughly measure the effects of impugned legislation, such evidence has to be accepted and fairly interpreted.

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10 Canada, Department of Justice, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution,* Vol 2, Catalogue no. 55/2-1985E (Ottawa: Department of Justice, 1985) at 353 [Fraser Report]; See also, for example, Sampson *supra* note 9; and Sherene H Raznak, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 Can LJ & Soc 91 [Raznak].

11 *Bedford* SC, *supra* note 1 at para 90.

12 Sampson, *supra* note 9 at 161.

13 Raznak, *supra* note 10 at 94.

14 Benjamin Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018) 44:1 Queens LJ 121 at 125 [Perryman].

15 *Ibid* at 125.

16 *Ibid* at 130.

17 See, for example, *Re: Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452.

B. Review of Literature

Broadly, the literature addressing social science evidence in constitutional cases and *Charter* claims has not yet engaged in a fulsome discussion of its implications for poverty challenges. To my knowledge, David Wiseman appears to be the only commenter to have discussed social science evidence in the specific context of poverty law *Charter* claims. Wiseman has some interesting writings on the topic in which he concludes that social science has "mixed potential" in the area of anti-poverty claims.[18] In a more tangential composition that goes beyond the scope of this paper, he also engages in a wider discussion of the justiciability of poverty-related *Charter* claims.[19] Prior to the release of the Supreme Court of Canada ("SCC") decision on *Bedford*, Julia Hughes and Vanessa MacDonnell contrasted the assessment of social science by the Canadian judiciary with that of German courts, concluding that there were many problems in the Canadian use of social science evidence that needed to be clearly addressed by an appellate authority. [20] While some issues Hughes and MacDonnell address are beyond the scope of this paper, they also express concerns regarding inconsistency in the evaluation of social science evidence and the following of *stare decisis*—the principle that the courts look to prior decisions to guide their judgement—in light of new academic findings.[21] Given that these issues are addressed in *Bedford SCC,* we can consider Hughes and MacDonnell's criticism in the context of these changes. More recently, Jodi Lazare has written two papers assessing the use of social science in two important constitutional cases, *Carter v Canada (AG)* and *Reference re: Section 293 of the Criminal Code of Canada* (commonly referred to as *the Polygamy Reference)*. [22] Lazare's article on the *Polygamy Reference* is highly critical, stating that the law has a "long way to go before it can make proper use of the social sciences,"[23] In contrast, her later article on *Carter* primarily praises Justice Smith's measured weighing of social science evidence in that particular case.[24] Although she still identifies significant procedural problems in the overall processing of social science generally, the tone in her *Carter* article provides a more optimistic understanding of the ways this evidence may be used in the future.[25] Michelle Bloodworth writes that courts are "uncomfortable" applying social science, but also asserts that, with proper guidance, there is no reason why trial judges cannot make determinations using social science evidence.[26] Perryman's writings in the area are particularly useful, as he seeks to fill a gap in the literature by discussing best practice in the actual adducing of social science, taking a more technical approach

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18 David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, The Institutional Competence of Courts and the Prospects of Anti-Poverty Charter Claims Burden" (2014) 33:1 Nat'l J Const L 1 at 2 [Wiseman]; see also, the earlier version of this paper, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51:3 McGill LJ 503.

19 David Wiseman, "The Charter and Poverty: Beyond Injusticiability," (2001) 51:4 U Toronto LJ 425.

20 Julia Hughes & Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32:1 Nat'l J Const L 23 [Hughes & MacDonnell].

21 *Ibid* at 25. Note: Hughes and MacDonnell also discuss admissibility of expert evidence and court deference to legislative review of social science evidence (at 25).

22 Jodi Lazare, "Judging the Social Science in Carter v Canada (AG)" (2016) 10:1 McGill JL & Health S35 [Lazare on *Carter*]; Jodi Lazare "When Disciplines Collide: Polygamy and the Social Sciences on Trial" (2015) 32:1 Windsor YB Access to Just 103 [Lazare on *Polygamy Reference*]. See also, *Carter v Canada (Attorney General)* 2012 BCSC 886 [*Carter*]; *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [*Polygamy Reference*].

23 Lazare on *Polygamy Reference, supra* note 22 at 106.

24 Lazare on *Carter, supra* note 22.

25 *Ibid*.

26 Michelle Bloodworth, "A Fact Is a Fact Is a Fact: Stare Decisis and the Distinction between Adjudicative and Social Facts in Bedford and Carter" (2014) 32:2 Nat'l J Const L 193 at pp 198, 209 [Bloodworth].

and describing best practices for counsel who wish to "harness" social science evidence.[27] Overall, the literature appears to be accepting of the use of social science evidence in theory, but critical of its application. The way the judiciary navigates social science evidence thus remains unstable, and circumstances in which such evidence is utilized appropriately tend to be treated by commenters as lucky exceptions rather than the rule.

C. Poverty-Related *Charter* Claims

What makes *Charter* claims involving poverty distinct from other *Charter* claims is not immediately clear. Wiseman asserts that anti-poverty *Charter* claims must "explicitly seek *Charter* protection against inadequate income or lack of basic socio-economic necessities."[28] However, this definition is extremely narrow and excludes cases that have a significant impact on the lives of the impoverished. Anti-poverty *Charter* litigation challenges legislative and executive action that disproportionally affects impoverished people by creating additional social barriers for those living in, or at risk of, poverty. From Wiseman's conception, the claim in *Bedford* was not an anti-poverty *Charter* claim because the applicants were not making a claim based on either lack of income or a right to necessities, but, rather, against government intervention in measures to protect themselves. By defining anti-poverty claims in this manner, Wiseman seems to advocate specifically for positive rights, i.e. "rights to" certain necessities, while *Charter* rights have been traditionally interpreted as negative rights, or "rights from" government intervention. For example, in *Gosselin* the Supreme Court of Canada held that it would not yet recognize positive rights under section 7, but that "one day" they might do so.[29] This does suggest some openness to readdressing the matter in the future. However, claims that find ways to argue within the existing jurisprudence may be more successful (and viewed by courts as less radical) than repeatedly requesting judgement on the viability of section 7 positive rights claims. An example of these creative workaround tactics is the British Columbia Court of Appeal case, *Victoria (City) v Adams.* [30] In *Adams*, the applicants successfully argued that the City of Victoria bylaws, which prohibited erecting overnight shelters in city parks, violated the section 7 rights of homeless people in Victoria who were sleeping in tents at night to reduce their exposure to harm from elements.[31] *Bedford* represents a similar creative workaround of this issue by utilizing the existing recognized principles of fundamental justice in an attempt to implicitly improve working conditions for sex workers. This successful strategy should be emulated in poverty law cases in the future where possible.

III. EXPERT TESTIMONY AT TRIAL

At the trial level in *Bedford,* the parties included the three applicants and the Attorney General of Canada, the respondent. Joining the case against the applicants were the following intervenors: the Attorney General of Ontario, the Christian Legal Fellowship ("CLF"), REAL Women of Canada, and the Catholic Civil Rights League.[32] Social science evidence was submitted in the form of expert testimony, which is required when "[t]he subject matter of the inquiry must be such that ordinary people are unlikely to form a

27 Perryman, *supra* note 14 at 125.

28 Wiseman, *supra* note 18 at 2.

29 *Gosselin v Québec (Attorney General),* 2002 SCC 84 at para 82 [*Gosselin*].

30 2006 BCCA 563 [*Adams*]; Interestingly, although Wiseman does not classify *Bedford* as an anti-poverty *Charter* claim, he does consider *Adams* to be one. However, he classifies it is a "narrow negative liberty claim arising only as a last resort and only of temporary individual benefit" (Wiseman, *supra* note 18 at 33).

31 *Adams*, *supra* note 30.

32 *Bedford SC*, *supra* note 1 at para 5.

correct judgment about it, if unassisted by persons with special knowledge."[33] As John Lowman explains through a reflection on his testimony in the *Bedford* trial, the main purpose of expert testimony is to provide an opinion which courts expect will "reflect the expert's personal knowledge in the realm of their expertise."[34] In *Bedford* and many other *Charter* challenge-related cases, the expert testimony as to the legislative facts puts courts in a position to make judgements on the effects of the impugned provisions, as well as the implications of its enactment on the lives of Canadian sex workers.[35]

In order to be in accordance with the principles of fundamental justice under section 7 of the *Charter*, a law must not be arbitrary, overbroad, or grossly disproportionate, if it affects a claimant's life, liberty or security of the person.[36] In *Bedford*, the legislative evidence brought by the applicants sought to demonstrate that the laws in question were not in accordance with these principles. The respondent argued that sex work is an inherently risky activity, and therefore involves risk no matter how it is practiced. The Attorney General of Ontario argued that the exploitative nature of the relationship between a sex worker and a customer contribute to the risk involved in the sex trade and that these laws exist to "limit the negative effects of prostitution on both the prostitute and the public, as they curtail commercialized institutional prostitution and prohibit public prostitution."[37] The claimants argued that these provisions reflect the values of society and should therefore be upheld.[38]

At trial, a vast array of evidence was considered by the court. Lowman, a professor at Simon Fraser University who studied prostitution in Vancouver for 30 years, provided key expert testimony for the applicants.[39] The respondent's key expert witness was from Dr. Melissa Farley, who is the founder of the Prostitute Research and Education non-profit and has 40 years of experience in psychology research and 15 years' experience conducting research specific to prostitution and human trafficking.[40] "The Fraser Report" was also discussed at great length as a contribution to the evidentiary record. The Fraser Report was generated in 1985 by the Special Committee on Pornography and Prostitution and entailed "a great deal" of empirical research.[41] The Committee made four recommendations that, generally, suggested either that sex work be wholly criminalized and legislation should be strengthened to keep sex workers off the streets, or that it should be decriminalized and exploitative relationships between sex workers and pimps or customers be targeted instead.[42] Interestingly, the Fraser Report's recommendations were largely ignored by Parliament and, in 1985, Parliament introduced the "communication provision," one of the provisions at issue in *Bedford*.[43] It is important to recognize that it is unlikely that the evidence from the Fraser Report would have been enough on its own for the provisions to be ruled unconstitutional, and that social science has developed substantially since

33 *Kelliher (Village of) v Smith,* [1931] SCR 672, 1931 CanLII 1 (SCC) at para 684.

34 John Lowman, "The Role of Expert Testimony in *Bedford v. Canada* and *R v. McPherson"*, excerpt from "In the Eye of the Storm: The (Ab)Use of Research in the Canadian Prostitution Law Reform Debate" (Paper delivered at Durham Law School, Durham University, 18–19 September, 2014) [Unpublished] at 3.

35 *Ibid* at 3.

36 *Bedford SC*, *supra* note 1 at para 12.

37 *Ibid* at para 40.

38 *Ibid* at para 23.

39 *Ibid* at para 129.

40 *Ibid* at para 132.

41 *Bedford* SC, *supra* note 1 at para 138; Fraser Report, *supra* note 10.

42 Fraser Report, *supra* note 10 at 357.

43 *Bedford SC, supra* note 1 at para 149.

1985. It is also difficult to condemn the legislature in this case, because it might not be known if a law's effects are arbitrary, overbroad, or grossly disproportionate until the law has been enacted and its effects measured.

Although Justice Himel's treatment of the social science evidence brought before her has been subject to criticism, her analysis of the evidence was exactly what adjudicators in these types of cases should be expected to do. Both sides made arguments to discredit the other side's expert witness evidence, which Justice Himel accounted for when making her findings of fact. Justice Himel's weighing of the evidence submitted by expert testimony is fair and reasoned.[44] She considered the totality of the expert evidence from a legal perspective and concluded:

> The evidence led on this application demonstrates on a balance of probabilities that the risk of violence towards prostitutes can be reduced, although not necessarily eliminated. The two factors that appear to affect the level of violence against prostitutes are location or venue of work and individual working conditions. With respect to venue, working indoors is generally safer than working on the streets. Working independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada. That said, working conditions can vary indoors, affecting the level of safety. For example, working indoors at an escort agency (out-call) with poor management may be just as dangerous as working on the streets.[45]

Based on these findings, Justice Himel proceeds in her analysis of the principles of fundamental justice from section 7 of the *Charter*. She concludes that the provisions are not in accordance with the principles of fundamental justice and should be struck down.[46]

Max Waltman criticizes Justice Himel's findings of fact, claiming that Justice Himel missed several key methodological concerns in the social science evidence presented that resulted in the case being wrongly decided.[47] I take issue with Waltman's argument for two reasons. First, the case did not turn on many of the issues Waltman points out.[48] Second, Waltman seems to have misinterpreted the implications of the *Bedford* decision, the legal burden of proof required in this case, and what actions were left open to Parliament following the ruling. Waltman's criticisms seem to confuse his own views on the legalization of prostitution with whether Justice Himel successfully balanced the evidence in front of her.[49] Waltman further discusses alleged problems within the methodology of key studies cited in the decision. Although an in-depth evaluation of these criticisms is beyond the scope of this paper, Waltman's analysis seems to require specific proof to a scientific degree that there is a causal connection between indoor sex work and lower instances of violence.[50] Waltman can perhaps be forgiven for asserting this standard because, in academic discussions of social science evidence, methodological arguments are important for the improvement of research and the discourse of ideas. However, the burden of proof for the applicants in this case was on a balance of probabilities, or whether it is more probable than not

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44 *Ibid* at paras 300–359.

45 *Bedford SC, supra* note 1 at para 300.

46 *Ibid* at paras 300–538.

47 Max Waltman, "Assessing Evidence Arguments, and Inequality in Bedford v. Canada" (2014) 37:2 Harv JL & Gender 459–463 [Waltman].

48 See, for example, his lengthy discussion on whether or not sex work causes PTSD, or the fact that he engages in a lengthy methodological discussion, seeming to conclude the cases cited in *Bedford* lack credibility, but cites cases to prove his own points without subjecting them to the same intense scrutiny (*Ibid* at 471–473, 491–510).

49 Waltman on various occasions insists that prostitution is "intrinsically exploitative" (Waltman, *supra* note 47).

50 *Ibid* at 495.

that the totality of the evidence points to a certain conclusion. When using social science evidence in *Charter* claims such as this one, it is important to consider that courts are making decisions that affect the lives of real people. Therefore, if it is more probable than not that a law is infringing on *Charter*-protected rights (and is not saved under section 1 of the *Charter*), then there is a societal net value in striking down that law. The likelihood that the legislation violates a *Charter* right must be balanced in proportion to the harm that it perpetuates. Particularly in the context of poverty law, these provisions could mean the difference between life and death, or incarceration and liberty. Justice Binnie explains in *R v Marshall* that "litigating parties cannot await the possibility of a stable academic consensus."[51] That is not to say that social scientists should not continue to seek a higher degree of certainty while conducting research. However, courts do not have the luxury of waiting for a certainty that will be nearly impossible to prove definitively.

IV. SUPREME COURT DECISION

In a unanimous decision written by Chief Justice McLachlin, the Supreme Court of Canada agreed with Justice Himel's ruling that all three provisions were unconstitutional. The Court struck down the impugned provisions. The decision also made interesting changes to the law in relation to the handling of social science evidence, and in particular evidence as to the effects of legislation, or legislative evidence.

As Perryman notes, the *Bedford* decision makes two key holdings regarding the treatment of social science evidence.[52] First, lower courts are now permitted to reconsider issues without strict adherence to *stare decicis* should there be "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[53] Second, the Supreme Court affirmed that legislative facts be treated as other findings of fact upon review. The Court of Appeal in *Bedford* based their decision on an interpretation of the existing law, which suggested the standard for reviewing legislative facts was different than for adjudicative facts and could be accorded less deference.[54] To this, the Supreme Court responded that the standard of review for findings of "social facts" by the trial chambers should be whether there is a "palpable...and overriding error," the same standard used for adjudicative findings of fact at the trial level. [55] The implications of these holdings suggest not only an openness to the admittance of social science evidence, but a recognition of its legitimacy in Canadian society.

We can see an example of the evolution of circumstances in *Bedford* itself. The applicants argued similar issues to the 1990 Supreme Court decision, the *Prostitution Reference*, which upheld the bawdy-house and communication provisions as constitutional under the *Charter*.[56] At the trial level, Justice Himel ruled that she was not bound by this decision because the interpretation of section 7 of the *Charter* had evolved considerably since the decision.[57] The Supreme Court majority ruled even further, stating that a matter can be revisited if there are significant changes in the law *or* if there is a significant change in circumstances or in evidence.[58] This is hugely significant with respect to social science evidence and the *Charter* because it means that *Charter* matters relating to the

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51 [1999] 3 SCR 456, 177 DLR (4th) 513 para 3, cited in Lazare on *Polygamy Reference*, *supra* note 18 at 113.

52 Perryman, *supra* note 14 at 131.

53 *Bedford SCC supra* note 1 at 42.

54 As discussed in *Bedford SCC*, *supra* note 1 at para 48.

55 *Ibid* at para 56.

56 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 SCR 1123, 68 Man R (2d) 1 [*Prostitution Reference*].

57 *Bedford SCC*, *supra* note 1 at para 17.

58 *Ibid* at 42.

constitutionality of legislation can never be truly settled law. Perryman suggests that a societal change in circumstances may include the evolution of the socially accepted meaning of marriage, while a change in evidence might be new research that was not available when a matter was previously ruled upon.[59] Although this approach, in opening the possibility of revisiting matters, might seem to be radical on its face, the idea is actually consistent with the purpose of using a case-based common law system, which allows the law to evolve with societal norms. As Hughes and MacDonnell assert, courts should be encouraged to engage with social science in a meaningful way, while being open to the possibility that this might mean revisiting and reviewing constitutional issues as further evidence becomes available.[60]

Chief Justice McLachlin gives two reasons for the decision to change the standard of review of legislative facts: (1) efficiency of the system (an appellate level review of legislative findings of fact would essentially result in a new trial at every level); and (2) legislative facts might be "intertwined" with case-specific adjudicative facts, which means that it would be impractical to apply different standards of review to different types of facts.[61] The decision to change the standard of review for findings of fact with respect to legislative evidence seems to have mixed reception. For example, Bloodworth asserts there is nothing inherent about social science facts that might make them any more "suspicious" than adjudicative facts.[62] Bloodworth also contends that the previous interpretation that legislative facts were not due the same deference as adjudicative facts was a misinterpretation of *RJR-MacDonald Inc. v Canada (Attorney General)* and never should have been law.[63] The change to the law gives trial judges a lot of responsibility when it comes to the weighing of evidence, evaluating of methodology, and determining credibility of expert witnesses. Although many commentators seem ready to embrace the new standard, there are consequences. As Lazare points out:

> [A]s a case makes its way up the appeals process, the evidentiary record is scrutinized by increased numbers of judges at each level of court, creating a sense of safety in numbers and consensus. As the number of judges increases, so do the chances that the evidence will be examined by a judge with the requisite awareness of the risks and challenges associated with expert evidence from the social sciences. Thus, the risk of uncritical reliance on unsound evidence, or of misapprehension of complex scientific evidence, is minimized.[64]

However, although the new standard may seem to set an insurmountable task before a trial judge, the requisite reasoning is actually quite similar to the way that trial judges are already required to make findings of fact. It should also be noted that in an instance of palpable and overriding error in the interpretation of a trial judge, the appellate courts retain the right to step in. In addition, if there appear to be missing elements to the evidentiary records, appellate courts might look to intervenors or *amici curiae—"friend(s) of the court" asked to provide external counsel to stakeholders and adjudicators*—to fill in the gaps. The fact remains, however, that many trial judges might find they are actually up to the task. As we can see from Justice Himel's use of logic and her assessment of applicability to the facts before her, this responsibility might be considered simply an application of the skills that judges already utilize when analyzing different areas of evidence. In the same way

59 Perryman, *supra* note 14 at 125.

60 Hughes & MacDonnell, *supra* note 20 at 57.

61 *Bedford SCC, supra* note 1 at paras 51 and 52.

62 Bloodworth, *supra* note 26 at 208.

63 *Ibid* at 208–209, see also *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199, 127 DLR (4th) 1 at para 79.

64 Lazare on *Carter, supra* note 22 at 45.

that a judge is not expected to be a forensic scientist, a judge does not have to be a social scientist to carefully evaluate evidence that is before them.[65] Pointing out methodological problems with opposing evidence is the responsibility of the parties involved in the case and their counsel in cross-examination. This, as is the case for any other matter within the adversarial system, means that the parties must bring their strongest case forward.

V. CONTINUING PROBLEMS IN POVERTY LAW *CHARTER* CLAIMS

A clear access to justice problem arises in the context of the resources required to bring forward poverty-related claims. Many cases involving poverty law may benefit from social science evidence, but few impoverished people have the resources to retain counsel necessary to make radical *Charter* claims or to hire experts to testify on their behalf. Professor Allan Young writes that "most people cannot afford to mount constitutional challenges in order to vindicate their rights."[66] Legislative fact evidence drives the already exorbitant costs of *Charter* litigation even higher, with the cost to bring a claim possibly even exceeding a million dollars.[67] Young explains that even when a lawyer agrees to argue the claim *pro bono,* the other costs, particularly that of expert witnesses, still make *Charter* claims a costly undertaking. [68]

In *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society,* the Supreme Court suggests that an access to justice remedy could include allowing public interest groups to bring forward claims.[69] I take issue with this being the sole remedy because the judiciary is assigning responsibility to non-profit groups to solve problems that the government themselves created by passing unconstitutional legislation. Some funding may be available for *Charter* claims under the federal "Court Challenges Program," which was initially introduced in 1978 but was cut by the previous government in 2006.[70] The current government has committed themselves to reinstating the program, but has not provided substantive information about the timeline, stating that it is "gradually" transiting the program to its new independent organization.[71] Applicants in Ontario can also apply for funding under test case public interest funding through Legal Aid Ontario, but the funding is limited and, even when granted, does not come near to Young's estimate of the cost of bringing these claims.[72] Another potential solution for funding these claims would be a practice of judges awarding costs to applicants. However, applicants would still need to acquire funding up-front, and unsuccessful applicants would be responsible for their own costs. [73]

The use of social science evidence via expert witness testimony may also pose problems given the adversarial nature of Canada's court system. In fact, the adversarial system is mentioned

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65 Perryman, *supra* note 14 at 149.

66 Alan Young, Department of Justice Canada, "The Costs of Charter Litigation" (2016) at 2, online (pdf) <https://www.justice.gc.ca/eng/rp-pr/jr/ccl-clc/ccl-clc.pdf> archived at [https://perma.cc/A96D-93VL] [Young].

67 *Ibid* at 3.

68 *Ibid*.

69 2012 SCC 45 at para 51.

70 Canada, "Objective and History of Court Challenges Program" (5 February 2019), online <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program/backgrounder.html> archived at [https://perma.cc/CDW7-B72R].

71 *Ibid*.

72 Young, *supra* note 66 at 3.

73 *Ibid* at 7.

explicitly as a problem by many commentators.[74] As was the case in *Bedford,* there can be much disagreement even amongst experts. A court may miss important evidence if both sides have incentives to not bring the best witnesses or hide related findings from the court. In these cases, it might be prudent for judges to have discretion to call important experts on the matter that neither side has presented in a witness. One possible solution to this is to adopt a quasi-inquisitorial method for seeking truth in legislative evidence. Inquisitorial systems allow for the presiding judge to direct the process rather than the adversarial parties, as is commonplace in the adjudicative process.[75] Lazare discusses the possible benefits of adopting methods from inquisitorial systems by pointing out that the adversarial system can be "potentially hindering" to the search for truth.[76] This could potentially curtail a large portion of the costs of bringing *Charter* claims as it would greatly reduce the parties' costs in acquiring their own expert witnesses.

CONCLUSION

Social science evidence brings clear public benefits to *Charter* claims in a poverty context and allows courts to rule on the constitutionality of legislation using social evidence to contextualize the real effects of the impugned legislation. *Bedford* is a significant case in the realm of the adjudication of social science evidence in law and poverty cases for various significant reasons. The case demonstrates a robust example of how a trial judge might weigh expert testimony to make legislative findings of fact. The applicants in *Bedford* were ultimately successful in their claim, demonstrating the possible success of utilizing social science evidence strategically. The changes in the law that stem from the Supreme Court decision suggest courts' increasing openness to hearing expert testimony and accepting social science evidence as legitimate. Poverty law-related *Charter* claims are particularly challenging because of the continued refusal of the courts to recognize any positive rights to the basic necessaries of life. Cases such as *Bedford* are examples of creative legal workarounds using officially recognized *Charter* rights to make claims in areas of law that disproportionately affect the impoverished. The use of social science to form legislative evidence in such cases is still developing, and some clear issues in relation to access to justice and available funding for these cases will need to be addressed as the jurisprudence matures. This paper recommends an embracing of social science evidence and further discussion on how courts can be most successful in admitting the best evidence, improving efficiency, and helping impoverished persons bring claims in order to advance the aims of anti-poverty advocacy.

74 See, for example, Hughes & MacDonnell, *supra* note 20; Lazare on *Carter, supra* note 22; Lazare on *Polygamy Reference, supra* note 22.

75 Jodi Marissa Lazare, *The Use of Social Science Evidence in Constitutional Adjudication Overcoming the Challenges of the Adversarial System* (LLM Thesis, McGill University, 2012) [unpublished] at 107.

76 *Ibid* at 107.

ARTICLE

INDIGENOUS SACRED SITES & LANDS: PURSUING PRESERVATION THROUGH COLONIAL CONSTITUTIONAL FRAMEWORKS

Chase Blair *

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ABSTRACT

Sacred sites and lands are vital to the spiritualities of many Indigenous peoples in Canada. However, colonial conceptions of land ownership, land use, and religion have worked in concert to stifle the preservation of Indigenous sacred sites and lands. This article examines three options, based in the *Constitution Act, 1982*, that Indigenous peoples in Canada may pursue to preserve their sacred sites and lands: the section 35 title option, the section 35 rights option, and the section 2(a) *Charter* option. This paper suggests that the legal frameworks associated with each option perpetuate colonial values, whether it is the dispossession of land, the belief that land is only a commodity, or the superiority of Christianity over Indigenous spiritualities. By constructing legal frameworks that make the preservation of sacred sites and lands so difficult, Indigenous spiritualities are only further oppressed by the Canadian state.

INTRODUCTION

Indigenous spiritualities have long been targeted by the Canadian state, whether through the seizure of sacred lands, the criminalization of spiritual practices, or the persecution of Indigenous spiritual leaders.[1] Additionally, mandatory attendance at residential schools—institutions based on the "assumption that European civilization and Christian religions were superior to Aboriginal culture"—was used to disconnect Indigenous children from their traditional spiritual lands, sites, and practices.[2] The Canadian state has since issued a formal apology to Indigenous peoples, recognizing the economic, political, social, and spiritual harms wrought by residential schools.[3]

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* Chase Blair completed his JD degree at Thompson Rivers University, Faculty of Law in 2019, after obtaining his BA from the University of Victoria in 2015. He thanks Sarah Pike, his friends, and the Editorial Board of *Appeal* for their helpful feedback with this article.

1 Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada," (31 May 2015) 1–2, online (pdf): <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf> [TRC Summary] archived at [https://perma.cc/Z3HS-BU8J].

2 *Ibid* at 4.

3 Government of Canada, "Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools system," (11 June 2008), online: <http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649> archived at [https://perma.cc/2D5X-WAHS].

Despite this formal recognition of wrongdoing and the legalization of Indigenous spiritual practices, colonial ideas persist, and Indigenous spiritualities are still devalued and suppressed. In this article, I discuss the colonial ideas entrenched in the Canadian judiciary, focusing specifically on how three legal frameworks used to interpret constitutional rights—the section 35 Aboriginal title test, the section 35 Aboriginal rights test, and the section 2(a) *Charter* freedom of religion test—impact Indigenous spiritualities.[4]

In Part I, I outline the values held by those who colonized Canada, including their conceptions of land ownership, land use, and religion. In Part II, I briefly summarize the historical uses of the law to suppress Indigenous spiritualities. Part III describes how each of the three aforementioned legal frameworks reflect colonial values and suppress Indigenous spiritualities by making it exceedingly difficult for Indigenous groups to preserve[5] their sacred sites and lands. First, I demonstrate that both of the section 35 frameworks reflect colonial values, whether it is the dispossession of land or the belief that land is only a commodity. Second, using the case study of *Ktunaxa,*[6] I demonstrate that the section 2(a) *Charter* freedom of religion framework reflects colonial conceptions of land use, favours Christian conceptions of religion, and devalues Indigenous spiritualities.[7]

I. THE VALUES OF COLONIALISM & CONCEPTIONS OF RELIGION

A. Dispossession of Land

Europeans viewed the New World as a land rich in resources, ready to be settled by their citizens. However, to fully exploit the resources of the New World and settle a new population, dispossessing Indigenous peoples of their lands was necessary. Two worldviews worked in tandem to justify this dispossession: the Doctrine of Discovery and the philosophy of John Locke.

Under the Doctrine of Discovery, the first European Christian nation to discover non-Christian lands had a pre-emptive right—against all other Christian nations—over the "infidels" and the lands that they occupied.[8] A beneficial right of occupancy, or something resembling legal title, was crystallized upon first landing at the beach and justified based on a perception that Indigenous peoples were spiritually inferior to their Christian counterparts.[9]

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4 Indigenous peoples in Canada may also use section 35 treaty rights to seek constitutional protection of their sacred sites and lands. However, I do not discuss this option in the paper, as treaty rights are not assessed through a uniform legal test—they are assessed depending on the terms of the specific treaty. I discuss the section 35 title framework, section 35 rights framework, and section 2(a) *Charter* framework because courts apply the same legal tests in every rights claim uniformly across Canada.

5 In this paper, I use the word "preserve" or "preservation" to mean the following: (1) keeping sacred sites or lands completely free of construction, occupation, or development by humans (see Ktunaxa Nation, "Qat'muk Declaration," (15 November 2010), online: <http://www.ktunaxa.org/who-we-are/qatmuk-declaration/> [Qat'muk Declaration]), or (2) keeping sacred sites or lands unoccupied by humans, save for when Indigenous peoples travel to them to pray, communicate with gods, visit ancestors, or otherwise engage in other spiritual acts.

6 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54.

7 *Ibid.*

8 Robert N Clinton, Neil J Newton et al, *American Indian Law: Native Nations and the Federal Systems: Cases and Materials* (Newark: LexisNexis, 2005) at 1008.

9 David E Wilkins, "Federal policy, western movement, and consequences for Indigenous people, 1790-1920," in Michael Grossberg, ed, *The Cambridge History of Law in America: Volume II the Long Nineteenth Century (1789-1920)* (Cambridge University Press, 2008) at 210; Matthew Charles Stamford, *The Use of Law in the Destruction of Indigenous Religions in Canada and the United States: A Comparative Perspective* (DPLS, University of Sussex, 2012) [unpublished] at 18 [Stamford].

John Locke also believed that Indigenous peoples were inferior and did not truly own the lands of the New World, but he justified his belief through a different framework. In *Two Treatises of Government*, Locke described Indigenous peoples as hunter-gatherers in a "pre-political state of nature," who lacked government, property, agriculture, and organized commerce.[10] Locke believed that Indigenous peoples did not "labour" over the land, meaning that they did not cultivate and enclose it according to European standards.[11] Without "labour," Indigenous peoples could not claim sovereignty over the land, thus rendering it vacant and ripe for dispossession.[12]

According to the Doctrine of Discovery and the theories of John Locke, Indigenous peoples were morally inferior as non-Christians, and politically and economically inferior because they did not use the land "properly." Indigenous peoples were not worthy of living on or using the lands of the New World. Thus, their forced removal was justified.

B. The Value and Use of Land

In the colonial worldview, land is privately owned, either through cultivation or enclosure.[13] Land is a commodity that is demarcated, purchased, used, and sold in order to accumulate capital. Land that is untouched by humankind, and lacks value as a commodity, is not being "used" properly and is seen as wasted land. Land is dominated by humanity, echoing the Christian creation story in Genesis 1:28 in which God commands for man to "fill the earth and subdue it; and have dominion [...] over every living thing."[14]

Many Indigenous peoples' attitudes toward land starkly contrast with those of the colonizer. In this worldview, the primary value of land is spiritual and not economic, though one may still earn a livelihood from the land.[15] Land does not need to be cultivated, enclosed, or "used" by humans to have value. The value of land is incapable of being appraised in monetary terms.[16] Humans do not dominate the land under this worldview. Instead, there is an acknowledgment that natural resources exist without humanity but that humanity does not exist without those same natural resources.[17]

C. Conceptions of Religion

What it means to follow a religion and what it means to be pious have varied over time and across cultures. During the Reformation in the early 16th century, figures like Huldrych Zwingli and John Calvin played an important role in shifting Western peoples' conceptions of what it meant to be religious.[18] To these figures, religion denoted a state of

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10 John Locke and Peter Laslett, *Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett, second edition* (Cambridge: University Press, 1970) at 27.

11 Gary Fields, *Enclosure: Palestinian Landscapes in a Historical Mirror* (Oakland: University of California Press, 2017) at 61–2.

12 Blake A Watson, "John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery," (2006) 36:2 Seton Hall LR 481 at 489.

13 Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005) at 36–7 [Banner].

14 Genesis 1:28, Revised Standard Version.

15 Natasha Bakht and Lynda Collins, "'The Earth is our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada," (2017) University of Ottawa Working Paper No 2012/24 at 8 [Bakht & Collins].

16 Sari Graben, "Resourceful Impacts: Harm and Valuation of the Sacred," (2014) 64 U Toronto LJ at 84 [Graben].

17 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 20.

18 Jonathan Z Smith, "Religion, Religions, Religious," in Marc C Taylor, ed, *Critical Terms for Religious Studies* 2nd ed, (Chicago: University of Chicago Press, 1998) at 271 [Smith].

mind, and there were no ritual connotations associated with this state of mind.[19] Donald Lopez argues that the shift to belief, rather than ritual, became "the pivot around which Christians have told their own history."[20] From this time on, internalized belief became the defining characteristic of Christianity.[21] In a sense, the Christian God transcended geography. Christians could worship in any church of the same denomination, and as long as their belief was strong, they were considered pious.[22] The location of the house of worship bore "little to no effect on its practical religious […] functions."[23] This shift to internalized belief, largely unconnected to specific locations, allowed European Christians to easily transport their religion across the Atlantic and proselytize it to Indigenous peoples.

For many Indigenous peoples, spirituality is rooted in the land; without the land, internalized belief is irrelevant.[24] The strength of their spiritual connection "is inextricably bound up with certain natural areas held to be sacred."[25] Indigenous spiritualities may require Indigenous groups to maintain stewardship over a sacred site, or perform rituals at these sites.[26] Many Indigenous spiritualities are based in what some scholars term "geopiety," meaning that ceremonies are "conducted in a specific location" and, as a result, these geopious spiritualities "are not easily transportable like the Christian God."[27]

Christians often have a difficult time grasping the importance of sacred sites to Indigenous spiritualities because of what RC Gordon-McCutchan dubs the "edifice complex," where sacred space is viewed "primarily in terms of buildings."[28] The emphasis on buildings as sacred spaces, rather than "unoccupied" or "undeveloped" land, illustrates the relative disconnection of Christianity from natural landscapes and reflects the colonial belief that land must be cultivated and commodified in order to have value. Protestantism and Roman Catholicism have been the dominant religions in Canada's history, both viewing religion through this colonial lens.[29] Because of this, the colonial lens has become the "standard" to which all other religions and spiritualities are compared.

Throughout Canada's history, the belief that the dispossession of Indigenous land is necessary, that land is only a commodity, and that piety is based purely on one's internal belief has helped shape the Canadian legal system. In turn, this system has resulted in the dispossession of Indigenous lands and the suppression of Indigenous spiritualities.

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19 *Ibid*.

20 Donald S Lopez, "Belief Critical Terms for Religious Studies," in Marc C Taylor, ed, *Critical Terms for Religious Studies* 2nd ed, (Chicago: University of Chicago Press, 1998) at 21.

21 Smith, *supra* note 18 at 271.

22 Stamford, *supra* note 9 at 43.

23 Michael Lee Ross, *First Nations Sacred Sites in Canadian Courts* (Vancouver: UBC Press, 2005) at 214 [Ross].

24 *Ibid* at 3.

25 Bakht & Collins, *supra* note 15 at 783.

26 Qat'muk Declaration, *supra* note 5.

27 Sylvia McAdam, *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich Publishing Limited, 2015) at 53.

28 Lori G Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion," (2002) 44:1 J Church and State at 144–5 [Beaman].

29 *Ibid* at 138.

II. HISTORICAL SUPPRESSION OF INDIGENOUS SPIRITUALITIES

The connection between Indigenous spiritualities and the land cannot be understated. Anishinaabe Nation Elder Fred Kelly explains that "[t]o take the territorial lands away from a people whose very spirit is so intrinsically connected to Mother Earth was to actually dispossess them of their very soul and being; it was to destroy whole Indigenous nations."[30] In British Columbia, Indigenous peoples were placed on reserves constituting only 0.4 percent of land in the province.[31] This act of dispossession damaged Indigenous peoples' spiritualities, severely restricting their access to sacred sites and areas on non-reserve lands.

In order to leave their assigned reserve and access these sacred sites and lands, many Indigenous peoples had to seek permission from an Indian agent under what is known as the "pass system."[32] If an Indigenous person was found off reserve without a pass, they were "taken into custody by the police and summarily returned to their reserve."[33] When access to sacred sites and lands is denied or is subject to the discretion of government administrators, Indigenous peoples cannot "distribute their spiritual connection to the land," leaving them "with a mere shell of their spiritual relationship with the land."[34]

Working alongside dispossession were schools and laws that preached the supposedly superior European "values of Christianity and acquisitive capitalism."[35] Denominational boarding schools were built, segregating Indigenous children from their traditional cultures and spiritualities.[36] The Potlatch, a redistributive gift-giving ceremony used mostly in British Columbia, was banned from 1884 to 1951.[37] Lawmakers justified this ban by claiming that it destroyed accumulated capital, hindered economic and social progress, and was antithetical to the Protestant work ethic and acquisitive capitalism.[38]

In 1914, the Canadian government criminalized off-reserve dancing "in aboriginal costume" or "inducing or employing any Indian to take part in such dance" without the consent of an Indian agent.[39] Laws were also passed that effectively prevented Indigenous peoples from using the legal system to defend their spiritual practices. In 1927, Parliament barred Indigenous peoples from soliciting funds for their legal claims without a licence.[40]

Simply put, the Canadian state attempted to erase Indigenous cultures and spiritualities by promoting private land ownership, agriculture, and Christianity. While Indigenous spiritualities are no longer criminalized, the historical dispossession of land has forced Indigenous peoples to use the judicial system in an attempt to protect and preserve their sacred sites and lands. However, the judiciary has constructed legal tests imbued with colonial values, making it difficult for Indigenous peoples to have their spiritualities constitutionally protected.

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30 TRC Summary, *supra* note 1 at 225.

31 Nicholas Blomley, "Making Space for Property," (2014) 104:6 Annals of the Association of American Geographers at 1292.

32 Laurie F Barron, "The Indian Pass System in the Canadian West, 1882-1935," (1988) 13:1 Prairie Forum at 26.

33 *Ibid*.

34 Ross, *supra* note 23 at 3.

35 George E Tinker, *Missionary Conquest: The Gospel and Native American Cultural Genocide* (Minneapolis, Fortress Press, 1993) at 109.

36 Stamford, *supra* note 9 at 93.

37 *Ibid* at 107.

38 *Ibid* at 108, 112.

39 *Ibid* at 115.

40 *Ibid* at 116.

III. OPTIONS FOR PRESERVING SACRED SITES & LANDS

A. The Section 35 Route

In this section, I first outline the Aboriginal title framework for preserving sacred sites and lands, while also highlighting how aspects of this route are problematic and reflect colonial values; I then repeat this process for the Aboriginal rights framework. Finally, I outline the problematic aspects shared by both frameworks and describe how these common aspects reflect colonial values.

i. Aboriginal Title Framework

To establish Aboriginal title, an Indigenous group must prove that there was sufficient occupation prior to sovereignty, continuity of occupation from pre-sovereignty to the present time, and exclusive occupation at sovereignty.[41] If each of the three aforementioned elements is established, title is recognized and titleholders are granted "the right to use and control the land."[42] Indigenous groups can then "use and control the land" to preserve sacred sites or designate sacred lands. However, preserving Indigenous sacred sites and lands through the section 35 title framework is difficult given the colonial values embedded in the framework itself.

The first element of the section 35 title framework is sufficiency of occupation. This element can be established through a variety of activities:

> [R]anging from the *construction of dwellings* through *cultivation and enclosure of fields* to *regular use* of definite tracts of land for hunting, fishing or otherwise *exploiting its resources*.[43]

A strong presence on or over the land claimed must be evidenced by "acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group."[44]

The test for establishing sufficient occupation requires that courts take into account the Indigenous perspective, yet the descriptions of how to establish sufficient occupation are from a solidly colonial perspective.[45] The "construction of dwellings" is listed as the surest sign of sufficient occupation, echoing the colonial belief that land must be put to productive use, build capital, and be dominated by humankind to be used "properly." The importance of the construction of buildings in the sufficient occupation analysis is irrelevant to many Indigenous groups pursuing title over specific spiritual sites and lands. Given that Indigenous sacred spaces are usually rooted in land, and not buildings, such as in Christianity, it is unlikely an Indigenous group will be able to prove the surest sign of sufficient occupation under the section 35 title framework.[46] Indigenous groups must then point to other signs that they sufficiently occupied the claimed sacred site or lands.

The second strongest ground to prove sufficient occupation is the "cultivation and enclosure of fields."[47] Again, this sign of sufficient occupation is largely useless to an Indigenous group using the section 35 title framework to preserve sacred sites or lands. That is, unless

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41 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 26 [*Tsilhqot'in*].
42 *Ibid* at para 18.
43 *Ibid* at para 37. [emphasis added]
44 *Ibid* at para 38.
45 *Ibid* at para 14.
46 Beaman, *supra* note 28 at para 145.
47 *Tsilhqot'in*, *supra* note 41 at para 37.

an Indigenous group signifies their spiritual connection with the land by cultivating it, or putting a fence around it, they will not be able to prove the second strongest ground of sufficient occupation.

Listing "enclosure and cultivation" also overlaps perfectly with John Locke's colonial theory of land ownership.[48] Lockean theory uses the concepts of "sovereignty" and "labour," while the section 35 title framework uses the analogous concepts of "title" and "cultivation and enclosure." However, both frameworks effectively communicate the same message: an Indigenous group must "labour" over the land (i.e. cultivate and enclose it) to claim sovereignty (i.e. title) over the land. Revering the land spiritually is simply not enough to prove ownership.

At the lowest end on the spectrum of sufficient occupation is the "regular use of definite tracts for hunting, fishing or otherwise exploiting its resources."[49] The words included and omitted in this part of the section 35 title framework also reflect colonial conceptions of land ownership and use. Under this framework, the exploitation of land for food and other resources are acceptable "uses" of land, but the regular use of land for spiritual purposes is absent. In the colonial mindset, the idea of land use and ownership is confined to exploitative activities whereby humans take resources, rather than spiritual guidance, from the Earth.

The second component of the section 35 title framework is continuity of occupation. For continuity of occupation to be established, an "unbroken chain" of continual occupation is not required. I discuss the problematic aspects of the second component in Part IV(a)(iii), as they overlap with those in the section 35 rights framework.

The final requirement is exclusivity of occupation. Here, the Aboriginal group must have "the intention and capacity to retain exclusive control" over the claimed lands.[50]

For an Indigenous group to preserve their sacred sites or lands through the section 35 title framework, they must satisfy a three-part test; however, this is a difficult task given the structure of the legal test. The sufficient occupation component of the framework is particularly challenging. At this stage, Indigenous peoples must express their spiritual beliefs by either dominating the land, "labouring" over it, building structures on it, or exploiting its resources to have a chance of preserving their sacred places under the section 35 title framework.

ii. Aboriginal Rights Framework

For an Indigenous person or group to establish that they have a section 35 Aboriginal right to access an undeveloped sacred site or preserve sacred lands, they must satisfy four steps. First, they must demonstrate that they were acting pursuant to an Aboriginal right.[51] To prove this, the right must first be characterized and a court must determine whether the activity is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" prior to contact with Europeans.[52] Second, a court must determine whether the claimed right "was extinguished prior to the enactment of section 35(1) of the *Constitution Act, 1982*."[53] Third, the Aboriginal claimant must prove

48 Banner, *supra* note 13 at 36–7.
49 *Tsilhqot'in*, *supra* note 41 at para 18.
50 *Ibid* at para 47.
51 *R v Gladstone,* [1996] 2 SCR 723, 200 NR 189 at para 20 [*Gladstone*].
52 *R v Van der Peet*, [1996] 2 SCR 507, [1996] CarswellBC 2309 at para 46 [*Van der Peet*].
53 *Gladstone, supra* note 51 at para 20.

that the government action or legislation produces a prima facie infringement.[54] In the final step, the onus is reversed and the Crown must prove that the infringement was justified.[55]

a. Re-Characterizing Rights

The first problem with the section 35 rights framework occurs during the first stage of the four-step test, where courts have a large amount of discretion. During this stage, litigants characterize their asserted right to spiritual sites or lands, but a court may re-characterize the section 35 right "on terms that are fair to all parties."[56] The process of re-characterization necessitates a compromised solution. However, if an Indigenous group compromises, the sacred site or land in question may be desacralized, thereby preventing future rights claims for the sacred area in question.

For example, imagine an Indigenous group claimed a section 35 right to preserve sacred land—which, to remain sacred, must be undisturbed by humans—and the other party sought to build a ski resort on that land. In this scenario, there are no acceptable compromises between the claimant Indigenous group and the other party that would preserve the sacrality of the land, as *any* development would desecrate it.[57] The claimant group would never pursue the right to access that land in the future, as the site would no longer have spiritual value. The ability of a court to re-characterize a section 35 rights claim not only may prevent future rights claims, but also includes an element of paternalism, preventing litigants from expressing their spirituality in their own terms.

b. Lack of Legal Precedent

Second, though not a problem with the framework itself, courts have not been receptive to section 35 claims seeking to access, use, protect, or preserve off-reserve sacred sites. In fact, though such rights have been asserted, they have never been proven in court.[58] Factors like the length and cost of litigation and the risk of an unfavourable precedent deter Indigenous groups from pursuing such claims.[59] In turn, if an Indigenous group does commence litigation, the colonial values imbued in the section 35 rights framework decrease the likelihood that their claim will succeed. Many of the colonial values of the section 35 rights framework are shared with those of the section 35 title framework.

iii. Problems Common to Both Routes

There are five problems common to both the section 35 title framework, and the section 35 rights framework.

a. Presumption of Non-Existence

The first shared problem is the burden of proof for title and rights claims. Section 35 does not state what party needs to prove or disprove an Aboriginal right or title claim; rather, the test is the product of jurisprudence. The Supreme Court of Canada ("SCC") decided that the Indigenous group asserting the section 35 claim bears the burden of proving

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54 *R v Sparrow*, [1990] 1 SCR 1075, [1990] CarswellBC 105 at paras 67–70 [*Sparrow*].

55 *Gladstone*, *supra* note 51 at para 20.

56 *Lax Kw'alaams Indian Band v Canada (Attorney General)*, [2011] 3 SCC 56 at para 46.

57 See *Ktunaxa*, *supra* note 6 at para 36 for an example of when any development would desecrate sacred lands.

58 See *Hupacasath First Nation v British Columbia (Minister of Forests) et al*, 2005 BCSC 1712, 51 BCLR (4th) 133; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41; *Hiawatha First Nation v Ontario (Minister of the Environment)*, 2007 CarswellOnt 738, 221 OAC 113.

59 Ross, *supra* note 23 at 15.

that they possess an Aboriginal right or title to lands.[60] This test applies regardless of whether the land or site in question is unceded territory. Indigenous rights to sacred sites or ownership of sacred lands are thus presumed to be non-existent; dispossession is the default. Furthermore, Indigenous peoples bear the burden of proving that their rights or title were infringed, rather than the Crown proving an infringement did not occur.[61]

b. Temporal Limitations

The second shared problem is that both section 35 frameworks limit claims to specific time periods based on the arrival of Europeans. First, take the continuity-of-occupation component of the section 35 title framework. Under this component, if evidence of present occupation is used to support a claim of pre-sovereignty occupation, "the present occupation must be rooted in pre-sovereignty times."[62] This presents obvious problems if sites or lands became sacred after sovereignty was established in British Columbia in 1846.[63] Similarly, in the section 35 rights framework, Indigenous groups can only pursue an Aboriginal right to preserve sacred sites and lands that became sacred *prior* to contact with Europeans.[64] Hypothetically, say the Tsilhqot'in people designated a parcel of land as sacred in 1820, a full 200 years ago. They could not pursue the right to preserve this parcel of land under the section 35 rights framework, given that contact occurred in 1793.[65]

The section 35 rights and title frameworks both require some form of continuity from pre-sovereignty or contact times until the present day. While these frameworks allow for practices to evolve from pre- to post-sovereignty or contact times, evidence from pre-sovereignty or contact times is still required for title and rights to be constitutionally recognized.[66] However, Indigenous groups did not stop designating new sacred sites and lands after Europeans arrived or asserted sovereignty. As a result of this requirement, Indigenous groups may only use the section 35 rights and title frameworks to preserve lands they designated as sacred *prior* to the assertion of sovereignty or contact. In effect, this test freezes the number of sacred sites and lands to the number that existed in pre-sovereignty or contact times, rejecting the protection of lands designated as sacred in more recent times.[67]

c. Justification for Infringement Test

The third shared problem is the test for justification of infringement under the section 35 rights and title frameworks. In the section 35 title framework, the Crown must prove:

> [T]hat it discharged its procedural duty to consult and accommodate, that its actions were backed by a *compelling and substantial objective*, and that the governmental action is consistent with the Crown's fiduciary obligation to the group.[68]

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60 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] CarswellBC 2358 at para 143 [*Delgamuukw*].

61 *Sparrow*, *supra* note 54 at paras 67–70; see Kent McNeill, "The Onus of Proof of Aboriginal Title" (1999) 37:4 Osgoode Hall LJ 775 for further discussion of the burden structure of the Aboriginal title test.

62 *Tsilhqot'in*, *supra* note 41 at para 46.

63 *Delgamuukw, supra* note 60 at para 145.

64 *Van der Peet, supra* note 52 at para 64.

65 *William v British Columbia*, 2012 BCCA 285, [2012] CarswellBC 1860 at para 262.

66 *Van der Peet, supra* note 52 at para 64.

67 See L'Heureux-Dubé J's dissent in *Van der Peet*, particularly paragraphs 164–179, in which she asserts that it should be possible for Aboriginal rights to arise *after* the assertion of British sovereignty or European contact.

68 *Tsilhqot'in, supra* note 41 at para 77. [emphasis added]

For the fiduciary obligation to be met, the Crown must establish the following:

> [1] [T]hat the incursion is necessary to achieve the government's goal (*rational connection*); [2] that the government go no further than necessary to achieve it (*minimal impairment*); and [3] that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (*proportionality of impact*).[69]

For Aboriginal rights claims, the Crown must prove that there was a "*compelling and substantial purpose* and establish that they are consistent with the Crown's fiduciary duty to the group."[70] If the infringement to a particular right "could reasonably be considered to be as minimal as possible," then it will meet the minimal impairment test as required in the Crown's fiduciary duty.[71]

Three aspects of the infringement framework are problematic for the preservation of Indigenous sacred sites and lands. The first problem is that the "government's goal," or the "compelling and substantial purpose" is almost always based on colonial conceptions of land use and the value of land. In *Delgamuukw*, Chief Justice Lamer listed the kinds of objectives that would be considered "compelling and substantial" enough to justify the infringement of Aboriginal title, including:

> [T]he development of [1] agriculture, [2] forestry, [3] mining, and [4] hydroelectric power, [5] the general economic development of the interior of British Columbia, [6] protection of the environment or [7] endangered species, the [8] building of infrastructure and [9] the settlement of foreign populations to support those aims.[72]

Though the list contains "protection of the environment or endangered species," the seven other listed activities reflect colonial conceptions of land and land use. One activity explicitly endorses dispossession, allowing for the settlement of foreign populations to trump Aboriginal title or rights. Six of the nine activities permit section 35 infringements as long as the land has extractive value or is used in a way that facilitates further economic development. With such a wide scope of infringement-worthy objectives, the first step of the justification framework is essentially ensured. Even if an Indigenous group demarcates a sacred site and proves ownership over it using the settler-imposed section 35, certain colonial ideas—chiefly that unsettled and unexploited land is wasted land—permeate the infringement framework.

The second problem with the infringement framework is the "minimal impairment" component, which essentially bars Indigenous groups from imposing absolute prohibitions. However, this is incongruous with many Indigenous sacred sites and lands whose sacrality depends on absolute prohibitions. For example, the Ktunaxa believe that their sacred, undisturbed mountain, Qat'muk, will be desecrated and its spiritual value destroyed if *any* of its earth is moved.[73] From the Ktunaxa's perspective, even if the amount of earth moved is minimized, the effect of that movement will not be minimally impairing.[74]

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69 *Ibid* at para 87. [emphasis added]

70 *Ibid* at para 18. [emphasis added]

71 *R v Nikal*, [1996] 1 SCR 1013, 133 DLR (4th) 658 at para 110.

72 *Delgamuukw, supra* note 60 at para 165. [emphasis added]

73 *Ktunaxa, supra* note 6 at para 36.

74 In *Ktunaxa*, the Ktunaxa based their claim to preserve Qat'muk in s 2(a) of the *Charter*, rather than s 35. The Ktunaxa did not attempt to preserve Qat'muk through the section 35 rights or title frameworks, perhaps knowing that courts would not accept their absolute prohibition of development on Qat'muk, and perhaps fearing that the court may justify the movement of earth on the basis that the action was "minimally impairing." See Part III(B) for further discussion of the *Ktunaxa* case.

The third problem with the infringement framework is that the proportionality-of-impact component, weighing the objective against the adverse effects, is a subjective exercise, leaving decisions vulnerable to the explicit or implicit values of the almost exclusively non-Indigenous judiciary. As of 2016, no SCC appointees, 0.7 percent of provincial Supreme Court appointees, and 1.3 percent of provincial Court of Appeal appointees were Indigenous.[75] Thus, it is highly improbable that a judge hearing a rights or title case is Indigenous and even more improbable that they are members of the same Indigenous group as the litigant. Given these statistics, the likelihood that the specific "site sacred to the litigating First Nation will also be sacred to the judge" is exceedingly low.[76]

In this balancing exercise, non-Indigenous judges may devalue the severity of the adverse impact in question on Indigenous spiritualities. A judge from a non-Indigenous religious background is less likely to grasp the importance of sacred sites and lands in general and the necessity of continued renewal with those places to the vitality of the Indigenous group's spirituality.[77] Further, they may be more likely to view untouched or uncultivated land as useless, and more likely to value land through a commercial lens, which tends to weigh in favour of the government objective. They may view an accommodation offered by the government as a reasonable trade-off between the Indigenous group's spiritual site or lands and the economic interests of the province or country. Judges make these decisions in the face of immense societal pressure, weighing the economic interests of millions of non-Indigenous people against a site that is sacred to perhaps a few hundred Indigenous peoples; in this utilitarian calculation, the preservation of sacred sites and lands becomes increasingly unlikely.[78]

d. Translating Indigenous Spiritualities

The fourth shared problem is that Indigenous conceptions of land and spirituality do not translate neatly into terms understandable to most lawyers and adjudicators. The perspective of Aboriginal people needs to be taken into account when assessing rights and title claims to spiritual sites and lands.[79] However, Indigenous litigants must perform what Matthew Stamford dubs "a double translation."[80] First, Indigenous litigants must articulate their rights or title claims to sacred sites and lands into Christian religious concepts.[81] Then, they must translate their claims into a form that is "cognizable to the non-aboriginal legal system," which includes articulating their claim in one of Canada's two official languages, English or French.[82] If, by chance, they fit their claim into the Christian religious box and make it cognizable, there is still a risk that a highly unrepresentative judiciary will interpret their translated claims "in ways other than how they were intended."[83]

e. Confidentiality

Briefly, the fifth shared problem of rights and title claims to sacred sites or lands relates to confidentiality. Inherent in many Indigenous spiritualities is an element of secrecy. By

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75 Andrew Griffith, "Diversity among federal and provincial judges," (May 2016), online: *Policy Options,* <http://policyoptions.irpp.org/2016/05/04/diversity-among-federal-provincial-judges/> archived at [https://perma.cc/9WWT-FHHV].

76 Ross, *supra* note 23 at para 22.

77 Anita C Pryor, and Gypsy C Bailey, "An Indian Site-Specific Religious Claim Again Trips Over Judeo-Christian Stumbling Blocks (*Lyng v. Northwest Indian Cemetery Protective Association*, 108 S Ct 1319 (1988))" (2018) 5:1 Florida State University J of Land Use and Environmental Law 293 at 317.

78 Graben, *supra* note 16 at 73.

79 *Tsilhqot'in*, *supra* note 41 at para 14.

80 Stamford, *supra* note 9 at 48.

81 *Ibid*.

82 Ross, *supra* note 23 at 16.

83 *Ibid* at 21.

presenting evidence of the location of their sacred site or lands, an Indigenous group may be desacralizing the site.[84] However, for a judge, "the reason why the evidentiary cupboard is bare does not change the fact that it is," and in the Canadian judicial system, evidence is the key to deciding rights and title claims.[85]

Using section 35 to ensure that sacred sites and lands are protected is a monumentally challenging task. Only one Indigenous group has proven title through the section 35 route, and none have proven an Aboriginal right to preserve a sacred site or tract of land. As the next section illustrates, preserving Indigenous sacred sites and lands through the *Charter* is also a difficult task.[86]

B. The Section 2(a) *Charter* Framework

The third framework through which Indigenous groups can attempt to preserve sacred sites and lands is by proving that their section 2(a) *Charter* rights were infringed and that the infringement was not justified under section 1 of the *Charter*.[87] Below, I provide a factual background to the *Ktunaxa* case, describe the section 2(a) test for infringement, and demonstrate that the majority's reasoning reflects colonial conceptions of religion.

i. Facts of *Ktunaxa*

The heart of the case in *Ktunaxa* was whether the Jumbo Glacier Ski Resort development (the "Project") should be built on Qat'muk, a sacred mountain of the Ktunaxa people. The Project was first proposed in 1991.[88] The British Columbian government then consulted with potentially affected Indigenous communities after an agreement could not be reached between the province, the company proposing the development, and Indigenous communities.[89] The Ktunaxa later adopted the position that accommodation was impossible, as "a ski resort with lifts to glacier runs and permanent structures would drive Grizzly Bear Spirit [the "Spirit"] from Qat'muk and irrevocably impair their religious beliefs and practices."[90] The government responded with another offer to accommodate, this time offering to bolster protections for grizzly bear habitat.[91]

During the process, Elder Chris Luke advised the government that Qat'muk was "a life and death matter" and that "any movement of earth and the construction of permanent structures would desecrate the area and destroy the valley's spiritual value."[92] On November 5, 2010, the Ktunaxa issued the Qat'muk Declaration. They emphasized the importance

84 Stamford, *supra* note 9 at 49.

85 *Ibid*.

86 Dwight Newman, in "Arguing Indigenous Rights Outside Section 35: Can Religious Freedom Ground Indigenous Land Rights, and What Else Lies Ahead?" Tom Isaac, ed, *Key Developments in Aboriginal Law* (Toronto: ThomsonReuters Canada, 2018) at 6, argues that section 2(a) offers some advantages over the section 35 rights framework for Indigenous groups looking to establish claims over tracts of land. He notes that section 2(a) does not require a practice to be connected to pre-contact practices, and the "logical evolution" of the claim is irrelevant, as long as the belief is sincere.

87 For the purposes of this paper, I do not discuss the impact of section 1 of the *Charter*. But, given that the infringement framework for section 35 contains elements (rational connection, minimal impairment, and proportionality of impact) similar to those applied in a section 1 analysis, one could anticipate that similar problems would arise with the application of section 1 (see Section III(A)(iii)(c)).

88 Dwight Newman, "Implications of the Ktunaxa Nation/Jumbo Valley Case for Religious Freedom Jurisprudence" in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) at 311.

89 *Ibid*.

90 *Ktunaxa*, *supra* note 6 at para 6.

91 *Ibid* at para 33.

92 *Ibid* at para 36.

of Qat'muk in this document, stating that the Spirit "was born, goes to heal itself, and returns to the spirit world" on the mountain.[93] They also stated that they had a "stewardship obligation and duty" to the Spirit and Qat'muk.[94] In 2014, the Ktunaxa launched court proceedings, arguing that the decision to approve the Project breached their constitutional right to freedom of religion.[95] In 2017, the SCC decided to hear the case.

ii. The Section 2(a) Test

Section 2(a) of the *Charter* states that everyone has the "freedom of conscience and religion."[96] As stated in *R v Big M Drug Mart Ltd* ("*Big M*"), freedom of religion protects

> [T]he right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.[97]

Put simply, freedom of religion has two aspects: the freedom to *hold* a religious belief, and the freedom to *manifest* one.[98] The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* both define freedom of religion in this way.[99]

To establish an infringement of their right to freedom of religion, a claimant must first demonstrate that they sincerely believe "in a practice or belief that has a nexus with religion."[100] Second, they must prove that "the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with [their] ability to act in accordance with that practice or belief."[101] At the second stage, the claimant group must demonstrate that the impugned state action is within the scope of section 2(a) by asking whether the state action interfered with the group's freedom to hold a belief, or their freedom to manifest that belief.[102]

The Ktunaxa contended that the Minister of Forests, Lands, and Resources' decision allowing the Project to proceed violated their right to freedom of religion, as protected by section 2(a) of the *Charter*.[103] First, they argued that they had a sincere belief with a nexus to religion.[104] Second, they argued that the Minister's decision interfered, in a manner that was non-trivial or not insubstantial, with their ability to act in accordance with their belief or practice—or, more specifically, that any movement of ground on Qat'muk would permanently drive the Spirit from the mountain thereby removing "the basis of their beliefs and render[ing] their practices futile."[105]

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93 Qat'muk Declaration, *supra* note 5.

94 *Ibid*.

95 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, [2014] CarswellBC 901.

96 *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

97 *Ktunaxa*, *supra* note 6 at para 62.

98 *Ibid* at para 64.

99 *Ibid* at paras 64–5.

100 *Ibid* at para 68.

101 *Ibid*.

102 *Ibid* at para 70.

103 *Ibid* at para 58.

104 *Ibid* at para 69.

105 *Ibid* at para 59.

iii. Colonial Reasoning in *Ktunaxa*

In *Big M*, the SCC found that section 2(a) of the *Charter* prohibits government from giving legislative preference to "any one religion at the expense of those of another."[106] While a preference is not enumerated in the *Constitution Act, 1982*, in effect Christian views of religion are favoured over Indigenous spiritualities. The reasoning in *Ktunaxa* is a prime example of this phenomenon.

In *Ktunaxa*, the majority dismissed the appellant's case and concluded that the claim did "not engage the right to freedom of conscience and religion under section 2(a) of the *Charter*."[107] The majority found that the Ktunaxa satisfied the first part of the section 2(a) test, as their belief in the Spirit and that permanent development on Qat'muk would drive it from the mountain, was sincere.[108] However, the Ktunaxa did not satisfy the second part of the infringement test. The majority held that neither the Ktunaxa's "freedom to *hold* their beliefs, nor their freedom to *manifest* those beliefs [were] infringed by the Minister's decision to approve the [P]roject."[109] The Court's ruling at the second stage of the section 2(a) test reflects colonial conceptions of religion in two broad ways: what is necessary to *hold* a belief, and what constitutes an acceptable *manifestation* of belief.

First, the majority could not comprehend how the Minister's decision would affect the Ktunaxa's ability to *hold* their beliefs. The majority stated that the Ktunaxa were "not seeking protection for the freedom to believe in Grizzly Bear Spirit," but rather, they were seeking to protect the Spirit itself.[110] The majority tried to split the Ktunaxa's freedom to believe in the Spirit and protect the Spirit itself into two, but in doing so, failed to understand that they are inextricably linked to one another. As the Katzie First Nation succinctly stated in their factum as an intervener for *Ktunaxa*, "the spiritual 'belief' and the land are one and the same."[111]

In many Indigenous spiritualities, "sacred sites are needed to distribute [the Indigenous group's] spiritual connection with the land," and without them, belief ceases to exist.[112] If Qat'muk were desecrated, the Ktunaxa's belief would cease to exist.[113] From a Christian viewpoint, this may be difficult to understand because the idea of "killing a god is nonsensical," given that God exists in a perpetual, supernatural state.[114] The Ktunaxa would still have the mental ability to believe in the Spirit, but practically, their belief would be hollow and pointless. In dissent, Justice Moldaver recognized the link between Qat'muk and the ability to hold a belief in the Spirit, writing that the Ktunaxa's beliefs would be rendered "devoid of any spiritual significance" if the Project was to proceed.[115]

Unfortunately, the majority's line of reasoning is not unusual, but just the latest example of a non-Indigenous court misunderstanding Indigenous spiritualities. In Christian

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106 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 58 NR 81 at para 134.

107 *Ktunaxa, supra* note 6 at para 8.

108 *Ibid* at para 69.

109 *Ibid* at para 8. [emphasis added]

110 *Ibid* at para 71.

111 Katzie First Nation, "Factum of the Intervener Katzie First Nation," online (pdf): <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36664/FM060_Intervener_Katzie-First-Nation.pdf> archived at [https://perma.cc/W4T6-WD65].

112 Ross, *supra* note 23 at 3.

113 *Ktunaxa, supra* note 6 at para 36.

114 Howard Kislowicz & Senwung Luk, "Recontextualizing *Ktunaxa Nation v British Columbia*: Crown Land, History and Indigenous Religious Freedom," (2019) 88 Supreme Court LR (2d) at 219 [Recontextualizing *Ktunaxa*].

115 *Ktunaxa, supra* note 6 at para 118.

denominations, all that is necessary to "hold a belief" is a state of mind.[116] Internalized belief in God is not contingent on sacred sites in Christian theology. A physical manifestation of the faith can be destroyed, as long as the ability to believe in that same faith remains. In other words, the *supernatural* trumps the *natural*. If the Court limits the freedom to hold a belief to an internalized belief in a supernatural being, any spirituality in which the capacity to hold a belief cannot be divorced from the natural world will fail at this step of the section 2(a) test.

Second, the majority unduly restricted the acceptable range of manifestations of religious belief in a manner that reflects colonialist values. The majority stated that the Ktunaxa's claim did not fall within the parameters of the freedom to manifest religious beliefs.[117] Recall that in *Big M*, the freedom to manifest a religious belief was defined as the freedom to *worship*, *practice*, *teach*, and *disseminate* a belief; *preservation* or *stewardship* are not listed as acceptable manifestations.[118] The exclusion of preservation and stewardship reflects the Christian lens of religion, where manifestations of belief do not require interaction with, let alone preservation of, nature.

The Christian lens of the majority was also evident when they stated that the Ktunaxa were not seeking the freedom to "pursue *practices* related to [belief in the Spirit]."[119] In fact, the Ktunaxa were seeking this freedom, but for a practice deemed unworthy by the majority. The Ktunaxa were seeking to preserve Qat'muk, given their stewardship obligation.[120] However, preserving a landscape is not viewed as a "practice" under the Christian framework because it is passive—humankind is not dominating their God-given land by building a church or performing spiritual rituals on it.

The majority in *Ktunaxa* also decided that freedom of worship did not include the protection of the focal point of worship.[121] Excluding the protection of all focal points of worship is formally equal, but substantively unequal in its application because of the different weights attached to sacred sites and lands in Christianity and Indigenous spiritualities. Through the Christian lens, the focal point of worship, the church, is important, but not vital to act in accordance with the Christian religion; internalized belief is the key. In contrast, sacred sites and lands are the "taproots" that feed Indigenous spiritualities.[122]

The importance of the *location* of the point of worship also differs widely. In Christianity, the location of the church is not crucial to the ability to worship. In Indigenous spiritualities, "worship is often site-specific with the spirituality inherent in the geography."[123] The Ktunaxa cannot simply pick another pristine mountain to be the new focal point of worship like a parishioner can go to a different church of the same denomination in another part of town.[124]

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116 Smith, *supra* note 18 at 271.

117 *Ktunaxa, supra* note 6 at para 75.

118 *Ibid* at para 62.

119 *Ibid* at para 71. [emphasis added]

120 Qat'muk Declaration, *supra* note 5.

121 *Ktunaxa*, *supra* note 6 at para 71.

122 Ross, *supra* note 23 at 3.

123 Stamford, *supra* note 9 at 43.

124 Howard Kislowicz and Senwung Luk, in their article "Recontextualizing *Ktunaxa*" at 208 point out that if Protestants or Catholics sought to protect a sacred site like a church or cemetery, it is unlikely they will need to use section 2(a), as they likely own the property on which the church or cemetery sits. These dominant religious groups likely own the land on which their church or cemetery sits because the Crown historically granted land directly to them. On the contrary, land was not willfully granted to Indigenous groups. Instead, land was dispossessed on a large scale, thereby transferring control over sacred sites and lands from Indigenous groups to settlers or the Canadian state.

The majority in *Ktunaxa* mentioned that they were "cognizant of the importance of protecting Indigenous religious beliefs and practices."[125] Despite this statement, the remainder of their decision—which does not protect Indigenous spiritualities and instead affirms that they are inferior under section 2(a)—brings the sincerity of this statement into question.

CONCLUSION

Constitutional rights are the ultimate form of rights recognition in Canada, supreme over both the common law and legislation. Constitutional rights are not easily alterable, unlike rights granted through legislation, which can be amended or reversed depending on the government in power at the time. To have their spiritualities recognized as constitutional rights, Indigenous groups may use the section 35 title, section 35 rights, and section 2(a) rights frameworks. Unfortunately, all of these tools are dull and ineffective mechanisms to protect sacred sites and lands. Only one Indigenous group has ever proved the existence of Aboriginal title under section 35.[126] No Indigenous group has ever proven the existence of an Aboriginal right to preserve sacred sites and lands under section 35, nor have any proven that they possess the right to preserve sacred sites and lands under section 2(a) of the *Charter*.

Each framework forces Indigenous groups to translate their claims into the language of the common law and explain their stories to a judiciary dominated by non-Indigenous people. Difficulties in translation are then compounded by legal frameworks imbued in colonial values, which presume that Indigenous rights and title do not exist, permit governments to override Indigenous interests in the name of resource exploitation, and view spirituality through a narrow, Christian lens. By constructing legal tests that, in effect, prevent the preservation of Indigenous sacred sites and lands at the constitutional level, the Canadian state perpetuates the dispossession of Indigenous land and the subjugation of Indigenous spiritualities.

With the passage of the *Declaration on the Rights of Indigenous Peoples Act*, implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in British Columbia, and a promise from the federal government to do the same, Indigenous peoples may reassess the routes they take to preserve sacred sites and lands. Perhaps they will conclude that, with the passage of the aforementioned legislation, the section 35 and section 2(a) routes are useful tools in the quest to preserve sacred sites and lands.[127] Or perhaps they will conclude that the Canadian constitution is inherently flawed, that using it as a tool of preservation is a fruitless endeavour, and seek alternative methods to preserve their sacred sites and lands.[128]

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125 *Ktunaxa*, *supra* note 6 at para 10.

126 See *Tsilhqot'in*, *supra* note 41.

127 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; John Paul Tasker, "Throne speech promises tax cut, climate action and ban on military-style firearms," (5 December 2019), online: <https://www.cbc.ca/news/politics/liberal-government-throne-speech-1.5385526> archived at [https://perma.cc/XF3X-733G].

128 Since I initially wrote this paper, the Nature Conservancy of Canada, acting on behalf of the Ktunaxa Nation, "negotiated a financial settlement to cancel all the leases and tenures" held by Glacier Resort Ltd., the proponent of the Jumbo Glacier Ski Resort, in the Upper Jumbo Valley (Qat'muk). This final settlement has cleared the way for the development of an Indigenous Protected and Conservation Area—funded by $16.1 million from the federal government and $5 million from various private donors—which would encompass Qat'muk. While this is welcome news, Qat'muk is still not constitutionally protected. But, perhaps this settlement will set a precedent and other Indigenous groups will use similar tactics to preserve and protect their sacred sites and lands, rather than doing so through litigation (see Columbia Valley Pioneer, "Jumbo saga reaches finale," (18 January 2020), online: <https://www.columbiavalleypioneer.com/news/jumbo-saga-reaches-finale/> archived at [https://perma.cc/G7SE-BMEY]).

ARTICLE

THE PRICE OF GOD: UNDERSTANDING REASON AND RELIGION IN THE DUTY TO MITIGATE

Emma Compeau *

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ABSTRACT

Tortfeasors have a responsibility to take their victim as they find them, and victims of tort have a duty to mitigate their damages. Nestled between these two legal principles is a situation where a victim of tort refuses medical treatment following injury on the basis of religious conviction. This paper addresses and predicts possible legal outcomes in this undetermined area of Canadian legal jurisprudence. This paper asks to what extent the thin skull principle in tort embraces a plaintiff's religiously motivated decision to refuse medical treatment following injury. Ultimately, it is more likely than not that the religious thin skull will be supported by Canadian courts. This is necessary due to Canada's commitment to *Charter* values and the realities of living in a multicultural society that values both freedom of religion and equality under the law. However, while it is likely that religious refusal of medical treatment will be treated as a religious thin skull rather than a failure of the duty to mitigate, this would likely be limited to cases where the refusal falls within foreseeable religious requirements that would necessarily exist within a multicultural society.

* Emma Compeau is currently completing her JD at Western University. Emma is actively involved with Community Legal Services at Western University and was the head supervisor of the Family Law Team in 2019. Emma has been published in the Ontario Family Law Reports and was a contributor in updating the E-Discovery chapter in Niman's *Evidence in Family Law*.

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INTRODUCTION

In 2018, Canada accepted 321,065 immigrants, setting the record for the highest number of immigrants to enter the country since 1913.[1] The increased number of new Canadian residents has several implications, including a greater proportion of Canadian residents with diverse backgrounds who hold different religious beliefs and practices. Given that the *Canadian Charter of Rights and Freedoms*[2] applies to all people on Canadian soil, novel claims rooted in section 2(a) of the *Charter* regarding fundamental freedoms of conscience and religion are likely to begin to appear in Canadian private jurisprudence. Although *Charter* rights are not directly applicable to common law, the Supreme Court of Canada ("SCC") has made it clear that *Charter* values are indeed relevant in the private legal sphere.[3] Given that a patient may refuse medical care for religious reasons, plaintiffs in personal injury cases may do the same. In the undetermined legal realm that exists between the thin skull principle and the plaintiff's duty to mitigate damages in tort cases, how will Canadian courts determine liability for personal injury damages?

This paper seeks to address the following questions for which there is no clear answer in Canadian legal jurisprudence: To what extent does the thin skull principle embrace a plaintiff's religiously motivated decision to refuse medical treatment subsequent to tortious personal injury? Conversely, could a defendant be justifiably held liable for a plaintiff's sincerely held religious belief that precludes the latter from undergoing medical treatment following personal injury? Finally, what kind of responsibilities does Canadian tort law have with respect to providing equal access to justice for the increasingly multicultural Canadian residents that it exists to serve?

This paper will proceed to address the above questions first by outlining the legal principles of damages in personal injury, including the thin skull principle and the duty to mitigate. Second, this paper will discuss the notion of the religious thin skull, the divergence of Canadian legal authorities on the topic, and international legal perspectives on the issue. Third, this paper will provide the strongest arguments for and against the religious thin skull within the limits of Canadian jurisprudence by first considering religion as a bar to capacity, then by evaluating the extent of *Charter* protection for religiously motivated decisions. Fourth, the limitations of the *Charter* in private law will be evaluated by examining cases where section 2(a) *Charter* rights have been either limited or upheld in private jurisprudence. Fifth, this paper will discuss the positions of lower courts on the religious thin skull. Sixth, this paper will discuss Canada's legal response to the religious refusal of medical treatment in cases involving children. Lastly, the reasonable person and the role of subjectivity in Canadian law will be considered to determine whether or not the religious thin skull will be accepted in Canadian law.

Although this is a contentious issue, the religious thin skull must exist in Canada. This is necessary due to Canada's commitment to *Charter* values and the reality of living in a multicultural society that values both freedom of religion and equality under the law.

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1 Canadian Citizenship & Immigration Resource Center, "Canada Welcomes Highest Number of New Immigrants in More Than a Century" (27 March 2019), online: *Immigration.ca* <https://www.immigration.ca/canada-welcomes-highest-number-of-new-immigrants-in-more-than-a-century> archived at [https://perma.cc/48FH-YGNN].

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

3 *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at para 46, 33 DLR (4th) 174, Beetz J [*Dolphin Delivery*].

I. PRINCIPLES OF DAMAGES

The overarching principle of damages in tort is the notion of *restitutio in integrum*—restoration to original condition. Often cited for this guiding principle is the 1880 House of Lords case *Livingstone v Rawyards Coal Co*,[4] wherein Lord Blackburne famously stated:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. [5]

This statement serves as the goal for monetary damages in the realm of tort law and indicates that each remedy ought to be as close as possible to this sometimes-impossible aim of returning the injured party to their prior position.

The Supreme Court of Canada recently outlined the principles of recovery in negligence personal injury cases in the 2012 case *Clements (Litigation Guardian of) v Clements*.[6] In this case, the plaintiff, Mrs. Clements, sought compensation in negligence for a severe brain injury that she suffered following a motorcycle accident.[7] The Court states that negligence presupposes a relationship wherein there is a duty of care between the parties which upon breach requires compensation from defendant to the plaintiff in order to correct the injury that the plaintiff has suffered.[8] Of course, in the context of personal injury, returning the injured person back to their pre-injury status is often impossible, as no amount of money can replace a lost limb. However, in such cases, the aim of damages is to come as close as possible to putting the injured person back to the position that they were in prior to the tortious conduct.

II. THE THIN SKULL PRINCIPLE

The "thin skull principle" is another core principle in personal injury law, first appearing in the 1901 King's Bench case *Dulieu v White & Sons*.[9] In this case, Justice Kennedy stated:

> If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.[10]

Sixty years later, the Queen's Bench Division addressed this issue again in the 1963 case *Smith v Leech Brain & Co*, where a burn suffered by the plaintiff at work turned into cancer and eventually led to his death.[11] In determining liability for the employer with respect to Mr. Smith's death, Lord Chief Justice Parker stated:

> The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether

4 5 App Cas 25.
5 *Ibid* at 38.
6 2012 SCC 32 [*Clements*].
7 *Ibid*.
8 *Ibid* at 7.
9 [1901] 2 KB 669 at 697, 70 LJKB 837.
10 *Ibid*.
11 [1962] 2 QB 405, [1962] 2 WLR 148.

> these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of the burn, depends upon the characteristics and the constitution of the victim.[12]

The historical case law demonstrates a clear principle with respect to personal injury damages that satisfies most common-sense notions of justice. The negligent wrongdoer must be accountable for the injury that his or her victim sustained as a result of their actions, even if that victim suffered worse injuries than most would have in the circumstance due to a pre-existing vulnerability. This makes sense from a physical injury standpoint, which leads one to consider how the thin skull rule should be applied to victims who suffered increased injury as a result of psychological predispositions rather than physical ones. The notion that the wrongdoer has increased accountability for these non-physical predispositions is referred to as the "psychological thin skull" rule. Historically, the courts gave little certainty as to how this rule should be applied.

The 1974 British Columbia Supreme Court case *Marconato v Franklin* sheds some light on this issue. In this case, the plaintiff sought recovery for psychological harm as a head of consequential losses, as she incurred minor physical injuries but suffered emotional distress including depression, hostility, anxiety, and a distrust of medical professionals following a motor vehicle accident.[13] The Court found that the plaintiff had a paranoid-type personality, but was not mentally ill prior to the accident.[14] The Court stated that the consequences of the plaintiff's injury were *not* the sort that one would ordinarily anticipate using reasonable foresight, although they arose from her pre-existing personality traits.[15] However, when considering her pre-existing personality traits, the Court found her condition to be within the ambit of the thin skull principle and found that the defendant was liable for the psychological injuries suffered by the plaintiff.[16]

The Supreme Court of Canada placed a limit on the psychological thin skull in the 2008 case *Mustapha v Culligan of Canada Ltd*, where Mr. Mustapha—an African immigrant—sought recovery for psychological damage as a standalone claim.[17] Mr. Mustapha suffered psychological injury after looking at contaminated drinking water that he had purchased for the personal consumption of himself and his family.[18] It should be noted that in this case the issue was remoteness at the stage of liability, whereas in *Marconato v Franklin* the issue was consequential loss following the establishment of liability. However, the SCC importantly held that Mr. Mustapha failed to demonstrate that his injuries would be reasonably foreseeable for a person of ordinary fortitude.[19] The Court emphasized expert evidence stating that Mr. Mustapha's injuries were "highly unusual" and "very individual."[20] It was found that the trial judge's application of a subjective standard of reasonable behaviour based on Mr. Mustapha's previous history, particular circumstances, and cultural factors was an error, which resulted in the Court finding that Mr. Mustapha's claim failed as his psychological injury was too remote.[21]

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12 *Ibid* at 415.
13 [1974] BCJ No 704, 6 WWR 676.
14 *Ibid* at 48.
15 *Ibid* at 49.
16 *Ibid*.
17 2008 SCC 27.
18 *Ibid* at 18.
19 *Ibid*.
20 *Ibid*.
21 *Ibid*.

The differing outcome of these seemingly similar cases invites a consideration of what it means to use an objective standard for a person of "ordinary fortitude" as the benchmark for the foreseeable victim. As stated in no uncertain terms by Chief Justice McLachlin, as she then was, Mr. Mustapha did not fit into this category due to his previous history and cultural circumstances.[22] Mr. Mustafa was an African immigrant whose life experience led him to have great concern for the water that he and his family consumed.[23] His concern was so great that he elected to purchase bottled water for consumption rather than drinking tap water. In setting a clear boundary for what is reasonably foreseeable, and for who might be the reasonable person, this case engenders the following question: Where do we draw the line between reasonable behaviour and assumption of risk of injury in life? In a multicultural country, it becomes more difficult to determine what injuries should be considered reasonably foreseeable and what kind of person best meets the expectations of the abstract "reasonable person."

As argued by Olga Redko, the thin skull principle sits at the intersection of two competing understandings of the individual, one as an autonomous actor and the other as a sum of their experiences, conditions, and choices.[24] This tension lies at the very heart of the issue of the religious thin skull, which may be defined as an individual having a pre-existing religious belief that prevents them from accepting certain medical treatments, thereby making them likely to suffer from increased injury as a result of these beliefs following being victim to a tort. Whether or not the religious thin skull should exist is a critical question relating to our assumptions about the reasonable person.

III. THE DUTY TO MITIGATE

The duty to mitigate damages in the context of personal injury cases means that in order to claim full damages, the plaintiff must seek and follow medical treatment in order to minimize their costs.[25] As stated by Lord Justice Pearson in the 1963 case *Darbishire v Warran*, the duty to mitigate is less of a duty and more of a limitation on the claim that the plaintiff can make against the defendant.[26] The plaintiff can be as luxurious as they choose, but the defendant will only be liable for reasonable costs associated with the plaintiff's injury. Thus, the duty to mitigate reflects a legal understanding of the victim as an agent in their life who is capable of making choices that may not be the responsibility of the defendant.[27]

Mitigation is not required in all circumstances. Plaintiffs who do not undergo recommended medical treatment by reason of mental illness[28] or inability to pay[29] are exempted. The SCC test with respect to the duty to mitigate damages once again returns to the concept of reasonableness, and is articulated in the 1985 case *Janiak v Ippolito* ("*Janiak*").[30] In this case, the plaintiff sustained back injuries following a motor vehicle collision and refused to undergo medical treatment that had a 70–75 percent chance of success due to his innate fear of surgery.[31] In her reasons, Justice Wilson stated:

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22 *Ibid*.

23 *Ibid*.

24 Olga Redko, "Religious Practice as a Thin Skull in the Context of Civil Liability" (2014) 72:1 UT Fac L Rev 38 at 50 [Redko].

25 Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 3d ed (Toronto: Irwin Law, 2014) at 446 [Cassels].

26 [1963] 1 WLR 1067, 107 Sol J 631, [1963] 3 All ER 310 at 315.

27 Redko, *supra* note 24.

28 *Elloway v Boomars* (1968), 69 DLR (2d) 605 (BCSC) McIntyre J.

29 *Brown v Raffan*, 2013 BCSC 114.

30 [1985] 1 SCR 146 [*Janiak*].

31 *Ibid* at 9.

> It is evident that not every pre-existing state of mind can be said to amount to a psychological thin skull. It seems to me that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision.[32]

Further, Justice Wilson stated that so long as an individual is capable of making a choice, they then assume the cost of any unreasonable decision, but when the individual cannot make a choice at all, they then fall within the thin skull category.[33]

It is not clear how a court will treat a religious refusal of medical treatment in cases of tort. Would a religious individual fall within a category of having a pre-existing psychological condition that removes any meaningful choice in the matter? The kind of language employed here is not very attractive to use in the context of religion, as it seems to relegate religion into the realm of mental disability. This language also undermines the important purpose that religion holds in many people's lives as an avenue of individual autonomy and self-determination. For most people who practice religion, it is precisely about choice and choosing God. Additionally, to refer to religion in such a way offends a certain sensibility of decency and respect that we are accustomed to using when addressing religion and those with religious beliefs.

On the other hand, there is concern that when "the quality of the religious subject's autonomy or capacity for choice is somehow in question… the law often fears that the choice is not truly free."[34] This concern, which has been addressed by the Supreme Court and will be discussed below, is that the religious individual is being presented with a choice with respect to accessing their full damages in tort and compromising their religious beliefs at an unacceptable cost to their personal identity.[35] This decision is one that is also most likely to impact religious minorities. Is it fair and just to ask certain groups of people to bear the financial burden of their religious beliefs, especially when such beliefs are valued and protected in society?

IV. RELIGION AND THE REFUSAL OF MEDICAL TREATMENT: ARGUMENTS FOR AND AGAINST THE RELIGIOUS THIN SKULL

Religious refusal of medical treatment can appear in tort law in a variety of forms and can include a variety of potential victims. Examples of individuals whose interests are at stake in this issue include a female patient whose doctor negligently provided medication other than birth control and who then refused to get an abortion due to her Christian faith,[36] the Muslim man who would not accept state-altering medical treatment following an accident during the fasting period of Ramadan,[37] and a Jehovah's Witness who refused a blood transfusion due to religious law. For purposes of simplicity and clarity, the Jehovah's Witnesses refusal of medical treatment will be the primary example referred to for the remainder of this paper, as it is one of the most common examples referred to in this area of law.

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32 *Ibid* at 24.

33 *Ibid*.

34 Benjamin L Berger, "Law's Religion: Rendering Culture" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 277.

35 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13 [*Corbiere*].

36 *Troppi v Scarf*, 31 Mich App 240, 187 NW 2d 511 (Mich Ct App 1971).

37 Kate McMahon-Parkes, "Rationality, Religion and Refusal of Treatment in an Ambulance Revisited" (2013) 39:9 at 587.

To assess whether or not a religious-based refusal of treatment is reasonable, one must understand the nature of the claim grounded within the faith. The refusal of blood treatment is an obligatory practice for eight million Jehovah's Witnesses worldwide.[38] The religion views the refusal of blood transfusions as a strategy for protecting the group, and following a 1961 article in *The Watchtower*, a religious magazine for Jehovah's Witnesses, it was made clear that all Jehovah's Witnesses who accepted a blood transfusion should be excluded from the community.[39] The refusal of blood transfusions is viewed as the ultimate act of devotion which can serve to strengthen one's connection to God and is grounded in Biblical passages that include Genesis 9:4, Leviticus 17:10–14, and Acts 15:28–29.[40] An estimated one thousand Jehovah's Witness followers die each year following the refusal to accept blood transfusions.[41] It is clear that within this faith, those who are faced with the decision of accepting a blood transfusion are forced to make a decision between mitigating their injuries and upholding their fundamental beliefs and community values. It is undeniable that the decision to receive a blood transfusion is profoundly different for a Jehovah's Witness than for an atheist person.

Currently, there is no clear consensus on whether the thin skull principle includes religious refusal of medical treatment in Canadian personal injury cases. Leading academics diverge in their predictions of how courts will handle this issue. Jamie Cassels and Elizabeth Adjin-Tettey are not convinced that religious refusal of medical treatment will be covered by the thin skull principle and argue that the significant factors that can determine reasonableness in refusing medical treatment are a plaintiff's financial status, the nature of the medical advice received, and the explanation of the risks and benefits of the procedure.[42] They go on to state that any psychological infirmity preventing a plaintiff from mitigating treatment must be a genuine psychological disorder, and that "a line must be drawn" between those who are capable of rational decision-making and those who are not.[43]

This line of reasoning would appear to exclude those who refuse medical treatment by reason of sincerely held religious belief. As previously mentioned, it is problematic and disrespectful to liken religious belief to a mental disorder. However, barring such an understanding, there seems to be little room within this framework to accept religious refusal of medical treatment as falling within the ambit of the thin skull principle. Therefore, the perception of the thin skull principle and the duty to mitigate as understood by Cassels and Adjin-Tettey indicates that religious refusal of medical treatment should be considered a failure to mitigate damages rather than a thin skull.

Ken Cooper-Stephenson, another leading Canadian authority on tort law, takes the opposing view and says that religious refusal of medical treatment will likely be covered by the thin skull principle.[44] He argues that cultural and religious attributes are part of the defendant taking the plaintiff as he or she encountered them.[45] Noting a general move toward subjectivism in tort law, Cooper-Stephenson cites *Dolphin Delivery Ltd v RWDSU Local 580* and argues that there are significant components of subjectivity within the reasonable person test that accommodate for characteristics such as youth or physical

38 HK Rignes & H Hegstad, "Refusal of Medical Blood Transfusions Among Jehovah's Witnesses: Emotion Regulation of the Dissonance of Saving and Sacrificing Life" (2016) 55:5 J Relig Health 1672 at 1674.

39 *Ibid*.

40 *Ibid*.

41 *Ibid* at 1673.

42 Cassels, *supra* note 25 at 449.

43 *Ibid* at 451.

44 Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2d ed (Scarborough: Carswell, 1995) at 873 [Cooper-Stephenson].

45 *Ibid* at 861.

disability, as well as for a varied higher standard of knowledge in individuals who have expertise in a given area.[46] For instance, the 1981 Manitoba Court of Appeal case *McLeod v Palardy* found that an Indigenous woman who returned to a rural area in Manitoba to be with her family did not fail to mitigate damages.[47] Cooper-Stephenson states that this case points to a respect within Canadian law for the reality that culture may influence post-tort conduct without mitigating damages.[48]

Canadian scholars who argue for the religious thin skull hold that Canada's commitment to equality and freedom of religion necessitates viewing religiously based refusal of medical treatment as reasonable.[49] Ramsey, another academic on this issue, goes further and holds that the objective standard cannot be easily applied in cases of religious refusal of medical treatment and refers to American case law to demonstrate an alternative to the strict objective standard.[50] In the 1997 New York case *Williams v Bright*, Appellate Division of the Supreme Court of New York evaluated the behavior of the plaintiff using the standard of a reasonable Jehovah's Witness rather than a reasonable person.[51] The United States Supreme Court has also determined in *United States v Ballard* that the Court is barred from adjudicating the reasonableness of a religion, as a process of applying an objective standard to determine such an outcome would invariably lead to a loss of recovery for religious plaintiffs and would consistently undervalue their subjective belief.[52]

It is not only American courts that have embraced the religious thin skull. British jurisprudence has also found liability for the full extent of injuries suffered in cases in which victims refused to accept medical treatment based on religious conviction. In the 1975 case *Regina v Blaue*, the accused in a criminal trial stabbed a Jehovah's Witness woman who later died following her refusal of blood transfusions.[53] The England and Wales Court of Appeal held that Blaue was guilty of manslaughter and that a person who inflicts violence on another must take their victim as they find them.[54] Although it may be argued that negligence in tort is different from violence in criminal law due to the *mens rea* requirement, the higher burden of proof in criminal law is a strong indicator that British courts would accept the religious thin skull in tort.

Although these cases point to the acceptance of the religious thin skull in other jurisdictions, the same arguments may not succeed in Canadian cases for the religious thin skull. Adjin-Tettey and Cassels' approach can be strongly supported by citing *Janiak v Ippolito*. In this case, the SCC directly addressed the American analysis of the religious thin skull and discussed the use of a subjective standard of assessment for what can be expected of a particular plaintiff. On this note, the SCC clearly said:

> Where a plaintiff does not suffer from a constitutional incapacity to act reasonably he cannot make the defendant bear the burden of his unreasonable behaviour. Thus, the analytic focus in each case is on the *capacity* of the plaintiff to make a reasonable choice.[55]

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46 *Ibid* at 873.

47 [1981] 124 DLR (3d) 506 1981CarswellMan 60.

48 Cooper-Stephenson, *supra* note 44 at 862.

49 Marc Ramsay, "The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failure of Mitigation?" (2007) 20:2 Can JL & Jur 399 at 400.

50 *Ibid* at 452.

51 632 NYS 2d 760, 167 Misc 2d 312 (1995).

52 322 US 78 (1944).

53 [1975] 3 All ER 446 (CA).

54 *Ibid*.

55 *Janiak*, *supra* note 30 at 26.

Further, other Supreme Court cases have warned against the application of American law, which is at best persuasive rather than authoritative. As stated by former Chief of Justice Beverly McLachlin:

> To blindly follow the paths that American courts have taken in dealing with the *Bill of Rights* would be to not only overlook the significant differences between the *Charter* and the American constitutional guarantees, but to ignore the unique matrix of Canadian society.[56]

This sentiment provides little guidance as to how we should understand the unique matrix of Canadian society in the context of religious refusal of medical treatment. Is Canada uniquely multicultural and diverse, with a specific appreciation and respect for religious freedom? Or does the matrix of Canadian society require a different approach than that taken by the American courts? This remains to be seen. It appears that, at this time, American jurisprudence takes a more subjective approach to the reasonable person test than Canadian law.[57]

Both the Cooper-Stephenson and Cassels-Adjin-Tettey camps provide compelling arguments on the issue. However, there are missing components to the discussion involving both constitutional law and social science. Perhaps examination of how these areas of law and academics interpret the purpose and function of religion may offer some clarity on this grey area of law.

V. RELIGION AS A BAR TO CAPACITY

In order to convince the Cassels-Adjin-Tettey camp that religion can constitute a thin skull, one must successfully frame religious belief as a pre-existing psychological condition that is akin to a psychological infirmity. This is an uncomfortable argument to make, but it is an important consideration in evaluating the viability of the religious thin skull in the strictest interpretation of the law in *Janiak*. Psychologists studying the function of religion in society suggest that religious beliefs may work in part to mitigate the psychological impact that comes with concerns about mortality.[58] This idea has been named "terror management theory," which argues that the human capacity to reflect on the inevitability of death can lead to debilitating anxiety and existential nihilism.[59] The theory posits that humans constructed religion in order to combat these feelings, explain the origins of existence, and provide guidelines for a meaningful life.[60] This theory is further supported by the "mortality salience hypothesis," which posits that increased appreciation of personal mortality correlates with an increased need for structures that offer protection from the awareness of death.[61]

In this understanding of religion, religious beliefs serve a functional purpose of managing concerns about death.[62] Thus, it is not surprising that individuals of religious faith who believe in an afterlife also have lower levels of concern about the prospect of death, and when fears of death are heightened, many people report an increase of their religious faith.[63]

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56 Beverley McLachlin, "*The Charter of Rights and Freedoms*: A Judicial Perspective" (1989) 23:5 UBC L Rev 579 at 582.

57 *Janiak*, *supra* note 30 at 160.

58 Matthew Vess, Jamie Arndt & Cathy R Cox, "Exploring the Existential Function of Religion: The Effect of Religious Fundamentalism and Mortality Salience on Faith-Based Medical Refusals" (2003) 97:2 Journal of Personality and Social Psychology 334 at 335.

59 *Ibid*.

60 *Ibid*.

61 *Ibid*.

62 *Ibid*.

63 *Ibid*.

In five concurrent studies, religious fundamentalists were found to be more likely to make treatment-based decisions consistent with the idea that faith alone is a viable treatment option when they have a heightened awareness of personal mortality.[64] In this way, religious refusal of medical treatment can be framed as a self-supporting cycle of mortality concerns. Using this theory as a springboard, it is not a far leap to begin to frame religion as a kind of mental condition that allows an individual to cope with the stress of life.

The comparison of a religious thin skull to psychological infirmities also appears in academic scholarship on the issue. In her paper entitled "Religious Practice as a Thin Skull In the Context of Civil Liability," Olga Redko attempts to draw a parallel to the issue with the 1983 SCC case *Cotic v Gray*.[65] In this case, Nediljko Cotic suffered depressive illness, paranoia, and psychosis and ultimately committed suicide 16 months later following a serious motor vehicle accident.[66] In this case, the Court addressed the issue of whether or not a defendant can be liable for the suicide of a victim of negligence and held that the fact that the psychological vulnerability of the plaintiff resulted in an additional action taken by the plaintiff resulting from his psychological vulnerability did not prevent liability for the defendant.[67]

Upon inspection, the stated arguments likening religious refusal of medical treatment to psychological infirmities are quite harsh. As a result, they are unlikely to be endorsed by the Canadian legal system because of the deeply insulting and disrespectful nature of the claim. Practically, it is unlikely that a lawyer would advance an argument on behalf of a religious plaintiff that frames religion as a mental illness. This notion of religion goes against a general sense of decency and respect that is expected when addressing the topic. To liken sincerely held religious beliefs to a mental health disorder is problematic on many levels. It undervalues other accepted principles of religion that include self-determination, spiritual self-fulfilment, and individual conscience and development which have a long-standing place in Canada's historic and political tradition.[68] Canada has never been neutral in terms of religion.[69] Further, it ignores the special status that religion and religious beliefs hold as an analogous ground in Canadian jurisprudence. In addition, the comparison of religious refusal of treatment to suicide is both unconvincing and macabre; it ultimately fails to provide insight into this issue. An action taken—or not taken—by reason of sincerely held religious belief is fundamentally different from an action taken out of mental health and despair. One can be treated by medical and social intervention; the other is a protected system of beliefs and practices. There is something about extending liability to negligent actors whose victims go on to commit suicide that is distinct from extending liability to negligent actors whose victims refuse treatment by reason of sincerely held religious belief. There is a public function in not assigning blame for one person's suicide onto another. There is a sense of gravity and permanence that comes with assigning liability for this sort of act on someone, especially on a defendant who commits a negligent act rather than an intentional one.

The apparent similarity between the religious refusal of recommended medical treatment and suicide is that they are both actions that would be irrational to a "reasonable person." However, this speaks to the qualities that we attribute to the "reasonable person" and the possibility that there may be an optimal victim who is most likely to achieve *restitutio in integrum* by virtue of their religious affiliation. Given the above issues with respect to

64 *Ibid* at 345.

65 Redko, *supra* note 24 at 46.

66 (1981) 33 OR (2d) 356, 124 DLR (3d) 641 (CA), aff'd [1983] SCJ No 58 at para 1.

67 *Ibid* at 101.

68 Redko, *supra* note 24 at 69.

69 David Schneiderman, "Associational Rights, Religion, and the *Charter*" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 65–67.

framing religion as a bar to capacity, it appears that a different argument must be made if the religious thin skull is to prevail in Canadian law.

VI. THE *CHARTER* AS AN ADVOCATE FOR THE RELIGIOUS THIN SKULL

A more comfortable and likely more convincing argument in favour of the religious thin skull involves examining *Charter* values and emphasizing their application to the common law. Any successful argument for the religious thin skull rooted in the *Charter* would be contingent on the degree of emphasis placed upon these values balanced against the perceived importance of black letter tort law. The relevant sections of the *Canadian Charter of Rights and Freedoms* in this discussion include section 2(a), which provides for freedom of conscience and religion, and section 15, which provides for equal protection and benefit of the law.[70] These two sections are connected to each other, and academics have argued that the fundamental principle of equality requires accepting the religious thin skull, as failure to do so will result in the victim of the tort facing discrimination for personal characteristics, which the principles of equality forbid.[71]

The core idea behind the conception of equal religious citizenship, equality, and freedoms means that religious people can participate equally in Canadian society without abandoning their faith, as long as doing so would not interfere with the rights of others or compelling social interests.[72] As stated by Bruce Ryder, the idea that religious followers should not choose between their faith and full participation of the laws of the land requires a commitment to adjusting rules and policies that appear neutral but have the effect of interfering with a religious practice and belief.[73] Further, scholars have defined religion as something that can only be understood through lived experience and have found that the practice of religious beliefs is about the manner in which religion manifests in daily life.[74]

It is widely accepted that those who are likely to face the greatest struggle in enjoying both freedom of religion and equality in the law are members of religious minority groups whose traditions are poorly understood.[75] Thus, we can identify a vulnerable population of religious minorities who may practice their faith in a manner that may be considered unreasonable by the majority of the population and, as a result, whose religious freedoms are most likely to be limited when other interests and social rights are affected. Although the law is intended to be equal for all citizens, it is apparent that the refusal of the religious thin skull would disproportionately impact religious minorities. The question becomes whether Canada has a responsibility to protect these interests in an increasingly multicultural society. Legal scholars Martha Chamallas and Jennifer B. Wriggins have stated that:

> Close scrutiny of the rules and methods that govern damage awards is a chief way to protect against the devaluation of individuals and social groups to ensure basic equity in the torts systems of compensation.[76]

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70 *Canadian Charter of Rights and Freedoms*, ss 2(a), 15(1), Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

71 Dannis Klimchuk, "Causation, Thin Skulls and Equality" (1998) 11 Can JL and Jurisprudence 115 at 138.

72 Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 87 [Ryder].

73 *Ibid* at 88.

74 Lori G Beaman, "Defining Religion: The Promise and Peril of Legal Interpretation" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 192 at 194.

75 Ryder, *supra* note 72 at 88.

76 Chamallas, M & Wriggins, J, *The Measure of Injury: Race, Gender, and Tort Law* (New York: NYU Press, 2010) ch 6 at 156.

The Supreme Court of Canada in *R v Big M Drug Mart Ltd* specifically stated that the *Charter* safeguards religious minorities from the "tyranny of the majority" and found that the freedom of religion includes the manifestation of religious belief by worship and practice free from coercion.[77] Former Chief of Justice Beverley McLachlin also spoke of the importance of religion as an enumerated ground within the *Charter* in the 1999 SCC case *Corbiere v Canada (Minister of Indian and Northern Affairs)*, in which she stated:

> [T]he fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds... is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.[78]

Although the *Charter* does not directly apply to private litigation, the Supreme Court of Canada stated in *Dolphin Delivery Ltd v RWDSU Local 580* that the common law ought to be applied in a manner consistent with the fundamental values of the Constitution.[79] Given that this is a grey area in the common law, there is room for application of the law in a manner that would reflect *Charter* values of equality and religious freedom. The Supreme Court of Canada re-emphasized this idea of reflecting *Charter* values in the common law in the 1995 case *Hill v Church of Scientology of Toronto*, in which Justice Cory provided guidance regarding the approach courts should use when incorporating these values into private jurisprudence.[80] In writing for the majority, he stated that courts must balance conflicts between principles in a more relaxed fashion than would occur in a traditional section 1 analysis involving a state actor and held that:

> *Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.[81]

The history, timing, and method of implementation of the *Charter* may also have significant bearing on the outcome of the religious thin skull and its place within the *Janiak* framework. The *Charter* came into effect in 1982; however, section 15 importantly took effect on April 17, 1985 in order to allow the courts time to align their laws with the equality right enumerated in the section.[82] The Supreme Court of Canada decided *Janiak v Ippolito* on March 14, 1985, one month before equality rights came into effect.[83] At this time in Canadian legal history, *Charter* interpretation in private law was an open question. If the courts were faced with a religious thin skull today, it is likely that they would understand *Janiak* to be pre-*Charter* litigation that did not adequately reflect the implementation of *Charter* values into private jurisprudence. The courts would thus

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77 [1985] 1 SCR 295 at 336, 346, 18 DLR (4th) 321 at 94–96 [*Big M*].

78 *Corbiere*, *supra* note 35.

79 *Dolphin Delivery*, *supra* note 3 at 125.

80 [1995] 2 SCR 1130, 126 DLR (4th) 129, Cory J [*Hill*].

81 *Ibid* at 100.

82 Government of Canada, "Guide to the Canadian Charter of Rights and Freedoms" (22 November 2018), online: Canada.ca <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> archived at [https://perma.cc/9HV9-VUXD].

83 *Janiak*, *supra* note 30.

recognize the religious thin skull given indica in more recent case law that *Charter* values do indeed have a place in private law.

Given the emphasis on freedom of religion and equality in Canadian jurisprudence, it must be determined how these *Charter* values impact the issue of the religious thin skull. The following section will analyze the strongest arguments both for and against the religious thin skull in tort considering *Charter* values and their application. In assessing *Charter* values, two diverging paths once again emerge that both support and reject the religious thin skull.

VII. RECONCILING PUBLIC VALUES AND PRIVATE LAW

It appears, thus far, that case law on the *Charter* contains strong arguments in favour of the religious thin skull. Indeed, the SCC has recognized the fact that religion is an important part of various aspects of daily life for many Canadians.[84] However, when inevitable conflict arises as a result of religion impacting other interests, Chief Justice McLachlin, as she then was, has stated: "Many religious practices entail costs which society reasonably expects the adherent to bear."[85] How do we determine whether the costs associated with cases of personal injury mitigation come at too high a price for the religious person, given that they live in a society that protects their religious freedom and fundamental equality? Is the decision to mitigate damages for the Jehovah's Witness who requires a blood transfusion asking the victim to make a decision that will come at an unacceptable cost to their beliefs? Given that the thin skull rule is concerned with fairness and equality underlying corrective justice, is it in keeping with the thin skull rule to expect the religious victim to bear the cost of their sincerely held belief? Perhaps further clarity can be gained on this issue by determining the extent to which private law has incorporated and limited the application of *Charter* values.

In the 2001 Alberta Court of Appeal case *MacCabe v Westlock Roman Catholic Separate School District No. 110*, the Court grappled with the application of *Charter* values, including equality, to the tort case. In delivering his reasons, Justice of Appeal Wittmann stated:

> While I accept that the common law must try to be consistent with *Charter* values including equality, this consistency cannot be at the expense of the fundamental purposes of compensatory damages in tort law. In this case, to strictly adopt the approach taken by the learned trial judge runs the risk of ignoring, or at the very least, minimizing the essential purpose of compensatory damages in tort law.[86]

More recently, according to the 2016 Ontario Court of Appeal case *Spence v BMO Trust Co*, the *Charter* exists to protect the personal autonomy of Canadians and freedom from governmental activities. It explicitly held that the *Charter* does not apply to testamentary dispositions of a private nature.[87] The Ontario court went on to state that "the *Charter* does not seek to affect the private conduct of individuals in their relations with each other."[88] Here, we see cases that point to the limitation of the use of *Charter* values to influence tort case outcomes. These cases indicate that if the essential purposes of compensatory damages in tort law require psychological thin skulls to be in the form of a foreseeable mental infirmity, then *Charter* values will not succeed in the argument for a religious thin skull.

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84 *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 SCR 569 at 611.

85 *Ibid* at 612–613.

86 293 AR 41, 108 ACWS (3d) 823 at para 107.

87 129 OR (3d) 561, 263 ACWS (3d) 550 at para 74.

88 *Ibid* at 125.

However, in other areas of private law, *Charter* values have been applied to determine case outcomes. In the 1994 Supreme Court of Canada case *Willick v Willick*, Justice Sopinka's reasons were influenced by *Charter* values of equality in the context of a divorce case, as he stated:

> Given the profound economic impact on the parties that may follow from differing interpretations of the *Divorce Act*'s support provisions, it follows that in the present case… this court should seek to assure itself that its preferred interpretation is consistent with *Charter* values of substantive equality rather than with the values of formal equality.… Specifically, an interpretation of the *Divorce Act* provisions relating to support and its variation that is sensitive to equality of result as between the spouses must be preferred to an approach that only contemplates equality of treatment and whose effect may be to discriminate by reason of sex.[89]

Those who argue against the religious thin skull may point to the fact that this case is in the context of family law rather than tort. Family law is an area of law that needs to be sensitive to equality, given the gendered vulnerability that arises alongside financial and custody disputes between previous partners. However, advocates of the religious thin skull may argue that this case is authoritative because it is Supreme Court of Canada jurisprudence emphasizing substantive equality and its place within private law. In doing so, *Willick v Willick* demonstrates that private law can indeed bear the imprint of *Charter* values.

Another relevant Supreme Court case with respect to limiting section 2(a) *Charter* rights for a member of a religious minority is the 2012 case of *R v S(N)*.[90] In this case, a Muslim woman who wore a niqab was a complainant who alleged that she had been sexually assaulted by her cousin and uncle as a child.[91] The major issue was whether or not she was able to testify wearing her niqab, as there was concern that allowing a witness to testify with their face covered posed a serious risk of a wrongful conviction.[92] In balancing the competing interests of upholding the complainant's religious freedom with the accused's right to a fair trial, Chief Justice of Canada McLachlin, as she then was, put forth the following test:

> I conclude that a witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if:
>
> (a) requiring the witness to remove the niqab is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; *and*
>
> (b) the salutary effects of requiring her to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion.[93]

It must be noted that this case shows the limitation of religious freedom in the context of religious minorities whose practices do not fit within the expectations of Canadian law. Advocates for the religious thin skull may distinguish this case, as it is a criminal trial where the accused's liberty is at stake as the opposing value—it is not in the sphere of

89 [1994] 3 SCR 670, 119 DLR (4th) 405 at para 54.
90 2012 SCC 72, [2012] 3 SCR 726 [*S(N)*].
91 *Ibid*.
92 *Ibid* at 2.
93 *Ibid* at 3.

private law. However, this case demonstrates a willingness of the Supreme Court to limit religious freedom for a member of a minority group in favour of another social interest.

VIII. LOWER COURTS ON RELIGION AND MITIGATING DAMAGES

Lower level courts have touched on the issue of the religious thin skull, including the 2015 British Columbia Supreme Court case *Sebaa v Ricci*.[94] In this case, the plaintiff suffered both physical and psychological injury following a motor vehicle collision.[95] Pointing to the plaintiff's failure to complete counselling and take anti-depressant medication, the defendant argued that the plaintiff did not adequately mitigate her damages.[96] The plaintiff explained that she grew up in a small community that was religious, and discussing mental health was something that was taboo and personally stressful.[97] Although Justice Brown did not address the issue of the religious thin skull directly, he acknowledged that the question is an open one in Canadian law and that academics have seemed to support the view that culture and religious beliefs can in certain circumstances excuse a failure to pursue an otherwise reasonable treatment option.[98] Importantly, Justice Brown accepted evidence demonstrating that spiritual growth and involvement in religious communities can benefit an individual's mental health and sense of well-being.[99] This case demonstrates a willingness to explore the religious thin skull in Canadian courts.

Another recent British Columbia Supreme Court case discussed the issue in 2012. In *Abdalle v British Columbia (Minister of Public Safety & Solicitor General)*, the plaintiff was struck in a motor vehicle accident by an RCMP officer and refused to follow some of the recommended treatments.[100] In his refusal, he claimed that his religious beliefs precluded him from taking any strong medications.[101] Justice Ross stated that "unless Mr. Abdalle's spiritual objections provide a reason to refuse treatment, I conclude that Mr. Abdalle's refusal to follow the recommendations of his physicians was unreasonable."[102] Elaborating further, Justice Ross held that the question of the religious thin skull includes two issues: first, whether and to what extent religious or cultural beliefs can be taken into consideration in addressing a plaintiffs duty to mitigate, and, second, whether in this particular case the failure to follow a recommended course of treatment is the result of adherence to a religious belief or practice.[103]

Ultimately, Justice Ross determined that arguing for or against the religious thin skull was not appropriate in this case, as there was no factual support to Mr. Abadelle's claim of religiously motivated refusal of medical treatment.[104] Justice Ross stated that there was no evidence before him to indicate if Mr. Abdalle's claims were formal tenants of his faith or personal to him, citing a specific lack of religious texts, spiritual advisor testimony, or widespread conviction among members of the faith.[105] Because of these shortcomings,

94 257 ACWS (3d) 346, 2015 CarswellBC 2419.
95 *Ibid*.
96 *Ibid* at 3.
97 *Ibid* at 36.
98 *Ibid* at 133.
99 *Ibid* at 138.
100 2012 BCSC 128, [2012] BCWLD 7812.
101 *Ibid* at 71.
102 *Ibid* at 72.
103 *Ibid* at 78.
104 *Ibid* at 79.
105 *Ibid* at 80.

Mr. Abdalle's argument failed and his refusal to follow recommended treatment was deemed to be an unreasonable breach of his duty to mitigate.[106]

The merit of Justice Ross's requirement of evidence including religious texts, testimony, and widespread conviction may be questioned by examining the nature of the freedoms associated with *Charter* values. In *R v Big M Drug Mart*, the SCC stated that the freedom of religion is "the right to entertain such religious belief as a person chooses."[107] The importance of protecting individual understandings of religion was further emphasized by Justice Iacobucci in *Syndicat Northcrest v Amslem*, where he emphasized that the definition of religion must be inherently subjective, as it is "integrally linked with an individual's self-determination and fulfillment and is a function of personal autonomy and choice."[108] Further, in the same case, the Supreme Court adopted a low threshold in order to establish sincerity of belief.[109] Such inquiries must be as limited as possible, and must have the purpose "only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice."[110] Importantly, Justice Iacobucci emphasizes that courts are not arbiters of scriptural interpretation.[111] Therefore, in order to prove that a religious belief is sincerely held in the subjective, it is unclear what sort of evidence ought to be required by courts.

IX. RELIGIOUS REFUSAL OF MEDICAL TREATMENT FOR CHILDREN

One area where Canadian law has made the limit of religiously based refusal of medical treatment clear is where parents refuse medical treatment for their children. In these cases, Canadian courts have clearly held that the right to freedom of religion can be limited when it is weighed against the best interests of the child.[112] In the 1995 Supreme Court of Canada case *B(R) v Children's Aid Society of Metropolitan Toronto*, the Court held that restrictions on the rights of parents who refuse medical treatment for their children are amply justified.[113] Justice Iacobucci stated that "freedom of religion, like all other rights, applicable ... in its private dimension as against another individual, may be made subject to overriding societal concerns."[114] There are few societal interests more important than the protection of children, and Canadian law has taken the position that medical treatment can be forced upon unwilling child patients if it is in the best interests of the child.

In the 2009 SCC case *Manitoba (Director of Child & Family Services) v C(A)*, A.C., a 14-year-old Jehovah's Witness, was apprehended by Child and Family Services and was ordered to undergo blood transfusions as she was suffering from life-threatening internal bleeding.[115] The order was made and carried out despite the fact that A.C. herself had signed an advance medical directive indicating that it was her wish for blood transfusions to not be administered.[116] Writing for the majority, Justice Abella upheld the constitutionality of section 25(8) of the *Child and Family Services Act*; this section allowed for the order of blood transfusions to be made.[117] The Court dismissed A.C.'s appeal on the grounds

106 *Ibid* at 81.
107 *Big M*, *supra* note 77 at 94.
108 2004 SCC 47, [2004] 2 SCR 551 at 39 [*Amselem*].
109 *Ibid* at 52.
110 *Ibid*.
111 *Ibid* at 45.
112 [1995] 1 SCR 315, 122 DLR (4th) 1 [*B(R)*].
113 *Ibid* at 113.
114 *Amselem*, *supra* note 108 at 63.
115 2009 SCC 30, [2009] 2 SCR 181 at para 7.
116 *Ibid* at 21.
117 *Ibid*.

that no determination was made in the prior proceedings of her ability to make a mature, independent judgment with respect to her medical treatment but found that she had successfully argued that the provisions should be interpreted in a manner that allows an adolescent under the age of 16 who demonstrates sufficient maturity to have their decisions respected.[118] This case presents an important limitation in Canadian law, indicating that children's religious beliefs can be overruled if the court deems that it is in their best interests to do so. This limitation on the ability of a child to determine their medical treatment is important, as it touches on an underlying issue of when the court allows someone to make a health-related decision based on religious values and to what extent and for what reason religious freedom is protected.

Religion is often not only a personal choice; it can be deeply rooted in an individual's social, cultural, and private life.[119] Social science demonstrates that religion is something that is very often inherited and is a function of circumstances at birth and the socialization that follows.[120] The most determinative factor with respect to a child's religious orientation is their home environment and parental impact, particularly that of the mother.[121] In light of this social science, there is a risk that children may follow their parent's advice and refuse medical treatment without having a full appreciation of the decision that they are making. It is on these grounds that Canada can be justified in overriding the child's refusal of treatment and ordering medical intervention where a child refuses medical treatment on religious grounds.

This presents a potential argument against the religious thin skull. If Canadian law can order that it is in the best interests of a child to set aside their religious beliefs in favor of medical treatment, is it then fair that Canadian law may require a defendant in tort to financially compensate the plaintiff for making the same decision as an adult that would not be permitted in a child? Is the crux of this issue really about the maturity to appreciate the risks associated with the decision, as *Manitoba (Director of Child & Family Services) v C(A)* would appear to indicate, or is it about protecting children from making a decision that is not in their best interests? What does this tell us about Canada's view of an individual's best interests in terms of the hierarchy of medical care and religious freedom? Perhaps most importantly, does Canadian law view the religious refusal of medical treatment to be an immature, incorrect, or irresponsible decision? This argument could be made in the rejection of the religious thin skull.

Advocates for the religious thin skull can distinguish this case on the very basis that it is a child making the decision who may not have the life experience required to develop a sincerely held religious belief. The advocate for the religious thin skull can argue that these cases involve state actors and, as such, involve a different standard of adjudication of *Charter* rights. By this standard, *Charter* rights can yield to other competing social interests. As previously mentioned, there are few social interests more compelling than protecting children and their safety. If children are not able to fully assert the sincerity of their religious beliefs because they are simply too young to appreciate them and may be mirroring the attitudes of influential people in their life, Canada is rightly justified in protecting their health until they have reached a stage of life development that permits them to make such a decision.

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118 *Ibid* at 121.

119 Richard Moon, "Religious Commitment and Identity: Syndicat Northcrest v Amselem" (2005) 29:2 Sup Ct L Rev (2d) 201 at 213.

120 Scott M Myers, "An Interactive Model of Religiosity Inheritance: The Importance of Family Context" (1996) 61:5 American Sociological Review 858 at 858.

121 Bruce Hunsberger & LB Brown, "Religious Socialization, Apostasy, and the Impact of Family Background" (1984) 23:3 Journal for the Scientific Study of Religion 239 at 250.

CONCLUSION: THE RELIGIOUS THIN SKULL, CANADIAN MULTICULTURALISM, AND THE REASONABLE RELIGIOUS PERSON

It is unclear how Canadian law will respond to the inevitable question of the religious thin skull. Redko argues for a case-by-case balancing approach, focusing on the particularities of the parties, but her argument is unconvincing.[122] A case-by-case approach leaves too much room for discretion and may result in a manifestation of unequal outcomes across similar cases. Further, a case-by-case approach does not provide the kind of clarity that is being sought on this issue. This is a narrow area of tort law in which a victim's injuries are made more severe owing to a religiously based refusal of medical treatment. In all cases, the defendant's interests in limiting their costs are the same. Similarly, in all cases the plaintiff's interests in realizing the full extent of their damages from the defendant are also the same. One legal principle should be capable of covering such a niche area and be applied equally to different religious groups.

A court may take an approach similar to Cassels, Adjin-Tettey, *McCabe v Westlock*, and *Janiak v Ippolito*, drawing on the fundamental principles of tort which suggest that the plaintiff ought to bear the financial burden of their religious beliefs and treat the religious refusal of medical treatment as a failure to mitigate. In the alternative, a court may agree with Cooper-Stephenson and *Willick v Willick*, influenced by *Amslem, Big M*, and the *Charter*, holding that *Charter* values ought to be implemented into private law to ensure that the rights of freedom of religion and equality for vulnerable groups are not curtailed due to the structure of the law. This paper has demonstrated that the academic divergence on this topic indicates that people who are educated in the law can justifiably hold different conclusions with respect to this issue. The answer that each person will come to with respect to the religious thin skull is ultimately dependent on their answers to two questions that are both simple yet complicated: What is law? And what is religion?

For many, the purpose of law is the pursuit of justice, with the aim of allowing people to engage freely in the world while providing recourse for when things go wrong. In contrast, perspectives on religion will likely include much more diversity, particularly in a society which respects a myriad of beliefs ranging from atheism to fundamentalism. An individual's opinion will be informed by their personal perspective and lived experience with respect to religion. It is unclear whether an atheist would support the religious thin skull, given that they will never benefit from it but may bear its financial burden as a defendant in tort. Should an individual's belief in a religious doctrine impose a financial burden on another person who may be a non-believer? Perhaps it is simply a "tax" that must be paid in a multicultural a society that acknowledges the profundity of religious belief.

Canada is a multicultural society that welcomes immigrants from around the world who come for the promise of a better life in a country that values freedom and equality. Further, Canadians are often willing to make accommodations and accept that diversity of beliefs and practices are part of modern Canadian life. In order to be a society that truly reflects the values that it espouses, we must ensure that Canadian law serves the Canada that currently exists rather than the Canada that existed in the past.

It seems that the only solution to this issue is to accept the Canadian religious thin skull so long as the plaintiff is making a decision that is in keeping with the subjective requirements of their faith and is borne out of a sincerely held belief. The religious thin skull should be limited where the decision goes beyond the realm of foreseeable religious requirements that necessarily exist within a multicultural society where freedom of religion

122 Redko, *supra* note 24 at 77.

and equality are both valued. Rather than asking what the reasonable Jehovah's Witness would do, we should ask if the religious refusal of medical treatment is within the realm of our multicultural commitment to equality and freedom of religion. Instead of a subjective analysis of the individual, we ought to approach this question from an objective lens that is consistent with the values of Canadian society. In doing so, judges should ask first if the victim of the tort who is refusing medical treatment is doing so as a result of following a religious practice that could be reasonably found in a multicultural society, and second, whether the refusal of medical treatment can be found to be rooted in a foreseeable interpretation of that religion. This approach will ensure that *Charter* values are respected while simultaneously upholding core concepts of private law. Given the implementation of section 15 of the *Charter* immediately following the Supreme Court's ruling in *Janiak*, as well as the jurisprudence of the relevance of *Charter* values that followed, the Supreme Court of Canada would likely recognize the religious thin skull.

The effect of limiting the religious thin skull to foreseeable religious requirements that would exist within a multicultural society is twofold. First, it means that individuals who follow diverse religions will be considered to have a religious thin skull, rather than having failed to mitigate. This is important, as it respects religious diversity and therefore upholds *Charter* values such that Canadian residents can manifest their religious beliefs equally without having to pay for the cost of doing so following tortious injury. Second, it means that tortfeasors do not have to pay for refusals of medical treatment that claim to be rooted in religion but cannot be sourced to any religious dogma or requirements. Limiting the religious thin skull in such a way will prevent claims that are inconsistent with the reasonable expectations of a multicultural society. This is important as it ensures that the religious thin skull remains something that is truly a protected interest of the ability and right for Canadians to practice and manifest their religion as they see fit.

While the acceptance of the religious thin skull is consistent with current legal trends and the application of *Charter* values to private law, in reality, the question of whether or not the religious thin skull should exist engages a high degree of personal bias surrounding one's understanding of law and religion. A case demanding a final decision on this matter will likely appear in the near future given the increasing diversity of Canadian residents and this apparent gap in the law. It is possible that this decision will hinge on the facts of the case and the degree of sympathy which the plaintiff can garner. Until such a decision arises, the question remains open in Canadian law.

ARTICLE

MISSPENT YOUTH: THE (MIS)APPLICATION OF THE *YOUTH CRIMINAL JUSTICE ACT* BY THE *CRIMINAL CODE* REVIEW BOARDS OF BRITISH COLUMBIA AND ONTARIO

Kyle McCleery *

CITED: (2020) 25 *Appeal* 109

ABSTRACT

This article examines the treatment of young people, as defined in the *Youth Criminal Justice Act* (*YCJA*), by the *Criminal Code* review boards of British Columbia and Ontario. Section 141(6) of the *YCJA* requires provincial review boards to give special consideration in making disposition decisions applicable to young people found not criminally responsible on account of mental disorder (NCRMD). Through an analysis of decisions made by the two review boards in 2015 and 2016, this article concludes that neither review board is consistently giving effect to this provision. It then considers whether there is a need to provide distinct treatment to young people in this context, concluding that there are compelling reasons for giving special consideration to young people found NCRMD, but also that the requirements of section 141(6), even if given their full effect, are insufficient to account for the unique circumstances of this population.

INTRODUCTION

Among the foundational principles of the Canadian criminal justice system is that each individual is an autonomous and rational being, who can distinguish right from wrong and whose actions can give rise to criminal liability.[1] However, Canadian law does recognize some limits to this principle. Among these are that, in some circumstances, individuals suffering from mental disorders should not be held responsible for criminal acts and that young people under the age of 18 bear less responsibility for their crimes than do adults. Both of these exceptions have been recognized by the Supreme Court of Canada as principles of fundamental justice[2] and have been the subject of significant academic and

* Kyle McCleery completed an LLM at the University of British Columbia and is a member of the Law Society of British Columbia. This article is based on research made possible through a grant from the Law Foundation of British Columbia. The author is grateful to Professor Isabel Grant for her guidance and thoughtful feedback on a previous draft of this article.

1 *R v Bouchard-Lebrun*, 2011 SCC 48 at paras 48–49.

2 *R v DB*, 2008 SCC 25 at para 70 [*DB*]; *R v Swain*, [1991] 1 SCR 933 at 976–977 [*Swain*].

judicial attention.[3] Far less consideration has been given to cases in which they intersect; that is, when young people commit criminal acts while suffering from a mental disorder.

This article is intended to begin to fill this gap in two ways. First, it presents data on the population of young people, as defined in the *Youth Criminal Justice Act*[4] ("*YCJA*" or the "Act"), under the jurisdiction of the British Columbia and Ontario *Criminal Code* review boards in 2015 and 2016. Second, it examines how the two review boards have treated these accused, ultimately concluding that neither is giving meaningful consideration to their status under the *YCJA*.

The article proceeds in four parts. It begins with an overview of the legislative context created by the *Criminal Code of Canada*[5] and the *YCJA*. Part two presents data regarding the population of young people under review board jurisdiction in British Columbia and Ontario in 2015 and 2016. Part three examines the approach taken by the review boards to cases involving young people and considers whether they are satisfying the requirements of section 141(6) of the *YCJA*. Section 141(6) provides that:

> Before making or reviewing a disposition in respect of a young person under Part XX.1 (mental disorder) of the *Criminal Code*, a youth justice court or review board shall consider the age and special needs of the young person and any representations or submissions made by a parent of the young person.

Finally, part four discusses the implications of the analyses set out in parts two and three and identifies directions for future research. It argues that there are compelling reasons to treat young accused found not criminally responsible by reason of mental disorder ("NCRMD") differently from adults. This argument is grounded in the elevated impact of an NCRMD verdict on the liberty interests of a young person and the different incentives facing young people considering pursuing the NCRMD verdict. In its present form, section 141(6) does not allow provincial review boards to adequately recognize the unique circumstances of young people as it does nothing to expand the scope of the review board's decision-making beyond the narrow dangerousness analysis mandated by the *Criminal Code*.

I. LEGISLATIVE CONTEXT: THE *CRIMINAL CODE* AND THE *YCJA*

The legal status of young people accused of criminal offences while suffering from mental disorder is governed by two pieces of legislation. Section 16 and Part XX.1 of the *Criminal Code* apply to all accused, regardless of age, who successfully raise the mental disorder defence. The *YCJA* also applies in cases where the accused was 12 years old or older[6] and under the age of 18 at the time of the alleged offence.

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3 See *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625; *Bouchard-Lebrun*, *supra* note 1; *Swain*, *supra* note 2; *DB*, *supra* note 2; *R v BWP; R v BVN*, 2006 SCC 27; *R v CD; R v CDK*, 2005 SCC 78; Anne G Crocker, "The National Trajectory Project on Individuals found Not Criminally Responsible on Account of Mental Disorder" (2015) 60:3 Canadian Journal of Psychiatry 96; Isabel Grant, "Canada's New Mental Disorder Disposition Provisions: A Case Study of the British Columbia *Criminal Code* Review Board" (1997) 20:4 International Journal of Law and Psychiatry 419; James D Livingston et al, "A Follow-Up Study of Persons Found Not Criminally Responsible on Account of Mental Disorder in British Columbia" (2003) 48:6 Can J Psychiatry 408; Nicholas Bala et al, "Evaluating the Youth Criminal Justice Act After Five Years: A Qualified Success" (2009) 51:2 Canadian Journal of Criminology and Criminal Justice 131; Lihui Zhang, "Are youth offenders responsive to changing sanctions? Evidence from the Canadian Youth Criminal Justice Act of 2003" (2016) 49:2 Canadian Journal of Economics 515.

4 SC 2002, c 1 [*YCJA*].

5 RSC 1985, c C-46 [*Criminal Code*].

6 Section 13 of the *Criminal Code*, *supra* note 5, provides that children under the age of 12 bear no criminal responsibility for their acts.

A. Section 16 and Part XX.1 of the *Criminal Code*

Section 16(1) of the *Criminal Code* establishes the "defence of mental disorder":

> No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Exemptions from criminal liability for those suffering from mental illness or mental disorder have existed in the English-speaking world since the 11th century.[7] Section 16 of the *Criminal Code* reflects a version of this defence first articulated by the English House of Lords in *M'Naghten's Case* in 1843.[8] Despite its long history in the common law, the defence is rarely applied in Canada today. Over the past decade, the number of new cases entering the Ontario Review Board system, including both new NCRMD accused and those found unfit to stand trial, has not exceeded 300 accused in any year.[9] In British Columbia, this number has not exceeded 100.[10]

While section 16 describes mental disorder as a "defence," an accused person who successfully raises it does not receive a complete acquittal. Rather, the accused is found "not criminally responsible by reason of mental disorder,"[11] a verdict the Supreme Court of Canada has held is neither a true acquittal nor a conviction.[12] Following the verdict, an accused found NCRMD cannot be punished, but may be detained in a hospital or subject to other restrictions on his or her liberty for the purpose of protecting the public.[13]

A disposition hearing must be held to determine whether the accused should remain under the jurisdiction of the review board. If so, the accused's custodial status is also determined at this hearing.[14] The hearing is most often held by a provincial review board, [15] but it may also be held by the court that entered the verdict.[16] Each province is required to establish a review board with jurisdiction over accused persons who have been found NCRMD or unfit to stand trial.[17] Following this initial disposition hearing, there must be a subsequent hearing to review the disposition every 12 months.[18]

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7 Cyril Greenland, "Crime and the Insanity Defence, an International Comparison: Ontario and New York State" (1979) 7:2 Bulletin of the American Academy of Psychiatry and Law 125 at 125.

8 *Daniel M'Naghten's Case* (1843), 10 Cl & Fin 200, 8 ER 718 (HL).

9 Ontario Review Board, Annual Report Fiscal Reporting Period April 1, 2017–March 31, 2018 (Toronto: Ontario Review Board, 2018) at 8.

10 British Columbia Review Board, Annual Report Fiscal Year: April 2017–March 2018 (Vancouver: British Columbia Review Board, 2015) at 14.

11 *Criminal Code*, *supra* note 5, s 672.34.

12 *Winko*, *supra* note 3 at para 35.

13 *Ibid* at para 21.

14 *Criminal Code*, *supra* note 5, ss 672.45–672.46.

15 Anne G Crocker et al "To Detain or to Release? Correlates of Dispositions for Individuals Declared Not Criminally Responsible on Account of Mental Disorder" (2011) 56:5 Can J of Psychiatry 293 at 294; Livingston et al, *supra* note 3 at 411.

16 *Criminal Code*, *supra* note 5, s 672.45.

17 *Ibid*, s 672.38.

18 *Ibid*, s 672.81; the time for holding a hearing may be extended to 24 months where the accused is represented by counsel and both the accused and the Crown agree to the extension: s 672.81(1.1); this rule does not apply in the case of accused designated "high-risk accused" under s 672.64 of the *Criminal Code*. For these accused, the time for holding a subsequent hearing may be extended up to 36 months if the review board is satisfied that the accused's condition is not likely to improve and that detention remains necessary for the period of the extension: s 672.81(1.32).

At the conclusion of each initial and subsequent disposition hearing the court or review board must make an order imposing one of three dispositions. The accused may be detained in a hospital, discharged with conditions, or discharged absolutely.[19] In making an order, the court or review board must take into account "the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused."[20]

If a review board concludes that "the accused is not a significant threat to the safety of the public," the accused must be absolutely discharged.[21] This outcome frees the accused from the review board's jurisdiction and eliminates the need for further hearings. In *Winko v British Columbia (Forensic Psychiatric Institute)*,[22] the Supreme Court of Canada held that there is no presumption of dangerousness and that in order to retain jurisdiction over the accused, a review board must make a positive finding that the accused is "dangerous."[23] If the review board is unable to make such a finding, the accused must be discharged absolutely.

Where the review board finds that the accused poses a significant threat to the safety of the public, it must either detain the accused in hospital or grant a conditional discharge. Here, the review board must make an order that is "necessary and appropriate,"[24] a standard held by two appellate courts to require the "least onerous and least restrictive" disposition.[25] All disposition decisions made by the review board can be appealed to the court of appeal of the province in which the decision was made.[26]

B. The *Youth Criminal Justice Act*

The *YCJA* came into force in 2003, replacing the *Young Offenders Act*[27] ("*YOA*"). The *YCJA* was enacted in large part to address concerns regarding the administration of youth criminal justice under the *YOA*. Under the *YOA*, Canada had one of the world's highest rates of youth custody and one of the lowest rates of youth diversion.[28] Accordingly, a primary objective of Parliament in passing the *YCJA* was, as articulated in the preamble, to create "a youth justice system that reserves its most serious interventions for the most serious cases and reduces the over-reliance on incarceration for non-violent young persons."[29]

The *YCJA* establishes a separate system of criminal justice for young people. It defines a young person as one who was 12 years old or older but under the age of 18 at the time of the offence in question. Accordingly, for the purposes of the review board system, NCRMD accused who committed their index offence before the age of 18 continue to be "young people" under the *YCJA* even after turning 18.[30]

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19 *Ibid*, s 672.54.
20 *Ibid*.
21 *Ibid*.
22 *Winko*, *supra* note 3.
23 *Ibid* at para 46.
24 *Criminal Code*, *supra* note 5, s 672.54.
25 *Ranieri (Re),* 2015 ONCA 444 at paras 19–20; *Carrick (Re),* 2015 ONCA 866 at para 15; *Nelson v British Columbia (Adult Forensic Psychiatric Services),* 2017 BCCA 40 at para 26.
26 *Criminal Code, supra* note 5, s 672.72.
27 RSC 1985, C Y-1.
28 Bala et al, *supra* note 3 at 132.
29 *Ibid* at 136.
30 *YCJA*, *supra* note 4, s 2; *JF (Re),* [2015] ORBD No 1352 at para 6.

The Act provides for the designation of courts as "Youth Justice Courts"[31] and assigns such courts exclusive jurisdiction over any offence alleged to have been committed by a young person. The separate system of youth criminal justice established by the Act recognizes a set of principles applicable to youth criminal justice,[32] creates unique procedures for young people charged with offences,[33] provides for distinct and lesser forms of punishment,[34] and protects the privacy of young people charged with criminal offences.[35]

The *YCJA* expressly incorporates the *Criminal Code* mental disorder regime described above into the youth criminal justice system. Section 141(1) of the *YCJA* provides that section 16 and Part XX.1 of the *Criminal Code* apply to young people, with any necessary modifications, except to the extent they are inconsistent with or excluded by the *YCJA*.

Section 141 goes on to set out a number of modifications to the *Criminal Code* applicable where a young person is found NCRMD. These include distinct measures for providing notice to the accused[36] and separate provisions for where NCRMD youth may be detained following the verdict.[37]

Section 141(6) of the *YCJA* sets out special considerations that must be taken into account by a review board in making dispositions pertaining to young people. This provision requires a review board to consider any submissions made by a parent[38] and mandates that a young person's age and special needs must be considered in any disposition decision:

> Before making or reviewing a disposition in respect of a young person under Part XX.1 (mental disorder) of the *Criminal Code*, a youth justice court or review board shall consider the age and special needs of the young person and any representations or submissions made by a parent of the young person.

Neither the *Criminal Code* nor the *YCJA* provides guidance as to how the court or review board should take the age or special needs of the young person into account. This section has not received judicial consideration in any reported case. Accordingly, there is little direction as to how this requirement should be applied.

This lack of direction regarding section 141(6) is significant because the implications of the age of an accused for disposition decisions are not immediately clear. The *YCJA* definition of "young person" includes all NCRMD accused who commit index offences prior to turning 18, a status the accused retains even after entering adulthood. Once an NCRMD youth turns 18, however, it is not obvious how age would distinguish that accused from an accused of the same age with an index offence committed later in life.

This is partly because a key rationale for treating young people differently from adults in the criminal justice system generally would seem to have little application in the NCRMD context. A central principle of youth criminal justice in Canada is that young people who commit criminal acts bear less culpability and moral responsibility for those acts

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31 *YCJA*, *supra* note 4, s 13; Sherri Davis-Barron, *Canadian Youth & the Criminal Law* (Markham: LexisNexis, 2009) at 78.

32 *YCJA*, *supra* note 4, s 3; Davis-Barron, *supra* note 31 at 148–152.

33 *YCJA*, *supra* note 4, ss 23–37; Davis-Barron, *supra* note 31 at 179–203.

34 *YCJA*, *supra* note 4, ss 38–82; Nicholas Bala and Sanjeev Anand, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2009) at 469–471.

35 *YCJA*, *supra* note 4, ss 110–129; Bala and Anand, *supra* note 34 at 450–456.

36 *YCJA*, *supra* note 4, s 141(2).

37 *Ibid*, s 141(11).

38 *YCJA*, *supra* note 4; section 2 of the YCJA defines "parent" broadly to include "any person who is under a legal duty to provide for the young person or any person who has, in law or in fact, the custody or control of the young person."

than do adults because of their lack of maturity, moral sophistication, and experience.[39] Inherent in the NCRMD verdict, however, is that the accused, regardless of age, bears *no* culpability or moral responsibility for the offence because of their mental state at the time the criminal act was committed. Where the offender is already not responsible for their actions due to mental disorder, the degree of responsibility cannot be further reduced because of age. This contradiction resonates in review board decision-making. The role of the review board is to assess the threat the accused poses to the public. While age may play a role in this analysis, culpability does not. As such, the review board has no capacity to consider how age may impact blameworthiness. Instead, unlike other facets of the youth criminal justice system, it is conceivable that age could be viewed to increase the danger posed by a young NCRMD accused, heightening rather than mitigating the impact on the accused's liberty interests.

With this general overview in mind, part two of this article will describe the populations of NCRMD youth under the jurisdiction of the British Columbia and Ontario review boards in 2015 and 2016. It will discuss features such as age and sex, index offence characteristics, diagnoses, and time spent under review board jurisdiction. Part three will address how the review boards are approaching these accused in disposition hearings, with particular reference to their consideration of the factors identified in section 141(6) of the *YCJA*.

II. YOUNG PEOPLE BEFORE THE BRITISH COLUMBIA AND ONTARIO REVIEW BOARDS IN 2015 AND 2016

Presented below are the results of a review of the British Columbia and Ontario review boards' decisions from 2015 and 2016 involving young people. This section begins with an overview of cases before each review board, including the age and sex of the young people, the index offences that resulted in their NCRMD verdicts, the dispositions imposed upon them, and the time these accused had spent under review board jurisdiction at the time of the decision. This is followed by a closer look at those accused who have spent 10 or more years under the supervision of the review board.

A. Data and Methodology

The data described below was compiled through a review of British Columbia and Ontario review board decisions made in 2015 and 2016. The British Columbia decisions were obtained as part of a larger set of decisions provided directly by the review board. The relevant cases were identified and extracted from the larger set by reviewing all decisions delivered during this two-year period and selecting those involving young persons as defined in the *YCJA*.

The Ontario decisions were identified using an online commercial legal database in which Ontario Review Board decisions are published. The relevant Ontario decisions were identified by reviewing all decisions from 2015 and 2016 in which the name of the accused was anonymized. From these cases those that could be identified as involving an accused who was under the age of 18 at the time he or she committed the *actus reus*—the "guilty act"—of the index offence were selected.

For both provinces, all available decisions that could be identified as pertaining to young people were included in the data set. The data set includes a total of 28 decisions involving 18 young people for the British Columbia Review Board and 37 decisions involving 22 young people for the Ontario ReviewBoard.

39 *DB, supra* note 2 at paras 44 and 62.

B. Young People before the British Columbia and Ontario Review Boards: 2015–2016

Table 1: Young People before the Ontario and British Columbia Review Boards by Sex

	Male	Female	Total
British Columbia	15 (83.3%)	3 (16.7%)	18
Ontario	21 (95.5%)	1 (4.5%)	22
Total	**36 (90.0%)**	**4 (10.0%)**	**40**

In both provinces, young people before the review board were overwhelmingly male. This sex distribution is generally consistent with historical data about the general NCRMD population, in which males heavily outnumber females.[40] This finding is also consistent with the criminal justice system broadly, in which a substantial majority of offenders are male.[41]

All of the accused with a determinable age at the time of offence[42] committed their index offences when they were at least 15 years of age, but no older than 17.[43] The ages of the accused at the time of their hearings show consistency between the two provinces, with the greatest number between the ages of 18 and 24 at the time of hearing. The average age at the time of hearing was 23.1 in British Columbia and 25.7 in Ontario.

Table 2: Young People before the British Columbia and Ontario Review Boards by Age at Time of Hearing[44]

Age	British Columbia	Ontario	Total
<18	2 (11.1%)	0 (0.0%)	2 (5.0%)
18–24	10 (55.5%)	9 (40.9%)	19 (47.5%)
25–29	3 (16.6%)	5 (22.7%)	8 (20.0%)
30–35	1 (5.6%)	3 (13.6%)	4 (10.0%)
>35	2 (11.1%)	1 (4.5%)	3 (7.5%)
Not Indicated	0 (0.0%)	4 (18.2%)	4 (10.0%)
Average Age	23.1	25.7	24.4

40 Grant, *supra* note 3 at 428; Livingston et al, *supra* note 3 at 410; Jeff Latimer and Austin Lawrence, *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (Canada: Department of Justice, 2006) at 13; Sarah L Desmararais et al, "A Canadian Example of Insanity Defence Reform: Accused Found Not Criminally Responsible Before and After the Winko Decision (2010) 7:1 International Journal of Forensic Mental Health 1 at 6; Anne G Crocker et al, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 2: The People Behind the Label" (2015) 60:3 Can J Psychiatry 106 at 109.

41 Rebecca Kong and Kathy AuCoin, "Female Offenders in Canada" (2008) 28:1 Juristat 1 at 2; Olivia Choy et al, "Explaining the Gender Gap in Crime: The Role of Heart Rate" (2017) 55:2 Criminology 465 at 465.

42 For those accused for whom it was not possible to determine the precise age at the time of offence, other information was used to confirm that the accused was a young person at the time of the index offence.

43 For accused with multiple index offences committed at different ages, age at the time of the first index offence for which the accused had not been absolutely discharged was used.

44 Where multiple decisions were available for a single accused, the age of the accused at the time of the most recent hearing was used.

Table 3: Young People before the British Columbia and Ontario Review Boards by Most Serious Index Offence

Most Serious Index Offence	Number of British Columbia Accused	Number of Ontario Accused	TOTAL
Murder	5 (27.8%)[45]	1 (4.5%)	6 (15.0%)
Attempted Murder	0 (0.0%)	2 (9.1%)	2 (5.0%)
Aggravated Assault	1 (5.6%)	0 (0.0%)	1 (2.5%)
Assault with a Weapon	5 (27.8%)	7 (31.8%)	12 (30.0%)
Assault	1 (5.6%)	3 (13.6%)	4 (10.0%)
Assaulting a Peace Officer	2 (11.1%)	1 (4.5%)	3 (7.5%)
Sexual Assault	1 (5.6%)	1 (4.5%)	2 (2.0%)
Robbery	0 (0.0%)	1 (4.5%)	1 (2.5%)
Arson	2 (11.1%)	1 (4.5%)	2 (5.0%)
Uttering Threats	0 (0.0%)	2 (9.1%)	2 (5.0%)
Criminal Harassment	0 (0.0%)	2 (9.1%)	2 (5.0%)
Possession of a Dangerous Weapon	1 (5.6%)	0 (0.0%)	1 (2.5%)
Breach of Undertaking	0 (0.0%)	1 (4.5%)	1 (2.5%)
TOTAL	**18**	**22**	**40**

Assaults were the most serious index offence for the majority of accused persons. This is in keeping with the general NCRMD population, where assaults have consistently been the most common index offences since 1992.[46] The overall percentage of cases with an index offence of murder[47] (15 percent) was also consistent with historical data for the NCRMD population generally.[48]

There are also differences between the two provinces. The NCRMD youth in British Columbia generally seem to have committed more serious index offences than those in Ontario. More than a quarter of the NCRMD youth in British Columbia committed an index offence of murder, compared to fewer than five percent in Ontario. Conversely, a higher proportion of NCRMD youth in Ontario had committed an index offence that did not involve physical violence, such as a breach of undertaking, criminal harassment, or uttering threats.

45 "Murder" is listed as a single category as the review boards do not consistently identify in these cases whether a murder is first or second degree.

46 Grant, *supra* note 3 at 427; Livingston et al, *supra* note 3 at 411; Latimer and Lawrence, *supra* note 40 at 17; Desmarais et al, *supra* note 40 at 6; Crocker et al, *supra* note 40 at 110.

47 While it is not possible to distinguish between first- and second-degree murder (see note 45, *supra*), it does not appear that any of these cases involved index offences of manslaughter with the possible exception of one British Columbia case in which the index offence was not directly identified. The facts of this case were consistent with murder, but could also have supported a charge of manslaughter.

48 Grant, *supra* note 3 at 427; Livingston et al, *supra* note 3 at 410; Latimer and Lawrence, *supra* note 40 at 17; Desmarais et al, *supra* note 40 at 6; Crocker et al, *supra* note 40 at 110.

Table 4: Young People before the British Columbia and Ontario Review Boards by Diagnosis

Diagnosis	British Columbia	Ontario	Total
Schizophrenia[49]	6 (33.3%)	12 (54.5%)	18 (45%)
Other Psychosis[50]	7 (38.9%)	2 (9.1%)	9 (22.5%)
Other	5 (27.8%)	8 (36.4%)	13 (32.5%)

Approximately two-thirds of the accused in both provinces had a diagnosis of schizophrenia or another form of psychosis. The prevalence of schizophrenia is consistent with historical data about the broader NCRMD population.[51]

Table 5: Young People before the British Columbia and Ontario Review Boards by Outcome of Most Recent Review Board Hearing

Outcome	British Columbia	Ontario	Total
Detention	10 (55.6%)	17 (77.3%)	27 (67.5%)
Conditional Discharge	7 (38.9%)	5 (22.7%)	12 (30.0%)
Absolute Discharge	1 (5.6%)	0 (0.0%)	1 (2.5%)

Both review boards detained the young people at a high rate. In both British Columbia and Ontario, more than half of the accused were detained in the most recent decision. Conversely, only one young person was absolutely discharged in either province over the entirety of 2015 and 2016.

Table 6: Young People before the British Columbia and Ontario Review Boards by Time under Review Board Jurisdiction as of date of hearing[52]

Time	British Columbia	Ontario[53]	Total
0–4 years	9 (50.0%)	7 (31.8%)	16 (40.0%)
5–9 years	4 (22.2%)	8 (36.4%)	12 (30.0%)
10–14 years	3 (16.7%)	4 (18.2%)	7 (17.5%)
15–19 years	3 (16.7%)	2 (9.1%)	5 (12.5%)
20–25 years	1 (5.6%)	1 (4.5%)	2 (5.0%)

While half of the NCRMD youth in British Columbia had been under review board jurisdiction for fewer than five years, the largest cohort in Ontario, more than 35 percent, had been under review board jurisdiction for five to nine years. The average period of time under review board jurisdiction (from time of verdict) in Ontario was 7.45 years, and 6.06

49 The following diagnoses were included in this category: paranoid schizophrenia; chronic disorganized schizophrenia; schizophrenia.

50 The following diagnoses were included in this category: psychotic disorder nos; drug-induced psychotic state; psychosis; schizophreniform psychosis; psychosis (unspecified type); drug-induced paranoid psychosis; schizoaffective disorder; unspecified psychotic disorder.

51 Grant, *supra* note 3 at 430; Livingston et al, *supra* note 3 at 411.

52 Time since NCRMD verdict.

53 Does not include the four accused for whom age could not be determined.

years in British Columbia. Table 6 also reveals that a significant percentage, 35 percent, had been under review board jurisdiction for 10 or more years.

These accused, with a decade or more under the supervision of the review board, will be examined more closely below. In the table that follows, characteristics of each of these accused, including age, sex, index offence, and diagnoses are indicated.

C. NCRMD Youth with 10 or More Years under Review Board Jurisdiction

Table 7: Accused with 10+ Years under Review Board Jurisdiction

	Prov.	Years Under RB	Sex	Age	Offence	Diagnosis	Disposition
1	BC	21	M	37	Murder	Schizophrenia/ Cannabis Use Disorder	Custody
2	BC	18	M	36	Murder	Paranoid Schizophrenia	Conditional Discharge
3	BC	15	M	33	Murder[54]	Paranoid Schizophrenia	Custody
4	BC	10	M	27	Assault with a Weapon	Schizophrenia/ Mild Mental Retardation/ Asperger's Disorder/ Polysubstance Abuse Disorder/ Obsessive-Compulsive Disorder	Custody
5	BC	10	M	25	Possession of a Weapon	Complex Neuropsychiatric Syndrome	Conditional Discharge
6	ON	20	M	36	Assault	Unspecified Psychotic Disorder/ Personality Disorder	Custody
7	ON	17	M	35	Sexual Assault	Bisexual Pedophilia/ Developmental Disability/ Frontal Lobe Dysfunction	Custody
8	ON	15	M	33	Assault with a Weapon	Schizophrenia/ Cannabis/Alcohol Abuse/ Learning Disorder NOS	Conditional Discharge
9	ON	14	M	32	Assault with a Weapon	Personality Disorder NOS/ Mental Retardation/ ADHD	Custody
10	ON	11	M	28	Assault with a Weapon	Obsessive Compulsive Disorder	Conditional Discharge
11	ON	11	M	27	Assault with a Weapon	Impulse Control Disorder/ ADHD/ Conduct Disorder/ Mental Retardation/ Antisocial Personality Disorder	Custody
12	ON	10	M	28	Assault with a Weapon	Schizophrenia/ Obsessive Compulsive Disorder	Conditional Discharge

Three noteworthy observations can be made from this table. First, the majority of these accused were detained following their most recent hearing. While it cannot be ascertained whether all of these accused had been detained for the entirety of their decade or more under review board jurisdiction, it is clear that the NCRMD verdict has led to substantial restrictions on the liberty of these accused for an extended period of time.

54 In this case, the review board does not directly identify the index offence, but the facts provided are consistent with murder.

Secondly, while the index offences in most of the cases from both provinces are serious, there is a notable difference between British Columbia and Ontario in this regard. Whereas the majority of the British Columbia accused had an index offence of murder, *none* of the Ontario accused did. All of the Ontario index offences were a form of assault, most often assault with a weapon. While this may be expected due to the absence of murder as the index offence in Ontario in the scope of this article, it is significant that this rarity of murder has not led to a smaller number of accused remaining under review board jurisdiction for an extended period of time or, as noted above, a lesser average time spent under review board jurisdiction.

Finally, there is also a notable difference in the diagnoses for these accused in British Columbia and Ontario. While four of the five British Columbia accused in this group had a schizophrenia diagnosis, only two of the seven Ontario accused carried this diagnosis. This is particularly surprising given the much higher percentage of Ontario NCRMD youth in the larger sample diagnosed with schizophrenia.

While this data set is very small, the differences between these two populations suggest that the duration of an NCRMD youth's time under review board jurisdiction and time in detention may be driven by different factors in the two provinces. In British Columbia, it appears that the severity of the index offence may play a larger role in review board decision-making, whereas in Ontario, the data suggests that the nature of the accused's mental illness may be of greater significance. The low number of accused with a schizophrenia diagnosis who have been under review board jurisdiction for 10 years or more may be attributable in part to the availability of treatment for those accused. The potential for progress may not have been possible in the case of accused persons with other diagnoses, such as developmental disability. If the British Columbia Review Board is indeed more sensitive to index offence severity, while the Ontario Review Board is more responsive to demonstrated progress in treatment, this distinction may have important implications for the equitability of treatment of NCRMD youth between provinces and for decision-making by young people and their counsel in deciding whether to seek an NCRMD verdict.

III. CONSIDERATION OF CASES INVOLVING YOUNG PEOPLE BY THE REVIEW BOARDS

Despite the seemingly clear direction given in section 141(6) of the *YCJA*, neither provincial review board appears to be giving special consideration to cases involving young people. As discussed above, that section imposes two obligations on a review board. First, the review board is obliged to "consider the age and special needs of the young person," and, secondly, the review board is required to consider "any representations or submissions made by a parent of the young person."

Section 141(6) is only expressly mentioned in one of the 65 reviewed decisions.[55] As will be discussed below, even in that case the Ontario Review Board seems to misinterpret the provision. Most of the decisions reviewed do not mention the *YCJA* at all. The majority of British Columbia decisions make no reference to the Act. In Ontario, only five of the 37 decisions make any reference to the *YCJA*.

55 *JF (Re)*, *supra* note 30 at para 6.

One Ontario decision referred to section 141(6) of the *YCJA*. In that case, it was addressed as follows, under the heading "Initial Matters":[56]

> Mr. Nikota, as representative of the Crown, appropriately drew attention to s. 141 of the Youth Criminal Justice Act ("YCJA") which relates to these proceedings, since at the time of the occurrence of the index offences, F.(J.) was a young offender and the following were therefore addressed:
>
> (1) The non-publication order which was initially made in regard to this matter continues.
>
> (2) It was confirmed with the parents that they had both received notice of the hearing. Further, it is indicated on the notice of hearing that they had been sent copies of it.
>
> (3) The parents, in accordance with s. 141(6) of the YCJA, were given the opportunity to make submissions to the panel, especially with regard to their son's age and special needs. At the end of the hearing, neither parent wished to make a statement.

Aside from being the only reference to section 141(6) in any of the 65 decisions reviewed, this is concerning for two reasons. First, this mention of the provision is the only reference to it anywhere in the decision, suggesting that the panel believed it could address the section as an "initial matter" without any consideration in its analysis. Secondly, even here the review board interprets the provision to mean only that the young person's parents may make submissions regarding his age and special needs. Clearly, this is incorrect. The review board's obligation is to consider the age and special needs of the young person *and* the submissions of the parent. The obligation to consider age and special needs exists regardless of whether a parent makes submissions, and the submissions of a parent are not limited to these issues.

Of course, the review board is not obliged to identify each legislative provision it considers, and the failure to do so in this case does not mean that it is not being applied in substance. However, with few exceptions, there is no basis to believe the review boards are applying this provision at all.

Beginning with the obligation to consider "any representations or submissions made by a parent of the young person," there is no recognition of this requirement in any of the 65 decisions, aside from the one referred to above. While parents do sometimes attend review board proceedings,[57] there is no acknowledgment that parents hold a different status than in a hearing pertaining to an adult. Notably, in two of the British Columbia decisions, parents were granted special status, but this was done pursuant to section 672.5(4) of the *Criminal Code* which applies to all review board hearings:

> The court or review board may designate as a party any person who has a substantial interest in protecting the interests of the accused, if the Court is of the opinion that it is just to do so.

While section 672.5(4) of the *Criminal Code* applies to hearings involving youth, it seems unnecessary to designate a parent as a party using this provision. In cases involving young people, parents are already entitled to receive copies of anything received by the accused and entitled to any notice owed to the accused. Further, as noted above, the review board

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56 *Ibid*.

57 See, for example, *ibid* at para 5.

is obligated to consider any submissions made by the parent. There may be circumstances in which it is appropriate for a parent to be a party to review board proceedings rather than simply the beneficiary of the rights granted in the *YCJA*. However, the absence of any analysis in these cases of the distinction between these statuses or acknowledgment of a parent's entitlements under the *YCJA* suggests a lack of awareness of these entitlements.

The review boards fare little better in satisfying the obligation to consider "the age and special needs of the young person." While the "special needs" of the accused are arguably considered in every disposition hearing, neither review board consistently gives the required consideration to the accused's age. In many cases, even determining the age of the accused at the time of offence or time of hearing is challenging. Where age is discussed, it is often mentioned only as part of the summary of the accused's background and circumstances with no consideration in the review board's analysis. The Ontario Review Board's decision in *CG (Re)* is a representative example. Under the heading "Background," the review board explained:

> G.(C.)'s personal background and history are set out in detail in the Hospital Report entered as exhibit 1 at the hearing and need not be repeated here. Briefly stated, he is 19 years of age, having been born in a refugee camp in Uganda on September 10, 1995. He is the eldest in a sibline [*sic*] of six. He came to Canada with his mother and sister when he was six years of age. [58]

While the review board acknowledges the age of the accused, it is not referred to or "considered" anywhere else in the decision. Notably, in the first paragraph of the "Analysis and Conclusion" section of the decision, the review board sets out the factors it *has* taken into consideration in making its decision:

> In arriving at this conclusion, we take into consideration, the index offence, history of non-compliance with medication, history of aggressive behaviour, history of substance use, ongoing delusions concerning the victim, and a limited insight into the index offence, his mental illness and the need for treatment. G.(C)'s risk is both physical and psychological in nature.

The review board does not state that this list is exhaustive. However, the intention of this paragraph is clearly to set out the factors taken into account in reaching the decision. It is noteworthy that the review board does not include age, a statutorily-mandated consideration, among these factors. In this case in particular, the failure to consider the age of the accused is important. It seems to have led the review board to ignore the circumstances of his childhood in a refugee camp and potential links between an unsettled and possibly traumatic upbringing and the mental illness associated with his offending behaviour at such a young age. In this sense, this passage also serves to highlight the difficulty of considering age where blameworthiness is not in issue, discussed above. While the circumstances of the accused's upbringing would very likely be considered mitigating circumstances if the accused was being sentenced, their relevance is less clear in the review board context. Whether and how they affect the level of danger posed by the accused is uncertain. It is conceivable that his age could be found to have no impact on dangerousness, or to make him more dangerous, justifying a more restrictive disposition contrary to the purposes of the *YCJA*.

While the vast majority of the review board decisions considered as part of this study do not take age into account, there are a small number that do. In one 2016 British Columbia decision the review board notes that "[w]e have taken into account that [the accused] is a very young man and that his presentation has improved during his most

58 [2015] ORBD No 1848 at para 7.

recent committal...” In another 2016 decision from British Columbia, the term of the accused’s disposition was shortened to coincide with his birthday in the hope that he could be discharged before transitioning to an adult facility. In one Ontario decision, the review board noted of a 26-year-old accused that it was “mindful… that this is a young man who entered the forensic system at the age of 16. Tragically he had a very traumatic childhood and… has never had the opportunity to live in a pro-social setting.”[59] These fleeting acknowledgements of the significance of age stand out because it is so unusual that age is considered at all, despite the requirement in the *YCJA*. Even in these rare cases, there is no recognition on the part of the review board that this consideration is mandatory.

For the reasons outlined above, it is evident that both the British Columbia and Ontario review boards consistently fail to apply section 141(6) of the *YCJA*. This is cause for concern, as it not only leaves review board decisions vulnerable to appeal but may also deprive youth of more favourable dispositions that may result from consideration of the mandated factors.

At a surface level, it does not seem to be a particularly challenging problem to resolve. The obligations imposed by section 141(6) are not especially onerous, requiring only that the review boards “consider” the identified factors. To comply with this provision, they simply need to identify the age of the accused in their reasons, and indicate whether this factor, the special needs of the accused, and any submissions by a parent have any effect on the disposition to be imposed. The provision does not presuppose that these factors will have an impact on the decision, nor does it require any material difference in outcome. In fact, given that most of the decisions considered for the purpose of this article involved accused in their 20s and 30s, it seems plausible that age would have little impact on most disposition decisions, as it is not a feature that distinguishes these accused from those found NCRMD as adults.

More important and more challenging, however, are the broader policy questions of whether this limited analysis satisfies the intention of the provision, and the *YCJA* generally, and more fundamentally whether young people in the forensic mental health system *should* be treated differently than adults. While a complete answer to this question is beyond the scope of this article, some preliminary observations are offered below.

IV. SHOULD NCRMD YOUTH BE TREATED DIFFERENTLY THAN ADULTS?

The question of whether NCRMD youth should be treated differently than adults is, in part, a medical question. Whether the age of an accused has a bearing on their treatment, the risk they pose to the public, or the degree to which their freedom needs to be restricted to ensure public safety are questions best informed by medical opinions about the individual in question, and will vary from case to case. The medical components of this question are beyond the scope of this article.

However, as the review board system lies at the intersection of law and medicine, it is important to consider whether there are legal and public policy considerations relevant to determining whether differential treatment is justified. I argue below that there are two: the need for heightened sensitivity to the liberty interests of the accused and the stronger disincentives to seeking an NCRMD verdict that may be present in cases involving young people.

59 *JG (Re)*, [2015] ORBD No 1916 at para 10.

The indeterminate duration of review board jurisdiction following an NCRMD verdict has a particularly significant impact on the liberty interests of young people. Those found NCRMD during adolescence risk being detained, or remaining under review board jurisdiction, for the entirety of their adult lives, an extraordinarily long period of time that could last 70 years or more. Further, the significance of detention during adolescence and young adulthood should not be overlooked. Missing out on normal developmental milestones during these periods due to detention would seem likely to have a significant effect on an accused person's ability to reintegrate into society later in life. Unruh, Gau, and Waintrup make this point with respect to young offenders generally:[60]

> Societal expectations of adolescents as they navigate the trajectory from adolescence to adulthood are to: (a) live independently, (b) establish a career path, (c) obtain and maintain competitive employment and/or continuing education, and (d) engage in healthy social relationships and leisure activities.... Juvenile offenders frequently incarcerated during [adolescence], released into society, and often viewed as adults miss the adolescent developmental process with no opportunity to practice the myriad of requisite skills and natural consequences experienced during the pathway to adulthood.

The importance of this life stage compounds the impact on the liberty interests of the accused. Further, it seems plausible that this may be particularly true of young people in the forensic mental health system, where these challenges may be exacerbated by mental illness.

The second reason why special consideration for young people under the jurisdiction of provincial review boards may be justified is the incentive structure created by the youth criminal justice system. The NCMRD verdict and its predecessor (the "not guilty by reason of insanity" verdict) have long been sought primarily by those facing particularly serious charges, which may be attributable to the outcome of an NCRMD verdict relative to the sentences for different offences.[61] Where an adult is charged with murder, for example, the indefinite detention resulting from an NCRMD verdict may seem an attractive option compared to the mandatory life-sentence[62] that follows a conviction. Conversely, an accused charged with a minor offence likely to result in a short term of imprisonment or a non-custodial sentence may be far less inclined to risk the possibility of an extended period of detention or supervision that follows an NCRMD verdict. As a result, the accused may be disinclined to raise the mental disorder defence, even where it is likely to succeed.

The disincentives to seeking an NCRMD verdict are heightened in the case of young people for two reasons. First, access to records of youth convictions is strictly limited,[63] meaning that a youth record is less likely to lead to the ongoing negative repercussions that may result from an adult criminal record. Accordingly, the opportunity to avoid a conviction and the resulting record may be of less significance to a young person than an adult.

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60 Deanne K Unruh, Jeff M Gau, and Miriam G Waintrup, "An exploration of Factors Reducing Recidivism Rates of Formerly Incarcerated Youth with Disabilities Participating in a Re-Entry Intervention" (2009) 18 Journal of Child and Family Studies 284 at 284.

61 Livingston et al, *supra* note 3 at 410–411; Latimer and Lawrence, *supra* note 40 at 17–19; 2006; Desmarais et al, *supra* note 40 at 6; Crocker et al, *supra* note 40 at 109–110; Stephen L Golding, Derek Eaves and Andrea M Kowaz, "The Assessment, Treatment and Community Outcome of Insanity Acquitees: Forensic History and Response to Treatment (1989) 12 International Journal of Law and Psychiatry 149 at 160; Simon N Verdun-Jones, "Tightening the Reins: Recent Trend in the Application of the Insanity Defence in Canada" (1991) 10 Med & L 304 at 304; Grant, *supra* note 3 at 441.

62 *Criminal Code*, *supra* note 5, s 745(a).

63 *YCJA*, *supra* note 4, Part 6.

Second, youth sentences are less punitive than adult sentences. The *YCJA* limits the use of incarceration, and even when young people are imprisoned, it is typically for far shorter periods of time than adults.[64] The maximum youth sentence for first-degree murder, for example, is 10 years, including six years in custody, and four years of supervision in the community.[65] Even when sentenced as an adult, young people are subject to a shorter period of parole-ineligibility than a true adult offender.[66] For serious offences including attempted murder, manslaughter, and aggravated sexual assault, the maximum sentence is three years.[67] Assault with a weapon, the index offence for six of the accused under review board jurisdiction for 10 or more years in this study, carries a maximum sentence of two years, of which only two-thirds can be served in custody.[68]

That young people face strong disincentives to pursuing NCRMD verdicts should be concerning. An NCRMD verdict is not a conviction and, as indicated by the special verdict, amounts to a finding that the accused was not criminally responsible for the index offence. Where an accused eligible for an NCRMD verdict is convicted, it should be viewed as a wrongful conviction and miscarriage of justice as would the conviction of a person who is factually innocent. Accused persons, whether adults or young persons, should not be disincentivized from pursuing NCRMD verdicts to which they may be entitled any more than innocent people should be encouraged to plead guilty to offences they did not commit.

Additionally, past studies have demonstrated that the recidivism rate for accused persons found that NCRMD is lower than for accused persons who are convicted, particularly those with mental illnesses.[69] This suggests that the forensic mental health system is more effective in rehabilitating and reintegrating NCRMD accused with mental illness than the correctional system. This record of relative success[70] gives reason to work to eliminate disincentives to accused seeking NCRMD verdicts, as it would seem to better serve the interests of both offenders and the general public that those eligible for NCRMD verdicts receive them.

A. The Need for Reform and Directions for Future Research

If, as suggested above, there is a justifiable basis for treating young people before the review board differently than adults, section 141(6) of the *YCJA* is inadequate for the task. This provision requires only that the review boards "consider" certain factors and does not alter the tests the review boards are mandated to apply in making disposition decisions. It imposes no limits additional to those which apply to adults on the ability of review boards to restrict the liberty of young people.

The standard applied by the review board in deciding whether an accused should remain under its jurisdiction is whether the accused represents "a significant threat to the safety

64 *Ibid,* Part 4.

65 *Ibid,* s 42(q)(i).

66 *Criminal Code*, *supra* note 5, s 745.1.

67 *YCJA*, *supra* note 4, s 42(o).

68 *Ibid,* s 42(n).

69 Yanick Charette et al, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 4: Criminal Recidivism" (2015) 60:3 Can J Psychiatry 127 at 128 and 133.

70 It should be acknowledged that this relative success may also be attributable to the fact that NCRMD accused remain under review board jurisdiction until the review board decides they are safe to be absolutely discharged. As a result, unlike in the correctional system, no NCRMD accused is released simply due to the passage of time despite concerns that the individual may still be dangerous. Any reform that limits the ability of the review board to detain or supervise accused persons for as long as it deems necessary could undermine this success.

of the public".[71] While age may play a role in this analysis, it offers little opportunity to consider the accused's status as a young person. In particular, there seems to be no scope to consider the impact of an order on an accused's liberty interests, and certainly no opportunity to make allowances for the different incentive structure affecting young people.

If the "significant threat" standard is met, the review board is required to detain or conditionally discharge the accused, making an order that is "necessary and appropriate."[72] It must take into account "the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused."[73] While these factors would seem to allow some additional opportunity to consider an accused's age and their status as a "young person," they offer little chance to consider the accused's liberty interest, and none to account for the incentives discussed above.

For these reasons, section 141(6) is insufficient to account for the unique position of young people found NCRMD. As such, legislative reform is needed. The *YCJA* does offer models for how this might be done; it includes, for example, comprehensive regimes for sentencing young people,[74] for custody and supervision,[75] and for detention prior to sentencing.[76] In fact, the review board context seems to be the only one in which young people are at risk of detention as a result of criminal acts (but given no meaningful special consideration), and are essentially treated as adults. Accordingly, it seems plausible that a similar system that better accounts for the unique circumstances of young people could be established for youth in the review board system.

To inform the direction of this legislative change, additional research is needed. More information is required, for example, about the progression of mental illness among young people in the forensic mental health system and its relationship with review board dispositions. Research is required about decision-making by accused young persons and their counsel in considering whether to pursue an NCRMD verdict; about diagnostic and other characteristics correlated with lengthy terms under review board supervision for young people; and about the trajectory of young people after leaving the review board system. Research is also required regarding the impact of lengthy periods of detention or review board supervision on the ability of young people to reintegrate into society.

At a more fundamental level, however, it is important to recognize that the challenges posed by these young people cannot be solved by changes to the *YCJA* or review board process alone. The illnesses suffered by many of these accused are severe, and there is good reason why the Ontario and British Columbia review boards are finding, year after year, that these accused pose a significant threat to public safety. While it may be possible to better account for the unique circumstances of these young people, and offer marginally greater levels of autonomy and independence in some cases, it is critical to acknowledge that many of these accused will require a highly restrictive and invasive level of supervision for the remainder of their lives.

It may be that more effective reform is possible by developing a broader understanding of the events and circumstances that lead to NCRMD verdicts and extended periods of review board supervision for young people. From the decisions reviewed for this article, it is evident that many of the young people under review board supervision suffered trauma

71 *Criminal Code*, *supra* note 5, s 672.54.
72 *Ibid.*
73 *Ibid.*
74 *YCJA*, *supra* note 4, Part 4.
75 *Ibid*, Part 5.
76 *Ibid,* ss 28–31.

and neglect long before committing their index offences. Intervention following the verdict may well often be too little too late. The opportunity to make a real difference in the lives of these young people may lie in reforms to child protection and welfare systems, educational institutions, and investment in the marginalized communities in which these children spend their formative years. As such, the most fruitful avenues of future research may be those that look carefully at the broader life circumstances and systemic issues that contribute to accused young people being found NCRMD in the first place and consider how these issues can be addressed.

V. CONCLUSION

The aim of this article was to begin to fill the gap in knowledge about young people under the jurisdiction of provincial review boards following NCRMD verdicts. It does so in two respects. First, it describes the population of young people who appeared before the British Columbia and Ontario review boards in 2015 and 2016 in terms of demographic, index offence, and diagnostic characteristics. Secondly, it discusses how both review boards have approached cases involving young people, as evidenced in their reasons.

While the characteristics of the combined population of NCRMD youth in the two provinces were largely consistent with the results of past research into the general NCRMD population in Canada, there were important differences between the two provinces. A significant proportion of these accused in both provinces had been under review board jurisdiction for 10 or more years.

Neither review board demonstrated much concern for the age of these accused, or their status as young persons under the *YCJA*. This is despite the direction in section 141(6) of that Act requiring review boards to consider the "age and special needs" of the accused in any disposition hearing involving a young person. While the failure of the review boards to comply with this mandatory provision of the *YCJA* is cause for concern as it renders disposition decisions vulnerable to appeal and may have a material impact on the outcome of disposition hearings, it is not clear precisely *how* this provision is intended to affect review board deliberations. In light of the standards mandated by the *Criminal Code*, there seems to be little scope for section 141(6) to materially affect the outcome of review board hearings or allow for consideration of the unique circumstances of young people subject to NCRMD verdicts.

The high proportion of NCRMD youth in both provinces who have spent a decade or more under the supervision of the review board suggests that the forensic mental health system may be underprioritizing the liberty interest of these accused. These accused are spending far longer in the review board system, often in custody, than the term of the maximum sentence available under the *YCJA*. This not only has a significant impact on the liberty interests of these accused but may be deterring young people from seeking NCRMD verdicts even where they may be entitled to them.

The direction provided in section 141(6) is clearly inadequate, but it seems unlikely that the *YCJA* in itself presents a meaningful opportunity to resolve the problems identified in this article. Changes to the *YCJA* and the review board process may allow for some marginal improvements in the lives of these young people but would do little to address the life-long marginalization and trauma that may be associated with their offending behaviour. A more fruitful approach may be to work to better understand the systemic issues and life experiences affecting these young people to assess whether it is possible to more effectively prevent these young people from being found NCRMD in the first place.